COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2013-SC-270

UNITED STATES OF AMERICA, MOVANT
BY AND THROUGH THE UNITED STATES ATTORNEYS
FOR THE EASTERN AND WESTERN DISTRICTS OF KENTUCKY

V. **BRIEF OF UNITED STATES IN SUPPORT OF MOTION FOR REVIEW OF ETHICS OPINION**

KENTUCKY BAR ASSOCIATION RESPONDENT

* * * * *

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Certificate of Service

On April 29, 2013, I served John D. Meyers, Executive Director, Kentucky Bar Association, 514 W. Main Street, Frankfort, Kentucky 40601, with a hand-delivered copy of this brief.

Kerry B. Harvey

INTRODUCTION

The United States seeks review of Advisory Ethics Opinion E-435.

STATEMENT CONCERNING ORAL ARGUMENT

The United States requests oral argument. Oral argument may assist the Court in its review of the inherent conflict of law posed by Advisory Ethics Opinion E-435 and the United States's interest in defending the constitutional rights of those charged with federal crimes.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Kentucky Bar Association issued Advisory Ethics Opinion E-435 in the March 2013 issue of the *Bench & Bar*. KY. B. ASS'N, *Advisory Ethics Op. E-435*, 77 BENCH & BAR 2, at 34-35 (March 2013). The Opinion concludes that a criminal defense attorney cannot ethically 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. Nor may a prosecutor ethically propose a plea agreement requiring the defendant to waive the right to pursue such claims. *Id.* The United States is aggrieved by the Opinion and seeks this Court's review. *See* SCR 3.530(12).

SUMMARY OF ARGUMENT

The Supreme Court should vacate Advisory Ethics Opinion E-435. The Opinion conflicts with controlling federal law. Moreover the Opinion wrongfully concludes that an ineffective assistance of counsel waiver creates an automatic conflict of interest for defense counsel that cannot be waived and that a prosecutor who makes a plea offer containing such a waiver violates the Rules of Professional Conduct. The inclusion of an ineffective assistance of counsel waiver in a plea agreement in Kentucky does not

violate the Rules of Professional Conduct. If an ineffective assistance of counsel waiver benefits a defendant, notwithstanding the waiver, and there is no reason to believe that the defense attorney's representation has been ineffective, the defense attorney's consideration and recommendation of the agreement to his client does not impermissibly conflict with the attorney's personal interests. The Opinion in effect impinges a criminal defendant's Sixth Amendment right to effective assistance of counsel. Similarly, if a prosecutor has no reason to believe that the defense attorney's representation has been ineffective, the prosecutor is not improperly inducing the defense attorney to violate his ethical duties to his client by offering such an agreement.

ARGUMENT

Advisory Ethics Opinion E-435 conscribes defense attorneys from advising 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. *Advisory Ethics Op. E-435*, 77 BENCH & BAR 2, at 34. The Opinion concludes that these agreements "create[] a conflict of interest under SCR 3.130(1.7) for the attorney that cannot be waived." *Id.* The Opinion reasons that an attorney has a "personal interest in not having his or

her representation of the client found to be constitutionally ineffective," and "cannot advise a client about such an agreement." *Id.* Rule 1.7 bars a lawyer from representing a client when they have a conflict of interest. SCR 3.130(1.7). The Opinion, while recognizing that SCR 3.130(1.8(h)), which prohibits lawyers from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented," "does not directly apply to the plea agreement situation," further reasons that "[i]f 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." *Advisory Ethics Op. E-435*, 77 BENCH & BAR 2, at 34.

The Opinion also prohibits prosecutors from proposing a plea agreement requiring the defendant to waive the right to pursue such claims. *Id.* at 35. The Opinion, noting that 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 that under SCR 3.130(8.4(a)) "[i]t is professional misconduct for a lawyer to violate the Rule of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another," concludes that "[i]t is 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 ineffective assistance of counsel." *Id.* The Opinion reasons that "[i]n making such a proposal, a prosecutor is assisting or inducing another lawyer, defense counsel, to violate the Rules of Professional Conduct . . . ." *Id.*

The Ethics Committee issued Advisory Ethics Opinion E-435 on November 17, 2012. The Opinion was "formally" adopted by the Board of Governors of the Kentucky Bar Association. *Id.* The Opinion should be vacated.

