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Confidential Settlements for Professional Malpractice

Sande L. Buhai

CONFIDENTIAL SETTLEMENTS FOR PROFESSIONAL MALPRACTICE

SANDE L. BUHAI[†]

INTRODUCTION

A lawyer representing a plaintiff in a professional malpractice case advises her client not to file a complaint with the state regulatory body—the state bar, the medical board, or some other pertinent body—until later. The lawyer explains that she can offer to settle the case more favorably, more quickly, and at lower cost if they promise that, as part of the settlement, defendant's malfeasance will never be reported to the state regulatory body responsible for ensuring professional competence in the area. This tactic may allow the client to negotiate a larger settlement because the defendant should be willing to pay more to avoid having to defend himself in an administrative, criminal, or disciplinary proceeding. Although the lawyer's present client may benefit, failing to report professional malfeasance may hurt both future clients and the public at large. Professional regulatory agencies exist to protect the public from substandard professional services. Advising a client to withhold relevant information from such agencies for personal gain—both the client's and the lawyer's—raises serious public policy issues. The dangers of confidentiality provisions have been explored in other contexts, particularly in products liability[1] and sexual

[†] Sande L. Buhai is a Clinical Professor of Law at Loyola Law School. The author would like to thank Loyola Law School for their support of scholarship. She would also like to thank Professor Ted Seto for his amazing editing and encouragement.

[1] *See, e.g.*, Myron Levin, *GM's Exploding Pickup Problem*, MOTHER JONES (Apr. 6, 2010), https://www.motherjones.com/environment/2010/04/gm-ck-exploding-pickup/ [https://perma.cc/R88U-AXX4]; Rebecca Hersher, *Settlement Deal Reached in 2014 West Virginia Chemical Spill*, NPR (Oct. 26, 2016, 3:04 PM), https://www.npr.org/sections/thetwo-way/2016/10/26/499307717/settlement-deal-reached-in-2014-west-virginia-chemical-spill [https://perma.cc/M5SE-YY4N].

harassment cases.[2] This Article explores similar problems in the context of professional malpractice. Much of the discussion here will focus on legal malpractice; however, similar concerns and arguments apply to other professionals as well.

The American Bar Association ("ABA") Model Rules do not prohibit parties from agreeing not to report professional misconduct to a state bar or other regulatory agency. In the absence of a provision prohibiting such conduct, lawyers are free to leverage the possibility of promising to refrain from such reporting to gain their clients—and themselves—more money. This frustrates the purposes of the Model Rules and of professional regulation more generally. Attorneys guilty of professional malfeasance face no reprimand from the state bar for their misconduct. Indeed, an attorney who has repeatedly violated the Model Rules may nevertheless be able to maintain a pristine record. And potential clients who consult state bar records may, as a result, end up being misled—*by the bar itself*—regarding the malfeasance history of the lawyers they are considering retaining. Even the ABA acknowledges that confidentiality in professional malpractice settlement agreements "prevent[s] regulators and government agencies from performing their duty to enforce the law and protect the public."[3]

In the case of legal malpractice, California prohibits such conduct. California Rules of Professional Conduct ("CRPC") 5.6(b) states: "A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules."[4] When adopting CRPC 5.6(b), California recognized that the Model Rules did not contain any such provision, but "carried [the provision] forward because it provides important public protection."[5] The California rules also prohibit threatening to report professional misconduct more broadly to gain an advantage in civil settlements. CRPC 3.10(a) states: "A

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[2] *See, e.g.*, Ann Fromholz & Jeanette Laba, *#MeToo Challenges Confidentiality and Nondisclosure Agreements*, L.A. LAW., May 2018, at 12.

[3] Ronald L. Burdge, *Confidentiality in Settlement Agreements Is Bad for Clients, Bad for Lawyers, Bad for Justice*, GPSOLO (Nov. 1, 2012), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2012/november_december2012privacyandconfidentiality/confidentiality_settlement_agreements_is_bad_clients_lawyers_justice/ [https://perma.cc/52YK-U7LH].

[4] CAL. RULES OF PRO. CONDUCT r. 5.6(b) (2020).

[5] CAL. RULES OF PRO. CONDUCT r. 5.6 exec. summary (Proposed Draft 2017), https://www.calbar.ca.gov/portals/0/documents/rules/rrc2014/final_rules/rrc2-5.6_[1-500]-all.pdf [https://perma.cc/3ETN-6JRN].

lawyer shall not threaten to present criminal, *administrative, or disciplinary charges* to obtain an advantage in a civil dispute."[6]

This Article argues that the ABA should adopt rules similar to CRPC 5.6(b) and CRPC 3.10(a) to prohibit: (1) threatening to report professional misconduct to gain an advantage in civil settlements; and (2) agreeing to not report professional misconduct to the relevant professional regulatory body as part of such settlements. This Article does *not* argue that confidential settlements should be eliminated in all circumstances—for example, in the settlement of certain kinds of employment disputes. The prohibitions for which this Article does argue are specific: that lawyers should be prohibited from threatening to report professional misconduct to gain an advantage in a civil dispute and that they should also be prohibited from agreeing to forego reporting professional misconduct to the relevant professional regulatory body in a settlement agreement.

This Article proceeds in four parts. Part I highlights the widespread dangers that arise whenever a plaintiff agrees to withhold information from the relevant professional regulatory body. In the process, it briefly examines two other areas where confidential settlements have been examined and criticized on similar grounds: sexual harassment and products liability. Part II explores how CRPC 5.6(b) prevents the societal harms that result from confidential settlements in the legal malpractice context, though not in other professional malpractice contexts. Part III examines CRPC 3.10, which acts as a counterpart to CRPC 5.6(b) and prohibits lawyers from using threats of reporting professional misconduct to the relevant professional regulatory body, among other threats, to gain an advantage in the civil setting. Finally, Part IV argues that the ABA Model Rules should adopt explicit rules that prohibit lawyers from agreeing, on behalf of themselves or their client, not to report professional malfeasance to the relevant professional regulatory body and, further, that prohibit lawyers from threatening to make such reports to gain an advantage in civil disputes.

I. THE DANGER OF CONFIDENTIAL SETTLEMENTS

Confidentiality clauses in settlement agreements commonly prohibit the parties from disclosing the details of the settlement

[6] CAL. RULES OF PRO. CONDUCT r. 3.10(a) (2020) (emphasis added).

and any facts that led up to the settlement.[7] These provisions, also called non-disclosure agreements ("NDAs"), sometimes create codes of silence that, if broken, lead to severe financial penalties.[8] Although such agreements can be beneficial in some contexts—for example, in protecting trade secrets—in other contexts the agreements can prevent the dissemination of information that is important to preventing harm to others. For example, users of a negligently manufactured product may continue to buy that product, risking further harm. And victims of sexual harassment may be silenced, giving perpetrators the freedom to continue a career of abusive behavior. Under these agreements, any legitimate criminal and disciplinary charges escape publicity and are sealed away in these confidential settlements.[9] The relevant malefactors face no public reprimand for their behaviors and may therefore continue to engage in conduct harmful to others.[10]

Confidential settlements also prevent litigants from obtaining valuable information regarding previously settled disputes. In civil cases, this creates an "inefficiency of allowing disputants to keep confidential information that might otherwise assist future parties."[11] For example, the confidential settlement of a products liability case is likely to result in duplicative efforts to prove the harmful nature of the product in question, making litigation far more expensive for both plaintiffs and the legal system as a whole.[12] Prohibiting disclosure of information regarding previously settled cases often results in future litigants having to go through the "expense and trouble of essentially relitigating disputes that have already been resolved."[13]

A. Settlements in Sexual Harassment Lawsuits

In the context of sexual harassment, commentators have observed that confidential settlements free perpetrators while

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[7] Fromholz & Laba, *supra* note 2.

[8] Vasundhara Prasad, Note, *If Anyone is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2513–15 (2018).

[9] *See* Burdge, *supra* note 3.

[10] *See id.*

[11] Erik S. Knutsen, *Keeping Settlements Secret*, 37 FLA. ST. U. L. REV. 945, 962 (2010).

[12] *Id.*

[13] *Id.*

silencing their victims.[14] Perpetrators often seek secrecy; a promise of confidentiality from one victim allows the perpetrator to continue to victimize others.[15] The perpetrator may be undeterred by the first lawsuit, perhaps even encouraged, because he knows the public will never learn about his predilections and prior acts.[16] The silencing of one victim means that "similarly situated victims will not know that they too can bring claims against the same perpetrator."[17] One victim's credibility would be strengthened by testimony of similar acts by the same alleged perpetrator.[18] The silencing of victims allows the perpetrator to divide and conquer, minimizing the possibility of corroboration.[19]

The consequence of helping another victim may be breach of contract; a prior victim who corroborates the current victim's story may be forced to repay any amounts she obtained in settlement, commonly plus penalties and legal fees.[20] Confidentiality agreements in sexual harassment cases create the risk of financial catastrophe if the victim should ever feel impelled to tell her story at a later time.[21] When victims are silenced and perpetrators are enabled to evade accountability, victims feel isolated and powerless.[22]

In September 2013, Occidental College reached a confidential settlement between the thirty-seven Occidental students and alumni who alleged "that [Occidental College] deliberately discouraged victims from reporting sexual assaults, misled students about their rights during campus investigations . . . and handed down minor punishment to known assailants who in some cases allegedly struck again."[23] In connection with the confidential settlement, Occidental "agreed to pay the women an undisclosed sum to avoid a lawsuit."[24] As is

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[14] Prasad, *supra* note 8, at 2510.

