Lisa Borodkin <lborodkin@gmail.com>

AEI et al. v. Xcentric (C.D. Cal. 10-cv-1360) Draft Rule 26f Report

Lisa Borodkin <lisa_borodkin@post.harvard.edu> **Sun, May 9, 2010 at 3:17 PM**
To: david@ripoffreport.com
Cc: Maria Crimi Speth <mcs@jaburgwilk.com>, Daniel Blackert <blackertesq@yahoo.com>

David,

Your email raises very serious issues. We are extremely mindful of the Rules of Professional Responsibility and we are immediately looking into all of the issues.

We will of course look at your letter tomorrow and take everything there into consideration. I would request that you be very specific and detailed with your legal authorities in particular. It helps us get a head start on understanding your positions.

I'm not necessarily disagreeing with you, and I think I understand what what you are proposing in the way of case management, but bear with me for now, as I am just learning about all this since Friday night and haven't yet drawn any conclusions.

You know best about how these recordings got into the deposition. I want to raise a few more points for discussion, as I am not yet persuaded that things are quite as simple as you are making out.

1. As you have known for some time, we have an ECF filing deadline tomorrow at 4:30 p.m. for the Rule 26(f) Report. There is a Rule of Professional Conduct, 3-700, that says an attorney cannot withdraw without taking reasonable steps to avoid prejudice to a client. Given the filing deadline, I am not sure that simply not filing anything tomorrow is the best or correct way to go about it while we are still analyzing the situation. Perhaps the State Bar can give some clarification tomorrow morning.

In any event, I just wanted to let you know that I am not completely foreclosing the possibility of filing a Rule 26(f) report tomorrow. We should discuss that tomorrow. If we do decide to file something, I don't believe that should prejudice you too much, since you have had our portions for over a week and you emailed me Friday morning that your portions were almost done. I would have to check it over to see what is in there and how it may be affected by your recent emails.

2. Regarding the recordings, I want to remind you that there is a Rule of Professional conduct, 5-220, about the supression of evidence. I am not accusing you of that, and I realize the style of practice in state courts may differ from the federal style, but I do think you should look at that Rule combined with Federal Rule 26(a) and perhaps be prepared to explain why you did not identify the existence of these recordings earlier than you did.

I presume as general counsel of Xcentric you are aware of your client's practice of recording telephone calls. Those recordings seem to be central to your defense, not merely impeachment. Arguably they would fall under your Rule 26(a) initial disclosures. They could also have been revealed in the Rule 26(f) conference, at any time we conferred or the two times we were before the Court on case management issues. Again, this could have saved a great deal of time, money, expense and trouble for all concerned -- including mitigating the damages you are now claiming your client may have suffered from having certain documents now in the Court docket.

Again, I am not asserting any conclusions, I just think you should look at that. I understand vigorous advocacy, but on the other hand, as a practical matter, an earlier disclosure could have saved all involved a great deal of time, money, embarrassment and annoyance.

3. As to the recordings themselves, I am not sure they are evidence. I have reviewed portions of the rough

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TEST # 60
1 HOUR CREDIT
LEGAL ETHICS

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No Threats, Please

California Joan Explores Liabilities For Threatening To Present Criminal, Disciplinary Or Administrative Charges

By ELLEN R. PECK

"Whatcha reading, Cali?" California Joan's review of the new State Bar California Attorney Guidelines of Civility and Professionalism (calbar.ca.gov) was interrupted by Meryl Terpitude's voice. As she held up the self-explanatory cover and motioned for Meryl to sit in one of the comfy chairs in her office, her face registered surprise.

Meryl smiled broadly, saying with that devilish twinkle in his eye, "Civility guidelines. . . I'll have to read those now that I'm back! Yes, all federal and state charges against me were dropped. So the firm partners asked me back and here I am. I ran into a few ethical issues so I am a supplicant before you at the temple of ethics, beseeching you for words of wisdom."

"Welcome back, Meryl! Things have been a little quiet without you," Cali greeted Meryl warmly.

