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New York State Bar Association
Committee on Professional Ethics

Opinion 1048 (3/3/15)

Topic: Waiver of appeal on grounds of ineffective assistance of counsel as part of plea bargain

Digest: A defense lawyer may advise the defendant as to a proposed plea agreement including waiver of challenges to the conviction based on ineffective assistance of counsel unless a reasonable lawyer would find a personal interest conflict of interest, i.e. a significant risk that the lawyer's professional judgment on behalf of the defendant would be adversely affected by the lawyer's own interest in avoiding an allegation of ineffective assistance of counsel. In case of such conflict, the lawyer may continue in the representation if the conflict is waivable and properly waived by the defendant, but otherwise must seek the court's permission to withdraw from the representation.

Rules: Scope ¶7, 1.0(j), 1.2(c), 1.4(a) 1.7(a) & (b), 1.16(d), 1.8(h), 8.4 (a) & (d)

FACTS

1. The inquirer is a criminal defense attorney practicing in a county in which the District Attorney's Office conditions certain plea bargains on the defendant's execution of a form in which the defendant waives challenges to the judgment of conviction (the "Waiver"). The Waiver is signed during the plea proceedings, in court, by the defendant and the defense attorney.

2. The Waiver states that the defendant, in consideration for the plea agreement, waives all rights to appeal from the judgment of conviction; waives all right to make post-conviction motions challenging the judgment of conviction; and waives and withdraws all pre-trial motions that may have been made. It states that the defendant understands and intends that the plea agreement will be a complete and final disposition of the matter, and that the defendant understands that the terms of the plea agreement and the Court's sentence promise are conditioned upon the defendant's waiver of rights to challenge the judgment of conviction.

3. The inquiry focuses on one potential ground for challenging a conviction by plea: ineffective assistance of counsel (an "IAC" challenge). The inquirer claims that the Waiver would on its face preclude such challenges by waiving "any and all rights to make post-conviction motions challenging the underlying judgment of conviction," and cites various authorities for the proposition that it is unethical for prosecutors and defense attorneys to participate in a defendant's waiver of the right to challenge a conviction on grounds of ineffective assistance.

QUESTION

4. May a defense lawyer participate in a plea bargain process in which the lawyer advises the defendant as to a waiver of the defendant's right to challenge the conviction on grounds including ineffective assistance of counsel?

OPINION

5. This question has been the subject of much attention. Ethics opinions in at least twelve jurisdictions have answered it in the negative.[1] Opinions in two other jurisdictions have concluded that a defense attorney is not necessarily barred from participating in a plea agreement including an IAC waiver.[2]

6. Many of these opinions also address the question whether *a prosecutor* may ethically condition a plea offer on an IAC waiver, and that question also has been addressed recently by the Department of Justice.[3] The inquiry before us, however, is from a defense attorney and we

[1] Alabama Opinion 2011-02; Florida Opinion 12-1; Kentucky Opinion E-435 (2012), *aff'd*, *United States v. Kentucky Bar Ass'n*, 439 S.W.3d 136 (Ky. 2014); Missouri Opinion 126 (2009); Nevada Opinion 48 (2011); North Carolina Opinion 129 (1993); Ohio Opinion 2001-06; Pennsylvania Opinion 2004-100; Tennessee Opinion 94-A-549; Utah Opinion 13-04; Vermont Opinion 95-04; Virginia Opinion 1857 (2011). Some of these opinions conclude that participation is barred by a personal-interest conflict of interest; some conclude that a participating defense lawyer is impermissibly seeking to limit malpractice liability; and others rely on both theories.

[2] Arizona Opinion 95-08 (concluding that a defense lawyer may participate in a plea agreement with an IAC waiver without violating the rule against limiting malpractice liability "or any other ethical rule"); Texas Opinion 571 (2006) (concluding that, depending on the facts of a given case, a criminal defense lawyer "may or may not have a conflict of interest" in advising defendant about a plea waiver of IAC claims, and that the rule against malpractice limitation does not prohibit such advice, assuming that a court would not interpret the plea agreement to limit malpractice liability).