[15] *Id.* at 2515.

[16] Bradford J. Kelley & Chase J. Edwards, #*MeToo, Confidentiality Agreements, and Sexual Harassment Claims*, 2018 A.B.A. BUS. L. TODAY 1, 2.

[17] Prasad, *supra* note 8, at 2515.

[18] Fromholz & Laba, *supra* note 2, at 13.

[19] *Id.* at 13–14.

[20] Prasad, *supra* note 8, at 2514.

[21] *See* Kelley & Edwards, *supra* note 16.

[22] Prasad, *supra* note 8, at 2519.

[23] Jason Felch & Jason Song, *Occidental College Settles in Sexual Assault Cases*, L.A. TIMES (Sept. 18, 2013), https://www.latimes.com/local/la-xpm-2013-sep-18-la-me-occidental-settlement-20130919-story.html.

[24] *Id.*

common with confidential settlements, the terms of Occidental's 2013 agreement barred the victims from publicly discussing the college's handling of their cases.[25] Most likely, at least some of the assailants continued their inexcusable behaviors. If Occidental had instead taken appropriate measures to disclose and punish the alleged assailants, they would not likely have repeated those behaviors.

1. The Model Rules' Attempts to Address the Issue

The Model Rules provide little guidance to attorneys who fear that confidentiality provisions in sexual harassment cases may hurt the public or hinder future plaintiffs. Indeed, the duty of zealous representation may require recommending, drafting, and including such provisions in settlement agreements notwithstanding attorneys' fears.[26] While some rules may arguably apply in limited circumstances, no rule provides clear guidance to attorneys considering confidentiality agreements in the context of repeated sexual misconduct—even in cases that could be prosecuted as felony offenses or cases involving childhood sexual abuse.

There has been some debate about the applicability of MR 5.6(b) in confidential settlements.[27] MR 5.6(b) provides that an attorney cannot agree to restrict her right to practice in the future as part of the settlement.[28] According to the ABA Ethics Committee, an attorney cannot agree to a settlement that would prohibit him from using any information learned during the current representation in any future representation against the same defendant.[29] The committee also stated, however, that "a lawyer may participate in a settlement agreement that prohibits him from revealing information relating to the representation of his client."[30] This apparent ambivalence suggests that the committee has not yet fully resolved the relevant issues.

The committee has had the opportunity to consider and adopt a specific rule relevant to this question.[31] Professor

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[25] *Id.*

[26] *See* MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2019).

[27] *See* Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 496–500, 498 n.45 (2008).

[28] MODEL RULES OF PRO. CONDUCT r. 5.6(b) (AM. BAR ASS'N 2019).

[29] ABA Comm. on Ethics & Pro. Resp., Formal Op. 00–417 (2000).

[30] *Id.*

[31] Tammy J. Meyer & Kyle A. Lansberry, *Ongoing Debate: Confidential Settlement Agreements*, 48 No. 7 DRI FOR DEF. 37 (2006).

Richard A. Zitrin proposed a rule that would have restricted lawyers' ability to participate in the creation of confidential agreements in, among other contexts, that of sexual predators.[32] Professor Zitrin believed that attorneys felt that in participating in the creation of confidential settlements they were "zealous[ly] advoca[ting]" for their clients, as required by the Model Rules, even if such provisions might be contrary to the public interest.[33] He offered a solution in the form of a rule with a structure similar to that of the client confidentiality rule.[34] His proposed rule stated:

> A lawyer shall not participate in offering or making an agreement, whether in connection with a lawsuit or otherwise, to prevent or restrict the availability to the public of information that the lawyer reasonably believes directly concerns a substantial danger to the public health or safety, or the health or safety of any particular individual(s).[35]

The committee rejected the proposed rule, however, because members believed that since it is legal for clients to enter into such agreements, it must be ethical for lawyers to help clients to do so by participating in the drafting.[36] The Model Rules, to the extent they address this issue, therefore effectively weigh in on the side of nondisclosure.

2. State Legislative Attempts to Address the Issue

A number of states, by contrast, have enacted legislation limiting confidentiality in this context.[37] For instance, Florida's Sunshine Act prohibits a court from entering an order or judgment that intentionally or incidentally conceals a "public hazard."[38] "Consequently, courts have interpreted the term 'public hazard' to mean a 'tangible danger to public health or safety.' "[39] The law encompasses orders regarding sealed

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[32] *Id.*

[33] Emily Fiftal, *Respecting Litigants' Privacy and Public Needs: Striking Middle Ground in an Approach to Secret Settlements*, 54 CASE W. RSRV. L. REV. 503, 531 (2003).

[34] *Id.*; *see* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR. ASS'N 2018).

[35] *Richard A. Zitrin Re: Comment on Rules 1.7 and 1.4*, CTR. FOR PRO. RESP. (Sept. 19, 2000), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_witness_zitrin/ [https://perma.cc/KW8A-SLEU].

[36] Meyer & Lansberry, *supra* note 31.

[37] Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J.F. 121, 140 (2018).

[38] FLA. STAT. ANN. § 69.081 (West 2020).

[39] Prasad, *supra* note 8, at 2532.

documents, evidence, or settlement agreements and "voids, as a matter of public policy, any agreement, including private settlement agreements, that hides a 'public hazard.' "[40] Similarly, a Texas statute creates the presumption that all court records are public records, which includes any document filed with the court, including settlement agreements.[41] If a party wishes to have a settlement agreement remain confidential, they must show the need for confidentiality outweighs the public health and safety concerns.[42]

California likewise prohibits settlement agreements that prevent the disclosure of factual information related to claims involving certain types of sexual conduct, cases that can be prosecuted as felony offenses, and childhood sexual abuse.[43] The legislature believed that although confidentiality agreements may help to facilitate individual claim settlements, they also put the public at risk by allowing sexual predators to hide from law enforcement and the public at large.[44] Under California law, an attorney who demands the inclusion of a confidentiality provision in a settlement agreement that conceals an act that may be prosecuted as a felony sex offense, or advises a client to sign such an agreement, may face discipline by the State Bar of California.[45]

In January 2018, a bill was submitted to the California Legislature that would ban the accused wrongdoer in sexual harassment cases from requiring the purported victim to remain silent about the harassment as a condition of a settlement.[46] The proposed bill, Stand Together Against Non-Disclosures ("STAND") Act, would expand the current settlement prohibition to prohibit attempts to use confidentiality agreements to conceal alleged sexual assault, workplace harassment, or discrimination based on sex.[47] The bill protects victim privacy by allowing victims to request confidentiality but prohibits the alleged perpetrator from initiating the inclusion of such provisions.[48] The New York State Assembly has similarly taken up a bill

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[40] *Id.* at 2531.
[41] Meyer & Lansberry, *supra* note 31.
[42] *Id.*
[43] CAL. CIV. PRO. CODE § 1002(a) (West 2012).
[44] Mizrahi, *supra* note 37.
[45] Prasad, *supra* note 8, at 2534–35.
[46] *Id.* at 2522.
[47] Mizrahi, *supra* note 37, at 141.
[48] *Id.*

aimed at preventing the enforcement of clauses in employment contracts that conceal the details of harassment or waive procedural rights or remedies.[49]

B. Settlements in Product Liability Cases

Similar problems arise in the product liability context. Confidentiality provisions in product liability cases often have harmful consequences to the public.[50] Most obviously, confidentiality provisions prevent the public from learning that a product is harmful. The Johns-Manville Co. secretly settled a case brought by employees for asbestos-related injuries.[51] For forty years, thousands of workers contracted respiratory diseases as a result of asbestos, and for much of that period, manufacturers denied that asbestos was dangerous[52] Equally important, failure to publicly disclose product defects substantially reduces the incentive for manufacturers to fix their harmful products. For example, tread separation of Bridgestone/Firestone tires caused multiple car accidents over the course of almost a decade, resulting in serious injuries and fatalities.[53] The manufacturer simply settled the resulting lawsuits and continued to sell its defective tires by the millions.[54] As a result, the National Highway Traffic Safety Administration estimated that Firestone tires caused 203 deaths and more than 500 injuries.[55] Secret settlements have allowed manufacturers to continue to sell defective products; so long as profits from the sales exceed the costs of settlement, such manufacturers have

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[49] Prasad, *supra* note 8, at 2521.

