

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 12-13, 2013

RESOLUTION

RESOLVED, THAT the American Bar Association opposes plea or sentencing agreements that waive a criminal defendant's post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct or destruction of evidence unless based upon past instances of such conduct that are specifically identified in the plea or sentencing agreement or transcript of the proceedings; and

FURTHER RESOLVED THAT a defendant must be provided independent counsel before being permitted to waive those post-conviction claims of ineffective assistance of counsel that are specifically identified in the plea or sentencing agreement or transcript of the proceedings.

FURTHER RESOLVED, THAT the American Bar Association urges judges in all jurisdictions to reject plea and sentencing agreements that include waivers of a criminal defendant's post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence unless based upon past instances of such conduct that are specifically identified in the plea or sentencing agreement or transcript of the proceedings.

REPORT

Nature of the Problem

As the United States Supreme Court has recognized, “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.” *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012). Guilty “pleas account for nearly 95% of all criminal convictions.” *Id.* “The reality is that plea bargains have become so central to the administration of the criminal justice system that plea bargains are not an “adjunct to the criminal justice system; it *is* the criminal justice system. *Id.*

It is in this context that this resolution addresses, as a matter of policy, the inclusion in plea agreements of provisions that require the defendant to waive, on direct appeal or post conviction review, the right to raise claims of ineffective assistance of counsel, prosecutorial misconduct or destruction of evidence. A number of prosecutors, in federal courts and in some state courts, require criminal defendants to execute waivers containing these provisions as a condition of each and every plea agreement. In such agreements, there has been no distinction made for waivers of past or future conduct and there has been no indication of specifically identified allegations that are subject to the waiver.

The ABA has long recognized that finality in judgments of conviction is an important goal in the criminal justice system. Finality, however, must be tempered by the recognition that an effective and fair criminal justice system requires that attorneys act competently and diligently and that prosecutors operate as ministers of justice to promote the fair administration of justice. The broad waivers at issue undermine these goals.

Unfortunately, there are number of cases where defendants may enter a guilty plea because the trial lawyer has convinced the client to accept the plea offer even though that lawyer has not performed minimal investigation or otherwise provided a competent and diligent defense. In some instances, a prosecutor may intentionally fail to disclose exculpatory evidence and then offer the defendant a significantly reduced prison sentence to obtain a guilty plea. Defendants—including those who did not commit the crime--have plead guilty under such circumstances. It is not possible to know the number of innocent people who have plead guilty to crimes to avoid lengthy prison terms, but studies in recent years have proven that the phenomenon occurs with greater frequency than once imagined.¹ Currently “ the incentives for defendants to plead guilty are greater than at any previous point in the history of our criminal justice system[,]” and “[t]oday, the incentives to bargain are powerful enough to force even an innocent defendant to falsely confess guilt in hopes of leniency and in fear of reprisal.”² As we stated in Resolution 107, “Taken as whole, deficiencies in indigent defense services result in a fundamentally unfair criminal justice system that constantly risks convicting persons who are genuinely innocent of the charges lodged against them.”

¹ ABA RESOLUTION 107, ADOPTED BY THE HOUSE OF DELEGATES (2005)

² Lucian E. Dervan, *Bargained Justice: Plea-Bargaining’s Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 64, 56 (2012)(citing research literature to state “it is clear that plea-bargaining has an innocence problem.” *Id.* at 84 & n. 257)

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Such risk of wrongful convictions is addressed by appellate and post conviction remedies in both state and federal systems. The remedies are based upon an implicit recognition that errors and injustices do occur in criminal proceedings, whether guilt is determined by a fact finder or a plea of guilty, and may be unnoticed or disregarded by the judge, prosecutor and defense attorney involved. These post conviction mechanisms are designed to permit convicted defendants to challenge the validity and legitimacy of their convictions and sentences, whether obtained by trial or guilty plea. An ancillary benefit of such remedies is the transparency provided by post conviction scrutiny, thereby improving public respect for the administration of criminal justice.

This resolution seeks to achieve the twin goals of insuring such post conviction scrutiny in appropriate cases as well as finality of judgments. In some cases, the defense and the prosecution engage in thorough and productive negotiation over the terms of the guilty plea agreement and both sides expect that the guilty plea will foreclose further litigation over issues, including allegations of prosecutorial misconduct, destruction of evidence or ineffective assistance of counsel that are known to counsel and the client at the time of the plea. This is a necessary and appropriate expectation. Consequently, this resolution opposes only waivers of or ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence that were not based upon past conduct subject to clear identification in the plea or sentencing agreement.

