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When Does a Threat within a Demand become Extortion or Professional Misconduct?

In this article we consider when a threat contained within a demand is not a legitimate negotiation tactic and instead becomes extortion and/or professional misconduct.

The California Court of Appeal, Fourth District's recent opinion in ***Falcon Brands, Inc. v. Mousavi & Lee, LLP***, No. G059477, 2022 WL 246851 (Cal. Ct. App. Jan. 27, 2022) addressed this topic. That matter arose out of Amy Mousavi's client, Nick Honard, being terminated by Falcon Brands, Inc. and Coastal Harvest II, LLC (collectively Falcon), a cannabis distributor. On October 8, 2019, Mousavi e-mailed a letter to Falcon's counsel that summarized Honard's employment claims and then itemized eleven allegedly illegal activities engaged in by Falcon, which included violations of California employment laws or Bureau of Cannabis Control ("BCC") regulations, as well as alleging bribery of a deputy district attorney.

Mousavi then offered to settle Honard's claims for $490,000. She required a response to her demand by the next day or else she would file a complaint and notify Falcon's planned merger partner, Harvest Health and Recreation, Inc. (Harvest), about the complaint against Falcon, which would matter because Harvest would remain liable as the surviving corporation after any merger.

After Falcon's counsel responded, Mousavi, in an October 9 email and telephone call, again stated that she would be notifying Harvest of Honard's claims and Falcon's violation of various cannabis statutes and regulations before filing the complaint.

On Friday, October 11, Mousavi sent another e-mail to Falcon's counsel: "I have put the attorneys for [Harvest] on notice about Mr. Honard's claim for wages, ***without disclosing other issues mentioned in my letter of October 8, 2019***. However, Harvest has requested that I forward the demand letters I have sent you. ***I am planning to e-mail those letters on Tuesday.*** Please call me if you have any questions. Thanks."

The parties failed to reach a settlement. On January 31, 2020, Mousavi filed Honard's complaint against Falcon. The complaint alleged that Falcon engaged in specific illegal activities, but he did not affirmatively link those acts to either his wrongful termination or the non-payment of his commissions, salary, or expenses.

Falcon filed a cross-complaint against Mousavi and her law firm, Mousavi & Lee, LLP, for, among other things, civil extortion based on Mousavi threat to report Falcon's alleged criminal acts to Harvest unless Falcon paid $490,000 to settle Honard's claims against it. The trial court granted Mousavi's motion to strike.

On appeal, the Fourth District found that the October 8 email, "standing alone" did not cross the line by referencing state law violations within its demand. The Court found that the email was a "close[] call when considered by itself"; it contained an implicit threat by listing Falcon's crimes but did not link them to her settlement demands.

The Court then considered the October 8 e-mail alongside the October 11 e-mail, where Mousavi informed Flacon's counsel that she put Harvest on notice about Honard's claims without disclosing "other issues" raised in the October 8 email.

The Court found the October 11 email clearly crossed the line by demanding settlement based on the threat to accuse Falcon of committing a crime (i.e., bribing a deputy district attorney). Pen. Code, §§ 518, 519(a). "The implication is clear: settle the case now or Harvest will become aware of Falcon's alleged criminal misconduct next week." The Court added, "Mousavi's threat to disclose criminal activity entirely unrelated to her client's damage claim exceeded the limits of respondent's representation of [her] client" (internal quotation marks and citation omitted). The Court permitted the extortion cause of action to proceed.

The issue on the ethical permissibility of including threats in negotiations was initially addressed in the ABA Model Code: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." This rule was not retained when the ABA Model Rules were adopted in 1983 because it was seen as redundant in the light of ABA Model Rules 3.1, 4.1, 4.4, and 8.4(b) through (e). ABA Formal Op. 92-363 (1992) explained the deliberate omission by the drafters in the light of the other Model Rule provisions listed above.

Many states still have some variation of this language in their version of Model Rule 3.4, 4.4, 8.4 or another rule. See CT Rule 3.4(7); DC Rule 8.4(g); FL Rule 4-3.4(g); GA Rule 3.4(h); HI Rule 3.4(i); ID Rule 4.4(a)(4); IL Rule 8.4(g); KY Rule 3.4(f); LA Rule 8.4(g); MA Rule 3.4(h); NJ Rule 3.4(g); NY Rule 3.4(e); OR Rule 3.4(g); TN Rule 4.4(a)(2); TX Rule 4.04(b); VA Rule 3.4(i).

States that have not expressly forbidden such conduct will likely follow ABA Formal Opinion 92-363's guidance and find any threat is nevertheless impermissible as a violation of other rules, such as Model Rule 8.4(d) (prohibiting "conduct that is prejudicial to the administration of justice") or Model Rule 8.4(b) (prohibiting criminal acts) if the threat amounts to the crime of coercion, extortion or compounding. See NC Op. 3 (2005).

Those jurisdictions that do permit attorneys to link settlement demands with threats to report a well-founded administrative claim or criminal complaint require such ancillary proceeding to be ***related*** to the civil claim being negotiated. ABA Formal Op. 92-363 (1992); ***see also*** N.Y. City 2017-3 (2017) (threatening to report to administrative agency); AK Op. 97-2 (1997); MI Op. RI-78 (1991); ***compare*** IL Op. 20-03 (2003) (permissible to set forth ***possibility*** of both civil and criminal liability, but impermissible to threaten criminal prosecution or stating prosecution can be avoided by settling the matter).

Otherwise, it is generally impermissible to threaten to expose illegal or otherwise embarrassing information to anyone outside of a potential court proceeding. ***See generally Flatley v. Mauro***, 39 Cal. 4th 299 (2006); ***United States v. Avenatti***, No. S119CR373PGG, 2020 WL 70951 (S.D.N.Y. Jan. 6, 2020).

To that end, threat of litigation, by itself, is not impermissible, so long as the threatened lawsuit is not based on intentional falsehoods, a frivolous claim, or the lawyer knows the client will never sue under any circumstances. ***State v. Cohen***, 302 Ga. 616 (2017) (threatening to file sexual harassment lawsuit and to use video recording as evidence in that litigation was not extortion if the threatened lawsuit was not unlawful); ***Jefcoat v. Foreman***, No. 1:15-CV-00456-CL, 2016 WL 3468964, at *4 (D. Or. Apr. 29, 2016) (cease and desist letters with threat of bringing civil claim was "common and encouraged" because "[t]hey facilitate dispute resolution outside of court"); NYSBA 1228 (2021) (threatening to file lawsuit that lawyer knew client would never file would rise to a false statement of fact).

In order to determine whether an impermissible threat was made, the courts and discipline committees will examine both the content and context of the negotiation demand—as blackmail is usually conveyed through innuendo or suggestion. However, jurisdictions are split on whether an attorney must make an accusation of specific criminal conduct, or if a general accusation will suffice. ***Compare In re Pelkey***, 962 A.2d 268, 276 n.9 (D.C. 2008) (references to "a violation of the California Penal Code," and to "invok[ing] all governmental investigative resources available to us" was "sufficiently vague"), ***with*** NY Eth. Op. 772 (2003) (no distinction between general or specific accusation as purpose to coerce is clear).

As a result of this case law and disparate provisions of the Rules of Professional Conduct, as well as the ethics opinions, lawyers need to be mindful of the law and rules in their jurisdiction, and should use such negotiation tactics with caution and sparingly. In addition to the ethical and criminal risks raised here, lawyers should also consider that threats often sour the relationship with opposing counsel, question the litigator's credibility if not followed through, and can actually have the unintended consequence of signaling weakness in the client's case.

Further information

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