

The Supreme Court of Texas  
Professional Ethics Committee  
Opinion Number 571  
May 2006

QUESTIONS PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a prosecutor require as part of a plea agreement that a criminal defendant waive post-conviction appeals based on prosecutorial misconduct and ineffective assistance of counsel?

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a criminal defendant's lawyer to advise the defendant regarding such an agreement, and if agreed to by the defendant, to sign the plea agreement along with the defendant?

STATEMENT OF FACTS

In the context of negotiating a plea agreement with a criminal defendant, and as a condition to the prosecutor's acceptance of the plea agreement, the prosecutor requires the criminal defendant to execute an agreement waiving post-conviction rights to appeal based on prosecutorial misconduct and ineffective assistance of counsel. Additionally, the prosecutor requires the criminal defendant's lawyer to sign the plea agreement containing these waivers of post-conviction rights to appeal.

DISCUSSION

The questions presented relate to numerous legal issues that may be involved in the enforceability and effect of waivers contained in plea agreements but that are not within the jurisdiction of the Committee. Because of the limited jurisdiction of the Committee, this opinion is necessarily limited to consideration of the applicability of the Texas Disciplinary Rules of Professional Conduct to the circumstances presented.

Prosecutor

Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct sets forth certain ethical standards for prosecutors in criminal cases. Rule 3.09(c) states that the prosecutor in a criminal case shall "not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights" (emphasis added). By its terms, Rule 3.09(c) prohibits a prosecutor from attempting to obtain a waiver of post-conviction rights from a criminal defendant who is not represented by counsel. In contrast, the criminal defendant in the circumstances here considered is and has been represented by counsel. In these circumstances, Rule 3.09 does not prohibit a prosecutor from requesting in a plea agreement a waiver of appeals based on prosecutorial misconduct or ineffective assistance of counsel.

Paragraphs (a) and (d) of Rule 3.09 provide that a prosecutor shall:  
"(a) refrain from prosecuting ... a charge that the prosecutor knows is not supported by probable cause;

...

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; ...."

A violation of these requirements can constitute prosecutorial misconduct. While Rule 3.09 does not prohibit a prosecutor from including in a plea agreement a waiver of post-conviction appeals based on claims of prosecutorial misconduct or ineffective assistance of counsel, obtaining such a waiver in a plea agreement does not relieve the prosecutor from complying with the requirements of Rule 3.09. Further, the waiver does not exempt the prosecutor from disciplinary action for misconduct that violates the Texas Disciplinary Rules of Professional Conduct.

### Defense Counsel

The Texas Disciplinary Rules of Professional Conduct impose on defense counsel no special constraints with respect to representation of a criminal defendant concerning a proposed plea agreement containing a waiver of appeals based on claims of misconduct by the prosecutor. However, with respect to a proposed waiver of appeals based on claims of ineffective assistance of the defendant's counsel, the requirements of Rule 1.08(g) and Rules 1.06(b) and 1.06(c) as applied to defense counsel must be considered.

Rule 1.08(g) provides in pertinent part that "[a] lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement ...." A plea agreement waiving post-conviction appeals based on ineffective assistance of counsel does not expressly limit the defense counsel's liability to the defendant for malpractice. Rather, the waiver is directed at arguments that might be made, on direct appeal, by habeas corpus or otherwise, in an effort by the criminal defendant to set aside the plea agreement and thus the conviction. Nevertheless, depending on the precise language of the plea agreement and the specific facts of a particular case, an attempt could be made to use or interpret the plea agreement waiver of rights to appeal based on a claim of ineffective assistance of counsel as an agreed limitation on defense counsel's liability for malpractice. In this opinion, the Committee assumes that in a malpractice dispute, upon a consideration of the relevant public policy concerns arising from the circumstances surrounding plea agreements and the nature of the relationship between a criminal defendant and criminal defense counsel, a court or other authority would not allow a waiver in the plea agreement to be used or interpreted as an agreement limiting a defendant's malpractice claim. Consequently, the Committee finds that Rule 1.08(g) does not prohibit a lawyer from advising a defendant regarding a plea agreement waiver of post-conviction appeals based on ineffective assistance of counsel. However, if such a plea agreement waiver were interpreted to be an agreement limiting a criminal defense lawyer's liability to the defendant for malpractice, Rule 1.08(g) would require that the criminal defendant be represented by separate counsel, at least with respect to considering and entering into the waiver relating to ineffective assistance of counsel.