[3] The Department of Justice has stated that it perceives no ethical bar to the practice, but has nonetheless adopted a policy providing that United States Attorneys will no longer seek plea waivers of challenges based on ineffective assistance of counsel. The new policy states:

> While the Department is confident that a waiver of a claim of ineffective assistance of counsel is both legal and ethical, in order to bring consistency to this practice, and in support of the underlying Sixth Amendment right, we now set forth uniform Department of Justice policies relating to waivers of claims of ineffective assistance of counsel.
>
> Federal prosecutors should no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel ….

Deputy Attorney General James Cole, Memorandum for All Federal Prosecutors (Oct. 14, 2014). Prior to the new policy, 35 of 94 U.S. Attorney's Offices had been seeking plea waivers extending to IAC claims. Press Release, "Attorney General Holder Announces New Policy to Enhance Justice Department's

limit our analysis accordingly. Thus we do not here opine as to whether a prosecutor may ethically condition a plea offer on an IAC waiver; we analyze only whether, if a prosecutor does condition a plea offer in that way, the defense lawyer may ethically participate in the plea bargain process.

Would the Waiver preclude challenges based on ineffective assistance of counsel?

7. As the inquirer points out, the Waiver *on its face* would apply to IAC challenges, given its broad language precluding all challenges to the conviction whether through appeal or post-conviction motion. There is nevertheless a threshold question as to whether the Waiver would *actually* bar IAC challenges. A subsidiary question is whether, in New York, a defendant may lawfully waive an IAC challenge as part of a plea proceeding. Whether a pleading defendant may effectively waive an IAC challenge is a question of law beyond our jurisdiction; we briefly survey case law only because the answer to the question could render the ethical analysis unnecessary.

8. It is settled in New York that plea waivers are valid, subject to certain exceptions:

> A criminal defendant's waiver of the right to appeal, obtained as a condition of a sentence or plea bargain, will be upheld if it is voluntary, knowing and intelligent, **and implicates no larger societal interest or important public policy concern**. As long as those conditions are satisfied, the scope of the waiver of the right to appeal can be fully comprehensive, and is enforceable consistent with the actual intent underlying its execution.

People v. Muniz, 91 N.Y.2d 570, 573 (1998) (citations omitted and emphasis added). Barring an exception, a general waiver "will be upheld completely even if the underlying claim has not yet reached full maturation," and even if the kind of underlying claim is not explicitly named in the waiver. 91 N.Y.2d at 574-75 (citations omitted).

9. The *Muniz* opinion states that the exceptions are:

> certain defects in the proceedings leading to a conviction which are unwaivable as part of a plea bargain. This narrow class of appellate claims, grounded in the integrity of our criminal justice system and "the reality of fairness in the process," implicate either an infirmity in the waiver itself or a public policy consideration that transcends the individual concerns of a particular defendant to obtain appellate review.

Muniz, 91 N.Y.2d at 573 (1998) (citations omitted). The opinion cites three kinds of challenges that may be asserted despite a general waiver: constitutional speedy trial rights, illegality of a sentence, and lack of competency to stand trial. 91 N.Y.2d at 574. But the opinion does not state that this list is exhaustive, and it does not address whether there is another exception for IAC challenges. There are Appellate Division cases indicating that there is an exception for

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Commitment to Support Defendants' Right to Counsel" (Oct. 14, 2014), available at http://www.justice.gov/justice-news.

some IAC challenges.[4] The question has also been addressed by courts in other jurisdictions, which have often declined to enforce waivers when the alleged ineffective assistance relates to the plea proceedings or the waiver itself.[5]

10. If New York law clearly excluded all IAC challenges from the Waiver, then the inquirer could advise the defendant as to the merits of the Waiver and the ethical issues discussed below would not even arise. But it appears from the case law to date that New York might deny enforcement of only those challenges that relate to ineffective assistance in connection with the voluntariness of the plea. Since New York courts may enforce waivers at least as to other kinds of IAC challenges, the ethical issues cited in the inquiry do arise for a defense lawyer confronted with a blanket IAC waiver, and we turn to an analysis of those issues.

