

**PAY "OR ELSE" -- WHEN DO ATTORNEY DEMANDS**

**BECOME UNLAWFUL EXTORTION?**

**(The Answer is Not So Simple)**

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In the highly contentious and aggressive world of litigation, attorneys must exercise care when making demands on opposing parties, as certain types of demands can be considered impermissible threats, subjecting the attorney (and/or the client) to liability. This is particularly true when a demand made on an opposing party refers or relates to a matter in which the opposing party could face potential criminal, administrative or disciplinary charges in addition to civil liability.

California recognizes a private cause of action for civil extortion based on the requirements of Penal Code Section 518. Extortion, as it is defined in the Penal Code, is the wrongful use of force or fear to obtain money or property from another. Fear, for purposes of extortion "may be induced by a threat, either:

...

2. To accuse the individual threatened ... of any crime; or,
3. To expose, or impute to him . . . any deformity, disgrace or crime[.]"

(Pen.Code, § 519.)

Attempted extortion is treated the same as actual extortion -- "Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in Section 519, is punishable in the same manner as if such money or property were actually obtained by means of such threat." (Pen.Code, § 523.)

In addition to the extortion statute, the California Rules of Professional Conduct also state that an attorney is subject to discipline and civil liability for threatening to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute. CRPC 5-100.

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This includes threats to file a complaint with a federal, state or local government agency that may result in the loss or suspension of a license, imposition of a fine or other sanction of a quasi-criminal nature. See *Matter of Rodriguez*, (Rev. Dept. 1993) 2 Cal. State Bar Ct.Rptr. 480, 488, 499.

Given the statutory framework, one might understandably question whether certain pre-litigation demands by attorneys cross the line. Lawyers can generally take comfort in the fact that articulating a person's intent to invoke the law in a civil action to enforce his or her rights is not a threat to accuse one of a crime within the meaning of the extortion statute. *Murray Show Case & Fixture Co. v. Sullivan*, 15 Cal. App. 475 (1911). Nevertheless, authority shows that attorneys must be alert to potential issues and exercise care when sending demand letters, as certain types of demands are at risk of crossing the line. This is particularly true when making demands in matters where there is any potential for criminal liability, even if only in connection with a purely statutory offense.

For example, extortion has been found in cases involving threats to accuse one of violations of municipal housing ordinances, packaging statutes and knowingly selling diseased food. Notably, the threat to accuse one of a crime can amount to extortion even though the one making the threat is not specific as to the particular crime. *People v. Sanders*, 188 Cal. 744 (1922); *People v. Goldstein*, 84 Cal. App. 2d 581 (1948). As one leading treatise explains, "the more vague and general the terms of the accusation, the better it would serve the purpose of the accuser in magnifying the fears of the victim." Cal. Jur. 3d Criminal Law: Crimes Against Property § 459.

For another example, the California Supreme Court held that a lawyer's demand letter constituted an improper threat because the letter stated, "the Department of Savings and Loan and the Attorney General will be requested to assist us" in resolving the dispute; it also contained a notation that copies of the letter were sent to the Department of Savings and Loan and the Attorney General's Office. The Court held that the attorney's letter constituted an improper threat under Rule 5-100. *Crane v. State Bar*, 30 Cal.3d 117 (1981) (decided under former rule).

In another case, an attorney who had lost at trial sent a letter to the opposing party accusing the opposing party of perjury and demanding payment of a debt to the attorney's client. The letter further stated that unless the debt was paid, the attorney would file a motion for new trial and a complaint for perjury against the opposing party. The Court held that the attorney's

actions violated Rule 5-100, and potentially exposed the attorney to criminal liability for extortion. *Libarian v. State Bar*, 38 Cal.2d 328 (1952).

Attorneys should also know that when a demand letter does cross the line, the litigation privilege will offer no protection. In 2006, the California Supreme Court held that the anti-SLAPP statute did not protect an attorney demand letter that amounted to extortion as a matter of law. *Flatley v. Mauro*, 39 Cal. 4th 299 (2006). A recent case before the Ninth Circuit is particularly interesting in this regard. In *Metabolic Research, Inc. v. Ferrell* (No. 10-16209), a California attorney sent demand letters to two out of state companies in Nevada and Pennsylvania, notifying the recipients that they had violated the California Consumer Legal Remedies Act by falsely advertising the properties and potential benefits of a fitness supplement. The attorney demanded that these companies cease their false advertising, identify all consumers who purchased the product and provide each of these consumers with an appropriate refund. He further demanded that the companies disgorge all revenues from the sales of the product for consumers who could not be identified. He concluded the letters with an offer to compromise and allowed 30 days for the companies to agree to an injunction. If the companies chose not to accept his offer, the letters stated that the attorney would file a lawsuit (presumably in California) and seek all available relief. In response, one of the companies filed a lawsuit in Nevada, charging the attorney with extortion. The attorney filed a motion to dismiss based on Nevada's anti-SLAPP statute, but the district court denied the motion, finding that the attorney had not established that the demand letter constituted a good-faith communication in furtherance of the right to petition because Nevada's anti-SLAPP legislation only protected communications made directly to a governmental agency, not a demand letter sent to a potential defendant in litigation. The attorney immediately appealed, but the Ninth Circuit concluded that there was no right of immediate review of a denial of an anti-SLAPP motion. The case shows that attorneys must be particularly careful when sending demand letters out of state, as they may be subject to liability in jurisdictions outside of California.

