

# ADVISORY ETHICS OPINION 95-04

## **SYNOPSIS:**

An attorney may not recommend that a client enter into a plea agreement in a criminal case that contains provisions waiving post-conviction rights or remedies that would be based on allegations of ineffective assistance of counsel or prosecutorial misconduct.

## **FACTS:**

A state's attorney's office has begun drafting plea agreements that contain a provision limiting the defendant's right to bring post-conviction relief petitions and habeas corpus actions. One such provision reads:

As a further condition of this Agreement, the Defendant, \_\_\_\_\_, hereby understands and agrees to waive all rights to appeal his convictions based on any errors which may have been committed in pre-trial matters, and any collateral matters including, but not limited to, post-conviction relief and habeas corpus which may be available to him in either a state or federal forum. The Defendant further understands and agrees to reduce his waiver of appellate rights to writing and file it as required V.R.A.P.3(b).

Such a waiver would eliminate the defendant's right to contest whether the defense attorney provided ineffective assistance or whether the State's Attorney committed an unethical act (such as withholding evidence from the defense) in appellate or collateral proceedings.

## **DISCUSSION:**

The Committee has received a request from a defense lawyer who is concerned that recommending a plea agreement containing language like that quoted above to a client might violate the Code of Professional Responsibility. As a general proposition, the execution of a lawful plea agreement does not appear to contravene the Code of Professional Responsibility. The attorney's concern is well-placed, since DR 6-102(A) states, "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for personal malpractice." The language in which a defendant waives his rights to bring collateral attacks on convictions due to errors in pre-trial matters can be construed to limit the defendant's rights to attack his counsel's representation of him and the prosecutor's conduct in pre-trial and pre-plea proceedings. As such, the attorney recommending the plea agreement and any other attorney who is a party to the agreement would seem to be in violation of DR 6-102(A).

## **CONCLUSION:**

The Committee concludes that an attorney should not recommend to a defendant in a criminal case that the defendant enter into a plea agreement that contains a provision limiting the client's right to assert a claim of ineffective assistance of counsel in a post-conviction proceeding.