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HeadNotes

One of the most satisfying aspects of editing the *NY Business Law Journal* is the opportunity to judge the Business Law Section's annual student writing competition. Open to all students enrolled in degree programs at accredited law schools, the competition has produced quality and cutting-edge contributions to the *Journal*. The 2014 competition was no exception; first prize, including a check for $1,500, went to Mr. Richard Jones, a student at New York Law School, for his article in the Summer 2014 edition of the *Journal*, "The Counterintuitive Effects of the Volcker Rule and the Push-Out Rule," which showed how two key provisions of the Dodd-Frank financial reform law could have the unintended effect of increasing systemic risk. Second prize went to Ms. Nithya Narayanan, for "America's Tweak to the Loser Pays Rule: A Board-Insulating Mechanism?" which appeared in the Winter 2014 issue. Ms. Narayanan, who graduated from Harvard Law School this spring, discussed a recent Delaware court decision upholding a by-law provision that would compel the plaintiffs in an unsuccessful shareholder derivative suit to pay the legal costs of the corporation, but would not require the corporation to pay legal costs if it loses. Both students received their awards in person at the Section's spring meeting in New York. At the same meeting, the Section's Executive Committee voted unanimously to increase the potential number of awards per year to three.

Also at the spring meeting, the Executive Committee voted unanimously to oppose legislation that would extend the reach of Section 630 of the Business Corporations Law (see the report of the Legislative Affairs Committee under Committee Reports). Section 630 makes the ten largest shareholders of a New York close corporation personally liable for unpaid wages incurred in the state. The predictable result has been to cause businesses to incorporate in other jurisdictions, usually Delaware. The proposed amendment would extend Section 630 to foreign corporations doing business in New York. While couched in terms of ending "discrimination" between New York and foreign corporations, the effect again is to discourage companies from doing business in New York. In December, with little or no notice to the public, the Legislature passed legislation extending Section 630 to LLCs as well as corporations. Coupled with New York's costly and onerous publication requirement, which benefits no one except a handful of newspapers that carry legal notices, the effect has been to drive essentially all new LLC formations out of state—again, to the primary benefit of Delaware. These enactments continue a discouraging trend of making the State unfriendly to business. They also violate the fundamental principle of limited liability that applies throughout the United States. Governor Cuomo has promoted a well-publicized business-friendly agenda in other areas, such as taxation; his views on this latest extension of Section 630 were not known when we went to press.

We are pleased to announce that, commencing with this issue, the *Journal* has renewed its historic ties to Albany Law School, after several years of working with New York Law School. Concurrently Mr. Stuart Newman, founder of the *Journal* and Advisor Emeritus, has been made Chair of the *Journal*'s Advisory Board. And appropriately, Mr. Newman also has provided our lead article for this issue. In "Piercing the LLC Veil under New York Law," Mr. Newman and Mr. Tyler Silvey, a partner and associate respectively of the New York City firm of Salon Marrow Dyckman Newman & Broudy LLP, examine the development of the doctrine of "piercing the corporate veil" as applied to LLCs. They note that, while only 20 years or so have elapsed since LLCs came into general use in the United States, this form of business organization has surpassed the corporate form in most states (but not New York, most likely reflecting the State's onerous publication requirement for new LLCs, noted above, which the Business Law Section has long opposed). However, while courts have looked to traditional corporate veil-piercing factors (inadequate capital, failure to keep records, et al.) in analyzing veil-piercing issues for LLCs, they have not consistently applied these factors in a way that recognizes the differences between the corporate and LLC forms. Messrs. Newman and Silvey conclude by providing a sensible and practical list of recommendations for lawyers who counsel LLCs to assist their clients in anticipating and avoiding possible veil-piercing scenarios.