"I was engaged to jointly represent a couple (the Parents) who wanted to adopt a child and a birth mother (Mary Mater) who wanted to give up her unborn child for adoption. Ms. Mater had a very healthy pregnancy; the birth went well; the beautiful child was healthy and was delivered to the Parents. Two days ago, Ms. Mater, the Parents and I met when Ms. Mater demanded $50,000 or the return of the child. Mr. Parent recorded the entire conversation. We told Ms. Mater we'd think about it and meet with her tomorrow afternoon at my office. Ms. Mater repeated the demand on the telephone to Mr. Parent this morning and to me at my office; both conversations were recorded," Meryl told Cali. Cali started to warn Meryl: "You need to check on the legality of your recordings and I hope you obtained the extensive written and informed consent from both the Parents and Ms. Mater." (Fam.C., §8800; Rule 3-310(C)(1) and (2), Rules of Professional Conduct (CRPC))

"Tomorrow, I want to tell Ms. Mater that I have advised the Parents not to pay her, that we had recorded her prior demands, that the recordings demonstrated her criminal conduct of attempted extortion for which she could be prosecuted, that the recordings would be available regarding any action she might take to have her child returned.

However, if the adoption goes through without any action on her part to obtain the child, I would destroy the recordings," Meryl beamed.

"Meryl, there are two potential ethics issues here," Cali advised. "First, CRPC 5-100(A) prohibits a lawyer from threatening to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute. Second, the circumstances are very close to an older case called *Arden v. State Bar* (1959) 52 Cal.2d 310, 315-316, 320-321.

In that case, the Supreme Court determined that a threat adverse to a current or former client birth mother, whether or not it constituted attempted extortion, fell within the definition of an act of moral turpitude in violation of Business and Professions Code §6106."

"I am not going to threaten her," Meryl protested. "I just want to advise her of the Parents' and my intent."

"Mr. Arden disclaimed his threat too," Cali countered. "However, the court observed that it was clear that Mr. Arden was threatening the birth mother with a prosecution unless she desisted from her threat to interfere with and overturn the pending adoption. (*Arden v. State Bar* (1959) 52 Cal.2d 310, 321) Plus, you cannot take an adverse action against your own client by making such a threat." (CRPC 3-310(C)(2); *Flatt v. Superior Ct.* (1994) 9 Cal.4th 275, 284-285)

Meryl threw up his hands in surrender. "You've convinced me. I want to stay as clean as a whistle, so I'll withdraw from representing both parties immediately."

Cali breathed a sigh of relief. Meryl started telling her about another client matter.

"For about six weeks, I have represented Mrs. Smith in a dissolution of marriage action. Mr. Smith, who runs a very prominent international 'soldier for hire' business, is representing himself in the dissolution action," Meryl said. "About two weeks ago, Mr. Smith came to my home office to discuss the case. We had a fistfight. I brought criminal charges of assault and battery against him because he destroyed my antique Louis XV desk and chair and two original Tiffany lamps and injured me. The property damages were about $50,000 and medical expenses $750.

"A few days after the fight," Meryl continued, "the Smiths signed a marital settlement agreement, which called for the payment by Mr. Smith of my attorney's fee of $25,000 following the sale of his separate property, a gun collection. The criminal trial is in a month." Meryl shifted uneasily in his chair and Cali waited for the punch line.

“Last weekend, the Smiths reconciled. Mrs. Smith came to my office the next day and begged me to drop the criminal charges. Overcome with her beauty and her tears, I said I would.

“Two days ago, she called and said that the charges had not been dropped yet. I told her, ‘Well, tell your husband to deposit the $25,000 in fees pursuant to the marital settlement agreement and then I’ll drop the charges.’ Later that afternoon, Smith’s criminal attorney called me and asked if I would be willing to drop the criminal charges against Mr. Smith. I replied that ‘if the attorney’s fees were paid for the divorce, I would consider dropping the criminal charges.’” Meryl looked like a deer in the headlights.

“Meryl, your situation is exactly like a disciplinary case called *Bluestein v. State Bar* (1974) 13 Cal.3d 162, 166-170 except that the husband did not pay the legal fees and was acquitted at the criminal trial,” Cali said. “The California Supreme Court held that Mr. Bluestein ‘willfully and wrongfully attempted to use criminal proceedings in order to collect a legal fee in the divorce action’ and that he committed acts involving moral turpitude (Bus. & Prof. Code, §6106) by using extortionate means to attempt to obtain payment of his attorney’s fee in a divorce action.

“The court noted that even if these acts did not constitute attempted extortion, the statements indicating he would drop, or consider dropping, the criminal charges against the husband if he paid petitioner the attorney’s fee in the divorce action constituted an oppressive method of attempting to collect that fee and involved moral turpitude.”
“What can or should I do?” Meryl asked.