Rule 1.7: Personal-interest conflicts

11. Some of the ethics opinions cited in footnote 1 above conclude that a *per se* and unwaivable conflict bars a defense counsel from ever advising a defendant as to waiver of IAC challenges. We believe, however, that the personal interests at stake are not so invariably strong as to justify such a *per se* rule. Instead, the potential conflict should be analyzed based on the facts and circumstances of each case. *See, e.g.*, Texas Opinion 571 (2006).

Rule 1.7(a)(2): Existence of a conflict

12. Under Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the "Rules"), a lawyer may not represent a client if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely

[4] *See People v. Abdullah*, 122 A.D.3d 958 (3rd Dept. 2014) (appeal waiver foreclosed an IAC claim that did not "impact the voluntariness" of the plea); *People v. Smith*, 119 A.D.3d 1088 (3d Dept. 2014) (same); *People v. Montalvo*, 105 A.D.3d 774 (2d Dept. 2013) ("Because the defendant voluntarily waived his right to appeal, his claim that he was deprived of his right to effective assistance of counsel is precluded, except to the extent that the alleged ineffective assistance may have affected the voluntariness of his plea.").

[5] *See, e.g., United States v. Craig,* 985 F.2d 175, 178 (4th Cir.1993) (waiver does not foreclose "a claim that the waiver of appeal as well as the guilty plea itself was tainted" by ineffectiveness); *United States v. White*, 307 F.3d 336, 343 (5th Cir. 2002) (following "wealth of authority" that IAC challenges survive a waiver of appeal only when the claimed assistance directly affected the validity of that waiver or the plea itself"); *Davila v. United States,* 258 F.3d 448, 451 (6th Cir.2001) (enforcing waiver as to IAC claim relating to sentencing rather than plea or waiver); *Hurlow v. United States***,** 726 F.3d 958, 964 (7th Cir. 2013) ("[A]ppellate and collateral review waivers cannot be invoked against claims that counsel was ineffective in the negotiation of the plea agreement."); *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994) (doubting "that a plea agreement could waive a claim of ineffective assistance of counsel based on counsel's erroneously unprofessional inducement of the defendant to plead guilty or accept a particular plea bargain"); *United States v. Cockerham,* 237 F.3d 1179, 1187 (10th Cir. 2001) (holding that a plea waiver does not bar IAC claims "challenging the validity of the plea or the waiver" but does bar other IAC claims), *cert. denied*, 534 U.S. 1085 (2002).

affected by the lawyer's own financial, business, property or other personal interests," unless that conflict is waivable and properly waived by the client under Rule 1.7(b).

13. An IAC challenge is meant to result in favorable consequences for the defendant (such as vacating a conviction, resulting in a trial) that typically would not be directly contrary to the personal interests of the defense lawyer. But there also may be indirect effects of such a challenge. For that reason, a criminal defense lawyer no doubt has a personal interest in avoiding challenges to the effectiveness and propriety of his or her professional services. Even a challenge that is neither meritorious nor successful could require the lawyer to spend time responding, and could cause the lawyer reputational damage. Stronger challenges could lead to more concrete harms like malpractice awards[6] or professional discipline. The *degree* of the lawyer's personal interest will be a factor in determining whether that interest gives rise to a Rule 1.7 conflict and, if so, in determining whether the conflict is waivable.

14. The degree of personal interest implicated by a lawyer's advice as to the Waiver here will in turn depend on a number of factors including the likelihood that, in the absence of such a waiver, the defendant would make a subsequent IAC challenge;[7] the various negative consequences likely to result directly or indirectly from such a challenge; the seriousness of the personal detriment that each of those consequences would be likely to cause the lawyer; and the chance that the waiver would avoid such consequences.