Our next article deals with an employment law issue that is coming increasingly to the fore, with potentially significant implications for New York businesses and their attorneys. In "Workplace Bullying for Private Employers: FAQs About Workplace Bullying," Sharon Perella, a partner with Thompson Hines LLP and an expert on employment law, provides a clear and comprehensive overview of the emerging consensus as to what constitutes actionable bullying in the private workplace. While at present "bullying" per se is not prohibited under federal or state law, except to the extent it occurs within the context of otherwise actionable discrimination or tortious conduct, Ms. Perella notes that anti-bullying laws have been adopted in other countries, and legislation has been introduced in the New York State Assembly. As always, one risk of such legislation is the potential for frivolous litigation. But the lesson for businesses and their counsel is to get on

top of this issue before bullying—which is increasingly defined to include interfering with an employee's ability to perform his or her responsibilities, as well as verbal or physical abuse—becomes a problem, and for this purpose Ms. Perella's FAQs offer an indispensable guide. The editors are pleased to announce that, in recognition of her ongoing contribution to the *Journal* and its readers in the area of employment law, Ms. Perella has been appointed as a member of the *Journal*'s Advisory Board.

An emerging issue in corporate governance is the relative stagnation of representation of women on corporate boards, which has held steady at around 16 percent in recent years, notwithstanding the demonstrated benefits to the bottom line for corporations with significant numbers of women on their boards. In "Successfully Advocating for Gender Parity on Corporate Boards: Cost Effective, Demand-Side Strategies and Shifting from 'Why' to 'How,'" Amanda Evans, a candidate for the JD degree at the University of Richmond School of Law, presents a thorough, well-written and well-researched discussion of the history of women being represented on corporate boards and the reasons their numbers have continued to lag. Noting that the large percentages of women earning JD, MBA and other advanced degrees have created a more than ample supply of qualified candidates, she goes on to discuss specific strategies focused on the demand side—increasing corporate board awareness of the desirability of adding women—and offers practical guidance on specific strategies to achieve this.

Prepared by the attorneys at Skadden Arps, "Inside the Courts" has been a regular and invaluable feature of the *Journal*, highly prized by our readers. The latest version is no exception, with the usual range of insightful, tightly written summaries of significant current litigation, spanning the gamut of corporate and securities law issues of which all business practitioners should be aware. The editors remain grateful to the team at Skadden for their willingness to share their knowledge and expertise with our readers.

And ditto, our ethics guru Evan Stewart, a partner at Cohen & Gresser LLP and visiting professor of law at Cornell and adjunct professor at Fordham, who continues to grace every issue with his witty insights into ethical questions all attorneys deal with (or, sometimes, fail to deal with) in day-to-day practice. In his latest entry, "Pigs Get Fat, Hogs Get Slaughtered: Keeping Lawyers Out of the Slaughterhouse," Mr. Stewart, as he has in the past, urges our readers to steer clear of buying the proverbial pig in a poke—in this case, enlightening us about two pigs for the price of one. The first revolves around the ethical rule that attorneys may not threaten criminal action in order to gain advantage in a civil litigation. But as always, Mr. Stewart warns that things are never as simple as they seem. Today there are three groups of states: the majority have no explicit ban on such conduct, a handful prohibit it outright, and the remainder—including New York—prohibit such conduct only if it is aimed "solely" at gaining an advantage in civil litigation. But what is meant by "solely?" And what is "threatening," as distinguished from "informing," "calling attention to," et al.? Mr. Stewart's second pig-in-a-poke is the seemingly bright-line rule that attorneys may not, as part of a settlement in litigation, enter into restrictive covenants whereby they agree not to represent certain parties in certain matters and the like. Noting that this rule is often honored in the breach, Mr. Stewart firmly cautions against buying this pig in a poke. As always, his witty and erudite footnotes alone are worth the price of admission.

As a senior counsel at Buffalo's M&T Bank, Sabra Baum brings an insider's practical perspective to issues of banking law, particularly those surrounding payment systems. In her latest contribution, "Providing Payment Processing or Other Services to Illegal Businesses? Beware of Financial Services (and Other) Regulators," Ms. Baum discusses two recent initiatives aimed at involving banks more closely with law enforcement attacks on illegal businesses. The first, "Operation Choke Point," involves efforts by regulators to "choke off" the ability of illegal payday lenders to originate automated clearing house (ACH) debits of customer accounts through the banking system. For this purpose, they invoke the responsibility of banks and other financial institutions to combat money laundering under the Bank Secrecy Act (BSA), an area in which the burden of compliance for all financial institutions continues to expand. The second involves a lawsuit by the Consumer Financial Protection Bureau (CFPB), created under the Dodd-Frank financial reform law of 2010, seeking to impose liability on non-bank payment processors for facilitating illegal or abusive practices by debt collection companies. In recognition of her ongoing contributions to the *Journal*, the editors are pleased to announce that Ms. Baum has accepted our invitation to join the *Journal*'s Advisory Board.

