Ethics and Ineffective Assistance of Counsel Waivers

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Federal Defender of Eastern Washington and Idaho
Spokane, WA
MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: James M. Cole  
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SUBJECT: Department Policy on Waivers of Claims of Ineffective Assistance of Counsel

As we all recognize, the right to effective assistance of counsel is a core value of our Constitution. The Department of Justice has a strong interest in ensuring that individuals facing criminal charges receive effective assistance of counsel so that our adversarial system can function fairly, efficiently, and responsibly. Accordingly, in recent years, the Department has made support of indigent defense a priority. We have worked to ensure that all jurisdictions – federal, state, and local – fulfill their obligations under the Constitution to provide effective assistance of counsel, especially to those who cannot afford an attorney.

When negotiating a plea agreement, the majority of United States Attorney’s offices do not seek a waiver of claims of ineffective assistance of counsel. This is true even though the federal courts have uniformly held a defendant may generally waive ineffective assistance claims pertaining to matters other than entry of the plea itself, such as claims related to sentencing. While the Department is confident that a waiver of a claim of ineffective assistance of counsel is both legal and ethical, in order to bring consistency to this practice, and in support of the underlying Sixth Amendment right, we now set forth uniform Department of Justice policies relating to waivers of claims of ineffective assistance of counsel.

Federal prosecutors should no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel whether those claims are made on collateral attack or, when permitted by circuit law, made on direct appeal. For cases in which a defendant’s ineffective assistance claim would be barred by a previously executed waiver, prosecutors should decline to enforce the waiver when defense counsel rendered ineffective assistance resulting in prejudice or when the defendant’s ineffective assistance claim raises a serious debatable issue that a court should resolve.

As long as prosecutors exempt ineffective-assistance claims from their waiver provisions, they are free to request waivers of appeal and of post-conviction remedies to the full extent permitted by law as a component of plea discussions and agreements.
Subject: Plea Agreements Waiving the Right to Pursue an Ineffective Assistance of Counsel Claim

Question 1: May a criminal defense lawyer advise a client with regard to a plea agreement that waives the client’s right to pursue a claim of ineffective assistance of counsel as part of the waiver of the right to collaterally attack a conviction covered by the plea agreement?

Answer: No.

Question 2: May a prosecutor propose a plea agreement that requires a waiver of the defendant’s or potential defendant’s right to pursue a claim of ineffective assistance of counsel relating to the matter that is the subject of the plea agreement?

Answer: No.


Question 1 Discussion

*Defense Counsel May Not Advise a Client about a Plea Agreement Involving a Waiver of the Right to Pursue an Ineffective Assistance of Counsel Claim Related to the Subject of the Plea Agreement*
Prosecutors sometimes propose plea agreements that bar collateral attacks on convictions that result from the plea agreements. Sometimes these plea agreement proposals require the defendant to waive the right to pursue a claim of ineffective assistance of counsel. The question that has arisen is whether defense counsel may ethically advise the client about a plea agreement proposal that bars the client from later pursuing a claim of ineffective assistance of counsel related to the conviction that results from the plea agreement. In effect, the question is whether defense counsel may advise the client regarding a waiver of a claim of ineffective assistance of counsel that would be based on the attorney’s own conduct in representing the client. Because the offered plea agreement creates a conflict of interest under SCR 3.130(1.7) for the attorney that cannot be waived, such an attorney ethically cannot advise a client about such an agreement.

SCR 3.130(1.7) states in pertinent part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: …

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The lawyer in the plea agreement setting has a “personal interest” that creates a “significant risk” that the representation of the client “will be materially limited.” The lawyer has a clear interest in not having his or her representation of the client challenged on the basis of ineffective assistance of counsel. The lawyer certainly has a personal interest in not having his or her representation of the client found to be constitutionally ineffective.

Even in cases of concurrent conflict, SCR 3.130(1.7) allows a representation to occur if, among other requirements, “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.” SCR 3.130(1.7). A lawyer cannot reasonably believe that he or she can provide competent representation when the lawyer is tasked with advising the client about a plea agreement involving a waiver of the right to pursue a claim of ineffective assistance of counsel when that claim would be based on the attorney’s own conduct in representing the client.

This reasoning is consistent with the reasoning surrounding SCR 3.130(1.8)(h)(1)). Rule 1.8(h)(1) states: “A lawyer shall not: (1) make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.” Thus, a lawyer cannot ethically advise the client when the issue is the attorney’s own conduct.

Rule 1.8(h)(1) does not directly apply to the plea agreement situation because the issue in the plea agreement situation is a waiver of the client’s ineffective assistance claim, not a waiver or limitation of a malpractice claim. Yet, the underlying basis for a malpractice claim is the attorney’s own professional conduct. Likewise, the underlying basis for an ineffective assistance of counsel claim is the attorney’s own professional conduct. If a lawyer ethically cannot advise a client about a malpractice limitation, a lawyer ethically cannot advise a client about an ineffective assistance of counsel waiver.

Other ethics bodies have reached the conclusion that defense counsel may not advise the client on a plea agreement when the agreement involves a waiver of the right to later claim ineffective assistance of

Question 2 Discussion

A Prosecutor May Not Propose a Plea Agreement Requiring a Waiver of the Right to Pursue an Ineffective Assistance of Counsel Claim Relating to the Matter that is the Subject of the Plea Agreement


As Comment 1 to SCR 3.130(3.8) states:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

SCR 3.130(3.8) Cmt 1. SCR 3.130(3.8(b)) requires a prosecutor to “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.” In addition, SCR 3.130(8.4(a)) states:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

SCR 3.130(8.4(a)).

It is inconsistent with the prosecutor’s role as a minister of justice and the spirit of SCR(3.8(b)) for a prosecutor to propose a plea agreement that requires the individual to waive his or her right to pursue a claim of ineffective assistance of counsel. Accord Mo. S. Ct. Adv. Comm. Formal Op. 126 (2009).


Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.
Synopsis

Background: United States Attorneys petitioned for review of the merits of ethics advisory opinion by Kentucky Bar Association (KBA) finding that use of an ineffective-assistance-of-counsel (IAC) waiver in a plea agreement constitutes professional misconduct.

Holdings: The Supreme Court granted petition, Minton, C.J., held that:

[1] the opinion does not violate the supremacy clause;

[2] advising a defendant regarding an IAC waiver in a proffered plea agreement constitutes professional misconduct by defense counsel; and

[3] embedding an IAC waiver in a plea agreement constitutes professional misconduct by a prosecutor.

Opinion

Opinion of the Court by Chief Justice MINTON.

**1 “[O]urs is for the most part a system of pleas, not a system of trials [.]”^1 Plea ^140 bargaining is “not some adjunct to the criminal justice system; it is the criminal justice system.”^2 The pervasiveness of plea bargain agreements in the Courts of the Commonwealth cannot be overstated. Today, we deal with the ethical ramifications of one aspect of this “horse trading between prosecutor and defense counsel [.]”^3


^2 Id.

^3 Id. (internal alteration removed).

The United States Attorneys for the Eastern and Western Districts of Kentucky (United States) have moved this Court to review the merits of Kentucky Bar Association (KBA) Ethics Opinion E–435, an ethics advisory opinion, which finds the use of ineffective-assistance-of-counsel (IAC) waivers in plea agreements violates our Rules of Professional Conduct. We agree with the KBA that the use of IAC waivers in plea bargain agreements (1) creates a nonwaivable
conflict of interest between the defendant and his attorney, (2) operates effectively to limit the attorney’s liability for malpractice, and (3) induces, by the prosecutor’s insertion of the waiver into plea agreements, an ethical breach by defense counsel. Consequently, we hold that E–435 accurately states our ethical rules.

I. FACTUAL AND PROCEDURAL HISTORY.

In November 2012, the KBA Board of Governors formally adopted E–435 and published it in the March 2013 issue of Bench & Bar, the KBA’s monthly publication. A month later, the United States Attorneys of both the Eastern and Western Districts of Kentucky petitioned this Court for review of E–435 under Supreme Court Rule (SCR) 3.530(12). The use of IAC waivers is a common practice in the United States' plea negotiations, so it argues it has been aggrieved by E–435’s declaration.

SCR 3.530(12) provides a direct appeal to this Court for the review of KBA ethics advisory opinions. The rule reads:

Any person or entity aggrieved or affected by a formal opinion of the Board may file with the clerk [of this Court] within thirty (30) days after the end of the month of publication of the KENTUCKY BENCH & BAR in which the full opinion or a synopsis thereof is published, a copy of the opinion, and, upon motion and reasonable notice in writing to the Director, obtain a review of the Board’s opinion by the Court. The Court’s action thereon shall be final and the Clerk shall furnish copies of the formal order to the original petitioner, if any, the movant and the Director. The movant shall file a brief in support of the review, and the Director may file a response brief thirty days thereafter.

The KBA undertook to answer two questions through E–435:

1. May a criminal defense lawyer advise a client with regard to a plea agreement that waives the client’s right to pursue a claim of ineffective assistance of counsel relating to the matter that is the subject of the plea agreement?

2. May a prosecutor propose a plea agreement that requires a waiver of the defendant’s or potential defendant's right to pursue a claim of ineffective assistance of counsel relating to the matter that is the subject of the plea agreement?

The KBA answered both questions in the negative. According to the KBA, the defense attorney's personal interest “in not having his or her representation of the client challenged on the basis of [IAC]” and “in not having his or her representation of the client found to be constitutionally ineffective [,”]”create[d] a ‘significant risk’ that the representation of the client ‘will be materially limited.’ ” The KBA relied on SCR 3.130–1.7, our rule dealing with conflicts of interest, in reaching this conclusion. With regard to question 1, the KBA additionally found counseling defendants on an IAC waiver violated SCR 3.130–1.8(h), our rule prohibiting any “agreement prospectively limiting the lawyer's liability to a client for malpractice [.”]” The KBA acknowledged –1.8(h) does not explicitly “apply to the plea agreement situation”; but much like an IAC claim, “the underlying basis for a malpractice claim is the attorney's own professional conduct.” And “[i]f a lawyer ethically cannot advise a client about a malpractice limitation,” then “a lawyer ethically cannot advise a client about an [IAC] waiver.”