Plea waivers serve important interests of both the defendant and the government. The Opinion, however, effectively forecloses a defendant from ever considering a plea agreement containing an ineffective assistance of counsel waiver, even when such a waiver is offered in exchange for other terms the defendant considers more beneficial. Like a waiver of direct appeal rights, a defendant's waiver of his right to raise claims of ineffective assistance of counsel serves the government's interest in avoiding both the expense and uncertainty of further litigation. *See United States v. Rosa,* 123 F.3d 94, 97 (2d Cir. 1997). The defendant, in turn, characteristically receives important benefits as well. For example, waivers are often an important part of a bargain, allowing the defendant to obtain exemption from

prosecution for other crimes, the government's stipulation to an acceptable sentencing guidelines range, or the government's agreement that it will not seek upward departures or adjustments beyond that range, thereby offering significant assurance, although no guarantee, that a sentence will not exceed a predicted maximum severity. *See Garcia-Santos v. United States,* 273 F.3d 506, 509 (2d Cir. 2001).

Collateral attack waivers are usually incorporated in a broader provision that also waives the defendant's right to appeal the conviction and sentence. Such waivers, when knowingly and voluntarily made, and supported by a Federal Rule of Criminal Procedure 11(b) plea colloquy, are enforceable, even though the waiver extinguishes the defendant's right to raise an ineffective assistance claim. *United States v. Lemaster,* 403 F.3d 216, 219-20 (4th Cir. 2005). As part of a guilty plea colloquy, Rule 11 requires a court to inform the defendant of "the terms of any plea agreement provision waiving the right to appeal or to collaterally attack the sentence." FED. R. CRIM. P. 11(b)(1)(N). In *Watson v. United States,* 165 F.3d 486, 489 (6th Cir. 1999), the Sixth Circuit agreed with other federal circuits that have upheld the enforceability of a defendant's informed and knowing waiver of his right to collaterally attack his sentence. *See also United States v. McGilvery*, 403 F.3d 361, 363 (6th Cir. 2005) ("[W]e strongly encourage the

government to promptly file a motion to dismiss the defendant's appeal where the defendant waived his appellate rights as part of a plea agreement . . . ."); *Davila v. United States*, 258 F.3d 448, 451 (6th Cir. 2001) ("When a defendant knowingly, intelligently, and voluntarily waives the right to collaterally attack his or her sentence, he or she is precluded from bring[ing] a claim of ineffective assistance of counsel based on 28 U.S.C. § 2255."). As the Fourth Circuit observed: "Every Circuit Court of Appeals to consider the issue . . . has held that the right to attack a sentence collaterally may be waived so long as the waiver is knowing and voluntary." *Lemaster,* 403 F.3d at 220 (citing *Garcia-Santos,* 273 F.3d at 509; *United States v. Cockerham,* 237 F.3d 1179, 1183 (10th Cir. 2001); *DeRoo v. United States,* 223 F.3d 919, 923 (8th Cir. 2000); *Jones v. United States* 167 F.3d 1142, 1145 (7th Cir. 1999); *Watson,* 165 F.3d at 489; *United States v. Wilkes,* 20 F.3d 651, 653 (5th Cir. 1994); *United States v. Abarca,* 985 F.2d 1012, 1014 (9th Cir. 1993)).

A. The Opinion conflicts with controlling federal law

Federal prosecutors are required by statute to comply with state rules of attorney conduct to the same extent as other attorneys in the state. 28 U.S.C. § 530B(a). But binding regulations issued by the Attorney General of the United States under the delegation stated in § 530B(b) preclude the

statute from being "construed in any way to alter federal substantive, procedural, or evidentiary law . . . ." 28 C.F.R. § 77.1(b); *see United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (holding that when "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation, . . . any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute"). Regardless, when a conflict exists between federal law and policy and a state case or ethics opinion, federal law controls. *See, e.g., Cavender v. United States Xpress Enter., Inc.*, 191 F. Supp. 2d 962, 966 (E.D. Tenn. 2002) (holding that a federal court is not bound by state court or attorney disciplinary board interpretations of provisions of the Code of Professional Responsibility); *Grievance Comm. for the S.D.N.Y. v. Simels*, 48 F.3d 640, 646 (2d Cir. 1995) (holding that state court and bar association opinions concerning rules of professional conduct "should be relied upon only to the extent that they are compatible with federal law and policy . . . . Indeed, requiring a federal court to follow the various and often conflicting state court and bar association interpretations of a disciplinary rule, interpretations that may

also contravene important federal policy concerns, threatens to balkanize federal law").