And just in case commercial banks and their lawyers think they finally have a handle on the plethora of federal and state regulators they have to deal with, a potential new one has emerged. In "Commercial Banks and Compliance with Sustainability Accounting Standards," Samuel Gunther, an attorney and CPA, along with attorney Richard Murray and Sheila Gunther, a professor at LIU, describe the structure and function of the new Sustainability Accounting Standards Board (SASB). The SASB traces its roots to the International Integrated Reporting Council (IIRC), an initiative undertaken by Britain's Prince Charles in 2010. Describing itself as a "global coalition of regulators, investors, companies, standard setters, the accounting profession and NGOs [non-governmental organizations]," the IIRC's self-appointed mission is to establish worldwide standards for organizations to report, in a single Integrated Report (IR), how they intend to create value over time. The IRs are intended to focus on environmental, social and governmental objectives—collectively often referred to as "sustainability" informa-

"Pigs Get Fat, Hogs Get Slaughtered: Keeping Lawyers Out of the Slaughterhouse"

By C. Evan Stewart

Recently, I was on a conference call with a large, distinguished group of lawyers in which various courses of action were debated. One such course, I opined, was particularly troubling because I feared we would be buying a pig in a poke. Eventually (and fortunately), the group veered away from the course I feared. But I was troubled that no one seemed to know what I meant when I referenced the "pig" and the "poke"; later, I asked two colleagues if they understood the phrase, and they candidly fessed up that they did not.[1]

As readers of this learned *Journal* know, from time to time this author has attempted to alert members of the bar to a whole variety of pigs in pokes.[2] This article will identify two more.

Threatening Criminal Action

Suppose the following hypothetical: (1) your client is the respondent in a FINRA arbitration in which the claimants are suing for hundreds of millions of dollars in damages, with an evidentiary hearing imminent; (2) while you are preparing witnesses and getting ready for trial, you learn that the claimants' attorneys have been contacting the U.S. Securities and Exchange Commission, the Attorney General of the United States, the U.S. Attorney for the Southern District of New York (the home of your client), the New York Attorney General, FINRA's Enforcement Division, the U.S. Consumer Financial Protection Bureau, and the U.S. Attorney for the Northern District of California (the home of the claimants); (3) the purpose of the claimants' attorneys' efforts in contacting those governmental (and quasi-governmental) agencies is to have them launch an investigation(s) into your client's "criminal wrongdoing" which harmed the claimants; (4) only the U.S. Attorney for the Northern District of California has taken the bait and launched an investigation; and (5) the claimants' attorneys are from a prominent national law firm, with the lawyers working on the case based out of the firm's New York City and San Francisco offices. What, if anything, is wrong with this picture?

Long ago and far away, in a distant universe (i.e., when the author was in law school), the answer was pretty clear. In 1969, the American Bar Association adopted the Model Code of Professional Responsibility; and thereafter the states generally adopted the ABA's Code. Of particular relevance to our hypothetical were Canon 7 ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law") and Disciplinary Rule 7-105 ("A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."). The ABA's Ethical Consideration 7-21 fleshed out the rationale for DR 7-105:

> The civil adjudicative process is primarily designed for the settlement of disputes between the parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of the judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

Ethical Consideration 7-21 cited as its reference point the 1930 decision of New York's Appellate Division, First Department *In re Gelman*.[3] In that case, a New York lawyer wrote a threatening letter to a taxi driver who had been in an accident with the lawyer's client. Among other things, the lawyer wrote that if he was "put to the trouble of proceeding against [the driver] personally..., [he would] be compelled to initiate criminal proceedings against [the driver] for failing to cover [his] taxicab by proper insurance policy under the law."

