

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

Opinion No. 14-03

A DEFENSE ATTORNEY MAY NOT ADVISE A CRIMINAL DEFENDANT REGARDING A PLEA AGREEMENT WHICH CONTAINS A WAIVER OF THE RIGHT TO SEEK POST-CONVICTION RELIEF ON THE BASIS OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

A PROSECUTOR MAY NOT REQUIRE A CRIMINAL DEFENDANT TO WAIVE RIGHTS TO POST-CONVICTION RELIEF ON THE BASIS OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHEN OFFERING A PLEA AGREEMENT

FACTS

An inquiry has been made of the Nebraska Supreme Court's Advisory Committee to Nebraska Attorneys as to whether it is appropriate for a defense attorney to advise a criminal defendant regarding the execution of a plea agreement which contains a waiver of the defendant's right to seek post-conviction relief and/or appeal his or her conviction on the basis of a claim of ineffective assistance of counsel (IAC). The initial inquiry indicated that in Nebraska federal court prosecutions of criminal defendants it was common to seek a written plea agreement in which is contained a waiver of IAC rights. As a part of the same inquiry, it is also requested that the committee opine on whether it is appropriate for a prosecutor to require a criminal defendant waive the IAC rights as a part of a plea agreement as apparently has also been a common practice.

This matter has been under consideration for a number of months. In consideration of these questions, the committee received the initial analysis submitted by the inquiring party who is a Nebraska attorney practicing criminal law in the federal courts. The committee also received a letter briefs from the United States Attorney for the District of Nebraska defending the practice and the Office of the Federal Public Defender for the District of Nebraska opposing the practice. The United States Attorney for the District of Nebraska also sought input from the federal judges in Nebraska; however, the judges have declined to comment.

Subsequent to the receipt of the briefs and arguments on this matter, the United States Department of Justice announced that the Department "will no longer ask criminal defendants who plead guilty to waive their right to bring future claims of ineffective assistance of counsel." See <http://www.justice.gov/opa/pr/attorney-general-holder-announces-new-policy-enhance-justice-departments-commitment-suppoeet>. The United States Attorney for the District of Nebraska confirmed to the committee that a memorandum was received from the Office of the Deputy Attorney General, U.S. Department of Justice, indicating that federal prosecutors should no longer seek IAC waivers.

Prior to the announcement by the Department of Justice, the committee had noted the practice of seeking an IAC waiver was not a universal practice of federal prosecutors across the United States. In fact, the model plea agreement available on the website of the United States Department of Justice specifically reserves the right to contest a conviction on the basis of an IAC claim. See <http://www.justice.gov/atr/public/criminal/index.html>. Furthermore, a prior policy statement issued by the Department indicated that plea agreements in at least one situation should reserve the right to IAC claims for the defendant. See <http://www.justice.gov/sites/default/files/dag/legacy/2012/01/31/fast-track-program.pdf>.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

Nebraska Supreme Court Rules § 3-501.7. Conflict of interest; current clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Nebraska Supreme Court Rules § 3-501.8. Conflict of interest; current clients; specific rules

* * *

(h) A lawyer shall not:

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement... .

Nebraska Supreme Court Rules § 3-508.4. Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct knowingly assist or induce another to do so or do so through the acts of another[.]

DISCUSSION

Despite the recent announcement by the Department of Justice indicating that federal prosecutors should no longer seek IAC waivers, the committee notes that there has been no change in law affecting whether IAC waivers may be required of a defendant by a federal prosecutor exercising discretionary authority. The committee recognizes the somewhat awkward position the Department's announcement placed the United States Attorney for the District of Nebraska given the recent defense of the practice in letter briefing received by the committee. Furthermore, the committee has no reason to believe that federal prosecutors in Nebraska will not follow the directive of the Department and discontinue the practice of seeking IAC waivers. However, it is noted that, until now, federal prosecutors have been seeking IAC

waivers as a part of their discretionary authority despite a prior Department policy statement suggesting the waivers are inappropriate in some cases. Given the political nature of the office in which federal prosecutors are seated, there is nothing prohibiting a change in the practice following a future election. It remains to be seen how judges in the federal courts will react to the Department's new position on these matters. And, while the matter before the committee addresses the issue from the perspective of the federal court forum, it is conceivable to the committee that the action may be or could occur in state court proceedings as well. Accordingly, the committee has determined that the Department's announcement does not make the matters presented herein moot and that it is appropriate for the committee to issue this opinion.