**2 For question 2, the KBA focused primarily on the special role of the prosecutor as a “minister of justice[,]” In sum, the KBA found it was “inconsistent with the prosecutor's role as a minister of justice and the spirit of SCR [3.130–] (3.8(b)) for a prosecutor to propose a plea agreement that requires the individual to waive his or her right to pursue a claim of [IAC].” In making such a proposal, a prosecutor is assisting or inducing another lawyer ... to violate the Rules of Professional Conduct[.]”

Because this Court is constitutionally charged with the regulation of the practice of law in the Commonwealth and the declarations made by E–435 are matters of statewide concern, we granted the United States’ petition.

II. ANALYSIS.

[1] [2] [3] [4] [5] Our Rules of Professional Conduct permit the KBA's Ethics Committee to issue both informal and formal ethics opinions to provide clarity to members of the bar regarding what conduct is permissible by a licensed attorney. The procedure for this is set out in SCR 3.530.
Initially, the Ethics Committee provides a recommendation to the KBA Board of Governors for approval. "If the recommended opinion is approved by three-fourths of the Board of Governors, it carries the weight of an advisory opinion.... On proper request by an aggrieved party, we have the authority to evaluate the opinion and determine whether it accurately states the law."\(^5\) We do so today and, of course, because of the advisory nature of E–435, we are not bound by its terms.\(^6\) In fact, while the KBA functions as our agent in disciplinary matters,\(^7\) the Kentucky Constitution establishes this Court as the ultimate rulemaking body for ethical attorney conduct.\(^8\) Consequently, we engage in de novo review.

A. E–435 does not Violate the Supremacy Clause or Conflict with Federal Law.

Before proceeding with our review, we must address an issue of weighty concern. The United States asserts that E–435 violates the Supremacy Clause\(^9\) because it stands in direct conflict with federal case law, statutes, and regulations. If we accept this argument, we would be compelled to vacate E–435 as applied to the United States. For several reasons, we wholly \(^{142}\) disagree with the United States' "remarkable"\(^10\) notion.


\(^{12}\) *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23 (1824).

The amenability of federal-government attorneys to any ethics guidelines—let alone state ethics guidelines—has been the subject of debate. Before 1998, attempting to determine what ethics rules applied to federal attorneys was nearly a fool's errand.\(^13\) Following a protracted battle over the practice of certain federal prosecutors who, despite ethics prohibitions, made direct contact with persons represented by counsel,\(^14\) Congress enacted 28 U.S.C. § 530B, commonly called the McDade Amendment.\(^15\) This law attempted to settle this issue by binding all government attorneys to "State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." The United States Attorney General, under § 530B, is vested with the authority to "make and amend rules of the Department of Justice to assure compliance with [§ 530B]."

\(^{13}\) See, e.g., *Collins v. Dept. of Justice*, 94 M.S.P.R. 62, 68 (Aug. 22, 2003) ("Before 1998, the question of whether to apply state or 'national' ethics rules to attorneys appearing before the Board would have been difficult to resolve.").

\(^{14}\) For an example of this battle, see *U.S. ex rel O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir.1998). Some sources claim this case served as the impetus for § 530B. See Everytrial Criminal Defense Res. Book § 12:2 (2013).

\(^{15}\) See Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 Harv.L.Rev. 2080, 2080 n. 2 (2000) ("The Amendment took its name from its chief sponsor in the U.S. House of Representatives, Congressman Joseph McDade (R-Pa.).").

**3** To provide guidance to government attorneys, the Attorney General issued 28 C.F.R. § 771.1–4. These regulations put some flesh to the § 530B bone. The relevant scope of § 530B covers "rules enacted or adopted by any State ... or by any federal court, that prescribe ethical conduct for attorneys and that would subject an attorney ...

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to professional discipline, such as a code of professional responsibility.”

Section 530B’s application to E–435 is clear.

According to the United States Attorney General, § 530B “requires Department attorneys to comply with state and local federal court rules of professional responsibility[].” Going further, § 530B “imposes on Department attorneys the same rules of professional responsibility that apply to non-Department attorneys”; and Department attorneys are required to comply with state ethical rules “to the same extent and in the same manner as other attorneys in that State[].”

Our “interest in the professional conduct of attorneys involved in the administration of criminal justice[, however,] is of special importance.” So strong is this “traditional and primary responsibility” that it “call[s] for exceptional deference by the federal courts.” That the regulation of attorneys is an area traditionally occupied by the States is not up for dispute. When faced with attempted Congressional action in such an area, as we are here, “we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” But, “[i]t is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.”

Even without § 530B, the Supremacy Clause demands E–435’s lurking constitutional concerns be resolved.

*143 [7] [8] But § 530B should not “be construed in any way to alter federal substantive, procedural, or evidentiary law[].” On its face, this provision appears to be an attempt at federal preemption through regulation. Normally, when Congress has explicitly expressed its intent to preempt state law; “a reviewing court's task[, therefore,] is reduced to determining the scope of that intended preemption.” This Court, acting in review of possible federal preemption, “must consider not only the language of the statute but also the statute's legislative history[,]” which, despite its debated role in interpretative methodology, can serve as “an important indicator of Congress's intent.”

[13] See Theard v. United States, 354 U.S. 278, 281, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957) (“The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court.”).

[15] See, e.g., Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (“Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress.”).

[16] 28 C.F.R. § 77.2(h).
[18] Id. at (c).
[19] 28 C.F.R. § 77.3.
[22] See, e.g., Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (“Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress.”).
[23] Id. (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)).
[24] Id. at 438, 102 S.Ct. 2515 (Brennan, J., concurring in the judgment).
[26] Id. at 230–31, 67 S.Ct. 1146. In this particular case, the perplexity is increased by the fact that the Executive Branch, through the Office of Attorney General, is attempting to dictate to the Judicial Branch the standards for which attorneys, i.e., officers of the courts, should uphold. The judiciary is autonomous with regard to the standards required of its officers. See Theard v. United States, 354 U.S. 278, 281, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957) (“The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court.”).
the federal circuit courts of appeals. As the United States' argument goes, these decisions make up the applicable "federal substantive law" on the issue that E–435 attempts to alter erroneously. We concede that federal jurisprudential support for the waivers at issue here is nearly unanimous. Our research indicates that every federal circuit to consider the validity of an IAC waiver—ten out of twelve—has explicitly permitted defendants to plead guilty and waive collateral review, including IAC. Undoubtedly, this case law is substantial and persuasive, if we were deciding, on its merits, whether a defendant could waive an IAC claim. But we are not deciding that issue. The obligations of attorneys are the real focus of this appeal. The KBA Ethics Committee, in any event, is without jurisdiction to issue opinions on such questions of law. So this Court's review of an IAC waiver's validity in the context of a plea agreement waits for another day.

1. **E–435 does not Violate the Supremacy Clause Because it is an Ethical Rule Applicable to the United States Under § 530B.**

To date, there is a paucity of decisions interpreting § 530B and its associated regulations. Of course, the United States primarily cites federal decisions holding government attorneys are not subject to particular state ethics rules. These decisions are minimally persuasive because the ethics rules at issue were substantially different than E–435. They dealt with ethics rules that attempted to create new procedural requirements rather than focusing on attorneys' ethical conduct.

some courts have, however, acknowledged the growing trend of state court ethics opinions and the complications they may present. These decisions arose in the context of a defendant's claim of IAC following a plea agreement that included a waiver of such claims. The Courts acknowledged possible ethics concerns, but ultimately decided the cases on alternate grounds. See United States v. DeLuca, No. 08–108, 2012 WL 5902555 (E.D.Pa. Nov. 26, 2012), available at: https://www.paed.uscourts.gov/documents/opinions/12d1097p.pdf; Watson v. United States, 682 F.3d 740, 744 (8th Cir.2012); United States v. Stevens, 813 F.Supp.2d 758, 770 (W.D.Va.2011) (distinguishing
Virginia ethics opinion by finding it only prohibited defense counsel from advising defendant to accept an IAC waiver, rather than advising the defendant generally about the waiver. Additionally, the Supreme Court of Missouri has not followed its ethics opinion. See Cooper v. State, 356 S.W.3d 148, 153–57 (Mo.2011).

Additional, the Supreme Court of Missouri has not followed its ethics opinion. See Cooper v. State, 356 S.W.3d 148, 153–57 (Mo.2011).

Second, E–435 is written in commandment form. The prohibition on use of IAC waivers is unequivocal. The Tenth Circuit noted ethics rules are often drafted in vague form in order to be broad enough to cover the various aspects of lawyer conduct. While E–435 is perhaps not as vague as other ethics rules, we do not find this dispositive. We will not hold it against E–435 that its focus is on a specific form of attorney conduct.

Finally, E–435 is narrowly tailored to address only attorney conduct. As the Tenth Circuit highlighted, “when a rule of professional conduct is violated, members of the profession would agree that the violating attorney ought to be held personally accountable; whereas[,] when a procedural or substantive rule is violated, any negative effect would be directed primarily at the progress of the claim itself.” The United States may argue that E–435 affects the progress of the conviction but we disagree. A waiver of IAC is the right of the defendant, and nothing in E–435 limits the defendant's freedom of choice or control over his defense.

In our view, E–435 survives scrutiny under § 530B and the Supremacy Clause because it is simply an ethical rule and does not affect federal substantive, procedural, or evidentiary law. There is no subterfuge in E–435. It is not a procedural or substantive rule disguised as an ethics rule. E–435 also survives because, as we mention below, there is no contrary federal law.