Certainly prosecutors, the courts and even the public have a right to expect that overturning guilty pleas will not be easy, but it should not be *impossible*. Case law at both the state and federal level evidences the difficulties a defendant faces appealing a guilty plea and sentence, bringing a post-conviction challenge to a guilty plea conviction, or succeeding in proving that defense counsel at the guilty plea and/or sentencing was ineffective. Procedural rules and statutes of limitations that require defendants to file direct appeals and post-convictions actions in a timely fashion are strict and limit the ability to pursue those avenues of relief. Thus, it is unlikely that there will be increased litigation and post-conviction relief except in the rarest cases if defendants who enter a guilty plea are permitted to challenge his attorney's ineffective assistance or a prosecutor's misconduct that was unknown to the defendant at the time of the plea.³

Even assuming, for argument's sake, that plea waivers are unethical, a judgment that this Committee is not empowered to make, there is a need for a clearly-defined policy about offering and accepting a plea bargain with these conditions. The ABA has not previously undertaken this task. A policy would strengthen the interests of all involved in the criminal justice system in seeking justice and fairness. This Resolution makes clear the ABA's singular opposition to the inclusion of these waivers in plea agreements unless the past conduct that gave rise to these claims is clearly identified in the plea agreement or transcript of the proceedings.

³ See Nancy J. King, *Plea Bargains That Waive Claims of Ineffective Assistance-Waiving Padilla and Frye*, 51 DUQUESNE L REV. 647 (2013) (arguing that "only in the rarest of cases would a claim of bad advice regarding a waiver generate relief")

The Resolution and General Waivers

Often the guilty plea waiver provisions are general waivers—that is, they do not specify that the defendant waives the right to raise ineffective assistance of counsel or prosecutorial misconduct claims; instead, these are general waivers of either or both the right to appeal the conviction and sentence and the right to challenge the conviction and sentence through collateral review. Subsumed in these general waivers are prohibitions against litigating in post-judgment proceedings claims of ineffective assistance of counsel and prosecutorial misconduct. These waivers result in finality of judgments, even in circumstances where fairness would compel a different result.

This resolution does not address the propriety of general waivers of the right to appeal or to seek collateral relief. Instead, it urges excision from these general waivers the defendant’s right to assert, whether on appeal or on collateral review, three significant claims. These exempted claims are the denial of the right to effective assistance of counsel, prosecutorial misconduct or destruction of evidence in any and all aspects of the guilty plea proceedings including sentencing unless the waiver is based upon past conduct that is specifically identified in the plea or sentencing agreement or in the transcript of the proceedings.

The Current Landscape of Waivers

A brief survey of the case law and ethics opinions informs the current landscape and the need for ABA policy that promotes the fair administration of justice.

Courts, primarily in federal cases, addressing the legality or constitutionality of waivers of appellate and post conviction review, have found waivers to be generally enforceable.⁴ The Eighth Circuit has left the waiver enforceability question open.⁵ Some courts have sustained

⁴ See, e.g., *Jones v. United States*, 120 Fed. Appx. 594 (6th Cir. 2005) (finding voluntary waiver); *Davila v. United States*, 258 F.3d 448, 450-51 (6th Cir. 2001) (surveying cases and expressly adopting waiver); *Watson v. United States*, 165 F.3d 486, 488-89 (6th Cir. 1999) (upholding explicit waiver of the right to collaterally attack a sentence under § 2255 because it was an informed and voluntary waiver); *Mason v. United States*, 211 F.3d 1065, 1069 (7th Cir. 2000) (determining that defendant waived right to seek relief under § 2255); *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir.1994) (stating that plea agreement may “waive the right to bring a § 2255 motion [if] it does so expressly”); *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994) (upholding an express waiver of post-conviction proceedings, including § 2255, because court could “see no principled means of distinguishing such a waiver from the [enforceable] waiver of a right to appeal”); *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.1993) (holding that defendant may waive statutory right to file § 2255 petition challenging length of his sentence); *United States v. Djelevic*, 161 F.3d 104, 107 (2d Cir. 1998); *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (a valid sentence-appeal waiver, entered into voluntarily and knowingly, pursuant to a plea agreement, precludes the defendant from attempting to attack in a collateral proceeding the sentence through an ineffective assistance of counsel claim during sentencing).

