When "Ministers of Justice" Violate Rules of Professional Conduct During Plea Bargaining: Contractual Consequences

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ABSTRACT

This Article argues that when a prosecutor—a "minister of justice"—violates a rule of professional conduct during plea bargaining, provisions of the agreement that are the product of the violation are likely unenforceable. Violating a rule of professional conduct is usually against public policy, and plea agreements, like all contracts, are enforceable only to the extent that enforcement does not contradict public policy.

As an example, this Article primarily examines waivers of the right to collateral attack. A broadly worded waiver of the right to collateral attack includes a waiver of the right to claim ineffective assistance of counsel. Bar associations have concluded, generally, that a defense attorney cannot advise his or her client to accept such a waiver. Prosecutors, under the rules of professional conduct, cannot induce or attempt to induce a violation of the rules. As such, if a prosecutor makes an offer with a broadly worded waiver of the right to collateral attack, he or she has violated a rule of professional conduct.

The state has a substantial interest in enforcing the rules of professional conduct. Doing so not only protects the public but also encourages trust in the criminal justice system and the legal profession more generally. Provisions of a plea agreement that are made through a bargaining process that violated a rule, therefore, cannot be enforced.

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INTRODUCTION

Carmichael Cannady pled guilty in the summer of 1999 "to a drug-related conspiracy charge."[1] As a part of a plea agreement, Mr. Cannady agreed to waive his right to launch a collateral attack under 28 U.S.C. § 2255.[2] Such a broadly worded

1. United States v. Cannady, 283 F.3d 641, 642 (4th Cir. 2002).

2. *Id. Ballentine's Law Dictionary* defines a collateral attack as:

> Attempting to impeach or challenging the integrity of a judgment, decree, or order in an action or proceeding other than that in which the judgment, decree, or order was rendered, other than by appeal from, or review of, the judgment, decree, or order and other than an action or proceeding instituted for the express purpose of annulling, correcting, or modifying the judgment, decree, or order, or enjoining its execution.

Collateral attack, BALLENTINE'S LAW DICTIONARY (3d ed. 2010).

Certain claims generally cannot be raised in a direct appeal, which makes collateral attacks particularly important. For example, "actual innocence generally is not a cognizable independent claim on [direct] appeal." Meghan J. Ryan & John Adams, *Cultivating Judgment on the Tools of Wrongful Conviction*, 68 SMU L. REV. 1073, 1103 (2015) (citing Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 602 (2009)).

Ineffective assistance of counsel claims are problematic on direct appeal. *See generally* Thomas M. Place, *Deferring Ineffective Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel*, 98 KY. L.J. 301 (2010). "As a general rule, in order for the issue of trial counsel ineffectiveness to be raised on direct appeal, new counsel needs to be appointed or retained and must present the ineffectiveness claim to the trial court in a motion for a new trial." *Id.* at 301 n.6. Many times, trial counsel will not realize they were

waiver encompassed, among other things, the right to claim ineffective assistance counsel. The judge, apparently, required waivers as a standard operating procedure.[3] The judge said during the proceedings:

> The point is I'm not going to waste time by taking a guilty plea and then having him file a 2255 that says Mr. Glaser [Cannady's attorney] didn't prepare for trial; and, therefore, I want to withdraw my plea and have a trial later two years from now. That is not going to happen.
>
> So either he decides to waive the 2255, or we are going to go to trial, and I will get the jury down here this afternoon and we'll start.[4]

Mr. Cannady responded, "that he did not know what a 2255 motion was."[5] The judge told him, "you will find out as soon as you get to a federal system."[6] The judge never informed him of one element of the crime.[7]

A rule of criminal procedure at the time stated, "the attorney for the government and the attorney for the defendant . . . may engage in discussions with a view toward reaching a[] [plea] agreement" but "that the district court 'shall not participate in any such discussions,'"[8] and so Mr. Cannady invoked § 2255 to argue the judge inappropriately asserted himself into the plea bargaining process.[9] The Fourth Circuit noted, "in the course of arguing that the district judge coerced him into accepting the plea agreement, [Mr.] Cannady state[d] that waivers of the right to initiate § 2255 proceedings 'have been held illegal by many if not all appellate courts.'"[10]

Unfortunately for Mr. Cannady, he was wrong. The Fourth Circuit wrote, "[T]he courts considering the issue have found § 2255 waivers to be generally valid, subject to the same conditions and exceptions applicable to waivers of the right to file a direct appeal."[11] Federal courts since have also generally concluded

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ineffective. *Id*. at 302. Even if trial counsel realizes he or she was possibly ineffective and new counsel is retained, if "the record is incomplete or inadequate for purposes of deciding the claim, many states will defer the claim to the collateral review process instead of remanding the claim to the trial court." *Id*. Indeed, the U.S. Supreme Court has stated, "collateral review will frequently be the only means through which an accused can effectuate the right to counsel . . . ." *Id*. at 301–02 (quoting Kimmelman v. Morrison, 477 U.S. 365, 378 (1986)).

3. *Cannady*, 283 F.3d at 642–43.

4. *Id*. at 642 (alterations in the original).

5. *Id*. at 643.

6. *Id*.

7. *Id*.

8. *Id*. (quoting FED. R. CRIM. P. 11(e)(1) (1999)) (alterations in the original). Plea agreement procedures are now outlined in FED. R. CRIM. P. 11(c) (2019). The current rule has essentially the same prohibition: "The court must not participate in these discussions." FED. R. CRIM. P. 11(c).

9. *Cannady*, 283 F.3d at 644.

10. *Id*. at 645 n.3.

11. *Id*. (citing Garcia-Santos v. United States, 273 F.3d 506, 509 (2d Cir. 2001) (per curiam); United States v. Cockerham, 237 F.3d 1179, 1183 (10th Cir. 2001); DeRoo v. United States, 223 F.3d 919, 923 (8th Cir. 2000); Watson v. United States, 165 F.3d 486, 488–89 (6th Cir. 1999); United States v. Wilkes, 20 F.3d 651,

waivers are enforceable.[12]

Problematically, Mr. Cannady's attorney and the prosecutor faced an ethical dilemma: lawyers violate their rules of professional conduct by participating in the making of such a plea bargain.[13] A supermajority of bar associations to issue ethics opinions on the subject have concluded that "to the extent that a plea agreement provision operates as a waiver of the client's right to claim ineffective assistance of counsel, a defense lawyer may not ethically counsel his client to accept that provision."[14] Perhaps more importantly, prosecutors, in asking for a waiver, also violate a rule by "implicitly requesting that the defense lawyer counsel his client to accept . . . [the waiver], which is an inducement to the defense lawyer to violate Rules [of Professional Conduct]."[15] When plea bargaining, prosecutors are expected to live up to high standards as "minister[s] of justice,"[16] and they should be held to the standards imposed by the rules of professional conduct.

Both scholars and courts have long recognized that plea agreements are unilateral contracts.[17] As such, plea agreements may be unenforceable on public policy grounds,

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653 (5th Cir. 1994) (per curiam); United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993); United States v. Brown, 232 F.3d 399, 405–06 (4th Cir. 2000)).

12. Va. State Bar Standing Comm. on Legal Ethics, Va. Legal Ethics Op. 1857, at 2 (2011), https://www.vsb.org/docs/LEO/1857.pdf [https://perma.cc/KU89-CPQR] (citing United States v. Lemaster, 403 F.3d 216, 220 (4th Cir. 2005) ("Federal courts have consistently held that such a [waiver] provision is legally enforceable against the defendant.")).

See, for example, *United States v. Lemaster*, explaining a trial court judge's refusal to address an ineffective assistance of counsel claim:

> In addition to the claims discussed in the text, Lemaster alleged in his § 2255 motion that his counsel was constitutionally ineffective in the following respects: (1) counsel failed to provide Lemaster with a copy of the presentencing report; (2) counsel failed to object to the presentencing report as directed by Lemaster; (3) counsel failed to request a downward departure based on Lemaster's diminished capacity; (4) counsel failed to request a downward departure based on Lemaster's deteriorating medical condition; and (5) counsel ignored Lemaster's correspondence. . . . Because the district court held that Lemaster knowingly and voluntarily waived his right to collaterally attack his conviction and sentence, it declined to address these claims on the merits.

403 F.3d at 219 n.1. On appeal, the Fourth Circuit said a waiver of the right to collateral attack prevented an ineffective assistance of counsel claim "in the absence of extraordinary circumstances." *Id*. at 221. It suggested that extraordinary circumstances had to be either an admission by the government that the defense attorney was ineffective or evidence of physical or mental impairment so significant as to suggest the waiver was involuntary. *Id*. at 221–23.

13. Va. Legal Ethics Op. 1857, *supra* note 12.

14. *Id*. at 2 & n.5.

15. *Id*. at 3.

16. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2018) [hereinafter MODEL RULES] ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 39 (2009) ("For over 150 years, courts and scholars have consistently urged for the image of the American prosecutor as a 'minister of justice,' a person who, in effect never loses a case, whether conviction or acquittal, as long as the outcome is fair. Prosecutors in the United States represent 'the people' . . . . As a result, the prosecutor's role in the adversarial system differs substantially from that of the defense attorney; the prosecutor is a quasi-judicial officer.").

