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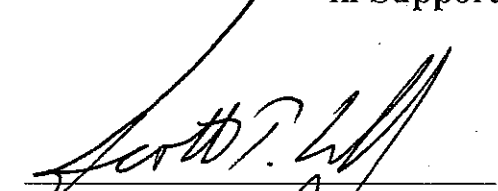
Commonwealth of Kentucky
Supreme Court of Kentucky
No. 2013-SC-270

United States of America,
By and through the United States Attorneys
for the Eastern and Western Districts of Kentucky, Movant,

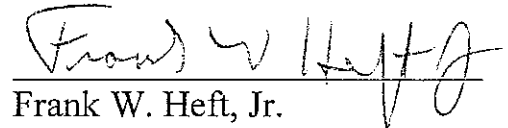
v.

Kentucky Bar Association, Respondent.

Brief of Amicus Curiae,
Western Kentucky Federal Community Defender, Inc.
in Support of Kentucky Bar Association



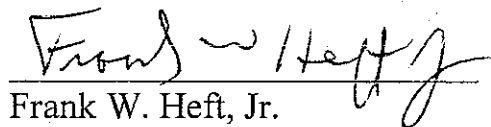
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Certificate of Service

I hereby certify that on July 17, 2013, the foregoing brief was served on the following persons via U.S. Mail, post-prepaid: Mr. John D. Meyers, Executive Director, and Mr. Thomas H. Glover, Office of Bar Counsel, Kentucky Bar Association, 514 W. Main Street, Frankfort, KY 40601; Mr. David J. Hale, United States Attorney for the Western District of Kentucky, 717 W. Broadway, Louisville, KY 40202; and Mr. Kerry B. Harvey, United States Attorney for the Eastern District of Kentucky, 260 W. Vine Street, Suite 300, Lexington, KY 40507.



Frank W. Heft, Jr.

Introduction

The United States moves the Court to review and vacate Kentucky Bar Associations's (KBA) Ethics Opinion E-435, which provides that: 1) a criminal defense attorney cannot ethically advise a client about a plea agreement involving a waiver of the right to pursue a claim of ineffective assistance of counsel related to the subject of the plea agreement; and 2) a prosecutor cannot ethically propose a plea agreement that requires the defendant to waive the right to pursue a claim of ineffective assistance of counsel related to the subject of the plea agreement.

Interest of Amicus

Western Kentucky Federal Community Defender, Inc. [hereinafter referred to as the Federal Public Defender], is the designated Federal Community Defender Organization for the United States District Court for the Western District of Kentucky pursuant to 18 U.S.C. §3006A(g)(B). The Federal Defender represents the majority of defendants charged with felonies and misdemeanors in the United States District Court for the Western District of Kentucky. Most of the criminal cases in federal court are resolved by guilty pleas, and many of these are pursuant to plea agreements with the United States. Amicus seeks to participate in this case because KBA Ethics Opinion E-435 addresses the ethical conduct of our attorneys who practice exclusively in federal court.

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Statement of the Case

The Kentucky Bar Association (KBA) issued Ethics Opinion E-435 on November 17, 2012, and published it in the March, 2013, issue of Bench and Bar. (77 Bench and Bar, pp. 34-35, March 2013).

Ethics Opinion E-435 addresses two issues. First, the Opinion prohibits a criminal defense attorney from advising a client with regard to a plea agreement that waives the client's right to pursue a claim of ineffective assistance of counsel that is related to the subject of the plea agreement. To do so amounts to a conflict of interest in violation of SCR 3.130(1.7)(a)(2)) since "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." A conflict of interest also arises under SCR 3.130(1.8)(h)(1)) which prohibits a lawyer from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice . . ."

Second, Ethics Opinion E-435 precludes a prosecutor from offering a plea agreement that requires the defendant to waive any claim of ineffective assistance of counsel that is related to the subject of the plea agreement. That portion of the Opinion is based on the prosecutor's role as "a minister of justice" under SCR 3.130(3.8), Comment 1. Offering a plea agreement that contains a waiver of an ineffectiveness claim is inconsistent with the prosecutor's role as "a minister of justice" and amounts to inducing or assisting another attorney to violate the Rules of

Professional Conduct. *See* SCR 3.130(8.4)(a)).

