

**ETHICS OPINION NO. 260  
OF THE MISSISSIPPI BAR  
RENDERED NOVEMBER 20, 2014**

**CAVEAT:** This Opinion is limited strictly to the facts as presented for analysis under the Mississippi Rules of Profession Conduct. The facts and questions outlined below and the opinion rendered is limited to ethical issues only.

**Is it ethical for a criminal defense lawyer to participate in a “Plea Agreement” that requires the Defendant to waive past or future ineffective assistance of counsel claims? Does this provision of the plea agreement create a personal conflict of interest between the criminal defense lawyer and the client? If so, does such conflict rise to the level of denial of the right to loyal counsel under the Sixth Amendment of the United States Constitution? Is this a violation of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution? Is this an attempt by defense counsel to limit liability of the lawyer to the client? Does this waiver violate the prosecutors’ ethical responsibility?**

**ANALYSIS**

The Ethics Committee for The Mississippi Bar has been requested to render an opinion as to the ethical implications of an attorney participating in a “Plea Agreement” where the client waives past or future ineffective assistance of counsel. In the hypothetical posed by the requestor, the defendant is entering into a voluntary plea agreement, and in consideration of the plea offer the defendant has been requested to waive any rights that he might have to attack the plea or other conduct under 28 USC §2255 or other available remedies concerning the “effectiveness of counsel’s” responsibility prior to or subsequent to the plea.

The Committee is of the opinion that it is improper for a criminal defense attorney to participate in making such a plea agreement and it is equally unethical for a prosecutor to require such a waiver. Whether a particular plea agreement containing such a waiver is lawful, enforceable and/or constitutional are questions of law outside the scope of this opinion. This Opinion addresses only the propriety of a lawyer participating in such an offer under the Mississippi Rules of Professional Conduct.

The Preamble to the Rules of Professional Conduct accurately describes a lawyer as “ a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” This obligation extends to a number of functions: as an advisor, as an advocate, as a negotiator and as an intermediary and evaluator. The important goal of finality in criminal convictions must be balanced against the fact that an effective and fair criminal justice system necessitates both competent, diligent and conflict free defense attorneys and prosecutors who promote the fair administration of justice. Plea bargains are a central part of the administration of the criminal justice system and account for nearly 95% of all criminal convictions. *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012).

Several of the Mississippi Rules of Professional Conduct (“MRPC”) are at play and interrelated in this scenario. First Rule 1.7(b), MRPC states:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interest, unless the lawyer reasonably believes:

- (1) the representation will not be adversely affected; and
- (2) the client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the representation and the advantages and risks involved.

Axiomatic in Rule 1.7 is counsel’s obligation to avoid conflicts – conflicts that would be detrimental to the client’s interest. The Comment to Rule 1.7 explains that loyalty is an essential element in the lawyer client relationship and the lawyer’s own interest cannot be permitted to have an adverse effect on the representation of the client. Defense counsel has an undoubtable personal interest in the issue of whether he has provided constitutionally effective representation. That same defense lawyer cannot be expected to objectively evaluate his own representation in an ongoing case when considering and advising his client on a plea agreement that contains such a waiver. This is a conflict that cannot be waived by consent of the client. A majority of states to consider the propriety of this practice have likewise found it impermissible for defense counsel to participate in making a plea agreement that waives a defendant’s past or future claims for ineffective assistance of counsel.<sup>1</sup>

As for the prosecutor who may request such a waiver, his conduct in requesting the waiver is likewise prohibited. Rule 3.8, MRPC, and its comment explain that a prosecutor has a heightened responsibility as a minister of justice and not simply that of an advocate. This heightened responsibility includes seeing that the defendant is accorded procedural justice. Rule 8.4(a) prohibits a lawyer from inducing another to violate the rules of professional conduct. Rule 8.4(d) prohibits any conduct that is prejudicial to the administration of justice. A prosecutor’s insistence on a waiver of past or future claims of ineffective assistance creates a conflict for the defense counsel between his client’s interest and his own and is prejudicial to the administration of justice. Foreclosing a defendant’s ability to have claims that defense counsel has failed in his most fundamental duty to provide competent, diligent and conflict free representation undermines confidence in our criminal justice system.

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<sup>1</sup> North Carolina Ethics Opinion 129 (1993); Tennessee Informal Ethics Opinion 94-A-549; ; Vermont Ethics Opinion 95-04; Ohio Ethics Opinion 2001-6; Missouri Formal Ethics Opinion 126 (2009); Alabama Informal Opinion September 1, 2010; Virginia State Bar Legal Ethics Opinion 1857 (2011); Florida Bar Professional Ethics Opinion 12-1; National Association of Criminal Defense Lawyers Formal Opinion 12-02; ABA Resolution 113E, August 2013.

## **CONCLUSION**

For the reasons stated above, an attorney representing a defendant in a criminal case may not participate nor enter into a “Plea Agreement” where the Defendant waives past, present or future “ineffective assistance” of counsel. Similarly, a prosecutor may not insist on such a waiver.