In fact, the United States Attorney General has issued a policy statement prohibiting the IAC waivers at issue here in a separate context, notably not at the point of an ethical bayonet. On January 31, 2012, Deputy Attorney General James M. Cole published a memorandum applicable to early disposition or “fast-track” programs dealing with criminal immigration cases. The programs provide prosecutors great discretion to handle the seemingly ever-growing immigration cases. In the minimum requirements for a plea agreement outlined in the memorandum, “the defendant must enter into a written plea agreement that includes at least the following items[.]: ... the defendant agrees to waive ...

2. The United States' Supremacy Clause Challenge Fails Because There is no Federal Law Contrary to E–435.

[15] [16] [17] To the extent the United States' argument can be characterized as asserting federal circuit case law binds this Court's interpretation of § 530B and its associated regulations or determination of the ethical validity of IAC waivers, it is meritless. Admittedly, state courts are charged “with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure.” But this does not mean the Supremacy Clause mandates our interpretation of federal law must dovetail with that of federal courts, whether it is unanimous or otherwise. State courts and federal courts exercise concurrent jurisdiction, and we are free to disagree. Of course, the approach taken by federal courts may be viewed as persuasive but it is not binding. Moreover, a fair amount of the case law cited by the United States was dated before the enactment of § 530B, so even if we were bound by federal interpretation, the cited cases would offer little help in light of more recent developments.


See, e.g., Johnson v. Williams, 568 U.S. ——, 133 S.Ct. 1088, 1098, 185 L.Ed.2d 105 (2013) (“[T]he views of the federal courts of appeals do not bind the California Supreme Court when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law.”); Lockhart v. Fretwell, 506 U.S. 364, 376, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (Thomas, J., concurring) (“The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation.”); Cook v. Popplewell, 394 S.W.3d 323, 346 (Ky. 2011) (“We, of course, look to the Sixth Circuit with a great deal of respect, but as the Court of Appeals noted, we are not bound by Sixth Circuit precedent.”);


For further discussion of state courts' treatment of federal law, see Colin E. Wrabley, Applying Federal Court of Appeals' Precedent: Contrasting Approaches to Applying Court of Appeals' Federal Law Holdings and Erie State Law Predictions, 3 SETON HALL CIR. REV. 1 (2006).

See, e.g., Grievance Committee for Southern Dist. of New York v. Simels, 48 F.3d 640 (2d Cir.1995). In addition, Cavender v. U.S. Xpress Enterprises, Inc., 191 F.Supp.2d 962 (E.D.Tenn.2002), cited by the United States, relies extensively on Simels, despite being decided after § 530B's enactment. In fact, Cavender fails to mention § 530B at all, relying instead on the adoption of Tennessee's Code of Professional Conduct in its own local rules. As a result, the persuasive value is minimal at best.

We must admit it seems E–435, on its face, presents complicated Supremacy Clause concerns with regard to defense counsel. Under Padilla v. Kentucky, the Supreme Court reaffirmed that a defendant is entitled to effective assistance of counsel “[b]efore deciding whether to plead guilty”; and, in Missouri v. Frye, the Court held that a defense attorney “has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”

Surely, the waiver of collateral attack—including IAC claims—in exchange for a lesser sentence would be “favorable to the accused.” Given precedent, we think the Supreme Court would find as such. While waiving the potential for an IAC claim does not carry with it the severe ramifications of deportation, it may foreclose the only remaining challenge to a conviction. Accordingly, it would be “quintessentially the duty of counsel to provide her client with available advice[.]”

559 U.S. 356, 365, 373, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) (“Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of [ ] counsel.”; “In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”) (internal quotation marks omitted).

Frye, 132 S.Ct. at 1408.
**6 If that is true, an attorney subject to E–435 faces a dilemma. On the one hand—the federal hand—the attorney is required to disclose the terms of the offer to the defendant, which would presumably—as we described above—include some form of advice; on the other hand—the state hand—the attorney is prohibited from counseling the client on an IAC waiver. The attorney is left with two utterly unappealing “choices”: act in a manner that may lead to bar discipline, perhaps endangering the attorney’s license; or, act in a manner that is explicitly ineffective assistance of counsel, thereby violating the constitutional rights of the client. As a result, compliance with both would be a “physical impossibility”; and E–435 would be forced to yield because this situation would perhaps alter federal substantive law, contrary not only to § 530B, but to constitutional principles as well. Of course, this “physical impossibility” only arises if the prosecution offers a plea agreement with an IAC-waiver provision. We know of no federal law or constitutional principle that mandates defense counsel, of the attorney’s own accord, to counsel on every potential plea-agreement term or to offer those terms to the prosecution. As we mention below, there is no constitutional or statutory right to a plea agreement, so there can be no such right to any specific plea-agreement provision.


18 Moreover, the Sixth Amendment requires more than simple disclosure of plea agreement terms to qualify as “effective.” Conflict-free counsel is also demanded. The majority of jurisprudence surrounding counsel operating with a conflict focuses on representing multiple defendants or successive representation. Admittedly, the type of personal conflict presented here with an attorney forced to advise a client on the attorney’s own conduct may fall short of the conflict presented with an attorney essentially attempting to serve two masters. That said, a conflict exists; and one can easily foresee a serious impact on a defendant’s access to effective assistance. The special nature of an attorney’s relationship with a client only emphasizes the impact of this conflict: “There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully guarded by the law, or governed by sterner principles of morality and justice[.]”

50 See, e.g., Holloway v. Arkansas, 435 U.S. 475, 480–90, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); Mickens v. Taylor, 535 U.S. 162, 179, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) (Kennedy, J., concurring) (“The Sixth Amendment protects the defendant against an ineffective attorney, as well as a conflicted one.”); Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981) (“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.”).

51 See, e.g., Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).


1920 Given the pervasiveness of plea bargaining in our modern criminal justice system, an attorney’s personal conflict that affects the terms of the plea agreement could, of course, be highly prejudicial. Indeed, counsel’s performance complicated by possible personal conflict may fall “below an objective standard of reasonableness.” Perhaps because of the attorney’s advice, there may exist a “reasonable probability that[ ] but for counsel’s unprofessional errors[ ] the result of the proceeding would have been different.” The conflict, the extent of which often will not be evident until post-conviction, may have prompted the defendant to take rational action other than entering a plea.

53 “Anything less [than effective assistance of counsel] might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would
help him.” *Frye*, 132 S.Ct. at 1408 (quoting *Massiah v. United States*, 377 U.S. 201, 204, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)).

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*Id.* at 694, 104 S.Ct. 2052.

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For example, the American Bar Association and National Association of Criminal Defense Lawyers argue that it is common for innocent defendants to plead guilty. In fact, “the incentives to bargain are powerful enough to force even an innocent defendant to falsely confess guilt in hopes of leniency and in fear of reprisal.” Am. Bar Ass’n Resolution 113E (quoting Lucian E. Dervan, *Bargained Justice: Plea Bargaining’s Innocence Problem and the Brady Safety–Valve*, 2012 Utah L.Rev. 51, 56 (2012)). The potential prejudice arising from such plea agreements may be higher as a result of the thumb on the scale in favor of actually entering a plea agreement.

*149 **7 [21] Ethics opinions and American Bar Association standards “are guides to determining what is reasonable” and “may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions[.]”* 

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The Supreme Court has yet to answer whether the Sixth Amendment prohibits an attorney from advising a defendant on waiving IAC, but “[t]he weight of prevailing professional norms supports the view” articulated by E–435.

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*Padilla*, 559 U.S. at 366–67, 130 S.Ct. 1473 (internal citations and quotation marks omitted).

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See *Frye*, 132 S.Ct. at 1412–14 (Scalia, J., dissenting) (“[I]t does present the necessity of confronting the serious difficulties that will be created by constitutionalization of the plea-bargaining process. It will not do simply to announce that they will be solved in the sweet by-and-by.”); *Lafer v. Cooper*, — U.S. ——, 132 S.Ct. 1376, 1391–92, 182 L.Ed.2d 398 (2012) (Scalia, J., dissenting) (“[T]he Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law.... [I]t would be foolish to think that ‘constitutional’ rules governing counsel’s behavior will not be followed by rules governing the prosecution’s behavior in the plea-bargaining process[.]”).

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475 U.S. 157, 165–66, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). The Supreme Court forecasted the issue presented by its recent constitutionalization in the plea-bargaining context and now E–435’s application:

> When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts. In some future case challenging attorney conduct in the course of a state-court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct.

The United States' Supremacy Clause argument likewise fails because there is no “Law of the United States” mandating the terms a prosecutor must offer in a plea bargain. Generally speaking, the voluminous *150 case law cited by the United States focuses on the defendant's right to waive an IAC claim when entering into a plea agreement. The prosecutor's obligation in the negotiation goes unmentioned. We know of no constitutional requirement, outside of simple fair play, applying to the prosecutor's role in the plea bargain process. In fact, it is a matter of prosecutorial grace that a defendant is even offered a plea bargain, terms aside. With no right to be offered a plea agreement, a defendant is not vested with a right requiring the inclusion of any particular terms in a plea agreement.
We note there is some case law to suggest that because E–435 is an interpretation of the Kentucky Rules of Professional Conduct, and those rules have been adopted by the federal courts within Kentucky, see Joint Local Rules of Criminal Practice for the U.S. District Courts for the Eastern and Western Districts of Kentucky (LCrR) 57.3(c), E–435 is actually federal law and the Supremacy Clause does not apply. See United States v. Klubock, 832 F.2d 649, 651 (1st Cir.1987) (“[S]ince its adoption by the District Court, PF 15 can no longer be considered state law, because by its incorporation into the local rules, PF 15 has become federal law.”). We reject its application here because, while the federal courts within Kentucky have adopted our Rules of Professional Conduct, E–435 is merely an advisory opinion and does not become binding in any way, save the review we are currently undertaking.