While it turned out the driver did have "proper" insurance (and thus the threat of "criminal proceedings" was not in fact a meaningful one), the First Department ruled that the lawyer was to be "severely censored" for violating "the principle which condemns any confusion of threats of criminal prosecution with the enforcement of civil claims." In so ruling, the *Gelman* court applied the ethical standard in effect at that time;[4] and that standard would continue to be the widely accepted one thereafter.[5]

In 1983, the ABA, based upon the work of the Kutak Commission, engaged in a wholesale overhaul of the professional responsibility rules. Not included in the new ABA Model Rules, however, was an analog to DR 7-105; thus, at least as far as these aspirational rules were concerned, threats of criminal prosecution in civil matters appeared to be no longer verboten. To the extent uncertainty about that issue remained, the ABA's Standing Committee on Ethics and Professional Responsibility weighed in, issuing Formal Opinion 92-363 ("Use of Threats of Prosecution in Connection with a Civil Matter"):

> The Model Rules do not prohibit a lawyer from using the possibility of prosecuting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that the criminal matter is related to the client's civil claim, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest influence over the criminal process.[6]

Three Groups of States

So how have the states (and the District of Columbia) reacted to this change of affairs? Basically, they have split into three groups. The first, consisting of twenty-seven jurisdictions, has followed the ABA approach and has no explicit prohibition on this conduct.[7] The second, consisting of six jurisdictions, blanketly prohibits this conduct.[8] The third, consisting of eighteen jurisdictions, prohibits this conduct—if it is designed "solely" to gain an advantage in civil litigation.[9]

In the first group of states, a number have seemingly embraced—in a positive sense—making criminal threats to gain a tactical edge. Thus, for example, Delaware takes the view that an "[a]ttorney may use the threat of prosecuting criminal charges against [an opposing party] in order to gain relief for [her client] in her civil claim without violating the applicable ethical standards if the criminal matter is related to [her client's] civil claim."[10] Others have suggested threatening criminal prosecution to gain an advantage in civil litigation *may* be violative of other ethical rules.[11]

With respect to the second group of states, California sets forth the standard in its most explicit and clear terms: "A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute."[12] And the California courts and bar authorities have not been reticent in enforcing this provision.[13]

As an example of the third group of states, New York's Rule 3.4 (e) ("Fairness to Opposing Party and Counsel") pretty faithfully tracks the old DR 7-105: a lawyer shall not "present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."[14]

What Constitutes a "Threat"?

In the two groups of states which recognize there is an ethical issue for lawyers engaging in this conduct, an important issue to understand is what constitutes a "threat." As a 2003 New York State Bar Association Ethics Opinion observed: "there is no universal standard to determine whether a letter 'threaten[s] to present criminal charges.' Such a determination requires the examination of both the content and the context of the letter."[15] A real "threat" is pretty easy to understand, whether it be the threat used in *Gelman* or in a legion of other cases.[16]

But in less obvious situations, different jurisdictions have determined and differentiated between the act of "threatening" versus "notifying" versus "informing" versus "warning" versus "calling attention to." In Colorado, for example (which is one of the states in the third group), that state expressly provides that it is not an ethical violation "for a lawyer to *notify* another person in a civil matter that the lawyer reasonably believes that the other's conduct may violate criminal...statutes."[17]

And in Wisconsin (another state in the third group), it is permissible for a lawyer to *inform* another person that her conduct may violate a criminal statute and that the lawyer or her client has a right and duty to report the violation.[18]

Oregon (also a state in the third group) actually allows threats, "but *only if*...the lawyer reasonably believes the charge to be true and *if* the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge."[19]

And finally, a number of states have statutes requiring lawyers bringing civil actions to give *notice* of potential criminal prosecution.[20] Thus, in those states, complying with a statutory obligation cannot constitute a violation of a lawyer's professional responsibility obligations.

What Is "Solely"?

"Solely" would seem to support a difficult standard—i.e., if there are mixed reasons, the standard would not be met. The same 2003 New York Ethics Opinion cited above,[21] however, suggested a somewhat less unequivocal bar:

> When a lawyer threatens criminal charges unless the recipient takes specified action, the threat is likely to have one clear purpose—the doing of that specific act. Thus, when a lawyer threatens to present criminal charges unless an action is taken which remedies a civil wrong, a presumption is likely to arise that [Rule 3.4(e)] has been violated.

How has this notion been applied in practice? One of the leading (and often cited) cases fleshing out "solely" is *In re Decato*.[22] There, a lawyer sent a letter that said:

> In New Hampshire, it is a crime to obtain services by means of deception in order to avoid the due payment therefore [sic]. Without any proof on your part, you have chosen to stop payment on a check after it was made for the payment of ser-

> vices. Unless you communicate directly with me and give me some proof that the damages sustained to your son's International Harvester were the result of the failure of Decato Motor Sales, Inc., I shall consider filing a criminal complaint with the Lebanon District Court against your son for theft of services.

