

# Revisiting The NY Rule On Threats Of Criminal Prosecution

BY SARAH DIANE MCSHEA

Disciplinary Rule 7-105(a) forbids lawyers from threatening criminal prosecution “solely to obtain an advantage in a civil matter.” However, the rule has been interpreted in New York to prohibit lawyers from even mentioning an adversary’s potential criminal liability if there is a parallel civil claim arising out of the same conduct, even if no advantage is sought. Consider the following scenario and the rule’s impact on a lawyer’s ability to act for the client:

A routine internal audit of the escrow and fiduciary accounts maintained by a prominent New York law firm reveals that a recently-retired trusts and estates partner removed \$500,000 from an estate account by signing the executor’s name on five estate checks without his knowledge or consent. The law firm makes good on the loss and discloses the matter to the executor, who directs the firm to pursue its former partner to recover the missing funds. In discussing possible settlement, what may the firm’s lawyer and the former partner’s lawyer say?

1. Under New York law, the firm’s lawyer may not tell the former partner’s lawyer that the firm will report the check forgery and embezzlement to the District Attorney’s Office if restitution is not promptly made.
2. The firm’s lawyer may not allude to the former partner’s criminal liability, even if it’s clear that both the former partner and his counsel are unaware that the liability exists. She should not offer copies of the relevant Penal Law provisions even if it appears that her adversary is unfamiliar with them.
3. The firm’s lawyer may disclose the audit report to her adversary and she may forward copies of the five checks signed by the former partner in the executor’s name. However, she should not use words like “forgery” or “embezzlement” or “crime” because these may be read as implicitly threatening a criminal complaint.
4. In sharp contrast, the former partner’s lawyer may offer to settle the matter by making restitution in exchange for the law firm’s promise not to file or pursue criminal charges against the former partner. Go figure!

## New York Law On Threats Of Criminal Prosecution

DR 7-105(a) provides that a lawyer “shall not present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.” N.Y.C.R.R. § 1200.36 (McKinney’s 2000). The rationale for the rule is that “the civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole.”

EC 7-21. Threatening to file criminal charges in order to settle a civil claim is said to subvert the criminal process, deter litigants from asserting their legal rights and diminish the public's confidence in the legal system because it has been abused by litigants. (See generally ABA/BNA Lawyers' Manual on Professional Conduct, 71:601-606 (1994); Simon's New York Code of Professional Responsibility Annotated (2000), at 459-463; J. Cohen and S.D. McShea, "Threatening to Contact the Criminal Authorities: A Lawyer's Dilemma," New York Law Journal, October 26, 1999.)

DR 7-105(a), which has been criticized as vague and overbroad, was modeled after the ABA Model Code of Professional Responsibility, but a similar rule was specifically omitted from the ABA Model Rules of Professional Conduct. The drafters concluded that other rules effectively prohibited "extortionate, fraudulent, or otherwise abusive threats" and set the limits on the "legitimate use of threats of prosecution." ABA Formal Opinion 92-363 (1992) ("... such a prohibition would be overbroad, excessively restricting a lawyer from carrying out his or her responsibility to 'zealously' assert the client's position under the adversary system. Such a limitation on the lawyer's duty to the client is not justified when the criminal charges are well founded in fact and law, stem from the same matter as the civil claim, and are used to gain legitimate relief for the client.")

DR 7-105(a) continues to be enforced in New York, although largely through the imposition of private discipline on unwitting lawyers.

### **Public Discipline Is Rarely Imposed**

In the past century, fewer than ten New York lawyers have been publicly disciplined for threatening to bring criminal charges against an adversary. In *Matter of Gelman*, 230 A.D. 524, 245 N.Y.S. 416 (1st Dept. 1930), the Court severely censured a lawyer who wrote to a taxicab driver who had hit his client's car: "If I am put to the trouble of proceeding against you personally on the judgment referred to, I will be compelled to institute criminal proceedings against you for failing to cover your taxicab by proper insurance policy under the law." The Gelman court noted its "disapproval of using threats of criminal prosecution as a means of forcing a settlement of civil claims," even if the threats did not result in criminal charges or a settlement. In *In re Beachboard*, 263 N.Y.S. 492 (1st Dept. 1933), the court censured an attorney who wrote a "scurrilous" letter to his adversary, threatening to file larceny and embezzlement charges unless a small sum in dispute was paid. See also *In re Hyman*, 226 A.D. 468, 235 N.Y.S. 622 (1st Dept. 1929) (censure for lawyer who threatened criminal action unless driver of car settled civil damages claim of woman he hit); *In re Penn*, 196 A.D. 764, 188 N.Y.S. 193 (1st Dept. 1921) (censure for young attorney who threatened criminal charges unless client's former fiancée returned diamond engagement ring).

