

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-321
Issued: July 1987

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May an attorney for a defendant in a criminal case ethically argue as a ground for reversal that he has rendered ineffective assistance of counsel to the defendant?

Answer: Qualified no.

References: DRs 5-101(A), 5-101(B), 5-102(A), 5-105(D).

OPINION

The request originated with the Inquiry Tribunal in an effort to secure guidance from the Committee. The Committee forwarded the request to the Public Advocate for comment.

In the Committee's view, an attorney who believes that he or she has rendered ineffective assistance of counsel to the client should ordinarily inform the client of the facts supporting this belief and move to withdraw from the case. The attorney should not argue on behalf of a client that the attorney was ineffective unless ordered by the court to do so.

There are several reasons why an attorney should not argue his or her own ineffectiveness. First, there is an apparent conflict between the client's interest and the attorney's interest in his or her reputation, which may give rise to a claim that the attorney did not zealously pursue the claim - an assertion of ineffectiveness in presenting the ineffectiveness claim. DR 5-101. Secondly, "a skeptical court may conclude, too easily, that he is merely attempting to obtain a reversal for his client by contending that his own conduct was inexcusable, and reject the issue without reflection." D. Webster, The Public Defender, the Sixth Amendment, and the Code of Professional Responsibility: The Resolution of a Conflict of Interest, 12 Am.Cr.L.J. 739, 748 (1975) (cited hereinafter as Webster). Thirdly, the presentation of such a claim almost invariably involves the assertion of facts outside the record, thus violating the rule against an attorney acting as both counsel and witness. DR 5-101(B) and 5-102(A).

There may, nevertheless, be a few situations in which it may be proper for an attorney to raise the ineffectiveness claim. If the claim is that the attorney was unable to

properly present the case because of government interference, the ineffectiveness claim does not call into question the attorney's performance, nor does it implicate the attorney-witness rule. Examples of government violation of the right to effective counsel are found in Geders v. New York, 425 U.S. 80 (1976) (ban on attorney-client consultation during recess); Herring v. New York, 422 U.S. 853 (1975) (ban on summation); and Brooks v. Tennessee, 406 U.S. 605 (requirement that defendant testify first).

The denial of funds to employ an expert witness may fall within this exception if the attorney can separate the effect of such a denial from his own performance. The same may be true of a denial of a continuance (for example) when the denial makes it so unlikely that a lawyer could be prepared that prejudice is presumed. U.S. v. Cronin, 104 S.Ct. 2039 (1984). Outside counsel should be obtained, however, if the attorney cannot argue the effect of the governmental action without discussing his own performance.

The more difficult question is whether another attorney in the same office can argue the matter. Even though the rule of imputed disqualification (DR 5-105(D)) is not always applied to attorneys in public agencies (Summit v. Mudd, 639 S.W.2d 225 (Ky. 1984)) there are sound reasons to apply the rule in this instance. Attorneys in the same office have personal relationships and share an interest in the quality of the legal work of that office. These are interests which conflict with the client's interest in establishing that the trial attorney erred. The secondary authorities (Wolfram at 406, Webster at 742, Ethical Dilemma at 610), cases (Angarano v. United States, 329 A.2d 453, 457 (D.C. Ct.App. 1974), and ethics opinions (e.g., New York State Op. 533, Law. Man. Prof. Con. 801:6104), concur that the ineffectiveness claim should be presented by outside counsel. On the other hand, Wolfram notes that "an arguable different case is presented if the public defenders, although employed by the same agency, operate from physically separated offices." Wolfram at 406, citing Babb v. Edwards, 412 So.2d 859 (Fla. 1982). This issue may presumably be addressed by the courts in the context of specific cases, as the need arises.

The commentators are in agreement that an attorney should not argue his or her ineffectiveness. C. Wolfram, *Modern Legal Ethics*, 811 (1986); Webster at 748, 751. "The interests of society in the proper administration of criminal justice leads this author to conclude that a compelling basis exists to require that all trial counsel, appointed or privately retained, decline presenting an appeal which questions the effectiveness of his trial services." *Ineffective Counsel's Last Act - Appeal?: An Ethical Dilemma of Conflicting Interests*, 1979 *Ariz.St.L.J.* 595, 608 (1979) (cited hereinafter as *Ethical Dilemma*).

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.