Michael Jackson was on the verge of criminal charges for child molestation in 1993. But at the moment of truth, the child chose not to testify. The prospect of subpoenaing an underage boy and forcing him to publicly point a finger at the pop star in court, thus allegedly victimizing him again, left the prosecutor at a dead end in California.

Not surprisingly, the child's decision to not testify was not pure fate for Mr. Jackson. Crafty lawyering for both sides — Johannie Cochran (and Howard Weitzman) on behalf of Mr. Jackson and Larry Feldman for the child's family — led to a purse in excess of $20 million for the alleged victim, and a walk in the park for Mr. Jackson.

Eleven years later, because Mr. Jackson faces new, similar charges, and his 1993 alleged victim is now 24 years old, a prosecutor can subpoena the young man with that testimony admissible in California as "similar act" evidence, so the "deal" Mr. Jackson cut with the family is useless.

But given that the "deal" effectively "bought silence" from Jackson's initial accuser, raising the specter of witness tampering or bribery, how could it have been legal? And furthermore, since it was negotiated not by laymen but by top of the line attorneys, how could "buying off" the witness, or "asking to be bought off" have been ethical for those lawyers?

New York Bar Opinion

We find no reported New York cases directly on point. Interestingly, however, a New York Bar Association Ethics Opinion concludes that although an attorney may not offer his client's willingness to refrain from filing a complaint with the criminal authorities as a condition to settling a civil suit, an attorney may, with a handful of qualifiers (principally that the agreement not constitute "Compounding A Crime" under New York's Penal Law) negotiate such an agreement as long as the offer is made by the attorney for the potential civil/criminal defendant.

The qualifiers also include that: (1) the destruction or concealment of evidence not be implicated; (2) the settlement must relate to the matter implicated by the criminal and criminal allegations; and (3) the benefit conferred is no more than restitution or indemnification for the crime. Notably, Stephen Gillers, in a 2002 article (which does not cite the Association's Opinion), discusses agreements to obtain "silence" in federal investigations and concludes that a lawyer cannot ask an accuser to refrain from voluntarily providing information to the criminal authorities under federal criminal law and the ethics rule in most American jurisdictions.

Instructive Cases

No question, however, if a criminal target, or his attorney, went to a witness and said, "Don't testify and I'll pay you $X," he should be indicted for solicitation.

Moreover, offering money (or counseling an offer) to compromise testimony is a serious ethical violation in any jurisdiction.

Though few reported cases address such payments, Florida Bar v. Machin, 635 So.2d 938 (Fla. 1994), is on point.

Machin’s client, Nelson Gonzalez, was charged with first-degree murder and kidnapping the victim’s pregnant girlfriend. Gonzalez pleaded guilty to second-degree murder. But, at various times before sentencing, Machin offered, on behalf of his client, to set up a trust fund for the child worth $30,000 — but only if the victims’ families did not speak at sentencing "in aggravation."

Interestingly, Machin disclosed this offer to the State’s Attorney’s Office, the sheriff’s office and the victim’s assistance representative. As if that were not enough, he also told the sentencing judge. Ultimately, the victim’s family rejected the offer and the judge imposed the maximum sentence available under the plea agreement. However, despite his disclosures, and the court’s recognition that "payment of money, unrelated to restitution or fines, in criminal cases is not unheard of in the legal community in which Machin practices,” the Florida Supreme Court suspended Machin from practice for 90 days.

Closer to home, in 1971, the New Jersey Supreme Court, in Matter of Friedland, 280 A.2d 183 (1971), suspended three lawyers who conspired to “pay” a victim of a loan sharking transaction if he withdrew his civil claim and criminal complaint.

One of the lawyers was the municipal prosecutor who was acting as a private attorney when he appeared in court to join the recommendation for dismissal, and later sought the required approval of the county prosecutor.

In his discussion with the prosecutor, the lawyer did nothing to correct the mistaken impression that he was advocating dismissal on behalf of the municipality rather than for a
private client.

Interestingly, when defending against the disciplinary complaint, the lawyers argued, in part, that the criminal charge was baseless and the defendant was ultimately acquitted.

The court made a point to respond that “the criminal law does not exhaust the ethical duty of a lawyer.” Further, “the unethical quality of their conduct consists of thwarting the criminal process without regard to whether the party complained of is in fact guilty.”

In People v. Kenelly, 648 P.2d 1065 (1982), the Colorado Supreme Court disciplined an attorney who represented a client that had been shot, resulting in both a criminal and civil suit. The client/victim called the defendant’s attorney seeking a settlement, who contacted the victim’s attorney, Kenelly.

Kenelly explained that he was authorized to settle the case for $25,000, but if his client received an extra $5,000 “he might find himself with the means to end up in Switzerland or Jamaica, some place like that.”

Although Kenelly was acquitted on criminal charges for his conduct, the court held that an acquittal is not a bar to disciplinary action, and suspended him for one year.

