Q&A


LAWYER LIABILITY AND ETHICS

# When Does a Threat of Criminal Prosecution Become Extortion?

Joseph Brophy

Celebrity lawyer and apparent scoundrel Michael Avenatti recently made news when he allegedly attempted to extort millions of dollars from Nike by threatening to reveal that Nike pays high school athletes to attend colleges that are "Nike schools." Among the athletes identified was Deandre Ayton of the Phoenix Suns, as if the Suns don't have enough problems already. According to the prosecution, Mr. Avenatti was apparently unaware that the general public has assumed for decades that Nike was paying college athletes, thus rendering his threatened disclosure of limited value for blackmail. Nike certainly thought so—instead of paying, they promptly called the FBI and had Mr. Avenatti arrested. Nike's stock remains high and its sneakers remain wildly overpriced.

Mr. Avenatti's defense will be that he was aggressively trying to leverage a settlement for his client. After all, every settlement negotiation has an element of "or else" involved. Indeed, the Second Circuit once reversed a sanction against a lawyer who threatened to conduct "the legal equivalent of a proctology exam" on the opposing party's finances and billing practices if a settlement could not be reached. So what are the ethical limits on an attorney's threat to initiate a criminal prosecution for the purpose of influencing a civil matter?

It is generally considered to be unethical for an attorney to present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter. Arizona does not have a rule specific to the issue. However, Arizona Rules 4.4 and 8.4 mirror the ABA Model Rules. The ABA explained in Formal Opinion 92-363 that the drafters believed that extortionate, fraudulent, or otherwise abusive threats were dealt with by other more general rules (e.g., Model Rules 4.4, "Respect for Rights of Third Persons," and 8.4, "Misconduct").

The Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a civil matter to gain relief for a client, provided that: (1) the criminal matter is related to the client's civil claim; (2) the lawyer has a well-founded belief that both the civil claim the criminal charges are warranted by the law and the facts; and (3) the lawyer does not attempt to exert or suggest improper influence over the criminal process. The Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim, to refrain from presenting criminal charges against the opposing party as part of a settlement agreement, provided that such agreement does not violate applicable law.

New York and many other jurisdictions have ethics rules barring threats of criminal prosecution to gain an advantage in a civil matter (see, e.g., Ohio, D.C., Florida, Texas, California). This is bad news for Mr. Avenatti as his alleged extortion took place in New York and he is licensed in California. The policy behind barring the threat of criminal prosecution is that if a person has engaged in criminal conduct, it ought to be brought to the attention of the appropriate authorities, not merely threatened, and if a person has not engaged in criminal conduct then there is no basis for threatening to bring criminal charges.

According to the government, Mr. Avenatti crossed the line by demanding not only $1.5 million for settlement of his client's claims against Nike, but an additional payment to Mr. Avenatti in either a lump sum or as a fee for conducting an "internal investigation" of Nike that Nike did not request. If the latter allegation proves true, Mr. Avenatti has big problems.

For an example of how murky these waters can be, compare Flatley v. Mauro, 139 P. 3d 2 (Cal. 2006) (holding that a letter demanding "seven figures" by a lawyer representing an alleged rape victim was extortion because at the core of the letter were threats to publicly accuse the defendant of rape and to report and publicly accuse him of other unspecified violations of various laws unless he settled) with Malin v. Singer, 217 Cal. App.4th 1283 (2013) (holding no extortion in sending a demand letter threatening to sue defendant for embezzlement, conversion, and breach of fiduciary duty by using company funds to arrange sexual liaisons with older men because the use of the embezzled funds was inextricably tied to the allegations in the civil complaint). ■

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# New Landlord-Tenant Help Available

The Arizona Commission on Access to Justice has produced videos in both English and Spanish that describe the eviction process for both tenants and landlords.

With evictions on the rise in Arizona, the Commission drew together a work group made up of court personnel, members from tenant assistance organizations, and landlord attorneys. The group created the videos and legal information sheets that cover most scenarios landlords and tenants face. Justice of the Peace Anna Huberman of the Country Meadows Precinct chaired the work group.

"I see so many people in my court who have no idea what their rights are," Huberman said. "We think these videos and legal sheets will prepare them for what they are about to go through and hopefully help them avoid the eviction process in the first place."

Topics include getting a security deposit back, what will happen in court, tenant defenses for non-payment of rent, what steps to take when the landlord is not following the lease, tenant obligations, and many more.

The information serves to increase residents' access to justice, which Arizona Supreme Court Chief Justice Scott Bales has named one of the state's most pressing legal needs.

The information is free and available online at azcourts.gov/eviction. The same information may be found in Spanish at azcourts.gov/desalojo. ■

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### Arbitration Fee Donations Help

Partnering with the Maricopa County Superior Court, the Maricopa County Bar Foundation (MCBF) is once again encouraging attorneys assigned to arbitration to donate the $75 fee to the Foundation's fundraising efforts.

### It's Easy to Contribute

The court has made it easy to contribute with a convenient "pro bono" check-off box located at the bottom of the Invoice in Support of Request for Warrant, a form provided in your arbitration packet. For more information, go to maricopabar.org and click on "About Us" on the top menu bar then "Maricopa County Bar Foundation."

**THANK YOU FOR MAKING A DIFFERENCE!**