The issues presented herein have been the subject of decisions by a number of state ethics committees, bar associations or similar authorities. The majority of these ethics decisions have stated that it is in violation of applicable ethics rules for an attorney to advise a criminal defendant about the propriety of entering into a plea agreement which waives the defendant's right to seek post-conviction relief on the basis of an IAC claim. Typically, in these decisions, it is further concluded that it is inappropriate for a prosecutor to seek a plea agreement that contains such a waiver.

An opinion issued by the Kentucky Bar Association is representative of many of these state ethics decisions. Kentucky Supreme Court Rule 3.130(1.7(a)) is similar to Nebraska Supreme Court Rule § 3-501.7 and provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if ...

(2) there a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Based upon this rule, the Kentucky Bar Association stated as follows:

The lawyer in the plea agreement setting has a "personal interest" that creates "significant risk" that the representation of the client "will be materially limited." The lawyer has a clear interest in not having his or her representation of the client challenged on the basis of ineffective assistance of counsel. The lawyer certainly has a personal interest in not having his or her representation of the client found to be constitutionally ineffective.

This reasoning is consistent with the reasoning surrounding SCR 3.130(1.8(h)(1)). Rule 1.8(h)(1) [which is similar to Nebraska Supreme Court Rule § 3-501.8(h)(1)] states: "A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." Thus, a lawyer cannot ethically advise the client when the issue is the attorney's own conduct.

Rule 1.8(h)(1) does not directly apply to the plea agreement situation because the issue in the plea agreement situation is a waiver of the client's ineffective assistance claim, not a waiver or limitation of a malpractice claim. Yet, the underlying basis for a malpractice claim is the attorney's own professional conduct. Likewise, the underlying basis for an ineffective assistance of counsel claim is the attorney's own professional conduct. If a lawyer ethically cannot advise a client about a malpractice limitation, a lawyer ethically cannot advise a client about an ineffective assistance of counsel waiver.

KBA E-435.

As to the prosecutor's actions in these situations, the Kentucky Bar Association noted that Kentucky Supreme Court Rule 3.130 (3.8), which is equivalent to Nebraska Supreme Court Rule §3-503.8, provides that:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

* * *

It is inconsistent with the prosecutor's role as a minister of justice and the spirit of SCR (3.8(b)) for a prosecutor to propose a plea agreement that requires the individual to waive his or her right to pursue a claim of ineffective assistance of counsel.

Id. Compare Va. State Bar Legal Eth. Op. 1857 (2011); Mo. S. Ct. Adv. Comm. Formal Op. 126 (2009); Ohio Adv. Op. 2001-6 (2001); Vt. Adv. Eth. Op. 95-04 (1995); N.C. Eth. Op. RPC 129 (1993), all cited in KBA E-435. See also Plea Bargain That Waive Claims of Ineffective Assistance – Waiving Padilla and Frye, Nancy J. King, 51 Duq.L.Rev. 647 (urging courts to decline to enforce waivers of an IAC claim), in which the following state ethics decision were noted: Professional Ethics of the Florida Bar, Proposed Advisory Op. 12-1 (2012) (affirmed by the Board of Gov's December 7, 2012) (finding it "improper for the prosecutor to make such an offer and for the defense lawyer to advise the client on accepting the offer," noting that the "the majority of states that have examined this issue have concluded that such an offer is impermissible for the criminal defense lawyer, the prosecutor, or both, for varying reasons," and reviewing authority including Ala. State Bar, Ethics Op. RO 2011-02 (2011); Advisory Comm. of the S. Ct. of Mo., Formal Op. 126 (2009); Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. No. 48 (2011); N.C. State Bar, RPC 129 (1993); Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2001-6 (2001); Va. State Bar, Legal Ethics Op. 1857 (2011) (ethics opinion stated a defense attorney could not ethically advise a client to accept a collateral review waiver encompassing ineffective assistance claims but did not specifically bar an attorney from advising a client about such a provision); Vt. Bar Ass'n, Advisory Ethics Op. 95-04 (1995)).

The Kentucky Supreme Court recently affirmed KBA E-435 upon a motion of the United States Attorneys for the Eastern and Western Districts of Kentucky. Before addressing ethical findings of the Kentucky Bar Association, the Kentucky Supreme Court noted that 28 U.S.C. § 530B makes binding on all government attorneys "[s]tate laws and rules, and local federal court rules, governing attorney in each state where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that state." United States of America, By and Through the United States Attorneys for the Eastern and Western Districts of Kentucky v. Kentucky Bar Association, 2013-SC-000270-KB (Ky.Aug. 21, 2014) at _____. In the decision it was also noted that KBA E-435 was "narrowly tailored to address only attorney conduct[.]" and "is simply an ethical rule and does not affect federal substantive law, procedural, or evidentiary law." The Kentucky Supreme Court also determined that there is no federal law contrary to the decision rendered by the bar association.