[50] Brendan Faulkner & Michael A. D'Amico, *Unnecessary Court Secrecy in Product Liability Litigation Endangers Our Safety, and Undermines Fundamental Principles of our Civil Justice System*, https://www.damicopettinicchi.com/scholarly-articles/unnecessary-court-secrecy-in-product-liability-litigation-endangers-our-safety-and-undermines-fundamental-principles-of-our-civil-justice-system.html [https://perma.cc/F2BW-5B8P] (last visited Apr. 2, 2021).

[51] Sara Thacker, *Court Seeks End to Secret Settlements*, REPORTERS COMM., https://www.rcfp.org/journals/the-news-media-and-the-law-fall-2002/court-seeks-end-secret-settle/ [https://perma.cc/XEH7-SPWH] (last visited Apr. 2, 2021).

[52] *Id.*

[53] John Greenwald, *Inside the Ford/Firestone Fight*, TIME (May 29, 2001), http://content.time.com/time/business/article/0,8599,128198,00.html [https://perma.cc/DRS7-C7QN].

[54] *Id.*

[55] Nat'l Highway Traffic Safety Admin., *NHTSA Press Release Firestone Recalls*, (Oct. 4, 2001), https://icsw.nhtsa.gov/nhtsa/announce/press/firestone/Update.html [https://perma.cc/M6WR-N77L].

little incentive to fix the underlying problems.[56] Publicizing those problems, by contrast, would reduce sales and profits, thus incentivizing the manufacturers to sell safer products.

Another example of the role of confidential settlements in perpetuating product liability problems would be that of General Motors' faulty ignition systems.[57] Beginning in 2002, these systems caused at least fifty-six deaths and eighty-seven injuries.[58] GM settled the resulting product liability cases with agreements that required plaintiff and attorney confidentiality. It was not until twelve years later, in 2014, that GM was forced to issue a recall of models with the faulty ignition; it was only then that "the public realized that GM had been secretly settling wrongful death and negligence claims that arose when these ignition switches failed."[59] If the public had learned about these secret settlements and the dangers associated with the faulty ignition systems early on, far fewer deaths and injuries would have occurred.[60] History demonstrates that many manufacturers are aware of the risks associated with their products "and use[ ] secret settlements to purposely hide those risks from the public"[61] rather than fixing the underlying problems.

Unfortunately, in this context, lawyers are often complicit in concealing product risks.[62] Rather than informing the appropriate authorities or publicly litigating cases, they use their knowledge of the dangers of the products that have harmed their clients to gain larger settlement payouts, which they commonly share. Once the settlement agreement has been signed, the

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[56] *See, e.g.*, Levin, *supra* note 1; Rebecca Hersher, *Settlement Deal Reached in 2014 West Virginia Chemical Spill*, NPR (Oct. 26, 2016, 3:04 PM), https://www.npr.org/sections/thetwo-way/2016/10/26/499307717/settlement-deal-reached-in-2014-west-virginia-chemical-spill [https://perma.cc/PJA3-BYUP] (detailing toxic chemical spills); Jef Feeley & Edvard Pettersson, *Johnson & Johnson Unit Sued Over Leaking Breast Implants*, BLOOMBERG (Feb. 3, 2017, 5:05 PM), https://www.bloomberg.com/news/articles/2017-02-03/johnson-johnson-unit-sued-over-leaking-breast-implants (discussing leaking breast implants).

[57] Mel David Zahnd, *Who's Afraid of the Light? Product Liability Cases, Confidential Settlements, and Defense Attorneys' Ethical Obligations,* 28 GEO. J LEGAL ETHICS 1005, 1007–09 (2015) (citing *GM Recall*: *Sealed Settlements and Public Safety*, MPR NEWS (Mar. 18, 2014, 2:00 PM), https://www.mprnews.org/story/2014/03/18/daily-circuit-secret-settlements-gm [https://perma.cc/QX2C-7VVZ]).

[58] *Id.* at 1005.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 1006.

[62] *See id.* at 1008.

danger of the product is reconcealed, never again to see the light of day until the next victim is injured.

Some states have begun to address the problems created by confidential settlements in products liabilities cases. Florida has a statute that prohibits the concealment of public hazards.[63] The Eastern District of Michigan requires that secret settlements be unsealed after two years.[64] California prohibits confidential settlements in actions brought under its Lemon Law, regarding defective cars.[65] More recently, California legislators introduced Assembly Bill 889 to broadly ban confidentiality in settlement agreements involving dangerous products.[66]

Sexual harassment and products liability cases have an important characteristic in common: they commonly involve threats to the safety and well-being of parties other than the two parties to the settlement agreement—what economists call "externalities."[67] In such situations, we cannot rely on the parties to the agreement to protect all relevant stakeholders. Most importantly, we cannot rely on them to protect future potential victims. In the face of externalities, standard justifications for freedom of contract collapse. Regardless of whether confidentiality agreements in such contexts should be legal, it is unbecoming for attorneys to recommend or participate in their creation. The next Section argues that the same is true of confidentiality agreements that have the effect of suppressing reports of professional malfeasance to the relevant regulatory authorities.

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[63] FLA. STAT. ANN. § 69.081 (West 2020) ("Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced.").

[64] *See* REAGAN ET AL., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 3 (2003).

[65] *See* CAL. CIV. CODE § 1793.26 (West 2020) ("Any automobile manufacturer, importer, distributor, dealer, or lienholder . . . is prohibited from . . . [i]ncluding . . . a confidentiality clause . . . prohibiting the buyer or lessee from disclosing information to anyone about the problems with the vehicle.").

[66] A.B. 889, 2017–2018 Gen. Assemb., Reg. Sess. (Cal. 2017).

[67] *See, e.g.*, HENRY N. BUTLER, CHRISTOPHER R. DRAHOZAL & JOANNA SHEPHERD, ECONOMIC ANALYSIS FOR LAWYERS 185 (3d ed. 2014).

II. PROHIBITING ATTORNEYS FROM PARTICIPATING IN AGREEMENTS TO SUPPRESS REPORTING OF PROFESSIONAL MALFEASANCE

Of reported cases of attorney malfeasance, 46% arise from substantive errors such as "a failure to know or apply substantive law . . . [a] failure to know or ascertain a deadline . . . [or i]nadequate investigation or discovery of facts";[68] 28.5% arise from administrative errors such as "clerical and delegation errors, lost file or document errors, and procrastination," "failure to file documents," and "failure to calendar";[69] 12.3% arise from intentional wrongs including "fraudulent acts by the lawyer, malicious prosecution or abuse of process, libel or slander, [or] violations of civil rights";[70] and 12.3% arise from client-relations errors including "failure to follow the client's instructions," or "failure to obtain the client's consent or to inform the client."[71] Such problems are commonly systemic—substantive errors typically reflect a failure to have mastered substantive or procedural rules; administrative errors typically reflect poorly designed or administered office systems; intentional wrongs are rarely limited to a single wrongful act; and, problems in client relations commonly reflect bad habits. Even the most seemingly innocuous errors often lead to the dismissal of claims, leaving clients little recourse.

The most egregious acts of malfeasance often remain unreported to the state bar, and therefore never come to the attention of the attorney's potential future clients because the malefactor insists on confidentiality as a condition of settlement. For instance,

> [c]lients who become aware that their funds have been stolen are often unwilling to report the misconduct because they are negotiating with the lawyer to retrieve their money. A common condition of such settlements is that the client will not report the misconduct. The lawyer then steals from another client to pay the settlement.[72]

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[68] Daniel E. Pinnington, *The Biggest Malpractice Claim Risks*, 28 GPSOLO, 18, 18–19 (2011).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] Comm'n on Evaluation of Disciplinary Enf't, *Lawyer Regulation for A New Century*, A.B.A. CTR. FOR PRO. RESP. (Sept. 18, 2018), https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report/ [https://perma.cc/WPM2-3Q9A].

Just as some states have begun to prohibit the concealment of threats to the public in the sexual harassment and product liability contexts, so has California begun to prohibit attorney participation in the concealment of threats to the public in the professional malfeasance context.[73] CRPC 5.6(b), known previously as CRPC 1-500(A), now provides that: "A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules."[74] Although the rule is limited to malfeasance by attorneys, not professional malfeasance generally, it is a promising first step. Thus far, CRPC 5.6(b) is unique to California; no other states' legal practice rules contain such a provision.

In adopting the quoted portion of the rule, the commission commented that: "[a]lthough this concept is not in Model Rule 5.6, the Commission recommends that it be carried forward because it provides important public protection."[75] The Executive Summary of CRPC 5.6 explained that CRPC 5.6 expressly prohibits an attorney from conditioning a civil settlement for professional misconduct against the attorney on the client not filing a complaint with the State Bar.[76] The language of the rule was similar to California Business & Professions Code § 6090.5, which prohibits arrangements that seek to bar reporting malpractice; the Executive Summary explained that CRPC 5.6 was intended to be broader "because it was not limited to circumstances involving attorney malpractice."[77]

The drafters of the 2018 CRPC also recommended adopting a provision that would have prohibited confidential settlement agreements in general, but the State Bar rejected it.[78] Although the State Bar acknowledged the positive values of prohibiting confidential settlements, such as not allowing the concealment of disclosure of dangerous evidence in a case that can "undermine public safety,"[79] the State Bar believed that such a prohibition would be better "accomplished by statute or rule of procedure,

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[73] *See supra* Part I.