The Sixth Amendment guarantees a defendant the right to effective representation and requires counsel to provide the defendant with all of the potentially favorable legal options that may be available and an independent professional assessment of the relative benefit of those options. *See, e.g., Missouri v. Frye,* 132 S. Ct. 1399, 1408-09 (2012); *Strickland v. Washington,* 466 U.S. 668 (1984). But a defendant is not prohibited from waiving his constitutional rights (including the right to effective assistance of counsel), if he thinks it in his best interests to do so. *See United States v. Guillen,* 561 F.3d 527, 529-31 (D.C. Cir. 2009); *Williams v. United States,* 396 F.3d 1340, 1342 (11th Cir. 2005); *United States v. White,* 307 F.3d 336, 341-44 (5th Cir. 2002); *Davila*, 258 F.3d at 451; *Cockerham,* 237 F.3d at 1183-87; *DeRoo,* 223 F.3d at 923-24; *Mason v. United States,* 211 F.3d 1065, 1069-70 (7th Cir. 2000); *United States v. Djelevic,* 161 F.3d 104, 106-07 (2d Cir. 1998); *United States v. Pruitt,* 32 F.3d 431,433 (9th Cir. 1994). The Federal Rules of Criminal Procedure protect the defendant's interests by requiring the district court to "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." FED. R. CRIM. P. 11(b)(1)(N).

Simply, the Board lacks "the power, in the guise of regulating ethics, to impose strictures that are inconsistent with federal law." *See Stern v. U.S. Dist. Ct.*, 214 F.3d 4, 20 (1st Cir. 2000). A different result would run afoul of the Supremacy Clause. *See Baylson v. Disciplinary Bd. of the Supreme Ct. of Pa.*, 975 F.2d 102, 108 (3d Cir. 1992) ("Rule 3.10 seeks to regulate . . . an area of criminal practice and procedure"); *Baylson*, 975 F.2d at 110 (noting that the Massachusetts subpoena rule at issue in *United States v. Klubock*, 832 F.2d 649 (1st Cir.), *vacated, op. withdrawn, on reh'g en banc*, 832 F.2d 664 (1st Cir. 1987) (en banc), "while . . . labeled a rule of conduct, . . . was in fact a procedural rule"); *Almond v. U.S. Dist. Ct. for the Dist. of R.I.*, 852 F. Supp. 78, 87 (D.N.H. 1994) ("[L]abeling [Rule 3.8(f)] an ethical rule cannot obscure the fact it requires the creation of, and prosecutorial compliance with, a novel form of grand jury procedure"), *aff'd in part, rev'd in part, Whitehouse v. U.S. Dist. Ct. for the Dist. of R.I.*, 53 F.3d 1349 (1st Cir. 1995).

B. The Opinion wrongfully concludes that an ineffective assistance of counsel waiver creates a conflict of interest that cannot be waived

Ineffective assistance of counsel waivers normally do not violate Rule 1.7, which precludes representation when the attorney has a concurrent conflict of interest, defined, inter alia, to mean that "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." SCR 3.130(1.7(a)(2)). The concurrent conflict standard under Rule 1.7(a) addresses conflicts that pose a "significant risk" that the lawyer's loyalty and independent judgment in representing the client would be compromised. And, notwithstanding a conflict, a client may consent to continued representation by an attorney under Rule 1.7(a) if the requirements of 1.7(b) are met. *See* SCR 3.130(1.7(b)) (permitting representation if (1) the lawyer reasonably believes that he will be able to provide competent and diligent representation, (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) the client gives informed consent which is confirmed in writing after consultation on the advantages and risks involved).

Admittedly, when a defense attorney is aware of his own constitutionally deficient representation by the time of the plea offer and counsels the client to accept such a plea, a concurrent conflict of interest under Rule 1.7(a) may arise. In this instance, the defense attorney may be torn between his "personal interest" in minimizing (by operation of the collateral-attack waiver or later malpractice claims) the possibility that his ineffectiveness will be exposed, on the one hand, and his duty to zealously represent his client's best interests, on the other hand. *See* SCR 3.130(1.7(a)(2)); *see also* SCR 3.130(1.1) ("A lawyer shall provide competent representation to a client."). Although this situation presents an area for caution, whether this situation always raises a "significant risk" that the defense attorney's ability to properly advise his client will be "materially limited" is doubtful. *See, e.g., Evans v. Jeff D.,* 475 U.S. 717, 727-28 (1986) (holding that plaintiffs' counsel did not have ethical conflict when defendants offered favorable settlement that required plaintiffs to waive right to seek statutory attorney fees). Moreover, because the defense attorney is ethically bound to follow his client's wishes with regard to "a plea to be entered," *see* SCR 3.130(1.2(a)), the inability of a defense attorney to solicit, consider, and discuss all possible plea proposals with his client – even one that waives his own ineffective assistance – would be detrimental and

