COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2013-SC-000270

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

V. **BRIEF OF KENTUCKY BAR ASSOCIATION**
IN RESPONSE TO MOTION FOR REVIEW OF ETHICS OPINION

KENTUCKY BAR ASSOCIATION RESPONDENT

* * * * * * * * * * * *

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Certificate of Service

This is to certify that on May 28, 2013, the following persons were served via U.S. Mail, postage pre-paid: David J. Hale, United States Attorney for the Western District of Kentucky, 717 W. Broadway, Louisville, KY 40202 and Kerry B. Harvey, United States Attorney for the Eastern District of Kentucky, 260 W. Vine St., Ste. 300, Lexington, KY 40507.

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INTRODUCTION

The United States of America, through the United States District Attorneys for the Eastern and Western Districts of Kentucky, have asked for review of KBA Ethics Opinion E-435, and have asked the Supreme Court of Kentucky to vacate the Opinion. This Brief is the response of the Executive Director of the Kentucky Bar Association, filed pursuant to SCR 3.530(12).

STATEMENT CONCERNING ORAL ARGUMENT

Respondent does not request oral argument, and believes that the Court can decide the issues presented from the arguments contained within the Briefs of the respective parties.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Board of Governors of the Kentucky Bar Association approved KBA Ethics Opinion E-435, and published it in the March 2013 issue of the *Bench & Bar*. (Ky. Bar Ass'n, Advisory Ethics Opinion E-435, 77 BENCH & BAR 2, 34 (March, 2013).)

The Opinion advises (1) that a criminal defense attorney has a personal conflict of interest pursuant to SCR 3.130(1.7) when advising a client to accept a plea bargain when the plea agreement contains a provision that would bar the client from pursuing any potential claims of ineffective assistance of counsel against the criminal defense attorney, (2) that a criminal defense attorney also has a particular conflict of interest under the spirit of SCR 3.130(1.8(h)), which prohibits attorneys from entering into agreements prospectively limiting the attorney's liability for malpractice, (3) that a prosecutor who includes a prospective waiver of claims of ineffective assistance of counsel is in derogation of the duty to be a "minister of justice" and to make reasonable efforts to assure that the accused has been advised of the right to counsel, and has been given reasonable opportunity to obtain counsel, under SCR 3.130(3.8(b)) and Comment 1, and (4) that a prosecutor also is inducing or assisting another attorney to violate the Kentucky Supreme Court's Rules of Professional Conduct, in violation of SCR 3.130(8.4(a)).

Movant seeks review of the Opinion, and asks that it be vacated, pursuant to SCR 3.530(12).

Respondent files this Brief in response to the Brief of Movant pursuant to SCR 3.530(12) and asks this court to uphold the Opinion and leave it in full force and effect to be followed by all attorneys practicing within this Commonwealth.

SUMMARY OF ARGUMENT

The Supreme Court should leave KBA Ethics Opinion E-435 intact as it was correctly adopted by the Board of Governors of the Kentucky Bar Association and represents a fair and true interpretation of Kentucky's Rules of Professional Conduct. The Opinion advises that a criminal defense attorney should not advise a client to enter into a plea agreement which would preclude any future claims of ineffective assistance of counsel against that attorney, and further advises that a prosecutor should not induce or assist a criminal defense attorney to do so by insisting upon a waiver of such claims.

KBA Ethics Opinion E-435 is consistent with other states' ethics authorities which have decided the issues, including Alabama, Florida, Missouri, Nevada, North Carolina, Ohio, Tennessee, Vermont and Virginia, disagreeing only with Arizona and Texas. Most of these opinions which are consistent with Kentucky's interpretation were decided in the last four years, and this Court is asked to take notice of the trend toward inclusion by prosecutors of prospective waivers of claims of ineffective assistance of counsel in plea agreements.

The Opinion does not conflict with federal law, but rather the Opinion addresses the ethics only of prospective waivers of claims of ineffective assistance of counsel. Federal law holds only that a waiver of ineffective assistance of counsel is not barred by law if such waiver is knowing, voluntary and intelligent and does not address lawyer ethics.

Finally, the Opinion protects the numerous criminal defendants who did not have effective assistance of counsel, who would be without remedy if the inclusion within plea agreements of such prospective waivers is upheld as ethical and becomes commonplace within the Commonwealth.

ARGUMENT

I. Ethics Opinion KBA E-435 correctly interprets the obligations of attorneys practicing in this Commonwealth set forth in the Rules of Professional Conduct SCR 3.130(1.7, 1.8(h), 3.8 and 8.4(a)).

Ethics Opinion KBA E-435 (Appendix, Exhibit A) correctly interprets the provisions of this Court's Rules of Professional Conduct. A fair and true reading of the applicable rules involved in the analysis of the questions presented yields no other results than the ones expressed in the text of the opinion.

The first question presented was "[m]ay 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?"

The second question presented was "[m]ay 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 answer to both questions is "no."

A. A criminal defense attorney may not ethically advise a client to waive a potential claim of ineffective assistance of counsel made against that attorney's personal interest.

SCR 3.130(1.7(a)) states the general rule regarding conflicts of interest when representing a client and provides in pertinent part:

> 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 ... a personal interest of the lawyer.

While SCR 3.130(1.7(b)) provides that an attorney may represent a client even when a concurrent conflict of interest exists, such a conflicted representation ethically may occur only if four conditions exist. As provided in SCR 3.130(1.7(b)(1), one of those conditions is that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client."

As the Opinion states, the lawyer in a plea agreement whereby the client is waiving a claim of ineffective assistance of counsel has a personal interest that

creates a significant risk the representation of the client will be materially limited and thus has a conflict of interest. A lawyer ethically cannot continue the representation with such a concurrent conflict of interest because the lawyer cannot "reasonably believe[] that the lawyer will be able to provide competent and diligent representation to" the client.

Generally, "[t]he 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." (KBA Ethics Opinion E-435.) At a minimum, the reputation of the attorney is at stake, with his or her legal competence, work product, or work ethic being discussed in a public forum. An investigation and subsequent hearing upon claims of ineffective assistance of counsel could lead to the discovery of facts which could result in discipline by the Kentucky Bar Association, and/or the filing of a malpractice suit. Some actions could result in media attention which could result in a loss of business or cause mistrust among attorneys, judges, or other participants in the legal system. Even without newspaper or television coverage, mere "talk" among community members of a particular attorney's "ineffectiveness" could result in a loss of reputation not easily gained back.