Whether the maker of a questionable demand or the recipient, attorneys should be alert to these sorts of issues and recognize the types of threats that could be impermissible. An improper demand may subject the attorney to liability for civil extortion and potential disciplinary action by the state bar.

The following are pertinent excerpts and exercises to inform an assessment whether a strategy would constitute extortion or permissible demand.

**Clearly Extortionate Demand Letter:**

“Please be advised that we represent a women[sic] with whom you engaged in forcible sexual assault on or about October 19-20, 2003. Please consider this our first, and only, attempt to amicably resolve this claim against all Defendants named in the Complaint at Law enclosed herein. ¶ . [A]n in-depth investigation into MICHAEL FLATLEY'S personal assets, business agreements, royalties, future engagements and financial compensation worldwide shall be undertaken. ALL OF THIS INFORMATION SHALL BECOME A MATTER OF PUBLIC RECORD, AS IT MUST BE FILED WITH THE COURT, as it will be part of the bases of several of our expert's testimony. ¶ Any and all information, including Immigration, Social Security Issuances and Use, and IRS and various State Tax Levies and information will be exposed. We are positive the media worldwide will enjoy what they find. ¶ Once again, please remember all pertinent information and documentation, if in violation of any U.S. Federal, Immigration, I.R.S., S.S. Admin., U.S. State, Local, Commonwealth U.K., or International Laws, shall immediately [be] turned over to any and all appropriate authorities. . ¶ . We look forward to a prompt and timely response. There shall be no continuances nor any delays. If we do not hear from you, then we shall know you are not interested in amicably resolving this claim and shall immediately file suit. ¶ P.S. Note: along with filing suit, there shall be PRESS RELEASES DISSEMINATED TO, but not limited to, THE FOLLOWING MEDIA SOURCES: Fox News Chicago, Fox News Indiana, Fox News Wisconsin, and the U.S. National Fox News Network, WGN National U.S. Television, All Local Las Vegas Television, radio stations and newspapers; The Chicago Tribune, The Chicago Southern Economist, The News Sun, The Beacon News, The Daily Herald, The New York Times, The Washington Post; ALL National U.S. Television Networks of NBC, ABC and CBS; as well as INTERNET POSTINGS WORLDWIDE, including the BRITISH BROADCASTING COMPANY, and the Germany National New Network Stations.” (Original emphasis.)

**Closer calls:**

Are the following examples EXTORTION (E) OR LEGITIMATE DEMANDS (D)?

1. Lawyer threatens to sue hair salons for pricing haircuts differently for men and women and then takes money to settle the matter **E D**
2. After losing at trial, lawyer sends a letter to opposing counsel, accusing his opponent's client of perjury and threatening to use the perjury charge as the basis of a new trial motion and a criminal complaint, unless opposing counsel's client pays money **E D**
3. Attorney threatens an oil company with reporting adulteration of its gasoline to the prosecutor unless oil company pays his clients **E D**

4. Lawyer's letter demands \$175,000 settlement in divorce case and states he might advise his client to report husband to Internal Revenue Service and United States Custom Service **E D**
5. Lawyer's letter states, "The Department of Savings and Loan and the Attorney General will be requested to assist us" in resolving the dispute; it also contains a notation that copies of the letter were sent to the Department of Savings and Loan and the Attorney General's Office **E D**
6. Demand letters to two out of state companies in Nevada and Pennsylvania, notifying the recipients that they had violated the California Consumer Legal Remedies Act by falsely advertising the properties and potential benefits of a fitness supplement, and providing an offer to compromise and allowing 30 days for the companies to agree to demands to cease false advertising, identify all consumers who purchased the product and provide each of these consumers with an appropriate refund, and to disgorge all revenues from sales of the product for consumers who could not be identified. If the companies choose not to accept the offer, the letter threatens to file a lawsuit **E D**

[Answer Key: All answers should be "E"]