David Marroso, left, and Emma Lux, right, of O'Melveny & Myers. Courtesy photos

COMMENTARY

Advocacy or Extortion? It Depends on the Court

What is zealous advocacy and how far may a lawyer go?

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Legal Ethics and Attorney Discipline

By David Marroso and Emma Lux

"Lawyers argue for a living. Some do more than argue. They lace their settlement demands with threats. When does such activity cross the line and become professional misconduct?" See *Falcon Brands v. Mousavi & Lee,* 74 Cal. App. 5th 506, 511 (Cal. Ct. App. 2022). The current answer for California practitioners—as unsettling as it sounds—very well may be: "it depends on the court."

Pushing the Limit

Every lawyer is familiar with the duty to "zealously advocate" for his or her client. In *In re Josiah Z.,* 36 Cal. 4th 664, 680 (Cal. 2005); Model Rules of Pro. Conduct, Preamble, at Section 2 (Am. Bar Ass'n) (lawyer must "zealously assert the client's position under the rules of the adversary system"). But, what is "zealous advocacy" and how far may a lawyer go?

Falcon Brands v. Mousavi & Lee, decided this month, is causing many lawyers to reconsider their tactics. The case involves cannabis, whistleblowers and accusations of extortion—and its ultimate outcome could redraw the line between zealously advocating for clients and blackmailing their adversaries.

Bromides and Blackmail

To understand this current question of advocacy triggered by the California marijuana industry, we must first look all the way back to 19th century England, to a case that involved one of the day's most taboo topics: divorce. Lord Brougham represented the Queen against a legal effort by the King to obtain a divorce based on the Queen's alleged adultery. In defense, Lord Brougham developed evidence that the King, when he was Prince, himself had committed adultery which, under law, prohibited him from maintaining the throne. If successful in defense, England would be thrown into crisis, as the sitting King would be dethroned. Lawyers and citizens implored Lord Brougham to avoid that particular defense. In what became known as Lord Brougham's Bromide, he stated:

"[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others."

—Gerald F. Uelman, Lord Brougham's Bromide: Good Lawyers as Bad Citizens, 30 Loyola L.A. L. Rev. 119, 120 (1996).

Of course, few legal disputes result in constitutional crisis; but many run-of-the-mill matters trigger the tension between advocate and citizen. See, e.g., David Mellinkoff, "The Conscience of a Lawyer 189" *(1973)*. Pre-litigation settlement demands are a perfect example. Just as every attorney is familiar with the duty to advocate zealously, California lawyers should be familiar with the crime of extortion or blackmail, which is "the obtaining of property ... from another, with his or her consent...induced by a wrongful use of force or fear ...," according to the Cal. Penal Code Section 518(a). The California Rules of Professional Conduct prohibit attorneys from "threaten[ing] to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute."

How far may a lawyer go—in fact, what must a zealous advocate say—in a pre-litigation letter seeking to resolve a case on behalf of his or her client? May the lawyer threaten to file the lawsuit in court if demands are not met? May the attorney threaten to go public? Threaten to go to authorities? Tell your business partner? Tell your spouse?

Disarray

For decades, California practitioners treaded on uncertain terrain when playing hardball on behalf of their clients. Some courts found that demand letters could rise to the level of extortion and subjected attorneys to professional sanctions. For example, in a well-known case from almost a century ago called *Barton v. State Bar of California*, the California Supreme Court upheld the disbarment of an attorney for threatening to report a company to the authorities unless the company settled with the attorney's client.

Other courts went the opposite direction, refusing to sanction an attorney who sent a belligerent pre-litigation settlement demand letter to an adversary. "[I]t is incumbent upon" a "competent" attorney, the court held, "to communicate promptly with a potential adversary, setting out the claims made upon him, urging settlement, and warning of the alternative of judicial action." See *Lerette v. Dean Witter Organization,* 60 Cal. Ct. App. 3d 573, 577 (Cal. Ct. App. 1976).

