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New York State Bar Association
Committee on Professional Ethics

Opinion 1098 (6/10/2016)

Topic: Criminal law; prosecutor conditioning plea bargain on defendant's waiver of ineffective assistance of counsel claims

Digest: A prosecutor may not ethically require, as a routine condition of a plea bargain, that a defendant waive ineffective assistance of counsel claims.

Rules: Rule 8.4(d)

FACTS

1. In N.Y. State 1048 (2015) we considered whether a defense lawyer may ethically advise a defendant whether to accept a plea bargain that includes a waiver of future claims of ineffective assistance of counsel ("IAC"). We concluded that a *per se* personal-interest conflict under Rule 1.7(a) does not arise. Instead, we concluded that determining whether advising as to an IAC waiver creates a personal-interest conflict for the defense lawyer -- and whether any such conflict is waivable -- requires a case-by-case inquiry. We expressly left open the question, however, whether a prosecutor is ethically prohibited from routinely requiring IAC waivers as a condition of a plea bargain. We now consider that open question.

QUESTION

2. May a prosecutor ethically require, as a routine condition of a plea bargain, that a defendant waive IAC claims against a defense lawyer?

OPINION

3. At the outset, we note that prosecutors often insert into a plea bargain agreement a general waiver of any right to appeal or otherwise make a collateral attack on the conviction. Although such a waiver does not specify an appeal based on ineffective assistance of counsel, the courts have read such general waivers as including at least some IAC claims. *See People v. Abdullah*, 122 A.D.3d 958 (3d Dept. 2014) (appeal waiver foreclosed an IAC claim that did not "impact the voluntariness" of the plea). Consequently, when this opinion refers to IAC waivers, it includes a general waiver of the right to appeal, unless it specifically excludes an appeal based on a claim of ineffective assistance of counsel.

4. Rule 8.4(d) provides that a lawyer or law firm shall not "engage in conduct that is prejudicial to the administration of justice." Comment [3] to Rule 8.4 states that this prohibition generally is applicable when the conduct at issue "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." While the examples provided by the comment all involve willful malfeasance, we have not interpreted Rule 8.4(d) to apply only to instances involving bad faith. Instead, if the conduct in question is likely to cause substantial individual or systemic harm to the administration of justice, regardless of the motivation of the party, we have interpreted Rule 8.4(d) to apply. Rule 8.4(d), of course, applies to all lawyers, including prosecutors. Examples of the rule's particular application to prosecutors are useful. Thus, for example, we have repeatedly interpreted Rule 8.4(d) -- and its predecessor under the former N.Y. Code of Professional Responsibility, Disciplinary Rule 1-102(A)(5) -- to prohibit prosecutors from engaging in partisan political activity. *See* N.Y. State 1071 (2015) (municipal attorney employed by Civilian Complaint Review Board); N.Y. State 696 (1997) (examining attorney for Department of Investigations); N.Y. State 675 (1995) (Assistant District Attorney or Assistant County Attorney); and N.Y. State 568 (1985) (District Attorneys and their assistants). The result reached in those opinions was supported by the recognition that "prosecutors have a duty to seek justice," *see* N.Y. State 683, and by the conclusion that partisan political activity by prosecutors has the potential to cause systemic harm to the administration of justice because such activity risks creating the appearance that prosecutors are not exercising their discretion in an independent, disinterested fashion.

5. Other jurisdictions have applied their 8.4(d) analog, in the context of plea proceedings, to the conduct of prosecutors that, while not motivated by bad faith, risked harming the administration of justice. For example, in *In the Matter of Nancy J. Flatt-Moore*, 959 N.E.2d 241 (Ind. 2012), the Indiana Supreme Court concluded that a prosecutor violated 8.4(d) by allowing the victim of a crime to have unfettered veto power in plea negotiations, including insisting on terms the court would not be authorized to impose. The *Flatt-Moore* Court concluded that, at the very least, this practice gave the appearance that the resolution of the case would not turn on the equities of the case. *Id.* at 245. The Court reached this result notwithstanding its conclusion that the prosecutor "did not act out of any selfish or dishonest motive . . . ." *Id.* at 246.

6. Similarly, in *In re Complaint as to the Conduct of Roger Rook*, 556 P. 2d 1351 (Ore. 1976), the Oregon Supreme Court concluded that it was prejudicial to the administration of justice for a prosecutor to refuse to offer a plea bargain to a group of criminal defendants as long as they remained represented by either of two particular criminal defense attorneys. The Court concluded that, while the prosecutor did not act out of any motive for personal gain or profit, the prosecutor's conduct risked unduly burdening the plea bargaining process, and was therefore prejudicial to the administration of justice. *Id.* at 1356. *Cf. United States ex rel. United States Attorneys v. Kentucky Bar Ass'n*, 439 S.W.3d 136 (Ky. 2014) (finding that routine use of IAC waivers by prosecutors violates Rule 3.8 because a prosecutor is charged with seeing that the defendant is accorded procedural justice, "and we simply do not believe the use of IAC waivers lives up to that lofty expectation").