Advising a defendant about a plea agreement that waives post-conviction appeals based on claims that the criminal defendant's lawyer rendered ineffective assistance would normally present for the lawyer conflict of interest issues that are governed by Rules 1.06(b) and 1.06(c). These Rules provide in pertinent part: "(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.

(c) A lawyer may represent a client in the circumstances described in (b) 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."

Depending upon the facts involved in each case, a criminal defense lawyer may or may not have a conflict of interest with respect to advising the defendant about a plea agreement containing a waiver of claims of ineffective assistance of counsel. In some cases, the defense lawyer may have no cause for any reasonable concern as to his effectiveness in 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.

In other cases, if the lawyer has a reasonable basis for concern that he may have rendered ineffective assistance to the defendant, the lawyer's representation of the defendant as to the proposed plea agreement waiver may reasonably appear to be limited by the lawyer's own interest in not being found to have rendered ineffective assistance. Rule 1.06(b)(2) would then prohibit the lawyer's representation as to the waiver unless the requirements of Rule 1.06(c) can be met. In that circumstance, the lawyer would have to apply Rule 1.06(c)(1) and determine whether he reasonably believes that the representation of the defendant with respect to the plea agreement and waiver would not be adversely affected by the lawyer's own interests. In this regard, Comment 5 to Rule 1.06 notes that "[i]f the lawyer's own conduct in a transaction is in question, it may be difficult for the lawyer to give a client detached advice." In some instances, a disinterested lawyer would conclude that the defendant should not agree to the lawyer's representation with respect to the proposed plea agreement waiver, in which case the lawyer should not ask for the defendant's consent to continue the representation as to the waiver. See Comment 7 to Rule 1.06.

In other circumstances, following a determination that the requirements of Rule 1.06(c) apply, the lawyer may reasonably believe after examination of the issue that the representation of the defendant as to the proposed plea agreement waiver will not be materially affected by the lawyer's own interests. In that case, Rule 1.06(c)(2) requires the lawyer to seek the consent of the defendant for the lawyer's representation concerning the waiver after full disclosure to the defendant of the facts and issues involved. In disclosure on this matter and in communications with the defendant generally, the lawyer is required under Rule 1.03(b) to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." In some cases, although the lawyer reasonably believes under Rule

1.06(c)(1) that the representation of the defendant will not be materially affected, it may be impossible to make the required full disclosure or to obtain informed consent from the defendant. For example, a lawyer may not be able to make the necessary disclosure because of duties owed to other clients, or the defendant may for some reason be unable to consider appropriately the question of giving consent after the lawyer's disclosure. In cases where consent after full disclosure is required but for whatever reason cannot be obtained, defense counsel may not advise the defendant as to a plea agreement waiver of appeals based on claims of ineffective assistance of counsel.

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.

## CONCLUSION

The Texas Disciplinary Rules of Professional Conduct do not prohibit a prosecutor from including in a plea agreement a waiver of post-conviction appeals based on claims of prosecutorial misconduct or ineffective assistance of counsel. However, obtaining such a waiver does not relieve the prosecutor from complying with the requirements of Rule 3.09 and does not preclude discipline for misconduct that violates the Texas Disciplinary Rules.

Assuming that a waiver of claims of ineffective assistance of counsel in a plea agreement is not treated as an agreed limitation on possible future malpractice claims by the defendant against the lawyer, the Texas Disciplinary Rules of Professional Conduct do not prohibit a criminal defense lawyer from advising a defendant with respect to a plea agreement that contains a waiver of post-conviction appeals based on prosecutorial misconduct or ineffective assistance of counsel or from signing the plea agreement along with the defendant, provided that in the particular case the defense lawyer fully complies with the applicable requirements of Rules 1.06(b) and 1.06(c) with respect to any conflict of interest arising from the waiver of post-conviction appeals based on ineffective assistance of counsel.