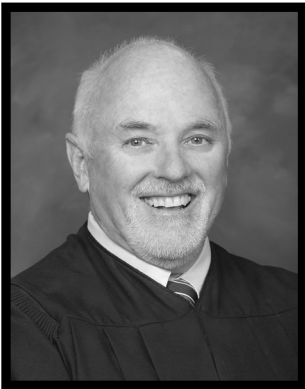


Q&A with Presiding Judge Erick L. Larsh

By Richard Krebs



[Editorial Note: Judge Larsh began his current term as Presiding Judge of the Orange County Superior Court on January 1, 2021. He previously served as Assistant Presiding Judge. Judge Larsh was appointed by Governor Arnold Schwarzenegger to the Orange County Superior Court bench in 2005. He has served as Supervising Judge at the Central Justice Center in Santa Ana, as well as at the West Justice Center in Westminster, and as Supervising Judge for the Domestic Violence Courts.

Before his appointment to the bench, Judge Larsh served as an Orange County Superior Court Commissioner from 1997 to 2005. Judge Larsh has also taught in several colleges over the years, among them Biola University, California State University, and Witkin Judicial College. He graduated from Western State University College of Law with a Juris Doctor degree in 1986 and from the California State University, Fullerton, with a Bachelor of Arts degree in Psychology/Criminal Justice in 1983.]

Q: What is the role of the presiding judge of the Orange County Superior Court?

A: The presiding judge's role is defined in California Rules of Court 10.603. Responsibilities include

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Avoid Speculation and be Clear When you Convey a Section 998 Offer to Compromise

By Robert T. Matsuishi

Given the minimal costs associated with preparing a Code of Civil Procedure section 998 offer to compromise, conveying one can often be an inexpensive, but effective, way for parties to gain leverage in settlement negotiations. But this ease in preparation can often lead to attorney complacency. Problems arise when the drafting party fails to carefully review and double-check their offer to make sure it meets section 998's strict requirements.

Chief among the overlooked requirements is ensuring that all the offer's terms and conditions are included within the offer itself and are capable of valuation. Section 998 requires this so the offeree can evaluate the offer's worth when considering acceptance, and to allow the trial court to determine whether the offer was more favorable than the judgment. This article outlines a few takeaways from two recent California appellate decisions concerning the enforceability of 998 offers with speculative or omitted terms and conditions.



Attorneys know there are many potential benefits for a party to convey a pre-trial offer to compromise under Code of Civil Procedure section 998. If the plaintiff rejects the defendant's 998 offer and fails to obtain a more favorable judgment, a penalty attaches where they cannot recover their post-offer costs, even if they prevail. The plaintiff must also pay the defendant's post-offer costs. If the defendant rejects the plaintiff's offer and fails to obtain a more favorable judgment, the plaintiff is entitled to recover statutory costs. Thus, a plaintiff that may otherwise not be a prevailing party under Code of Civil Procedure section 1717 because each side prevailed on some issues may still be entitled to certain post-offer costs because the defendant did not obtain a more favorable judgment.

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President's Message By Maria Z. Stearns

As we head into the holiday season of 2021, "normal" still seems far away. But I'm thankful for the glimpses of it that ABTL has given us the opportunity to experience this year. Our first in-person event after 18 months was the annual Robert Palmer Wine Tasting Event and Summer Judicial Mixer at The Boardwalk in Irvine on July 21, 2021. It was a smashing success with approximately 200 attorneys enjoying an outdoor soiree complete with a wood-fired pizza truck, Hi-Times wine tasting, Sprinkles cupcakes, and a live jazz band led by the musical talents of my colleague Rutan & Tucker Partner Alex Angulo. This event reminded me of the unique power that ABTL has of bringing together leading Orange County business litigators (often adversaries of one another), and esteemed members of the judiciary, to connect and build a sense of community, particularly during what continues to be an exceptionally challenging time. What made the evening even better was knowing that ABTL-OC raised \$39,000 for the Public Law Center.



