CRIMINAL LAW

The Accidental Extortionist

by Dana Grimes and Robert Grimes

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During litigation, some clients cross the line that separates negotiation from extortion. When lawyers let their clients cross this line, it can result in prosecution. California Penal Code §518 provides, "Extortion is the obtaining of property from another, with his consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right." Penal Code §519 further provides:

> **Fear, such as will constitute extortion, may be induced by a threat, either:**
> **1. To do an unlawful injury to the person or property of the individual threatened or of a third person; or,**
> **2. To accuse the individual threatened, or any relative of his, or member of his family, of any crime; or,**
> **3. To expose, or to impute to him or them any deformity, disgrace or crime; or,**
> **4. To expose any secret affecting him or them.**

It is often necessary to remind clients that truth is not a defense to extortion and the law does not permit the use of extortion as a means of collecting a debt, even a legitimate one: "The law of California was established in 1918 that belief that the victim owes a debt is not a defense to the crime of extortion." *Gomez v. Garcia* (9th Cir. 1996) 81 F.3d 95, 97.

Likewise, the courts have long held there is no free speech defense to extortion: "It may categorically be stated that extortionate speech has no more constitutional protection than that uttered by a robber while ordering his victim to hand over the money, which is no protection at all." *United States v. Quinn* (5th Cir.1975) 514 F.2d 1250, 1268. Thus, extortion is a somewhat paradoxical crime in that it criminalizes the making of threats that might not otherwise be illegal. In many cases the threat itself is perfectly legal but it nevertheless becomes illegal when tied to a demand for money or other consideration.

For example, in one case we handled, a litigant in a business dispute sent an email informing Mr. X, the opposing party, that if Mr. X did not agree to a proposed settlement of the litigation by a given date, a list of Mr. X'a sexual peccadilloes would be distributed to his neighbors and his wife. That was a clear-cut case of extortion and the writer of the email was prosecuted.

Threatening Criminal Prosecution

We were once involved in a case in which a person driving under the influence of alcohol caused serious injuries to a plaintiff. The plaintiff's attorney told the criminal defense attorney that unless the defendant agreed to a specific civil settlement by a certain date, the plaintiff would petition the judge in the criminal case for a harsh sentence. This was a violation of Penal Code §518.

We occasionally find ourselves reminding colleagues that attorneys are not exempt from the principles of extortion in their professional conduct. See, *Flatley v. Mauro* (2006) 39 Cal.4th 299. Indeed, the plaintiff's attorney mentioned above violated the Rules of Professional Conduct which specifically prohibit attorneys from "threaten[ing] to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute." Cal. Rules of Prof. Conduct, rule 5-100(A).

The Perils of Parallel Criminal and Civil Cases

In many civil cases there is a parallel criminal prosecution. Civil and criminal attorneys alike have to be careful not to violate Penal Code §518 *et seq*. When negotiating the civil case, the criminal case is the elephant in the room, which generally should not be discussed.

We frequently have clients in criminal cases who need firm guidance to avoid violating Penal Code §518. For instance, in a case in which an employer accuses an employee of embezzling $100,000 but has not yet reported the case to the police, the client will suggest to us that in return for settling the claim civilly, he wants the employer to agree not to report the embezzlement to the police or the District Attorney. That is an illegal bargain.

However, it is usually in the best interests of the potential criminal defendant to make full and complete restitution to victims at the earliest opportunity. Once they get their money back, the alleged victim may decide not to report the matter and, if the case is prosecuted, the defendant (if convicted) will generally receive a lesser sentence for having paid restitution.

We tell our clients the repayment of the misplaced or mismanaged or misappropriated or stolen money cannot in any way be coupled with an agreement by the alleged victim to not report a crime and pursue prosecution. An agreement of that nature would be a violation of Penal Code §518 by both parties, and, of course, it would not be binding on the police or the prosecutor, who represent the People, not the victim.

In cases in which our client is charged with inflicting death or great bodily injury on another person, there is often a parallel civil proceeding. Usually, this occurs when our client is charged with vehicular manslaughter or felony driving under the influence, but sometimes it occurs when the defendant is charged with other types of conduct, such as stabbing someone in a bar fight. Since even a broken nose is worth $10,000 in emergency medical room bills, large amounts of money are at stake and there is extensive negotiation between the plaintiff/victim and the defendant's insurance company. We always encourage the defendant's insurance company to make a prompt and generous settlement with the plaintiff/victim. The victim typically appreciates that and may express as much to the probation department and the sentencing judge. However, we are careful not to ask for any promise of leniency in return for the civil settlement.

Demand Letters That Read Like Ransom Notes

A threat that constitutes criminal extortion is not cleansed of its illegality merely because it appears on legal letterhead. Sending a threatening letter with intent to extort money is "punishable in the same manner as if such money ... were actually obtained." Penal Code §523. And it is important to remember that the crime of extortion involves moral turpitude. In one divorce case, the wife's attorney suggested in a letter demanding settlement that he might advise his client to report her husband to Internal Revenue Service and United States Customs Service. The Supreme Court of Vermont ruled this conduct constituted "veiled threats [that] exceeded the limits of respondent's representation of his client in the divorce action" and held that it supported the attorney's extortion conviction. *State v. Harrington* (1969) 128 Vt. 242.

As the wise saying goes, "Don't write it if you can say it; don't say it if you can imply it." (…And don't even imply it, if it's extortion.)