prejudicial to his client. *See* SCR 3.130(1.3) (noting that "a lawyer shall act with reasonable diligence and promptness in representing a client.").

The Opinion wrongfully assumes that even when the defense attorney is not aware his representation of his client is constitutionally deficient, and a defendant has not raised a claim of ineffective assistance of his counsel, there is still a "significant risk" that the defense attorney's representation during the plea negotiations is materially limited by a concurrent conflict of interest. To presume the existence of a conflict based on a personal interest when no adverse personal interest is known to exist is unfounded, unwarranted, and simply wrong. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689. In light of the *Strickland* presumption, and absent a pending claim of ineffectiveness or counsel's knowledge of his own ineffectiveness, counsel should not be required to provide his client with an objective evaluation of his representation in the normal course of advising the client about a plea. Instead, a defense attorney in such a situation is entitled to take advantage of the presumption of effectiveness and simply advise his client about the ramifications of the waiver, including the impact it might have on any future

ineffectiveness claim. With such information, the client is in an informed position to make his decision about the plea offer.

Rule 1.7(a)(2) provides that a concurrent conflict only arises when there is a "significant risk" that an attorney's representation of a client will be materially limited by the attorney's personal interest. If lawyers are presumed to provide competent representation and, by the time of the plea, a defense attorney is not aware of, or has not otherwise been accused of providing, ineffective representation, there is no "significant risk" that counsel's plea representation will be materially compromised by the possibility that, sometime in the future, counsel's representation might be deemed ineffective.

When a defense attorney fulfills his duty to provide constitutionally sufficient representation to his client, as must be presumed, one can reasonably assume, absent evidence to the contrary, that he will adequately counsel his client about the ramifications of the collateral attack waiver, including the impact it might have on any future ineffectiveness claim. Likewise, one can assume that, in fulfilling its obligations under Rule 11(b), a trial court will ensure the criminal defendant's plea is knowing and voluntary, and that the defendant is fully aware of "the terms of any plea agreement provision waiving the right to appeal or to collaterally attack the

sentence." FED. R. CRIM. P. 11(b). To impose a per se rule in this scenario is to wrongfully assume that both the defense lawyer and the trial court will have abandoned their obligations and responsibilities to the criminal defendant and the judicial system.

Importantly, collateral attack waivers simply do not extend to, and courts will not enforce such a waiver in, situations where the defendant raises a colorable claim that the plea agreement itself (and thus the collateral-attack waiver) "is tainted by constitutional error, be it lack of constitutionally effective assistance of counsel . . . , unconstitutional denial of any counsel whatsoever, or something else." *United States v. Attar,* 38 F.3d 727, 733 n.2 (4th Cir. 1994) (citing *United States v. Craig,* 985 F.2d 175 (4th Cir. 1993)); *see also United States v. Broce,* 488 U.S. 563, 569 (1989) ("[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary."); *Wilson v. United States,* 962 F.2d 996, 997 (11th Cir. 1992) (upholding dismissal of an ineffective-assistance-of-counsel claim raised in a collateral post-conviction motion because "[a] defendant who enters a plea of guilty waives all nonjurisdictional challenges to the constitutionality of the conviction, and only an attack on the voluntary and knowing nature of

the plea can be sustained"). This means that claims of counsel's ineffectiveness relating to a client's decision to enter into the agreement and his subsequent plea may be properly raised in a collateral proceeding. The competent and diligent defense attorney knows this and, therefore, knows that such "right" is not bargained away when he advises a client to accept a plea agreement containing such a waiver.