The United States challenges Ethics Opinion E-435 and urges the Court to vacate it on the grounds that it conflicts with federal law and that there is no automatic conflict of interest for a criminal defense attorney. The United States further maintains that the Opinion infringes upon a defendant's Sixth Amendment right to effective assistance of counsel.

Amicus joins in the brief of respondent Kentucky Bar Association in urging the Court to uphold Ethics Opinion E-435 in its entirety. This amicus brief further develops one of the issues before the Court, namely, whether Opinion E-435 violates existing federal law and policy.

Summary of Argument

Opinion E-435 is consistent with existing policy of the United States. Even if it were not, federal law does not preempt this Court from adopting E-435 because the United States District Court maintains its own authority to admit, discipline, and disbar attorneys practicing in federal courts. If E-435 is enforced in federal court, it will be because the federal court chooses to do so.

Argument

E-435 Is Consistent with Federal Law and Policy And Is Not Preempted by Them

Section 116 of the Kentucky Constitution grants to the Kentucky Supreme

Court exclusive authority to admit, discipline, and disbar attorneys practicing law in the Commonwealth. To this end, the Kentucky Supreme Court has adopted rules of professional conduct. SCR 3.130 *et seq.* These include a rule prohibiting attorneys from representing a client “if there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer.” SCR 3.130(1.7(a)). In particular, “[a] lawyer shall not . . . make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.” SCR 3.130(1.8)(h)(1)).

Likewise, the Judicial Branch of the federal government—*not* the Executive Branch—has exclusive authority to admit, discipline, and disbar attorneys practicing in federal courts. United States District Courts for the Eastern and Western Districts of Kentucky specifically recognize the disciplinary rules of the Kentucky Supreme Court as being applicable in all federal proceedings in Kentucky.

If it appears to the Court that an attorney practicing before the Court has violated the rules of the Kentucky Supreme Court governing professional conduct or is guilty of other conduct unbecoming an officer of the Court, any judge may order an attorney to show cause—within a specified time—why the Court should not discipline the attorney. . . .

Joint Local Rules of Civil Procedure for the United States District Court of the Eastern and Western Districts of Kentucky [hereinafter referred to as “LR”] 83.3 (c); Joint Local Rules of Criminal Procedure for the United States District Court of the Eastern and Western Districts of Kentucky [hereinafter referred to as “LCrR”] 57.3

(c). Indeed, except in the most extraordinary of circumstances, an attorney suspended or disbarred by the Kentucky Bar Association for a violation of the Kentucky Supreme Court's rules of ethics is subject to disqualification from practicing in federal court as well. LR 83.3((b); LCrR 57.3(b).

The Kentucky Bar Association has issued Advisory Ethics Opinion E-435 holding that SCR 3.130(1.7) prohibits an attorney from advising a client regarding a plea agreement incorporating a waiver of the client's right to collaterally attack the judgment on grounds that the attorney provided constitutionally ineffective counsel. According to Ethics Opinion E-435, such plea agreements create "a conflict of interest under SCR 3.130(1.7) for the attorney that cannot be waived".

The substance of the opinion has enjoyed *de facto* implementation in the Western District of Kentucky since September, 2012, when, in light of the then newly proposed Florida Professional Ethics Opinion 12-1¹, the Federal Defender asked the United States to suspend the inclusion of ineffective assistance of counsel waivers in all plea agreements pending this Court's definitive resolution of the issue. In response, the United States has exempted ineffective assistance of counsel claims from collateral attack waivers in its plea agreement offers.

The United States now contends that it is aggrieved by E-435 and urges the

¹See Brief of Kentucky Bar Association, pp. 19-20.

Court to vacate the opinion, apparently desiring to reintroduce all inclusive collateral attack waivers in its plea agreement offers.

The United States raises several grounds for vacating Opinion E-435, and the respondent Kentucky Bar Association has ably responded to each. Amicus joins in the brief of the Kentucky Bar Association. However, one issue raised by the United States merits further comment, namely, that E-435 somehow violates existing federal law and policy and is therefore void or otherwise preempted.

Opinion E-435 does not conflict with federal law at all. Indeed, it is consistent with current United States Department of Justice Policy applicable to all United States Attorneys.