[74] CAL. RULES OF PRO. CONDUCT r. 5.6(b) (2018).

[75] CAL. RULES OF PRO. CONDUCT r. 5.6 exec. summary (Proposed Draft 2017), https://www.calbar.ca.gov/portals/0/documents/rules/rrc2014/final_rules/rrc2-5.6_[1-500]-all.pdf [https://perma.cc/3ETN-6JRN].

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[and] not a rule of professional conduct."[80] The State Bar feared that adopting and implementing such a rule would require policy decisions that go "beyond the scope of the Commission's Charter."[81]

As has been noted, this Article does not argue that confidential settlement agreements should be prohibited in general. CRPC 5.6(b) might easily have been expanded, however, to provide that: "A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules or of any other professional malfeasance by a member of a regulated profession." There is no obvious reason to prohibit attorneys from concealing malfeasance by a lawyer while allowing them to conceal malfeasance by other regulated professionals.

III. PROHIBITING THREATS OF DISCIPLINARY REPORTING TO OBTAIN AN ADVANTAGE IN CIVIL PROCEEDINGS

The flip side of agreeing not to report professional malfeasance in a settlement agreement is to threaten to report such malfeasance if the opposing party fails to agree to the proposed settlement. It would be incongruous to prohibit such threats while permitting such settlements or to prohibit such settlements while permitting such threats. If a lawyer is permitted to threaten disciplinary reporting if the opposing party fails to settle—and thereby for the lawyer implicitly to promise not to undertake such reporting if the opposing party agrees—one would expect the same lawyer to be able to reduce her implicit promise to a writing enforceable in court. Conversely, if a lawyer is not permitted to threaten disciplinary reporting if the opposing party fails to settle—and thereby for the lawyer implicitly to promise not to undertake such reporting if the opposing party agrees—one would expect the same lawyer to be prohibited from reducing that same implicit promise to writing. Unlike CRPC 5.6(b), however, which is unique to California, the question of whether a lawyer may make threats to report malfeasance to obtain an advantage in civil litigation has been subject to extensive consideration by both the ABA and the states.[82]

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[80] *Id.*

[81] *Id.*

[82] ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 92-363 (1992) (discussing the use of threats in prosecution in connection with a civil matter).

Many states have adopted provisions that prohibit lawyers from using threats to report malfeasance to obtain an advantage in civil proceedings.[83] The ABA's old Model Codes used to contain a similar provision, but the ABA abandoned that provision when it adopted the Model Rules.[84] This reopened the door for attorneys and their clients to threaten disciplinary action to gain favorable settlement offers. This, in turn, is consistent with the ABA's current position regarding attorney participation in agreements to suppress the reporting of professional malfeasance.

The relationship between threats and agreements and the relationship between civil and other proceedings are both complex. "Any time parties have a dispute and engage in prelitigation negotiations, there is at least the implied 'threat' or understanding that if they cannot reach an agreement or 'settlement,' either party may sue the other."[85] That "threat" or understanding may well be express. A threat to sue if a settlement of a civil matter cannot be reached should not provide grounds to void a settlement agreement. The ethical and public policy considerations that prohibit threats to accuse someone of a crime in order to induce a settlement agreement do not apply to a threat to commence a civil suit, since the civil system exists for the very purpose of providing a peaceful means to resolve disputes. If a dispute cannot be resolved without filing a lawsuit, it is to be expected—and even encouraged—that a party would file a lawsuit rather than resort to self-help or some extrajudicial means of dealing with it.

By contrast, a threat to report a crime unless a related civil matter can be amicably resolved may or may not be permissible. "If you do not make good on the check you delivered to my client, we will have to file charges that you willfully passed a bad check" seems reasonable. "If you do not settle my client's negligence claim on the terms we have set forth, we will tell the police that you have been stealing from your employer" does not seem

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[83] BREM MOLDOVSKY ET AL., COMMERCIAL AND FED. LITIG. SECTION OF THE N.Y. STATE BAR ASS'N, THREATENING DISCIPLINARY ACTION AGAINST ATTORNEYS IN NEW YORK 14 (2015).

[84] *Id.* at 13.

[85] RICHARD ROSEN & LIZA M. VELAZQUEZ, SETTLEMENT AGREEMENTS IN COMMERCIAL DISPUTES: NEGOTIATING, DRAFTING & ENFORCEMENT 4–32 (2d ed. 2019).

reasonable. Indeed, the latter may itself be criminal blackmail. In civil suits,

> [s]ettlement agreements, like other contracts, may be attacked on the grounds that they were procured by wrongful threats or duress. Such a settlement agreement is voidable. The party seeking to set aside the settlement agreement must establish (1) a threat, (2) unlawfully made, (3) which caused involuntary acceptance of the contract terms (party was deprived of the exercise of free will), (4) because the circumstances permitted no alternative (resort to legal remedies or other relief not practical).[86]

This creates a potentially high bar for rules of professional responsibility seeking to regulate such threats. Is a threat to for a lawyer to say she will report a crime unless the opposing party takes some specified action professionally permissible unless it constitutes criminal blackmail or duress of a sort that would permit a party to void the contract? As will be seen, the ABA comes dangerously close to answering this question in the affirmative.[87] A rule or interpretation that exonerates an attorney unless the disciplinary board can be persuaded that she has committed criminal blackmail or exerted duress of a sort that would void a contract is unlikely to play any significant role in the ongoing regulation of professional behavior. It is an abdication, not a rule.

A large part of the discussion of the foregoing issues has been framed in terms of threats to report criminal violations. Most of the same considerations, however, apply to threats to report professional disciplinary violations, where the penalty is loss of livelihood, not jail. The issue is further complicated by ABA Model Rule 8.3, which itself requires that lawyers report legal malpractice to "the appropriate professional authority."[88] To threaten such a report to obtain an advantage in a civil dispute and then contractually to agree never to make such a report as part of a personally profitable settlement agreement impugns the integrity of the entire profession.

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[86] RICHARD A. ROSEN ET AL., SETTLEMENT AGREEMENTS IN COMMERCIAL DISPUTES: NEGOTIATING, DRAFTING AND ENFORCEMENT § 4.07(b) (2d ed. Supp. 2021).

[87] *See infra* text accompanying notes 115–119.

[88] MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS'N 2019).

A. The Model Rules

The ABA intentionally omitted a provision that prohibits threats to gain an advantage in civil disputes when it replaced the Model Code with the Model Rules. In August 1969, the ABA replaced the Canons of Professional Ethics with the Model Code of Professional Responsibility ("Model Code").[89] The Model Code acted as the "standard of conduct" for lawyers, employing a "unique tripartite" system of "aspirational" Canons and Ethical Considerations and mandatory Disciplinary Rules.[90] Courts struggled to apply the tripartite system of the Model Code uniformly.[91] Therefore, in 1983, the ABA replaced it with the Model Rules of Professional Conduct ("Model Rules").[92] The Model Rules were written in restatement format with the thought that that they might thereby be more understandable, convenient, and amenable to uniform application.[93] The ABA intended that the Model Rules accomplish the same results as the Model Code, but through "clearer language" and "more useful interpretive guidance."[94] The ABA did not originally recommend any substantive changes be made to the Model Code.[95] Nevertheless, not all rules in the Model Code were retained.

Most importantly for the purpose of this Article, Disciplinary Rule ("DR") 7-105(A) was removed, which stated, "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."[96] The rule prohibited a lawyer from "coerc[ing] a civil remedy by threatening criminal accusations unrelated to the civil wrong."[97] By prohibiting such conduct, the rule prevented a lawyer from bringing, directly or indirectly, or threatening to bring criminal charges for the sole purpose of gaining an advantage in a civil case.[98] In essence, DR 7-105(A) prevented an attorney from extorting either another attorney or the opposing

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[89] *Model Code of Professional Responsibility and Model Code of Judicial Conduct*, 108 ANN. REP. A.B.A. 1214 (1983).

[90] A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at xiv (Art Garwin ed., 2013).

[91] *Id.* at xiv–xv.

[92] *Id.* at xvi.

[93] *Id.* at xiv–xv.

[94] *Id.* at xv.; George A. Kuhlman, *Pennsylvania Considers the A.B.A. Model Rules of Professional Conduct*, 59 TEMP. L. Q. 419, 421 (1986).

[95] A LEGISLATIVE HISTORY, *supra* note 90, at xv.

[96] MODEL CODE OF PRO. RESP. DR 7-105(A) (AM. BAR ASS'N 1980).

[97] Bruce Green, *Threatening Litigation*, 44 A.B.A. LITIG. J. 13, 14 (2017).