The conflict is not just about an attorney's reputation; the time involved in responding to future post-conviction actions must also be considered. Private counsel is not being paid for the time spent testifying on the stand, and public

defenders are generally not seeing their caseloads reduced while they address a post-conviction claim. The burdens of trial counsel toward the client in a post-conviction action are potentially substantial (document production, testimony, etc.) and are *entirely relieved* if they advise the client to sign on the bottom line, which is a clear, direct conflict.

The risk of all or part of these consequences occurring is significant enough that it could behoove an attorney to advocate a prospective waiver of any potential claim of ineffective assistance, or at the least, sit idly by while the client agrees to a waiver not fully realizing the constitutional rights he or she may be giving up.

SCR 3.130(1.8(h)(1)) speaks specifically to the issue of waivers of malpractice and provides: "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."

As KBA Ethics Opinion E-435 points out, in such cases a lawyer cannot ethically advise the client when the issue is the attorney's own conduct. Although SCR 3.130(1.8(h)(1)) does not directly apply to a plea agreement in a criminal case – both because a claim of ineffective assistance of counsel is technically not a claim of malpractice, and because the agreement is between the client and the Commonwealth, not the client and the attorney – the critical public policy values and spirit behind the rule do apply:

> [T]he 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.

(KBA Ethics Opinion E-435.)

The connection between a claim of ineffective assistance of counsel and a potential malpractice claim emanating therefrom has been recognized by the courts. In *Griffin v. United States*, 330 F.3d 733 (6th Cir. 2003), the Sixth Circuit Court of Appeals granted a defendant a new trial where his attorney had failed to inform his client of a plea offer that the defendant later said he would have accepted had he known about it. Recognizing that courts must "exercise caution in ordering an evidentiary hearing" on such claims, since defendants could manipulate the system by taking their chances at trial only to later claim that they had not been informed of a plea bargain about which they actually had been informed, the Sixth Circuit felt the concern was "mitigated" by the fact that:

> Most defense lawyers, like most lawyers in other branches of the profession, serve their clients and the judicial system with integrity. Deliberate ineffective assistance of counsel is not only unethical, but usually bad strategy as well. For these reasons and ***because incompetent lawyers risk disciplinary action, malpractice suits, and consequent loss of business***, we refuse to presume that ineffective assistance of counsel is deliberate. (*Id.* At 739, *quoting United States v. Day*, 969 F.2d 39, 46 n. 9 (3rd Cir.1992)(emphasis added).

Even where a claim of ineffective assistance of counsel is not meritorious the investigation and hearing that occurs as a result of the claim can lead to the exposure of embarrassing details regarding an attorney's performance, including, possibly, potential discipline by the bar. See, for example, the unpublished

opinion of *Bobbitt v. Commonwealth*, No. 2011-CA-000741-MR, 2013 WL 375479 (Ky. App. 2013) (Appendix, Exhibit B), cited not as authority but as an example only, wherein the client claimed that his counsel was ineffective for not following his ethical duty to report observed juror misconduct to the judge. The juror had approached the defendant in the case and told him to "watch who he runs with." The lawyer, thinking the comment was more favorable than not, did not report the communication to the court. The Court of Appeals presumed the unethical nature of the conduct, because the court stated it was "persuaded by the reasoning of the First Circuit Court of Appeals which held that unethical conduct by an attorney is not per se ineffective," referencing *Chapee v. Vose*, 843 F.2d 25, 33 (1st Cir. 1988) and found the attorney involved not to be ineffective. Nevertheless, an arguable claim of ineffective assistance has given rise to the discovery of a potential ethics violation in a forum that, while unpublished, is nevertheless available for viewing by the public. This case and others like it illustrate the "personal interest" that a lawyer could have in quashing potential claims of ineffective assistance of counsel before they ever arise.

Movant states on page 12 of its Brief that 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 interest." Movant further states that "[t]o 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." Movant quotes *Strickland v. Washington*, 466 U.S. 668, 689 (1984) that a counsel's performance as counsel is presumed to fall within the "wide range of reasonable assistance." (Movant's Brief at p. 12.)

Movant misunderstands the Rules of Professional Conduct regarding conflicts of interest. Our rules are prophylactic and forbid situations in which harm to a client is possible; the rules do not forbid only situations in which the client suffers actual harm. SCR 3.130(1.7(a)(2) clearly states that a concurrent and impermissible conflict exists if there is "a significant risk" that the representation will be "materially limited." The risk is the key, not actual harm to a client. Likewise, in SCR 3.130(1.9(a)) (the conflict of interest rule governing the former client setting), the rule forbids representation of a client in a matter that is the "same or a substantially related matter" to the one in which the lawyer represented the former client and in which the interests of the current client are "materially adverse" to the interests of the former client. The rule is prophylactic; the representation is prohibited without proof of actual harm.

This Court has previously stated in *American Insurance Association v. KBA*, 917 S.W.2d 568, 573 (Ky. 1996) that "the mere appearance of impropriety is just as egregious as any actual or real conflict." In that case, this Court upheld KBA Ethics Opinion E-368, which advised that a lawyer may not ethically enter into a contract with a liability insurer in which the lawyer or his firm agrees to do

all of the insurer's defense work for a set fee. The insurance companies contesting the ethics opinion suggested that "the potential for conflict [between the insurance-contracted lawyers and the clients being represented on the polices] is very often lacking, because in general, the interests of the insurer and the insured are aligned." *Id.* This Court rejected the notion that presuming a conflict where none is known to exist as wrong, and stated that the opinion in question acted as a "prophylactic device to eliminate the potential for a conflict of interest or the compromise of an attorney's ethical and professional duties," but rather "view[ed] the situation surrounding the set fee agreement as ripe with potential conflicts." *Id.*

Such a view is consistent with the prohibition of waivers of malpractice liability under SCR 3.130(1.8(h)). An attorney's personal interest in waiving a claim of malpractice may not yet have materialized, and it can fairly be said that an attorney's representation is presumed to have been competent. After all, it is the plaintiff urging a case of professional legal malpractice who has the *burden of proving* that his or her attorney neglected the duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances, and that such negligence was the proximate cause of damage to the client. *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky. 2003). The lawyer need not prove that his advice or conduct was that of a reasonably competent attorney; to prevail, the plaintiff must overcome this presumption of reasonableness.

Yet, SCR 3.130(1.8(h)) presumes the existence of a conflict of personal interest on behalf of the attorney, and thus does not allow a prospective waiver of potential malpractice liability, not only because a client may be giving up relief for harms he or she may be suffering which are as yet unknown, but because the mere existence of a prospective waiver might cause an attorney to be lax or irresponsible in the rendering of legal services. As Comment 14 to the rule provides:

> Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement ***because they are likely to undermine competent and diligent representation***. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. (Emphasis added.)