The United States complains at length about how E-435 is in conflict with federal law and policy and that, in such cases, federal law controls. Brief of the United States , p. 7. The cases cited by the United States are inapposite. Cavender v. United States Xpress, 191 F.Supp.2d 962 (E.D. Tenn. 2002) and Grievance Committee v. Simels, 48 F.3d 640 (2d Cir. 1995), cited by the United States for the proposition hold nothing of the sort. They merely hold that federal courts are not bound by state court ethics determinations and that such determinations should be relied upon only to the extent they are compatible with federal policy. Brief of the United States, pp. 7-8. Agreed. But, the federal courts in Kentucky have already done the calculus and determined that they *choose* to follow the ethical rulings of this

Court and its Bar Association. See LR 83.3; LCrR 57.3. The argument of the United States relates—if at all—only to whether the United States District Court should follow E-435, not to whether this Court should adopt E-435. The former issue is not relevant to these proceedings. The latter is.

To say that the Supreme Court of Kentucky should vacate E-435 because the United States District Court should arguably decline to follow it, is specious at best. The Kentucky Supreme Court and the federal courts are each autonomous when it comes to admitting and disciplining the attorneys admitted to practice before them.

We apply a presumption against federal preemption unless the state attempts to regulate an area in which there is a history of significant federal regulation. See *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir.2003). Gadda does not contend that attorney discipline is such an area. In fact, the opposite is true. The Supreme Court of the United States has long recognized that the several states have an important interest in regulating the conduct of the attorneys whom they license. See *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982); see also *Theard*, 354 U.S. 278, 281, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957) (“The two judicial systems of courts, the state judiciatures and the federal judiciary, have autonomous control over their officers.”); cf. *Matter of Abrams*, 521 F.2d 1094, 1101 (3rd Cir.1975) (recognizing the “absolute and unfettered power” of the federal courts to admit and discipline members of its bar independently and separately from admission and disciplinary procedures of the state courts).

Gadda v. Ashcroft, 363 F.3d 861, 869 (9th Cir. 2004).

It is the United States District Court that controls the ethics of the attorneys admitted to practice before it. Nothing in E-435 will impose anything on the federal

courts that they do not choose to impose upon themselves through their own rules.

The disingenuousness of this feigned parade-of-horrors is highlighted by the fact that in a significant category of cases, federal policy *already forbids plea agreements containing waivers of collateral attack on grounds of ineffective assistance of counsel*. In implementing the nationwide “Fast-Track” program—a program to encourage the early disposition of illegal immigration cases—the United States Department of Justice has established minimum requirements for all “Fast-Track” plea agreements. Among these is the following provision:

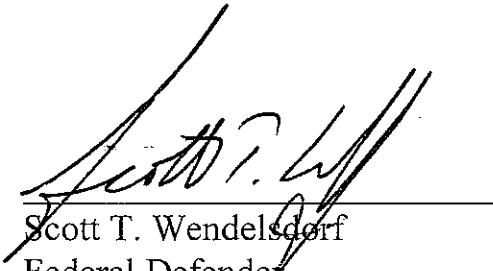
As determined by the United States Attorney after taking into account applicable law and local district court practice and policy, the defendant agrees to waive the right to argue for a variance under 18 U.S.C. §3553(a), and to waive appeal and the opportunity to challenge his or her conviction under 28 U.S.C. §2255, *except on the issue of ineffective assistance of counsel*

James M. Cole, Deputy Attorney General, Memorandum for All United States Attorneys re Department Policy on Early Disposition or “Fast-Track” Programs, January 31, 2012, ¶III(C)(3).² (Emphasis added). While the Attorney General of the United States is not the arbiter of what ethical standards this Court imposes upon the attorneys admitted to practice before it, it should be some comfort that—at least in a good number of federal cases—he concurs with E-435 that plea agreement waivers of collateral attack should not include claims for ineffective assistance of counsel.

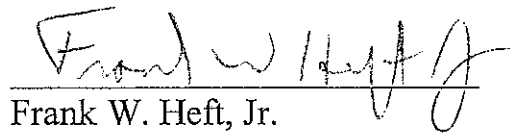
² Found at www.justice.gov/dag/fast-track-program.pdf.

Conclusion

For the foregoing reasons and those contained in the Brief of the Kentucky Bar Association, Amicus respectfully submits that the Court should uphold Ethics Opinion E-435 in its entirety.



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