“Withdraw any demand for any fees in connection with the criminal case immediately and hope that you are not prosecuted yourself,” Cali said.

“You mean that my professional standards prohibit me from presenting criminal charges to or cooperating with law enforcement regarding criminal charges? I’m the victim here!” Meryl did his best imitation of a victim.

“Meryl, the rule does not prevent you from presenting criminal, administrative or disciplinary charges. It simply prohibits you from communicating a threat to present such charges. Bottom line, just do it, without any threats,” Cali clarified.

Mollified, Meryl started a new topic. “Well, I can see that I need some help on another matter. Let me tell you about it. . .

“About 18 months ago, I finalized the marital settlement, child custody and final dissolution of marriage of Sammy Starr, the celebrated star of action adventure flicks, from his wife, Serenity. He was having a torrid affair with the famous star of Asian martial arts films, Lili Li, whom he has now married. Lili, a citizen of Taiwan, has applied for United States citizenship.

“Sammy owes me about $250,000 in past due fees from the dissolution action, which I have not been able to vigorously pursue due to my trouble with federal authorities. Sammy has recently declared bankruptcy and I am a creditor in the bankruptcy proceedings. That last picture starring Sammy and Lili bombed badly. Since he put all of his own money into the production, he has virtually no resources left to pay his considerable debts.

“Lili, however, has tons of money and Sammy listens to her. I called her last night and told her how unhappy I am at standing in line at the bankruptcy court with other creditors. I told her that if she did not pay my bill, immigration authorities would find out that she has been importing opium into the United States and that she and Sammy have their own opium den at Sammy’s house, which is always open at parties. That means immediate deportation, which will not only interrupt her domestic bliss but her filming projects here.

“I also told her that children’s protective services will receive information that Sammy and his guests smoke opium at times when he has custody of the children at his home. There will be an investigation of potential abuse and, of course, Serenity will reopen custody of the children. An internet blog on the right site will get a whole spread in People magazine, putting Sammy’s and Lili’s careers on the rocks for awhile.”

Only the look of absolute horror on Cali’s face caused Meryl to take a breath and pause. “Meryl, call Lili immediately,” she ordered. “Apologize. Tell her you were stressed out and you were blowing off steam. Tell her that you did not intend to threaten her and that you did not mean it. Your conduct is just like *Lindenbaum v. State Bar* (1945) 26 Cal.2d 565, 569-572, holding that such threats constitute oppressive methods of attempting to collect legal fees and attempted extortion, which both involve moral turpitude (Bus. & Prof. C., §6106.) It also involves a threat to present administrative charges to obtain an advantage in a civil dispute.” (CRPC 5-100)

“What is an administrative charge?” Meryl asked.

“The term ‘administrative charges’ means the filing or lodging of a complaint with a federal, state or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action,” Cali explained. (CRPC 5-100(B))

“So, telling Lili that I will present a charge with federal immigration authorities concerning her importation and use of opium would be a ‘threat’ to present an administrative charge, since the result of the administrative action (deportation) is quasi-criminal?” Meryl asked.

“Yes!” said Cali. “However, sending a letter threatening to file administrative charges against an employer with the EEOC for employment discrimination pursuant to Title VII

of the Civil Rights Act of 1964, where the filing of such charges is a prerequisite to the filing of a civil lawsuit, is not a violation of rule 5-100(A). Since a party is required to exhaust administrative remedies by filing a claim with the EEOC, such attempts are intrinsically related to the objects of the civil litigation and thus are not collateral." (State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 1984-81)

"One of the other dangers is that Lili and Sammy can sue you civilly for extortion," Cali warned.

"No problem!" Meryl laughed confidently. "The litigation privilege is going to be my complete defense!" (Civ. C., §47(b))

"Be careful, Meryl," Cali warned. "The litigation privilege does provide a defense to a civil cause of action based upon threats to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute (*Ross v. Creel Printing & Pub. Co.* (2002) 100 Cal.App.4th 736, 745-746). Moreover, in a recent case, the California Supreme Court comments that civil causes of action against a defendant for acts of extortion may be protected by the litigation privilege but it reserved deciding the issue." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322)

"Well, then," Meryl said, "I can bring a special motion to strike the extortion suit under the anti-SLAPP (strategic lawsuit against public participation) statute (C.Civ. Proc., §425.16). I can get the action dismissed plus get attorney's fees for my efforts. My so-called threats were in furtherance of petitioning activities and protected by the First Amendment."