The issue before the Supreme Court of New Hampshire was whether the lawyer's letter constituted a violation of DR-7-105. The Court concluded that it did not, hanging its hat on the letter's lack of a "demand or request [for] payment"; as such, the Court could not "find by clear and convincing evidence that his *sole* purpose was to 'obtain an advantage in a civil suit.'"[23]

State bar authorities have also weighed in on "solely." The District of Columbia, for example, has said it is permissible for a lawyer sending a demand letter for a debt owed to include citation to criminal statutes and a potential criminal referral, so long as the threat is not made "solely" to gain advantage in the civil collection action.[24] And Michigan is of the view that a lawyer may properly inform opposing counsel of potentially relevant criminal statutes and possible prosecution, so long as her "sole" purpose is not harassment but instead the legitimate enforcement of her client's interests.[25] Other bar authorities have issued opinions of similar ilk.[26]

So where does all this leave us? Notwithstanding the three basic approaches and the jurisdictional traps inherent in the different standards in play across the country, there appears to be a lot of wiggle room in the joints to account for aggressive lawyering, especially if one picks one's language with some care (and with an eye to precedent). Whether this is a good outcome (or a place where the legal profession should feel good about itself), I will leave to others. But, at a minimum, a lawyer needs to proceed with caution if this is a course of conduct being contemplated.

Are Restrictive Settlements Hunky Dory?

At about the same time I was posing my "pig in a poke" concern to my colleagues, another client asked me to opine on the propriety of a settlement agreement that would include a provision whereby the opposing counsel would agree not to represent certain clients or bring certain claims in the future. This struck me as sort of the opposite bookend of the issue just discussed,[27] and I got cracking to provide the answer to a scenario I had never seen in 38 years of practice.

It turns out that there are in fact three answers. The first is that such an arrangement is patently forbidden by the applicable ethical rules. Rule 5.6 (e) (2) states: "A lawyer shall not participate in offering or making...an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy." And if that were not clear enough, Comment 2 to the Rule states that this provision "prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client."[28] So, if the first answer is so clear and unequivocal, how can there be two others?

Well, the second answer is that, notwithstanding the ethical restriction, a number of lawyers apparently enter into such agreements with some frequency.[29] Why? Perhaps in the hopes that (1) the ethical prohibition is not (or will not be) known or raised, and/or (2) the restriction, contractually agreed to, will be prophylactically effective in restraining the settling lawyer from bringing new claims.[30] Another reason may be that there has been push-back against Rule 5.6 (e) (2)'s restriction by prominent legal academics as lacking any persuasive rationale.[31]

The third answer is perhaps the most interesting: such agreements, even though they are unethical, have been held to be legally enforceable in certain jurisdictions. Huh? In the words of one Texas state court that reached this result:

> [The restriction] does not void the settlement agreement. The attorneys involved are not parties to this lawsuit. Nor does the agreement affect the outcome of the lawsuit. The ethics of the attorneys' actions, if justifiably questioned, are for a state bar grievance committee to decide and not for this tribunal.[32]

Other states following Texas' lead include New York[33] and Florida.[34] But some other states have not split the baby this way, finding that an ethical violation of this kind also affects the enforceability of a settlement agreement.[35]

By pointing out these three answers, I sincerely hope I am not furthering a race to the bottom by lawyers who believe answers "2" or "3" constitute an appropriate way to practice law.[36] They do not; once one hears answer "1," that should end the analysis.

