

## TOP STORY

## Hardball Attorney Tactics Considered Extortion

By Sara E. Costello – October 12, 2022

An attorney committed extortion when she escalated her settlement demands by threatening to reveal damaging information about the adverse party, a state appellate court concluded. Although the attorney in [Falcon Brands, Inc. v. Mousavi & Lee, LLP](#), argued that her demands were part of run-of-the-mill settlement negotiations, the court was not persuaded. Because the attorney's threatening demands were not protected speech, the attorney and her law firm must contend with a cross-claim for extortion, the appellate court ruled.

To avoid a similar fate, ABA Litigation Section leaders stress that attorneys must understand that negotiation requires honest dealing, not just zealous advocacy. They also recommend that attorneys scrutinize the relevant criminal law on extortion, as well as any ethical requirements for negotiations in one's jurisdiction, prior to engaging with opposing counsel.

### Attorney Threatens Client's Former Employer

In *Falcon Brands*, a former employee of Falcon Brands, a cannabis company, retained an attorney to represent him in a wrongful termination case in California state court. Initially, the employee's counsel contacted Falcon to request employment records for her client.

After receiving no response to her records request, the attorney threatened to contact a company planning to merge with Falcon. In an email, she alleged that Falcon committed numerous violations of California's cannabis regulations, including illegally transporting cannabis to Las Vegas, delivering illegal products, and bribing a deputy district attorney when a Falcon employee was arrested. The attorney then offered to settle her client's claims. But she did not link any of the alleged illegal conduct to her client's settlement demands.

Shortly afterwards, the attorney informed Falcon that she had told the merger partner about her client's claims without disclosing any of the alleged misconduct. But the attorney cautioned that she would provide additional, damaging information to the merger partner in four days. In a follow-up email to Falcon, the attorney emphasized: "If you want to resolve this matter, now is the time."

The parties did not reach a settlement. The attorney sent the merger partner copies of the settlement demands that included the discussion of illegal activities. As a result, the company sued to rescind its merger with Falcon.

## Attorney Accused of Extortion

Following disclosure of the criminal allegations, Falcon filed a cross-complaint against the employee, as well as the employee's attorney and law firm, in the underlying wrongful termination action, alleging that the lawyer and firm committed extortion and intentionally interfered with its contract with the merger partner. The attorney and her firm moved to strike the cross-complaint under California's [Anti-SLAPP](#) (Strategic Lawsuits Against Public Participation) law.

The state's anti-SLAPP law "authorizes courts to strike any cause of action which falls within the statute's purview, if the plaintiff cannot demonstrate a probability of prevailing on it." However, the Supreme Court of California has established that a defendant whose statements are illegal cannot use the anti-SLAPP law to strike a complaint.

After reviewing the settlement demands, the trial court granted the attorney's motion to strike. In the trial court's view, Falcon failed to prove that the attorney sent the demands "with the intent to extort money by fear."

## Link Between Threats and Settlement Demands Is Dispositive

The California Fourth District Court of Appeal reversed the trial court's ruling on the extortion claim. Analyzing the emails in detail, the appellate court found that the attorney's "escalating series of threats ultimately transformed what had been legitimate demands into something else: extortion."

Under [California Penal Code section 518](#), extortion occurs when one obtains property from another, with his or her consent induced by a wrongful use of force or fear. The appellate court held that the attorney's initial messages to Falcon were acceptable. But then the attorney expressly linked her threat to inform the merger partner of Falcon's illegal conduct to Falcon's failure to meet her client's settlement demands. Once the attorney threatened to disclose criminal activity that was unrelated to the settlement demands, the court held, she "crossed the line."

Because the attorney's threats were extortion, the appellate court concluded that they were not protected by the state's anti-SLAPP law and remanded. The California Supreme Court denied a petition for further review.

## Focus on Honest Dealings, Not Zealous Advocacy

Lawyers may think that hardball settlement tactics like those used in *Falcon Brands* are a necessary part of their duty of zealous representation. But Litigation Section leaders say that attorneys should pay attention to their responsibilities when acting as a negotiator in addition to their role as an advocate.