⁵ *United States v. Andis*, 277 F.3d 984, 988 (8th Cir. 2002) (attack on illegal sentence not barred); *Latorre v. United States*, 193 F.3d 1035, 1037 n. 1 (8th Cir. 1999) (observing that Eighth Circuit had “not yet addressed the question of a defendant’s power to waive collateral-attack rights in a plea agreement” and indicating that court’s prior

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waivers with certain limitations, most notably the ability to challenge the validity of the process by which the waiver has been procured—that is permitting examination of whether the defendant’s waiver was voluntary, knowing and intelligent.⁶ Other courts exempt *all* ineffective assistance of counsel claims from enforceable waivers⁷ but at least one claim of ineffective assistance of counsel that traced the claim to the plea offer itself was allowed to proceed notwithstanding such a waiver.⁸

The Supreme Court has not addressed the constitutionality of plea waivers that include a waiver of the right to raise claims of ineffective assistance of counsel. In *United States v. Ruiz*, 536 U.S. 622 (2002) the Court found that there is no prohibition against limited express plea waivers of *Brady* material constituting impeachment information or that which is relevant to an affirmative defense. The waivers at issue in *Ruiz*, however, did not implicate issues of a defense attorney’s conduct, prosecutorial misconduct or destruction of evidence.

Notwithstanding the legality of these waiver provisions in many jurisdictions, some state bar committees and the National Association of Criminal Defense Lawyers (NACDL) have opined that such provisions violate ethics rules. The NACDL opinion concluded that defense counsel presented with a waiver of ineffective assistance claims in a proposed plea agreement has a conflict of interest that has constitutional implications for the client.⁹ Specifically, because the right to effective assistance of counsel includes the plea bargaining process, such a waiver creates a violation of the Sixth Amendment right to conflict-free counsel, and a consequential violation of the right to due process of law under the Fifth and Fourteenth Amendments. In addition, NACDL found that the ethics rules prohibit such agreements because the waiver is a prospective attempt to limit lawyer liability in violation applicable ethics rules.

The Florida Bar opined that a “criminal defense lawyer has an unwaivable conflict of interest when advising a client about accepting a plea offer in which the client is required to expressly waive ineffective assistance of counsel and prosecutorial misconduct,” and that a prosecutor may not make an offer that requires the defendant to waive either ineffective assistance of counsel or

“decisions upholding waivers of direct-appeal rights have explicitly noted the availability of § 2255 collateral attack”); *United States v. Michelson*, 141 F.3d 867, 869 n. 3 (8th Cir. 1998) (general waiver of rights by plea did not encompass waiver of § 2255 rights to an illegal sentence).

⁶ See, e.g., *United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001)(no bar 6to bar on waivers as long as they do not bar 2255 claims attacking the underlying plea); *United States v. Thomas*, 49 Fed. Appx. 781 (10th Cir. 2002); *United States v. Broughton*, 288 F.3d 1183 (10th Cir. 2002); *United States v. Broughton*, 71 F.3d 1143, 1147 (4th Cir.1995); *United States v. Craig*, 985 F.2d 175, 178 (4th Cir. 1993); *United States v. Henderson*,72 F.3d 463, 465 (5th Cir. 1995); *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000).

⁷ *U.S. v. Apodaca*, 2013 WL 264329 (6th Cir. 2013) (ineffective assistance of counsel claims exempted in waiver); Similar results were reached in *U.S. v. Malone*, 2013 WL 136029 (10th Cir. 2013) ; *U.S. v. Pendergrass*, 2013 WL 71786, (4th Cir. 2013)); *U.S. v. Logan*, 2012 WL 5951543 (5th Cir. 2012) (*U.S. v. Roque*, 2012 WL 5898024 (4th Cir. 2012); For a thorough review of the holdings of state and federal cases see Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance—Waiving Padilla and Frye*, n.2 *supra*.

⁸ See *DeRoo v. United States*, 233 F. 3d 919 (8th Cir. 2000) (defendant claimed ineffectiveness in plea for counsel’s failure to challenge the indictment).