The plea agreement between the government and the criminal defendant which pre-waives ineffective assistance of counsel issues – to which the criminal defense attorney becomes a third-party beneficiary of the waiver provision – is no less likely than a waiver of professional malpractice liability to undermine competent and diligent representation. If the risk that a client might suffer harm from professional legal malpractice not already recognized as having occurred is "significant" enough that a prospective waiver of liability ought not be allowed, then a prospective waiver of claims of ineffective assistance of counsel should not also be allowed.

B. Effective assistance of counsel should not come at the expense of abandoning ethical responsibilities.

If waivers of potential claims of ineffective assistance of counsel are inserted into plea bargains – and the plea bargain appears to be an attractive offer which would be in the best interests of the defendant to accept, based on what is known at the time – the defense counsel finds himself or herself in a dilemma. This is especially true if the defense counsel knows or has reason to know that his or her representation has been deficient or lacking. An unusually attractive plea offer that comes with a guarantee that the defense attorney will never have to face a claim of ineffective assistance of counsel may be just as attractive to the defense counsel, or more so, as it is to the defendant. On the one hand, the offer may be so good that it might appear to be ineffective assistance of counsel *not* to recommend the deal to the client. On the other hand, good as the offer may be, perhaps the attorney has been so ineffective that he or she missed something in the investigation or discovery that would have and should have resulted in the case being dismissed altogether, meaning the offer is not as good as everyone thinks.

Movant admits that "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," but states that this presents an "area for caution," and says it is "doubtful" that this situation always raises a "significant risk" that the defense attorney's ability to properly advise his client will be "materially limited."

(Movant's Brief at page 11.) But this is the very type of *actual* conflict that Rules 1.7 and 1.8 seek to avoid.

Movants state that a defense counsel is "ethically bound to follow his client's wishes with regard to 'a plea to be entered,'" (Movant's Brief at page 11, quoting SCR 3.130(1.2(a))), and that "the inability of a defense attorney to solicit, consider, and discuss all possible plea proposals – *even one that waives his own ineffective assistance* – would be detrimental and prejudicial to his client." (Movant's Brief at pages 11-12, emphasis added). This statement squarely identifies the potential conflict between an attorney's competent representation of a client and the attorney's personal ethics.

This issue was addressed in the United States Supreme Court decision of *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), where a defense attorney refused to assist his client in presenting perjured testimony and threatened to withdraw as counsel if the client did not abandon the perjury strategy. The attorney acted as required by Iowa's ethical rules in effect at the time. Following conviction, the defendant filed a petition for writ of habeas corpus alleging ineffective assistance of counsel and a denial of his right to present a defense based upon his attorney's admonition to his client not to lie on the stand.

The United States District Court for the Southern District of Iowa denied the writ, concluding "there could be no grounds for habeas relief since there is no constitutional right to present a perjured defense." (*Id.*, at p. 162.) However, the Court of Appeals for the Eight Circuit actually reversed, holding that, while a

defendant does not have a right to commit perjury, an intent to commit perjury does not alter a defendant's right to effective assistance of counsel and that counsel's threat to withdraw – which would have entailed telling the judge about the potential perjury – was a "threat to violate the attorney's duty to preserve client confidences," and therefore a breach of the duty to effectively represent a client. (*Id.* at p. 163.)

The Supreme Court reversed the Court of Appeals, finding that the attorney did not rob his client of any constitutional right by refusing to assist the client in testifying falsely. In addressing the interplay of the Sixth Amendment constitutional standards and state ethical codes, the Court warned against "constitutionaliz[ing] 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." The Court more fully stated:

> Under the [*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel. 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.** Here we need not face that question,

since virtually all of the sources speak with one voice. (Id. at p. 165, emphasis added.)

In the matter at hand, no precedent states that the Sixth Amendment demands that an attorney represent a client in a situation in which the representation is prohibited by state rules of professional conduct.

Respondent asserts that there is a better set of facts which illustrates how quickly a defense practitioner can rationalize dismissing his or her own conflict of interest cloaked in the flag of "zealous representation." The insertion into a plea bargain of a waiver – without which the government will not offer the plea bargain – places the defendant with a choice to "take it or leave it," and allows the defense attorney to discount his own potential liability with no more an explanation than, "well, he wanted the plea bargain, it was less than he could have gotten at trial, and therefore my duty to effectively represent him would not allow me stand in his way."

When the result of the plea becomes permanent, any facts which arise later and suggest ineffective assistance of counsel are irrelevant even though the facts were not known when the waiver became effective. It is precisely for this reason that a prosecutor should not be allowed to insist upon a waiver of claims of ineffective assistance of counsel to be included within a plea agreement.

C. A prosecutor who proposes a plea agreement which requires a waiver of the defendant's right to pursue a claim of ineffective assistance of counsel relating to the defendant's counsel's performance is not administering justice, but is assisting or inducing another lawyer to violate the Rules of Professional Conduct.

As KBA Ethics Opinion E-435 states, "[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."

As Comment 1 to SCR 3.130(3.8) "Special responsibilities of a prosecutor" 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. (Emphasis added.)

This responsibility includes the specific responsibility 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." (SCR 3.130(3.8(b))). This responsibility to criminal defendants imposed upon prosecutors is a check and *departure* from the prosecutor's duty to advocate for the state. So much effort has gone into this Court's Rules of Professional Conduct to ensure that criminal defendants are advised of the right to counsel, and how to get one that it seems inconsistent to believe that once the prosecutor's duties in this regard are performed prosecutors can take steps which

are "likely to undermine competent and diligent representation," to borrow from Comment 14 to Rule 1.8(h), which prohibits prospective waivers of malpractice liability.

Beyond being an impediment to the administration of justice, the insertion of a waiver into a plea bargain, would place the defense counsel for the accused in an irresolvable conflict of personal interest. This action by a prosecuotr violates SCR 3.130(8.4(a)) which states that 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."

Kentucky's justice system ought not allow indirectly what could not be done directly. If a criminal defense attorney has a personal conflict of interest in advising a client to accept a plea with a condition of waiver, the conflict does not disappear merely because it was offered by a prosecutor, and not the defense counsel.

Inclusion of the waiver into the plea negotiation discussions places the defense counsel into ethical conflict which, if not properly resolved by attorney withdrawal or appointment of successor counsel (which would pass the very same conflict on to the next attorney), would assist the defense attorney's violation of an ethical obligation.

II. With the issuance by the Kentucky Bar Association of Ethics Opinion E-435, Kentucky joins the majority of states who have determined that it is an inherent conflict of interest for a criminal defense attorney or prosecutor to induce a client to waive potential ineffective assistance of counsel claims when entering a plea of guilty.