15. In a given case, a reasonable lawyer could perceive low risk or high risk that the defense lawyer's professional judgment on behalf of the defendant would be adversely affected by the prospect of an IAC challenge. For example, a reasonable lawyer could conclude that the likelihood of an IAC challenge is low if the client has acknowledged guilt, if the conviction involves a minimal sentence for a minor charge, or if it resulted from a plea bargain very favorable to the defendant. The likelihood of such a challenge may be much greater in case of a severe sentence or significant collateral consequences such as deportation. Even then, other factors may limit the risk of an adverse effect on professional judgment. If the defense lawyer

[6] *But see Dumbrowski v. Bulson*, 19 N.Y.3d 347, 971 N.E.2d 338, 948 N.Y.S.2d 208 (2012) (limiting damages in legal malpractice cases based on negligent representation in a criminal matter to pecuniary damages, such as lost wages, which often are negligible in indigent criminal representation).

[7] In *Strickland* v. *Washington*, 466 U. S. 668 (1984), the U.S. Supreme Court ruled that, before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." It also established a two-prong inquiry into determining whether the defendant has received such effective assistance: (1) counsel's representation must fall "below an objective standard of reasonableness," 466 U. S., at 688, and (2) there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694. The Court in *Strickland* recognized some of the drawbacks in winning an IAC claim: (a) judicial scrutiny of counsel's performance must be highly deferential, since attorney errors are as likely to be harmless as they are to be prejudicial, (b) to obtain relief on an IAC claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances (*citing Roe* v. *Flores-Ortega*, 528 U. S. 470, 480, 486 (2000)), and (b) it is difficult for petitioners to satisfy *Strickland*'s prejudice prong if they have acknowledged their guilt. The Court also commented that collateral challenges at the plea stage are made less frequently than those after trial (e.g. pleas account for nearly 95% of all criminal convictions, but only approximately 30% of the habeas petitions filed.)

has provided highly skilled representation, a reasonable lawyer may find that an IAC challenge is less likely to be made, or at least less likely to be successful. When the evidence of skilled representation is highly visible, such as when a defendant fares substantially better than similarly situated codefendants, then there may be a low likelihood of an IAC challenge even being asserted. But if the defense lawyer has provided deficient representation, especially of a nature that might well lead to severe reputational, financial or disciplinary consequences, then a reasonable lawyer might well find a significant risk of adverse effect on professional judgment.[8]

16. We cannot give a blanket answer to the fact-specific question of whether, in a particular case, a reasonable lawyer would find a significant risk that the prospect of an IAC waiver would adversely affect a defense lawyer's professional judgment on behalf of the defendant. The defense lawyer in a particular case will be aware of the relevant facts bearing on personal interest. The decision of the Kentucky Supreme court affirming Kentucky Opinion E-435 (cited in footnote 1 above) argues that it will be hard for the lawyer to answer this question fairly, given studies in the field of behavioral economics showing that it is "extremely difficult for professionals …to appreciate the deleterious consequences of conflicts of interest," and that "people tend to overestimate their ability to act ethically." *United States v. Kentucky Bar Ass'n*, 439 S.W.3d 136, 154-55 (Ky. 2014) (citations omitted) (*aff'g* Kentucky Opinion E-435 (2012)). We agree that it may be hard to be objective, but lawyers routinely need to assess the ethics of their own potential conduct even when, as with Rule 1.7(a)(2), their personal interests may be implicated. To the extent that conflict analysis is conducted case by case rather than based on broad *per se* rules, such assessments are, even if difficult, unavoidable.