"Reconsider, Meryl!" Cali disagreed. "A recent California Supreme Court case involved the famous Lord of the Dance impresario Michael Flatley, who sued a lawyer for extortion after the lawyer threatened to continue presentation of criminal charges for the purported rape of his client, after his client had a one-night stand with the dancer. The court held that if the defendant concedes, or the evidence conclusively establishes, that the protected speech or petition activity was illegal as a matter of law (like criminal extortion), the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action (*Flatley v. Mauro, supra*, 39 Cal.4th at pp. 321, 332). In addition, the court rejected application of the anti-SLAPP statute to activities for which the litigation privilege may provide a defense." (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 325)
Meryl backed down. "All right, Cali! I will cease and desist from these threats. Help me with one last case."

"I represent three plaintiffs in separate civil actions, all of which have settled and we have received settlement funds. My clients all dispute the charges of three medical lienholders. Yesterday, I received a letter from Leland Leland, Esq., who has been retained by the several medical lienholders to collect money from my clients."

Meryl read his pertinent response to the Leland letter aloud:

"Please be advised that your clients are under criminal investigation. If you attempt to damage my or my client's credit, I will make your conduct part of the District Attorney's and the FBI's investigation. Moreover, if you do not cease and desist further action, I am going to turn over your name and company information to the FBI.

"cc: Federal Bureau of Investigation, District Attorney's Fraud Investigation Unit, U.S. Attorney, Department of Insurance, the Board of Chiropractic Examiners, the California Chiropractic Association and the Chiropractic Board of California."

Cali immediately advised, "Meryl, the language in your letter constitutes threats of criminal and administrative charges to gain an advantage in a civil dispute. In similar instances, lawyers have been disciplined for this conduct." (*Crane v. State Bar* (1981) 30 Cal.3d 117, 121, 123-124; *In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627, 633, 637.)

"What can I ethically say?" Meryl asked.

Cali responded: "You can say: 'If you attempt to damage my or my client's credit or if you do not cease and desist further action, we will pursue all available legal remedies.'" (State Bar Standing Committee On Professional Responsibility and Conduct, Formal Opinion No. 1991-124 (2004).)

Meryl acknowledged, "The bottom line is that I can present criminal, administrative or disciplinary charges on my own behalf or another. However, I just can't threaten the presentation of criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute. To do so may expose me to discipline for violating CRPC 5-100(A) or even moral turpitude, civil liability for extortion or a criminal action for extortion. I'll be much more careful in my discussions and correspondence."

■ *Ellen R. Peck, a former State Bar Court judge, is a sole practitioner in Escondido and a co-author of The Rutter Group California Practice Guide: Professional Responsibility.*

Test — Legal Ethics
1 Hour MCLE Credit

This test will earn one hour of MCLE credit in Legal Ethics.

1. The State Bar has recently adopted new California Attorney Guidelines of Civility and Professionalism.

2. Joint representation of a birth mother and adoptive parents in adoption proceedings is inherently illegal, even with the informed consent of all the parties.

3. Threatening to file criminal extortion charges against a birth mother unless she went forward with the adoption without objection constitutes a threat to present criminal charges to obtain an advantage in a civil dispute.

4. Threatening to file criminal extortion charges against a birth mother unless she went forward with the adoption without objection does not constitute an act of moral turpitude.

5. CRPC 5-100(A) prohibits a lawyer from threatening to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute.

6. "Birth mother, if you do not go forward with the adoption without objection, I will file criminal charges against you for extortion" is not a threat but rather a statement of intent.

7. Lawyer states that he will drop criminal charges against a former opposing party if the opposing party pays legal fees awarded in a civil matter. This constitutes a wrongful attempt to use criminal proceedings in order to collect a legal fee and an act involving moral turpitude.

8. The California Rules of Professional Conduct prohibit any lawyer from presenting criminal charges collateral to civil proceedings to prevent extortion.

9. Using threats of administrative charges to collect past due fees is an acceptable fee collection method.

10. An administrative charge within the meaning of CRPC 5-100 means the filing or lodging of a complaint with a federal, state or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction or other sanction of a quasi-criminal nature.