A lawyer who files criminal charges without first threatening prosecution may be treated more harshly if a court later concludes that the criminal charges were intended primarily to improve her client's bargaining position. See *In re Abrahams*, 158 A.D. 595, 143 N.Y.S. 927 (1st Dept. 1913) (suspension for lawyer who promised to have pending criminal charges withdrawn if adversary paid judgments entered in unrelated civil disputes); *In re Feinstein*, 233 A.D. 541, 253 N.Y.S. 455 (2nd Dept. 1931) (suspension for attorney who repeatedly filed criminal charges and withdrew them after adversaries settled parallel civil cases).

In the past two decades, only three lawyers have been publicly disciplined for violating DR 7-105(a). In *Matter of Glavin*, 107 A.D.2d 1006, 484 N.Y.S.2d 933 (3rd Dept. 1985), a lawyer wrote to a building contractor who had been paid \$1,000 by Glavin's client: "you will return the money or go to jail," "I will have a warrant issued for your arrest," and "If you return her money and just don't do any work then I will tell the City not to punish you." Citing his violation of DR 7-105(a), the court censured Glavin. Glavin's real offense was probably the implication that he could personally control the criminal process, a claim which would have been improper even if DR 7-105(a) didn't exist. In *Matter of Padilla*, 491 N.Y.S.2d 630 (1st Dept. 1985), the court disbarred a lawyer for more serious charges, but found that he had also improperly threatened to file criminal charges.

Just last year, in *Matter of Geoghan*, 253 A.D.2d 205, 686 N.Y.S.2d 839 (2nd Dept. 1999), the court disbarred a lawyer for violating DR 7-105(a). Lawyer Geoghan represented a police officer who was assaulted and injured while arresting Anthony Mason, a prominent professional basketball player. Geoghan requested \$100,000 from Mason's lawyers, promising that his client would, in exchange, give "false and misleading testimony" if asked to testify before the grand jury. After the D.A.'s Office reviewed the tapes of Geoghan's "offer," it dismissed the criminal charges against Mason and forwarded the matter to the grievance committee. Geoghan had not only violated DR 7-105(a), he had also obstructed justice and attempted to extort Mason. Disbarment rather than jail was a fortuitous outcome.

### **Private Discipline Usual Penalty For Less Serious Infractions**

More typically, violations of DR 7-105(a) are not accompanied by extortion or obstruction of justice, but involve essentially a lawyer's effort to resolve a legitimate civil claim against an adversary whose conduct was also criminal. A New York lawyer who "threatens" an adversary with a criminal complaint, even a legitimate complaint, is likely to be privately disciplined if the matter is reported to a disciplinary or grievance committee. For some years, the disciplinary committees have cautioned and admonished lawyers whose letters to adversaries could be construed as threatening criminal prosecution.

DR 7-105(a)'s requirement that the threat be made solely to obtain an advantage in a civil matter has been ignored by disciplinary prosecutors, much to the surprise of lawyers who believe that zealous and effective representation often requires discussion of an adversary's criminal conduct.

Many practitioners are unaware that disciplinary committees often proceed by imposing private discipline. The unfortunate result is that DR 7-105(a) has become a trap for the unwary. A lawyer who receives a "threatening" letter from an adversary may report it to the disciplinary committee, thereby gaining a significant tactical advantage in the litigation or negotiations. Often, it is the less-culpable lawyer who is on the receiving end of the complaint to the disciplinary committee, a fact which is often overlooked in meting out punishments.

One troubling aspect of New York's DR 7-105(a) is its uncritical acceptance and uneven interpretation by New York bar association ethics committees. In Opinion 1995-13, the Ethics Committee of the Association of the Bar of the City of New York held that while the lawyer for a victim could not mention the wrongdoer's criminal liability, if the wrongdoer's lawyer raised the issue first, the victim's lawyer could respond and negotiate a settlement in which the wrongdoer agreed to make restitution and the victim agreed not to file criminal charges. Similarly, the Nassau County Bar Association has endorsed DR 7-105(a). BANC Opinion 98-12 (1998; BANC Opinion 94-20.)