17. *See generally* Puckett v. United States, 556 U.S. 129, 137 (2009) ("Although the analogy may not hold in all respects, plea bargains are essentially contracts."); State v. Wheeler, 631 P.2d 376, 378–79 (Wash. 1981)

like any other contract.[18] This Article makes two contributions. First, this Article argues that provisions of plea agreements should be unenforceable if the prosecutor violated a rule of professional conduct in the bargaining process. Second, this Article explores, given the ethical restraints on prosecutors, what terms they can ask for. As an example, this Article primarily considers waivers of the right to collateral attack. Bar associations' opinions have used different reasoning to conclude that defense attorneys cannot counsel clients to accept waivers of collateral attacks[19] (and, therefore, that prosecutors cannot ask). Depending on the rationale, it may be possible that collateral attacks generally can be waived as long as ineffective assistance of counsel is not.

This Article proceeds in three parts. Part I argues prosecutors cannot violate rules of professional conduct during plea bargaining without also violating public policy. This Article does not make the more substantial claim that such violations are problematic under the Due Process Clause, though the argument might be similar. Part II walks through various rationales bar associations have used to conclude collateral attack waivers are unethical. Part III explores what prosecutors may ask for given these restraints. This Article concludes that violations of the rules of professional conduct during plea bargaining have contractual consequences.

I. VOIDING PLEA AGREEMENTS FOR ETHICS VIOLATIONS

Prosecutors often ask for broadly worded appeal waivers, in part, because the law has not definitively said they cannot. Recently, the Honorable Jack B. Weinstein, a judge in the Eastern District of New York, authored an opinion explaining the problem created by waivers of the right of collateral attack in more detail.[20] He stated, "[p]lea-bargaining '*is* the criminal justice

(internal citations omitted) ("The weight of authority is that, absent some detrimental reliance by the defendant, the State may withdraw from any plea agreement prior to the actual entry of a guilty plea. . . . That result has been reached by strictly applying contract principles and characterizing the plea bargain as a unilateral contract . . . . Only one case has deviated from that conclusion."); Mark Pettit, Jr., *Modern Unilateral Contracts*, 63 B. U. L. REV. 551, 568–69 (1983); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992). *See also* Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 164 (2007) ("[A] large body of legal scholarship on plea bargaining has suggested that plea bargains are a form of contract—a negotiated bargain between two parties—that takes place in a specialized setting, but still shares many of the same features of contract and contract negotiation, writ broadly."); Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 159 (2008) ("Courts have applied various bodies of law when dealing with broken prosecutorial promises, including the American Bar Association (ABA) Standards for Criminal Justice, the U.S. Constitution, and civil contract law. . . . Of these three bodies of law, however, contract law provides the best and most comprehensive framework for the enforcement of plea agreements.").

Note that at least one court has categorized plea agreements as bilateral contracts. Ramirez v. State, 89 S. W.3d 222, 226 n.5 (Tex. Ct. App. 2002) (citing Oritz v. State, 885 S.W.2d 271, 273 (Tex. Ct. App. 1994), *aff'd*, 933 S.W.2d 102 (Tex. Crim. App. 1996)).

18. RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

19. Va. Legal Ethics Op. 1857, *supra* note 12, at 2.

20. United States v. Chua, 349 F. Supp. 3d 214 (E.D.N.Y. 2018).

system.'"[21] The vast majority of federal convictions—over ninety-five percent—result from guilty pleas.[22] Prosecutors have substantial bargaining power: "[P]rosecutors are free to warn suspects of additional and more serious charges, and to offer steep sentencing discounts only to those who will 'play ball.'"[23] Given the inequality in bargaining power, prosecutors frequently insert "boilerplate terms which are not negotiated."[24] A 2015 study found over two-thirds "of plea agreements contained a waiver of the right to a collateral attack."[25] For some criminal defendants, accepting such a plea agreement might be necessary to maintain their "social and economic stability following indictment."[26] A source cited by Judge Weinstein, for example, explained that the breadwinner in a family might not be able to be confined in jail for months waiting for trial.[27] Other defendants might be risk-averse and fear an increased sentence if they lose at trial.[28]

In part because of these issues, Judge Weinstein found that "a near blanket waiver of the right to collateral review without enumeration of all recognized exceptions . . . is not allowed."[29] He noted four specific theories of collateral attack that must be carved out: (1) challenges to the underlying waiver; (2) ineffective assistance of counsel claims; (3) considerations of "constitutionally impermissible factor[s]" in proceedings or sentences; and (4) miscarriages of justice.[30]

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21. *Id*. at 217 (quoting Missouri v. Frye, 566 U.S. 134, 144 (2012)).

22. *Id*.

23. *Id*. at 218 (quoting Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 74–75 (2015)).

24. *Id*. (citing Klein, Remis & Elm, *supra* note 23, at 75); R. Michael Cassidy, *Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias*, 48 SAN DIEGO L. REV. 1, 13 (2011) ("A . . . troublesome practice occurs when a prosecutor includes an explicit provision in a plea agreement whereby the defendant waives the right to later challenge the conviction on the grounds that the defendant was deprived of the Sixth Amendment Right to the effective representation of counsel during the proceeding. Prosecutors seem to be going 'waiver crazy' these days, trying to insulate all plea agreements from collateral attack on *any* grounds in order to achieve finality to the criminal process."). *But see* Memorandum from James M. Cole, U.S. Deputy Att'y Gen., to All Fed. Prosecutors (Oct. 14, 2014), https://www.justice.gov/file/70111/download [https://perma.cc/TKM8-X6AY] ("When negotiating a plea agreement, the majority of United States Attorney's offices do not seek a waiver of claims of ineffective assistance of counsel.").

25. *Chua*, 349 F. Supp. 3d at 218 (citing Klein, Remis & Elm, *supra* note 23, at 87).

26. *Id*. (citing Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, THE ATLANTIC (May 2, 2017), https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/ [https://perma.cc/5T7X-JFGK]).

27. *Id*. (citing Walsh, *supra* note 26).

28. Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ [https://perma.cc/LFX5-KCQ9] ("As prosecutors have accumulated power in recent decades, judges and public defenders have lost it. To induce defendants to plead, prosecutors often threaten 'the trial penalty': They make it known that defendants will face more-serious charges and harsher sentences if they take their case to court and are convicted.").

29. *Chua*, 349 F. Supp. 3d at 218.

30. *Id*. at 218–20.

The state of the law, however, is unclear, despite Judge Weinstein's articulate opinion. In early 2019, the U.S. Supreme Court explicitly left unanswered a critical question: What appealable claims can a defendant waive in a plea agreement?[31] Some lower courts have carved out various arguments that are unwaivable, such as "claims that a sentence is based on race discrimination, exceeds the statutory maximum authorized, or is the product of ineffective assistance of counsel."[32] Seemingly, the only argument lower courts universally agree is unwaivable is a challenge to the enforceability of a waiver itself.[33] Adding to the confusion, courts have not always articulated why they consider some arguments unwaivable. For example, the Fourth Circuit explained, "defendants can waive fundamental constitutional rights such as the right to counsel, or the right to a jury trial."[34] Just a paragraph later, the same opinion stated,

> [w]e agree . . . that a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court. For example, a defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute or based on a constitutionally impermissible factor such as race.[35]

The circuit court did not explain the line between waivable and unwaivable.[36] Furthermore, the Ninth Circuit has noted, "[o]nly a handful of cases interpret an appeal waiver or discuss its scope . . . ."[37]

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31. *See generally* Garza v. Idaho, 139 S. Ct. 738, 745 n.6 (2019) ("We make no statement today on what particular exceptions [i.e., claims that are unwaivable] may be required."). This critical footnote in the opinion significantly changes the scope of the holding. The question in *Garza* was not whether a waiver was enforceable. The question was whether, despite a waiver, defense counsel had a duty to file an appeal at the request of the defendant. *Id.* at 742. As the Cato Institute explained, lower courts had relied heavily on the fact that an appeal might be a breach of the plea agreement. Clark Neily & Jay Schweikert, Garza v. Idaho, LEGAL BRIEFS: CATO INSTITUTE (Aug. 17, 2018), https://www.cato.org/publications/legal-briefs/garza-v-idaho [https://perma.cc/P2PR-4L9R] "[W]hile that is an important practical consideration to discuss with the defendant, it is ultimately the defendant's choice to decide how to weigh that risk against the possible benefit of an appeal." *Id.* Furthermore, because some courts have declared some waivers unenforceable, it is particularly problematic for counsel to ignore a direct instruction from a client. *See generally* sources cited in this footnote.

32. *Garza*, 139 S. Ct. at 745 n.6 (quoting Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 224 (2005)).

33. *Id.* at 745 ("Most fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable . . . .").

34. United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992) (quoting United States v. Wiggins, 905 F.2d 51, 53 (4th Cir. 1990)).

35. *Id.*

36. *See also* United States v. Jacobsen, 15 F.3d 19, 23 (2d Cir. 1994) (citing *Marin*, 961 F.2d at 496) ("Given that a waiver of the right not to be sentenced on the basis of a constitutionally impermissible factor may be invalid . . . we read the agreement narrowly and hold that the present appeal, which raises no Guidelines issues, has not been waived.").

