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The Role of the Film Commission

SOME THEY DO, AND SOME THEY DON'T – LITIGATION PRIVILEGE FOR PRE-LITIGATION DEMAND LETTERS IN CALIFORNIA

By Edwin F. McPherson

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Two cases have been published by the same district of the California Court of Appeal, four years apart, that are arguably polar opposite views of the protection that pre-litigation demand letters receive under the California Civil Code Section 47 litigation privilege.[1] Coincidentally enough, both letters were written by the same attorney, Martin D. Singer.

Malin v. Singer

The first letter was so egregious that a Superior Court judge viewed it as criminal extortion, as a matter of law. The second letter was perhaps no different than demand letters that are written every day by attorneys, particularly by defamation/First Amendment practitioners. Yet, the first letter was held to be protected under the litigation privilege,[2] and the second letter was not—potentially opening a floodgate of which virtually every lawyer (and client) in the state may soon feel the adverse impact.

The first case, *Malin v. Singer*,[3] involved a pre-litigation demand letter that was sent by Singer to one of his client's partners in a consortium of restaurants and nightclubs. The letter accused the partner and other co-conspirators of misappropriating company resources for many years, hiding assets from creditors and taxing authorities, and engaging in insurance fraud. Then, the attorney takes it to the next level:

> Because [the other partner] has also received a copy of the enclosed lawsuit, I have deliberately left blank spaces in portions of the Complaint dealing with your using company resources to arrange sexual liaisons with older men such as "Uncle Jerry," Judge [name redacted from opinion, but specified in original letter], a/k/a "Dad" (see enclosed photo), and many others. When the Complaint is filed with the Los Angeles Superior Court, there will be no blanks in the pleading. My client will file the Complaint against you and your other joint conspirators unless this matter is resolved to my client's satisfaction within five (5) business days from your receipt of this Complaint . . . .[4]

Singer did include with the letter a photograph of the judge and a copy of the draft complaint. He did not identify any of the other alleged sexual partners in the draft complaint, but he did leave several blank spaces and redactions that, according to the demand letter, would be filled in before the complaint was filed. The draft complaint stated, in pertinent part:

> [O]ver the past several months, _____ has arranged through email and through Internet websites such as craigslist.org to have multiple sexual encounters with [redacted] which include _____. Based on information and belief, _____ used company resources to facilitate these rendezvous and to communicate with various [redacted] including _____, _____, and _____.[5]

After receiving the demand letter, Malin sued Singer and his client (and others) for civil extortion (based on the demand letter and draft complaint), violation of civil rights (based on alleged illegal wiretapping and computer hacking activities), and intentional and negligent infliction of emotional distress.

Singer's client ultimately did sue Malin for conversion, breach of contract, breach of fiduciary duty, accounting, and civil conspiracy. However, instead of disclosing the name of the judge, or even stating that one of the men with whom Malin allegedly engaged in the sexual encounters was a judge, as Singer threatened in his letter, the complaint that was ultimately filed alleged that Malin had misappropriated company assets to arrange and facilitate "multiple sexual encounters," and that:

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> Over the past several months, Malin has arranged through email and through Internet websites such as craigslist.org to have multiple sexual encounters with various older men during which Malin would live out fetish role play fantasies, whi[le] playing out Malin's versions of a father/son and uncle/nephew relationship. Based on information and belief, Malin used company resources and assets embezzled from Plaintiffs to facilitate these rendezvous and to communicate with various sex partners, including a[n] older man he referred to as 'Uncle Jerry,' one he referred to as 'Dad,' and several others.[6]

Singer and his client filed an anti-SLAPP motion, claiming that everything in the letter was protected under the litigation privilege, as all of the statements were made in contemplation of litigation.[7] The trial court denied the motion, citing *Flatley v. Mauro*,[8] in which the California Supreme Court indicated that, although pre-litigation demand letters are typically protected by the litigation privilege, there is an exception (the "Flatley exception") for a demand letter that is so extreme that it is found to constitute criminal extortion as a matter of law.[9]