⁹NACDL Ethics Advisory Comm. Formal Op, 12-02 (2012).

prosecutorial misconduct.”¹⁰ The Tennessee, Ohio and Vermont bar committees opined that such waivers are unethical but on the ground that such offers infringe on the rule against lawyers limiting their liability for malpractice.¹¹

In short, while there is precedent for defendants’ ability to waive core constitutional rights, there are contrary views about waivers of ineffective assistance of counsel or of prosecutorial misconduct claims that are based upon core principles that defense attorneys and prosecutors cannot seek to truncate fundamental professional norms.

Waiver of the Right to Litigate the Denial of Effective Assistance of Counsel

In recent years, the United States Supreme Court has repeatedly emphasized that the right to the effective assistance of counsel applies not only to plea negotiations, but also to the entire plea bargaining process including the entry of a guilty plea. *Padilla v. Kentucky*, 130 S.Ct. 1473, 1481, 1486 (2010); *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2013); and *Missouri v. Frye*, *supra* at 1405. These recent cases open new inquiry into competency in the plea bargaining process.

Competent representation is foundational to the fairness of the criminal justice process. The basic duty of defense counsel is to provide “effective quality” representation.¹² ABA Standards Plea of Guilt. Pleas of Guilty Standard 14- 3.2(b) provides that “to aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and considerations deemed important by defense counsel or the defendant in reaching a decision.” The commentary to this Standard explains that “[t]his is a critical standard because the system relies, at heart, on defense counsel to ensure that a defendant’s guilty plea is truly knowing and voluntary and is entered in his or her best interests.” See *also* commentary to Defense Function Standard 4-6.1(b) (“Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including analysis of controlling law and the evidence likely to be introduced at trial.”).¹³

In many circumstances, notably where counsel’s performance is deficient, that lawyer faces a dilemma in advising a client as to whether or not to waive the right to challenge that lawyer’s

¹⁰ Fla Bar Advisory Ethics Op. 12-1 (2012); See also Va Legal Ethics Op. 1857 (2011); Ala Bar Ethics Op. RO-2011-02; Missouri Formal Ethics Op. 126 (2009); NACDL Ethics Advisory Comm. Formal Op. 12-02 (2012); Kentucky Advisory Ethics Op. E-435(2013).

¹¹ Tennessee Inf. Ethics Op. 94-A-549; Ohio Ethics Op. 2001-6 (2001); Vermont Ethics Op. 95-04 (1995). Arizona is the only state to find that such waivers do not violate ethics rules. Arizona Comm. on the Rules of Professional Conduct Op. 95-08 (2008). Texas Prof. Ethics Comm. Op. 571 (2006) limited its opinion to a potential ethics violation for an agreement to limit future malpractice claims but did not hold such waivers always create a conflict of interest.

¹² ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION AND PROVIDING DEFENSE SERVICES (3RD ED 1992)

¹³ See the Brief of the American Bar Association as Amicus Curiae in *Lafler v. Cooper* and *Missouri v. Frye*, at p. 7, 132 S. Ct 1399 (2013).

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ineffectiveness. The defense lawyer has an obvious interest in assuring the client that his or her performance is effective; the lawyer cannot be expected to provide a client with an objective analysis of counsel's performance in the case. In other words, the defense lawyer often faces a conflict between his or her own personal interest and that of the client's Sixth Amendment right to effective assistance of counsel.

Prosecutors should not require a defendant to waive the right to raise defense counsel's ineffectiveness as part of the terms of a waiver of appellate and post conviction claims. A prosecutor typically does not have, and should not be required to have, any sound factual basis to conclude that the defendant's counsel had, up to the signing of the plea agreement, provided effective assistance in the plea bargaining process. The prosecutor does not know to what extent defense counsel has investigated the case – both the facts and the applicable law, discussed the case and the plea offer with the defendant, explained the collateral consequences of a conviction and otherwise provided effective representation.