In its review of the ethical findings, the Kentucky Supreme Court found that the introduction of the waiver of an IAC claim in a plea agreement requires the attorney "to advise a client on the attorney's own conduct, [and, as a result,] a personal interest certainly exists." *Id.* at _____. The court went on to state that an IAC claim "is time consuming for an attorney, may tarnish the attorney's professional reputation, may subject the attorney to discipline by the bar or courts, and may even have serious financial consequences for the attorney's practice. *Id.* The court went on to conclude that the conflict of interest of the attorney was so serious that it could not be waived as the ethics rule allows in some situations. *Id.*

Ethics decisions in a minority of other states have not come to the same conclusions as have the Kentucky Bar Association and the other states ethics authorities noted above. These "other states" decisions have not equated an attorney's "personal interest" with a "conflict of interest" as have the above decisions. In Professional Ethics Committee of the Supreme Court of Texas, Opinion No. 571, it was determined that it is very reasonable for an attorney to evaluate his or her own conduct to determine if a true conflict of interest is present, if the conflict prohibits the attorney from advising his or her client with respect to the plea agreement, and/or, when a conflict is present, if it is appropriate to ask the client to waive the conflict. Of particular note in the Texas opinion is the comment that "[a] plea agreement 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.” *Id.* This comment points out that the attorney is a spectator in a post-conviction matter seeking to overturn a conviction and any IAC claim that may be made. The opinion concludes that in many situations, this reality does not really create a conflict of interest which automatically leads to a finding that it is contrary to the Rules of Professional Responsibility for an attorney to advise a criminal defendant on a plea agreement containing a waiver of IAC claims.

In Arizona State Bar Commission on the Rules of Professional Conduct Opinion 95-08, the focus of the Commission was on Rule 1.8(h) and the idea that a waiver of an IAC claim might impact a potential malpractice claim. The Commission determined that there is “a significant difference between a defendant’s claim that a court should revisit his sentence because of ineffective assistance of counsel and a defendant’s claim against his lawyer that the lawyer malpracticed and that the lawyer is therefore personally liable to the client.” *Id.* Instead, the Commission determined that the focus is as follows:

Generally, the government is seeking to put an end to the proceedings as a part of the *quid pro quo* for the plea of guilty to a lesser charge. The government, not the defense lawyer, is requiring the waiver. The situation is not unlike the settlement of a civil case in which mutual waivers and releases are executed. When a lawyer in a civil case counsels his client to sign a settlement agreement releasing all claims made or which could have been made which relate in any way to the litigation, he is not violating ER 1.8(h) because he is not entering into an agreement in which he is prospectively limiting his liability to his client for malpractice.

Id. It should be mentioned that a dissent in the Arizona opinion noted what could be described as the real “rub” in situations such as presented in our matter – that being that “[t]he result [of the majority decision] is to assign to a particular class of clients, namely, criminal defendants in federal court, virtually no right to complain about their lawyer’s conduct in the representation [of the client].” *Id.*

While the majority of state ethics authorities have found that attorneys advising clients on the waiver of IAC claims and a prosecutor’s actions seeking such waivers are contrary to applicable ethical rules, the federal courts almost unanimously have taken a different view. The federal courts have generally held that the longstanding test for determining the validity of a guilty plea is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369, 88 L. Ed. 2d 203 (1985), citing *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969); and, *Machibroda v. United States*, 368 U.S. 487, 493, 82 S.Ct. 510, 513, 7 L.Ed.2d 473 (1962). These Supreme Court cases and their progeny reveal a deference on the part of the federal courts for achieving finality in the plea process. In *United States v. His Law*, 85 F.3d 379 (8th Cir. 1996) (per curiam) the court, in five sentences, dismissed an appeal of a sentence based upon a plea agreement in which the defendant agreed to “waive his right to appeal, or challenge via post-conviction writs of habeas corpus or coram nobis,” the judgment and sentence. The *His Law* decision was noted in *DeRoo v. United States*, 223 F.3d 919 (8th Cir. 2000) in which the court stated that “[t]he ‘chief virtues’ of a plea agreement are speed, economy, and finality.” *Id.* at 923, citing *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992).