11. An administrative charge within the meaning of CRPC 5-100 does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

12. Sending a letter threatening to file administrative charges against an employer with the EEOC for employment discrimination pursuant to Title VII of the Civil Rights Act of 1964, even though the filing of such charges is a prerequisite to the filing of a civil lawsuit, is a violation of CRPC 5-100(A).

13. Where a threat in violation of CRPC 5-100 is made in the context of litigation, the litigation privilege would be a complete defense to a later action based upon that threat brought by an opposing party.

14. The litigation privilege is never a defense to a civil cause of action against a defendant for acts of extortion.

15. If a defendant concedes, or the evidence conclusively establishes, that the protected speech or petition activity was illegal as a matter of law (like criminal extortion), the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action.

16. The anti-SLAPP statute applies to all activities for which the litigation privilege may provide a defense.

17. A lawyer's threat to pursue all available legal remedies to obtain an advantage in a civil dispute is a violation of CRPC 5-100(A).

18. After receiving a collection letter from a chiropractor, a personal injury lawyer threatens in writing to report the chiropractor to the Board of Chiropractic Examiners unless the matter is settled forthwith. This is an unlawful threat.

19. A lawyer may advise his opposing counsel of an intent to file a disciplinary complaint unless the opposing counsel settles a civil matter.

20. During a toxic tort civil action, personal injury Lawyer discovers that Defendant engaged in massive dumping of toxic chemicals in violation of federal environmental laws, which can result in fines, penalties and criminal sanctions. Lawyer may make a complaint to the appropriate federal agency charged with enforcement of such laws as long as Lawyer makes no threats to obtain an advantage in the civil action.

Certification

■ This self-study activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of one hour of legal ethics.

■ The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

MCLE ON THE WEB

TEST # 60 — No Threats, Please

1 HOUR CREDIT
LEGAL ETHICS

- Print the answer form only and answer the test questions.
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The State Bar of California
180 Howard Street
San Francisco, CA 94105

- Make checks payable to State Bar of California.
- A CLE certificate will be mailed to you within eight weeks.

Name

Law Firm/Organization

Address

State/Zip

State Bar Number (required)

1. True____ False____
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19. True____ False____
20. True____ False____ !

deposition transcript from Friday, and unless I am missing something I do not see where they are authenticated or verified unless you personally want to swear to them. There are potential issues with the completeness and accuracy of what you played into the record. Until we get a statement from someone under oath, I do not think I can necessarily accept them as conclusive.

I am also not sure they would be admissible. You probably know more about Arizona wiretapping law than we Californians, but one thing you said on the record was, I believe, that my client did not know his calls were being recorded. I would have to research the implications of that. I welcome any authority you want to provide on the use of such recordings in a civil proceeding.

4. I am also not so ready jump to the conclusion that there is perjury in a criminal sense. One of the elements is materiality. Also, a criminal conviction requires proof beyond a reasonable doubt, which is a different standard than in a civil proceeding, as you know.

5. I understand that what you are accusing my client of is very serious. However, the contents of what you played into the record on Friday also potentially raise serious concerns for your client under the perjury statute. Mr. Magedson's declaration of March 22, 2010 in support of your Anti-SLAPP motion [DN-10] and Mr. Magedson's affidavit of April 5, 2010 [DN-16], which you filed in opposition to the motion to remand, both appear to contain statements that are not corroborated by my initial review of the sound files of the recordings you emailed me or the rough transcript of the deposition.

Mr. Magedson declared at paragraph 31 of his declaration dated March 22, 1010 [DN-10] that in his phone calls with Mr. Mobrez, Mr. Mobrez became very threatening towards Mr. Magedson, and said he "had people in Arizona" who could "find [Mr. Magedson]."

Mr. Magedson's affidavit of April 5, 2010 [DN-16] also states that he lied about living in California because of alleged threats or threatening comments by Mr. Mobrez.

I did not hear the quoted statement or any such threatening statements by Mr. Mobrez in the recordings you sent me. Either I missed it, some recordings are missing, or my client never said those things. Or there is yet another explanation that I haven't thought of.

Likewise, it is damaging to my client to have sworn declarations in the public record accusing him of making threatening comments to another person. Accordingly, there are issues on both sides to discuss.

6. Your references to Title 18, your statement that your clients intend to vigorously pursue our clients for damages resulting from their "criminal actions," and your comments that you have contacted the State Bar are quite alarming.