The prosecutor should strive to uphold the most fundamental aspects of the criminal justice system, including competent and diligent defense counsel. A condition of a plea agreement that a criminal defendant waives the right to challenge the failure of defense counsel to provide effective representation is incompatible with functioning as “a minister of justice and not simply that of an advocate.” *ABA Model Rules of Professional Conduct (2012), Rule 3.8, Special Responsibilities Of A Prosecutor, Comment [1]*. “Insisting on so-called ineffective counsel waivers impresses me as overreaching of the worst sort and fundamentally inconsistent with a prosecutor's obligation as a minister of justice.”¹⁴

It is especially problematic that the prosecutor includes in the plea agreement a provision that requires the defendant to waive any ineffectiveness by defense counsel occurring *after* the plea bargain is accepted by the court. Defense counsel's ineffectiveness at sentencing or ineffectiveness in challenging the breach of the plea agreement by the prosecutor should not be immune from a later challenge by the defendant. In such circumstances, defense counsel's deficient performance could not have been anticipated or predicted by either the defendant or the prosecutor. Although justice must be symbolically blind, a defendant should not be required to waive defense counsel's future ineffectiveness. The Standards for the Prosecution and the Defense Function suggest that defense attorneys should not accept plea bargains that include waivers of “important defense rights” and prosecutors should not routinely require such plea waivers.¹⁵ Thus, plea waivers of conduct that has not yet occurred should not be subject to waiver.

A broad waiver of counsel's ineffective representation only serves to undermine public confidence in the fairness of the proceedings. Particularly in cases where counsel's ineffectiveness may be combined with a failure to uncover prosecutorial misconduct, the prosecution and the defense should not be permitted to negotiate over the only procedural means

¹⁴ R. Michael Cassidy, *Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias*, 48 San Diego L. Rev. 93, 108 (2011)

¹⁵ Rory K. Little, *The Role of Reporter for a Law Project*, 38 HASTINGS CONST. L.Q. 747 (2011)

by which a criminal defendant can raise these claims in guilty pleas. These issues should be brought to light, reviewed by the courts, and relief granted where warranted.

In some cases, it may be in the client's interest to agree to waive the right to raise claims of ineffective assistance of counsel. Where the allegations of ineffective assistance of counsel are specifically identified and based upon the attorney's past conduct rather than upon conduct yet to occur, the plea may be a knowing and intelligent one and should be permissible. In such cases, the defense attorney must resolve the conflict inherent in advising the client to plead guilty and waiving the clearly identified instances of ineffective assistance of counsel by obtaining the appointment of independent counsel to advise the client as to whether to take advantage of the plea offer. A specifically identified waiver based upon past conduct of counsel does not implicate the same constitutional, ethical or practical implications that arises in broad waives of ineffective assistance of counsel.

Waiver of the Right to Litigate Prosecutorial Misconduct

Nor should a defendant be required to waive the right to raise prosecutorial misconduct or destruction of evidence unless based upon past conduct and specifically identified in the plea agreement. If the defense is aware of prosecutorial misconduct prior to the defendant's decision to enter into a plea agreement, the defendant, through counsel, has to make the decision to challenge that alleged prosecutorial misconduct through a pretrial motion or to forego that motion for strategic reasons. The same is true for an allegation of negligent destruction of evidence. If the defense litigates unsuccessfully a pretrial motion for relief based on prosecutorial misconduct, the defendant has yet another difficult choice – either to plead guilty, forfeiting the right to appeal the adverse ruling, or to go to trial, knowing that, if convicted, the ruling on the issue of prosecutorial misconduct can be reviewed on appeal. In such a case, a defendant may choose to accept a plea bargain that forecloses the ability to raise the prosecutorial misconduct issues. In such case, a waiver of specifically identified allegations of past prosecutorial misconduct or destruction of evidence should be permitted.

But, should both the defendant and defense counsel be unaware of the prosecutorial misconduct or destruction of evidence or if that conduct has not yet occurred, the only way the issue of such misconduct, once discovered, could be litigated is through either appeal or collateral review. Claims of innocence based upon newly discovered evidence that the police or prosecutor failed to disclose exculpatory evidence should not be precluded from review. Nor should the criminal justice system permit waivers of prosecutorial misconduct or destruction of evidence that insulates the effect of the errant prosecutor's actions from judicial review. That effect necessarily includes a significant impact upon the conviction and the sentence.

As with ineffective assistance of counsel, such waivers should not be permitted for future conduct. The plea and conviction should not be insulated from challenge on the basis of the prosecutor's misconduct that occurs after the bargain is accepted and the plea entered, such as at the sentencing or in the prosecution's asserted breach of the agreement by the defendant. Neither

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defense counsel nor the defendant has any means by which to know what, if any, misconduct will arise after the plea bargain is signed and accepted by the court.