37. United States v. Johnson, 67 F.3d 200, 202 (9th Cir. 1995).

Instead of arguing directly any claims are categorically unwaivable, this Part argues a waiver is void for public policy under principles of contract law if made in violation of a rule of professional conduct. It seeks to build on the general agreement that a defendant may challenge the enforceability of a waiver.[38] It begins by noting various precedents for voiding a contract on public policy grounds if the contract violates a rule of professional conduct. Next, this Part examines case law concluding plea agreements are void on public policy grounds. These two arguments can be merged to support the proposition that if a prosecutor violates a rule of professional conduct, the underlying plea agreement may be unenforceable on public policy grounds.

A. WHAT HAPPENS WHEN LAWYERS CONTRACT UNETHICALLY?

Rules of professional conduct, despite being created by state supreme courts, "are statements of public policy with the equivalent legal force and effect as statutes . . . ."[39] At a high level, as one textbook explains, these rules serve two purposes: "First, the ethical rules seek to protect clients and the public as consumers. Second, they seek to protect the professional identity of lawyers."[40] These policies are connected; as the profession loses its dignity, the public also suffers.[41] "The perceived "alarming amount of corruption" in the nineteenth-century legal profession was partly attributed to a decline in professional regulation.[42] The first promulgation of ethical rules, the American Bar Association's Professional Canon of Ethics in 1908, was in response to this perceived corruption.[43] By ensuring the public holds the legal profession in high regard, states can ensure the public is confident in the legal system.[44]

Controversy exists regarding whether protecting the professional identity of lawyers is a legitimate goal of public policy.[45] However, it would be hard to

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38. *Garza*, 139 S. Ct. at 745.

39. Rich v. Simoni, 772 S.E.2d 327, 328 (W. Va. 2015); *see also* Calvert v. Mayberry, 440 P.3d 424, 430 (Colo. 2019) (quoting Rocky Mountain Hosp. & Med. Serv. v. Mariani, 916 P.2d 519, 525 (Colo. 1996) ("Although '[s]tatutes by their nature are the most reasonable and common sources for defining public policy,' professional ethical codes may also be expressions of public policy.").

40. RUSSELL G. PEARCE ET AL., PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH 180 (3d ed. 2017).

41. Skylar Reese Croy, *"Leave Me My Name!": Why Competitive Keyword Advertising Is an Ethical Landmine for Attorneys*, 103 MARQ. L. REV. 627, 638 (2019) (citing Daniel Callender, Comment, *Attorney Advertising and the Use of Dramatization in Television Advertisements*, 9 UCLA ENT. L. REV. 89, 92–93 (2001)).

42. Callender, *supra* note 41, at 93.

43. Croy, *supra* note 41, at 675–76 (quoting Callender, *supra* note 41, at 93).

44. *Id*. at 677 (quoting Florida Bar v. Went for It, 515 U.S. 618, 635 (1995)) ("In *Florida Bar v. Went for It, Inc*., the Court also stated that bars have 'substantial interest . . . in . . . preventing the erosion of the confidence in the profession . . . .'").

45. *E.g*., Rich v Simoni, 772 S.E.2d 327, 335 (W. Va. 2015) (Benjamin, J., concurring) ("I write separately, however, to express my belief that a Rule of Professional Conduct should only be determined to be a source of judicially conceived public policy when the rule at issue serves the public interest, not just the interest of the profession.").

identify a rule today that *solely* protects the profession.[46] As such, this Article is not overly concerned with the distinction, which seems mostly academic. Rules that bind prosecutors—in particular— protect the public.

1. A LAWYER CANNOT ENFORCE AN AGREEMENT THAT IS A PROHIBITED BUSINESS TRANSACTION UNDER THE RULES OF PROFESSIONAL CONDUCT

Courts have looked to several rules as sources of public policy when determining the enforceability of a contract. For example, courts will refuse to let attorneys enforce contracts that violate Rule 1.8, which states, in part:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
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> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
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> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.[47]

In *Calvert v. Mayberry*,[48] the Supreme Court of Colorado ruled a former attorney could not enforce contracts given that the procedures utilized to secure them

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46. If any rule fits this description, it would be the strict prohibition on the unauthorized practice of law ("UPL"). As one author stated,

> Last year, the legal profession continued to protect the delivery of legal services with multiple state bar ethics decisions negatively impacting legal service providers Avvo, LegalZoom, and Rocket Lawyer. . . . [Yet,] 80 percent—or 4 in 5 Americans—cannot obtain legal help. In most industries, this would be seen as a massive market opportunity for existing providers.
>
> In addition, I doubt you would hear arguments against other service providers that sound like protectionism. Yet, alternative legal service companies still operate fearful of being accused of the unauthorized practice of law or other ethical violations as they attempt to close the justice gap. . . . It's time to embrace alternative delivery by removing barriers masquerading as ethical issues or provider ability accusations and refocus the discussion on client demand, not attorney supply.

Mary Juetten, *When UPL Accusations Against Lawyer Paraprofessionals Are Just Protectionism*, A.B.A. J. (Jan. 12, 2018), http://www.abajournal.com/news/article/protectionism_and_upl_versus_paraprofessionals [https://perma.cc/TDY7-97CL]. Arguably, UPL is about protecting the monopoly lawyers have on the market and ensuring non-lawyers do not muddy lawyers' professional image. Protectionism is probably part of the reason for strict and broad understandings of UPL. However, to say that UPL is only about protecting the legal profession is cynical and ignores common sense. No reasonable person would suggest that all licensing requirements for lawyers should be done away with. UPL protects the public by ensuring those that practice law have at least minimal competency. It is not solely about protecting the legal profession.

47. MODEL RULES R. 1.8.

48. 440 P.3d 424 (Colo. 2019) (en banc).

violated Rule 1.8 without overcoming a rebuttable presumption that the contracts were enforceable.[49] David R. Calvert, while still a licensed attorney, helped a widow secure title to a house she and her husband owned jointly after her husband's death.[50] Notably, the widow had degraded mental capacity because of mental illness and drug use.[51] After securing title, the widow informed Mr. Calvert she wanted to sell the house.[52] Mr. Calvert loaned her $193,000 for renovations.[53] Mr. Calvert never advised the widow to seek independent legal advice, and the agreement was never put in writing.[54] A disciplinary case against Mr. Calvert summarized he had "plied a vulnerable client with loans in excess of one hundred thousand dollars without memorializing the terms of those loans."[55] Without the widow's knowledge, to secure his interest on the loan, he created and then recorded a false deed in another client's name and without the client's permission.[56] He then tried to have the false deed assigned to his real estate company.[57] As the disciplinary case stated, "[these acts] signal[ed] a calculated scheme to deprive his client of her home."[58] Mr. Calvert was disbarred for his scheme and other ethical violations.[59]

Following disbarment, the former attorney sued to enforce the contracts.[60] The court held the contracts void for public policy.[61] It reasoned not all rules represent public policy; only those that protect the public.[62] But the court held Rule 1.8 protected the public, and stated,

> Because of the unbalanced nature of the attorney-client relationship, . . . [the safeguards of Rule 1.8] are necessary to protect *the client*, as the "lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching" on the part of the attorney.[63]

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49. *Id.* at 427 ("[W]e hold that when an attorney enters into a contract without complying with Rule 1.8(a), the contract is presumptively void as against public policy; however, a lawyer may rebut that presumption by showing that, under the circumstances, the contract does not contravene the public policy underlying Rule 1.8(a).").

50. *Id.* at 428.

51. People v. Calvert, 280 P.3d 1269, 1287 (Colo. 2011) (describing the widow as "the epitome of a vulnerable victim: she suffer[ed] from mental illness and a severe chemical dependency, both of which significantly impair[ed] her judgment").

52. *Calvert v. Mayberry*, 440 P.3d at 428.

53. *Id.*

54. *Id.*

55. *People v. Calvert*, 280 P.3d at 1272.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Calvert v. Mayberry*, 440 P.3d at 428.

60. *Id.*

61. *Id.* at 434.

62. *Id.* at 430 ("To qualify as an expression of public policy . . . an ethical rule must (1) 'be designed to serve the interests of the public rather than the interests of the profession,' (2) 'not concern merely technical matters or administrative regulations,' and (3) 'provide a clear mandate to act or not act in a particular way.'").

63. *Id.* at 431 (quoting COLO RULES OF PROF'L CONDUCT R. 1.8 cmt. 1).

Other courts have also declared contacts void for public policy when they violate Rule 1.8. Indeed, the Colorado Supreme Court in *Mayberry* cited several.[64] One significant difference between Colorado and many other states, however, is that Colorado grants only a rebuttable presumption that a contract formed in violation of a rule is unenforceable.[65] Both Colorado and Washington recognize that although "all [ethical rule] violations are in some way injurious to the public, not all [ethical rule] violations will render any related contract injurious to the public."[66] For example, a court might enforce a contract formed in violation of a rule if voiding the contract would reward the attorney's unethical conduct, such as in one of the examples below.

2. CONTRACTS TO SHARE FEES WITH NON-ATTORNEYS ARE VOID FOR PUBLIC POLICY

Courts have also looked at Rule 5.4(a), which states, as a general rule, "[a] lawyer or law firm shall not share legal fees with a nonlawyer . . . ."[67] This rule preserves a core value of the profession: professional independence.[68] Lawyers are expected to render advice that is not influenced by non-lawyers.[69] Fee-sharing with a non-lawyer raises concerns that the non-lawyer is influencing the lawyer's advice.[70] For the most part, contracts in contravention of the rule are enforced only to the extent that enforcement punishes the lawyer's unethical conduct.