Coming off our great summer mixer, I just couldn't take the buzz-kill of a Zoom program. No more palm tree and ocean green screen backgrounds. ABTL to the rescue! Our 47th Annual Seminar was at the Mauna Lani – Auberge Resort on the Big Island of Hawaii from October 20-24, 2021 and it was an incredible event. The theme this year was the *Evolution of Business Litigation: Adapting and Overcoming* and we had a record number of registrants with over 450 people in attendance. This event was a huge success that could not have been made possible without the extremely hard work of our Executive Director Linda Sampson and the Annual Seminar Planning Committee (including Andrew Gray and Vikki Vander Woude). It was great seeing many of you there!

Energized by the in-person annual seminar, we plan to meet back in person locally and wrap up the year in November for our first live MCLE program since the pandemic. On November 10th, Professor Richard Hasen (UCI Law) will present "Is American

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ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl

ORANGE COUNTY

8502 E. Chapman Avenue, #443

Orange, CA 92869

Phone: 714.516.8106 Fax: 714.602.2505

E-mail: abtlloc@abtl.org

www.abtl.org

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Demand Letters, Extortion and the Litigation Privilege

By Jeff Singletary



In these pandemic times, tensions are high and everyone is angry. Client demands to “go for the jugular” in pre-litigation activity seem to have increased. “We should tell the other side that we could report them to the IRS or FTB” or “I know that they’ve been doing illegal things and we should let them know that we’ll report then unless...” are statements that are never music to the ethical lawyer’s ears. So, while there is probably no bad time to revisit the legality of demand letters, this may be a better time than most.

Attorneys often send pre-litigation demand letters that describe their clients’ grievances and threaten to file a civil lawsuit unless the dispute is settled for a monetary payment. These letters are common and are often protected by the litigation privilege. But not always. There is often a fine yet blurry line between a strongly worded demand letter and an extortionate threat.

The Basics

Demand Letters

“[A]ccess to the courts is not an end in itself but only one means to achieve satisfaction for a client. If this can be obtained without resort to the courts—even without the filing of a lawsuit—it is incumbent upon the attorney to pursue such a course of action first.” *Lerette v. Dean Witter Organization Inc.* (1976) 60 Cal.App.3d 573, 577. In comes the demand letter, seeking to pressure the potential adversary to do whatever is demanded through the threat of civil litigation and its costs in terms of time, money, and headaches. These letters run the gambit from simple demands for money on a threat of a protracted lawsuit to a lengthy synopsis of the facts, law and expected outcome should there not be a settlement that reads much like a closing argument to a judge or a jury.

Extortion

Extortion is “the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear . . .” Cal. Pen. Code § 518. Fear, for pur-

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The YLD Update

By Sayuri Espinosa and Lauren Blaes

This year’s Young Lawyers Division committee is made up of Sayuri Espinosa from Rutan & Tucker and Lauren Blaes from Sheppard, Mullin, Richter & Hampton.

On July 14, 2021, we hosted a brown bag lunch with Honorable James Di Cesare at the Orange County Superior Court. The event focused on law and motion practice for young attorneys. Judge Di Cesare provided advice on how to navigate the courtroom, how to argue motions, and effective briefing tactics. Judge Di Cesare discussed common pitfalls to avoid and answered questions from the attorneys present on motion practice. The young lawyers in attendance left with truly invaluable guidance. We are very grateful to Judge Di Cesare for taking the time to host the YLD.

Brown bag lunches are a unique opportunity to learn from members of the Orange County bench in a small setting. You receive insight and advice that will help you grow as an attorney and become an even greater asset to your firm. The Young Lawyers Division will be hosting another brown bag lunch this fall.

The YLD Committee is looking forward to a fun and educational year. We hope to see you at our events!

♦ Sayuri Espinosa is an associate at Rutan & Tucker LLP and Lauren Blaes is an associate at Sheppard Mullin Richter & Hampton LLP. If you wish to participate in the planning of future ABTL YLD events, please contact us at abtloc@abtl.org.