[98] ABA/BLAW Law. Man. On Prof. Conduct § 71:601 (ABA/BLAW 1984).

party to obtain a settlement.[99] To violate DR 7-105(A) there must be "proof that the person charged acted with a purpose solely to obtain an advantage in a civil matter."[100]

DR 7-105(A) was enacted in part to ensure that attorneys did not abuse the respective functions of the civil and criminal justice systems. In considering these goals, the duty of a lawyer, and the bounds of the law, the New York Lawyer's Code of Professional Responsibility explained:

> 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. 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 legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.[101]

DR 7-105(A) reflected the ABA's fear that, without this rule's specific guidance, threats of criminal referral to prosecutorial authorities would be used to extort settlements in civil actions.[102]

Prior to removing DR 7-105(A) from the Model Rules, the Committee twice addressed the use of a threat of criminal prosecution to gain an advantage in a civil matter.[103] In 1978, the Committee concluded that "a threat to present criminal charges made solely to collect a civil debt violated DR 7-105(A) even if the lawyer was correct in stating that the debtor violated an applicable criminal law."[104] A few years later, in 1981, the Committee concluded that "[a] law firm, while pursuing civil remedies on behalf of clients against persons who [were] also violating a criminal statute, [was] not prohibited under the Model Code of Professional Responsibility from reporting the

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[99] Green, *supra* note 97.

[100] Decato's Case, 379 A.2d 825, 827 (N.H. 1977).

[101] N.Y. RULES OF PRO. CONDUCT EC 7-21 (2007).

[102] Nicola M. McMillan, *Recent Developments in the Ethical Treatment of Threats of Criminal Referral in Civil Debt Collection Matters*, 21 GEO. J. LEGAL ETHICS 935, 937 (2008).

[103] *See id.*; *see also* ABA Comm. on Ethics & Pro. Resp., Informal Op. 1427 (1978); ABA Comm. on Ethics & Pro. Resp., Informal Op. 1484 (1981).

[104] ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-363 (1992).

violations to prosecutors" because the conduct did not involve the use of a threat against the opposing party."[105]

The ABA's deletion of DR 7-105(A) was based on its belief that it is not inherently harmful for a lawyer to threaten criminal charges to obtain an advantage in civil litigation.[106] The ABA concluded that abusive threats could be handled adequately by other parts of the Model Rules and the criminal law—specifically the law of extortion.[107] About ten years after deleting DR 7-105(A), the ABA offered its reasoning: "[t]he deliberate omission of DR 7-105(A)'s language or any counterpart from the Model Rules rested on the drafters' position that 'extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically.' "[108] The ABA further explained, "Model Rules that both provide an explanation of why the omitted provision DR 7-105(A) was deemed unnecessary and set the limits on legitimate use of threats of prosecution are Rules 8.4, 4.4, 4.1 and 3.1."[109]

The purportedly constraining effects of the cited Rules in this regard are not completely clear. Model Rule 8.4 makes clear that any lawyer who "engage[s] in conduct involving dishonest, fraud, deceit, or misrepresentation" is engaging in professional misconduct.[110] Model Rule 4.4 prevents an attorney from using methods that "have no substantial purpose other than to embarrass, delay, or burden a third person" or from using "methods of obtaining evidence that violate the legal rights of such a person."[111] Rule 4.4 also mandates that "[a] lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender."[112] Rule 4.1 prohibits an attorney from making "a false statement of material fact or law to a third person" and failing "to disclose a material fact [to a third person] when

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[105] ABA Comm. on Ethics & Pro. Resp., Informal Op. 1484 (1981); *see also* ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-363 (1992).

[106] ABA Comm. on Ethics & Pro. Resp., Informal Op. 1484 (1981).

[107] ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-363 (1992).

[108] *Id.*

[109] *Id.*

[110] MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2018).

[111] MODEL RULES OF PRO. CONDUCT r. 4.4 (AM. BAR ASS'N 2018).

[112] *Id.*

disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . . ."[113] Lastly, Model Rule 3.1 prohibits an attorney from bringing a meritless claim.[114]

According to the ABA, DR 7-105(A) acted "as a total prohibition regardless of the merits of the threatened action or the aim of the lawyer in making the threat."[115] Critics argued that the rule, read literally, was too extreme because it forbade all threats, even "non-extortionate and reasonable" ones.[116] For instance, the threat "[r]eturn the stolen money or we will tell the prosecutor that you possess child pornography" was obviously extortion and aimed at coercing opposing counsel into a civil remedy.[117] By contrast, the threat "[r]eturn the stolen money or we will report the theft to the prosecutor" merely threatened actions reasonable in the circumstances.[118] Yet DR 7-105(A), read literally, forbade both types of threats.[119]

The conceptual reach of DR 7-105(A), moreover, was arguably unclear. As a result, "courts struggled with definitional questions of lawyers' appropriate ethical conduct with respect to the treatment of threats of criminal action."[120] Interpretations of "threaten" and "solely" became contested issues.[121] Some jurisdictions distinguished "threatening" from "notifying," "informing," or "warning" others that lawyers' behavior may be criminal.[122] Other jurisdictions considered "the existence of an actual intent to report violations significant to whether the lawyer's sole purpose in making the threat is improper."[123] "Interpreting 'solely' [was] problematic" since it was a fact specific and "subjective inquiry into the true intent of the lawyer['s] . . . threat."[124] This allowed one lawyer to threaten another with criminal prosecution so long as an " 'imminently

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[113] MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS'N 2018).
[114] MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2018).
[115] Helen Gunnarsson, *Threats May Bring Disciplinary Trouble, Even Without Specific Rule*, 11 LAWS. MANUAL ON PRO. CONDUCT (ABA/BNA) (2012).
[116] Green, *supra* note 97.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] McMillan, *supra* note 102.
[121] *Id.* at 943.
[122] Gunnarsson, *supra* note 115.
[123] *Id.*
[124] McMillan, *supra* note 102, at 943.

plausible alternative explanation' for threatening prosecution," existed.[125]

Ultimately, courts found attorneys "disserv[ing]" their client when they abided by DR 7-105(A), and thus found the rule "unworkable."[126] The West Virginia Supreme Court held an attorney who sent opposing counsel a " 'demand' letter," which insisted that the opposing party either repay embezzled money or face criminal prosecution, was merely engaged in "legitimate negotiations."[127] Although West Virginia no longer followed DR 7-105(A), the court nevertheless found it useful to examine whether the respondent had violated the then-defunct ethical rule.[128] The court relied on secondary material that examined why the ABA had omitted DR 7-105(A).[129] The secondary material called the rule "overbroad because [it] prohibit[ed] legitimate pressure tactics and negotiations strategies," thus, creating "counterproductive" situations from attorneys who avoided negotiations out of fear of breaking the rule.[130]

The ABA acknowledged similar problems in Formal Opinions 92-363 (1992) and 94-383 (1994).[131] DR 7-105(A), it reasoned, might make it improper for an attorney to threaten an action otherwise lawful, such as filing criminal or disciplinary charges when an adequate legal and factual basis exists, to pressure an opposing party to settle a civil case on favorable terms.[132] It concluded that "the propriety of such a threat turns on whether the threatened proceeding provides an alternative means of vindicating the rights at issue in the civil case or whether the lawyer is threatening unrelated harm in order to obtain leverage or a bargaining chip for settlement."[133] Like the West Virginia Supreme Court, the ABA acknowledged that it was possible for an attorney to make a threat reasonably and not to simply extort opposing counsel, notwithstanding the literal language of DR 7-105(A).[134]

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[125] *Id.* at 943–44.

[126] Comm. on Legal Ethics of W. Va. State Bar v. Printz, 187 W. Va. 182, 185, 189 (1992).

[127] *Id.* at 184–85.

[128] *Id.*

[129] *Id.*

[130] *Id.* (quoting GEOFFREY C. HAZARD ET AL., THE LAW OF LAWYERING § 43.04 (4th ed. 2020)).

[131] N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2017-3 (2017).

[132] *Id.* at 4.

[133] *Id.* at 7.

[134] *Id.* at 7 n.3.

In addition, courts struggled with the rule. In *People v. Farrant*, the court ruled that an attorney made an impermissible threat of criminal prosecution to his client when the attorney provided his client with a letter he would send to the bankruptcy court if the client did not withdraw her objection to paying his fees.[135] The attorney attempted to deny making any threat, stating in his letter, "I don't send you this letter by any means as an extorsive device for my fees."[136] The court nevertheless concluded that the attorney had violated DR 7-105(A).[137]

However, in *In re Conduct of McCurdy*, the court ruled that an attorney did not violate DR 7-105(A) when he sent a letter to an accused hit and run driver on his client's behalf, stating that the client would not file charges if the driver paid for the damage to the client's car.[138] The court emphasized "that DR 7-105(A) requires evidence of specific intent to threaten to present criminal charges to obtain an advantage in a civil matter."[139] The attorney testified that he did not threaten criminal penalties in his letter to the driver, but instead alleged "reasonable efforts" to resolve the matter without filing suit.[140] The court was not convinced that the attorney had "threatened to present criminal charges to obtain an advantage in a civil matter."[141]

In *Decato's Case*, the New Hampshire Supreme Court considered a case of an attorney who had sent a letter demanding that the recipient make payment after placing a hold on his check.[142] The letter mentioned the crime of obtaining services by deception to avoid payment and that the attorney "shall consider filing a criminal complaint," if not fully paid.[143] The court ruled "[t]he mere mention of possibly filing criminal charges does not in itself suggest that the statement was made in an effort to gain leverage in a collection suit."[144] The court declined to find that the attorney's sole purpose in sending the letter was to obtain an advantage in a civil matter.[145]

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[135] People v. Farrant, 852 P.2d 452, 453–54 (Colo. 1993) (en banc) (per curiam).
[136] *Id.* at 454.
[137] *Id.*
[138] 681 P.2d 131, 131–33 (Or. 1984) (en banc) (per curiam).
[139] *Id.* at 132.
[140] *Id.* at 133.
[141] *Id.*
[142] 379 A.2d 825, 826 (N.H. 1977).
[143] *Id.* at 885.
[144] *Id.* at 887.
[145] *Id.* at 888.