The trial court, in fact, determined that the letter did constitute extortion as a matter of law, explaining that the allegations of sexual misconduct were "very tangential to the causes of action in Defendants' complaint, which have to do with a business dispute and alleged misuse of company resources."[10] According to the court, the letter was "well beyond a typical demand letter,"[11] in which a party threatens to file a complaint if some sort of settlement is not reached; here, the letter threatened to reveal the names of Malin's alleged sexual partners, including a judge, and it enclosed a photograph of one of those partners. The court found that the letter "accuses or imputes to the Plaintiff some disgrace or crime or threatens to expose some secret affecting him for purposes of obtaining money."[12]

Singer and his client appealed from the denial of the Anti-SLAPP motion. The Court of Appeal, Second District, reversed the trial court, ruling that the letter did not constitute criminal extortion as a matter of law under *Flatley*.

Malin argued that the letter constituted actionable extortion because it "contained, at the very least, an extortion demand that threatened to not only embarrass [Malin] and force him to 'settle' with the Appellants on whatever terms they deemed 'reasonable,' but also to expose and embarrass various innocent third parties who had no connection whatsoever to the dispute.[13] The Court disagreed, finding that the letter did not expressly threaten to disclose Malin's alleged wrongdoings to a prosecuting agency or the public at large.[14]

The Court indicated that there were two problems with Malin's argument. First, the "secret" that would allegedly expose him and others to disgrace was "inextricably tied" to the pending complaint." Second, the Court found that, although the threatened disclosure of secrets affected third parties (his alleged sexual partners), such threat did not necessarily constitute extortion because, under Penal Code Section 519, the third party "must be a relative of the individual threatened or a member of his or her family."[15]

The *Malin* court made it clear, not only that pre-litigation demand letters are subject to, and protected by, the litigation privilege, confirming *Briggs v. Eden Council for Hope & Opportunity*,[16] but also that the litigation privilege in California was expanding as a basis for anti-SLAPP motions.

Dickinson v. Cosby

On November 21, 2017, the California Court of Appeal, Second District, published a decision entitled *Dickinson v. Cosby (Singer)*,[17] the ramifications of which could be catastrophic to the legal world. Boiled down to its essence, the case potentially puts at risk every attorney that sends a demand letter and every client for whom a demand letter is sent. Although the case arises out of a 2014 interview and an attorney's response to that interview, the facts of the case really go back to 1982.

Janice Dickinson, a reality television personality and former model, claims that she and Bill Cosby had dinner together in 1982. During the dinner, she complained to Cosby that she was having menstrual cramps. Cosby offered her a pill that he said would

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help with her discomfort. According to Dickinson, however, the pill was actually a narcotic, which heavily sedated her. She further claims that, later the same evening, after she was drugged, Cosby raped her vaginally and anally.

Dickinson claims that she did not report the rape or the drugging when it occurred because of her fear of retaliation by Cosby, who was "a wealthy, powerful celebrity." However, she did tell some close friends about the incident at the time.

In 2002, Dickinson wrote an autobiography titled "No Lifeguard On Duty," which was to be published by HarperCollins. She disclosed the rape incident to her ghostwriter, and wanted to include it in the book. However, HarperCollins's legal department refused to allow any reference to the rape unless it could be independently corroborated. Dickinson's ghostwriter then wrote a "sanitized version of the encounter," in which Dickinson "rebuffed Cosby's sexual advances and retreated to her room." The book stated that, when Dickinson turned Cosby down, "he gave [her] the dirtiest, meanest look in the world, stepped into his suite, and slammed the door in [her] face."

In September 2002, shortly after the autobiography was published, the *New York Observer* published an interview with Dickinson about the book. The article began with a discussion of "highlights" from the book, which included Cosby telling Dickinson that she had a good singing voice, which Dickinson believed, "that is, until she didn't want to go to bed with him and he blew her off." When the interviewer asked Dickinson about the reference to Cosby in her book, she is quoted as responding, "Oh, he's so sad." She never mentioned the alleged rape, at least in the published portion of the interview.

However, in 2014, after several women had publicly come out against Bill Cosby, accusing him of drugging and raping them, Dickinson revealed to *Entertainment Tonight* that Cosby had raped her as well.