This says nothing about a defendant's right to waive an IAC waiver. The question of whether a defendant may waive something the defendant is offered is not the same as whether a defendant has a right to have the offer in the first place.

We are aware that Federal Rules of Criminal Procedure 11(b)(N) requires a trial court “inform the defendant of, and determine that the defendant understands ... the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.” On its face, this indicates that prosecutors may offer a defendant a plea agreement containing a provision waiving the right to attack the conviction collaterally, ostensibly including on IAC grounds. We emphasize “may” because while Rule 11 contemplates the occurrence of a provision like at issue here, there is no requirement that a plea include it; rather, Rule 11 operates as a safeguard for the defendant in the case a prosecutor decides to offer the provision. This lack of directive for a prosecutor makes sense in the scheme of plea bargaining because the United States desires—even needs—the ability to use its bargaining chips in whatever manner reaches a just result for the government, the defendant, and the victim.

As an aside, our review of the United States Attorneys' Manual for the mention of terms required for a plea agreement was fruitless. Instead, the manual describes considerations to be weighed when offering a plea and various specific plea situations. See Dept. of Justice, United States Attorneys' Manual §§ 9–16.001 to 9–16.500, 9–27.330 to 9–27.450.

On the other hand, this lack of directive effectively eliminates the United States' Supremacy Clause argument. E–435 prohibits prosecutors from offering an IAC-waiver provision, which incidentally eliminates the ethical and constitutional quandary discussed above. Because there is no federal law or constitutional principle contrary to E–435's proclamation, we are unable to discern how the Supremacy Clause prohibits this Court from fulfilling its obligation to embrace E–435 if its declaration comports with our Rules of Professional Conduct. And, again, the case law cited by the United States fails to address the duties of the prosecutor, so we fail to see how E–435 would alter federal substantive law with regard to prosecutors.

Similarly, the United States' attempt to paint E–435 as potentially creating the lamented prison of constitutional privileges is unavailing. Because the defendant enjoys no constitutional right to receive the best “deal” in a plea bargain, limiting the use of IAC waivers as a bargaining chip does not restrict a defendant's constitutional rights. Furthermore, a defendant retains the right to “conduct his own defense [perhaps] ultimately to his own detriment,” Faretta v. California, 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), so he is free to choose to waive IAC of his own volition. Restricting the conduct of the attorneys who are tasked with fairly operating the justice system in no way denies the defendant “the exercise of his free choice ... to dispense with some of these [constitutional] safeguards[,]” Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942). We are not, through our treatment of E–435, “imprison[ing] a [defendant] in his privileges and call[ing] it the Constitution.” Id. at 280, 63 S.Ct. 236. After all, the Sixth Amendment grants the defendant “personally the right to make his defense” and “an assistant, however expert, is still an assistant.” Faretta, 422 U.S. at 819–20, 95 S.Ct. 2525. Contrary to the assertion by the United States, we do not find E–435 limits a defendant's Sixth Amendment rights.
Given the background and context surrounding § 530B's enactment, it seems clear this is not the situation Congress was attempting to avoid; instead, it makes more sense that E–435’s current operation was what Congress sought. Because E–435 does not operate contrary to existing federal law, the United States’ Supremacy Clause challenge fails.

B. E–435 Correctly Articulates the Ethical Concerns Associated with Allowing IAC Waivers in Plea Agreements.

Having found E–435 is not precluded by the Supremacy Clause, we now turn to its merits. As we mentioned previously, E–435 does not express a novel position. E–435 aligns with the vast majority of state ethics decisions, and the two divergent states are not as differing in their views as the United States attempts to argue. 66 The soundness of E–435’s reasoning aside, as former Justice Robert Jackson famously remarked, “the mere fact that a path is a beaten one is a persuasive reason for following it.” 67 We choose the beaten path today.

For example, Arizona’s ethics opinion focuses solely on the application of –1.8(h), the prohibition of an attorney entering an agreement limiting exposure to liability for malpractice. There is no mention of a potential conflict of interest for defense counsel. Moreover, Arizona has case law expressing a strong policy of disallowing any waiver of appellate rights by a defendant. State v. Ethington, 121 Ariz. 572, 592 P.2d 768, 769–70 (1979) (“We hold that the right to appeal is not negotiable in plea bargaining, and that as a matter of public policy a defendant will be permitted to bring a timely appeal from a conviction notwithstanding an agreement not to appeal.”) (emphasis added). So, Arizona’s position on the waiver of IAC claims is rather ambiguous and does not clearly support the United States’ position.


1. Counseling a Defendant on an IAC Waiver Presents Both an Unwaivable Conflict of Interest and Concerns With Limiting Malpractice Liability.

a. Conflict of interest.

[25] The United States challenges E–435’s proscription of defense counsel’s providing advice on IAC waivers in plea agreements. The United States’ arguments are numerous but lacking. Primarily, the United States argues any personal conflict posed by the presence of an IAC waiver provision ordinarily will not propose a “significant risk” because of the attorney’s concomitant duty to advocate zealously for the client; E–435 presents an improper presumption that attorneys provide ineffective assistance; collateral attack is still available to the defendant; and an IAC waiver is not analogous to limiting malpractice liability. Additionally, the United States believes whether a conflict exists should be decided on a case-by-case basis with the attorney making that determination.

We begin our analysis with a simple observation about the nature of our Rules of Professional Conduct. Merely because a practice, arguably unethical in nature, does not arise in every client’s representation does not mean an ethical rule is not needed. Ethical rules are designed to eliminate the possibility of an ethical violation, no matter how unlikely the targeted conduct may be. Simply put, it is not sufficient to say, as the United States attempts to argue, that “ordinarily” an attorney’s personal interest will not create a significant risk that a client’s representation will be materially limited. This leaves open the possibility that ethical violations may occur and clients’ interests may be compromised. Instead of reactive, our ethics rules are intended to be proactive and operate preventively.

In that vein, SCR 3.130–1.7 deals with concurrent conflicts of interest, attempting to prevent situations from arising where there is a “substantial risk” representation of the client will be “materially limited” because of the lawyer’s “personal interest.” The goal of SCR 3.130–1.7 is to lessen the possibility of a “lawyer's own interests ... hav[ing] an adverse effect on [the] representation of a client.” 68 When defense counsel is forced, through the introduction of an IAC waiver in a plea agreement, to advise a client on the attorney’s own conduct, a personal interest certainly exists. An IAC claim is time consuming for an attorney, 69 may tarnish the attorney’s professional reputation, may subject the attorney to discipline by the bar or courts, and may even have serious financial consequences for the attorney’s practice. 70 In fact, SCR 3.130–1.7 Cmt. 10 contemplates just such a situation:
“[I]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.”

Providing advice on whether it is appropriate to waive collateral attack plainly involves, at the very least, an internal review of the probity of the attorney's own conduct.

**9** Admittedly, SCR 3.130–1.7 contemplates that a conflict may be waivable by the client if various requirements are met: (1) “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client”; (2) “the representation is not prohibited by law”; (3) “the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal”; and *(4) “each affected client gives informed consent, confirmed in writing.”

This conflict is unwavaiable, however, because the conflict of interest is not local; that is, the conflict is not limited to the single attorney representing the defendant. SCR 3.130–1.7 allows for independent counsel to step in when a conflict of interest is present. This procedure attempts to alleviate the impact of the conflict because, presumably, the independent counsel will not share the conflict. The United States concedes that an IAC claim challenging the knowingness or voluntariness of the plea entry would be allowed to proceed, notwithstanding the presence of a waiver provision. Ostensibly, independent counsel would provide advice for the defendant on the IAC waiver and, in doing so, would necessarily discuss independent counsel's own performance. A defendant, in theory, could then later bring an IAC claim attacking the entry of the plea because the independent counsel was ineffective. The conflict persists. Independent counsel does not alleviate its pervasiveness.

Moreover, as we will explain below, there is psychological evidence indicating that individuals are subject to "biases" that make difficult, in a situation such as presented here, effectively determining whether competent and diligent representation is possible. The United States argues it needs these waivers to ensure finality of conviction. Their argument involves a curious method of ensuring finality. If we were to accept the United States' position, IAC claims would still proceed, except with an additional step: the initial determination of whether the IAC went to the actual entry of the plea, *i.e.*, was the plea entered knowingly and voluntarily? The United States' position does not eliminate IAC claims, as we are sure is their aim but, rather, convolutes the process because the defendant would surely be entitled to “careful consideration and plenary processing of his claim, including full opportunity for presentation of the relevant facts.”

The United States' finality concerns merit heavy discussion. Their argument involves a curious method of ensuring finality. If we were to accept the United States' position, IAC claims would still proceed, except with an additional step: the initial determination of whether the IAC went to the actual entry of the plea, *i.e.*, was the plea entered knowingly and voluntarily? The United States' position does not eliminate IAC claims, as we are sure is their aim but, rather, convolutes the process because the defendant would surely be entitled to “careful consideration and plenary processing of his claim, including full opportunity for presentation of the relevant facts.”

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The United States next tries to claim that E–435 operates on a presumption that attorneys provide ineffective assistance. This argument is meritless on several grounds. We have the utmost confidence in the ethical conduct of the members of the Kentucky bar. That confidence, however, does not preclude the need for ethics rules to guide them.

We do not dispute that the Strickland analysis applies to plea bargaining. And, furthermore, we concede that Strickland calls for a presumption of effective assistance. But arguing E–435 presumes ineffective assistance is misguided. The Supreme Court has acknowledged the “murky pre-trial context” where the “likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict” and “rare [is the] attorney who will be fortunate enough to learn the entire truth from [her] own client, much less be fully apprised before trial of what each of the Government's witnesses will say on *154 the stand.”