I want to remind you of Professional Rule 5-100 and be sure that you are not alluding to these things in order to gain an advantage in this civil action.

This MCLE article on the State Bar website might be of help:

http://calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/December2007&MONTH=December&YEAR=2007&sCatHtmlTitle=MCLE%20Self-Study&sJournalCategory=YES

Please take a look at that.

In summary, I agree that there is much to discuss and decide. There are some serious problems here. While I am fairly certain some swift corrective action may be in order, I am not sure that withdrawing is the right thing to do. I think your clients may be in the same boat you are saying my clients are in, to some extent, based on the recordings and what you have said so far. As you have known of the recordings for much longer than we have, and you have litigated cases on behalf of your client before, we are extremely interested in your thoughts on all of this, including the above.

Please let us know when we can expect your letter and when is a good time to talk.

Lisa

[Quoted text hidden]

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“Two days ago, she called and said that the charges had not been dropped yet. I told her, ‘Well, tell your husband to deposit the $25,000 in fees pursuant to the marital settlement agreement and then I’ll drop the charges.’ Later that afternoon, Smith’s criminal attorney called me and asked if I would be willing to drop the criminal charges against Mr. Smith. I replied that ‘if the attorney’s fees were paid for the divorce, I would consider dropping the criminal charges.’” Meryl looked like a deer in the headlights.

“Meryl, your situation is exactly like a disciplinary case called *Bluestein v. State Bar* (1974) 13 Cal.3d 162, 166-170 except that the husband did not pay the legal fees and was acquitted at the criminal trial,” Cali said. “The California Supreme Court held that Mr. Bluestein ‘willfully and wrongfully attempted to use criminal proceedings in order to collect a legal fee in the divorce action’ and that he committed acts involving moral turpitude (Bus. & Prof. Code, §6106) by using extortionate means to attempt to obtain payment of his attorney’s fee in a divorce action.

“The court noted that even if these acts did not constitute attempted extortion, the statements indicating he would drop, or consider dropping, the criminal charges against the husband if he paid petitioner the attorney’s fee in the divorce action constituted an oppressive method of attempting to collect that fee and involved moral turpitude.”
“What can or should I do?” Meryl asked.

“Withdraw any demand for any fees in connection with the criminal case immediately and hope that you are not prosecuted yourself,” Cali said.

“You mean that my professional standards prohibit me from presenting criminal charges to or cooperating with law enforcement regarding criminal charges? I’m the victim here!” Meryl did his best imitation of a victim.

“Meryl, the rule does not prevent you from presenting criminal, administrative or disciplinary charges. It simply prohibits you from communicating a threat to present such charges. Bottom line, just do it, without any threats,” Cali clarified.

Mollified, Meryl started a new topic. “Well, I can see that I need some help on another matter. Let me tell you about it. . .

“About 18 months ago, I finalized the marital settlement, child custody and final dissolution of marriage of Sammy Starr, the celebrated star of action adventure flicks, from his wife, Serenity. He was having a torrid affair with the famous star of Asian martial arts films, Lili Li, whom he has now married. Lili, a citizen of Taiwan, has applied for United States citizenship.

“Sammy owes me about $250,000 in past due fees from the dissolution action, which I have not been able to vigorously pursue due to my trouble with federal authorities. Sammy has recently declared bankruptcy and I am a creditor in the bankruptcy proceedings. That last picture starring Sammy and Lili bombed badly. Since he put all of his own money into the production, he has virtually no resources left to pay his considerable debts.

“Lili, however, has tons of money and Sammy listens to her. I called her last night and told her how unhappy I am at standing in line at the bankruptcy court with other creditors. I told her that if she did not pay my bill, immigration authorities would find out that she has been importing opium into the United States and that she and Sammy have their own opium den at Sammy’s house, which is always open at parties. That means immediate deportation, which will not only interrupt her domestic bliss but her filming projects here.

“I also told her that children’s protective services will receive information that Sammy and his guests smoke opium at times when he has custody of the children at his home. There will be an investigation of potential abuse and, of course, Serenity will reopen custody of the children. An internet blog on the right site will get a whole spread in People magazine, putting Sammy’s and Lili’s careers on the rocks for awhile.”