After the *Entertainment Tonight* interview was aired, many media outlets contacted Cosby's representatives, indicating that they were going to run follow-up stories, and seeking Cosby's comment. Singer, on Cosby's behalf, immediately sent almost identical demand letters to *Good Morning America* and several other media outlets that were planning to run stories about Dickinson's accusation. The demand letter started with the following:

> **CONFIDENTIAL LEGAL NOTICE**
>
> **PUBLICATION OR DISSEMINATION IS PROHIBITED**
>
> We are litigation counsel to Bill Cosby. We are writing regarding the planned Good Morning America segment interviewing Janice Dickinson regarding the false and outlandish claims she made about Mr. Cosby in an Entertainment Tonight interview, asserting that he raped her in 1982 (the 'Story'). That Story is fabricated and is an outrageous defamatory lie. In the past, Ms. Dickinson repeatedly confirmed, both in her own book and in an interview she gave to the New York Observer in 2002, that back in 1982 my client 'blew her off' after dinner because she did not sleep with him. Her new Story claiming that she had been sexually assaulted is a defamatory fabrication, and she is attempting to justify this new false Story with yet another fabrication, claiming that Mr. Cosby and his lawyers had supposedly pressured her publisher to remove the sexual assault story from her 2002 book. That never happened, just like the alleged rape never happened. Prior to broadcasting any interview of Ms. Dickinson concerning my client, you should contact HarperCollins to confirm that Ms. Dickinson is lying.[18]

Later in the letter, Singer repeated that both the rape allegation and allegation of interference with HarperCollins were false—and asserting that all of it could be confirmed by HarperCollins. He then stated the following:

> If you proceed with the planned segment with Janice Dickinson and if you disseminate her Story when you can check the facts with independent sources at HarperCollins who will provide you with facts demonstrating that the Story is false and fabricated, you will be acting recklessly and with Constitutional malice.[19]

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He then claimed that Dickinson was only making up the rape story "to bolster her fading career." He then threatened:

> If *Good Morning America* proceeds with its planned segment with Ms. Dickinson and recklessly disseminates it instead of checking available information demonstrating its falsity, all those involved will be exposed to very substantial liability. You proceed at your peril.[20]

The next day, Singer issued a press release, which was headed "STATEMENT OF MARTIN D. SINGER, ATTORNEY FOR BILL COSBY," and stated the following:

> Janice Dickinson's story accusing Bill Cosby of rape is a lie. There is a glaring contradiction between what she is claiming now for the first time and what she wrote in her own book and what she told the media back in 2002. Ms. Dickinson did an interview with the New York Observer in 2002 entitled 'Interview With a Vamp' completely contradicting her new story about Mr. Cosby. That interview a dozen years ago said 'she didn't want to go to bed with him and he blew her off.' Her publisher HarperCollins can confirm that no attorney representing Mr. Cosby tried to kill the alleged rape story (since there was no such story) or tried to prevent her from saying whatever she wanted about Bill Cosby in her book. The only story she gave 12 years ago to the media and in her autobiography was that she refused to sleep with Mr. Cosby and he blew her off. Documentary proof and Ms. Dickinson's own words show that her new story about something she now claims happened back in 1982 is a fabricated lie.[21]

Seven months later, after demanding a retraction, Dickinson sued Cosby in Superior Court, asserting causes of action for defamation, false light, and intentional infliction of emotional distress. In the complaint, she alleged that Cosby had drugged and raped her, and that she had recently disclosed this publicly. The complaint goes on to say that:

> In retaliation, Cosby, through an attorney, publicly branded her a liar and called her rape disclosure a lie with the intent and effect of revictimizing her and destroying the professional reputation she's spent decades building.[22]

Cosby filed an anti-SLAPP motion in response to the Complaint. He argued that the demand letter was a pre-litigation communication, which was protected by the absolute litigation privilege in accordance with Civil Code Section 47. He also claimed that both the demand letter and the press release constituted privileged "opinion." He further argued that there were no damages because the crux of the statements was that Dickinson was a liar, and that there was no dispute that she was a liar.

According to Cosby, the statement that she is a liar was not actionable because she was either lying about the rape or she was lying in her book and the subsequent interview about the book; one way or another, she was lying. Cosby further argued that, having already cultivated the professional reputation of a liar, she could not have been harmed by the accusation, and therefore there were no damages.