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leading the court, establishing policies, allocating resources to promote access to justice for all, ensuring fair and expeditious resolution of disputes, and maximizing the use of judicial resources. My mentality is to lead by example. There is not a calendar I won't call if one of our judges is out. I'll roll up my sleeves and tackle any problem that arises that affects the court. I am fortunate because our court has a fantastic executive team headed by David Yamasaki who does a tremendous job. And I cannot speak highly enough of the great group of judges and employees we have who, individually and collectively, work so hard to keep our court open and moving.

Q: Are there policies you've implemented as the presiding judge you're particularly proud of?

A: I am most proud that we have kept our court open and moving despite the pandemic. We closed briefly to the public with minimal exceptions for time sensitive matters or matters pertaining to the safety and security in mid-March of 2020 and by May of 2020 we reopened to the public. We've continued to have in person jury trials, particularly for our criminal docket. Trials are the locomotive that pulls the train along. If a court stops conducting trials, the whole system can grind to a halt. We have accomplished this without compromising public safety. From the start of the pandemic, we have worked closely with public health officials to figure out how to keep the court open in a safe manner that complies with all the health protocols. For example, we turned some of our courtrooms into deliberation rooms so the jurors can still gather and deliberate as a group while maintaining social distancing. We've also provided the technology to allow for livestreams of trials to allow public access without crowding the courtroom.

Q: What other technologies have you used to keep the court open and active during the pandemic?

A: Technology has played such a significant part in our ability to continue to operate during the pandemic. Everything from setting up kiosks outside the court where people could speak with a court clerk without stepping foot into the building, to allowing jurors to check in using QR codes on their phones, to installing online portals for our traffic court that enable people to resolve their tickets from their homes or workplaces. We are also proud of our remote evidence pilot, called the Electronic Evidence Portal, which allows attorneys to submit their evidence electronically rather

than in a paper format. We won three national technology awards last year. We are always thinking about how we can improve our technological capabilities to make our court more efficient and improve access to justice for all, and how we can share what we've learned with other courts across the state to help improve our court system as a whole.

Q: What role do you see for technology innovation in the courts post-pandemic?

A: I think there is an appetite to do things more hybrid moving forward. That is what moving into the 21st century means. Some things work better in person, but other things can work really well remotely with the right technology. If you can do remote status conference and non-evidentiary hearings, while continuing to do in person trials and more substantive evidentiary hearings, that makes the whole system work more efficiently. The biggest hurdle for judges handling some of their matters remotely is all this technology is so new, it is like riding a bike for the first time, it can take some time to find our balance. But we've made great strides over the past couple of years and are moving full speed ahead.

Q: What is your process of designating judges for assignments?

A: The CRC gives a rundown of the factors the presiding judge is to consider. Big picture, it is about ensuring the court is effective and efficient. There is no one size fits all approach because every judge is different. Some judges really like having one focus, while other judges like moving around. I try to find individualized solutions to give each one of my judges the ability to play at their top game and support them the best I can. Ultimately, I try to put judges where they're going to perform well and be happy. The dignity of all people is so important.

Q: How do you try to ensure cases are timely resolved?

A: Being diligent and proactive in making sure we are all keeping up with our calendars. When I assumed this role, I selected a team of supervising judges that I thought could really help keep everyone pushing forward as a team and they've done a great job with that. We have a roll up our sleeves mentality at this court. Every one of our judges and employees takes pride in doing their part to keep our court open and moving.

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Q: How does the Orange County Superior Court identify and recruit temporary judges, and how are temporary judges utilized by the court?

A: We have an incredible bar in Orange County. We currently have 269 temporary judges, all of whom are OC attorneys in good standing, who applied for these positions. Some of them have put in over 200 hours this year, for volunteer work. Our temporary judges have had an incredible impact during COVID in helping us keep the court moving. As one example, our temporary judges settled over 200 family law cases to judgment. That is a remarkable achievement.