In sum, the drafters of the Model Rules deliberately omitted DR 7-105(A) because of their view that other Model Rules, such as Rules 8.4 and 4.4, generally prohibited threats and the type of conduct DR 7-105(A) aimed to protect against; thus, the drafters believed there was no need to prohibit threats specifically.[146] Also, the drafters felt, "no general prohibition on threats of prosecution [was] justified" because the "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."[147] Moreover, the drafters believed that regardless of whether threats of criminal prosecution violate the ethical rules, such conduct may constitute violations of criminal statutes, like blackmail, extortion, and coercion.[148]

Therefore, the ABA determined that "extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules," meaning the express prohibition in DR 7-105(A) was no longer necessary.[149] Furthermore,

> the ABA held that a lawyer's threat to file a disciplinary complaint against his adversary to gain an advantage in a civil case would violate the Model Rules if: the adversary's conduct required reporting; the misconduct was unrelated to the civil matter; the disciplinary charges are not well-founded in fact or law[;] or the threat is designed solely to harass.[150]

Thus, the Committee on Ethics and Professional Responsibility determined that:

> [t]he Model Rules do not prohibit a lawyer from using the possibility of presenting 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 improper influence over the criminal process.[151]

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[146] Gunnarsson, *supra* note 115.

[147] ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-363 (1992).

[148] *See* Gunnarsson, *supra* note 115.

[149] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 718 (1996) (citing MODEL RULES OF PRO. CONDUCT r. 8.4 note (AM. BAR ASS'N, Proposed Final Draft 1981) (Legal Background)).

[150] JAMES M. MCCAULEY, THREATENING CRIMINAL PROSECUTION OR DISCIPLINARY ACTION TO OBTAIN A CIVIL ADVANTAGE 4 (2012).

[151] ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-363 (1992).

Additionally,

> [t]he 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, provided that such agreement does not violate applicable law.[152]

Furthermore, it is not unethical "for attorneys to mention the possibility of criminal charges during civil suit negotiations, so long as they do 'not attempt to exert or suggest improper influence over the criminal process.' "[153]

B. State Approaches to the Issue

While the drafters of the Model Rules of Professional Conduct intentionally omitted DR 7-105(A) of the ABA Model Code of Professional Responsibility in 1983, various states continue to prohibit threats of presenting criminal charges to settle a lawsuit.[154] Specifically, some states adopted counterparts to DR 7-105(A) and expressly prohibited the conduct outlined in the now-defunct ABA rule.[155] Other states adopted variations of DR 7-105(A) and expanded on the category of prohibited threats to include administrative and disciplinary charges.[156] Yet, other

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[152] *Id.*

[153] Charles B. Craver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713, 732 (1997).

[154] *See, e.g.*, ALA. RULES OF PRO. CONDUCT r. 3.10 (2020); CONN. RULES OF PRO. CONDUCT r. 3.4(7) (2007); D.C. RULES OF PRO. CONDUCT r. 8.4(g) (2007); FLA. RULES OF PRO. CONDUCT r. 4-3.4(g) (2014); GA. RULES OF PRO. CONDUCT r 3.4(h) (2011); HAW. RULES OF PRO. CONDUCT r. 3.4(i) (2014); IDAHO RULES OF PRO. CONDUCT r. 4.4(a)(3)–(4) (2019); OR. RULES OF PRO. CONDUCT r. 3.4(g) (2005); N.J. RULES OF PRO. CONDUCT r. 3.4(g) (1990); N.Y. RULES OF PRO. CONDUCT r. 3.4(e) (2021); TENN. RULES OF PRO. CONDUCT r. 4.4(a)(2) (2017); VT. RULES OF PRO. CONDUCT r. 4.5 (2009); KY. RULES OF PRO. CONDUCT r. 3.130(3.4)(f) (2014); LA. RULES OF PRO. CONDUCT r. 8.4(g) (2004); MASS. RULES OF PRO. CONDUCT r. 3.4(h) (2015); OHIO RULES OF PRO. CONDUCT r. 1.2(e) (2016); S.C. RULES OF PRO. CONDUCT r. 4.5 (2005); TEX. RULES OF PRO. CONDUCT r. 4.04(b) (1990); VA. RULES OF PRO. CONDUCT r. 3.4(i) (2020).

[155] *See* ALA. RULES OF PRO. CONDUCT r. 3.10 (2020); CONN. RULES OF PRO. CONDUCT r. 3.4(7) (2007); FLA. RULES OF PRO. CONDUCT r. 4-3.4(g) (2014); HAW. RULES OF PRO. CONDUCT r. 3.4(i) (2014); IDAHO RULES OF PRO. CONDUCT r. 4.4(a)(3)–(4) (2019); OR. RULES OF PRO. CONDUCT r. 3.4(g) (2005); N.J. RULES OF PRO. CONDUCT r. 3.4(g) (1990); N.Y. RULES OF PRO. CONDUCT r. 3.4(e) (2020); TENN. RULES OF PRO. CONDUCT r. 4.4(a)(1) (2017); VT. RULES OF PRO. CONDUCT r. 4.5 (2009).

[156] *See* D.C. RULES OF PRO. CONDUCT r. 8.4(g) (2007); KY. RULES OF PRO. CONDUCT r. 3.130(3.4)(f) (2013); LA. RULES OF PRO. CONDUCT r. 8.4(g) (2004); MASS. RULES OF PRO. CONDUCT r. 3.4(h) (2015); OHIO RULES OF PRO. CONDUCT r. 1.2(e)

states adopted the ABA's reasoning for omitting DR 7-105(A) from its ethical guidelines and eliminated any equivalent of that rule in their disciplinary codes.[157]

1. States Containing Express Provisions

Several states expressly prohibit threats to present criminal charges to settle lawsuits. Specifically, Alabama, Connecticut, Florida, Georgia, Hawaii, Idaho, New Jersey, New York, Oregon, Tennessee, and Vermont adopted DR 7-105(A).[158] For instance, New York has adopted the precise language of DR 7-105(A) in its Rules of Professional Conduct ("NYRPC") 3.4(e).[159] The rule states, "[a] lawyer shall not: . . . present, participate in presenting, or threaten to present *criminal* charges solely to obtain an advantage in a civil matter."[160] Like the ABA's Model Code, NYRPC 3.4(e) does not prohibit threats of filing complaints with administrative agencies or disciplinary authorities; the plain language of the rule expressly limits the prohibited threats to "criminal charges."[161] Read literally, therefore, the rule in such states differs from the rule in states that include "administrative or disciplinary charges" in their counterparts to DR 7-105(A).[162]

Nevertheless, the New York Bar Committee has cautioned that "[g]iven the opportunities for abuse . . . the right to threaten a disciplinary grievance is subject to important limitations."[163] The Committee believes that several rules in New York's Rule of Professional Conduct provide such limitations, such as Rules 3.4(a)(6) (concerning knowledge of engagement in illegal conduct), 4.1 (concerning truthfulness in statements to others),

(2016); S.C. RULES OF PRO. CONDUCT r. 4.5 (2005); TEX. RULES OF PRO. CONDUCT r. 4.04(b) (1990); VA. RULES OF PRO. CONDUCT r. 3.4(i) (2020).

[157] *See infra* Part III.B.2.

[158] *See, e.g.*, ALA. RULES OF PRO. CONDUCT r. 3.10 (1994); CONN. RULES OF PRO. CONDUCT r. 3.4(7) (2019); FLA. RULES OF PRO. CONDUCT r. 4-3.4(g) (2014); GA. RULES OF PRO. CONDUCT r. 3.4(h) (2011); HAW. RULES OF PRO. CONDUCT r. 3.4(i) (2014); IDAHO RULES OF PRO. CONDUCT r. 4.4(a)(3)-(4) (2019); N.J. RULES OF PRO. CONDUCT r. 3.4(g) (1984) (amended 1990); N.Y. RULES OF PRO. CONDUCT r. 3.4(e) (2009); OR. RULES OF PRO. CONDUCT r. 3.4(g) (2005); TENN. RULE OF PRO. CONDUCT r. 4.4(a)(2) (2011) (amended 2017); VT. RULES OF PRO. CONDUCT r. 4.5 (2009).