Nor can the Opinion be reconciled with a defense attorney's more specific mandate to fully counsel, offer advice, and follow the client's direction on a plea offer. *See* SCR 3.130(1.2(a)). A criminal defendant can, for example, with the advice of his defense attorney, waive his constitutional entitlement to have his case tried by a jury or his right to remain silent and testify in his own behalf at a trial and the lawyer is ethically obligated to abide by these decisions. *See id.* And a defendant also can forego his right to a trial altogether, plead guilty, and waive his right to appeal in exchange for other bargained-for terms in a plea agreement. Indeed, a defendant surrenders most rights to challenge his guilt when he pleads guilty regardless of a plea agreement. *See United States v. Betancourth,* 554 F.3d 1329, 1332 (11th Cir. 2009) (holding that an unconditional guilty plea waives all non-jurisdictional challenges to conviction); *see also Menna v. New York,* 423 U.S. 61, 62-63 n.2 (1975) ("[A] counseled plea of guilty is an admission of

factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case[.]"). These rights include claims of pre-guilty plea ineffective assistance of counsel, whether those claims are asserted in the criminal proceedings or in a later post-conviction collateral attack. *See, e.g., Wilson,* 962 F.2d at 997 (upholding dismissal of an ineffective-assistance-of-counsel claim that was raised in a collateral post-conviction motion because "[a] defendant who enters a plea of guilty waives all non-jurisdictional challenges to the constitutionality of the conviction, and only an attack on the voluntary and knowing nature of the plea can be sustained").

Nor is Rule 1.8(h), which prohibits lawyers from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented," analogous. *See* SCR 130(1.8(h)). As the Opinion acknowledges, "Rule 1.8(h) 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." *See Advisory Ethics Op. E-435*, 77 BENCH & BAR 2, at 34. Yet the Opinion illogically concludes that the conduct of attorneys counseling collateral attack waivers as part of the defendant's agreement with the government is akin to limiting malpractice

liability and therefore must be prohibited, absolutely, notwithstanding that Rule 1.8(h) provides for flexible restrictions, rather than outright prohibition, on the malpractice liability that it specifically regulates. *See* SCR 3.130(1.8(h)).

Indeed, the Opinion may impinge on a defendant's Sixth Amendment right to effective assistance of counsel. *See, e.g., Guillen-Rivera v. United States,* No. 6:12-cv-293-Orl-37GJK, 2012 WL 3522672, at *8 n.6 (M.D. Fla. Aug. 15, 2012) (expressing concern that adoption of similar ethical opinion and its prohibitions on attorney conduct could deprive defendants of their Sixth Amendment right to counsel). As the Eighth Circuit has opined: "If the government cannot obtain the benefit of avoiding collateral litigation[,] . . . a defendant may be unable to secure the bargain most favorable to his interests. To require that conclusion would seem . . . 'to imprison a man in his privileges and call it the Constitution.'" *Chesney v. United States,* 367 F.3d 1055, 1058-59 (8th Cir. 2004) (quoting *Adams v. United States ex rel. McCann,* 317 U.S. 269, 280 (1942)); *see also Watson v. United States,* 682 F.3d 740, 743, 744 & n.2 (8th Cir. 2012) (quoting *Chesney* and separately noting, but not addressing, the emergence of state-bar ethics opinions on the issue of whether collateral attack waivers pose a conflict of interest).

Moreover, the Opinion leads to unintended consequences and disruptions to the criminal process. A federal prisoner who believes that his criminal sentence (to include his underlying conviction) occurred in violation of the United States Constitution or federal law may move to vacate, set aside or correct the sentence through a collateral attack filed in the sentencing court. 28 U.S. C. § 2255(a). Thus, the government often seeks a waiver of the defendant's right to file a collateral attack under § 2255(a). These waivers are enforceable against the defendant, even though the waiver extinguishes the defendant's right to raise an ineffective assistance claim. *Davila*, 258 F.3d at 451. But, as the court in *Williams*, 396 F.3d at 1342, recognized, denying enforcement to a defendant's knowing waiver of collateral claims, including ineffective-assistance-of-counsel claims, improperly allows a defendant "to circumvent the terms of [a] sentence-appeal waiver simply by recasting a challenge to his sentence as a claim of ineffective assistance, thus rendering the waiver meaningless" and rendering nugatory the government's bargained-for benefit of finality, while retaining the benefit of his side of the bargain. Once the waiver is rendered meaningless, the defendant is able to challenge his sentence, notwithstanding his promise not to do so. The criminal justice system, including defendants, will suffer. Courts and the government will face more frivolous collateral

attacks, defense counsel will face more unwarranted attacks on the effectiveness of their performance, and defendants will lose an important bargaining chip.