17. When a reasonable lawyer would conclude that the risk of adverse effect on professional judgment is not a significant one, then there is no conflict under Rule 1.7(a)(2) that would preclude the defense lawyer from advising the defendant as to the Waiver. On the other hand, when a reasonable lawyer would conclude that the risk is significant, then there is a personal-interest conflict, and the next step in the analysis is to consider waivability. Of course even when a defense lawyer is *inclined* to think that there is no conflict, the lawyer may choose to seek a conflict waiver as a matter of precaution and prudence. A lawyer who continues a representation in the absence of informed consent could face discipline if it later is determined that there actually was a conflict.

Rule 1.7(b): Waiver of a conflict

18. Under Rule 1.7(b), even if there is a significant risk that the lawyer's professional judgment on behalf of the client would be adversely affected by the lawyer's personal interest in the client agreeing to an IAC waiver, the lawyer may continue the representation if the criteria of Rule 1.7(b) are met.

[8] We are analyzing conflicts of interest, but we note also that deficient representation may give rise to a disclosure obligation whether or not the lawyer will continue to represent the client. *See* N.Y. State 789 ¶13 (2005); N.Y. State 734 (2000) (noting obligation to inform client of "significant error or omission that may give rise to a possible malpractice claim").

19. Rule 1.7(b) lists four criteria that must be met for effective waiver of a lawyer's personal-interest conflict. Two of them – requiring that the representation not be prohibited by law and not involve assertion of a claim by one client against another in the same proceeding – are not applicable to the current inquiry. Waivability of any conflict will therefore turn on the other two criteria: A defense lawyer with a personal-interest conflict may nonetheless represent a defendant and provide advice on an IAC waiver if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" to the defendant, Rule 1.7(b)(1), and the defendant "gives informed consent, confirmed in writing," Rule 1.7(b)(4).

20. The first criterion -- that the lawyer reasonably believes he or she will be able to provide competent and diligent representation -- has both a subjective and an objective component. The defense lawyer must believe that the lawyer will be able to give the defendant competent and diligent representation despite the conflict, and that belief must be reasonable. Whether such a belief is reasonable will depend on some of the same factors that bear on whether there is a conflict in the first place, as discussed in paragraphs 13 - 15 above. That is, the stronger the potential challenge to the lawyer's ineffective assistance prior to the negotiation of the plea agreement, the less likely that the lawyer could reasonably believe he or she will be able to provide competent and diligent representation in advising the defendant on the accepting a plea agreement with an IAC waiver.

21. If there is a fairly limited likelihood that an IAC challenge would result in serious detriment to the lawyer, then the lawyer may reasonably conclude that the lawyer can provide competent and diligent representation. For example, depending on the circumstances, such as the strength of the prosecution's case, the terms of the plea offer, and whether the defendant has admitted guilt to the lawyer, it might be quite clear that it would be in the interest of the defendant to accept the offer. On the other hand, if the defense lawyer believes that the defendant has a colorable claim of legal malpractice arising from defense services already provided, then it may not be reasonable to believe that the lawyer could provide competent and diligent representation. *Cf.* N.Y. State 865 (2011) (noting "manifestly untenable position of having to counsel the [client] executor on whether to sue himself (the lawyer)"). The inquiry is fact-specific, so we identify the relevant analysis but do not undertake to apply it to each kind of circumstance that could be covered by the current inquiry.

22. If the defense lawyer reasonably expects to provide competent and diligent representation, then the lawyer may continue the representation and advise the defendant as to the Waiver if the defendant "gives informed consent [to the conflict], confirmed in writing." Rule 1.7(b)(4). It is a prerequisite of informed consent that a lawyer "has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." Rule 1.0(j). Here, again, whether the lawyer will be able to provide such an adequate explanation may depend on the strength of the defendant's IAC claim. *See* Rule 1.7, Cmt. [10] ("if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.")

23. If the defendant chooses not to waive the conflict, or if it is unwaivable – whether because the conflict is so stark that a belief in the possibility of competent and diligent representation would not be reasonable, or because serious questions about the probity of the

lawyer's conduct preclude the kind of advice necessary for informed consent – then the lawyer would generally be required to withdraw from the representation.[9] There is an exception, however, if the lawyer needs, but cannot obtain, permission of court to withdraw. Rule 1.16(d).