In Kentucky Bar Association (KBA) Ethics Opinion E-435, issued on November 17, 2012, the KBA determined that a criminal defense lawyer may not 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. It inherently follows that a prosecutor may not propose a plea agreement that requires a waiver of the defendant's right to pursue a claim of ineffective assistance of counsel relating to the matter that is the subject of the plea agreement. By issuing KBA Opinion E-435, the KBA joined the opinion of the overwhelming majority of the states who have decided these issues; namely Alabama, Florida, Missouri, Nevada, North Carolina, Ohio, Tennessee, Vermont, and Virginia, and rejected the opinions of the two states that reached the opposite conclusion on the issues, Arizona and Texas.

A. State Opinions Agreeing with KBA Ethics Opinion E-435

1. Alabama

Alabama Ethics Opinion 2011-02 (2011) (Appendix, Exhibit C) addressed the same substantive questions as our own KBA E-435 and reached the same conclusions. The opinion stated that "[a]dvising a criminal defendant to enter into

an agreement prospectively waiving the client's right to bring an ineffective assistance of counsel claim against that lawyer would be a violation of [Alabama Rules of Professional Conduct] RPC 1.7(b) and 1.8(h)[substantively similar to Kentucky SCR 3.130(1.7(b) and1.8(h)]."

Likewise, "a prosecutor may not require a criminal defendant to waive such rights as a condition of any plea agreement because such would violate Rule 8.4(a) [substantively identical to Kentucky SCR 3.130(8.4(a))], which prohibits an attorney from 'induc(ing) another' to violate the Rules of Professional Conduct."

2. Florida

Florida Professional Ethics Opinion 12-1 (2012) (Appendix, Exhibit D) addressed the same issues and reached the same results as KBA E-435. Florida's opinion states that "[a] criminal defense lawyer has an unwaivable conflict of interest when advising a client about accepting a plea offer in which the client is required to expressly waive ineffective assistance of counsel and prosecutorial misconduct."

Like Kentucky, Florida analogized to its rule prohibiting limiting liability for malpractice (Florida RPC 4-1.8(h); *compare* Kentucky SCR 3.130(1.8(h)) and noted that while claims of ineffective assistance of counsel are not malpractice claims, "a lawyer should not be permitted to do indirectly what the lawyer cannot do directly," and a defense lawyer's recommendation that a client waive a claim of ineffective assistance of counsel "is akin to limiting malpractice liability," which

in Florida is impermissible without first advising the client in writing that "independent representation is appropriate." (Florida Ethics Opinion 12-1, citing Florida RPC 4-1.8(h)).

As additional underpinning for the opinion, the Florida opinion relied upon Florida RPC 4-1.7 which identifies an impermissible conflict in part, as Kentucky does in part, as a situation in which "there is a substantial 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." Just as the Kentucky rule does not allow a waiver of the conflict if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" the Florida rule states in part: "[w]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." The Florida opinion then concluded that a disinterested lawyer would be "unlikely to reach the conclusion that the criminal defense lawyer could give "objective advice about that lawyer's own performance."

With regard to the role of a prosecutor, the Florida opinion provides that "[a] prosecutor may not make an offer that requires the defendant to expressly waive ineffective assistance of counsel ... because the offer creates a conflict of interest for defense counsel and is prejudicial to the administration of justice," in

that it assists the criminal defense lawyer in violating the Rules of Professional Conduct.

3. Missouri

Missouri Supreme Court Advisory Committee Formal Opinion 126 (2009)(Appendix, Exhibit E) addressed the same issues and reached the same results as KBA Ethics Opinion E-435. Missouri prefaced its opinion with its "understand[ing] that some prosecuting attorneys have expressed intent to require such a waiver as part of a plea agreement." Interpreting Missouri's own RPC 4-1.7, 4-3.8 and 4-8.4, the Committee opined that it was not permissible for defense counsel to advise the defendant regarding waiver of ineffective assistance of counsel. Moreover, for a prosecutor to seek a waiver of post-conviction rights based on ineffective assistance of counsel would be "inconsistent with the prosecutor's duties as a minister of justice and the duty to refrain from conduct prejudicial to the administration of justice ..."

4. Nevada

The State Bar of Nevada Standing Committee on Ethics and Professional Responsibility issued Formal Opinion No. 48 (2011) (Appendix, Exhibit F), which stated that it was a conflict of interest for a criminal defense attorney to advise a client to waive a potential claim of ineffective assistance of counsel under Nevada Rule of Professional Conduct (NRPC) 1.7(a)(2) and 1.8(h)(1). These are substantively identical to Kentucky's SCR 3.130(1.7 and 1.8). Likewise, a

prosecutor is precluded from including a waiver of claims of ineffective assistance of counsel under NRPC 8.4(a), again, substantively identical to Kentucky SCR 3.130(8.4(a))

Nevada wholly rejected the Texas approach (*see* section II.K. below) and found the conclusions of Texas Professional Ethics Committee Opinion Number 571 (2006) unworkable:

> The decision of the Supreme Court of Texas Professional Ethics Committee is more equivocal, yet ultimately leads this Committee to the same conclusion regarding waivers of ineffective assistance of counsel. In addressing the potential conflict of interest facing a defense attorney, the Texas Professional Ethics Committee concluded that the attorney could trust his own judgment to decide whether or not his client might have a reasonable claim for ineffective assistance of counsel. If the attorney believed there was no basis for such a claim, he would be free to advise the client to sign the waiver.
>
> > In some cases, the defense lawyer may have no cause for any reasonable concern as to his effectiveness is representing the defendant. In such cases, the representation of the defendant as to the waiver would not reasonably appear to be adversely limited by the lawyer's interests, consequently, Rule 1.06(b)(2) would not prohibit the lawyer's representation of the defendant as to the waiver.
>
> This Committee finds the above reasoning to be unsatisfactory. An attorney should not be in a position to make a decision as to the effectiveness of his own representation, particularly when, as here, the decision will be final and unreviewable.

5. North Carolina

Unlike many states, North Carolina addressed the issues at hand in 1993. North Carolina Ethics Opinion RPC 129 (1993) (Appendix, Exhibit G) provides

that while waivers of appellate and post-conviction rights are generally allowed, "waiver of rights arising from the ineffective assistance of counsel ... appears to be, and shall prospectively be deemed to be, in conflict with the ethical duties expressed or implied in the rules."