[159] N.Y. RULES OF PRO. CONDUCT r. 3.4(e) (2020).

[160] *Id.* (emphasis added).

[161] N.Y. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 772 (2003); N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2017-3 (2017).

[162] N.Y. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 772 (2003); N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2017-3 (2017).

[163] N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2015-5 (2015).

4.4(a) (concerning conduct with no substantial purpose other than to cause embarrassment or harm), and 8.4(b)-(d), (h) (concerning illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness, or fitness and conduct prejudicial to the administration of justice).[164]

Other states have expanded DR 7-105(A)'s scope to also include other types of threats. Specifically, the District of Columbia, Kentucky, Louisiana, Massachusetts, Ohio, South Carolina, Texas, and Virginia also prohibit threats of disciplinary charges.[165] For example, Kentucky and Massachusetts Rules of Professional Conduct 3.130(3.4)(f) and 3.4(h), respectively, provide that a lawyer shall not "present, participate in presenting, or threaten to present criminal or *disciplinary* charges solely to obtain an advantage in any civil or criminal matter."[166]

California, Colorado, and Maine have even broader provisions that prohibit threats to present criminal, administrative, and disciplinary charges.[167] For instance, California's Rules of Professional Conduct 3.10(a) states that: "A lawyer shall not threaten to present criminal, *administrative, or disciplinary charges* to obtain an advantage in a civil dispute."[168] " '[A]dministrative charges' " are defined liberally as "filing or lodging of a complaint with any governmental organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature."[169] The

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[164] *Id.*

[165] *See, e.g.*, D.C. RULES OF PRO. CONDUCT r. 8.4(g) (2007); KY. RULES OF PRO. CONDUCT r. 3.130(3.4)(f) (2014); LA. RULES OF PRO. CONDUCT r. 8.4(g) (2004); MASS. RULES OF PRO. CONDUCT r. 3.4(h) (2015); OHIO RULES OF PRO. CONDUCT r. 1.2(e) (2016); S.C. RULES OF PRO. CONDUCT r. 4.5 (2005); TEX. RULES OF PRO. CONDUCt r. 4.04(b) (1990); VA. RULES OF PRO. CONDUCT r. 3.4(i) (2004).

[166] KY. RULES OF PRO. CONDUCT r. 3.130(3.4)(f) (2013) (emphasis added); see also MASS. RULES OF PRO. CONDUCT r. 3.4(h) (2015).

[167] *See, e.g.*, CAL. RULES OF PRO. CONDUCT r. 3.10 (2018); COLO. RULES OF PRO. CONDUCT r. 4.5(a) (2018); ME. RULES OF PRO. CONDUCT r. 3.1(b) (2012); *but see* Colo. Bar Ass'n Ethics Comm., Abstracts of Responses to Letter Inquiries 96/97-18 (1996–97), http://cobar.org/For-Members/Committees/Ethics-Committee/Abstracts-of-Responses-to-Letter-Inquiries/1996-1997-Archive-Letter-Abracts#18 [https://perma.cc/SQ9V-AC8U] (noting the difference between threatening a disciplinary action, and notifying opposing counsel of conduct that might constitute a violation of a disciplinary rule).

[168] CAL. RULES OF PRO. CONDUCT r. 3.10 (2018) (emphasis added).

[169] *Id.*

term "threat" is also broadly defined; it need not be stated expressly, but can be "inferred from the circumstances."[170]

States that have decided to retain the substance of DR 7-105(A) have done so because they deemed it important to have a clear rule forbidding the conduct in question, notwithstanding the ABA's decision to omit the rule.[171] For example, the District of Columbia decided to retain the provision because "[t]he problem dealt with . . . is not specifically addressed by any other provision in the proposed Rules" and "the conduct prohibited . . . which is tantamount to common law blackmail, was serious enough, and its occurrence frequent enough, that a rule clearly forbidding that conduct was needed."[172]

Similarly, when the California State Bar Committee redrafted its Rules of Professional Conduct in 2018, it acknowledged that "[a]lthough there are criminal laws regarding extortion that prohibit such conduct, it is important to have a disciplinary rule that prohibits the conduct and puts lawyers on notice that they are subject to discipline for making such threats."[173] This committee viewed California Rule of Professional Conduct 3.10 as "the most direct approach to preventing [the conduct and] . . . there is no evidence there has been a problem with it and removing this longstanding rule might suggest to some readers that these threats now are to be permitted."[174] Consistent with this view, when the California State Bar adopted its new comprehensive set of Professional Rules, it aimed at "ensur[ing] that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives."[175] Additionally, the commission in charge of developing these rules was tasked with "consider[ing] the historical purpose of the Rules of Professional

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[170] Jason D. Kogan, *Be Careful What You Threaten*, CAL. BAR J. (Dec. 2003), http://archive.calbar.ca.gov/archive/Archive.aspx?articleId=53542&categoryId=53522&month=12&year=2003 [https://perma.cc/QZR9-DBBE].

[171] *See, e.g.*, N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2017-3 (2017).

[172] D.C. Bar Ass'n Ethics Comm., Op. 220 n.1 (1991).

[173] CAL. RULES OF PRO. CONDUCT r. 3.10 exec. summary (Proposed Draft 2016), https://www.calbar.ca.gov/portals/0/documents/rules/rrc2014/final_rules/rrc2-3.10_[5-100]-all.pdf [https://perma.cc/RT66-5XJX].

[174] *Id.*

[175] Justice Lee Edmon, *Help the State Bar Revise the Rules of Professional Conduct* (June 27, 2019), http://www.calbarjournal.com/May2015/Opinion/JusticeLeeEdmon.aspx [https://perma.cc/2PCK-BDGB].

Conduct in California . . . and focus on revisions that . . . are necessary to address changes in law. . . ."[176]

2. States Omitting Express Provisions

In deciding to omit the provision, many states adopted the ABA's rationale for omitting DR 7-105 from the Model Rules.[177] As has been noted, the Model Rule's "omission of DR 7-105(A) . . . rested on the drafters' [belief] that extorti[ve], fraudulent, or otherwise abusive threats were [already] covered by other, more general prohibitions in the Model Rules."[178] Additionally, the drafters also thought that the rule was overbroad, forbidding "threats that were non-extortionate and reasonable."[179] Alaska, Arizona, Delaware, Illinois, Maryland, Minnesota, Missouri, North Carolina, and Utah explicitly acknowledged this line of reasoning in their state bar ethics opinions.[180] The Alaska Bar Association Ethics Committee, for example, agreed with the ABA's logic and found that "other provisions within the Ethical Rules adequately address potential unethical conduct."[181] Additionally, the committee believed that ABA Formal Opinion No. 92-363 provided "clearer guidelines for practitioners and is more consistent with an attorney's obligations to zealously assert a client's position."[182]

Nevertheless, like the Model Rules, these states continue to prohibit threats that involve extortion, fraud, or otherwise abusive conduct.[183] Rather than prohibiting the conduct through an explicit rule, these states rely on a framework of rules that indirectly proscribe such conduct. For instance, the North

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[176] *Id.*

[177] Alaska Bar Ass'n Ethics Comm., Op. 97-2, at 2 (1997); Ariz. Bar Ass'n Ethics Comm., Formal Op. 91-07 (1991); Del. Bar Ass'n Comm. on Pro. Ethics, Op. 1995-2 (1995); Md. Bar Ass'n Comm. on Ethics, Op. 2003-16 (2003); Kenneth L. Jorgensen, *Ethics Advisory Opinions*, 60 BENCH & BAR MINN. 12, 12, 13 n.7 (2003); N.C. Bar Ass'n Ethics Comm., Formal Op. 19 (1998) (adopted Apr. 23, 1999); Utah Bar Ass'n Ethics Comm., Op. 03-04 (2003).

[178] ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-363 (1992).

[179] Green, *supra* note 97.

[180] *See, e.g.*, Alaska Bar Ass'n Ethics Comm. Op. 97-2 (1997); Ariz. Bar Ass'n Ethics Comm., Op. 91-07 (1991); Del. Bar Ass'n Ethics Comm., Op. 1995-2 (1995); Md. Bar Ass'n Ethics Comm., Op. 2003-16 (2003); N.C. Bar Ass'n Ethics Comm., Op. 98-19 (1999); Utah Bar Ass'n Ethics Comm., Op. 2003-4 (2003).

[181] Alaska Bar Ass'n Ethics Comm., Op. 97-2 (1997); D.C. Bar Op. 220 (1991) (threats to file disciplinary charges solely to gain advantage in a civil matter violate Rule 8.4(g)).

[182] Alaska Bar Ass'n Ethics Comm., Op. 97-2 (1997).

[183] *Id.*; D.C. Bar Op. 220 (1991).

Carolina Bar emphasized that extortionate threats "would at a minimum violate" Rule 4.4, which governs the respect for rights of third persons, and Rule 8.4, which governs misconduct.[184] Similarly, Utah indicated that "extortionate" threats are "impermissible," since "extortion is a 'crime that reflects adversely on a lawyer's honesty.' "[185] Further, Arizona indicated that extortion might also implicate conduct that is "prejudicial to the administration of justice."[186] In essence, states rely on other professional rules to prohibit the abusive conduct that DR 7-105(A) once expressly prohibited.