Q: What are your budget priorities for 2022?

A: My goal is a balanced budget. In 2020, the state cut our funds and we had to furlough employees, spend our reserves, and maintain a high vacancy rate to make ends meet. This year, we have a balanced budget with no furloughs, and we budgeted for a vacancy rate down to 5.5 %. It is about finding more opportunities for efficiencies. For example, for our small claims court, we found that when people came in for trial, 82% continued, settled, defaulted, or were dismissed. So rather than having all those people come in, we started doing first trial appearances remotely. Those that wanted to go forward we sent over to mediation. In total we found about 81% of small claims cases were disposed of before the parties ever stepped foot into court. This also is another example of using technology to improve efficiencies and improve access to justice for all. For a lot of people in small claims cases, it makes a huge difference to be able to call in from work without having to lose a day's pay. And we avoid crowding the courthouse, which better ensures we can stay open and stay safe.

Thank you Judge Larsh for your time.

♦ *Richard Krebs is a senior associate in Orrick Herrington & Sutcliffe's Complex Litigation and Dispute Resolution group. He will be the 2022 ABTL Report Editor.*



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Democracy in Danger?" live at the Westin South Coast Plaza. We will begin the evening with an outdoor cocktail reception with dinner stations on the Terrace Gazebo of the Westin. This portion of the evening will take place from 6:00 to 7:30 p.m. to give ample time for our members to reconnect and visit with their OC colleagues. We will move indoors around 7:30 p.m. for the MCLE program. This event will include a holiday gift giving opportunity and we will be collecting stuffed animals from attendees for the Orange County Superior Court's adoption program.

Despite the challenges of the past two years, the Orange County legal community is thriving. Thank you to all 648 ABTL members for your unyielding support and especially to Darrell White of Kimura London & White LLP for serving as the ABTL Report Editor for the past two years. We appreciate his commitment and good work and look forward to seeing what Rich Krebs of Orrick has in store as the ABTL Report Editor for 2022.

♦ *Maria Stearns is a labor and employment partner at Rutan & Tucker LLP.*

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ment. In personal injury actions, the plaintiff is also entitled to 10% interest on the judgment from the date of the offer. And in either situation, the court also has the discretion to *order the payment of a* reasonable sum to cover the other side's post-offer expert witness fees, both in preparation for and during trial. This may even include expert witness fees the party incurred to depose the other side's expert. The decisions in *Khosravan v. Chevron Corporation*, 66 Cal. App. 5th 288 (2021), and *Arriagarazo v. BMW of North America, LLC*, 64 Cal. App. 5th 742 (2021), serve to remind attorneys that they must comply with section 998's strict drafting requirements in order to convey enforceable offers and trigger the potential penalties for non-acceptance.

**Be Wary of Including Non-Monetary
Terms in an Offer**

In *Khosravan*, the plaintiff husband and wife sued Chevron for negligence, premises liability, loss of consortium, and related claims, alleging the husband contracted mesothelioma caused by asbestos exposure at an oil facility controlled by Chevron's predecessors in Iran. Chevron's position that the claims were frivolous was understandable – in fact, two prior lawsuits by other plaintiffs had already been dismissed after trial courts in those cases determined that Chevron's predecessors did not have a duty to the workers since they did not exercise control over the facility. Confident in their position, Chevron served 998 offers that offered the *Khosravan* plaintiffs a mutual waiver of costs in the action in exchange for: (1) the plaintiffs dismissing with prejudice all of the causes of action against Chevron, (2) the plaintiffs' release of all future claims based on the allegations in their complaint, including, but not limited to, claims for wrongful death, and (3) an agreement that the plaintiffs would indemnify Chevron in the event such claims are filed by non-parties in the future. *Id.* at 292. The 998 offers were automatically rejected when the plaintiffs did not timely respond.