While the Anti-SLAPP motion was pending, Dickinson filed an amended complaint, adding Singer as a defendant, based upon the same demand letter and press release. Cosby and Singer filed a motion to strike the amended complaint on the ground that the Anti-SLAPP statute prohibits the amendment of a complaint while an anti-SLAPP motion is pending. The trial court granted the motion, and dismissed Singer from the suit.

The trial court ultimately granted the Anti-SLAPP motion as to the demand letter, ruling that the letter was sent in contemplation of litigation. However, the motion was denied as to the press release. Dickinson appealed both orders.

The California Court of Appeal reversed the Dickinson trial court on both orders. With respect to the dismissal of the first amended complaint, the Court determined that the rule precluding the amendment of a complaint after an anti-SLAPP motion is filed did not apply to the addition of a new party, who did not file an anti-SLAPP motion, *i.e.*, Singer, and the Court reversed the trial court's order dismissing Singer from the case.

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With respect to the anti-SLAPP motion itself, the Court first discussed the litigation privilege in the context of pre-litigation communication, noting that press releases can never be protected by the privilege. The Court went on to acknowledge that a pre-litigation demand letter may be privileged, but only "when it relates to litigation that is contemplated in good faith and under serious consideration."

The Court, citing *Edwards v. Centex Real Estate Corp.*,[23] stated that "even a threat to commence litigation will be insufficient to trigger application of the privilege if it is actually made as a means of inducing settlement of a claim, and not in good faith contemplation of a lawsuit."[24] The Court goes on to quote *Action Apartment Assn., Inc. v. City of Santa Monica*:[25] "No public policy supports extending a privilege to persons who attempt to profit from hollow threats of litigation."

The Court goes on to state that: "[w]hether litigation was contemplated in good faith and under serious consideration are questions of fact . . . . The good faith inquiry is not a question of whether the statement was made with a good faith belief in its truth, but rather, whether the statement was made with a good faith intention to bring a lawsuit." The Court then cites two cases in which the litigation privilege was extended to demand letters, one in which the attorney ultimately did commence litigation, and one in which the recipients of the demand letters "largely complied with the demand."

The Court ultimately ruled that, because the demand letter was only sent to media outlets that had not yet run the story, and because Cosby never sued any of the recipients of the letter, there was an "inference that the demand letter was not sent in connection with litigation contemplated in good faith and under serious consideration."[26] The Court found that the letter was a "bluff . . . with no intention to go through with the threat of litigation if they were uncowed. Hence the letters were, in the words of the California Supreme Court, 'hollow threats of litigation.'"[27]

The Court therefore held that Dickinson had made a *prima facie* showing that the litigation privilege did not apply, and, therefore, she had satisfied the second prong of SLAPP. Specifically, the Court stated the following:

> As the evidence supports a prima facie inference that Cosby sent the demand letter without a good faith contemplation of litigation seriously considered, Dickinson made a showing of a probability of prevailing on the merits of the litigation privilege affirmative defense under the second prong of the anti-SLAPP statute. Accordingly, the trial court erred in granting the motion as to the demand letter.[28]

Although the Court's ruling in that regard did not directly bind Singer (because he had not yet filed an anti-SLAPP motion), it is quite clear that Singer's anticipated anti-SLAPP motion (on remand) will fare no better. Either there is an inference that the letter is privileged or there is not. If it is not privileged vis-a-vis Cosby, it is highly doubtful that any litigation privilege will attach to Singer.

One could argue that the *Malin* demand letter was much, much worse than the *Dickinson* letter. The *Malin* letter was clearly designed to elicit a speedy settlement, with the extortionate threat of exposure, not only of *Malin*, himself, but also of third parties, including a retired Superior Court judge. That the ultimate complaint, when filed, did not include the name of the judge could certainly be construed as evidence that the letter was written "as a means of inducing settlement of a claim, and not in good faith contemplation of a lawsuit."

Yet, it is the *Malin* letter that was protected, and not the *Dickinson* letter, which could have been written by any number of attorneys in response to a claim such as that made by Dickinson. It is the *Malin* letter that the Court decided, as a matter of law, was sent in contemplation of litigation "in good faith and under serious consideration," and the *Dickinson* letter that the Court decided was *not* "in good faith and under serious consideration," at least for the purposes of SLAPP.