In Matter of Lutz, 607 P.2d 1078 (1980), a drunken-driving case involving both criminal and civil liability, the Supreme Court of Idaho imposed a one-month suspension on a lawyer who drafted a release to be signed by the owner of one of the automobiles involved in the accident stating: “I covenant not to be a witness against or give evidence against the interest of [Lutz’s client] in any civil or criminal proceeding, which may involve or concern the facts of my loss or claim which is hereby released.”

In sum, and to be clear, it is flatly illegal for the victim and the accused to agree to a payment in exchange for the victim’s noncompliance with a subpoena. And, by parallel reasoning, it is unethical for an attorney to counsel or facilitate such an agreement.

The ethics opinions discussed above dealt with situations where clients, in exchange for settling a civil case, refused to file a complaint with the criminal authorities — entirely different from an agreement refusing to testify in a filed criminal action.

But the pop star’s deal involved the settlement of a civil case, and resulted in the very evil these cases purport to condemn: Payment for a refusal to testify in a pending criminal case. So how did that deal work?

First, to distinguish Mr. Jackson from Machin, there was already a civil suit pending against Mr. Jackson on behalf of the 1993 victim. In Machin, however, the unquestioned goal of the trust deal was to “buy silence” in the criminal sentencing phase.

While Mr. Jackson was ostensibly paying to compromise the civil lawsuit, and many might question whether that was his true goal, it was certainly a legitimate tack — even given the sizeable sum.

Second, in contrast with Mr. Jackson’s payment, which was directly reviewed by the judge presiding over the civil settlement, the Friedland lawyers misled the municipal judge and county prosecutor as to the nature and substance of their deal.

But in the Jackson case, how could his skillful lawyers have counseled such a payment without “knowing” that Mr. Jackson would firmly be off the hook? Obviously, there could be no written or oral agreement — certainly no enforceable one — to preclude a witness’ testimony. What gave Mr. Jackson the confidence to hand over more than $20 million?

As a result, the “deal” was probably a matter of trust. Simply put, Mr. Cochran (we exclude Mr. Weitzman for editorial convenience) and Mr. Feldman, with mutual respect, looked each other in the eye and “knew,” as well as one can “know” what a lawyer on the other side intends.

Mr. Feldman recognized that Mr. Cochran was putting his credibility with his client on the line in advising the settlement. And Mr. Feldman presumably communicated to Mr. Cochran that he had total “control” of his clients and would “make good” despite huge anticipated pressure from a prosecutor who would be irate over a deal resulting in “no testimony.” Probably no words needed uttering between the lawyers, other than Feldman saying, “The kid, and his family, would like for him never to testify.”

Ethical? We believe so — although it would surely be interesting to have heard the conversation between Messrs. Cochran and Jackson before the client agreed to pay.

Did Mr. Cochran tell Mr. Jackson: “I know Larry, and his word is his bond”? Or perhaps, “We have no deal; but it’s worth the risk, because I think the kid won’t testify even if subpoenaed”? Or maybe, “We have no deal — we should settle the civil case, and maybe he’ll just decide he wants to put an end to the sordid business”?

We will never know, and that’s just as well. Because assuming the existence of mutual trust and our conclusion that lawyers’ ethics were not breached, the roadmap for the lawyer is clear: (1) no written or oral agreement to buy silence; (2) no “wink and nod” suggesting agreement; (3) no “hypothetical” dialogue between the lawyers; and (4) in accord with subsequent legislation in California and a bill recently introduced in New York, no such arrangements with child victims of sexual abuse.

Conclusion

If the accuser has already made the criminal allegation to the authorities, and a “deal” is contemplated, there must be full disclosure to the prosecutor. It’s simply too risky to do otherwise.

If the prosecutor is on board, i.e., a prosecutor with no role in the civil litigation, there must be a full disclosure, presumably in a sealed proceeding with the court. And the whole process may still be unwise if there is no initiated civil action to “settle.”

The order of the day is caution, as there is no bulletproof protection for the lawyer in particular, or even the payor and payee.

References:

1. Cal. C.C.P. §1219.5.
5. Although Mr. Gillers relies upon Model Rule 3.4(f), not applicable in New York, his reading of the rule may be broader than its text supports. Rule 3.4(f) provides, with two exceptions, that a lawyer shall not “request a person other than a client to refrain from voluntarily giving relevant information to another party.” Note two important qualifications in this rule. First, the rule prohibits asking someone “other than your client” from refraining to give information, and thus would not prevent offering the same from your own client. Second, the rule prevents refraining from giving information to “another party,” and one could conceivably argue that criminal authorities that have not filed charges are not “another party” under the rule. Last, Rule 3.4(f)(2) provides a catchall exception that permits an attorney to make such a request if the lawyer “reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.”
6. Stephen Gillers, “Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical,” 31 Hofstra L. Rev. 1 (Fall 2002). The American Bar Association reached a different opinion, and concluded that the Model Rules do not prohibit, with certain conditions, a lawyer from agreeing to refrain from presenting criminal charges in return for settlement of civil charges (though, oddly, the ABA did not cite or discuss Model Rule 3.4(f)). See ABA Comm. on Ethics and Prof’l. Resp., Formal Op. 92-363 (July 6, 1992).