**FALL FORUM INFORMATION INSIDE!**

# *Threats and Extortion: Walking the Ethical Line*

*by Keith A. Call and Taylor P. Kordsiemon*

We both have older brothers, which means we know a thing or two about threats – especially on the receiving end. Under threats of a "knuckle sandwich" and various other forms of intimidation, we have surrendered toys, food, control of the TV, and countless other things. We have also experienced witness tampering in the court of family affairs.

As lawyers, we should not threaten opponents with "knuckle sandwiches," but it is undeniable that threats are a crucial component of litigation and negotiation. Attorneys regularly threaten to file suit, move for sanctions, take a case to trial, or request punitive damages. The art of threatening has a long and storied history in the legal profession, and it is widely regarded as one of the most effective means of negotiating.

It is possible, however, for lawyers to take the threatening tactic too far. To avoid serious consequences, such as a bar complaint, lawyers should be aware of the ethical considerations surrounding such threats.

### Threatening Frivolous Litigation

Utah Rule of Professional Conduct 3.1 says that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law." Thus, attorneys are explicitly forbidden from filing non-meritorious claims. But what about threatening to file them?

While threats to instigate litigation can occur in a variety of settings, one of the most common forums is in demand letters. The primary purpose of a demand letter is to persuade an opponent into settling a dispute under threat of pending litigation. Such threats are commonplace, and an "attorney is entitled to warn the opposing party of his intention to assert colorable claims, as well as to speculate about the likely effect of those claims being brought." *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 80 (2d Cir. 2000). This holds true even when the threat is made in an offensive and uncivil manner. *Id.* at 79 (holding that a threat to subject an opponent to the "legal equivalent of a proctology exam" is not grounds for sanctions).

It is less clear, however, whether demand letters threatening frivolous litigation are permissible, but Utah courts have issued a few decisions that have some bearing on the matter. In *Avco Financial Services, Inc. v. Johnson*, 596 P.2d 658 (Utah 1979), the Utah Supreme Court held that a threat of baseless litigation can satisfy the compulsion element of a duress claim. *Id.* at 660. The court held that a jury could find duress where "plaintiffs, when they brought the action against [the defendant], knew that their allegations were unfounded; or their intent was not to pursue the action, but to force a more favorable settlement than originally agreed upon, knowing that defendants could not defend it because of economic pressure." *Id.* The court also quoted the Minnesota Supreme Court, stating, "one has no right to threaten another, in order to accomplish an ulterior purpose, with a groundless action." *Id.* (internal quotation marks omitted) (quoting *Wise v. Midtown Motors*, 42 N.W.2d 404, 408 (Minn. 1950)).

In a different case, Justice Christine Durham criticized the majority opinion for upholding "alienation of affections" as a viable tort

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in Utah. *Nelson v. Jacobsen*, 669 P.2d 1207, 1223 (Utah 1983) (Durham, J., concurring in result and dissenting). One of her many concerns was that the majority's rule would incentivize plaintiffs to extort payments from potential defendants through threats of groundless alienation of affection claims. *Id*. at 1227.

Other states seem to agree with Justice Durham that threats of frivolous litigation can constitute extortion. *See, e.g., State v. Hynes*, 978 A.2d 264, 270–71 (N.H. 2009) (upholding an attorney's extortion conviction for sending letters to beauty salons demanding $1,000 to settle baseless sex discrimination claims). The federal courts, however, have been more reluctant to treat any litigation threats as extortion. *See, e.g., United States v. Pendergraft*, 297 F.3d 1198, 1205–08 (11th Cir. 2002) (finding no wrongful conduct under the Hobbs Act where individual threatened to sue a public entity and support the lawsuit with fabricated evidence).

Given the above, attorneys should refrain from threatening suit unless they believe that their clients are entitled to the relief threatened. This is especially true when dealing with an unrepresented opposing party. *See* San Diego Cty. Bar Ass'n Ethics Op. 1978-6 (finding that attorneys cannot threaten to file frivolous counterclaims against a pro se plaintiff to induce plaintiff to drop his claims).

### Threatening Criminal Prosecution

Clients engaged in bitter civil conflicts are often happy to air an opponent's dirty laundry, so it is not hard to imagine a situation where threats of criminal charges could be used to one's advantage. Landlords seeking overdue rent may desire to use their knowledge of a tenant's illicit drug use to encourage payment. A spouse may threaten to reveal incriminating secrets to get a leg up in divorce proceedings. The possibilities are endless.

While there used to be a Rule of Professional Conduct that explicitly forbade threatening criminal prosecution to gain an advantage in a civil matter, it is omitted from the current version of the Rules. *See* Kate A. Toomey, *Practice Pointer: The Rule Against Threatening Criminal Prosecution to Gain an Advantage in a Civil Matter*, 15 Utah B.J. 12 (Dec. 2002). There are, however, still several rules relevant to any threats made during negotiations. *See* Utah R. Prof. Conduct 4.1, 8.4. "[T]hese rules exhort attorneys to engage in honest, fair play in their dealings with people other than their clients." Kate A. Toomey, *supra* at 12.