As expected, the trial court granted Chevron's summary judgment motion. Subsequently, Chevron, as the prevailing party, was awarded \$15,564 in costs against the plaintiffs. Included in that amount was an award of \$5,360 in post-offer expert witness fees incurred by Chevron. That portion of the trial court's costs award was reversed by the Second District.

At the heart of the *Khosravan* court's decision was Chevron's inclusion of the indemnification provision

in the 998 offers. Chevron likely had legitimate reasons to include the indemnification provision. The company may have been concerned about future lawsuits by heirs because a decedent's release of claims does not necessarily bar future wrongful death claims by the decedent's heirs. Chevron also may have wanted to send a clear, aggressive message to future plaintiffs after it was hit by a string of frivolous lawsuits.

The *Khosravan* court acknowledged that non-monetary terms may have settlement value, and that adding non-monetary terms does not automatically invalidate a 998 offer. But it reiterated the well-established rule that the terms of a 998 offer must still be sufficiently certain and capable of valuation. In that case, none of the parties knew how many potential claims by non-parties based on the allegations in the complaint might exist now or in the future. Nor could any of the parties speculate as to the likelihood of any heirs filing wrongful death claims, whether Chevron would have demanded the plaintiffs defend against those claims, or what if any defense costs could or would need to be reimbursed by the plaintiffs. At bottom, Chevron could not provide a valuation for the likely expense of defending against potential claims, meritless or not. And the court explained that any attempt to do so would "engage in wild speculation bordering on psychic prediction". This violated section 998's precept that the terms of an offer must be sufficiently certain and capable of valuation.

The court went one step further though. In evaluating the plaintiffs' potential liability if Chevron later enforced the indemnification provision; it found that the financial cost for the plaintiffs to pay for the company's defense would almost certainly exceed the result in the plaintiffs' underlying lawsuit against Chevron (*i.e.*, the judgment against the plaintiffs to pay Chevron's costs). Even if the indemnification provision could be valued, the court believed Chevron could not show that accepting the 998 offers would have been more favorable to the plaintiffs. Chevron, therefore, could not meet section 998's favorability requirement either.

The takeaway from *Khosravan* is not to overreach when making a 998 offer. Parties must remember that all the terms and conditions within the offer must be sufficiently certain to be capable of valuation. Thus, any party making an offer should carefully consider whether a potentially vague offer provision with limited settlement value is an absolute necessity for set-

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tlement. Including a provision of questionable validity may entirely null an otherwise valid 998 offer. That result may not matter if the costs award is minimal (like the \$5,360 in post-offer expert witness fees that was reversed in *Khosravan*). But in most cases the parties' post-offer costs and expert witness fees can often run into the high five-figures if a matter goes to trial. Losing out on the ability to rely on a valid 998 offer to recover some of those amounts certainly will be a difficult discussion with your clients.

Be Clear and Assume Nothing

When Conveying a 998 Offer

Arriagarazo was a tragic wrongful death case against BMW involving the plaintiffs' son. BMW elected to resolve the matter by conveying a 998 offer for \$15,000 as "settlement of all claims and causes of action being litigated in this action against [BMW]" and plaintiffs "execut[ing] a general release of all claims and causes of action against [BMW], with each side to bear their own costs and attorney fees." Notably missing from the 998 offer was any indication regarding how the case was to be finally resolved. Nor did the offer include a draft of the proposed general release.

The *Arriagarazo* plaintiffs immediately accepted the 998 offer and filed a notice of settlement with the court indicating that a request for dismissal would be filed after the settlement. BMW acknowledged receipt and promised to provide a draft general release.

Disputes regarding the release agreement arose almost immediately after the plaintiffs accepted the 998 offer. The plaintiffs' position was that a simple release would be fine, given that no confidentiality provision was contemplated or agreed upon in the 998 offer that they accepted. BMW, however, insisted on a confidentiality clause and sent the plaintiffs a proposed release with such a provision. BMW said this was the company's standard practice. The proposed release also stated—for the first time—that the plaintiffs would need to file a request for dismissal with prejudice after receiving the settlement proceeds. Refusing to sign BMW's proposed release, the plaintiffs instead signed and returned a different general release that did not include a confidentiality clause. The signed release also specified that a judgment would be filed with the court because the release arose from the acceptance of BMW's 998 offer.