24. If a defense lawyer's conflict results in withdrawal, another lawyer can be retained or appointed to represent the defendant. The new lawyer, having not previously represented the defendant and having no exposure for deficient representation up to that point, will likely be able to provide conflict-free representation.[10]

Rule 1.8(h): Limitation of liability

25. Rule 1.8(h)(1) provides that a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice." Some ethics opinions in other states have concluded that such provisions bar a defense lawyer's participation in a defendant's plea waiver of potential IAC challenges. We discuss first whether this Rule bars such participation by its literal terms, and then whether waiver of IAC challenges impermissibly violates the Rule's policy or spirit.

26. For several reasons, the literal terms of Rule 1.8(h)(1) do not bar a defense lawyer's participation in a plea process that includes a waiver of IAC challenges. First, the lawyer's participation typically will not constitute "mak[ing] an agreement" of the described type. A plea agreement is between the defendant and the prosecution; the defense lawyer may advise and may document that advice, but is not a party to the agreement.[11] Theoretically there could be a case

[9] Rule 1.16(b)(1) (providing that a lawyer who "knows that the representation will result in a violation of the Rules" generally must withdraw). Some of the prior ethics opinions finding an unwaivable conflict seem to assume that the remedy is for the lawyer merely to refrain from advising the defendant as to the waiver. But since the waiver is an integral part of a plea offer, the defense lawyer's duties would seem to require such advice. *See*, *e.g.*, Rule 1.4(a)(1)(iii) (requiring lawyer to promptly inform client of plea offers), Rule 1.4(a)(2) (requiring reasonable consultation about means to obtain objectives) and Cmts. [1] – [3]. In some circumstances, a lawyer may limit the scope of the representation with the client's informed consent, Rule 1.2(c), and such a limitation may serve to avoid conflicts, *see* N.Y. City 2001-3. But a criminal defense lawyer contemplating this approach would have to consider whether refraining from advice as to plea offers would be a limitation "reasonable under the circumstances," as required under Rule 1.2(c), and how it would comport with the defendant's right to effective assistance of counsel.

[10] The reason we do not adopt a *per se* conflict rule against defense lawyers participating in IAC waivers is that we see no circumstances to justify a departure from case-by-case analysis. But our discussion of withdrawal leads us to note an additional benefit of the case-by-case approach. A *per se* and unwaivable conflict rule would mean that when a prosecutor requires a plea bargain to include an IAC waiver, not only would the existing defense attorney have to withdraw, but so would every replacement defense attorney. Because defendants do need lawyers, the resolution might be for the court to order continued representation, despite the conflict, under Rule 1.16(d). A *per se* approach thus prevents any real solution to the claimed personal-interest conflict, while the case-by-case approach allows for a conflicted lawyer to be replaced by one without a conflict.

[11] *See* Arizona Opinion 95-08 (noting that in plea context, "the defense lawyer is not entering into an agreement with his client" to limit liability, because generally the government is seeking to put end to

in which the defense lawyer induces the prosecutor to require a plea waiver, in which case the defense lawyer's own conduct could be at issue. *See* Rule 8.4(a) (providing that a lawyer shall not violate the Rules "through the acts of another"). But we do not opine as to this unlikely situation of a defense lawyer proposing an IAC waiver as part of a plea agreement. In the usual case, it is the prosecutor who seeks a waiver of appeal as part of a plea agreement.

27. Second, an instrument such as the Waiver is not, literally speaking, one "limiting the lawyer's liability to a client for malpractice."[12] It may limit the client's ability to pursue in criminal court a challenge to the conviction, but the client would remain legally entitled to sue the lawyer in civil court for any perceived malpractice.[13] Some ethics opinions have argued that the waiver nevertheless "limit[s]" the lawyer's malpractice liability in a practical sense. If this were a valid argument, it could well apply in New York, which precludes IAC malpractice claims by defendants whose criminal convictions remain intact.[14] But the argument is not valid. The Rule cannot mean that a plea agreement's indirect, preclusive effect on malpractice liability bars the defense lawyer from participating in its negotiation. If that were the case, it would lead to the absurd result that a defense lawyer could not negotiate any plea agreement or counsel any guilty plea, whether or not involving a waiver of appeal.