Conclusion

In keeping with the title of the article, Joseph P. Kennedy once famously remarked: "Only a fool holds out for the top dollar."[37] Hopefully, readers who have made it this far will not be tempted to engage in the foolhardy (or worse) conduct flagged above. For, as Richard Nixon once said when he was discussing the Watergate cover-up with John Dean: "it is wrong[,] that's for sure."[38]

Endnotes

1. Dating back to the Middle Ages, this expression means to buy something without actually knowing its true nature or value (literally, to buy something—perhaps not even a pig—in a sack or bag without first checking out to see what is in the bag). In Finnish, this warning is translated: ostaa sika säkissä; in Irish, it is: ceannaigh mue i mála; in Zulu, it is: ukuthenga ingulube

esesakeni. Some believe this expression also led to another familiar one: "Letting the cat out of the bag." Perhaps more important to cultural historians, in NATIONAL LAMPOON'S EUROPEAN VACATION (Warner Bros. 1985), the Griswold family wins a free trip to Europe after defeating the Froegor family on the game show "Pig in a Poke" ("it pays to be a glutton"). Ellen Griswold (played by Beverly D'Angelo) wins the contest because she makes a sotto voce reference to her husband, Clark Griswold (played by Chevy Chase), at which point the host of "Pig in a Poke," Kent Winkdale (played by John Astin), says: "That's it: Clark...of Lewis and Clark. And the Griswolds are our grand prize winners!"

2. *See, e.g.*, C.E. Stewart, *'Positively 4th Street': Lawyers and the 'Scripting' of Witnesses*, N.Y. St. B. J., vol. 18 no. 1 (Summer 2014); C.E. Stewart, *Mad Dogs and Englishmen*, N.Y. St. B.J., vol. 17, no. 1 (Summer 2013); C.E. Stewart, *Just When Lawyers Thought It Was Safe to Go Back into the Water*, N.Y. St. B. J., vol. 15, no. 2 (Winter 2012); C.E. Stewart, *Thus Spake Zarathustra (And Other Cautionary Tales for Lawyers)*, N.Y. St. B. J., vol. 14, no. 2 (Fall 2011).

3. *In re Gelman*, 230 A.D. 524 (1st Dep't 1930).

4. *See, e.g.*, *In re Hart*, 131 A.D. 661 (1st Dep't 1909); *In re Abrahams*, 158 A.D. 595 (1st Dep't 1913); *In re Penn*, 196 A.D. 764 (1st Dep't 1921); *In re Ayman*, 226 A.D. 468 (1st Dep't 1929).

5. *See, e.g.*, *In re Glavin*, 107 A.D. 2d 1006 (3d Dep't 1985); *In re Linietsky*, 699 N.Y.S.2d 61 (2d Dep't 1999); *Standing Comm. v. Ross*, 735 F.2d 1168 (9th Cir. 1984); *In re Lewelling*, 678 P.2d 1229 (Or. 1984); *State ex rel. Counsel for Discipline v. Lopez Wilson*, 634 N.W.2d 467 (Neb. 2001); *In re Watson*, 768 N.E.2d 617 (Ohio 2002); *In re Huffman*, 983 P.2d 534 (Or. 1999); *In re Trexler*, 541 S.E.2d 822 (S.C. 2001); *Weiss v. Comm'n for Lawyer Discipline*, 981 S.W.2d 8 (Tex. App. 1998); *In re Boelter*, 985 P.2d 328 (Wash. 1999); *In re Robinson*, 46 So.3d 662 (La. 2010).

6. As demonstrated *infra* in notes 10–11, the ABA's Formal Opinion can be cited for many (and not always in harmony) positions. Related to the second subject matter of this article, *see infra* note 27 and accompanying text, the ABA's Formal Opinion also opined that the Model Rules "do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim, to refrain from presenting criminal charges against the opposing party as part of a settlement agreement." *Id.*

7. States following this approach are: Alaska, Arizona, Arkansas, Delaware, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, West Virginia, and Wisconsin.

8. States following this approach are: California, Illinois, New Jersey, Oregon, Tennessee, and Vermont. Five states bar such threats if they are made "to obtain an advantage in a civil matter." New Jersey's prohibition is directed against threats made "to obtain an improper advantage."

9. States following this approach are: Alabama, Colorado, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Massachusetts, New York, Ohio, South Carolina, Texas, Virginia, and Wyoming. *See, e.g.*, *In re Yarborough*, 488 S.E. 2d 811 (S.C. 1997); *People v. Sigley*, 951 P.2d 481 (Colo. 1998).