7. Various ethics opinions from state bars around the country have concluded that a *per se* personal conflict of interest arises when defense attorneys are asked to advise their clients as to an IAC waiver. A number of those opinions have also concluded that a prosecutor derivatively

violates Rule 8.4(d) by requiring an IAC waiver because the demand for an IAC waiver creates a conflict of interest for the defense lawyer. *See, e.g.*, Ariz. Op. 15-01 (2015); Fla. Op. 12-1 (2012); Mo. Op. 126 (2009). Although N.Y. State 1048 rejected the *per se* rule adopted by those other state bars, we nonetheless now conclude that the harms attributable to a prosecutor's routine conditioning of plea bargains on the waiver of IAC claims are sufficiently substantial as to prejudice the administration of justice in violation of Rule 8.4(d). Those harms are chiefly associated with the undue burdens on defense lawyers, defendants, and the court system that arise from a prosecutor's routine use of IAC waivers in an already overburdened criminal justice system.

8. We concluded in N.Y. State 1048 that a personal-interest conflict does not automatically arise every time a defense lawyer counsels a defendant as to the waiver of an IAC claim, but we also recognized that ascertaining whether or a not a conflict of interest exists in a particular case (and whether any such conflict is waivable) is often a difficult, complex task. First, a defense lawyer must review the representation and assess the likelihood that a successful IAC claim exists. Critically, when a lawyer actually did provide ineffective assistance of counsel, the lawyer will typically be unaware of the deficient performance. After making this initial, performance-based assessment, the defense lawyer will need to assess the likelihood that continued representation will be adversely affected by the defense lawyer's self-interest in securing an IAC waiver. While many lawyers may be relatively unconcerned about the risk of an IAC claim, other lawyers will be concerned about the time and anxiety that would be involved in defending against any IAC claim.

9. The routine insistence on IAC waivers by prosecutors similarly burdens the courts. When a defense lawyer concludes that a personal conflict exists but is waivable (and has been waived), the court will have to conduct its own independent inquiry to ascertain whether the defendant's waiver of the conflict is knowing, intelligent, and voluntary. *See, e.g., People v. Gomberg*, 38 N.Y.2d 307 (1975) (holding that a defendant's waiver of any conflict must be "knowing and intelligent"). When a defense lawyer concludes that the conflict created by a prosecutor's demand for an IAC waiver is not a waivable conflict, the defense lawyer will have to move to withdraw. In that situation as well, the court will have to expend resources to ascertain whether a conflict exists, and the court typically will need to balance the defendant's right to counsel of choice against defense counsel's duty to avoid potential conflicts of interest. *See People v. Watson*, 26 N.Y.3d 620 (2016) (noting that when potential conflicts of interest arise in criminal cases, courts often must engage in sensitive inquiries and weigh competing interests). If the court concludes that the danger of the conflict outweighs the defendant's right to choice of counsel, the court will need to allow time for the defendant to locate substitute counsel. Substitution of counsel usually will delay the proceedings and cause additional financial costs. But if the court denies the defense lawyer's motion to withdraw, then the defense lawyer will be forced to proceed despite a belief that there is an unwaivable (or unwaived) conflict of interest. That result may undermine public confidence in the fairness of the proceedings and often will trigger further litigation.

10. Given the large volume of cases in the criminal justice system, and the high caseloads

carried by many defense lawyers (*see, e.g., Hurrell-Harring v. State of New York*, 15 N.Y.3d 8 (2015)), a prosecutor's routine insistence on IAC waivers carries a substantial cost in time and money. Even more worrisome, these costs create enormous pressure for courts and defense lawyers to ignore the potential conflicts created by IAC waiver demands. Defense lawyers will reasonably fear that raising the conflict-of-interest issue at the point where a plea deal is about to be consummated will aggravate the court (or the prosecutor). Moreover, courts undoubtedly will be confused as to why the IAC waiver does not present a conflict as to some of the cases before it but does present a conflict as to other cases. To avoid aggravating and confusing the courts, defense lawyers will be sorely tempted to ignore conflicts they believe exist. (Indeed, we are concerned that, given the current, widespread use of these waivers, that is exactly what is going on now.) And, if a defense lawyer believes that raising the conflict-of-interest issue will jeopardize a beneficial plea bargain for the client, the defense lawyer will be placed in the untenable position of deciding between ignoring ethical obligations and undermining the client's interests.