Despite this deference, the *DeRoo* court also indicated that waivers of the right to seek post-conviction relief “are not absolute.” 223 F.3d at 923. “[J]ustice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself – the very product of the alleged ineffectiveness.” *Id.*, quoting *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999). The waiver of the right to seek post-conviction relief does not affect the “defendant’s right to argue... that the decision to enter into the plea [agreement] was not knowing and voluntary because it was the result of ineffective assistance of counsel.” *DeRoo*, 223 F.3d at 924. It is important to distinguish that the court in *DeRoo* did not indicate it was acceptable to challenge the conviction or sentence on the basis of an IAC claim when the plea agreement contained a waiver of such rights.

Instead, the court determined that a defendant must first show that the decision to enter into the plea agreement was the result of ineffective assistance of counsel. Id.

In Watson v. United States, 682 F.3d 740 (8th Circuit 2012), the court declined to expand on the exception to the rule noted in DeRoo and address the ethical concerns which have been voiced in many states.

If a criminal defendant is able to negotiate substantial concessions from the prosecution, but only on the condition that the defendant waive a potential future claim of ineffective assistance of counsel, does "justice" really dictate that this court refuse to enforce such an agreement in all circumstances? If the government cannot obtain the benefit of avoiding collateral litigation under section 2255, then the government may not be willing to offer certain concessions, and a defendant may be unable to secure the bargain most favorable to his interests. To require that conclusion would seem, in Justice Frankfurter's famous words, "to imprison a man in his privileges and call it the Constitution." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280, 63 S.Ct. 236, 87 L.Ed. 268 (1942).

Watson, 682 F.3d at 743, quoting Chesney v. United States, 367 F.3d 1055, 1058-9 (8th Cir. 2004)(citing Johnson v. Zerbst, 304 U.S. 458, 468-69, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). Despite acknowledging that "[e]thics opinions from various states have addressed whether a defendant's attorney labors under a conflict of interest when advising a client to waive an ineffective assistance of counsel claim, with conflicting results[.]" Watson, 682 F.3d at 744 (citations to state ethics decisions omitted), the court chose not to address these opinions. Instead, the court noted that the parties therein had not argued or briefed the issue. As a result, the court determined it would be premature to rule on the matter "until this related issue on a potential conflict of interest is fully aired by the adversarial process." Id. Instead, the court in Watson ruled that the appellant's IAC claim failed on its merits by not satisfying the requirements of Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)(a defendant must show that: (1) defense counsel's performance was deficient; and, (2) there is a reasonable probability that he or she would have made a different decision, but for his or her counsel's ineffectiveness). Consequently, the court in Watson sought finality to its decision rather than address the ethical concerns which were very apparent.

The avoidance of the issue of the ethical considerations appears to be prevalent by the federal courts as no substantive discussion of these considerations by other federal courts has been found. It can certainly be argued that the federal courts have determined that there are no ethical concerns in those cases where the court was not compelled to rule on the merits of the claim as was done in Watson. But such an argument leaves to speculation the reasons as to why a court in a case like Watson would ignore a specific waiver in a plea agreement and forge on ahead with a review of the merits of the claim as if the waiver did not exist.

CONCLUSIONS

There can be no doubt that an attorney has an interest in whether a client subsequent to the representation seeks to claim the attorney was ineffective. An attorney is not a party to a post-conviction proceeding in which his or her effectiveness is being evaluated. Nor is the decision in a post-conviction matter binding upon the attorney in any way. However, as noted by the Kentucky Supreme Court, *supra*, there are several very real possible interests of an attorney with respect to a waiver of an IAC claim in a plea agreement. See also Utah State Bar Association, Ethics Advisory Opinion 13-04, Paragraph 12 (discussing the interests of an attorney in a post-conviction review of an IAC claim).

In the course of representing criminal defendants, attorneys must always be aware that their actions taken in representation of the defendant will almost certainly be called into question. The more serious the crime the defendant is charged with having committed, the more likely that a post-conviction review of the attorney's representation will occur. Yet, even for the most innocuous offense, an attorney's focus during the representation must be on the rights of the defendant and not on any self-interest of the attorney.

Loyalty and independent judgment are essential elements in the lawyers' relationship to a client.

Comment 1, Nebraska Supreme Court Rules, §3-501.7, Conflict of Interest; current clients.