These states have also established stringent requirements for presenting charges in suits. The ABA has indicated that:

> a threat to bring criminal charges for the purpose of advancing a civil claim would violate the Model Rules if the criminal wrongdoing were unrelated to the client's civil claim, if the lawyer did not believe both the civil claim and the potential criminal charges to be well-founded, or if the threat constituted an attempt to exert or suggest improper influence over the criminal process.[187]

States that chose to omit DR 7-105 have followed these ABA guidelines. For example, North Carolina mandates that "a threat to present criminal charges or the presentation of criminal charges may only be made if the lawyer reasonably believes that both the civil claim and the criminal charges are well-grounded in fact and warranted by law and the client's objective is not wrongful."[188] Likewise, under the Alaska Ethical Rules, it is not unethical for a lawyer to use the possibility of presenting criminal charges,

> provided that the criminal matter is related to the client's civil claim, the lawyer has 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 improper influence over the criminal process.[189]

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[184] Michael Downey, *Threatening an Adversary*, 40 LITIG. 64, 64 (2014).
[185] Utah Bar Ass'n Ethics Comm., Op. 03-04 (2003).
[186] Ariz. Bar Ass'n Ethics Comm., Op. 91-07 (1991).
[187] ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-363 (1992).
[188] N.C. Bar Ass'n Ethics Comm., Formal Op. 19 (1999).
[189] Alaska Bar Ass'n Ethics Comm., Op. 2 (1997).

IV. THE ABA SHOULD ADOPT RULES SPECIFIC TO PROFESSIONAL MALFEASANCE

The ABA's struggles with DR 7-105(A) suggest that a general rule prohibiting threats of criminal or disciplinary prosecution may be overbroad. In the ordinary bilateral dispute, both civil and criminal remedies are often available.[190] The wronged party should have the freedom to select the most effective course of action to achieve redress. There is no overarching requirement in our law that all crimes must be prosecuted, regardless of whether the parties have already reconciled.

The same is not true when the wrongdoing involved has externalities—where, if not subject to regulatory oversight, the wrongdoing has the potential to threaten the safety or well-being of the public. Legislatures have already declared public policy in this context by, among other things, establishing oversight boards to supervise the regulated professions.[191] They have argued that the ordinary palette of civil and criminal remedies is not sufficient to prevent serious public harms.[192]

Allowing attorneys to agree to undermine the work of those oversight boards by agreeing to suppress evidence of professional malfeasance in exchange for financial reward is unnecessary, unseemly, and in the nontechnical sense unethical. It calls into question the integrity of the profession as a whole. Allowing attorneys to threaten not to suppress such evidence unless the malefactor makes payment is no better.

The ABA Model Rules should include provisions that prohibit attorneys from undertaking such actions. Specifically, the Model Rules should adopt a provision like CRPC 5.6(b), but covering professional malfeasance generally: "A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules" or of any other professional malfeasance by a member of a regulated profession.[193] The ultimate aim of including such a provision is to

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[190] *See, e.g.*, David L. Goldberg, *Civil Remedies for Criminal Conduct: Representing the Crime Victim*, 30 LITIG. 32, 32–36 (2004).

[191] *See, e.g.*, N.Y. PUB. HEALTH LAW § 230-c (McKinney 2020).

[192] *See* James Bessen, *Everything You Need to Know About Occupational Licensing*, VOX (Nov. 18, 2014, 10:26 AM), https://www.vox.com/2014/11/18/18089272/occupational-licensing [https://perma.cc/F2WZ-BBEU] (emphasizing licensing boards are needed "to make sure that service providers meet minimum standards of quality and safety" in order to prevent serious public harms).

[193] CAL. RULES OF PRO. CONDUCT r. 5.6(b) (2018).

ensure that attorneys are barred from agreeing to undermine oversight of the regulated professions for financial gain and thereby subverting the purposes of states' professional regulatory systems. Today, in the absence of such an explicit rule, malpractice plaintiffs regularly preclude themselves from reporting serious violations for the sake of bigger payouts.[194] Meanwhile, the public is never informed of a professional's misconduct, the relevant regulatory oversight board is not alerted of the need to take remedial action to prevent the professional in question from harming future clients, and potential clients or patients who search the oversight board's records to confirm the quality of the services they seek to purchase are *misled by the regulatory system's records themselves*.

Similarly, the ABA should adopt a rule narrower than DR 7-105(A) to prohibit threats of disciplinary action to gain an advantage in civil settings. Specifically, the Model Rules should adopt a provision analogous to, but narrower than, DR 7-105(A): "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."[195]

The ABA's reasoning for omitting DR 7-105(A) is inapplicable in the professional disciplinary context. First, the ABA justified the omission because extortion laws and other provisions in the Model Rules address any abusive action.[196] However, extortion laws are overly broad and are unlikely to have the same deterrent functions as an explicit provision in the Model Rules, the attorney standards of professional conduct, and none of the provisions cited by the ABA explicitly proscribe making threats. Second, the ABA's concern that DR 7-105(A) prohibited legitimate threats is inapplicable in the professional regulatory context.[197] With respect to attorney malfeasance, ABA Model Rule 8.3 already requires that lawyers report legal malpractice to "the appropriate professional authority."[198] A threat to make such a report unless the offending party makes a payment is arguably inconsistent with that rule.

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[194] *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-363 (1992).

[195] MODEL CODE OF PRO. RESP. DR 7-105(A) (AM. BAR ASS'N 1980).

[196] ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-363 (1992).

[197] *Id.* (showing the ABA's concern that the old Disciplinary Rule 7-105(A) prohibited legitimate threats of criminal charges).

[198] MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS'N 2018).

Notwithstanding this inconsistency, one suspects that Model Rule 8.3 is honored in the breach in the settlement of legal malpractice actions, in part because of the ABA's well-publicized ambivalence regarding the ethical status of threats and in part because of the lucrative consequences of such threats. Third, the ABA reasoned that DR 7-105(A) disserved client interests.[199] While this may be true, failure to report professional malfeasance creates serious externalities that cannot and should not be ignored. It is not the case that only the wronged client or patient has an interest in professional malfeasance. If it were, there would be no need for professional regulatory bodies. Professional malfeasance is a context in which client interests must be balanced with the countervailing interests of the public—just as state legislatures have concluded is true in the case of confidential settlements of sexual harassment and product liability cases.[200] In addition, notwithstanding the ABA's decision to delete DR 7-105(A), a majority of states have kept the rule. The majority has recognized the need to retain a black letter rule that clearly proscribes making threats to gain an advantage because the problem is perceived to be serious and common. The ABA is now out of step with practice; it has left the path to forge its own way, but only a minority of states have followed.

Ultimately, the provisions for which the Article advocates would limit a party's ability to suppress evidence of professional malfeasance through the use of confidential settlement agreements. The product liability and sexual harassment cases demonstrate the harmful consequences of permitting parties to use the promise of silence to exact larger settlement payouts. Under the current ABA Model Rules, professionals routinely remain unreported to the state regulatory authorities established for their supervision and oversight. The Model Rules are thereby being used to subvert those regulatory regimes. Professionals who have violated applicable regulatory standards are thereby permitted to continue to freely harm others. And lawyers and the ABA are at least arguably complicit in the resulting harms.

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[199] ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-363 (1992) (claiming that the old Disciplinary Rule 7-105(A) prohibited lawyers from zealously defending civil clients by means of legitimate criminal charges).

[200] For the sexual harassment context, *see* Fromholz & Laba, *supra* note 2, at 12–13. For the product liability context, see Zahnd, *supra* note 57, at 1012–13.

With the assistance of plaintiffs' attorneys, car manufacturers have continued to sell defective cars that resulted in hundreds of deaths. With the assistance of plaintiffs' attorneys, sexual predators have continued to sexually abuse others, often victim after victim. With the assistance of plaintiffs' attorneys, lawyers have continued to steal money from client after client to pay for their settlements. The provisions recommended here would constitute a major step forward to prevent these dangers and protect the public in the professional regulatory context.

CONCLUSION

The appropriateness of confidentiality provisions in settlement agreements has been widely contested. This Article takes no position on confidentiality provisions in general. Rather, it focuses on confidentiality provisions that undermine the operation of state professional regulatory systems. The problem is acute in the context of attorney oversight by bar overseers. Even today, notwithstanding Model Rule 8.3, legal malpractice claims are settled, and as a condition of that settlement, plaintiffs and their attorneys agree not to report the underlying conduct to the state bar. This common scenario undermines the state bar's authority to regulate and ultimately deter attorneys from violating professional rules of conduct and accurately to inform the public of specific attorneys' ethical histories. The same is true in the context of other professional regulatory regimes. Rules that prevent parties from agreeing to refrain from reporting professional malfeasance to the relevant regulatory authority or from making threats to making such reports to gain an advantage in civil settings are necessary.