The plaintiffs also provided a proposed stipulated judgment. But BMW refused to sign the stipulation because it felt the 998 offer did not provide for entry of judgment. Nevertheless, the plaintiffs filed the stipulated judgment with the court over BMW's objection. Months later at a case management conference, BMW learned that the judgment had been entered by the court.

BMW moved to vacate the judgment, asserting that it never stipulated to entry of judgment and the plaintiffs had filed the proposed judgment over BMW's objection. The plaintiffs argued, however, that the judgment accurately reflected the parties' intent as expressed in the 998 offer which the plaintiffs had accepted. The plaintiffs also contended that there was no mistake, fraud, misunderstanding, or other ground that would require the court to vacate the judgment; and section 998 in fact contemplated and called for the entry of judgment. The trial court was unconvinced by the plaintiffs' position and vacated the judgment; ruling that the judgment was void because entry of judgment was not contemplated by the terms of the 998 offer. The Court of Appeal disagreed.

Because the section 998 process is contractual, the *Arriagarazo* court applied traditional contract law principles in its analysis. Among those principles is the well-established rule that courts may not add a term to a contract about which the agreement is silent. The court acknowledged that a 998 offer can (and often does) require a plaintiff to dismiss the action as a condition of settlement in lieu of entry of a judgment. And understood that may have been BMW's intention throughout the settlement discussions. But as the drafter, BMW had the duty to make this clear in its 998 offer. And in this case, BMW's 998 offer never specified that the plaintiffs would be required to execute a dismissal in exchange for the settlement payment. Absent specific terms and conditions stated in the offer which provided otherwise, entry of judgment was the expected and standard procedural result by virtue of default to the statutory language of section 998. Although the offer required the plaintiffs to sign a "general release," this was not a technical term that indicated that the plaintiffs were required to execute a dismissal rather than allow judgment to be entered. Moreover, BMW's subsequent clarifications and objections did not alter the result since the plaintiffs had unconditionally accepted the section 998 offer as written. Thus, the court reversed the trial court's order vacating the judgment and held that the trial court abused

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its discretion when it modified the offer's terms.

The ruling in *Arriagarazo* is a good reminder that the burden is always on the offering party to demonstrate that a 998 offer is valid. The ruling shows that the true, subjective, but unexpressed intent of a party may be immaterial and irrelevant in the context of a 998 offer. It is crucial that any 998 offer be clear, and specifically indicate how the court will dispose of the matter. In *Arriagarazo*, BMW could have avoided any confusion if it had stated that dismissal of the action was an express condition of the settlement. At a minimum, if BMW had wished to deviate from the standard procedural result of section 998, it could have proposed a general release coupled with a dismissal.

At bottom, attorneys must always be cognizant of the stringent requirements that must be met to convey a valid 998 offer. If a 998 offer is challenged in the trial court, the burden will be on the offering party to demonstrate that the offer is valid. Moreover, an appellate court will independently review whether a 998 offer is valid and will interpret any ambiguity against the offeror. These decisions help to remind attorneys that the process for conveying a valid 998 offer is one of the few instances where form over substance is the rule.

♦ *Robert Matsuishi is a partner in the Irvine office of Payne & Fears LLP*

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poses of extortion, "may be induced by a threat of any of the following: 1. To do an unlawful injury to the person or property of the individual threatened or of a third person. 2. To accuse the individual threatened . . . of any crime. 3. To expose, or impute to him . . . any deformity, disgrace, or crime. 4. To expose a secret affecting him 5. To report his . . . immigration status or suspected immigration status." Pen. Code § 519. Attempted extortion is just as punishable as successful extortion. Pen. Code § 523.