The Judiciary's Responsibilities

Similarly, this resolution urges judges to reject plea bargains that include provisions requiring the defendant to waive the right to raise claims of ineffective assistance of counsel, prosecutorial misconduct or destruction of evidence unless the waivers are based upon past conduct specifically identified in the plea or sentencing agreement or transcript of the proceeding.

Judicial enforcement of waivers without such specifics is unwise for several reasons. First, it places beyond examination critical aspects of the well-recognized problems in providing effective assistance of counsel. Courts have only recently begun to specify the kind of advice and counsel that is constitutionally required in the plea negotiation process. Statutory or disciplinary regulation of lawyer conduct may be warranted. "Informed regulations of plea bargaining by anyone—courts, legislatures, ethics bodies or prosecutors themselves—depends upon accurate information about what lawyers do during this important phase of the criminal process, and waivers hide it all from view."¹⁶ Thus, as a matter of developing sound policy, the judiciary should support greater transparency about the process. Second and most fundamental to respect for the judiciary and the criminal justice system, is that upholding such waivers is contrary to the fair administration of justice.

Conclusion

Respect for the integrity of the criminal justice system requires a fair process that includes competent, diligent, and conflict-free defense counsel and the proper administration of justice by the prosecution. Where there are claims that either the prosecution or defense has failed in its fundamental duties, the foreclosure of a defendant's ability to due consideration of these issues undermines confidence in our system.

With an astronomically high percentage of criminal cases decided by pleas of guilty, the routine use of the guilty plea waivers of ineffective assistance of counsel, prosecutorial misconduct and destruction of evidence has the effect of insulating the guilty plea process from appellate court scrutiny and public awareness and should not be tolerated unless the claims based upon past conduct and are specifically identified in the plea or sentencing agreements or in the transcript of the proceedings.

Respectfully submitted,

William Shepherd, Chair

Criminal Justice Section

August 2013

¹⁶ Nancy J. King, *supra* n.2; Susan R. Klein, *Monitoring the Plea Bargaining Process*, 51 DUQUESNE L. REV. 559 (2013).

GENERAL INFORMATION FORM

To Be Appended to Resolutions with Reports

(Please refer to *Instructions for Filing Resolutions with Reports* for completing this form.)

Submitting Entity: Criminal Justice Section

Submitted By: William Shepherd, Chair

1. Summary of Resolution(s).

This resolution shows American Bar Association opposition to provisions in plea agreements where a criminal defendant waives the right to raise a claim of ineffective assistance of counsel or of prosecutorial misconduct not known to the defense at the time of the plea. It urges judges in all jurisdictions to reject plea agreements that include such provisions. It urges criminal defense attorneys, whether retained or appointed, to advise their clients that provisions in plea agreements waiving the client's right to raise a claim of ineffective assistance of counsel or of prosecutorial misconduct have been found to be unethical in various jurisdictions and are arguably unconstitutional.

2. Approval by Submitting Entity.

The proposed resolution was approved by the Criminal Justice Section Council at its May 12th, 2013 meeting.

3. Has this or a similar resolution been submitted to the House or Board previously?

While there is no directly on point policy, several existing ABA policies address similar issues. These include: The Prosecution and Defense Function Standards which state that the basic duty of defense counsel is to provide "effective quality" representation. The ABA Standards Pleas of Guilty. Pleas of Guilty Standard 14- 3.2(b) provides that "to aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and considerations deemed important by defense counsel or the defendant in reaching a decision."

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

While there is no directly on point policy, several existing ABA policies address similar issues. These include: The Prosecution and Defense Function Standards which state that the basic duty of defense counsel is to provide "effective quality" representation. The ABA Standards Pleas of Guilty. Pleas of Guilty Standard 14- 3.2(b) provides that "to aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and considerations deemed important by defense counsel or the defendant in reaching a decision." These policies will not be affected by adoption.