10. *See* Del. State Bar Ass'n Comm. On Prof'l Ethics, Op. 1995-2 (1995). *Accord* Alaska Bar Ass'n, Ethics Op. 97-2 (1997); State Bar of S. Dak., Ethics Op. 94-3 (1994); State Bar of Mich., Ethics Op. RI - 78 (1991). *See also* Utah State Bar, Ethics Advisory Op. 03-04 (2003). *See also West Virginia State Bar Comm. on Legal Ethics v. Printz*, 416 S.E. 2d 720 (W. Va. 1992) (DR 7-105 (A)'s prohibition is "unworkable"); *Ruberton v. Gabage*, 654 A.2d 1002 (N.J. Super. Ct. 1995) (threat okay because "lawyers must be free to advance the strength of a client's case in candid and objective ways"). And the ABA's Formal Opinion 92-363 also concluded that certain circumstances justify making criminal threats to gain an advantage in civil litigation. *Accord* Alaska Ethics Op. 97-2 (1997); Delaware Ethics Op. 1995-2 (1995); Michigan Informal Ethics Op. RI-78 (1991); North Carolina Ethics Op. 2008-15 (2009); South Dakota Ethics Op. 94-3 (1994); Utah Ethics Op. 03-04 (2003); West Virginia Ethics Op. 2000-01 (2000); Wisconsin Ethics Op. 2001-01 (2000).

11. *See, e.g.*, *State ex rel. Oklahoma Bar Ass'n v. Worsham*, 957 P.2d 549 (Okla. 1998) (lawyer's threat of criminal prosecution without *any basis in fact or law* could/would violate Rules 3.1, 4.1, 4.4, 8.4 (d) & (e)); Maryland Ethics Op. 2003-16 (2004) (former DR 7-105 (A) was "basically sound," but the rule was too broad; other ethical rules should work to counter improper threats by lawyers); Michigan Informal Ethics Op. RI-78 (1991) (Rules 3.1, 3.3, 3.4, 3.8, 4.1, 4.4, 8.3, and 8.4 adequately deal with the same concerns articulated by DR 7-105 (A)). And the ABA's Formal Opinion 92-363 expressed a similar view: Rules 3.1, 4.1, 4.4, and/or 8.4 may address the conduct barred by DR 7-105 (A)). *See* ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 92-363 (1992). *See also* Arizona Ethics Op. 93-11 (1993); Delaware Ethics Op. 1995-2 (1995); Florida Ethics Op. 89-3 (1989); New Mexico Ethics Op. 1987-5 (1987); North Carolina Ethics Op. 98-19 (1999); West Virginia Ethics Op. 2000-01 (2000).

12. *See* CAL. RULES OF PROF'L CONDUCT, Rule 5-100(A).

13. *See, e.g.*, *Crane v. State Bar*, 30 Cal. 3d 117 (1981); *Lopez v. Banvelos*, 2013 WL 4815699 (E.D. Cal. Sept. 6, 2013); *In re Elkins*, 2009 WL 3878295 (Cal. Bar Ct. Rev. Dep't 2009); *In re Malek-Yonan*, 2003 WL 23095707 (Cal. Bar Ct. Rev. Dep't 2003).

14. Connecticut, Florida, Georgia, Hawaii, Kentucky, Massachusetts, New Jersey, and Virginia all house this prohibition in Rule 3.4. Texas, Idaho, Tennessee, and Wyoming house it in Rule 4.04. Maine houses it in Rule 3.1; Ohio houses it in Rule 1.2; and the District of Columbia, Illinois, and Louisiana house it in Rule 8.4.

15. NYSBA Comm. on Professional Ethics, Formal Op. 772 (2003). Thus, as Comment 5 to New York's Rule 3.4 states: "[N]ot all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done." N.Y. RULES OF PROF'L CONDUCT R. 3.4 cmt. 5. *See also* N. McMillan, *Recent Developments in the Ethical Treatment of Threats of Criminal Referral in Civil Debt Collection Matters*, 21 GEO. J. LEGAL ETHICS 935 (2008).

16. *See supra* note 5. Interestingly, the U.S. Supreme Court recently handed down a decision whereby a not-so implicit notification threat of criminal conduct by a state-approved group of dentists was held to constitute a violation of the Sherman Act. *See North Carolina State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, No. 13-539 (Feb. 25, 2015).

17. COLO. RULES OF PROF'L CONDUCT R. 4.5(b) (2012) (emphasis added). *See also id.* at cmt. 6.

18. *See* Wisconsin Ethics Op. E-01-01 (2001). *Accord In re McCurdy*, 681 P.2d 131 (Or. 1981) (examining a lawyer's letter to parents of hit-and-run driver specifically which disclaimed "threatening," but did *inform* them of likely criminal exposure).