Only the look of absolute horror on Cali’s face caused Meryl to take a breath and pause. “Meryl, call Lili immediately,” she ordered. “Apologize. Tell her you were stressed out and you were blowing off steam. Tell her that you did not intend to threaten her and that you did not mean it. Your conduct is just like *Lindenbaum v. State Bar* (1945) 26 Cal.2d 565, 569-572, holding that such threats constitute oppressive methods of attempting to collect legal fees and attempted extortion, which both involve moral turpitude (Bus. & Prof. C., §6106.) It also involves a threat to present administrative charges to obtain an advantage in a civil dispute.” (CRPC 5-100)

“What is an administrative charge?” Meryl asked.

“The term ‘administrative charges’ means the filing or lodging of a complaint with a federal, state or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action,” Cali explained. (CRPC 5-100(B))

“So, telling Lili that I will present a charge with federal immigration authorities concerning her importation and use of opium would be a ‘threat’ to present an administrative charge, since the result of the administrative action (deportation) is quasi-criminal?” Meryl asked.

“Yes!” said Cali. “However, sending a letter threatening to file administrative charges against an employer with the EEOC for employment discrimination pursuant to Title VII

of the Civil Rights Act of 1964, where the filing of such charges is a prerequisite to the filing of a civil lawsuit, is not a violation of rule 5-100(A). Since a party is required to exhaust administrative remedies by filing a claim with the EEOC, such attempts are intrinsically related to the objects of the civil litigation and thus are not collateral." (State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 1984-81)

"One of the other dangers is that Lili and Sammy can sue you civilly for extortion," Cali warned.

"No problem!" Meryl laughed confidently. "The litigation privilege is going to be my complete defense!" (Civ. C., §47(b))

"Be careful, Meryl," Cali warned. "The litigation privilege does provide a defense to a civil cause of action based upon threats to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute (*Ross v. Creel Printing & Pub. Co.* (2002) 100 Cal.App.4th 736, 745-746). Moreover, in a recent case, the California Supreme Court comments that civil causes of action against a defendant for acts of extortion may be protected by the litigation privilege but it reserved deciding the issue." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322)

"Well, then," Meryl said, "I can bring a special motion to strike the extortion suit under the anti-SLAPP (strategic lawsuit against public participation) statute (C.Civ. Proc., §425.16). I can get the action dismissed plus get attorney's fees for my efforts. My so-called threats were in furtherance of petitioning activities and protected by the First Amendment."

"Reconsider, Meryl!" Cali disagreed. "A recent California Supreme Court case involved the famous Lord of the Dance impresario Michael Flatley, who sued a lawyer for extortion after the lawyer threatened to continue presentation of criminal charges for the purported rape of his client, after his client had a one-night stand with the dancer. The court held that if the defendant concedes, or the evidence conclusively establishes, that the protected speech or petition activity was illegal as a matter of law (like criminal extortion), the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action (*Flatley v. Mauro, supra*, 39 Cal.4th at pp. 321, 332). In addition, the court rejected application of the anti-SLAPP statute to activities for which the litigation privilege may provide a defense." (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 325)
Meryl backed down. "All right, Cali! I will cease and desist from these threats. Help me with one last case."

"I represent three plaintiffs in separate civil actions, all of which have settled and we have received settlement funds. My clients all dispute the charges of three medical lienholders. Yesterday, I received a letter from Leland Leland, Esq., who has been retained by the several medical lienholders to collect money from my clients."

Meryl read his pertinent response to the Leland letter aloud:

"Please be advised that your clients are under criminal investigation. If you attempt to damage my or my client's credit, I will make your conduct part of the District Attorney's and the FBI's investigation. Moreover, if you do not cease and desist further action, I am going to turn over your name and company information to the FBI.

"cc: Federal Bureau of Investigation, District Attorney's Fraud Investigation Unit, U.S. Attorney, Department of Insurance, the Board of Chiropractic Examiners, the California Chiropractic Association and the Chiropractic Board of California."

Cali immediately advised, "Meryl, the language in your letter constitutes threats of criminal and administrative charges to gain an advantage in a civil dispute. In similar instances, lawyers have been disciplined for this conduct." (*Crane v. State Bar* (1981) 30 Cal.3d 117, 121, 123-124; *In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627, 633, 637.)

"What can I ethically say?" Meryl asked.

Cali responded: "You can say: 'If you attempt to damage my or my client's credit or if you do not cease and desist further action, we will pursue all available legal remedies.'" (State Bar Standing Committee On Professional Responsibility and Conduct, Formal Opinion No. 1991-124 (2004).)