For example, a Florida attorney "verbally agreed to pay a paralegal a bonus calculated as a percentage of the attorney's fees."[71] The paralegal sued the attorney when he refused to pay part of the bonus.[72] As explained in an ABA article, "[t]he attorney argued the agreement was unenforceable because it constituted an

64. *Id.* at 432 (citing Succession of Cloud, 530 So. 2d 1146, 1150 (La. 1988); Evans & Luptak, PLC v. Lizza, 650 N.W.2d 364, 370 (Mich. Ct. App. 2002); Law Offices of Peter H. Priest, PLLC v. Coch, 780 S.E.2d 163, 174 (N.C. Ct. App. 2015); LK Operating, LLC v. Collection Grp., LLC, 331 P.3d 1147, 1164 (Wash. 2014)).

65. *Id.*

66. *Id.* (quoting *LK Operating*, 331 P.3d at 1147).

67. MODEL RULES R. 5.4(a).

68. MODEL RULES R. 5.4 cmt. 1.

69. *Id.*

70. *Id.* Rule 5.4 is controversial because it presumes lawyers cannot be trusted to ignore improper influence. Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 617 (2013) ("Rule 5.4 raises doubts about whether the bar still expects lawyers to cultivate independence as a trait of character. If in an earlier day lawyers could be counted on to withstand outside pressure in order to do what they thought was right as a matter of professional duty, the premise of Rule 5.4 is that lawyers need special protection against outside influence."). Many common law nations have minimized the prohibition on fee-sharing. *Id.* Notably, these nations have not had substantial problems with professional independence. *Id.* This Article should not be read as an endorsement of the public policy enshrined in Rule 5.4. But, as long as the rule exists, the public policy is clear: fee-sharing is a threat to professional judgment, and, therefore, restricted.

71. *Ethical Landmines on Using Nonlawyer Staff*, YOUR A.B.A. (Nov. 2017), https://www.americanbar.org/news/abanews/publications/youraba/2017/november-2017/ensure-your-paralegals-ethics-align-with-yours-/ [https://perma.cc/R3BF-BEXJ].

72. *Id.*

improper fee-sharing agreement that violated the professional conduct rules."[73] The judge recognized that the fee-sharing agreement violated the rules of professional conduct; however, the judge still enforced the agreement.[74]

Lawyers might be able to escape enforcement in a fact pattern involving unethical conduct by non-lawyers. For example, in *Rich v. Simoni*,[75] a West Virginia attorney allegedly entered into a fee-sharing agreement with Joseph Simoni, a graduate of the West Virginia University College of Law, who never passed the bar.[76] The court was not willing to go so far as to say all rules of professional conduct represented public policy because "some of the rules are stated . . . in hortatory terms only."[77] It did, however, unanimously hold that the prohibition on fee-sharing was a rule that represented a public policy.[78] It concluded the fee-sharing agreement ought to be "void as against public policy and wholly unenforceable."[79] This case is unique as it involved unethical conduct by a lawyer and the unauthorized practice of law by a non-lawyer. A better resolution, perhaps, would have been to punish both the lawyer and non-lawyer by ordering the non-lawyer's share of the fee returned to the client.

These examples represent prevalent thinking in the legal community. The *Rich* court declared its holding was in light "of the highly persuasive authority throughout the country. . . ."[80] Similarly, the Court of Appeals in *Mayberry* noted, "[c]ourts in other states have held that the violation of an ethical rule that is based on public policy renders contracts that were formed in violation of the ethical rule void."[81] The Colorado Supreme Court made a similar observation, already discussed above. It is hard to find counterexamples (though, admittedly, finding dissents is not that difficult).[82]

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73. *Id.*

74. *Id.*

75. 772 S.E.2d 327 (W. Va. 2015).

76. *Id.* at 328–29.

77. *Id.* at 334. For example, Model Rule 6.1 states, "[a] lawyer *should* aspire to render at least (50) hours of pro bono publico legal services per year." MODEL RULES R. 6.1 (emphasis added). This rule represents an aspirational goal of the profession, but, as noted by its use of the word *should*, it is not mandatory. As such, it is not a public policy rule *per se* but instead a mere public policy goal.

78. *Rich*, 772 S.E.2d at 335.

79. *Id.*

80. *Id.* at 334–35; Institutional Labor Advisors, LLC v. Allied Res., Inc., 2014 U.S. Dist. LEXIS 118070, at *5 (W.D. Ky. 2014)).

81. Calvert v. Mayberry, 442 P.3d 905, 913 (Colo. Ct. App. 2016*), aff'd in part and rev'd in part*, 440 P.3d 424 (Colo. 2019) (citing Santiago v. Evans, 547 F. App'x 923, 926–27 (11th Cir. 2013); Law Offices of Peter H. Priest, PLLC v. Coch, 780 S.E.2d 163, 174 (N.C. Ct. App. 2015); Scolinos v. Kolts, 37 Cal. App. 4th 635 (1995); Succession of Cloud, 530 So. 2d 1146, 1150 (La. 1988); Evans & Luptak, PLC v. Lizza, 650 N.W.2d 364, 370 (Mich. Ct. App. 2002); LK Operating, LLC v. Collection Grp., LLC, 331 P.3d 1147, 1164–65 (Wash. 2014)).

82. Calvert v. Mayberry, 440 P.3d 424, 435 (Colo. 2019) (en banc) (Coats, C.J., dissenting) ("I do not agree with the majority that the ethical rules promulgated by this court for the supervision of the practice of law are in any way capable of expressing public policy of the jurisdiction. Nor do I agree that a violation of those rules, even if they could be a source of public policy, could have the effect on contract formation envisioned by the majority.").

B. WHEN WILL A COURT INVALIDATE A PLEA AGREEMENT FOR PUBLIC POLICY REASONS?

Courts are willing to invalidate plea agreements, and similar contracts, that violate public policy. The seminal case is the U.S. Supreme Court's decision in *Newton v. Rumery*.[83] David Champy was charged with aggravated felonious sexual assault in 1983.[84] Bernard Rumery was a friend of Mr. Champy and knew the victim, Mary Deary.[85] He read about the assault in the local newspaper and then called Ms. Deary.[86] Precisely what was said is unknown.[87] What is clear, however, is that the call disturbed Ms. Deary, who reported the call to the local chief of police.[88] She felt intimidated.[89] Allegedly, Mr. Rumery had told Ms. Deary she might "end up like" a couple of women that were murdered in the New England area if she proceeded with her accusation.[90] Mr. Rumery was indicted with witness tampering.[91]

Mr. Rumery's attorney had an interesting strategy.[92] His attorney told a deputy county attorney that he "had better [dismiss] these charges, because we're going to win them and after that we're going to sue [for harm caused during the arrest]."[93] The deputy county attorney dropped the charges in exchange for a promise that "[Mr.] Rumery would . . . not sue the town, its officials, or [Ms.] Deary for any harm caused by the arrest."[94]

Almost a year later, Mr. Rumery filed suit under § 1983.[95] The government cited the agreement in a motion to dismiss.[96] The First Circuit ruled that the agreement was invalid because such agreements "tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied depravations of constitutional rights."[97] As the circuit court further explained, quoting a decision from the D.C. Circuit: "The major evil of these agreements is not that charges are sometimes dropped against people who probably should be prosecuted. Much more important, these agreements suppress complaints against police misconduct which should be thoroughly aired in a free society."[98] The circuit court ruled that such agreements are

83. 480 U.S. 386 (1987).
84. *Id.* at 389.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 389–90.
91. *Id.* at 390.
92. *See id.*
93. *Id.* (first alteration in the original).
94. *Id.*
95. *Id.* at 391.
96. *Id.*
97. *Id.* at 394 (quoting Rumery v. Newton, 778 F.2d 66, 69 (1st Cir. 1986)).
98. *Rumery*, 778 F.2d at 70 (quoting Dixon v. District of Columbia, 394 F.2d 966, 968–69 (D.C. Cir. 1968)).

per se invalid; however, the U.S. Supreme Court reversed.[99] It found problematic that the *per se* rule rested on the unfounded belief "that prosecutors will seize the opportunity for wrongdoing."[100] The Court felt that "the mere opportunity to act improperly does not compel an assumption that all –or even a significant number of –[such agreements] stem from prosecutors abandoning 'the independence of judgment required by [their] public trust. . . ."[101] The Court also noted that the prosecutor had a significant interest in protecting the victim, Ms. Deary, from being forced to testify.[102] The Court explained:

> Turning to the agreement presented by this case, we conclude that the District Court's decision to enforce the agreement was correct. As we have noted, . . . it is clear that Rumery voluntarily entered the agreement. Moreover, in this case the prosecutor had an independent, legitimate reason to make this agreement directly related to his prosecutorial responsibilities. The agreement foreclosed both the civil and criminal trials concerning Rumery, in which Deary would have been a key witness. She therefore was spared the public scrutiny and embarrassment she would have endured if she had had to testify in either of those cases. Both the prosecutor and the defense attorney testified in the District Court that this was a significant consideration in the prosecutor's decision.[103]

Newton has been controversial. The Court relied on what it called a "well established" principle: "[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."[104] Seth F. Kreimer, a professor at the University of Pennsylvania Law School, has argued the Court may have utilized the wrong contractual principle:

> It is debatable . . . whether the *Rumery* majority identified the appropriate "well-established" common law principle. The common law fairly bristles with other appropriate starting points for analysis, most of which would point to the per se voidability of release-dismissal bargains. Contracts induced by threats of prosecution are voidable at common law, and duress by imprisonment can prevent the enforcement of releases. At common law, obtaining items of value under color of public office constituted the crime of extortion, and the common law offense of "compounding a crime" punished agreements not to prosecute a crime in exchange for payment. It should be no surprise,

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99. Newton v. Rumery, 480 U.S. 386 (1987). Note that courts and scholars, including those cited in this Article, refer to the Supreme Court case as both *Newton* and *Rumery*. To keep with the custom of referring to a case by the first party name, the author refers to the case as *Newton*. However, this Article quotes cited text faithfully where the authority uses *Rumery*.