5. What urgency exists which requires action at this meeting of the House?

The urgency of this action exists guilty "pleas account for nearly 95% of all criminal convictions." "The reality is that plea bargains have become so central to the administration

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of the criminal justice system that plea bargains are not an “adjunct to the criminal justice system; it *is* the criminal justice system. It is in this context that this resolution addresses, as a matter of policy, the inclusion in plea agreements of provisions that require the defendant to waive, on direct appeal or post conviction review, the right to raise claims of ineffective assistance of counsel and/or prosecutorial misconduct not known to the defendant at the time of the plea. A number of prosecutors, in federal courts and in some state courts, require criminal defendants to execute waivers containing these provisions as a condition of each and every plea agreement. The ABA has long recognized that finality in judgments of conviction is an important goal in the criminal justice system. Finality, however, must be tempered by the recognition that an effective and fair criminal justice system requires that attorneys act competently and diligently and that prosecutors operate as ministers of justice to promote the fair administration of justice. The waivers at issue undermine these goals.

6. Status of Legislation. (If applicable)

Not Applicable

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The policy will be distributed to various criminal justice stakeholders in order to encourage and facilitate change in the use of plea waivers. The policy will also be featured on the Criminal Justice Section website and in Section publications.

8. Cost to the Association. (Both direct and indirect costs)

No cost to the Association is anticipated.

9. Disclosure of Interest. (If applicable)

None

10. Referrals.

At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2013 Annual Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

Standing Committees

Governmental Affairs

Pro Bono and Public Service

Legal Aid and Indigent Defendants

Professionalism

Federal Judiciary

Ethics and Professional Responsibility

Special Committees and Commissions

Commission on Civic Education in the Nation’s Schools

Commission on Disability Rights

Commission on Sexual and Domestic Violence
Commission on Homelessness and Poverty
Center for Human Rights
Center for Racial and Ethnic Diversity
Council for Racial and Ethnic Diversity in the Educational Pipeline
Commission on Racial and Ethnic Diversity in the Profession
Commission on Racial and Ethnic Justice
Commission on Sexual Orientation and Gender Identity
Commission on Women in the Profession
Commission on Youth at Risk
Commission on Ethics 20/20

Sections, Divisions

Government and Public Sector Division
Individual Rights and Responsibilities
Judicial Division
 National Conference of Federal Trial Judges
 National Conference of Specialized Court Judges
 National Conference of State Trial Judges

Litigation
Judicial Division
Senior Lawyers Division
State and Local Government Law
Tort Trial & Insurance Practice
Young Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

(Please refer to *Instructions for Filing Resolutions with Reports* for completing this form.)

1. Summary of the Resolution

This resolution shows American Bar Association opposition to provisions in plea agreements where a criminal defendant waives the right to raise a claim of ineffective assistance of counsel or of prosecutorial misconduct not known to the defense at the time of the plea. It urges judges in all jurisdictions to reject plea agreements that include such provisions. It urges criminal defense attorneys, whether retained or appointed, to advise their clients that provisions in plea agreements waiving the client's right to raise a claim of ineffective assistance of counsel or of prosecutorial misconduct have been found to be unethical in various jurisdictions and are arguably unconstitutional.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the following issues: guilty "pleas account for nearly 95% of all criminal convictions." "The reality is that plea bargains have become so central to the administration of the criminal justice system that plea bargains are not an "adjunct to the criminal justice system; it *is* the criminal justice system. It is in this context that this resolution addresses, as a matter of policy, the inclusion in plea agreements of provisions that require the defendant to waive, on direct appeal or post conviction review, the right to raise claims of ineffective assistance of counsel and/or prosecutorial misconduct not known to the defendant at the time of the plea. A number of prosecutors, in federal courts and in some state courts, require criminal defendants to execute waivers containing these provisions as a condition of each and every plea agreement. The ABA has long recognized that finality in judgments of conviction is an important goal in the criminal justice system. Finality, however, must be tempered by the recognition that an effective and fair criminal justice system requires that attorneys act competently and diligently and that prosecutors operate as ministers of justice to promote the fair administration of justice. The waivers at issue undermine these goals.

3. Please Explain How the Proposed Policy Position will address the issue

This resolution would help ensure proper plea bargains by: 1) opposing provisions in plea agreements where a criminal defendant waives the right to raise a claim of ineffective assistance of counsel or of prosecutorial misconduct not known to the defense at the time of the plea. 2) urging judges in all jurisdictions to reject plea agreements that include such provisions. 3) urging criminal defense attorneys, whether retained or appointed, to advise their clients that provisions in plea agreements waiving the client's right to raise a claim of ineffective assistance of counsel or of prosecutorial misconduct have been found to be unethical in various jurisdictions and are arguably unconstitutional.

4. Summary of Minority Views

None are known.