19. OR. CODE OF PROF'L RESPONSIBILITY DR 7-105 (2003) (emphasis added).

20. *See, e.g.*, Ohio Ethics Op. 87-9 (1987); Florida Ethics Op. 85-3 (1985); South Carolina Ethics Op. 07-06 (2007); Utah Ethics Op. 71 (1979); *see also Knoell v. Petrovich*, 90 Cal. Reptr. 2d 162 (Cal. Ct. Appls. 1999).

21. *See supra* note 15 and accompanying text.

22. 379 A.2d 825 (N.H. 1977) (sometimes this is cited as *Decato's Case*).

23. *Id.* at 888 (emphasis added). *But see In re Hyman*, 226 A.D. 468, 235 N.Y.S. 622 (1st Dep't 1929), which the New Hampshire Supreme Court distinguished on the ground that in *Hyman* (unlike in *Decato*) the lawyer *did* evidence a demand for payment which thus satisfied the "solely" requirement.

24. District of Columbia Ethics Op. 339 (2007).

25. Michigan Informal Ethics Op. RI-78 (1991).

26. *See also* Florida Op. 85-3; Georgia Op. 26 (1980); Utah Op. 71 (1979) (opining that a letter referencing criminal sanctions in the conduct of stopping payment on a check is not violative of the "solely" standard because state laws require such notification before filing a civil action); NYSBA Comm. on Professional Ethics, Formal Op. 772 (2003) (stating a lawyer may threaten an administrative or disciplinary proceeding against a broker so long as *one* purpose of the threat is to obtain information about the broker's history of conduct).

27. *See supra* note 6.

28. *See also* ABA Formal Ethics Op. 93-371 (1993); Colorado Formal Ethics Op. 92 (1993) ("When restrictions on the practice of law become bargaining chip between parties, the integrity of the profession is threatened.").

29. *See In re Mosher*, 25 F.3d 397 (6th Cir. 1994); Joanne Pitulla, *Co-Opting the Competition—Beware of Unethical Restrictions in Settlement*, A.B.A. J. vol. 78, no. 8, at 101 (1992).

30. *See* Philadelphia Ethics Op. 86-121 (1986). In that opinion, the Philadelphia bar authorities took the view that it was permissible to ask opposing counsel to state that she has no "present intention" to file another suit against his client, so long as the settlement agreement itself does not include a binding restriction to that effect. New York is not in accord with this approach. *See* NYSBA Comm. on Professional Ethics, Formal Op. 730 (2000).

31. *See* Gillers & Painter, *Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements*, 18 GEO. J. LEGAL ETHICS 281 (2005); Golan, *Restrictive Settlement Agreements: A Critique of Model Rule 5.6(b)*, 33 SW. U.L. REV. 1 (2003).

32. *Shebay v. Davis*, 717 S.W.2d 678, 682 (Tex. Ct. App. 1986).

33. *Feldman v. Minars*, 658 N.Y.S.2d 614 (1st Dep't 1997) (finding the agreement was not contrary to New York public policy and thus is not voided; but the promising lawyers are barred from representing clients if solicited in violation of the agreement). *See also Stratton Faxon v. Merck & Co.*, 2007 U.S. Dist. LEXIS 93413 (D. Conn. 2007).

34. *Lee v. Florida Dep't of Ins. & Treasurer*, 586 So.2d 1185 (Fla. Dist. Ct. App. 1991).

35. *See e.g., Jarvis v. Jarvis*, 758 P.2d 244 (Kan. Ct. App. 1988).

36. As I tell my law students, I will hunt down (even to Tierra del Fuego) anyone citing this article as a defense to such conduct and the punishment will be slow and excruciatingly painful.

37. *See Galleries*, SEC. & EXC. COMM'N HIST. SOC'Y, http://sechistorical.org/museum/galleries/ (last visited Apr. 28, 2015). President Kennedy's father also said: "More men die of jealousy than of cancer."

38. *See* B. Woodward & C. Bernstein, *Nixon Debated Paying Blackmail, Clemency*, WASH. POST, May 1, 1974, at A01.

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