100. *Id*. at 396.

101. *Id*. at 397 (quoting Imbler v. Pachtman, 424 U.S. 409, 423 (1976)) (second alteration in the original).

102. *Id*. at 398.

103. *Id*. at 397–98.

104. *Id*. at 392.

> therefore, that before *Rumery*, the weight of state and federal precedent had prohibited such agreements.[105]

While *Newton* upheld an agreement, other courts have used the reasoning in the case to invalidate plea agreements—or at least provisions of plea agreements. Notably, as both the Court's opinion and a concurrence by Justice O'Connor explained, the agreement in *Newton* was not a plea agreement because Mr. Rumery never pled to anything—the deal was a "release-dismissal agreement" where the prosecutors drop charges in exchange for a release from certain liabilities.[106] Nevertheless, the case is cited for the proposition that plea agreements can be voided for derogation of public policy.[107]

For example, in *People v. Smith*,[108] the Michigan Supreme Court invalidated a provision of a plea agreement that prohibited a defendant from running for office, and a plurality of the court relied on the reasoning in *Newton*.[109] As a plurality of the court explained:

> The United States Supreme Court has provided a framework for assessing whether certain agreements between prosecutors or government officials and criminal defendants violate public policy. In *Town of Newton v. Rumery*, the Court explained the "well established" balancing test under which "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."[110]

The plurality went on to explain that "[t]o treat political rights as economic commodities corrupts the political process."[111] It also noted, "the common law has long held that agreements impairing elections are void as against public policy."[112] The plurality then concluded, "[w]e would further hold that when challenged as void against public policy, bar-to-office provisions in plea agreements should be analyzed under the balancing test in *Rumery*."[113]

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105. Seth F. Kreimer, *Releases, Redress and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. PA. L. REV. 851, 861–62 (1988). Note that one justice on the Michigan Supreme Court has cited this passage of Professor Kreimer's article. People v. Smith, 918 N.W.2d 718, 733 n.3 (Mich. 2018) (Clement, J., concurring in part and concurring in the judgment in part).

106. *Newton v. Rumery*, 480 U.S. at 393 n.3, 399 (O'Connor, J., concurring in part).

107. *See Smith*, 918 N.W.2d at 724 n.24 (citing Burke v. Johnson, 167 F.3d 276, 285 (6th Cir. 1999)) ("[S]ubsequent courts have applied *Rumery* to plea bargains containing release-dismissal agreements.").

108. 918 N.W.2d 718 (Mich. 2018).

109. *Id.* at 723–24.

110. *Id.* at 723. Note that only a plurality of the court joined this section of the opinion. *Id.* at 720 n.2 ("Because the partial concurrence did not join this portion of the opinion, adoption of the *Rumery* test failed to garner majority support.").

111. *Id.* at 726 (quoting Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1398 (9th Cir. 1991)) (internal quotation marks omitted).

112. *Id.* at 727 & n.53 (citing various sources for this proposition, including *Corpus Juris Secundum*).

113. *Id.* at 731.

Some courts post-*Newton* have gone further than the court in *Smith*. For example, *United States v. Perez*[114] suggested all appeal waivers are invalid.[115] In this case, the defendant pled guilty, subject to a plea agreement with the following language:

> Defendant is aware that he has the right to challenge his sentence and guilty plea on direct appeal. Defendant is also aware that he may, in some circumstances, be able to argue that his plea should be set aside, or his sentence set aside or reduced, in a collateral challenge (such as pursuant to a motion under 28 U.S.C. § 2255).
>
> In consideration of the concessions made by the U.S. Attorney in this Agreement, Defendant knowingly and voluntarily waives his right to appeal or collaterally challenge:
>
> (1) Defendant's guilty plea and any other aspect of Defendant's conviction, including, but not limited to, any rulings on pretrial suppression motions or any other pretrial dispositions of motions and issues;
>
> (2) The adoption by the District Court at sentencing of any of the positions found in paragraph 3 [covering the Offense Level and the acceptance of responsibility reduction] which will be advocated by the U.S. Attorney with regard to offense conduct, adjustments and/or criminal history under the U.S. Sentencing Guidelines or application of minimum mandatory sentences; and
>
> (3) The imposition by the District Court of a sentence which does not exceed that being recommended by the U.S. Attorney, as set out in paragraph 4 [covering sentence recommendation], even if the Court rejects one or more positions advocated by the U.S. Attorney or Defendant with regard to the application of the U.S. Sentencing Guidelines or application of minimum mandatory sentences.

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114. 46 F. Supp. 2d 59 (D. Mass. 1999). See Jack W. Campbell IV & Gregory A. Castanias, *Sentencing-Appeal Waivers: Recent Decisions Open the Door to Reinvigorated Challenges*, 24 CHAMPION 34 (2000), for historical context and an explanation of the significance of *Perez*. Some courts have positively cited *Perez*. In particular, one district court, citing *Perez* at a few points, concluded that circuit courts and district courts should approach waivers differently. United States v. Mutschler, 152 F. Supp. 3d 1332, 1338 (W.D. Wash. 2016). The opinion explained:

> Almost all of the circuits have concluded that, absent some egregious circumstance or a miscarriage of justice, a unilateral waiver of the right to appeal is enforceable . . . .
>
> The circuit courts, however, approach appellate waivers from a completely different perspective than district courts. At the appellate level, the bargain has already been struck and memorialized, and the issue on review is merely whether the defendant should be bound by the terms of the written agreement. In contrast, when the matter of an appellate waiver is before a district court, the plea agreement is still tentative, and the decision to be made is whether to accept the terms of the bargain proposed by the parties.

Id. at 1337–38. The judge also cited a Fifth Circuit opinion that stated, "a district court's refusal to accept such a waiver . . . would be within its discretion." *Id*. at 1333 (quoting United States v. Melancon, 972 F.2d 566, 568 (5th Cir. 1992)).

115. *Perez*, 46 F. Supp. 2d at 61.

> In consideration of the concessions made by the U.S. Attorney in this Agreement, Defendant agrees not to seek to be sentenced or resentenced with the benefit of any successful collateral challenge to any counseled criminal conviction that exists as of the date of this Agreement.
>
> Defendant's waiver of rights to appeal and to bring collateral challenges shall not apply to appeals or challenges based on new legal principles in First Circuit or Supreme Court cases decided after the date of this Agreement which are held by the First Circuit or Supreme Court to have retroactive effect.
>
> Defendant's waiver also shall not extend to an appeal or collateral challenge based solely on the argument that the District Court misunderstood the scope of its authority to depart from the applicable Sentencing Guideline range, where the District Court states on the record at sentencing both its desire to depart and the basis on which it would depart if it had the legal authority to do so.
>
> This Agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b), and the U.S. Attorney therefore retains his appeal rights.[116]

Despite how broadly worded this waiver may seem, the district court judge characterized it as "fairly narrow."[117] For example, the judge noted, "[I]t would allow Perez to appeal any sentence above the guideline range agreed to . . . . In addition, it would allow him to appeal on the basis of a contested criminal history category since that was not a term settled in paragraph 3."[118]

The judge voided the agreement.[119] The government pointed to nine circuits that had allowed appeal waivers and argued that public policy permits these agreements because of their "speed, economy and finality."[120] Nevertheless, the court wrote, "[u]nderstanding full well that all the circuits which have looked at this issue have approved of appeal waivers more unconditionally than I do here, I . . . hold that appeal waiver clauses, including the limited one in the present case, are contrary to public policy and void."[121] The court had several rationales. Notably, he distinguished the public policy at issue from the concerns regarding the release-dismissal agreement in *Newton*:

> First, the § 1983 suit in *Newton* was based on past action. One can assess roughly what one is giving up in possible damages. But the mistakes which one might appeal are yet to be made and therefore unknowable at the time of waiver. . . . Second, a § 1983 suit is about *civil* damages, not loss of *liberty*. We

116. *Id.* at 61–62 (alterations in the original).
117. *Id.* at 62.
118. *Id.*
119. *Id.* at 61.
120. *Id.* at 65.
121. *Id.* at 61.