All lawyers are duty-bound to represent their clients zealously. If an adversary has both civil and criminal liability, there is no sound reason why the victim's lawyer should not be able to mention that dual liability, assuming no extortion or paralegals may not appear in court or any other judicial forum as advocates for their clients. This prohibition almost certainly includes quasi-judicial settings, such as depositions. See Pa. Bar Ass'n Formal Op. 98-75,1998 WL 988168.

When is it permissible for paralegals to perform any substantive legal tasks? The answer is that these tasks may be performed by paralegals only under the careful supervision of attorneys. The New Jersey Supreme Court has recognized that "[t]here is no question that paralegals' work constitutes the practice of law." In re Opinion No. 24 of the Committee on the Unauthorized Practice of Law, 607 A.2d 962, 966 (N.J. 1992). However, the paralegal's work does not constitute the unauthorized practice of law — or a violation of any ethical rules — if the "supervising attorney assumes direct responsibility for the work that the paralegals perform." *Id.* Indeed, the Court went on to hold, without qualification, that "paralegals who are supervised by attorneys do not engage in the unauthorized practice of law."

The New York City Bar Association Ethics Committee Opinion also makes clear that "given that the Code holds the attorney accountable, the tasks a non-lawyer may undertake under the supervision of an attorney should be more expansive than those without supervision or legislation [defining the practice of law]. Supervision within the law firm thus is a key consideration." 1995 WL 607778 at \*4

The training and supervision of paralegals must also address other potential ethical issues that often arise in the work of paralegals. Some of these are:

- preserving client secrets and confidences (DR 4-101);
- addressing potential conflicts of interest (DR 5-105; 5-108);
- maintaining client funds (DR 9-102);
- serving as fact witnesses (DR 5-102);
- transacting business with clients (DR 5-104); and
- communicating with third parties (DR 7-104).

Of these, issues concerning the maintenance of confidences and conflicts of interest have drawn the most attention. The need to maintain the confidentiality of client communications is drilled into attorneys beginning with their law school professional responsibility courses. Paralegals, on the other hand, are unlikely to have any training in the subtleties surrounding these issues until they begin to work at a firm. NYCPLR §4503(a) provides explicitly that statements to a paralegal by an attorney or client remain confidential. Indeed, law firms could not use paralegals effectively without the assurance that they will be privy to confidences.

However, because paralegals are also in a position to reveal overreaching is intended or attempted.

The federal courts have declared their ability to distinguish oppressive misconduct from reasonable negotiations. In *Interactive Edge, Inc. v. Martise*, 1998 WL 35131 (S.D.N.Y. 1998), the court declined to set aside a settlement agreement between a software company and a former employee whose potential criminal liability had been discussed by the lawyers during settlement negotiations. The court found no improper threat or coercion by the company's lawyers. The employee's "own conduct" had exposed him

to civil and criminal liability and he chose, with the advice of counsel, to “settle the civil suit and avoid further liability.”

Recently, the Second Circuit found that a lawyer did not violate DR 7-105(a) when he threatened to bring a civil RICO claim against his client’s former counsel and that his conduct was not sanctionable. *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71 (2d Cir. 2000). Although the lawyer’s letter “mentioned that use of the mails to perpetrate billing frauds had led to the criminal conviction of other attorneys,” the court nonetheless found no misconduct, holding that otherwise, “no attorney could ever threaten to bring a civil RICO suit without violating the ethical rules.”

## **Conclusion**

When a civil claim suggests criminal conduct, discussions between the lawyers involved will inevitably lead to discussion of the potential criminal liability. Permitting one lawyer to raise the subject while forbidding the other lawyer from doing so makes no sense. DR 7-105(a), as interpreted, unfairly restricts a lawyer’s ability to zealously represent her clients. If New York courts and ethics committees applied DR 7-105(a) only to threats meant solely to obtain an advantage in a civil matter, fewer problems would arise. The Rule should be read to permit a lawyer to mention an adversary’s criminal liability when there is a sound factual and legal basis for doing so and the lawyer intends to resolve a legitimate civil claim arising out of the same facts. Requiring evidence of improper “intent” before finding a violation of the rule would also reduce the misuse of the disciplinary process by unscrupulous adversaries seeking tactical advantages over less wary lawyers. Or, New York could simply abolish the rule, as most other jurisdictions have done.

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