The removal of the explicit rule regarding threats of criminal prosecution was cause for some confusion in the legal community. In 2003, the Utah State Bar Ethics Advisory Committee issued an opinion on the following question: "May a lawyer threaten to present criminal charges against an opposing party or witness during negotiations in a private civil matter?" Utah State Bar Ethics Adv. Op. Comm., Op. No. 03-04, ¶ 1 (2003).

Given how serious instigating criminal charges against an opponent is, the answer to whether an attorney may threaten such may surprise many: "[It] is not per se unethical for a lawyer to threaten that the client may pursue criminal charges against an adverse party…." *Id*. ¶ 2. Threatening to pursue criminal charges is at least "sometimes permissible under the Utah Rules of Professional Conduct." *Id*. ¶ 8. But there is a catch. In order for such a threat to be ethical, two conditions must be satisfied: (1) the civil and criminal matters must be related, and (2) the threat must not constitute extortion. *Id*. ¶ 7.

The requirement for the threatened criminal charge to be related to the underlying civil action is easily understood. The example of a landlord threatening to reveal a tenant's drug use to induce payment of overdue rent would likely not satisfy this test. The question of what does or does not constitute extortion, however, requires some explanation.


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What conduct qualifies as extortionate is "determined by the facts on a case-by-case basis." *Id.* ¶ 9. That being said, there are examples of clearly extortionate attorney behavior. For example, an extortionate threat was made when a New Hampshire civil rights lawyer publicly threatened city officials with serious criminal charges. *Id.* ¶ 10. An ethical violation also occurred when a plaintiff's lawyer sent a letter to opposing counsel threatening to send the local prosecutor documents that would incriminate the defendant unless the defendant paid overdue rent. *Id.* If the misconduct is severe enough, an attorney could even face criminal consequences. *See* Utah Code Ann. § 76-6-406 (defining "theft by extortion").

Not all threats to instigate criminal charges are extortionate though, or else it would not be "sometimes permissible." *See* Utah State Bar Ethics Adv. Op. Comm., Op. No. 03-04, ¶ 8 (2003). Before moving to permissible threats, however, a couple of points should be made. First, it is clearly unethical to threaten pursuit of frivolous criminal charges. Second, one may not threaten to file ethical complaints against opposing counsel unless certain demands are met because attorneys have a duty to report any misconduct "that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness." Utah R. Prof. Conduct 8.3.

While the above examples are helpful in detailing what type of conduct is forbidden by Utah's ethical rules, they do not offer much guidance on permissible threats. The ethics opinion explicitly says that threatening criminal charges is sometimes permissible, but it is difficult to imagine how such conduct is ever not extortionate.

Such threats may be proper when a lawyer "cannot avoid addressing conduct by another party that is both criminal and tortious." Utah State Bar, Ethics Adv. Op. Comm., Op. No. 03-04, ¶ 8 (2003) (citation omitted) (internal quotation marks omitted). For example, where counsel for a corporation discovers that an employee has embezzled funds, "it is counterproductive to prohibit the lawyer from discussing with the employee the possibilities [of having the employee pay back the money without the adverse publicity that a criminal trial would bring]." *Id.* (alteration in original) (citation and internal quotation marks omitted).

Other jurisdictions have also found vague threats that "'all available legal remedies will be pursued' unless satisfactory settlement is promptly forthcoming" are not, in themselves, ethically improper. State Bar of Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 1991-124 (1991).

Finally, while threatening to instigate criminal charges may not always be proper, there is no ethical problem if a lawyer agrees to refrain from presenting criminal charges as part of a settlement. *See* Utah State Bar, Ethics Adv. Op. Comm., Op. No. 03-04, ¶ 6 (2003). Attorneys may not, however, agree to refrain from filing ethical complaints against opposing counsel, because doing so would violate the duty to report under Utah Rule of Professional Conduct 8.3. *See* Utah State Bar, Ethics, Adv. Op. Comm., Op. No. 16-02, ¶ 7 (2016).

## Conclusion

Threats are a good and necessary tactic frequently employed by litigators during negotiation. If lawyers wish to threaten criminal charges against an opponent, however, they must be sure to remain on the right side of the line separating threats from extortion. To do so, attorneys should refrain from threatening frivolous litigation when making settlement demands. Furthermore, attorneys should not threaten criminal prosecution to gain an advantage in a civil matter unless the charges are directly related to the civil case and the conduct by the other party is both criminal and tortious, making it counterproductive to avoid discussion of potential criminal charges.