A reasonable argument could be made for protecting *both* letters, or even *neither* letter (though that would be a wrong decision), but it does not seem reasonable to rule that one letter is subject to the litigation privilege, and not the other—particularly in light of the fact that the *Malin* letter is seemingly so much more extortionate in nature. This is especially so in light of prior

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case law that mandates that the litigation privilege is "interpreted broadly in order to further its principal purpose of affording litigants and witnesses the utmost freedom of access to the courts without fear of harassment in derivative tort actions."[29] The privilege is absolute and applies regardless of malice.[30]

The undercurrent of the Dickinson Court may very well have been more related to the identity of the defendant than anything else. Perhaps very telling, the Court, at page 39 of the opinion, cites to a declaration by Dickinson's attorney, in which she states that Cosby "has not sued any of these media outlets. Nor has he ever sued any of the *thousands of media outlets* who have published stories about *the over fifty women who have now accused him of attempted or actual sexual assault over the last decade*."

The Court very well may have reasoned that, because there were so many accusers, and because Dickinson's accusation was therefore likely true, there was no way that Cosby ever intended to sue. However, if the Court really wanted simply to punish Cosby (and his attorney) for sending a threatening letter without intending to sue, it could have done so without publishing the opinion. Instead, every attorney (and client) in California is now bound by it, and substantially at risk.

The *Dickinson* decision, which suggests that attorneys (and their clients) may be held liable for defamatory statements contained in pre-litigation demand letters, is extremely dangerous, and sets a potentially floodgate-opening precedent. In virtually every demand letter that is sent in a potential defamation action, the author is accusing either the recipient or the source of the recipient of lying, whether or not that word is used. In fact, even in non-defamation actions, the author often expresses or implies that the recipient is lying.

One might ask if every demand letter is now going to be met with a defamation action, or the threat of one, and if, in fact, that demand letter, *i.e.*, the one threatening the original author of the original demand letter, might be met with another defamation action. The ramifications of this decision are monumental.

The only "rule" that can be inferred from these two cases is that, if an attorney does not follow through with a lawsuit, everything that he or she says in a demand letter can be the subject of a defamation suit. If that is the case, then attorneys are going to be forced to file litigation even if they think that a claim can be settled, just to avoid personal liability. One would think that public policy would dictate against such an encouragement of litigation.

Although the Court was clear that it was not making the determination, as a matter of law, that the defense of litigation privilege was not available to Cosby (and therefore Singer), that determination will therefore be left to the trial court or the jury, *i.e.*, was the demand letter just a "bluff," or truly "in contemplation of litigation." Even getting past the unsavory concept of putting that question in the hands of a jury, it is difficult to imagine how an attorney or client can possibly defend him/herself.

The obvious question to be asked is: "How can an attorney or party prove that he or she was serious about commencing litigation if he or she does not ultimately file that litigation?" It appears that anything short of a declaration from an attorney service stating that the attorney told them to file the complaint the next day would require privileged information. Certainly, an attorney would not be allowed to produce an e-mail from a client instructing him or her to file the complaint if the demand letter is unsuccessful; nor would he or she be allowed to produce an e-mail from the attorney to the client suggesting the same.

An attorney is therefore placed in the unenviable position of being held liable for damages for defamation if his/her client is not telling the truth or revealing privileged communication to prove that litigation was seriously intended (which may get him/her disbarred). No attorney should be put in this position, and it is doubtful that the Court of Appeal has thought through the horrendous ramifications of this decision.

ENDNOTES

[1] Section 47 provides as follows: "A privileged publication or broadcast is one made: (a) In the proper discharge of an official duty. (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section

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1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows: (1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action. (2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Chapter 14 (commencing with Section 2031.010) of Title 4 of Part 4 of the Code of Civil Procedure. (3) This subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies. (4) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law. (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law. (d) (1) By a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued. (2) Nothing in paragraph (1) shall make privileged any communication to a public journal that does any of the following: (A) Violates Rule 5-120 of the State Bar Rules of Professional Conduct. (B) Breaches a court order. (C) Violates any requirement of confidentiality imposed by law. (e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit."

2 The litigation privilege applies "to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg v. Anderson*, 50 Cal.3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365 (1990).

3 217 Cal. App. 4th 1283 (2013).

