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**The Limits on the Crime Victim's Counsel  
to Threaten Referral to Law Enforcement Authorities**

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This article addresses the guidelines that the crime victim's attorney should consider in conducting settlement negotiations in civil matters and limitations on negotiations that include referral to law enforcement authorities. The relevant ethical and disciplinary guidelines include:

1. The lawyer is forbidden to make "even veiled allusions in settlement discussions to an adversary's potential criminal liability." NYC Eth. Op 1995-13, 1995 WL 877125 (hereinafter "NYC Eth. Op.") The lawyer "who represents a potential [victim] is forbidden by DR 7-105(A) from injecting the subject of the adversary's possible criminal liability into settlement negotiations." (Ibid)
2. The lawyer may not suggest that the client would not report the crime if the potential defendant were to settle the civil claim satisfactorily. (Ibid.)
3. An agreement not to report a crime is illegal if it goes beyond a promise by the victim not to initiate contact with government agencies that enforce criminal laws. The victim may not promise to refuse to comply with lawful subpoenas for such evidence. Nor may the victim agree to alter and/or modify the evidence to support a position that the defendant wishes to advance to better its position in any criminal prosecution or in defense of proceedings brought by administrative agency. (Ibid)
4. If the defendant's lawyer "believes that the harm caused by a client's criminal conduct can be repaired by the settlement of a directly related civil claim, the lawyer commits no impropriety in making an appropriate settlement offer contingent upon an assurance that the victim will not make a criminal complaint." (Ibid) But such a non-reporting agreement may be unenforceable (see infra, # )
5. NY Eth. Op. 772, promulgated by the New York State Bar Association, Committee on Professional Ethics, 2003 WL 23099784 (hereinafter "NY Eth. Op 772") clearly states that the opinion does not cover the client's reporting the conduct to the authorities. (Fn. 1). An unanswered question is whether the lawyer, aware of the client's right to report a crime, may advise the client of that right during the course of negotiation of a settlement of civil claims. I have not found any Bar Association opinions, and or case law addressing this issue.
6. In connection, however, with settlement negotiations, "when a lawyer's motive to prosecute is genuine - that is, actuated by a sincere interest in and respect for the purposes of the criminal

justice system - DR 7-105(A) would be inapplicable, even if such prosecution resulted in a benefit to a client's interest in a civil matter." (NY Eth. Op 772)

7. DR 7-105(A) "does not proscribe the filing of a complaint about the [defendant's] conduct with a prosecutor unless the purpose of such a filing is 'solely to obtain an advantage in a civil matter.'" The "solely" requirement makes the propriety of filing such a complaint contingent upon the client's intent. "As long as one purpose of the client in filing such a complaint would not offend the letter or spirit of DR 7-105(A), we conclude that as long as the client's motivation includes that purpose, DR 7-105(A) would not be violated even if the filing of such a complaint resulted in the [defendant] returning the client's funds and even if the client also intended that result, because the lawyer would not have filed such a complaint 'solely' to obtain the return of the client's funds." (Ibid.)

8. The threat to file, or actual filing of **non-criminal** charges, e.g., complaints with Better Business Bureau, or state licensing agencies, would not be covered by DR 7-105(A) since they do not involve criminal charges. That is clear from NY Eth. Op. 722.

9. NY Eth. Op 722 also proscribes the lawyer's communication with the defendant, or its counsel, by merely reciting the criminal conduct without directly threatening to refer the charges to criminal authorities. In taking that position, the State Bar Association Committee reasoned that such an approach may be ambiguous, but it rises to the inherent level of a threat. As the Committee wrote "in our view there is no universal standard to determine whether a letter 'threatens to present criminal charges'. Such a determination requires an examination of both the content and context of the letter. In our view, a letter containing an accusation of criminal wrongdoing likely constitutes a threat, especially when coupled with a demand that the accused wrongdoer remedy the civil wrong. Whether the accusation is general (simply stating that the [defendant's] conduct violates the criminal law) or specific (stating that the [defendant's] conduct violates particular provisions of the criminal law), such an accusation serves the undeniable purpose of coercing the accused wrongdoer. We point out, moreover, that a lawyer who sends a letter containing such a communication is exposed to professional discipline based upon the disciplinary authorities' interpretation of the lawyer's intent in sending the letter or statement." (Ibid.)

10. DR 7-105(A) does not prohibit all threats to present criminal charges. It prohibits only those that are made "solely to obtain an advantage in a civil matter." If the threat of presenting criminal charges is "intended for a purpose other than obtaining an advantage in a civil matter, the conduct is not sanctionable." (Ibid.) If the lawyer refers the matter to criminal authorities, he will have satisfied the intent requirement so that DR 7-105(A) would not apply. (Ibid.)

11. If the lawyer sent a letter to the defendant "stating that the defendant's conduct appeared to violate certain criminal statutes or appeared to carry certain criminal penalties and request[ed] an explanation or justification of the [defendant's] conduct, such a letter would not violate DR 7-105(A) if the lawyer intended merely to determine whether the [defendant's] conduct was actionable, either civilly or criminally, because it was not "solely to obtain an advantage." (Ibid.)

With this review of the ethical and disciplinary guidelines as a background, a lawyer representing the plaintiff/claimant in a civil matter, who becomes aware that the defendant may have engaged in criminal conduct causing his client to incur losses, may discuss the following with defendant's counsel:

1. We have prepared our claim for recovery of substantial losses sustained by our client because of defendant's conduct.

2. Our investigation uncovers a pattern of over-billing, Defendant's receipt of moneys from our client for payment to trade contractors, never paid, withholding of huge deposits despite our client's demand for their return, and other acts of gross dishonesty.
3. As you would for your client, given such evidence we retained investigators whose expertise it is to corroborate the evidence. What they have uncovered provides corroboration from Defendant's former trusted employees that Defendant and its principal have actually over-billed clients, as a routine, have received moneys from clients for payment to trade contractors, and never paid them, but kept the money, as a routine, and as a routine matter altered client records to over-bill clients for work done for the CEO or work never done.
4. Our client has the right to inspect and audit Defendant's books and we certainly intend to do that, using the investigators with just the right training and expertise to detect such conduct.
5. Certainly, you and your client should appreciate that it is hardly in his interest to have this evidence presented during the mediation and at arbitration, and certainly he has no interest in our audit of his books and records to confirm the over-billing, altering of records and other dishonest conduct we can prove in this matter.
6. This is the time for settlement, before you and your client lose control of this civil matter. Of course, this is the time we have control over our clients, who have fully been briefed by us concerning the evidence we, and our investigators, have uncovered. As you know, they are free to see that justice is done, based on your client's conduct, as disclosed to them.
7. Hence, we are prepared to settle this matter in full, in return for exchange of general releases, if you client pays our client \$\_\_\_\_\_.
8. Failing to settle at this time as we have requested, we will proceed, albeit perfunctorily with the mediation, and proceed aggressively to arbitrate the claims and contemporaneously obtain the full audit of your client's books and records. All the evidence then will become a matter of public record.

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