No presumption of ineffectiveness is required to acknowledge the “imponderables” lurking during plea bargaining. E–435 simply attempts to provide a clear understanding of appropriate conduct in an often cloudy situation. In turn, the interests of both the defendant and the overall criminal justice system are protected.

Moreover, psychological studies have “uncovered psychological biases that make it extremely difficult for professionals, even those who are acting in good faith and whose only limitation is unconscious, to appreciate the deleterious consequences of conflicts of interest.”

Sure, the “venal lawyer may, from time to time, intentionally seek to obscure evidence of a conflict of interest, or the harmful effects that a conflict had during representation”; but “psychological research demonstrates that most lawyers—even those who are acting with the best intentions—are unable consciously to identify many conflicts that exist or to appreciate the corrosive effects that such conflicts may have on decision[-]making.”

Empirical data suggests it unwise to force an attorney to determine whether her own provided assistance was effective or not. Recently, the field of behavioral economics has been applied to ethical decision-making. This body of research has fostered what is known as “bounded ethicality,” essentially meaning humans are “limited during the process of making ethical decisions[.]”

Contrary to this notion, Texas, in its review of IAC waivers, adopted the view that attorneys were able objectively to review their conduct and provide adequate counsel to defendants. We reject this position, despite support in Supreme Court precedent for the idea that defense counsel can be trusted to acknowledge and disclose any potential conflict of interest because empirical data suggests reviewing one's own conduct is fraught with unconscious errors.

This method of thought stems from the use of bounded rationality to address a particular type of ethical decision-making originated by Mahzarin R. Banaji and R. Bhaskar in their work, Implicit Stereotypes and Memory: The Bounded Rationality of Social Beliefs, in MEMORY, BRAIN, AND BELIEF p. 139–75 (Daniel L. Shacter & Elaine Scarry, eds., 2000). See Dolly Chugh et al., Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest, in CONFLICTS...
Conflicts of interest, especially the personal conflict in question, provide an example of the “dual-process model” of decision-making, where “the human mind processes self-interest automatically, while decisions about professional responsibility are processed by the controlled mode of analytical thought.” The presence of a conflict of interest illustrates the necessity of E–435:

In most instances, automatic and controlled processes work together to make decisions. But when a conflict of interest is present, and self-interest and professional responsibility collide, the decision often results in an automatic preference for self-interest. This results in a critical observation: while the decision-maker will believe that the decision comes from rational deliberation where all competing concerns are considered and weighed, in actuality the automatic bias toward self-interest will often create an error in judgment that favors self-interest, automatically and without conscious awareness. In other words, the decision-maker will rationalize behavior as consistent with ethical norms, even when in actuality the decision preferences self-interest.

As a result, even an attorney acting in good faith, diligently attempting to provide the best advice for a client, is at risk of unconsciously painting an ethical gloss over his or her decision. In fact, “the decision-maker uses rational thought to search for arguments that support an already-made judgment through moral intuition”; and, furthermore, studies have indicated “people tend to overestimate their ability to act ethically, both prospectively when asked to consider how ethical they will be in the future and in hindsight when asked to evaluate how ethical they have been in the past.” Perhaps consistent with intuition, “[r]esearch demonstrates that situations where discretion is permitted, and bright lines do not exist, are where psychological biases that skew judgment are most likely to operate.” E–435 is both useful and necessary.

b. Limitation on malpractice liability.

An additional ground on which E–435 rests is SCR 3.130–1.8(h), the prohibition on “mak[ing] an agreement prospectively limiting the lawyer's liability to a client for malpractice[.]” The United States challenges this basis as irrelevant and inapplicable to a waiver of IAC. Of course, we can agree with the United States to the extent that an IAC claim is not a claim for malpractice. But that is where our agreement ends.

The reason advising a client to waive an IAC claim in a plea agreement limits an attorney's malpractice liability is indirect, yet straightforward. In Kentucky, to claim malpractice in a criminal case, just the same as a civil case, a defendant must show proximate cause.

In this context, proximate cause involves a “but for” determination, i.e., but for the attorney's malfeasance, the client—read: defendant—would not have been convicted. Admittedly, in Kentucky, the viability of a malpractice
claim following a guilty plea is in doubt. Saving a lengthy discussion of our malpractice landscape, suffice it to say that without having his conviction overturned, a defendant's attempt at proving proximate cause becomes extraordinarily difficult, virtually impossible.

89 See *Ray v. Stone*, 952 S.W.2d 220 (Ky.App.1997) (discussing requirement that defendant prove innocence before bringing malpractice action); see also David J. Leibson, 13 KY. PRAC. TORT LAW § 10:18.

90 It is important to note here that this Court has yet to rule explicitly on the “innocence” requirement adopted in *Stone*; that is, the requirement that a criminal defendant either prove his actual innocence or his legal innocence—a jury would not have found him guilty beyond a reasonable doubt without the attorney's negligence. A substantial volume of ink has been spilled debating the merit of such a requirement, see, e.g., Kevin Bennardo, Note, A Defense Bar: The “Proof of Innocence” Requirement in Criminal Malpractice Claims, 5 Ohio St. J.Crim. L. 341 (2007) (compiling cases and theories both in support and defense of requiring defendants prove some degree of innocence), but today is not the proper day for such a discussion. It is worth mentioning, however, that proving innocence in some form is the majority position among the States. See id.; see also Justin D. Wear, Case Note, Tort Law—Criminal Malpractice—Criminal Defendants Ability to sue his Defense Attorney for Legal Malpractice *Gibson v. Trant*, 70 TENN. L.REV. 905 (2003). Furthermore, there is caselaw, including *Stone*, supporting the concept that a criminal malpractice action may not be sustained following a guilty plea—the logic for such a doctrine being that any negligence by the attorney cannot overcome the fact that the defendant's admitted criminality is the reason for his conviction and incarceration. Again, we need not decide these issues today; we mention them here in the sake of accuracy.

Plainly then, advising a defendant to waive a potential IAC claim—an acknowledged method of obtaining post-conviction relief—would limit the potential for malpractice liability. An attorney should not be allowed to do indirectly that which the attorney is prohibited from doing directly.

The language of our ethics rules aside, public policy supports our conclusion that advising on an IAC waiver in a plea agreement is prohibited under –1.8(h). Criminal defendants, of course, seldom bring malpractice actions. Instead, the usual course of action is via an action under Kentucky Rules of Criminal Procedure (RCr) 11.42 or, federally speaking, a writ of habeas corpus under 28 U.S.C. § 2255. “[C]riminal defendants should not suffer from lesser protections simply because they usually seek habeas corpus relief rather than malpractice damage[.]” 91


**12 For the foregoing reasons, E–435 is appropriate as applied to defense counsel.

2. A Prosecutor Inserting an IAC Waiver into a Plea Agreement Induces a Fellow Attorney to Violate the Rules of Professional Conduct.

[28] Finally, the United States challenges E–435's proscription of prosecutors embedding an IAC waiver in a defendant's plea agreement. The United States claims a prosecutor, without knowing of specific ineffective performance by defense counsel, *157 cannot knowingly induce a fellow attorney to violate ethical rules. We disagree.

Under our ethical rules, “[i]t is professional misconduct for a lawyer to: ... knowingly assist or induce another [attorney] to”“violate or attempt to violate the Rules of Professional Conduct[.]” 92 Providing context to the language, knowing is defined as “[h]aving or showing awareness or understanding”; 93 and induce is roughly defined as to “influence [ ] or persuade[ ].” 94 Prosecutors offering plea agreements with IAC waivers surely violate this rule.

92 SCR 3.130–8.4(a).
93 BLACK’S LAW DICT. (9th ed.2009).
appellate waivers, they have been labeled as such. The plea agreement often comes with a take-it-or-leave-it tone. And defense counsel is forced to deal with the provision if offered. Because the prosecutor is aware of our ethical rules, we see little reason why offering a contract of adhesion that requires a fellow attorney to perform unethically in order to comply with other ethical or constitutional obligations would not be “influencing or persuading” a fellow attorney to violate our ethical rules. Contrary to the United States' assertion, it is not necessary that the prosecutor know defense counsel has been ineffective in order to satisfy the rule. Instead, the plain language of the rule indicates that what is required is for a prosecutor to understand his conduct will result in a fellow attorney violating our ethical rules.


E–435 additionally found the United States plea-bargaining practice violated –3.8 of our ethical rules. As a result of their weighty role in our justice system, –3.8 places special responsibilities on prosecutors. E–435 holds the insertion of IAC waivers in plea agreements violates the “spirit” of –3.8 and prosecutors disregard their role as a “minister of justice” when using such waivers. In truth, prosecutors are expected to be more than “simply ... an advocate.” Demanding a defendant waive a potential IAC claim—or, worse, all collateral attack—may provide finality but at too high of a cost. A defendant's conviction is essentially unappealable as a result of the waiver in question. A prosecutor is charged with “see[ing] that the defendant is accorded procedural justice,” and we simply do not believe the use of IAC waivers lives up to that lofty expectation.

SCR 3.130–3.8 Cmt. 1.

Id.

Accordingly, we affirm E–435 with respect to prosecutors.

III. CONCLUSION.

We are duty-bound to regulate the legal profession within our borders. Today, we are proactive in that role. Attorneys practicing in this Commonwealth, whether state or federal, must comply with our ethics rules. Accordingly, either defense counsel or prosecutors inserting into plea agreements waivers of collateral attack, including IAC, violates our Rules of Professional Conduct.

All sitting. All concur.