> In the context of a criminal case, a logical and appropriate interpretation of the rules is a prohibition against agreements waiving the client right to complain about an attorney's incompetent representation or misconduct. Moreover, an agreement waiving the right of Client C to complain about the conduct of either Attorney A or Government Attorney B may have the appearance or effect of serving the lawyer's own interests in contravention of Rule 5.1(b). In any event, the effective enforcement of the rules relating to the responsibilities of Attorney A and Government Attorney B requires that they not execute a plea agreement waiving appellate or post-conviction rights or remedies based on allegations of ineffective assistance of counsel or prosecutorial misconduct.

6. Ohio

Ohio Advisory Opinion 2001-6 (2001) (Appendix, Exhibit H) decided the issues under the Ohio Code of Professional Responsibility, and reached the same ultimate conclusions. Ohio's opinion cites DR 6-102(A)'s prohibition against an attorney attempting to exonerate himself or herself from liability due to personal malpractice, and condemning the practice. [A preface to the opinion has been added which informs current readers that the opinion "provides advice under the Ohio code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007," but does not withdraw or otherwise modify the opinion.] The opinion further quoted EC 6-6: "A lawyer who handles the affairs of his [her] client properly has no need to attempt to limit his [her]

liability for his [her] professional activities and one who does not handle the affairs of his [her] client properly should not be permitted to do so."

After noting that a cause of action for legal malpractice is "distinct" from an action to vacate a criminal judgment based on ineffective assistance of counsel, the opinion nevertheless said "there is a nexus between the two," and:

> While waiver of claims of ineffective assistance of counsel does not eliminate the opportunity for a criminal defendant to bring a legal malpractice action against a criminal defense attorney, it significantly limits and may even destroy the defendant's ability to establish proximate cause, a necessary element of a legal malpractice claim. Given this relationship, it is the Board's view that a plea agreement provision that waives appellate or post-conviction claims of ineffective assistance of counsel does constitute an attempt to limit the liability of the criminal defense attorney for personal malpractice.

Then, the Ohio Board of Commissioners on Grievances and Discipline addressed the issue of prosecutor involvement in waivers of claims of ineffective assistance of counsel, and concluded that it was unethical under the Ohio Code of Professional Responsibility for a prosecutor to negotiate and a criminal defense attorney to advise a defendant to enter a plea agreement that waives the defendant's appellate or post-conviction claims of ineffective assistance of trial counsel.

7. Tennessee

Respondent has no direct source for Tennessee, but the Florida Professional Ethics Opinion 12-1, discussed in section II.B. above cites Tennessee Informal Ethics Opinion 94-A-549 (apparently not available on-line) as stating "neither a

criminal defense lawyer nor a prosecutor may make an agreement to waive ineffective assistance of counsel or prosecutorial misconduct because of the prohibition in the Ethical Canons and Disciplinary Rules against limiting liability for malpractice."

8. Vermont

Vermont Advisory Ethics Opinion 95-04 (1995) (Appendix, Exhibit I) relies on the Code of Professional Responsibility in effect at the time rather than the Rules of Professional Conduct. The Opinion stated that any attorney recommending a plea agreement which contains a waiver of ineffective assistance of counsel, and any other party to the agreement, would be in violation of DR 6-102(A), which in Vermont stated "[a] lawyer shall not attempt to exonerate himself from or limit his liability to his client for personal malpractice."

9. Virginia

Virginia addresses the same substantive questions as our own KBA E-435 and provides the same answers. Virginia State Bar Legal Ethics Opinion 1857 (2011) (Appendix, Exhibit J) states that there is a "concurrent conflict of interest as defined by Rule 1.7(a)(2)[compare Kentucky SCR 3.130(1.7), substantively identical] between the lawyer's personal interests and the interests of the client. Defense counsel undoubtedly has a personal interest in the issue of whether he has been constitutionally ineffective, and cannot reasonably be expected to provide his client with an objective evaluation of his representation in an ongoing case."

The opinion also relied upon Rule 1.3(c), a provision for which Kentucky has no counterpart:

RULE 1.3 Diligence

> A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

Moreover, Virginia did not decide this case under its counterpart to Kentucky SCR 3.130(1.8(h)), which it held did not apply in this situation because the defendant is not making the agreement in the case; rather he is advising a client whether to enter into an agreement sought by the government.

As to a prosecutor, the Virginia opinion states that "it is a violation of Rule 8.4(a) [compare Kentucky SCR 3.130(8.4(a)), substantively identical] for the prosecutor to offer a plea agreement containing a provision that has the intent and legal effect of waiving the defendant's right to claim ineffective assistance of counsel. Because the prosecutor refuses to offer a plea agreement that does not include this provision, he is implicitly requesting that the defense lawyer counsel his client to accept this provision, which is an inducement to the defense lawyer to violate Rules 1.3(c) and 1.7."

B. Other State Opinions

There are two jurisdictions which have held differently from the jurisdictions discussed above.

1. Arizona

Arizona Ethics Opinion 95-08 (1995) (Appendix, Exhibit K) finds that the distinction between a malpractice claim and a claim of ineffective assistance of counsel are not the same, and that Arizona Ethics Rule 1.8(h) [*compare* Kentucky SCR 3.130(1.8(h))] is "specific and unambiguous" and does not prohibit waivers of ineffective assistance of counsel claims.

The Arizona opinion is flawed. Its discussion is limited to Rule 1.8(h). The opinion does not address rule 1.7 at all.

2. Texas

Supreme Court of Texas Professional Ethics Committee Opinion Number 571 (2006) (Appendix, Exhibit L) distinguishes a malpractice claim from a claim of ineffective assistance of counsel. The opinion concludes that the Texas equivalent of Rule 1.8(h) does not proscribe an attorney from advising a client to enter into a guilty plea which contains a waiver of the latter.

Opinion 571 also applies the Texas conflict rule in effect at the time of the opinion which is similar to Rule 1.7 but substantively different. Texas Rule 1.06(b) identifies an impermissible conflict as follows:

> (b) … except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person: …
>
> (2) reasonably appears to be or become adversely limited … by the lawyer's or law firm's own interests."

Texas Rule 1.06(c) then allows representation even with a conflict if

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

In contrast, Kentucky's SCR 3.130(1.7(a)(2)) identifies an impermissible conflict in part as one in which "there is a significant risk that the representation of one or more clients will be materially limited by ... a personal interest of the lawyer." Kentucky's Rule focuses on the "significant risk" of a representation being "materially limited." The Texas Rule focuses on whether a representation "reasonably appears to be or become adversely limited." The language of the Texas rule appears to focus not on a risk of limitation of representation, as is true in Kentucky, but on something closer to actual limitation.

