

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 2001-6

Issued December 7, 2001

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: It is 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 postconviction claims of ineffective assistance of trial counsel or prosecutorial misconduct.

OPINION: This opinion addresses the ethical propriety of a prosecutor negotiating and a criminal defense attorney advising a defendant to enter a plea agreement that contains provisions waiving claims of ineffective assistance of counsel and prosecutorial misconduct. This opinion does not address whether such waivers are legal or constitutional.

Is it unethical 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 postconviction claims of ineffective assistance of trial counsel or prosecutorial misconduct?

Waiver of claims of ineffective assistance of counsel

DR 6-102(A) of the Ohio Code of Professional Responsibility prohibits a lawyer from attempting to exonerate himself or herself from liability for personal malpractice.

DR 6-102(A) A lawyer shall not attempt to exonerate himself [herself] from or limit his [her] liability to his [her] client for his [her] personal malpractice.

EC 6-6 echoes the rule. "A lawyer should not seek, by contract or other means, to limit his [her] individual liability to his [her] client for his [her] malpractice. 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.

At first reading of DR 6-102(A), one might question why a waiver of claims of ineffective assistance of trial counsel might be considered an unethical attempt by an attorney to limit his or her liability for personal malpractice.

A cause of action for legal malpractice is distinct from an action to vacate a criminal judgment based on ineffective assistance of counsel.

An action to vacate a criminal judgment based on ineffective assistance of counsel is not the same as a cause of action for legal malpractice. A claim of ineffective assistance of counsel is based on constitutional guarantees and seeks reversal of a criminal conviction. Legal malpractice is a common-law action, grounded in tort, which seeks monetary damages. The proof of either of these two causes of action does not necessarily establish the other.

Krahn v. Kinney, 43 Ohio St. 3d 103, 107 (1989).

Further, in Ohio postconviction relief is not required to bring a legal malpractice action.

[W]e hold that a plaintiff need not allege a reversal of his or her conviction in order to state a cause of action for legal malpractice arising from representation in a criminal proceeding. To plead a cause of action for attorney malpractice arising from criminal representation, a plaintiff must allege (1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach.

Id. at 106.

Yet, there is a nexus between the two. Reversal of a conviction while not necessary to state a cause of action for legal malpractice, may help establish the element of proximate cause in a legal malpractice action.

Having enunciated the elements of a claim sounding in malpractice and arising from criminal representation, **we note that in most cases the failure to secure a reversal of the underlying criminal conviction may bear upon and even destroy the plaintiff's ability to establish the element of proximate cause.**

Id. at 106. (Emphasis added).

Thus, in Ohio, under *Krahn v. Kinney*, a reversal of a conviction is not a prerequisite for stating a cause of action for legal malpractice; however, failure to obtain a reversal may bear upon or even destroy a malpractice plaintiff's ability to establish the proximate cause element of a claim sounding in malpractice. *Id.* at 106, 107.

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 postconviction claims of ineffective assistance of counsel does constitute an attempt to limit the liability of the criminal defense attorney for personal malpractice.

Waiver of claims of prosecutorial misconduct

Under DR 7-103, a prosecutor has special ethical duties.

DR 7-103

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he [she] knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he [she] has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

EC 7-13 elaborates upon the duties of a prosecutor.

EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his [her] duty is to seek justice, not merely to convict. This special duty exists because; (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he [she] also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him [her] that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further a prosecutor should not intentionally avoid pursuit of evidence merely because he [she] believes it will damage the prosecution's case or aid the accused.

In addition to these special duties, prosecutors, like other lawyers, are bound by other rules within the Ohio Code of Professional Responsibility. DR 7-102 requires representation within the bounds of the law. DR 1-102(A)(5) prohibits engaging in conduct that is prejudicial to the administration of justice.

Prosecutorial misconduct may involve violations of disciplinary rules that may come to the judge's attention and be reported to disciplinary authorities pursuant to Canon 3(D)(2) of the Code of Judicial Conduct and DR 1-103(A). A prosecutor should not attempt through a plea agreement to excuse himself or herself from following disciplinary rules governing a prosecutor's behavior. A prosecutor does not serve justice by attempting to shield his or her past or future misconduct from scrutiny by obtaining a criminal defendant's waiver of appellate or postconviction claims based on allegations of

prosecutorial misconduct. This Board's view is that waiver of appellate or postconviction claims of prosecutorial misconduct is an improper attempt to insulate the prosecutor from his or her duties under DR 7-102, 7-103, and DR 1-102(A)(5) of the Ohio Code of Professional Responsibility.

Views from other states

North Carolina and Tennessee advise that it is ethically improper for prosecutors and criminal defense attorneys to negotiate plea agreements that waive allegations of ineffective assistance of counsel or prosecutorial misconduct.

North Carolina State Bar, Revised Op. RPC 129 (1993). Prosecutors and defense attorneys may negotiate plea agreements waiving appellate and postconviction rights, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

Bd of Professional Responsibility, Sup Ct Tennessee, Op. 94-A-549 (1994). Neither a prosecutor nor a defense counsel can ethically include a provision in a plea agreement that waives the defendant's right to allege ineffective assistance of counsel or prosecutorial misconduct.

Arizona presents a fractured view.

State Bar of Arizona Op. 95-08 (1995). A prosecutor and defense counsel may enter into a plea agreement whereby the defendant waives postconviction and collateral right, including a defendant's right to later allege ineffective assistance of counsel lawyer. (A minority of the committee expressed a dissenting view that by participating in a plea agreement waiving a defendant's right to allege ineffective assistance of counsel, a criminal defense counsel violates the ethical rule that prohibits attempts to limit liability for malpractice.)

Summary of this Board's view.

First, given that failure to obtain a reversal of a criminal conviction may bear upon or even destroy a legal malpractice plaintiff's ability to establish the proximate cause element of a claim sounding in malpractice, it is the Board's view that waiver of appellate or postconviction claims of ineffective assistance of counsel does constitute under DR 6-102(A) an improper attempt to limit the liability of the criminal defense attorney for personal malpractice. Second, given the duties of a prosecutor, waiver of appellate or postconviction claims of prosecutorial misconduct is an improper attempt to insulate the prosecutor from properly fulfilling his or her duties under DR 7-102, 7-103, and DR 1-102(A)(5) of the Ohio Code of Professional Responsibility.

In conclusion, the Board advises that it is 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 postconviction claims of ineffective assistance of trial counsel or prosecutorial misconduct.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.