Parallel Citations

2014 WL 4159988 (Ky.)
Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim

Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer’s self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

This opinion addresses whether a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel may, without the former client’s informed consent, disclose confidential information to government lawyers prior to any proceeding on the defendant’s claim in order to help the prosecution establish that the lawyer’s representation was competent. This question may arise, for example, because a prosecutor or other government lawyer defending the former client’s ineffective assistance claim seeks the trial lawyer’s file or an informal interview to respond to the convicted defendant’s claim, or to prepare for a hearing on the claim.

Under Strickland v. Washington, a convicted defendant seeking relief (e.g., a new trial or sentencing) based on a lawyer’s failure to provide constitutionally effective representation, must establish both that the representation “fell below an objective standard of reasonableness” and that the defendant thereby was prejudiced, i.e., that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Claims of ineffective assistance of counsel often are dismissed without taking evidence due to insufficient factual allegations or other procedural deficiencies. Numerous claims also are dismissed without a determination regarding the reasonableness of the trial lawyer’s representation based on the defendant’s failure to show prejudice. The Supreme Court recently expressed confidence “that lower courts – now quite experienced with applying Strickland – can effectively and efficiently use its framework to separate specious claims from those with substantial merit.” Although it is highly unusual for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying or otherwise submitting evidence in a judicial proceeding, sometimes trial lawyers have done so, and commentators have expressed concerns about the practice.

In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. See Rules 1.6 & 1.9(c). The confidentiality rule “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”

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1 This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.
3 Id. at 694.
6 This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.
8 Id. at 694.
12 See, e.g., Lawrence J. Fox, Making the Last Chance Meaningful: Predecessor Counsel’s Ethical Duty to the Capital Defendant, 31 Hofstra L. Rev. 1181 (2003).
13 See, e.g., Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex. App. 1991) (law firm breached its fiduciary duty when,
Ordinarily, if a lawyer is called as a witness in a deposition, a hearing, or other formal judicial proceeding, the lawyer may disclose information protected by Rule 1.6(a) only if the court requires the lawyer to do so after adjudicating any claims of privilege or other objections raised by the client or former client. Indeed, lawyers themselves must raise good-faith claims unless the current or former client directs otherwise.8 Outside judicial proceedings, the confidentiality duty is even more stringent. Even if information clearly is not privileged and the lawyer could therefore be compelled to disclose it in legal proceedings, it does not follow that the lawyer may disclose it voluntarily. In general, the lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant’s representation without the defendant’s informed consent.

Accordingly, unless there is an applicable exception to Rule 1.6, a criminal defense lawyer required to give evidence at a deposition, hearing, or other formal proceeding regarding the defendant’s ineffective assistance claim must invoke the attorney-client privilege and interpose any other objections if there are nonfrivolous grounds on which to do so. The criminal defendant may be able to make nonfrivolous objections to the trial lawyer’s disclosures even though the ineffective assistance of counsel claim ordinarily waives the attorney-client privilege and work product protection with regard to otherwise privileged communications and protected work product relevant to the claim.9 For example, the criminal defendant may be able to object based on relevance or maintain that the attorney-client privilege waiver was not broad enough to cover the information sought. If the court rules that the information sought is relevant and not privileged or otherwise protected, the lawyer must provide it or seek appellate review.

Even if information sought by the prosecution is relevant and not privileged, it does not follow that trial counsel may disclose such information outside the context of a formal proceeding, thereby eliminating the former client’s opportunity to object and obtain a judicial ruling. Absent a relevant exception, a lawyer may disclose client information protected by Rule 1.6 only with the client’s “informed consent.” Such consent “denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Rules 1.0(c) & 1.6(a). A client’s express or implied waiver of the attorney-client privilege has the legal effect of forgoing the right to bar disclosure of the client’s prior confidential communications in a judicial or similar proceeding. Standing alone, however, it does not constitute “informed consent” to the lawyer’s voluntary disclosure of client information outside such a proceeding.10 A client might agree that the former lawyer may testify in an adjudicative proceeding to the

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8 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80(1)(b) & cmt. c (2000) (“A client who contends that a lawyer’s assistance was defective waives the privilege with respect to communications relevant to that contention. Waiver affords to interested parties fair opportunity to establish the facts underlying the claim.”)

9 Cf. Clock v. United States, No. 09-cv-379-JD, slip op. (D.N.H. 2010). In Clock, at the prosecution’s request, the defendant signed a form explicitly waiving the attorney-client privilege with respect to the issues in her post-conviction petition in order to authorize her trial lawyer to answer questions regarding her ineffective assistance of counsel claim. Based on her office’s institutional policy, trial counsel nonetheless declined to respond to the prosecution’s questions unless ordered to do so by the court. Based on the defendant’s
extent the court requires but not agree that the former lawyer voluntarily may disclose the same client confidences to the opposite party prior to the proceeding.

Where the former client does not give informed consent to out-of-court disclosures, the trial lawyer who allegedly provided ineffective representation might seek to justify cooperating with the prosecutor based on the “self-defense exception” of Rule 1.6(b)(5), 11 which provides that “[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” 12 13

The self-defense exception grows out of agency law and rests on considerations of fairness. Rule 1.6(b)(5) corresponds to a similar exception to the attorney-client privilege that permits the disclosure of privileged communications insofar as necessary to the lawyer’s self-defense.

The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no basis for doing so. For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer’s firm, and need not wait until charges or claims are filed before invoking the self-defense exception. Although the scope of the exception has expanded over time, the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation. Consequently, it has been said that “[a] lawyer may act in self-defense under [the exception] only to defend against charges that imminently threaten the lawyer or the lawyer’s associate or agent with serious consequences ....” 14

When a former client calls the lawyer’s representation into question by making an ineffective assistance of counsel claim, the first two clauses of Rule 1.6(b)(5) do not apply. The lawyer may not respond in order “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer

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11 Although the confidentiality duty is subject to other exceptions, none of the other exceptions seems applicable to this situation.
12 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. b (“in the absence of the exception . . ., lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group”).
13 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83.
14 Rule 1.6 cmt. 10 (“The rule] does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.”). Cases addressing the self-defense exception to the attorney-client privilege are to the same effect. See, e.g., Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974) (lawyer named as defendant in class action brought by purchasers who claimed that prospectus contained misrepresentations had right to make appropriate disclosure to lawyers representing stockholders as to his role in public offering of securities).
15 See, e.g., First Fed. Sav. & Loan Ass’n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557 (S.D.N.Y. 1986) (self-defense exception to attorney-client privilege permits lawyer who is being sued for misconduct in securities matter to disclose in discovery documents within attorney-client privilege if lawyer's interest in disclosure outweighs interest of client in maintaining confidentiality of communications, and if disclosure will serve truth-finding function of litigation process); Association of the Bar of the City of New York Committee on Prof'l and Jud. Eth. Op. 1986-7, 1986 WL 293096 (1986) (lawyer need not resist disclosure until formally accused because of cost and other burdens of defending against formal charge and damage to reputation); Pennsylvania Bar Association Committee on Legal Eth. and Prof'l Resp Eth. Op. 96-48, 1996 WL 928143 (1996) (lawyer charged by former clients with malpractice in their defense in SEC is permitted to speak to SEC lawyers and reveal information concerning the representation as he reasonably believes necessary to respond to allegations); South Carolina Bar Eth. Adv. Committee Adv. Op. 94-23, 1994 WL 928298, (1994) (lawyer under investigation by Social Security Administration for possible misconduct in connection with his client may reveal confidential information as may be necessary to respond to or defend against allegations; no grievance proceeding pending anywhere else against lawyer).
16 Disciplinary Rule 4-101(C)(4) of the predecessor ABA Model Code of Professional Responsibility (1980) provided: “A lawyer may reveal . . . [c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct,” but did not expressly authorize the disclosure of confidences to establish a claim on behalf of a lawyer other than for legal fees.
17 Rule 1.6 cmt. 2. Commentators have maintained that the exception should be narrowly construed, both because the justifications for the exception are weak, see CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 308 (1986), and because there are strong policy considerations that disfavor the exception, including that it is subject to abuse, frustrates the policy of encouraging candor by clients, and undermines public confidence in the legal profession because it appears inequitable and self-serving. See Henry D. Levine, Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection, 5 HOFSTRA L. REV. 783, 810-11 (1977).
18 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 c (emphasis added).
and the client,” because the legal controversy is not between the client and the lawyer. Nor is disclosure justified “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved,” because the defendant’s motion or habeas corpus petition is not a criminal charge or civil claim against which the lawyer must defend.

The more difficult question is whether, in the context of an ineffective assistance of counsel claim, the lawyer may reveal information relating to the representation “to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” This provision enables lawyers to defend themselves and their associates as reasonably necessary against allegations of misconduct in proceedings that are comparable to those involving criminal or civil claims against a lawyer. For example, lawyers may disclose otherwise protected information to defend against disciplinary proceedings or sanctions and disqualification motions in litigation. On its face, the provision also might be read to apply to a proceeding brought to set aside a criminal conviction based on a lawyer’s alleged ineffective assistance of counsel, because the proceeding includes an allegation concerning the lawyer’s representation of the client to which the lawyer might wish to respond.

Under Rule 1.6(b)(5), however, a lawyer may respond to allegations only insofar as the lawyer reasonably believes it is necessary to do so. It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer’s belief must be objectively reasonable. The Comment explaining Rule 1.6(b)(5) cautions lawyers to take steps to limit “access to the information to the tribunal or other persons having a need to know it” and to seek “appropriate protective orders or other arrangements … to the fullest extent practicable.” Judicial decisions addressing the necessity for disclosure under the self-defense exception to the attorney-client privilege recognize that when there is a legitimate need for the lawyer to present a defense, the lawyer may not disclose all information relating to the representation, but only particular information that reasonably must be disclosed to avoid adverse legal consequences. These limitations are equally applicable to Rule 1.6(b)(5).