Respondent submits that Kentucky's standard for the existence of a conflict of interest is substantively different than that of Texas and thus Texas Opinion 571 is of limited significance. Even so, Opinion 571 advises the attorney to consider whether he or she "has a reasonable basis for concern" that the lawyer may have rendered ineffective assistance to the defendant, in which case Texas RPC 1.06(b)(2) would then prohibit the lawyer's representation as to the waiver unless the requirements of RPC 1.06(c) could be met:

In summary, a criminal defense lawyer must consider the application of Rule 1.06 in each case involving a plea agreement waiver of post-conviction appeals based on ineffective assistance of counsel. In some cases, the criminal defense lawyer will be able to determine that there is no concern on the part of the lawyer as to the

> effectiveness of the lawyer's assistance to the defendant that would create a conflict of interest for the lawyer under Rule 1.06(b)(2). In that event, the lawyer may represent the defendant with respect to the plea agreement waiver. In other cases, the representation will be permitted after the lawyer's evaluation under Rule 1.06(c)(1) and disclosure and consent under Rule 1.06(c)(2). In other cases, a conflict of interest will exist within the scope of Rule 1.06(b)(2) and it will not be possible for the lawyer to meet the requirements of Rule 1.06(c). In that event, the defendant must be advised by separate counsel concerning the proposed waiver of post-conviction appeals based on claims of ineffective assistance of counsel.

This approach was discussed and rejected by Nevada (see section II.D. above) on the basis that an attorney "should not be in a position to make a decision as to the effectiveness of his own representation, particularly when, as here, the decision will be final and unreviewable." (Nev. Stand. Comm. On Ethics and Resp. Formal Op. No. 48 (2011)).

III. KBA Ethics Opinion E-435 addresses the ethical conduct of attorneys only and does not purport to invalidate a federal statute or violate the Supremacy Clause.

Movant characterizes the issue of whether a person can waive a constitutional claim of ineffective assistance of counsel as an issue of constitutional law, not one of ethics. To that end, Movant devotes much of its brief (see Movant's Brief at pages 5-9) to arguing that federal law allows prospective waivers of claims of ineffective assistance of counsel claims; that federal law controls over conflicting state law, and that therefore the Opinion must be vacated, because it is inconsistent with federal law.

Movant mischaracterizes the issues. KBA Ethics Opinion E-435 does not purport to change, alter, modify or vitiate a federal statute, regulation, or rule in any way. It does not attempt to overrule or contradict any federal case holding that a criminal defendant may execute a knowing, voluntary and intelligent waiver of a constitutional right, including the Sixth Amendment right to assistance of counsel (*see, e.g., Davila v. United States*, 258 F.3d 448, 451 (6th Cir. 2001)). All that *Davila* and the other like-decided cases from other circuits have decided essentially is that there is no constitutional bar to a defendant waiving the constitutional right to effective assistance of counsel.

The cases do not point to any federal statute, regulation or rule which affirmatively provides that a defendant shall be entitled to waive within a plea agreement any claims of ineffective assistance of counsel which might be binding upon the states. More importantly, the cases do not decide, nor even discuss, the ethics of how a defendant might be advised by his own counsel that such that a waiver would be knowing, voluntary, and intelligent. Similarly, they do not adress the ethics of a prosecutor including a waiver within a plea agreement in a jurisdiction where a defense attorney would be precluded from recommending such a plea agreement. The decisions among the circuits merely decide that there is nothing particular about the constitutional right to effective assistance of counsel that cannot be waived, provided it is a knowing, voluntary and intelligent waiver.

A. Neither federal statute nor regulation prohibits Kentucky from deciding that it is not ethical for criminal defense attorneys or prosecutors to include waivers of claims of ineffective assistance of counsel within plea agreements

Movant correctly cites 28 U.S.C. § 530B(a) to say that federal prosecutors are required by statute to comply with state rules of attorney conduct to the same extent as other attorneys in the state. However, Movant then goes on to cite to 28 C.F.R. § 77.1(b) as authority that 28 U.S.C. § 530B(a) mandates that state rules of professional conduct should not be "construed in any way to alter federal substantive, procedural, or evidentiary law ..." (*see* Movant's Brief at pages 6-7). Movant uses this language to support the idea that Kentucky's Rules of Professional Conduct (or for that matter, any other state's rules of professional conduct) cannot prohibit a federal prosecutor from including a waiver of claims of ineffective assistance within a plea agreement.

The section quoted by Movant is entitled "Purpose and authority," and stands as a preamble for the other sections. Section 77.3 "Application of 28 U.S.C. 530B" speaks directly to the issue of to what extent the federal statute governs the ethical standards for government attorneys, as opposed to state rules of ethics:

> In all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local 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, as these terms are defined in § 77.2 of this part.

Section 77.2(h) "Definitions" defines "state rules and laws and federal local court rules governing attorneys" to mean:

> [R]ules enacted or adopted by any State or Territory of the United States or the District of Columbia or by any federal court, that prescribe ethical conduct for attorneys *and* that would subject an attorney, whether or not a Department attorney, to professional discipline, such as a code of professional responsibility. The phrase does not include:
>
> (1) Any statute, rule, or regulation which does not govern ethical conduct, such as rules of procedure, evidence, or substantive law, whether or not such rule is included in a code of professional responsibility for attorneys;
>
> (2) Any statute, rule, or regulation that purports to govern the conduct of any class of persons other than attorneys, such as rules that govern the conduct of all litigants and judges, as well as attorneys; ...

Finally, § 77.4 "Guidance" "provides in pertinent part:

> (IV) *Rules of the court before which a case is pending.* A government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending.
>
> (b) *Inconsistent rules where there is a pending case.* (1) If the rule of the attorney's state of licensure would prohibit an action that is permissible under the rules of the court before which a case is pending, the attorney should consider:
>
> (i) Whether the attorney's state of licensure would apply the rule of the court before which the case is pending, rather than the rule of the state of licensure;
>
> (ii) **Whether the local federal court rule preempts contrary state rules**; and
>
> (iii) Whether application of traditional choice-of-law principles directs the attorney to comply with a particular rule.
>
> (2) In the process of considering the factors described in paragraph (b)(1) of this section, the attorney is encouraged to consult with a

> supervisor or Professional Responsibility Officer to determine the best course of conduct. (Bold lettering added.)
>
> * * *
>
> (d) *Rules that impose an irreconcilable conflict.* If, after consideration of traditional choice-of-law principles, the attorney concludes that multiple rules may apply to particular conduct and that such rules impose irreconcilable obligations on the attorney, the attorney should consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

Respondent submits that a fair and thorough reading of the entirety of 28 C.F.R 77 demonstrates that there is no conflict between the KBA Ethics Opinion E-435 and either 28 U.S.C. 530B or 28 C.F.R. 77. The regulations direct a government attorney to conform to state ethical rules of conduct unless there are federal court rules which preempt contrary state law. Movant has cited to no federal court rule which would preempt the application of Kentucky's Rules of Professional Conduct with regard to a defense attorney's conflict of interest, or a prosecutor's duty not to induce another attorney to violate an ethical obligation or prohibition.