> plainly take much more care to protect people from the wrongful loss of liberty than from the wrongful loss of civil damages.[122]

For this Article, the most important of the judge's rationales was that plea agreements are contracts that may be voided for public policy, regardless of whether the waiver comports with constitutional standards.[123] The court, essentially, ruled that a waiver of the right to appeal is a contract of adhesion.[124] It analogized to commercial contracts.[125] If a party to a commercial contract who had signed a waiver of the right to appeal "faced an alternative that was quite dire, say loss of a lifetime's worth of saving and investment," and the other party had significantly more bargaining power, the court would likely strike the contract as unconscionable.[126] The court then quoted a passage from another opinion that suggested courts should be more skeptical of plea agreements than commercial contracts:

> First, the defendant's underlying 'contract' right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law. Second, with respect to federal prosecutions, the court's concerns run even wider than protection of the defendant's individual constitutional rights–to concerns from the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government.[127]

The court also noted that "[d]efendants . . . cannot waive the right to counsel free of a conflict of interest, 'in part because such a conflict "constitutes a breach of professional ethics and invites disrespect for the integrity of the court."'[128]

Even before *Newton*, courts invalidated plea agreements that violated public policy.[129] For example, in 1968, the U.S. Court of Military Appeals decided *United States v. Cummings*.[130] The plea agreement stated, "[t]he accused waives

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122. *Id*. at 66–67.

123. *Id*. at 70 ("Though the government protests that Perez agreed to the waiver of his right to appeal knowingly and voluntarily, I nonetheless hold that it is contractually invalid.").

124. *Id*.; *see also* Andrew Dean, Comment, *Challenging Appeal Waivers*, 61 BUFF. L. REV. 1191, 1210–11 (2013) (arguing many appeal waivers may be adhesion contracts).

125. *See Perez*, 46 F. Supp. 2d at 70–71.

126. *Id*. at 71.

127. *Id*. (quoting United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986)).

128. *Id*. (quoting United States v. Ready, 82 F.3d 551, 556 (2d Cir. 1996) (quoting Wheat v. United States, 486 U.S. 156, 162 (1988))); *see also* Dean, *supra* note 124, at 1121 ("Appeal waivers invite unethical behavior by insulating the actions of defense attorneys, prosecutors, and judges from review.").

129. Notably, courts used to be quite critical of all plea bargaining. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5–6 (1979). The practice seems to have started following the American Civil War, and the initial reaction was strong disapproval. *Id*. Some evidence suggests, had the issue come to the U.S. Supreme Court in its formative years, the Court may have invalidated the practice. *Id*. And one scholar has noted, "[a]s late as 1958, it seemed possible that the United States Supreme Court might hold the practice illegal . . . ." *Id*. Plea agreements voided for public policy at this point in history should be taken with a grain of salt as the entire practice was viewed with skepticism.

130. 17 C.M.A. 376 (1968) (per curiam).

any issue which might be raised which is premised upon the time required to bring this case to trial (and specifically waives any issue of speedy trial or denial of due process)."[131] The court noted that "it is improper in a plea agreement to lead the accused to believe his judicial confession of guilt will require him to forgo reliance upon his statutory and constitutional right to have the charges against him disposed of as rapidly as circumstances pertinent to the case may permit."[132] Later in the opinion, the court expressly stated that waivers in a plea agreement of the rights to due process and a speedy trial are void for public policy.[133]

Notably, the enforceability of plea agreements is often measured against both constitutional and contractual standards.[134] However, the Constitution is merely a floor.[135] It does not represent the ceiling of rights.[136] Regardless of the constitutional answer, public policy supports holding prosecutors to ethical rules and treating plea agreements as contracts.[137] Thus, the constitutional standard of "knowingly and voluntarily" waiving constitutional rights is not the only thing to consider.[138] There is still a violation of public policy, irrespective of the constitutional standard.[139]

II. THE ETHICAL DILEMMA OF ASKING A CRIMINAL DEFENDANT TO WAIVE HIS OR HER RIGHT TO COLLATERAL ATTACK

There is no apparent reason why prosecutors should not be held to the same ethical standards as other attorneys. Indeed, despite some calls for reform, a core value of the legal profession is unity—the profession is governed by a single set of rules that all lawyers must follow.[140] Prosecutors get no special privilege: they cannot benefit any more from a violation of an ethics rule than the lawyer that strikes a bargain in violation of Rule 1.8 or Rule 5.4(a). Furthermore, the reason the Court struck down the *per se* rule in *Newton* was its belief that prosecutors, generally, act ethically.[141] While true, if a prosecutor violates an ethics rule, the

131. *Id*. at 378.

132. *Id*.

133. *Id*. at 379.

134. Cicchini, *supra* note 17, at 159.

135. *E.g*., Darren Allen, *The Constitutional Floor Doctrine and the Right to a Speedy Trial*, 26 CAMPBELL L. REV. 101, 106 (2004) ("As long as states buttress their decisions on 'adequate and independent state grounds,' they may provide criminal defendants greater protection than the federal courts. They may not, however, use those same independent grounds to deprive their citizens of the minimum federal guarantee.").

136. *Id*.

137. United States v. Perez, 46 F. Supp. 2d 59, 66 (D. Mass. 1999).

138. *Id*. at 70.

139. See Cicchini, *supra* note 17, at 159, for an argument that a contractual framework is superior to a constitutional framework.

140. *See generally* Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. U. L. REV. 35 (1994).

141. Newton v. Rumery, 480 U.S. 386, 396 (1987).

resulting plea agreement would run counter to *Newton*.[142]

This Part explores the ethical dilemma that defense attorneys face when a prosecutor asks a criminal defendant to waive his or her right to collateral attack. Axiomatic to this exploration is Model Rule 8.4(a), which states, "[i]t is professional misconduct for a lawyer to 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."[143] When a defense attorney faces an ethical dilemma solely because a prosecutor created the dilemma, the prosecutor has violated Rule 8.4(a).[144]

Defense attorneys may face a dilemma for three reasons. First, collateral attacks, broadly worded, create personal conflicts of interest for a defense attorney because they include a waiver of the right to argue ineffective assistance of counsel.[145] The conflict created is not waivable by mere client consent.[146] Second, attorneys cannot make an agreement limiting their malpractice liability.[147] In some states, this prohibition is broad enough to encompass ineffective assistance of counsel.[148] Third, and most broadly, attorneys have an ethical obligation to be diligent.[149] Bargaining away the right to collateral attack may be too prejudicial to the client.[150] This argument appears somewhat weak given that rights are bargained away all the time, and the ultimate decision of whether to accept a plea agreement rests with the client.[151] Indeed, the *Model Rules* specifically contemplate the criminal defendant's right to waive a jury trial.[152]

Bar associations have considered the three rationales.[153] In particular, a legal ethics opinion from the Virginia Bar considered the following hypothetical:

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142. For a discussion on *Newton*, see *supra* Part I.B.

143. MODEL RULES R. 8.4(a) (emphasis added).

144. Va. Legal Ethics Op. 1857, *supra* note 12, at 3; *see also* Fla. Bar, Ethics Op. 12-1 (2012), https://www.floridabar.org/etopinions/etopinion-12-1/ [https://perma.cc/JU32-WLEP] ("A prosecutor may not make an offer that requires the defendant to expressly waive ineffective assistance of counsel and prosecutorial misconduct because the offer creates a conflict of interest for the defense counsel and is prejudicial to the administration of justice.").

145. Va. Legal Ethics Op. 1857, *supra* note 12, at 2.

146. *Id*.

147. *Id*.

148. *Id*.; *see also* Vt. Bar Ass'n, Advisory Ethics Op. 95-04 (1995), https://www.vtbar.org/UserFiles/files/Webpages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Plea%20Bargains/95-04.pdf [https://perma.cc/PJ5P-YCQY] (last visited Feb. 26, 2020).

149. Va. Legal Ethics Op. 1857, *supra* note 12, at 1.

150. *Id*. at 2 ("A defense lawyer who counsels his client to agree to this provision also violates Rule 1.3(c). The client has a constitutional right to the effective assistance of counsel and the defense lawyer's recommendation to bargain that right away prejudices the client.").

151. MODEL RULES R. 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

152. *Id*.

153. As of 2012, at least nine states have considered one or more of the rationales, including Alabama, Arizona, Florida, Missouri, North Carolina, Ohio, Tennessee, Vermont, and Virginia. Fla. Bar, Ethics Op. 12-1 (2012), https://www.floridabar.org/etopinions/etopinion-12-1/ [https://perma.cc/RNJ4-PRJV] (collecting cases).

> [A] defense lawyer represents a client who intends to plead guilty. The plea agreement provides that "I waive any right I may have to collaterally attack, in any future proceeding, any order issued in this matter and agree I will not file any court document which seeks to disturb any such order. I agree and understand that if I file any court document seeking to disturb, in any way, any order imposed in my case, such action shall constitute a failure to comply with a provision of this agreement." This provision is standard in all plea agreements offered by the prosecutor's offices, however, defense counsel has concerns that this provision may have the legal effect of waiving the client's right to later claim ineffective assistance of counsel. The defense lawyer asks whether he can ethically advise his client as to whether to waive that right and whether the prosecutor can ethically require this waiver as a term of a plea agreement.[154]

This Part considers the rationales. It starts with the conflict of interest rationale because it is most persuasive. It next moves to the malpractice rationale, which may not apply in many states. It then moves to the least compelling rationale: diligence.