Section 3-501.7(a)(2) of the Rules indicates that a concurrent conflict of interest exists if there is a "significant risk" that the representation of a client "will be materially limited" as a result of the interests of the attorney. Additionally, §3-501.7(b) of the Rules contemplates that when such risk is present, an attorney can continue to represent a client if certain conditions are met, including obtaining consent of the client. These provisions would seem to allow for an attorney to evaluate his or her interests and the circumstances surrounding the presentation, execution and enforcement of plea agreements which include a waiver of the right to bring an IAC claim; and, thereafter, allow an attorney to determine the appropriate course of action to deal with a conflict of interest. Such a conclusion is not warranted in the eyes of this committee with respect to the issues in this matter.

Comment 10 to §3-501.7 of the Rules provides that "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." The prohibition on seeking limitations on an attorney's liability for malpractice and all of the other restrictions on attorney conduct set forth in §3-501-8 are rules designed to be sure that attorneys provide "competent and diligent representation." Comment 14, Nebraska Supreme Court Rules, §3-501.8, Conflict of Interest; current clients; specific rules. With these concerns in mind, the committee finds the reasoning set forth in Utah State Bar Association, Ethics Advisory Opinion 13-04 persuasive:

It is this duty of loyalty, heightened for the criminal lawyer by the duty of loyalty under the Sixth Amendment to the United States Constitution, which raises the objectivity factor to a level which, in part, constrains this Committee to opine that an unwaivable conflict arises under RPC 1.7(a)(2) [which is akin to Nebraska Rule in §3-501.7(a)(2)]. Waiver of ineffective assistance *in futuro* interferes with the relationship between the attorney and the client. It shifts the focus from advice about the case and the plea agreement to the attorney-client relationship itself. It demands that the attorney counsel the client that, even though she intends to do a good job in future matters, if she doesn't, the client can do nothing about it. It sets up an untenable "personal interest" conflict in the form of a professional, if not psychological, dilemma. This is because the decision to advise the client to waive appeal and collateral attack in a plea agreement is inextricably intertwined with a waiver of the attorney's prospective ineffective assistance of counsel.

Id. at Paragraph 14. Consequently, it is the opinion of the committee that a defense attorney may not advise a criminal defendant regarding a plea agreement which contains a waiver of the right to seek post-conviction relief on the basis of a claim of ineffective assistance of counsel. A conflict of interest for the attorney is present in such situations is so serious as to be a conflict that cannot be waived by a defendant.

The second question presented to the committee dealing with the actions of a prosecutor in seeking a waiver of IAC claims is clearly and necessarily tied to the opinion provided in response to the first question. Section 3-508.4(a) of the Nebraska Rules of Professional Conduct indicates that a lawyer may not "knowingly assist or induce another" to violate the Rules. Following the logic of this Rule, the committee necessarily must opine that it is inappropriate for a prosecutor to require a defendant to waive the right to bring a claim of ineffective assistance of counsel when making an offer to enter into a plea agreement.

The committee recognizes that ultimately, the federal courts will determine whether it is appropriate for waivers of IAC claims to be included in plea agreements presented to those courts. The issues involved and the ever growing list of ethics opinions on the matter would seem to make it more likely than not that soon these matters will be "fully aired by the adversarial process." Watson, *supra*. However, it is the responsibility of the committee to opine on pertinent issues related to the Nebraska Rules of Professional Conduct. Having done so, the committee respectfully disagrees with the federal courts which have allowed the practice of waiving IAC claims by defendants to continue despite growing wave of opinions finding the practice to be inconsistent with applicable state ethics rules.

The failure of the courts to act on these issues has placed criminal defense counsel in a difficult position. The committee is also concerned about how the past, or even future, actions of criminal defense counsel may now be viewed in light of the opinions express herein. In this regard, the committee notes the following as stated in the Preamble to the Nebraska Rules of Professional Conduct:

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Nebraska Supreme Court Rules, Chapter 3, Attorneys and the Practice of Law, Article 5, Nebraska Rules of Professional Conduct, Preamble; A lawyer's responsibilities, Paragraph 9. Attorneys advising criminal defendants regarding the waiver of IAC claims have had to weigh the substantive law as previously determined by the courts, the rights of their clients, the Rules of Professional Responsibility and many other issues. The committee does not feel it is appropriate to judge the actions of attorneys, past or future, who have exercised their professional discretion and have or may continue to advise clients regarding plea agreements containing IAC waivers. The committee, as it is charged to do, is expressing its opinions to provide guidance for attorneys placed in the difficult position in the future. The committee also hopes that the courts, federal and state, will take action to prevent the continuing practice of seeking IAC waivers in matters before them. The right to effective assistance of counsel should always include the right of defendants to seek a review of the actions of their legal counsel.