The reason for this is that the federal courts do not have to abide by state ethics rules, they simply choose to do so as a matter of judicial economy. In making that choice, the federal courts are not preempting state rulemaking, or triggering supremacy clause concerns. Rather, they are choosing to forego the expense and difficulty of erecting their own discipline system and effectively ceding control over ethics issues to state authorities. The regulations simply

provide guidance for federal attorneys dealing with issues which may have ethical implications in multiple jurisdictions with differing rules.

Simply stated, KBA Ethics Opinion E-435 does not conflict with any federal statute, regulation or rule, nor any substantive law meant to be imposed upon the states.

B. Because an action is legal, it does not follow that the action is ethical.

As stated, *Davila, supra,* and the similar decisions of other circuits cited by Movant, do not address the ethics of whether a defense counsel or prosecutor can propose a waiver, nor the more complex issue of whether a state's ethical authorities can decide these issues. These decisions hold only that it is legal for a defendant to execute a knowing, voluntary and intelligent waiver of the constitutional right to effective assistance of counsel.

But it is well settled that, just because an action is legal, it does not necessarily follow that the action is ethical for an attorney to do. What is ethical and what is lawful have always been two separate inquiries, and there are many examples of actions which are legal under the law, but not ethical for attorneys in certain contexts.

For example, Kentucky law and federal law both allow the surreptitious taping of one or more persons' telephone conversation so long as one party to the conversation consents the taping. (*See* KRS 526.010, .020 and 18 U.S.C. § 2511(2)(d), *respectively*.) Nevertheless, it is unethical for an attorney to secretly

record conversations with others, even though the attorney may be a party to the conversation, except in the narrow circumstance where the party being taped is a witness or potential witness in a criminal case. (KBA E-279)

Likewise, it is legal for two consenting adults to engage in sexual relations because such conduct is part of the liberty protected by substantive due process under the Fourteenth Amendment. *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). Nevertheless, it is unethical for an attorney to enter into sexual relations with a client while in the course of representing the client. SCR 3.130(1.8(j)).

A person accepting a settlement on behalf of a client can certainly deposit the check into his or her own bank account and immediately write out a valid and funded check payable to the client without incurring criminal liability under KRS Chapter 514, or civil liability for conversion. However, this would be an unethical act because commingling of funds is prohibited by SCR 3.130(1.15(a)).

Generally, where an action is illegal to do, there is no need for an ethical rule to prohibit an attorney from doing such action. Respondent asserts that *most* ethical rules are in place to proscribe or regulate activity which otherwise would be legal for an attorney to do. Consequently, while a defendant may legally waive ineffective assistance of counsel claims, the ethical propriety of a lawyer or prosecutor facilitating the process is a different issue entirely.

C. **The Kentucky Bar Association's Ethics Committee, and the Kentucky Board of Governors of the Kentucky Bar Association, are not by adopting and issuing KBA Ethics Opinion E-435 making any comment, statement or alteration of substantive law.**

KBA Ethics Opinion E-297 spells out the jurisdiction of the KBA Ethics Committee and reaffirms that the Committee "does not answer questions of law." The issues in question in this matter are not "questions of law," but rather address questions of ethics, particularly, conflicts of interest between attorney and client.

Likewise, other states which have addressed these issues and decided consistently with KBA Ethics Opinion E-297 are located within federal circuits which have decided the legality of waivers of ineffective assistance of counsel consistent with *Davila, supra.* Ohio and Tennessee, with Kentucky in the Sixth Circuit, have answered the question consistently with Kentucky notwithstanding *Davila.* North Carolina and Virginia, in the Fourth Circuit, decide this ethical question consistent with Kentucky despite *United States v. Lemaster*, 403 F.3d 216 (4th Cir. 2005). Missouri, in the Eighth Circuit, has decided consistently with Kentucky despite *DeRoo v. United States*, 223 F.3d 919 (8th Cir. 2000). Nevada, in the Ninth Circuit, has decided consistent with Kentucky despite *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993). Texas freely decided the issue under its own laws without any discussion of the fact that the Fifth and Tenth Circuits (*see United States v. Wilkes*, 20 f.3d 651, 653 (5th Cir. 1994)). Arizona has left its decision intact despite *United States v. Cockerham*, 237 F.3d 1179 (10th Cir. 2001).

There is simply no merit to the argument that these ethical decisions of these various states are attempting to overrule or conflict with federal law on the point. These ethical decisions all address conflicts of interest, analogies to professional malpractice waivers, and inducements to have other attorneys commit ethical violations.

IV. There is no compelling governmental interest to preclude claims of ineffective assistance of counsel; but if prospective waivers of potential claims of ineffective assistance of counsel are held to be ethical, the logical consequence will be that such claims will be eliminated in the Commonwealth of Kentucky.

Ultimately, the question for this Court to decide is this: "Should the Kentucky Rules of Professional Conduct be construed in such a way that it could end the filing of claims of ineffective assistance of counsel forever?" That will be the result if KBA Ethics Opinion E-435 is vacated, despite the fact that there is no compelling governmental interest in prospectively limiting these claims.

As stated in Section I.B. above, 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. This is part of a prosecutor's duty to be "a minister of justice and not simply that of an advocate."

There is no appropriate reason for a "minister of justice" to include waivers of claims of ineffective assistance of counsel. Such claims are difficult to prove, and the government's procured conviction is only at risk of being vacated under

circumstances where the claimant has suffered a harm so serious it was as though the claimant never had counsel at all. (*See, e.g., Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001)(en banc), *which involved a habeas petition by a Texas defendant whose counsel slept through a substantial portion of the guilty phase of his capital murder trial. Habeas relief was sought because the conviction was affirmed on direct appeal in the Texas courts.*)

To prevail upon a claim of ineffective assistance of counsel, claimant must prove two things: First, that "counsel's performance was deficient...[and] made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Second, that counsel's "deficient performance prejudiced the defense... [and] counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, 687 (1984).

There are recent examples in which a defendant's conviction pursuant to a plea agreement was ultimately vacated due to ineffective assistance of counsel:

In *Commonwealth v. Pridham*, 394 S.W.3d 867 (Ky. 2012) this Court vacated the defendant's convictions, pursuant to a plea bargain, of manufacturing methamphetamine, second or subsequent offense, and other charges. Pridham's attorney had advised him that the charges were not "violent" under KRS 431.3401, and that he would be eligible for parole after serving twenty percent (20%) of his thirty-year sentence. In fact, manufacturing methamphetamine, second or greater

offense, is "violent" under KRS 431.3401 and requires service of at least eighty-five percent (85%) of the sentence to be served before becoming parole-eligible.

