

Defense Counsel's Efforts to Insulate Themselves From Liability and Conflicts of Interest

Vince Aprile

“

Criminal defense counsel should avoid trying to insulate themselves from legal liability by securing from their clients agreements prohibiting legal malpractice suits for the representation provided as there is a very strong possibility that such an agreement will constitute a disqualifying conflict of interest for the lawyer.

Many criminal defense attorneys, whether practicing in state or federal court, worry about being found to have rendered ineffective assistance of counsel (IAC) and/or to have committed legal malpractice. Prosecutors in the past disliked that convicted criminal defendants often raised on collateral proceedings claims of IAC even when the accused had plead guilty. To preclude that avenue of relief, federal and state prosecutors began inserting boilerplate language into guilty plea agreements requiring the waiver the right to assert claims of IAC on appeals or in other post-conviction proceedings.

In a similar vein, some criminal defense attorneys, primarily retained, sought to require their clients to enter into an agreement not to sue counsel for legal malpractice well before the results of the representation were known. The dangers of that particular practice was well known years ago whether in criminal or civil practice.

There is virtually a universal ethical prohibition against such an agreement not to sue unless certain conditions are met. “A lawyer shall not ... make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.” Rule 1.8(h)(1), *Current Clients: Specific Rules*, ABA Model Rules of Professional Conduct,

© 2025. This is an ethical restriction on lawyers whether providing representation in civil or criminal cases.

Basically, under ethical codes, a lawyer seeking to have the client agree not to sue her for malpractice must ensure that the client has an independent attorney to advise her about the dangers and advantages, if any, of agreeing to forego suing counsel in advance of seeing the work and its results. Some jurisdictions’ ethics codes will not allow such agreements even with the advice of independent counsel unless such agreements are permitted by law. In addition to informing the client that he cannot sign the agreement without having an independent counsel to represent him concerning the agreement, it is either implicit in or spelled out in ethical codes that the client must be afforded adequate time to hire independent counsel with ample opportunity to review the agreement.

“[I]n view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity

(Continued on next page)



LOUISVILLE BAR
ASSOCIATION
HEALTH & WELLNESS COMMITTEE

Health & Wellness Committee Corner

September 2026

CO-CHAIRS

Jennifer Kleier
Liz Mosler

ALL MONTH

National Suicide Prevention Month

September is National Suicide Prevention Month. For the legal profession, this carries particular weight: lawyers experience depression and suicidal ideation at rates significantly higher than the general population. Suicide Prevention Week is September 6–12, with World Suicide Prevention Day on September 10. These are more than observances—they are opportunities to check in, speak up and know where to turn for help. The H&W Committee encourages every member to make suicide prevention an active commitment this month.

National Self-Care Awareness Month

September marks the start of the fall push for most lawyers—new matters, returning deadlines and the compressed energy of Q4. The timing of Self-Care Awareness Month is not accidental. Self-care is not an indulgence. It is what makes sustained performance possible. This month, the H&W Committee encourages members to treat recovery the same way they treat billable hours: intentionally, consistently and without apology. One habit built in September is worth more than a wellness retreat you never take.

This month, try this:

1

Mark Suicide Prevention Week (Sept 6-12) on your firm calendar. Share the 988 Suicide and Crisis Lifeline with your team. It takes two minutes and could matter more than you know.

2

Build one recovery habit into September before the fall rush hits full speed. A standing lunch break, a consistent bedtime or a weekly no-email window all count.

3

Start planning for the AFSP Out of the Darkness Walk on November 7. The H&W Committee is participating. Watch for registration details and consider joining us.

GET INVOLVED

JOIN THE HEALTH & WELLNESS COMMITTEE!

Active LBA members who want to help promote wellness across the legal profession are welcome.

Contact Lisa M. Murray at lmurray@loubar.org to learn more.

UPCOMING LBA HEALTH & WELLNESS COMMITTEE HOSTED EVENTS:

4TH ANNUAL PICKLEBALL PALOOZA

Sunday, September 20 · Pickle & Pong
More details - see page 12

AFSP OUT OF THE DARKNESS WALK

Saturday, November 7 · Waterfront Park
Watch for details from the H&W Committee

MAHJONG OPEN PLAY

Date TBA · Watch for details from the H&W Committee

to find and consult independent counsel.” Rule 1.8, ABA Model Rules, *supra*, Comment [18].

In a criminal case, an agreement not to sue counsel for malpractice, even when entered into in compliance with the ethical guidelines, would constitute a disqualifying conflict of interest. “A concurrent conflict of interest exists if ... 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.*” Rule 1.7(a)(2), *Conflict of Interest: Current Clients*, ABA Model Rules, *supra*.

Parenthetically, criminal defense attorneys in many venues are already protected from disappointed clients’ malpractice suits by the exoneration doctrine. A number of jurisdictions in this country have adopted as a prerequisite to establishing a complaint for legal malpractice arising out of a criminal case that the plaintiff must prove that he or she was exonerated of the charges in the underlying criminal action.

