

**THE THREAT OF CRIMINAL PROSECUTION
AS A NEGOTIATING TOOL**

The Lawyer Disciplinary Board finds there is a need to give guidance to attorneys as to when and in what manner they may use the threat of criminal prosecution in negotiations in a civil matter. In *Committee on Legal Ethics v. Printz*, 187 W. Va. 182, 416 S.E.2d 720 (1992), the Supreme Court held, for the first time, that it is not unethical for a lawyer, on behalf of a client, to seek restitution in lieu of seeking a criminal prosecution as long as the negotiations are "otherwise legitimate." The Court warned:

Seeking payment beyond restitution in exchange for foregoing a criminal prosecution or seeking any payments in exchange for not testifying at a criminal trial, however, are still clearly prohibited.

187 W. Va. at 189, 416 S.E.2d at 727.

The Lawyer Disciplinary Board issues these guidelines:

- 1. The term "restitution" includes only actual pecuniary losses incurred by the client and excludes less quantifiable types of damage such as emotional distress.**

The *Printz* case involved a lawyer's attempt to recover a specific sum embezzled by his client's employee. Rule 8.4(b) of the Rules of Professional Conduct would be violated, for example, if the lawyer attempted to extract from an alleged perpetrator for his client a sum of money for emotional distress incurred during a sexual assault, in exchange for the alleged victim not reporting the incident to the police or for the alleged victim agreeing to ask the prosecuting attorney not to further pursue criminal charges. Under these circumstances, the lawyer would be limited to seeking restitution for any medical and therapy expenses incurred.

The Lawyer Disciplinary Board considered the Court's interpretation of the concept of restitution in other civil and criminal matters. In *Grove v. Myers*, 181 W. Va. 342, 382 S.E.2d 536 (1989), the Court examined the question of whether W. Va. Code § 56-6-31 awarded prejudgment interest on special or liquidated damages incurred but not yet paid by the plaintiff at the time of trial. The statute interprets special damages as "lost wages and income, medical expenses, damages to tangible personal property, and similar out-of-pocket expenditures." 181 W. Va. at 346 n.4, 382 S.E.2d at 540 n. 4. The Court observed, "[P]rejudgment interest is to be recovered as an element of compensatory damages where there is an ascertainable pecuniary loss. This theory of recovery is, thus, essentially that of restitution." 181 W. Va. 350, 382 S.E.2d at 544.

In *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997), the Court discussed the differences between criminal restitution and civil damages. W. Va. Code § 61-11A-4 defines restitution as the value of property damaged, the cost of necessary medical and therapeutic services, lost wages and the cost of necessary funeral expenses when death occurs. The Court noted:

For offenses causing bodily injuries, only specific medical costs are eligible for a restitution award. 'Although restitution for pain and suffering may be necessary and beneficial to the well being of the victim, a circuit court may not order this form of restitution under the Victim's Protection Act of 1994. The victim is not precluded, however, from filing an independent civil action to recover additional damages.'

201 W. Va. at 278 n. 6, 496 S.E.2d at 228 n. 6 [citation omitted].

By limiting any requested payment to restitution, the potential for extortionate requests is curtailed.

2. The amount requested must not exceed actual pecuniary losses caused by the criminal act.

The *Printz* Court's admonition that a lawyer may not demand payment beyond restitution is illustrated in the following South Carolina case. A lawyer settled a client's property damage claim involving her vehicle. Out of the proceeds, a car rental agency was to be paid. The lawyer claimed that he gave his client the money earmarked for the rental agency, \$237.60, but that she failed and refused to make payment. The attorney paid the agency himself and caused a warrant to be issued for the client's arrest. When an indictment was returned, the lawyer wrote to the client:

Please be advised that I am willing to ask the Solicitor to drop all charges against you if you would make restitution in the amount of . . . \$244.21. I must receive complete restitution no later than Thursday, December 31, 1992. If restitution is not received by the date stated, I will pursue the case against you.

The Court found that Respondent had requested an amount greater than the sum he paid the rental agency. Said the Court, "While the monetary difference may not be substantial, it clearly shows Respondent was attempting to use the criminal process to coerce Able to pay him not only the money he paid U-Save but also other fees and expenses owed him." *In re Yarborough*, 327 S.C. 161, 168, 488 S.E.2d 871, 875 (1997).

3. The restitution sought must arise from the alleged criminal wrongdoing.

It would be unethical, for example, for a lawyer of a divorce client to pressure the opposing spouse to agree to certain terms in a property settlement agreement in exchange for the spouse not reporting income tax violations to the authorities.

In *Bluestein v. State Bar of California*, 529 P.2d 599 (Cal. 1978), a divorce lawyer met with his client's spouse and became involved in a fight. The lawyer filed assault charges against the spouse. The parties later agreed to a property settlement agreement which included payment to the lawyer of \$1,000 in attorney fees. When the parties reconciled and the client beseeched the lawyer to drop the assault charges, the lawyer stated that he would drop charges when he was paid the \$1,000. The Court found that the money sought was not restitution for damages suffered in the assault, but was for the lawyer's fee in a civil matter, i.e., the divorce.

4. The threat of criminal prosecution must be made in good faith.

The use of the threat of criminal prosecution as a negotiation tool is legitimate only if the lawyer genuinely believes that the conduct in question would constitute a criminal act. In *In re Craddock*, 602 P.2d 406 (Alaska 1979), for example, the Court found that the lawyer had misled the complainant into believing she was subject to prosecution due to her refusal to make restitution.

5. Agreements concerning civil matters are not binding on prosecutors.

Negotiations or agreements concerning civil matters with possible criminal implications are, of course, not binding on prosecuting attorneys.

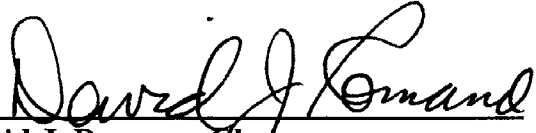
Regardless of any otherwise legitimate attempt to seek restitution, it is the prosecuting attorney who is vested with the discretion and duty to prosecute criminal charges and all parties entering such agreements concerning civil matters must be advised of same. *State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 270 S.E.2d 624 (1981).

CONCLUSION

The ability of a lawyer in West Virginia to use the threat of criminal prosecution in civil negotiations is circumscribed because of the potential threat to the administration of justice from misuse.¹ The Lawyer Disciplinary Board urges practitioners to employ caution when attempting to follow the dictates of *Committee on Legal Ethics v. Printz, supra*.

Lawyers are further cautioned that the *Printz* decision was based in part on the application of the doctrine of desuetude to render void a state statute prohibiting a victim or his agent from seeking restitution in lieu of criminal prosecution. Attorneys and their clients must also be aware of the federal statute dealing with witness tampering which makes it a felony to knowingly use intimidation or physical force, or threats "to burden, delay, or prevent the communication to a law enforcement office . . . of information relating to the commission or possible commission of a federal offense." 18 U.S.C. § 1512(b)(3).

APPROVED by the Lawyer Disciplinary Board on the 12th day of May, 2000.



David J. Romano, Chairperson
Lawyer Disciplinary Board
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¹ Many states which have considered the issue have an absolute ban on this practice. See cases cited in *In re Yarborough*, 327 S.C. 161, 488 S.E.2d 871 (1997).