Threats that may be legal on their own can become extortionate "when coupled with a demand for money." *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal. App. 3d 1058, 1079. Extortionate threats are criminal regardless of "whether or not the victim committed the crime or indiscretion upon which the threat is based and whether or not the person making the threat could have reported the victim to the authorities or arrested the victim." *Flatley v. Mauro* (2006) 39 Cal. 4th 299, 327 (2006) (citations omitted). The victim need not be accused of a specific crime—vague intimations suffice, provided that "the accusations . . . put the intended victim of the extortion in fear of being accused of some crime." *Id.* (quoting *People v. Sanders* (1922) 188 Cal. 744, 749-50 (1922)).

The Litigation Privilege

The litigation privilege effectively immunizes conduct if it is reasonably related to litigation. *Kashian v. Harriman* (2002). The litigation privilege applies to communications made in judicial proceedings, by litigants and other participants authorized by law, to achieve the objectives of the litigation, as to statements that have some connection or logical relation to the action. *People v. Toledano* (2019) 36 Cal.App.5th 715, 728. Pre-litigation communications are covered "only when it relates to litigation that is contemplated in good faith and under serious consideration." *Id.* Hollow threats are not protected, but the protection applies even when communications are made with malice or intent to harm, and regardless of whether the alleged conduct is fraudulent, perjurious, unethical or even illegal. *Id.* A party's failure to follow through with a litigation threat creates an inference that a demand letter was not sent in good faith. *Id.* A mere possibility of litigation being initiated does not support invocation of the litigation privilege. *Id.*

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Flatley v. Mauro

The seminal civil extortion case is *Flatley v. Mauro* (2006) 39 Cal. 4th 299 (2006). Michael Flatley (aka the Lord of the Dance), received a demand letter from attorney on behalf of a woman who claimed that Flatley raped her in a Las Vegas hotel room. The lawyer threatened that “all pertinent information and documentation, if in violation of an U.S. Federal, Immigration, I.R.S., S.S. Admin., U.S. State, Local, Commonwealth U.K., or International Laws, shall immediately be turned over to any and all appropriate authorities” if Flatley did not immediately settle the case. *Id.* at 308-09. The letter also threatened to send press releases to a laundry list of media outlets if Flatley did not settle. *Id.* at 309. In a follow up phone call with Flatley’s lawyers, the attorney said it would take “seven figures” to settle the matter and prevent him from “going public.” *Id.* at 311.

After declining to pay Mauro, Flatley sued the attorney for civil extortion. *Id.* at 305. The attorney responded with an anti-SLAPP motion, arguing that his demand letter, upon which Flatley’s complaint was premised, was subject to the litigation privilege. *Id.* at 311. Flatley argued that the attorney’s demand letter constituted extortion and was therefore illegal conduct unprotected by the litigation privilege. *Id.* The trial court agreed with Flatley and denied the attorney’s anti-SLAPP motion. *Id.* The Court of Appeal affirmed. *Id.* The California Supreme Court affirmed the Court of Appeal and held that because the attorney’s letter and subsequent phone calls constituted extortion, were illegal as a matter of law, and thus unprotected by the litigation privilege. *Id.* at 333. The Court held that the attorney’s threats to accuse Flatley of rape squarely met the definition of extortion in that he “threatened to ‘accuse’ Flatley of, or ‘impute to him,’ ‘crimes’ and ‘disgrace.’” *Id.* at 330 (citing Cal. Pen. Code § 519).

Trying to Draw the Line After Flatley

Flatley opened the floodgates to anti-SLAPP litigation over when demand letters could form the basis for a civil extortion lawsuit. Since *Flatley*, plaintiffs whose lawsuits target pre-litigation communications like demand letters have opposed anti-SLAPP motions by arguing that the communications constitute criminal extortion as a matter of law and therefore do not arise from protected activity (prong 1 of the anti-SLAPP analysis) and are protected by the litigation

privilege (prong 2 of the anti-SLAPP analysis).