What the Kentucky Supreme Court explained about IAC waivers in guilty plea agreements and conflicts of interest is equally applicable to a criminal defense attorney requiring a client to sign an agreement not to sue for malpractice:

When defense counsel is forced, through the introduction of an IAC waiver in a plea agreement, to advise a client on the attorney’s own conduct, a personal interest certainly exists. 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.

US Ex Rel. US Attorneys v. Kentucky Bar Ass’n, 439 S.W.3d 136, 152 (Ky. 2014).

All of these factors apply to a criminal defense attorney obtaining an agreement from his client not to sue him for legal malpractice except that it requires the lawyer to advise the client on counsel’s performance before it has even occurred. The conflict of interest is virtually the same. “[A] conflict exists when there is a ‘substantial risk’ of negatively impacting the client’s representation. This is true whether or not the ‘feared eventuality ever materializes.’” *US EX REL. US ATTORNEYS*, *supra*, 154.

It is well recognized today that a criminal defense lawyer may not advise a client with regard to a plea agreement that waives the client’s right to pursue a claim of ineffective assistance of counsel as part of the waiver of the right to collaterally attack a conviction covered by the plea agreement. This issue has “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 a 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.” Nebraska Ethics Advisory Opinion for Lawyers, Opinion No. 14-03.

On October 14, 2014, Department of Justice Policy stated that federal prosecutors should “no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel, whether those claims are made on collateral attack, or, when permitted by circuit law, made on direct appeal.” That policy also held that where such waivers had already been entered, federal prosecutors should “decline to enforce the waiver when defense counsel rendered ineffective assistance resulting in prejudice or when the defendant’s ineffective assistance claim raises a serious debatable issue that a court should resolve.”

What had been a prevalent practice in guilty plea agreements in federal courts and to a lesser extent in state courts is now almost universally condemned as unethical. Criminal defense attorneys were ethically prohibited from

counseling a criminal defendant to waive a future IAC claim in a guilty plea agreement because it would be a conflict of interest for counsel to do so.

“The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients’ counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.” Standard 4-1.2(b), *Functions and Duties of Defense Counsel*, ABA Criminal Justice Standards for the Defense Function, Fourth Edition (2017).

The conflict of interest arising out of a criminal defense attorney obtaining an agreement from a client not to sue counsel for legal malpractice is obvious. The attorney’s interest is in avoiding a malpractice lawsuit and that conflicts with the client’s interest to have a potential remedy for his lawyer’s deficient legal representation. Such an agreement barring a client from suing counsel is at least a subconscious disincentive to provide the best possible representation as the threat of professional accountability is significantly reduced.

As the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 692 (1984), explained:

One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, 446 U.S., at 345-350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel’s duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.

Criminal defense counsel should avoid trying to insulate themselves from legal liability by securing agreements from their clients prohibiting legal malpractice suits for the representation provided as there is a very strong possibility that such an agreement will constitute a disqualifying conflict of interest for the lawyer. Criminal defendants have the right to expect their lawyers will represent them knowing if the representation is deficient it can be reviewed by either an IAC claim in post-conviction proceedings or in malpractice litigation.

Defense Counsel’s Efforts to Insulate Themselves From Liability and Conflicts of Interest, J. Vincent Aprile II, © Published in *Criminal Justice*, Vol. 41, No. 01, by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means stored in an electronic database or retrieval system without the express consent of the American Bar Association or the copyright holder.

Vince Aprile, JD, LLM, began his legal career as a Captain in the Army Judge Advocate General’s Corps, where he did trial and appellate work (1969-1973). He then was a public defender with the Kentucky Department of Public Advocacy, where he served as the agency’s inaugural director of the appellate division and general counsel (1973-2003). He has argued four cases in the U.S. Supreme Court, winning two. Vince has taught lawyers in CLE presentations and advocacy programs in more than 35 states, Canada, Puerto Rico and Russia (Moscow and St. Petersburg). His column, *Criminal Justice Matters*, has been published as a regular feature of the ABA’s *Criminal Justice* magazine for 34 years (1992 to present). Since 2003, Vince has practiced law with Lynch, Cox, Gilman & Goodman, PSC. ■



Student-Firm Networking Event

The Louisville Bar Association, in partnership with the UofL Brandeis School of Law, invites you to join us for a special networking event designed to connect current law students with local smaller and mid-sized firms that typically don’t participate in on-campus interviews.

Firms:

This is a unique opportunity to introduce your firm to the law students who will soon join our local legal community as new attorneys. Contact: kmiller@loubar.org.

Students:

Meet local attorneys and leaders from small and midsize firms, explore career opportunities and build connections that could lead to future clerkships, internships or other opportunities. This is your chance to discover career paths beyond the traditional large-firm route! Contact: donna.lee@louisville.edu.

October 7
5:30 - 7:30 PM
Louisville Bar Center
600 W. Main St. #110