'The Flatley Rule'

Recognizing the need to clarify the line, the California Supreme Court struck a balance and set forth a new test in 2006. See *Flatley v. Mauro,* 39 Cal. 4th 299 (Cal. 2006). Michael Flatley is a well-known musician and entertainer. California attorney D. Dean Mauro represented a woman who claimed Flatley had raped her. Mauro sent Flatley a letter demanding a seven-figure payment to "settle." If Flatley refused to pay, Mauro threatened, he would file a lawsuit and "expose" Flatley to the press and police for violating immigration, Social Security and tax laws. In subsequent calls, Mauro repeatedly threatened to "go public," go to legal authorities and "ruin" Flatley. Rather than pay, Flatley sued attorney Mauro for civil extortion.

Mauro moved to strike the complaint under California's anti-SLAPP statute. SLAPP stands for strategic lawsuit against public participation; the law provides an immediate, powerful, and summary mechanism for defendants to test the merit of any claim arising from "constitutionally protected speech or petitioning activities." Courts previously held that pre-lawsuit settlement demands were protected petitioning activities. See e.g., *Briggs v. Eden Council for Hope & Opportunity,* 19 Cal. 4th 1106, 1115 (Cal. 1999) ("[C]ommunications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of" California's anti-SLAPP law). Leading up to 2006, lawyers successfully used the anti-SLAPP law to obtain summary dismissal of claims arising from pre-litigation negotiation practices. See, e.g., *Ruiz v. Harbor View Community Association,* 134 Cal. App. 4th 1456, 1470 (Cal. Ct. App. 2005) (finding that a lawyer's letter responding to threatened litigation against his client was protected by the anti-SLAPP law).

Invoking Lord Brougham's bromide, Mauro argued that his letter must be protected because he had a duty to zealously advocate for his client. His legal letter set forth the nature of his client's claims, urged settlement, and warned of the alternative of judicial action. Flatley countered that Mauro's conduct was outright extortion and is not protected simply because Mauro was a lawyer.

On that last point, the Supreme Court readily agreed with Flatley: under the Penal Code, extortion is extortion, even if perpetrated by an Esq. The harder question, then, was whether Mauro's demands were permissible sharp-elbow advocacy or unlawful extortion. To the surprise of many, the California Supreme Court denied Mauro's motion to strike, concluding that although some pre-litigation demand letters are protected activity, Mauro's threats "exceeded the limits of" zealous advocacy and were actionable. In what became known as "The *Flatley* Rule," the court held that Mauro crossed the line from advocacy to extortion because he threatened to report criminal activity to law enforcement; and go "public" with allegations that are "entirely unrelated to [the] alleged injury suffered by [the lawyer's] client."

Thanks to *Flatley*, California practitioners had a rulebook: don't threaten to go to authorities and don't threaten to go public with allegations that are "entirely unrelated" to the injury suffered, and you would be on safe ground.

'Malin v. Singer'

The *Flatley* Rule was pushed to the brink seven years later when "entertainment pitbull" Marty Singer sent a demand letter to Michael Malin, his client's former business partner, for allegedly "misappropriating" partnership funds in M*alin v. Singer*. As with most "settlement demands," Singer demanded that Malin pay money or else he would file a lawsuit. Famous for hardball litigation, Singer went the extra step of attaching a copy of the "draft complaint" he would file unless the money were paid. The draft complaint set forth the alleged facts and circumstances surrounding misappropriation of funds and, then, described how Malin used the funds to arrange sexual liaisons with older men. Like Flatley, Malin refused to pay and sued Singer for civil extortion.

Singer moved to strike the complaint under California's anti-SLAPP statute. Singer said he followed Flatley: he did not threaten to go to law enforcement, nor did he threaten to "go public" other than by filing a complaint in court, which is an absolutely protected act under California law. Malin responded that threatening to file publicly the draft complaint unless payment was made exceeded *Flatley* because the draft complaint contained allegations that Malin used the allegedly misappropriated funds to engage in sexual relations with older men. Those allegations were "unrelated" to the causes of action, Malin argued, and were added by Singer to ratchet up fear and pressure.