4 *Id.* at 1289.

5 *Id.* at 1289.

6 *Id.* at 1289, n.6.

7 Singer and his client denied any involvement in the computer hacking and wiretapping that was alleged in Malin's complaint, but argued in the alternative that the computer hacking and wiretapping constituted "pre-litigation information-gathering . . . which are clearly protected activities."

8 39 Cal.4th 299 (2006).

9 In *Flatley*, an attorney represented a client that allegedly was raped by the plaintiff, who was "a well-known 'performer and dance impresario.'" The attorney and his client made television appearances in which the client described the rape "in extremely lurid detail." *Id.* at 306, fn. omitted. After the lawyer sent a demand letter to the plaintiff, he (the attorney) telephoned the plaintiff's attorney to warn that he would "go public" with the rape allegations, which would be "publicized every place [the plaintiff] goes for the rest of his life..." *Id.* at 330. In subsequent phone calls, the attorney continued to threaten to "'go public'" with a story that "would follow [the plaintiff] wherever he or his groups performed and would ruin him." The attorney indicated that "it would take seven figures" to "avoid this." Flatley then sued the client and the attorney for "civil extortion, defamation, fraud, intentional infliction of emotional distress, and wrongful interference with prospective economic advantage." *Id.* at 306. The attorney filed an anti-SLAPP motion, which was denied, such denial being affirmed by the Court of Appeal and the California Supreme Court. The Supreme Court noted that "[e]xtortion is not a constitutionally protected form of speech," (*Id.* at 328), ruling that, when the speech is "illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." *Id.* at 320.

10 *Id.* at 1292.

11 *Id.*

12 *Id.*

13 *Id.* at 1298. Penal Code Section 518 defines "extortion" as "the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear . . . ." Penal Code Section 519 provides that "fear, such as will constitute 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, or a relative of his or her, or a member of his or her family, of a crime; (3) To expose, or to impute to him, her, or them a deformity, disgrace, or crime; (4) To expose a secret affecting him, her, or them; and (5) To report his, her, or their immigration status or suspected immigration status."

14 There is nothing in Section 518 or 519 that requires the accusation of a crime to be "to a prosecuting agency." It is difficult to imagine how much more "public" it could be than to file a lawsuit in Superior Court with such allegations, with literally the world having access to it.

15 Citing *People v. Umana*, 138 Cal.App.4th 625 (2006) (only threats that fall within one of the four [now five] categories of Section 519 will support a charge of extortion).

16 19 Cal.4th 1106, 1115, 81 Cal. Rptr. 2d 471, 969 P.2d 564 (1999) ("[J]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) . . . such statements are equally entitled to the benefits of section 425.16.") *Id.* at 1115.

17 Case No. B271470.

18 *Id.* at 5–6.

19 *Id.* at 6.

20 *Id.* at 6.

21 *Id.* at 7–8.

22 *Id.* at 10.

23 53 Cal.App.4th 15 (1997).

24 It is difficult to imagine why one would write a demand letter if it is not calculated to induce the settlement of a claim. Certainly, a demand letter that is calculated to induce the settlement of a claim, and one that is written "in good faith contemplation of a lawsuit," is not mutually exclusive. In fact, one could argue that most demand letters are both. It would certainly be a rare event that someone who sent a demand letter that was "in good faith contemplation of a lawsuit" would reject a settlement if enough money was offered. One could also argue that the *Malin* demand let-

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ter was much closer to one that was "made as a means of inducing a settlement of a claim, and not in good faith contemplation of a lawsuit" than the *Cosby* letter.

25 41 Cal.4th 1232 (2007).

26 *Id.* at 39.

27 *Id.* at 39–40.

28 *Id.* at 40. The Court stated in a footnote that it was not finding that Cosby could not prevail on the litigation privilege defense, "only that Dickinson has shown a probability of prevailing at this juncture." *Id.* n.13.

29 *Action Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal.4th 1232, 1241, 63 Cal. Rptr. 3d 398, 163 P.3d 89 (2007); *Digerati Holdings, LLC v. Young Money Entertainment, LLC*, 194 Cal.App.4th 873, 889, 123 Cal. Rptr. 3d 736 (2011).

30 *Id.*

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