Instead, the evaluation of whether a defense attorney has a conflict of interest in counseling a client about ineffective assistance of counsel claims should be made on a case-by-case, fact-driven basis that will turn on whether the attorney has reason to believe that he has not provided effective representation. Texas Ethics Opinion 571 rightfully recognizes that a criminal defense lawyer may or may not have a conflict of interest when faced with the plea offer from the prosecutor requiring a waiver of ineffective assistance of counsel and to advise the client regarding the plea offer, the lawyer must reasonably conclude that his representation will not be affected by his personal interests. Tex. Prof. Ethics Comm., Op. 571, 2006 WL 2038683 (May 2006). The Texas opinion concludes that the lawyer must decide on a case-by-case basis whether he has a conflict because of concerns that the client may have a basis to raise ineffective assistance of counsel and whether he is able to make the full disclosure to the client necessary to obtain consent to continued representation. *Id.* Moreover, although the Texas opinion indicates that the prosecutor may make such a plea offer, the prosecutor may still be subject to discipline if he

engages in prosecutorial misconduct. *Id; see also CenTra, Inc. v. Estrin*, 538 F.3d 402, 413 (6th Cir. 2008) ("Whether a conflict is consentable depends upon the facts of the case.").

C. The Opinion wrongfully concludes that a prosecutor who makes a plea offer containing an ineffective assistance of counsel waiver violates the Rules of Professional Conduct

The Opinion erroneously reasons that a prosecutor "is assisting or inducing another lawyer . . . to violate the Rule of Professional Conduct" in violation of Rule 3.8 and Rule 8.4(a) by offering a plea agreement that contains a waiver of ineffective assistance of counsel claims. *See Advisory Ethics Op. E-435*, 77 BENCH & BAR 2, at 35. A defense lawyer does not necessarily violate the Rules of Professional Conduct when advising a client in connection with a plea offer. Thus, unless a prosecutor has actual knowledge of factual circumstances that have created an irreconcilable, unwaivable conflict of interest for a defense lawyer who is advising his client regarding such a plea offer, the prosecutor's plea offer cannot "knowingly assist or induce" the defendant's lawyer in violating the Rules of Professional Conduct. *See* SCR 3.130(8.4(a)) ("It is professional misconduct for a lawyer to . . . knowingly assist or induce another to violate the Rules of Professional Conduct."). Absent such express knowledge, a prosecutor is entitled to rely on the presumption that the defense attorney

will act with competence and in accord with his professional obligations, and the prosecutor cannot be held to have violated Rule 8.4(a) by seeking to obtain a collateral attack waiver as part of a criminal plea agreement.

The defense attorney, not the prosecutor, has the primary responsibility to identify when he has a conflict and address the conflict in the first instance. Moreover, the knowledge that a defense attorney has been ineffective may often be gleaned only from information that is confidential and privileged. *See* SCR 3.130(1.1, 1.3, 1.4) (requiring attorney to provide competent and diligent representation and to communication with client); SCR 3.130(1.6(a),(b)(3)) (waiving an attorney's duty to maintain confidential or privileged information and permitting disclosure when necessary to defend against a claim "concerning the lawyer's representation of the client"). The Opinion, however, seemingly presumes that the prosecutor has knowledge of confidential and privileged information.

Nor does a prosecutor's responsibility under Rule 3.8 to see that a defendant is accorded "procedural justice" preclude him from proposing an ineffective assistance of counsel waiver. A blanket prohibition on conduct – waiving a constitutional right to effective assistance of counsel – usurps a choice that a defendant is legally permitted to make. A defendant and his attorney, for example, with full knowledge of the facts may decide that the

defendant's best interest is to waive those protections and plead guilty pursuant to a plea agreement that contains a collateral attack waiver. The Opinion, however, wrongfully forecloses the defendant from negotiating, by waiving his right to complain about his counsel's ineffectiveness, for important benefits in the context of plea negotiations when he is legally entitled to do so. The Board's substantive policy position, packaged as an ethics opinion, concerning the proper administration of the criminal justice system cannot be reconciled with these rules and governing substantive law. A prosecutor simply cannot be deemed to have violated his role as a minister of justice by engaging in conduct that is authorized by law and that courts have held is a legally valid component of the criminal justice system.

CONCLUSION

The Court should vacate Advisory Ethics Opinion E-435.

Respectfully Submitted,

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