Applying a literal reading of *Flatley*, the California Court of Appeal, Second District, held that Singer's demand letter was protected speech, not extortion. Unlike Mauro, Singer did not "expressly threaten to disclose Malin's alleged wrongdoing" to legal authorities. Furthermore, even though Singer's "sexual liaisons" allegations was not necessary to prove the misappropriation of funds, they were related (or not "entirely unrelated") to the causes of action. Namely, the sexual liaisons allegations provided a motive for why Malin supposedly took the money and, therefore, was "inextricably tied" to the client's underlying claim. With the motive linkage and no threat to go to law enforcement, the Second District reasoned, Malin did not breach the Flatley standard. Singer's demand letter did not constitute extortion, even if it was aggressive, sharp, and arguably unprofessional.

‘Falcon Brands v. Mousavi & Lee’

Falcon Brands v. Mousavi & Lee is the latest case to address the line between advocacy and extortion—and it may have thrown the law back into disarray.

Nick Honard worked for cannabis company, Falcon Brands, before being terminated. Honard hired Newport attorney Amy Mousavi to pursue claims on his behalf. Mousavi sent Falcon a series of pre-litigation emails, in which she demanded a monetary payment or else she would notify Falcon’s potential merger partner, Harvest Health, of Honard’s legal claims. One of those claims was that Falcon denied Honard commissions and fired him because he refused to violate Bureau of Cannabis Control regulations. In one email, Mousavi told Falcon she “put the attorneys for Harvest Health on notice about Mr. Honard’s claim for wages,” but she had not yet disclosed to Harvest Health the details of Honard’s allegation that Falcon violated cannabis regulations and fired him because he was a whistleblower. Falcon refused to settle, and Mousavi followed through on her threat by filing a complaint against Falcon. Falcon sued Mousavi for extortion.

Like Marty Singer, Mousavi moved to strike the suit pursuant to the anti-SLAPP law. She argued that she never expressly threatened to disclose Falcon to law enforcement and that Falcon’s regulatory violations were a reason Falcon denied Honard wages and ultimately fired him.

Despite the similarities to Singer, the California Court of Appeal, Fourth District, came to the opposite conclusion. The Fourth District acknowledged that Mousavi did not threaten to go to authorities and that the complaint did reference the regulatory violations. But, taking a more expansive view of Flatley, the Fourth District held that Mousavi’s allegation that Falcon committed regulatory violations was not directly related to the elements of the asserted breach of contract and wrongful termination claims. Even if the regulatory violations allegations provided a motive for denying wages and terminating Honard, they were not necessary to prove an element of those claims. Thus, threatening to include such “unrelated” allegations in the lawsuit was not protected, even if actually including them in the lawsuit was protected.

The Fourth District brushed aside Mousavi’s argument that her case was on all fours with *Malin v. Singer* with a single, six-word sentence that does not grapple with the point: “In attempting to distinguish this case from Flatley, Mousavi relies on *Malin v. Singer,* (2013) 217 Cal.App.4th 1283. But we are bound by Flatley.”

That is an accurate statement of California jurisprudence, of course. All Courts of Appeal are bound to follow California Supreme Court law. The Second District in deciding *Malin v. Singer* was bound by Flatley, just as the Fourth District was in deciding Falcon. What Falcon did not address is why allegations that provided a motive in *Malin v. Singer* were sufficiently related to asserted causes of action, whereas allegations that provided a motive in F*alcon Brands v. Mousavi* were not.

Post-’Falcon’ Uncertainty

The consequences of differing outcomes were severe. The lawsuit against Marty Singer was struck and he was awarded over $300,000 in legal fees for succeeding on his anti-SLAPP motion. *Malin,* 217 Cal. App. 4th at 1306 (remanding to the trial court to determine the attorneys’ fees owed to Singer). The lawsuit against Amy Mousavi, in contrast, proceeds, and she is subject to a multi-million extortion claim.

But the precedent of those two cases is more concerning. Lawyers in California are left to wonder whether their settlement demand crosses the line from advocacy or extortion. Without clarity and guidance from the Supreme Court or the Legislature, California attorneys must err on the "safe side," temper aggressiveness, and be less "zealous," lest they find themselves as personal defendants in an extortion lawsuit. Whether that is a good or bad result is beyond the scope of this article. But somewhere, Lord Brougham is shaking his head.

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