A. CONFLICTS OF INTEREST

A compelling rationale presented in the Virginia Legal Ethics Opinion is that waivers of the right to collateral attack create a conflict of interest.[155] Virginia's Rule 1.7(a)(2) states that a lawyer cannot represent a client if the lawyer has "a personal interest."[156] As the opinion explained, "Defense counsel undoubtedly has a personal interest in the issue of whether he [or she] has been constitutionally ineffective, and cannot reasonably be expected to provide his [or her] client with an objective evaluation of his [or her] representation in an ongoing case."[157] For example, a lawyer cannot handle an appeal arguing ineffective assistance of counsel if he or she was the attorney in the underlying case.[158] The lawyer would likely have to assert that he or she made errors that might "expose him [or her] to personal liability."[159] This conflict is not waivable.[160]

A problem is thus created: a criminal defendant has a right to be advised—by effective assistance of counsel—whether to accept a plea agreement.[161] Yet, if

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154. Va. Legal Ethics Op. 1857, *supra* note 12, at 1.

155. *Id*. at 2.

156. VA. RULES OF PROF'L CONDUCT R. 1.7(a)(2).

157. Va. Legal Ethics Op. 1857, *supra* note 12, at 2; *see also* Klein, Remis & Elm, *supra* note 23, at 93–94 ("Defense attorneys advising defendants to waive their constitutional claims of ineffective assistance of counsel have vested interests in obtaining those waivers to protect their reputations and jobs, avoid bar complaints, and prevent malpractice suits.").

158. Va. Legal Ethics Op. 1857, *supra* note 12, at 2.

159. *Id*. (quoting Va. Legal Ethics Op. 1122).

160. *Id*. at 2.

161. Lafler v. Cooper, 566 U.S. 156, 162–63 (2012) ("Defendants have a Sixth Amendment right to counsel, a right that extends to the plea bargaining process . . . . During plea negotiations defendants are 'entitled to the effective assistance of competent counsel.'"); *see also* Missouri v. Frye, 566 U.S. 134, 145 (2012) ("This Court

that agreement includes a broadly worded waiver of the right to collateral attack, no defense attorney can advise the defendant.[162] In short, it seems necessary then that a plea agreement expressly allows for ineffective assistance of counsel claims. And notably, because the conflict cannot be waived, prosecutors cannot sidestep this problem by asking the defendant to waive the conflict of interest.[163]

One scholarly article, after identifying this ethical dilemma, made a constitutional argument:

> When effective assistance of counsel and *Brady* waivers become boilerplate, it will be extremely difficult for a judge to determine, at either the hearing accepting such plea or on direct appeal, whether any particular such waiver was voluntary and intelligent. We believe these waivers could rarely, if ever, be voluntary and intelligent. Because only knowing, intelligent, and voluntary guilty pleas comport with constitutional requirements, these waivers might be considered unconstitutional.[164]

These scholars argue, convincingly, that a client needs unconflicted counsel to knowingly, intelligently, and voluntarily plea guilty.[165] One student comment has similarly suggested courts analyzing whether someone has been denied his or her Sixth Amendment right to effective assistance of counsel should consider state ethics decisions about conflicts of interest.[166]

However, the constitutional arguments are unnecessary. As explained throughout this Article, plea agreements are contracts that can be voided as degrading public policy. Thus, the constitutional avoidance doctrine counsels strongly against making this a constitutional issue.[167]

Furthermore, as the scholars admit, judges are supposed to serve as gatekeepers and ensure guilty pleas comport with the constitutional requirements.[168] Though some judges may fail to do their job, in theory, judges explain rights such that the

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now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.").

162. Va. Legal Ethics Op. 1857, *supra* note 12, at 2.

163. *Id*. at 2. One of the requirements for waiver of a concurrent conflict is that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." MODEL RULES R. 1.7(b)(1). A lawyer cannot reasonably believe his or her advice is unaffected when discussing his or her performance. Notably, when a defendant raises an ineffective assistance of counsel claim, the standard practice is to appoint new counsel. Place, *supra* note 2, at 301.

164. Klein, Remis & Elm, *supra* note 23, at 106–07. *See generally* J. Peter Veloski, Comment, *Bargain for Justice or Face the Prison of Privileges? The Ethical Dilemma in Plea Bargain Waivers of Collateral Relief*, 86 TEMPLE L. REV. 429 (2014).

165. Klein, Remis & Elm, *supra* note 23, at 109 ("A prophylactic rule ensuring that our criminal justice system provides unconflicted counsel during plea negotiations is necessary for courts to be sure that defendants understand the waiver of their pre-plea rights, including rights to effective counsel.").

166. Veloski, *supra* note 164.

167. *E.g*., People v. Alcozer, 948 N.E.2d 70, 74 (Ill. 2011) ("It is well settled that courts should avoid constitutional questions when a case may be decided on other grounds.").

168. Klein, Remis & Elm, *supra* note 23, at 107.

defendant has sufficient understanding to enter a guilty plea.[169] Many courts might assume judges will perform the function that defense attorneys are supposed to, and therefore, the constitutional argument is problematic.[170] But if the problem is that the prosecutor violated a rule of professional conduct, a judge's ruling that a guilty plea was knowing and voluntary cannot somehow turn back the clock and make the prosecutor's behavior ethical. The focus is not on the constitutionality of the waiver but on the enforceability of the contract.[171]

B. MALPRACTICE

Another rationale considered by the Virginia Legal Ethics Opinion will probably vary from state to state significantly. The opinion considered Virginia Rule 1.8(h), which states that attorneys cannot enter into agreements prospectively limiting their liability for malpractice.[172] Some states have slightly broader wording that suggests an attempt to limit liability—as opposed to entering into an agreement—is sufficient to violate a rule of professional conduct.[173] A Vermont Advisory Opinion interpreting this more broadly worded version of the rule found that "[t]he 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 [or her] and the prosecutor's conduct in pre-trial and pre-plea proceedings."[174] The opinion concluded that there might be a violation of the rule.[175] The Virginia opinion, however, concluded the Virginia rule does not apply because the defense attorney is not a part of any agreement.[176] In states that have the more broadly worded version of Rule 1.8(h), it may be hard to get around the rule without a reservation of the right to claim ineffective assistance of counsel.[177]

Whether a waiver of ineffective assistance of counsel can be equated with malpractice is controversial.[178] One dissenter on an Arizona ethics committee felt the

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169. Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 66 (2015) ("Judges ensure that the plea is 'knowing' and 'voluntary' but essentially rubberstamp most plea agreements.").

170. *See id.*

171. When the conflict of interest argument has been presented as a constitutional issue, it has often failed. *See, e.g.*, United States v. Garst, 2015 U.S. Dist. LEXIS 17815, at *12–18 (D. Kan. Feb. 3, 2015).

172. VA. RULES OF PROF'L CONDUCT R. 1.8(h).

173. These would include states that still follow the old *Model Rules of Professional Responsibility*. Likely, any state that still follows the old *Model Rules of Professional Responsibility* would reach similar results. MODEL CODE OF PROF'L RESPONSIBILITY DR 6-102 (1983); see also Vt. Bar Ass'n, Advisory Ethics Op. 95-04 (1995), https://www.vtbar.org/UserFiles/files/Webpages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Plea%20Bargains/95-04.pdf [https://perma.cc/86AY-EHPC], for an application of the rule and Fla. Bar, Ethics Op. 12-1 (2012), https://www.floridabar.org/etopinions/etopinion-12-1/ [https://perma.cc/RNJ4-PRJV].

174. Vt. Bar Ass'n, Advisory Ethics Op. 95-04, *supra* note 173.

175. *Id.*

176. Va. Legal Ethics Op. 1857, *supra* note 12, at 2.

177. See *supra* note 173, explaining that some states follow an older version of the rule, and these states would likely be the ones where this rationale is most effective.

178. *See generally* Klein, Remis & Elm, *supra* note 23, at 73.

majority was "too strictly and too formalistically" reading the rule when it held "that the waiver language in a plea agreement applies only to collateral attack and not to malpractice. . . ."[179] A Texas ethics opinion reached a similar conclusion to the Arizona majority on the presumption that a judge in a malpractice case "would not allow a waiver in the plea agreement to be used or interpreted as an agreement limiting a defendant's malpractice claim."[180]

C. DILIGENCE

The Virginia opinion's broadest analysis was under Virginia's version of Rule 1.3, which states, in part, "[a] lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship . . . ."[181] The opinion, unfortunately, is conclusory, merely stating, "[t]he client has a constitutional right to the effective assistance of counsel and the defense lawyer's recommendation to bargain that right away prejudices the client."[182]

This rationale cannot stand. Constitutional rights are not inherently inalienable. For example, a defendant can waive his or her right to a jury trial.[183] As one scholar noted, "A person by contract can forsake his [or her] right to work as a journalist (a First Amendment right) . . . ."[184] As a practical matter, it cannot be the case that merely because a right is constitutionally enshrined, a waiver of it is prejudicial. Indeed, it may be prejudicial to a client not to waive a constitutional right. For example, a defense attorney should probably advise a client to take a plea agreement, and thus forgo a jury trial, if the evidence of guilt is overwhelming. Perhaps a better reading of the Virginia rule is that, in individual cases where a defense attorney has been ineffective, it would be prejudicial if the right to claim ineffective assistance of counsel were waived.[185]

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179. *Id*. at 104–05.

180. *Id*. at 105 (quoting Sup. Ct. of Tex. Prof'l Ethics Comm. Op. 571 (2006)).