In vacating the conviction, this Court cited to the United States Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), which found that a non-citizen had ineffective assistance of counsel when his lawyer failed to advise him that the plea agreement into which he was entering would subject him to automatic deportation.

There are other examples, but this Court can take judicial notice of them (*see, e.g., Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971), *taking notice of bail amounts fixed in criminal cases*: "[i]n view of the many criminal cases from all over the Commonwealth that are reviewed by this court, we are not without knowledge of the amounts which are customarily required as bail generally..."), and thus already knows that many cases alleging claims of ineffective assistance of counsel are filed, that some result in vacated judgments, and others are remanded back to lower courts for further hearings. In other words, this Court recognizes how important the ability of courts to rule upon claims of ineffective assistance of counsel is to the proper administration of justice in this Commonwealth.

In summary, the cost to a defendant of having an otherwise successful claim for ineffective assistance of counsel barred by a prospective waiver is his Sixth Amendment's and Kentucky Constitution's Section 11's right to counsel and right to a fair trial, and potentially an unwarranted loss of life or liberty resulting

from the loss of these constitutional guarantees. And when the claimant is successful in getting a judgment vacated under the *Strickland* standard, the government – having an interest in promoting justice – wins as well; the government has no legitimate interest in preserving an unjust conviction.

On the other hand, what is the cost to the government having to defend against specious claims if waivers are not allowed in plea bargains to prevent them from being filed? The answer to that lies in the case cited by Movant, 258 F.3d 448 (6th Cir. 2001). The sentencing judge in that case explained to defendant Davila why the government wanted the waiver:

> THE COURT: What I really want to focus your attention on is the provision that talks about a post-conviction ... where a defendant, once he has been incarcerated and the time for an appeal has gone by, nonetheless files an action in the court from whence his conviction arose, and contends that in some fashion he was denied a constitutional right in the process that led to his conviction and sentence.
>
> And one of the most common things that's raised sometimes is, I was denied the effective assistance of counsel. And that kind of gets around the failure to appeal ...
>
> **What the government is trying to do is forestall any such action. And the reason is, frankly, they get tired of filing the paperwork to demonstrate there isn't any right to post-conviction proceedings, but now the plea agreements carry this trying to stop it.** [Emphasis added.]

That is the government's compelling interest for including waivers of claims of ineffective assistance of counsel: the government gets "tired of filing the paperwork."

If KBA Ethics Opinion E-435 is vacated, the government's interest in not filing paperwork to respond to non-meritorious or even frivolous claims of ineffective assistance of counsel will be given precedence over the criminal defendant's rights to counsel and a fair trial. There will be nothing standing in the way of prospective waivers of claims of ineffective assistance of counsel. Prosecutors would be free to include them as a matter of rote in each and every plea agreement.

It is already standard practice in this state that a person entering a guilty plea waives all right to appeals; this waiver appears in the Administrative Office of the Court's form Motion to Enter Guilty Plea. Yet, the person entering a guilty plea who later believes that he has had ineffective assistance of counsel can file under Kentucky RCr 11.42 to have his or her conviction vacated or set aside. If KBA Ethics Opinion E-435 is vacated and withdrawn, this important last-chance tool for administering justice may well disappear. The trend of prosecutors in federal courts to include prospective waivers of claims of ineffective assistance of counsel has been noted. (*See, e.g.*, A. Ellis and T. Bussert, "Stemming the Tide of Post-Conviction Waivers," *Criminal Justice*, Vol. 25, Number 1, Spring 2010, *stating* "[o]ver the last several years, waiver of a defendant's appellate and post-conviction rights has become a standard feature of plea agreements in federal cases," *and exploring* "ethical constraints on defense counsel's ability to advise clients and to shield themselves from ineffective assistance claims, as well as constraints on prosecutors' ability to demand such waivers...")(Appendix, Exhibit

M). As can be seen in section II, a number of state ethics committees or boards deciding this issue have rendered their opinions in the last four years: Missouri, 2009; Alabama, 2011; Nevada, 2011; Virginia, 2011; Florida, 2012; Kentucky, 2013.

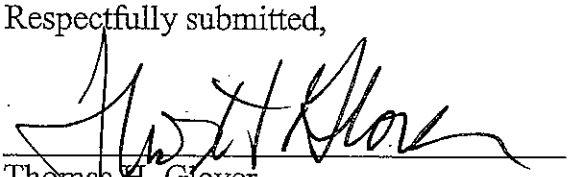
The use of waivers of claims of ineffective assistance of counsel is proliferating. If Movants are successful in getting KBA Ethics Opinion E-435 vacated or withdrawn, once that fact becomes known statewide, claims of ineffective assistance of counsel may cease to exist.

CONCLUSION

Prospective waivers of claims of ineffective assistance of counsel are becoming more and more prevalent. Various states have only recently decided the issue of what the inclusion of such waivers means ethically to criminal defense attorneys and prosecutors alike. It can reasonably be assumed that more states will decide the issue in the future. The ultimate question to be answered is whether claims of ineffective assistance of counsel are in danger of becoming extinct due to blanket waivers. American jurisprudence would not be well-served if the elimination of claims under the *Strickland v. Washington, supra*, standard ceased to exist for no compelling reason.

This Court is respectfully requested to deny the motion.

Respectfully submitted,



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APPENDIX OF EXHIBITS

Tab Number	Exhibit Description
A	Ethics Opinion KBA E-435
B	Bobbitt v. Commonwealth No. 2011-CA-000741-MR (Ky. App. 2013)
C	Alabama Ethics Opinion 2011-02 (2011)
D	Florida Professional Ethics Opinion 12-1 (2012)
E	Missouri Supreme Court Advisory Committee Formal Opinion 126 (2009)
F	Nevada State Bar Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 48 (2011)
G	North Carolina Ethics Opinion RPC 129 (1993)
H	Ohio Advisory Opinion 2001-6 (2001)
I	Vermont Advisory Ethics Opinion (1995)
J	Virginia State Bar Legal Ethics Opinion 1857 (2011)
K	Arizona Ethics Opinion 95-08 (1995)
L	Supreme Court of Texas Professional Ethics Committee Opinion Number 571 (2006)
M	A. Ellis and T. Bussert, "Stemming the Tide of Post-Conviction Waivers," *Criminal Justice*, Vol. 25, Number 1, Spring 2010