11. IAC waivers also cause substantial, unacceptable harms to criminal defendants. The Sixth Amendment entitles criminal defendants to the effective assistance of counsel. But when defense lawyers unwittingly have provided ineffective assistance of counsel (*i.e.*, when defense lawyers have been ineffective but do not know it), IAC waivers effectively leave these defendants without counsel as to the impact of the as-yet-undiscovered ineffectiveness.

12. Another problem is that the scope and impact of IAC waivers are uncertain. *See, e.g., People v. Abdullah*, 122 A.D.3d 958 (3d Dept. 2014) (appeal waiver foreclosed an IAC claim that did not "impact the voluntariness" of the plea). Accordingly, defendants are unlikely to comprehend the effect of these waivers. And, defendants who are informed that the waiver will foreclose all future claims of ineffectiveness may mistakenly believe that they will be unable to bring any IAC claim even when cases like *Abdullah* might allow them to do so. Finally, in contrast to parties suing for malpractice in civil litigation, criminal defendants who waive IAC claims but who were harmed by their lawyers have little recourse to malpractice litigation, both because the very conviction that resulted from the ineffectiveness will usually bar any relief at all -- and because even in the rare instances when criminal defendants succeed in proving malpractice, nonpecuniary damages are not available. *See Dombrowski v. Bulson,* 19 N.Y.3d 347 (2012) (when a convicted criminal defendant sues the former criminal defense attorney for legal malpractice, nonpecuniary damages are not available).

13. One final harm caused by IAC waivers is that they create an incentive for prosecutors to employ them to conceal IAC claims that are known to prosecutors but unknown to defendants and their lawyers. An experienced prosecutor may well witness an inexperienced defense lawyer's unwitting ineffectiveness. A prosecutor's use of an IAC waiver to cover up an IAC claim would result in a substantial injustice.

14. These substantial harms that the routine use of IAC waivers cause to the administration of justice are not outweighed by any identifiable benefits. While appeal waivers that apply to other issues may promote finality, IAC waivers do not achieve finality because the scope of an IAC

waiver is so uncertain. As suggested earlier, IAC waivers that "impact the voluntariness" of the plea are not waivable (*see People v. Abdullah*, 122 A.D.3d 958). But almost all IAC claims arising from plea cases *arguably* impact the voluntariness of the plea. Consequently, most IAC claims will be subject to future litigation, notwithstanding the presence of a waiver. That the cost of foregoing IAC waivers is not substantial is demonstrated by the United States Department of Justice's 2014 decision to prohibit federal prosecutors from using IAC waivers. *See* Deputy Attorney General James Cole, Memorandum for All Federal Prosecutors (Oct. 14, 2014). No negative effects have been reported as a result of the nationwide implementation of this policy.

15. Notably, the Massachusetts Supreme Court, apparently drawing the same conclusion about the impact of IAC waivers that the United States Department of Justice drew, amended the Massachusetts Rules of Professional Conduct effective April 1, 2016 explicitly to prohibit prosecutors from seeking IAC waivers. *See* Mass. R. Prof. C. 3.8(h) ("The prosecutor in a criminal case shall: . . .(h) refrain from seeking, as a condition of a disposition agreement in a criminal matter, the defendant's waiver of claims of ineffective assistance of counsel or prosecutorial misconduct."). While the New York Rules of Professional Conduct do not contain an *explicit* bar against IAC waivers, we believe that, under the totality of the circumstances, these waivers are prohibited under Rule 8.4(d) because of the substantial harms they cause to the administration of justice.[1]

16. In this opinion, we have considered whether the "routine" requirement of IAC waivers is prejudicial to the administration of justice. Because many of the harms that we have identified are connected with the broad use of IAC waivers in an already over-burdened criminal justice system, we believe that there may well be case-specific scenarios in which a bargained-for waiver of IAC claims does not raise the same concerns. The ABA House of Delegates Resolution and Report 113E (2013), which also condemned the general use of IAC waivers in criminal cases, noted one such example: a defendant who has been advised by an independent lawyer may waive an identified instance of ineffectiveness. Similarly, when a particularly sophisticated client has retained a lawyer of the client's choosing, a negotiated disposition that includes an IAC waiver would not necessarily implicate the same concerns as those addressed in this opinion.

CONCLUSION

17. A prosecutor may not ethically require, as a routine condition of a plea bargain, that a defendant waive ineffective assistance of counsel claims.

[1] Because, prior to this opinion, prosecutors were not on notice that Rule 8.4(d) prohibits prosecutors from routinely conditioning a plea bargain on the waiver of ineffective assistance of counsel claims, we do not believe that a prosecutor's prior use of this practice should be subject to discipline.