Permitting disclosure of client confidential information outside court-supervised proceedings

10 See Utah State Bar Eth. Adv. Op. Committee Eth. Op. 05-01, 2005 WL 5302775, at *6 (criminal defense lawyer may not voluntarily disclose client confidences to prosecutor or in court in response to defendant’s claim that lawyer’s prior advice was confusing; court stated, “[w]hile an arguable case might be made for disclosure under this exception, it … is fraught with problems. The primary problem is that the ‘controversy’ is not between lawyer and client, except quite tangentially. While there may well be a dispute over the facts between lawyer and client, there is no ‘controversy’ between them in the sense contemplated by the rule. Nor is there a criminal or civil action against the lawyer.”). But see Arizona State Bar Op. 93-02 (1993), available at http://www.myazbar.org/Ethics/opinionview.cfm?id=652 (interpreting “controversy” to include a disagreement in the public media).
20 Cf. State v. Madigan, 68 N.W. 179, 180 (Minn. 1896) (lawyer accused of inadequate criminal defense representation may submit affidavit containing attorney-client privileged information to disprove such charge).
21 See Rule 1.6(b)(5) (“allowing disclosure only ‘to the extent the lawyer reasonably believes necessary’”); Rule 1.6 cmts. 10 & 14.
22 See Rule 1.0(i) (“Reasonable belief’ or ‘reasonably believes’ when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.”)
23 Rule 1.6 cmt. 14. Similar restrictions have been held applicable to the related context in which a lawyer seeks to disclose confidences to obtain immunity. See, e.g., ABA Cmt’r Responsibility, Formal Op. 250 (1943), in OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS ANNOTATED 555, 556 (American Bar Foundation 1967) (“where a lawyer does resort to a suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights”).
24 For example, in In re Nat’l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig., 120 F.R.D. 687, 692 (C.D. Cal. 1988), the district court “reject[ed] the suggestion made by some parties that ‘selective’ disclosure should not be allowed, that if the exception is permitted to be invoked, all attorney-client communications should be disclosed,” finding that this suggestion was “directly contrary to the reasonable necessity standard.” Accord RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83 cmt. e (“The lawyer’s invocation of the exception must be appropriate to the lawyer’s need in the proceeding. The exception should not be extended to communications that are of dubious relevance or merely cumulative of other evidence.”); cf. Dixon v. State Bar, 653 P.2d 321, 325 (Cal. 1982) (lawyer sanctioned for gratuitous disclosure of confidence in response to former client’s motion to enjoin lawyer from harassing her); Levin v. Ripple Twist Mills, Inc., 416 F. Supp. 876, 886-87 (E.D. Pa. 1976) (“In almost any case when an attorney and a former client are adversaries in the courtroom, there will be a credibility contest between them. This does not entitle the attorney to rummage through every file he has on that particular client (regardless of its relatedness to the subject matter of the present case) and to publicize any confidential communication he comes across which may tend to impeach his former client. At the very least, the word ‘necessary’ in the disciplinary rule requires that the probative value of the disclosed material be great enough to outweigh the potential damage the disclosure will cause to the client and to the legal profession.”).
25 Courts further recognize that disclosures may be made to defend against a non-client’s accusation of misconduct only if the accusation is credible enough to put the lawyer at some risk of adverse consequences, such as a criminal indictment or a civil lawsuit; third parties otherwise would have an incentive to raise utterly meritless claims of lawyer misconduct to gain access to confidential information. Cf. SEC v. Forma, 117 F.R.D. 516, 519-525 (S.D.N.Y. 1987) (federal charges need not be issued in order for the self defense exception to apply); First Fed. Sav. & Loan Ass’n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 566 n.15 (S.D.N.Y. 1986) (former auditor’s evidence against lawyer must “pass muster under Fed. R. Civ. P. 11”).
undermines important interests protected by the confidentiality rule. Because the extent of trial counsel’s disclosure to the prosecution would be unsupervised by the court, there would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding. Disclosure of such information might prejudice the defendant in the event of a retrial. Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers.

Against this background, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable. It will be rare to confront circumstances where trial counsel can reasonably believe that such prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer. A lawyer may be concerned that without an appropriate factual presentation to the government as it prepares for trial, the presentation to the court may be inadequate and result in a finding in the defendant’s favor. Such a finding may impair the lawyer’s reputation or have other adverse, collateral consequences for the lawyer. This concern can almost always be addressed by disclosing relevant client information in a setting subject to judicial supervision. As noted above, many ineffective assistance of counsel claims are dismissed on legal grounds well before the trial lawyer would be called to testify, in which case the lawyer’s self-defense interests are served without the need ever to disclose protected information. If the lawyer’s evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant’s claim. In the generation since Strickland, the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings. There is no published evidence establishing that court resolutions have been prejudiced when the prosecution has not received counsel’s information outside the proceeding. Thus, it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to the prosecutor outside any court-supervised setting.

26 **Cf. Restatement (Third) of the Law Governing Lawyers** § 64 cmt. e (before making disclosures under the self-defense exception, a lawyer ordinarily must give notice to former client).

27 Some courts preclude the prosecution from introducing the trial lawyer’s statements in a later trial, see, e.g., Bittaker v. Woodford, 331 F.3d 715 (9th Cir.), cert. denied, 540 U.S. 1013 (2003) (waiver of privilege for purposes of habeas claim does not necessarily mean extinguishment of the privilege for all time and in all circumstances), but not all courts have done so. See, e.g., Fears v. Warden, 2003 WL 23770605 (S.D. Ohio 2003) (scope of habeas petitioner’s waiver of privilege not waived for all time and all purposes including possible retrial).

28 See, e.g., Utah State Bar Eth. Advisory Op. Committee Op. 05-01, supra notes 8 & 19 (where criminal defense lawyer’s former client moved to set aside his guilty plea on ground that lawyer’s advice about plea offer confused him, lawyer may not divulge attorney-client information to prosecutor to prevent a possible fraud on court or protect lawyer’s reputation; lawyer must assert attorney-client privilege in hearing on former client’s motion, and may testify only upon court order).

29 See Rule 1.6 cmt. 14.
Paul Ryan DOUGLAS, Petitioner, 
v. 
UNITED STATES of America, Respondent.


Attorneys and Law Firms
Cheryl J. Strum, Chadds Ford, PA, for Petitioner.

DECISION AND ORDER REGARDING ATTORNEY CLIENT PRIVILEGE

McMAHON, District Judge.

*1 Paul Douglas has filed a motion pursuant to 28 U.S.C. § 2255, alleging that his conviction for Bank Robbery and the killing of ATM repair technician Milton Moran Junior, a violation of 18 U.S.C. § 2113(a), should be overturned on the ground that he received ineffective assistance from his trial/appellate counsel.

As is well settled, where a habeas petitioner raises a claim of ineffective assistance of counsel, the petitioner waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer. Frias v. United States, No. 09 Civ. 2537, 2009 WL 1437797 at *1 (S.D.N.Y. May 20, 2009) (quoting In re Lott, 424 F.3d 446, 457–58 (6th Cir.2005) (quoting Bittaker v. Woodford, 331 F.3d 715, 720 (9th Cir.2003) (en banc); Tasby v. United States, 504 F.2d 332. 336 (8th Cir.1974). Where the defendant's allegations of fact, if credited, would support a finding of ineffective assistance, the court is required to obtain testimony from the attorney, either to support the former client's claim or to undermine it, and (if there is a conflict in the testimony of the movant and his former attorney) to make any needed credibility findings. The attorney's testimony is mandatory; in nearly every case, it is the only way to test the credibility of the defendant's assertion of ineffective assistance (an assertion that is, in this court's experience, often false). The relevance of such testimony is obvious and cannot be overstated; without it, any convict who chose to claim that his lawyer was ineffective, and who made a preliminary showing of same, would automatically win reversal of his conviction.

Because the need for the attorney's testimony was patent and the waiver of privilege plain, it has become the practice for attorneys to supply the required testimony (in the form of an affidavit or declaration, which qualifies as testimony and so perfectly acceptable) without obtaining express written consent from the former client. Formal consent was deemed unnecessary because the client had waived the privilege simply by making the motion. Additionally, some attorneys have given their testimony without being formally ordered to do so by a court, knowing that the waiver would be given effect and that a court order was guaranteed to issue. In most instances, the testimony was solicited by and given to the prosecutor's office that originally indicted and prosecuted the defendant, since it is the prosecutor that assembles the record in opposition to the § 2255 motion.

Recently, the American Bar Association (ABA) has issued an opinion in which it states that former counsel whose clients make ineffective assistance of counsel, consistent with their ethical obligations (1) may not disclose information imparted to them in confidence without first obtaining the former client's informed consent; and (2) may only disclose such information in “court-supervised testimony.” ABA Comm. on Eth. and Prof'l Responsibility, Formal Op. 10–456 (July 14, 2010). The term “informed consent” “denotes an agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”ABA Model Rules of Professional Conduct, Rules 1.0(e) & 1.6(a). The phrase “court-supervised testimony” is not defined. Nothing in the ABA opinion purports to abolish the waiver of privilege that is attendant to every ineffective assistance of counsel motion—nor could it, since the waiver is imposed by law and the ABA cannot change the law. Indeed, the opinion specifically recognizes the existence of the waiver. The ABA merely draws a distinction between the waiver of privilege and the lawyer's ethical obligations under Model Rule 1.6(a), and promulgates rules for the discharge of the lawyer's ethical obligation.

*2 The Government has asked this court for guidance as to how it should proceed to assemble the necessary record.
so that it can oppose Douglas' motion. (Gov't letter dated 12/9/10.) The Government subsequently spoke with Mr. Douglas' present attorney, Cheryl J. Sturm, who told the Government that Douglas does not consent to Mr. Calhoun speaking with the Government.