28. Some ethics opinions have reasoned that even if an IAC waiver does not violate the letter of Rule 1.8, it is nevertheless violates the Rule's policy or spirit. Even if there is some merit to that concern, we find it too attenuated to bar a defense lawyer from performing the crucial function of providing comprehensive and useful advice to a defendant who has been offered a potentially beneficial plea agreement.[15]

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proceedings in consideration for plea to lesser charge, and "[t]he government, not the defense lawyer, is requiring the waiver"); Virginia Opinion 1857 (2011) (opining that rule does not apply "because the defense lawyer is not making the agreement in this case – he is advising his client whether to enter into an agreement sought by the government").

[12] If the waiver were an agreement limiting the lawyer's liability to the client for malpractice, it would apply to a large extent retrospectively, rather than prospectively, and, to that extent, would not be prohibited by Rule 1.8(h).

[13] *See* Arizona Opinion 95-08 (stating that Rule 1.8(h) is "specific and unambiguous" and that there is a "significant difference" between an IAC challenge to a conviction and a malpractice claim); Texas Opinion 571 (2006) (stating that plea waiver of IAC challenges "does not expressly limit the defense counsel's liability to the defendant for malpractice," and assuming that in a malpractice dispute, a court "would not allow a waiver in the plea agreement to be used or interpreted as an agreement limiting a defendant's malpractice claim").

[14] *See Carmel v. Lunney*, 70 N.Y.2d 169, 173 (1987); *Kaplan v. Sachs*, 224 A.D.2d 666, 667 (2d Dept. 1996) (stating that "plaintiff's plea of guilty in the criminal proceeding bars recovery for legal malpractice allegedly committed by the defendant in that proceeding"); *accord McClinton v. Suffolk County Police 3rd Precinct*, 2014 WL 1028993 (E.D.N.Y. 2014) (applying New York law).

[15] *See* Rule 1.4(a)(1)(iii) (requiring a lawyer to promptly inform client of "material developments in the matter including settlement or plea offers"); *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a

Rule 8.4(d): Conduct prejudicial to the administration of justice

29. The inquirer has also asked whether advising a defendant as to a plea waiver of IAC claims would violate Rule 8.4(d), which provides that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice." But this provision is generally meant to address flagrantly improper kinds of conduct.[16] In considering prejudice to the administration of justice as a matter of ethics, it is relevant to bear in mind rules that guide the justice system as a matter of law.[17] We have noted certain ethics and policy issues as to IAC waivers, but the fact that such waivers are accepted to a significant extent in case law belies any claim that advising a defendant as to a waiver would afoul of Rule 8.4(d). *See* cases cited in footnotes 4 and 5.

CONCLUSION

30. A defense lawyer may advise the defendant as to a proposed plea agreement including waiver of challenges to the conviction based on ineffective assistance of counsel unless a reasonable lawyer would find a personal interest conflict of interest, i.e. a significant risk that the lawyer's professional judgment on behalf of the defendant would be adversely affected by the lawyer's own interest in avoiding an allegation of ineffective assistance of counsel. In case of such conflict, the lawyer may continue in the representation if the conflict is waivable and properly waived by the defendant, but otherwise must seek the court's permission to withdraw from the representation.

(50-14)

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plea on terms and conditions that may be favorable to the accused."); *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) ("[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.").

[16] Comment [3] to Rule 8.4 provides: "The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding."

[17] Rules Scope ¶7 ("The Rules presuppose a larger legal context shaping the lawyer's role. That context includes … substantive and procedural law in general.").