The Courts of Appeal have concluded that attorneys’ pre-litigation demand letters constitute extortion and are not protected by the litigation privilege and/or the anti-SLAPP statute if they threaten to file a criminal complaint or otherwise report criminal activities to government authorities. *Mendoza v. Hamzeh* (2013) 215 Cal.App.4th (holding that a demand of at least \$75,000 on threat of being “forced” to report to “the California Attorney General, the Los Angeles District Attorney, the Internal Revenue Service regarding tax fraud, the Better Business Bureau, as well as to customers and vendors with whom he may be perpetrating the same fraud upon” constituted extortion as a matter of law); *Stenehjem v. Sareen* (2014) 226 Cal.App.4th 1405 (holding that an attorney’s email to opposing counsel demanding a settlement payment and vaguely referencing that he did not “wish to make a Federal case out of this,” nor was it his “first choice to procede [sic] with the Qui Tam option” constituted extortion as a matter of law).

On the other end of the spectrum is *Malin v. Singer* (2013) 217 Cal.App.4th 1283. There, plaintiff Malin and one of the defendants, Arazm, were business partners. Arazm consulted a lawyer concerning the “alleged misappropriation of company assets.” *Id.* at 1287-88. Her attorney then sent a demand letter to Malin noting that Arazm intended to sue Malin for misappropriating over \$1 million unless the matter was resolved to Arazm’s satisfaction. *Id.* at 1288-89. In the letter, the attorney claimed that “Malin had misused company resources to arrange sexual liaisons with older men, including ‘Judge [first and last name omitted], a/k/a ‘Dad’ (see enclosed photo)’” and enclosed a photograph of the judge. Malin responded by suing for civil extortion. The trial court refused to strike the extortion claim under the anti-SLAPP statute but the Court of Appeal reversed, concluding that the letter was not criminal extortion as a matter of law.

The court explained that “[t]he demand letter accused Malin of embezzling money and simply informed him that Arazm knew how he had spent those funds.” *Id.* at 1289. “There is no doubt the demand letter could have appropriately noted that the filing of the complaint would disclose Malin had spent stolen monies on a car or a villa, if that had been the case. The fact that the funds were allegedly used for a more provocative purpose does not make the threatened disclosure of that purpose during litigation extortion.” *Id.* *Malin* dis-

-Continued on page 10-

tinguished cases like *Flatley*, where the illegality exception had been applied to attorney communications that threatened far more than the mere filing of a civil action. As the court explained, there was “a critical distinction between [the attorney’s] demand letter, which made no overt threat to report Malin to prosecuting agencies or the Internal Revenue Service, and the letters in *Flatley*” and similar cases, “which contained those express threats and others that had no reasonable connection to the underlying dispute.” *Id.* at 1299.

Takeaways from *Flatley* and its Progeny

There is no clear line between what constitutes extortion and what will be protected by the litigation privilege. We know what you cannot do. Do not threaten to report the recipient of a settlement demand to the authorities. In *Flatley*, *Mendoza*, *Stenehjem*, and others, the attorney made threats to report the recipients to the authorities if settlement demands were not met. All such threats were determined to be extortionate as a matter of law.

In contrast, it has long been the law that threats to file non--sham civil complaints are not within the scope of the extortion statutes, even though the execution of the threat could result in public disgrace or prosecution. A demand letter’s warnings that a prospective litigant intends to assert nonfrivolous claims is not improper, regardless of those claims’ likely public reception. A demand letter’s threat of “legitimate litigation, and the promise of concomitant publicity” that could ensue if private or sensitive information is publicized “through the judicial process,” fall “far short” of the extortionate threats in *Flatley*.” *Stark v. Withrow* (2009) 2009 WL 3957539 at *4-9.

Whether demand letters are proper pre-litigation communications protected by the litigation privilege (and the anti-SLAPP statute) or constitute extortionate demands will turn on the significant distinction between threats of civil litigation and threats of criminal prosecution.

♦ *Jeff Singletary is a partner at Snell & Wilmer LLP.*





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