Meryl acknowledged, "The bottom line is that I can present criminal, administrative or disciplinary charges on my own behalf or another. However, I just can't threaten the presentation of criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute. To do so may expose me to discipline for violating CRPC 5-100(A) or even moral turpitude, civil liability for extortion or a criminal action for extortion. I'll be much more careful in my discussions and correspondence."

■ *Ellen R. Peck, a former State Bar Court judge, is a sole practitioner in Escondido and a co-author of The Rutter Group California Practice Guide: Professional Responsibility.*

Test — Legal Ethics
1 Hour MCLE Credit

This test will earn one hour of MCLE credit in Legal Ethics.

1. The State Bar has recently adopted new California Attorney Guidelines of Civility and Professionalism.

2. Joint representation of a birth mother and adoptive parents in adoption proceedings is inherently illegal, even with the informed consent of all the parties.

3. Threatening to file criminal extortion charges against a birth mother unless she went forward with the adoption without objection constitutes a threat to present criminal charges to obtain an advantage in a civil dispute.

4. Threatening to file criminal extortion charges against a birth mother unless she went forward with the adoption without objection does not constitute an act of moral turpitude.

5. CRPC 5-100(A) prohibits a lawyer from threatening to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute.

6. "Birth mother, if you do not go forward with the adoption without objection, I will file criminal charges against you for extortion" is not a threat but rather a statement of intent.

7. Lawyer states that he will drop criminal charges against a former opposing party if the opposing party pays legal fees awarded in a civil matter. This constitutes a wrongful attempt to use criminal proceedings in order to collect a legal fee and an act involving moral turpitude.

8. The California Rules of Professional Conduct prohibit any lawyer from presenting criminal charges collateral to civil proceedings to prevent extortion.

9. Using threats of administrative charges to collect past due fees is an acceptable fee collection method.

10. An administrative charge within the meaning of CRPC 5-100 means the filing or lodging of a complaint with a federal, state or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction or other sanction of a quasi-criminal nature.

11. An administrative charge within the meaning of CRPC 5-100 does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

12. Sending a letter threatening to file administrative charges against an employer with the EEOC for employment discrimination pursuant to Title VII of the Civil Rights Act of 1964, even though the filing of such charges is a prerequisite to the filing of a civil lawsuit, is a violation of CRPC 5-100(A).

13. Where a threat in violation of CRPC 5-100 is made in the context of litigation, the litigation privilege would be a complete defense to a later action based upon that threat brought by an opposing party.

14. The litigation privilege is never a defense to a civil cause of action against a defendant for acts of extortion.

15. If a defendant concedes, or the evidence conclusively establishes, that the protected speech or petition activity was illegal as a matter of law (like criminal extortion), the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action.

16. The anti-SLAPP statute applies to all activities for which the litigation privilege may provide a defense.

17. A lawyer's threat to pursue all available legal remedies to obtain an advantage in a civil dispute is a violation of CRPC 5-100(A).

18. After receiving a collection letter from a chiropractor, a personal injury lawyer threatens in writing to report the chiropractor to the Board of Chiropractic Examiners unless the matter is settled forthwith. This is an unlawful threat.

19. A lawyer may advise his opposing counsel of an intent to file a disciplinary complaint unless the opposing counsel settles a civil matter.

20. During a toxic tort civil action, personal injury Lawyer discovers that Defendant engaged in massive dumping of toxic chemicals in violation of federal environmental laws, which can result in fines, penalties and criminal sanctions. Lawyer may make a complaint to the appropriate federal agency charged with enforcement of such laws as long as Lawyer makes no threats to obtain an advantage in the civil action.

Certification

■ This self-study activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of one hour of legal ethics.

■ The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

MCLE ON THE WEB

TEST # 60 — No Threats, Please

1 HOUR CREDIT
LEGAL ETHICS

- Print the answer form only and answer the test questions.
- Mail only form and check for $20 to:

MCLE ON THE WEB — CBJ
The State Bar of California
180 Howard Street
San Francisco, CA 94105

- Make checks payable to State Bar of California.
- A CLE certificate will be mailed to you within eight weeks.

Name

Law Firm/Organization

Address

State/Zip

State Bar Number (required)

1. True____ False____
2. True____ False____
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