181. VA. RULES OF PROF'L CONDUCT R. 1.3(c) (notably, the Virginia rule is broader than the Model Rule, which merely states, "[a] lawyer shall act with reasonable diligence and promptness in representing a client."); MODEL RULES R. 1.3.

182. Va. Legal Ethics Op. 1857, *supra* note 12.

183. Richard C. Donnelly, *The Defendant's Right to Waive Jury Trial in Criminal Cases*, 9 U. FLA. L. REV. 247, 247–48 (1956) ("The right of a defendant in a criminal proceeding to trial by an impartial jury is one of several constitutional safeguards in the attempt to insure a fair trial and to protect the accused from oppression. There are times, however, when a defendant considers it desirable to waive this right and to elect trial by the court alone. The crime charged may be of a revolting nature, such as rape; the victim may have been a prominent member of the community or a public official; the crime may have received sensational press notice . . . . In *Patton v. United States*, [281 U.S. 276 (1930),] . . . it was settled that a defendant in a federal criminal proceeding can waive his right to trial by jury.").

184. Michael J. Broyde, *Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, 90 CHI.-KENT L. REV. 111, 139 n.122 (2015).

185. *Cf*. Cole, *supra* note 24 ("For cases in which a defendant's ineffective assistance claim would be barred by a previously executed waiver, prosecutors should decline to enforce the waiver when defense counsel rendered ineffective assistance resulting in prejudice or when the defendant's ineffective assistance of counsel claim raises a serious debatable issue that a court should resolve.").

III. WHAT CAN A PROSECUTOR ASK FOR?

For the ethical reasons discussed above, this Article supports the conclusion of Judge Weinstein that "near blanket waiver[s]" are problematic.[186] This Article advises, to avoid ethics violations and ensure enforceability, agreements carve out specific types of collateral attack, as also suggested by Judge Weinstein.[187]

A prosecutor might consider the below boilerplate, which has been modified from actual agreements:

> LIMITED WAIVER OF MY RIGHT TO APPEAL
>
> [I am] aware that [I have] the right to challenge [my] sentence and guilty plea on direct appeal. [I am] also aware that [I] may, in some circumstances, be able to argue that [my] plea should be set aside, or [my] sentence set aside or reduced, in a collateral challenge (such as pursuant to a motion under 28 U.S.C. § 2255).[188]
>
> I hereby waive my right of appeal as to any and all issues in this case, and consent to the final disposition of this matter by the United States District Court. In addition, Except as reserved, I waive any right I may have to collaterally attack, in any future proceeding, my conviction and/or sentence imposed in this case.[189]
>
> I reserve the right to argue the following in a collateral attack: (1) ineffective assistance of counsel; and (2) miscarriages of justice.[190]

While Judge Weinstein identified four possible claims,[191] the two in this boilerplate are the most important from an ethics standpoint, which is the primary concern of this Article. Ineffective assistance of counsel is problematic for the above reasons.[192] Furthermore, federal prosecutorial guidance from 2014 supports the above provision's carve-out for ineffective assistance of counsel. That year, U.S. Deputy Attorney General James M. Cole sent a memorandum to all federal prosecutors stating,

> As we all recognize, the right to effective assistance of counsel is a core value of our Constitution. The Department of Justice has a strong interest in ensuring that individuals facing criminal charges receive effective assistance of counsel so that our adversarial system can function fairly, efficiently, and responsibly . . . .

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186. United States v. Chua, 349 F. Supp. 3d 214, 218 (E.D.N.Y. 2018).

187. *Id*.

188. This paragraph comes from the agreement under review in *United States v. Perez*, 46 F. Supp. 2d 59, 61 (D. Mass. 1999). It has been modified to make use of the first person.

189. This paragraph is taken from the agreement under review in *United States v. Lemaster*, 403 F.3d 216, 218 (4th Cir. 2005).

190. This paragraph is inspired by Judge Weinstein's opinion. *See Chua*, 349 F. Supp. 3d at 220.

191. *Chua*, 349 F. Supp. 3d at 218–20.

192. *See supra* Part II.

> When negotiating a plea agreement, the majority of United States Attorney's offices do not seek a waiver of claims of ineffective assistance of counsel. This is true even though the federal courts have uniformly held a defendant may generally waive ineffective assistance of claims pertaining to matters other than entry of the plea itself, such as claims related to sentencing. While the Department is confident that a waiver of a claim of ineffective assistance of counsel is both legal and ethical, in order to bring consistency to this practice, and in support of the underlying Sixth Amendment right, we now set forth uniform Department of Justice policies relating to waivers of claims of ineffective assistance of counsel.
>
> Federal prosecutors should no longer seek a plea agreement 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.[193]

Consistency is important, and so is supporting the underlying policy of the Sixth Amendment.[194] However, this Article takes serious issue with the memorandum's statement that such waivers are "legal and ethical."[195]

That is not the case. The practice is unethical and runs contrary to public policy.

The inability to argue a miscarriage of justice—in other words, actual innocence—is obviously and facially problematic from an ethics standpoint. Under Rule 3.8(g):

> When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
>
> (1) promptly disclose that evidence to an appropriate court or authority, and
>
> (2) if the conviction was obtained in the prosecutor's jurisdiction,
>
> (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
>
> (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.[196]

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193. Cole, *supra* note 24.

194. Akhil Reed Amar, Foreword, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 642 (1996) ("The deep principles underlying the Sixth Amendment[] . . . are the protection of innocence and the pursuit of truth.").

195. Indeed, when the memorandum was released, commentators praised it while at the same time noting that ethics opinions find the practice problematic. *See* Lissa Griffin, *DOJ Policy Bans Waivers of Ineffective Assistance of Counsel Claims as Conditions of Guilty Plea*, https://pcjc.blogs.pace.edu/2014/10/23/doj-policy-bans-waiver-of-ineffective-assistance-of-counsel-claims-as-condition-of-guilty-plea/ [https://perma.cc/5YBJ-FSAN] (last visited Feb. 14, 2020).

196. MODEL RULES R. 3.8(g); *see also* Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 1002 n.282 (2012) (discussing ethical and public policy implications involving DNA evidence and Rule 3.8(d)'s disclosure duties).

The entire point of an actual innocence claim is to present "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense."[197] If the actual innocence claim has merit, the prosecutor has an affirmative obligation to help the defendant, which stands in direct contradiction to a blanket waiver.[198] A prosecutor, in other words, could never say, "this new evidence makes me think there has been a miscarriage of justice, but too bad so sad, the defendant signed a waiver of collateral attack." Although this may seem obvious, scholars have noted, "plea bargaining has an innocence problem."[199] Indeed, some courts have refused to enforce such waivers, and their decisions have been characterized as "safety valve[s] [that are] not dissimilar to a court's common law ability to refuse to enforce the terms of a contract if it would violate public policy."[200]

Of course, facts in specific cases may raise other problems. For example, in 2015, a Virginia ethics committee advisory opinion concluded,

> a prosecutor may not knowingly take advantage of an unrepresented noncitizen defendant by making a plea offer which refers only to the state law disposition of the charge, and either makes no statement to the defendant of the defendant's potential need to seek immigration law advice or fails to ask the court to conduct a colloquy with and give an advisement to the defendant in that regard.[201]

This Article need not detail every specific ethical dilemma that could arise. The takeaway is that attorneys have a duty to know the rules of professional conduct and that the rules are, usually, statements of public policy.[202] It follows that prosecutors need to tailor their specific agreements in accordance with ethical constraints.

CONCLUSION

Courts should not tolerate ethics violations in the plea bargaining process. Indeed, it seems that ethics ought to be front and center. Plea bargaining has taken over the criminal justice system.[203] To ignore ethical problems related to plea bargaining is thus to wipe out the rules of professional conduct in the context of the criminal justice system.

Problematically, "the most potent criticism of the Model Rules as a means for enforcing prosecutor's obligations is that enforcement actions are only

197. MODEL RULES R. 3.8(g).

198. *Id*.

199. Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 74 (2009).

200. Cassidy, *supra* note 24, at 98 n.27 (citing Richard E. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 954–55 (1984)).

201. Va. State Bar Legal Ethics Op. 1876 (2015).

202. *See supra* Part I (explaining rules are statements of public policy).

203. Missouri v. Frye, 566 U.S. 134, 144 (2012).

infrequently brought, and ethics rules are therefore unlikely to change the behavior of prosecutors."[204] Admittedly, it might not take many enforcement actions to see a substantial change in behavior: when it comes to professional licensing—and thus people's livelihood—a handful of actions may be sufficient to put fear into prosecutors.[205] Nevertheless, until the state of lawyer regulation changes, ethical standards are not going to be enforced.[206]

In summary, court refusal to enforce plea agreements is thus necessary and important because, if courts do not enforce ethical standards, it appears they will go unenforced. Courts have the ability to do this through the public policy rationale explained in this Article. The literature seems to note both that plea agreements are contracts and that rules of professional conduct are considered public policy. At the intersection of these two concepts lies a powerful argument: plea agreements—or at least portions of plea agreements—are void for violating public policy when prosecutors engage in unethical conduct.

Judges are in a unique position to enforce standards because they must approve of plea agreements. If they fail to do so, the status quo will continue, and justice will suffer.

204. Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 962 (2008).
205. *Id*. at 962–63.
206. *See id*. at 962.