“The preamble to the Model Rules of Professional Conduct addresses an attorney’s role as negotiator and distinguishes it from advocate,” contends [Jeanne M. Huey](#), Dallas, TX, cochair of the Website & Written Content Subcommittee of the Section’s Ethics & Professionalism Committee. “It emphasizes honest dealings,” Huey notes. The [preamble](#) explains that lawyers perform various roles. “As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others,” the preamble counsels.

[Daniel Q. Harrington](#), Philadelphia, PA, Section member and past chair of the Pennsylvania Bar Association’s Committee on Legal Ethics and Professional Responsibility, remarks that he does not interpret the Model Rules of Professional Conduct to include a “duty of zealous representation.”

“There is a duty of diligence under [Rule 1.3](#),” Harrington explains. “Variants of the word ‘zeal’ do appear in a few comments to the Model Rules,” he indicates. But he advocates “removing those words, because zeal serves primarily as a cover for uncivil, or worse, behavior.”

If an attorney does cross the line during settlement negotiations, the penalties can be steep. “Then you run the risk of experiencing collateral litigation against you or your client,” [Alanna G. Clair](#), Washington, DC, cochair of the Attorneys’ Liability Subcommittee of the Section’s Professional Liability Litigation Committee, cautions. In that case, “you can create a whole avalanche of additional claims and grievances,” she warns.

## Applicable Rules Are Jurisdiction-Specific

Section leaders urge attorneys to carefully consider both extortion case law and the rules of professional conduct for the relevant jurisdiction when formulating settlement demands. An opinion from the ABA Standing Committee on Ethics and Professional Responsibility can provide some guidance depending on the applicable state disciplinary rule, Huey points out. [Formal Opinion 92-363](#) counsels that attorneys may use threats of criminal charges in civil negotiations in certain circumstances. However, the criminal matter must be related to the civil claim at issue, the civil claim and criminal charges must be warranted, and attorneys should not try to exert improper influence over the criminal process.

In keeping with Formal Opinion 92-363, Huey elaborates, some state rules have a “gray area where you can make a threat” as part of settlement negotiations. “But other states have a bright-line prohibition against the use of threats of criminal prosecution in a civil suit,” she adds.

“Those states have no wiggle room,” Huey emphasizes. “Regardless of any possible gray area in the applicable disciplinary rule, if a lawyer’s threatening words or conduct constitute a crime—extortion or attempted extortion—it will be a disciplinary rule violation,” she reiterates.

It is important to highlight the fact that different jurisdictions may treat similar circumstances differently—many of them perhaps even more severely than the California court did in *Falcon Brands*, Clair posits.

“It is interesting that *Falcon Brands* is a California state decision,” Clair observes. “California has some of the strongest anti-SLAPP protections [in the country],” so the fact that these settlement tactics were unacceptable in California means that “other jurisdictions may draw the line even more narrowly,” she cautions.

Harrington agrees. “Check the substantive case law on extortion in your state,” he advises. “If it is a murky line, just don’t do it.” Ultimately, Harrington concludes, “the criminal law is not intended to be a vehicle to gain an advantage over an opponent.”

[Sara E. Costello](#) is an associate editor for Litigation News.

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**Hashtags:** #negotiations, #ethics

## Related Resources

- *Falcon Brands, Inc. v. Mousavi & Lee, LLP*, Super. Ct. Op. 30-2020-01128818 (4th Cir. Jan. 27, 2022).
- Cal. Penal Code § 518: Crimes and Punishment – Extortion.
- Anti-SLAPP, Cal. Code Civ. P. § 307: Civil Actions – Pleadings Demanding Relief.

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- Model R.C.P. Preamble & Scope, Center for Prof'l Responsibility (2000).
- Mod. R. Prof'l Conduct 1.3: Diligence.
- Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 92–363, "[Use of Threats of Prosecution in Connection with a Civil Matter](#)" (July 6, 1992).
- [Flatley v. Mauro](#), 39 Cal. 4th 299 (2006).
- Bruce Green, "[Ethics: Threatening Litigation](#)," *Litig. J.* (Sept. 1, 2017).
- Daniel Harrington & Stephanie K. Benecchi, "[Is It Time to Remove 'Zeal' from the ABA Model Rules of Professional Conduct?](#)," *Ethics & Professionalism* (May 26, 2021).