Having reviewed the ABA opinion, the court issues the following guidelines:

1. When the court receives a § 2255 motion alleging ineffective assistance of counsel, it will review the motion and transmit it to the Government. If the Government believes that the motion on its face does not contain sufficient allegations of fact to support the claim of ineffective assistance, it shall so advise the court in a preliminary opposition to the motion. If the motion can be disposed of on the basis of the Government's preliminary opposition, the court will decide the motion on that basis.

2. If, however, the Government believes that attorney testimony is needed for it to respond fully to the motion, the Government shall so notify the court. The court will then issue an order in the following form:

   **Attorney–Client Privilege Waiver (Informed Consent)**

   WHEREAS (Petitioners Name) has moved for relief from his conviction pursuant to 28 U.S.C. § 2255 on the ground of ineffective assistance of counsel; and

   WHEREAS the Government, after reviewing the motion papers, has concluded that the testimony of Petitioner's former (trial/appellate) counsel, (Counsel's Name, Esq.), will be needed in order to allow the Government to respond to the motion; and

   WHEREAS the Court, after reviewing the motion papers, is satisfied that the testimony of (Counsel's Name Esq.) is needed in order to allow the Government to respond to the motion; and

   WHEREAS by making the motion, the movant has waived the attorney client privilege as a matter of law,

   IT IS HEREBY ORDERED that (Counsel's Name, Esq.) shall give sworn testimony, in the form of an affidavit, addressing the allegations of ineffective assistance of counsel made by movant.

   Cognizant of ABA Comm. on Eth. And Prof'l Responsibility, Formal Op. 10–456. Opinion (July 14, 2010), the Court is sending a document labeled “Informed Consent” to the movant (a copy of which is attached to this order). Movant must execute this document within 60 days from today's date and return it to the court. If the document is not received by the court within 60 days from today's date, the court will deny the § 2255 motion, on the ground that the movant failed to authorize the disclosure of information needed to permit the Government to respond to the motion.

   The “Informed Consent” document will read as follows:

   You have made a motion to have your conviction set aside on the ground that you received ineffective assistance from your lawyer, (Counsel's Name). The court has reviewed your papers and determined that we need to have a sworn testimonial statement from your former attorney in order to evaluate your motion.

   *3 The American Bar Association requires your attorney to obtain your consent before disclosing confidential communications between you and him that may bear on the disposition of your motion. This is a professional ethics requirement; there is no legal requirement that you give your attorney permission to disclose such information. In fact, as a matter of law, you have waived the attorney client privilege by making your motion, which means that if you wish to press your claim of ineffective assistance, you cannot keep the communications between yourself and your lawyer a secret—you must allow them to be disclosed to the Government and to the court pursuant to court order. The court has already issued an order (copy attached) ordering your attorney to give such testimony, in the form of an affidavit.

   If you wish to proceed with your motion to set aside your conviction on the basis that you received ineffective assistance of counsel, you must sign this statement and return it to the court in the attached envelope (keeping a copy for your records). The form authorizes your attorney to disclose confidential communications (1) only in response to a court order and (2) only to the extent necessary to shed light on the allegations of ineffective assistance of counsel that are raised by your motion.
You should know that if you sign this authorization, you run the risk that your attorney will contradict your statements about his/her representation of you. However, you should also know that the court will deny your motion if you do not authorize your attorney to give an affidavit in response to the court's attached order. Nothing in the American Bar Association's opinion alters the fact that you have already waived the attorney-client privilege; if you frustrate the court's ability to decide your motion by refusing to sign this authorization, your motion will be denied for failure to prosecute it.

You must return this form, signed by you and notarized, within sixty (60) days from the date of the court's order directing your lawyer to give testimony. If the court does not receive this letter, signed by you and notarized, within sixty (60) days from the date of the court's order directing your lawyer to give testimony, the court will automatically deny your motion.

NOTARIZED AUTHORIZATION

I have read the Court's order dated _______________ and this document headed “Attorney–Client Privilege Waiver (Informed Consent).” I hereby authorize my former attorney, _________________________, Esq., to comply with the court's order by giving testimony, in the form ordered by the court, relating to my motion to set aside my conviction on the ground of ineffective assistance of counsel. This authorization allows my former attorney to testify only pursuant to court order, and only to the extent necessary to shed light on the allegations of ineffective assistance of counsel that are raised by my motion.

Dated:

________________________________________

Sworn to before me this ___________ day of _________________________, 20____

*4 _____________________________________

Notary Public

As should be obvious, this court interprets the phrase “court-supervised testimony” to encompass the procedure outlined in its order. It has long been the case that a court may decide a habeas petition without requiring the production of the incarcerated petitioner, 28 U.S.C. § 2255(c), or even the taking live testimony, 28 U.S.C. § 2246, and the American Bar Association lacks the authority to alter those rules. Any interpretation of “court-supervised testimony” that required the taking of live testimony from the former attorney raises the possibility that the moving defendant might be required to be present at such testimony. However, the Supreme Court has made clear that this is not the case:

Not every colorable allegation entitles a federal prisoner to a trip to the sentencing court. Congress, recognizing the administrative burden involved in the transportation of prisoners to and from a hearing in the sentencing court, provided in § 2255 that the application may be entertained and determined without requiring the production of the prisoner at the hearing. This does not mean that a prisoner can be prevented from testifying in support of a substantial claim where his testimony would be material. However, we think it clear that the sentencing court has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing.


Requiring mandatory production of incarcerated petitioners in § 2255 cases would raise serious issues of cost and security (in that incarcerated defendants would have to be transported from their regular place of incarceration and housed), as well as calendar congestion (which cannot be imposed by professional association fiat). There is no reason that an attorney's initial testimony would need to be otherwise than by affidavit. It is the Court, not the ABA, that is best positioned to decide whether or not to order live testimony in order to resolve credibility issues.

The Government is advised that this court will follow these procedures in all cases, and will in the normal course direct the Government to advise the court of its position on the need for attorney testimony within 21 days.
In the present case, the Government has already demonstrated in its motion and supporting affidavit that an affidavit from petitioner's attorney is necessary to the adjudication of the instant petition. Accordingly, the Court will send petitioner a copy of the attorney-client privilege waiver form for his execution. (See attached order and waiver form.)

This constituted the decision and order of the Court.

04 CR 1065(CM)

Attorney–Client Privilege Waiver (Informed Consent)

You have made a motion to have your conviction set aside on the ground that you received ineffective assistance from your lawyer, Clinton Calhoun, Esq. The court has reviewed your papers and determined that we need to have a sworn testimonial statement from your former attorney in order to evaluate your motion.

*5 The American Bar Association requires your attorney to obtain your consent before disclosing confidential communications between you and him that may bear on the disposition of your motion. This is a professional ethics requirement; there is no legal requirement that you give your attorney permission to disclose such information. In fact, as a matter of law, you have waived the attorney client privilege by making your motion, which means that if you wish to press your claim of ineffective assistance, you cannot keep the communications between yourself and your lawyer a secret — you must allow them to be disclosed to the Government and to the court pursuant to court order. The court has already issued an order (copy attached) ordering your lawyer to give testimony, in the form ordered by the court, relating to your motion to set aside your conviction on the ground of ineffective assistance of counsel. This authorization allows your former attorney to testify only pursuant to court order, and only to the extent necessary to shed light on the allegations of ineffective assistance of counsel that are raised by your motion.

If you wish to proceed with your motion to set aside your conviction on the basis that you received ineffective assistance of counsel, you must sign this statement and return it to the court in the attached envelope (keeping a copy for your records). The form authorizes your attorney to disclose confidential communications (1) only in response to a court order and (2) only to the extent necessary to shed light on the allegations of ineffective assistance of counsel that are raised by your motion.

You should know that if you sign this authorization, you run the risk that your attorney will contradict your statements about his/her representation of you. However, you should also know that the court will deny your motion if you do not authorize your attorney to give an affidavit in response to the court's attached order. Nothing in the American Bar Association's opinion alters the fact that you have already waived the attorney-client privilege; if you frustrate the court's ability to decide your motion by refusing to sign this authorization, your motion will be denied for failure to prosecute it.

You must return this form, signed by you and notarized, within sixty (60) days from the date of the court's order directing your lawyer to give testimony. If the court does not receive this letter, signed by you and notarized, within sixty (60) days from the date of the court's order directing your lawyer to give testimony, the court will automatically deny your motion.

NOTARIZED AUTHORIZATION

I have read the Court's order dated ____________ and this document headed “Attorney–Client Privilege Waiver (Informed Consent).” I hereby authorize my former attorney, ______________________, Esq., to comply with the court's order by giving testimony, in the form ordered by the court, relating to my motion to set aside my conviction on the ground of ineffective assistance of counsel. This authorization allows my former attorney to testify only pursuant to court order, and only to the extent necessary to shed light on the allegations of ineffective assistance of counsel that are raised by my motion.

Dated:

________________________________________

Sworn to before me this _________ day of ________________________, 20_____.

*6 _________________________

Notary Public
RULE 1.6. CONFIDENTIALITY OF INFORMATION, WA R RPC 1.6

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer to the extent the lawyer reasonably believes necessary:

1. shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;

2. may reveal information relating to the representation of a client to prevent the client from committing a crime;

3. may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

4. may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with these Rules;

5. may reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

6. may reveal information relating to the representation of a client to comply with a court order; or

7. may reveal information relating to the representation of a client to inform a tribunal about any client's breach of fiduciary responsibility when the client is serving as a court-appointed fiduciary such as a guardian, personal representative, or receiver.
RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS, WAR RPC 1.7

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

Credits
[Amended effective September 1, 1995; September 1, 2006.]

Editors' Notes

COMMENT
RULE 1.9. DUTIES TO FORMER CLIENTS, WA R RPC 1.9

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Credits
[Amended effective September 1, 2006.]

Editors' Notes

COMMENT

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule.