LAWYER EXTORTION

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The crime of extortion has long been viewed in different ways. To some the primary sin has been that the extorter has acquired something to which he was not entitled, a focus that makes the crime a form of aggravated theft.[1] To others, however, the vice of extortion is the use of certain means to acquire money or property, whether or not there is a claim of right.[2] Emphasizing impermissible means of enforc-

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1. This focus is reflected in the most recent version of the proposed Federal Criminal Code, S. 1437, 95th Cong., 2d Sess. (1978). The offense of blackmail proscribes, in part, obtaining property of another by threatening to engage in criminal conduct, to accuse of crime, to procure dismissal from employment, to improperly subject to economic loss or injury, or to expose a secret with intent to impair reputation. *Id.* § 1723. A defense, however, is then provided if the threat was "intended solely to compel or induce the other person to take lawful and reasonable action to prevent or remedy the asserted wrong that prompted the defendant's conduct" and the defendant "reasonably believed his conduct was justified." *Id.* The defense is not available for threatened criminal conduct nor for a threat to accuse of crime unless the defendant reasonably believed the accusation to be true. *Id.* According to S. REP. No. 95-605 (pt. 1), 95th Cong., 2d Sess. 637 (1978), a person could not reasonably believe his conduct justified where he "had no honest complaint of his victim" or where the threats were "unrelated to the bona fide claim asserted by the defendant." To the extent that this is an endorsement of the proposition that foul means are fair if used in the pursuit of "justice," it substantially changes the discussion accompanying notes 15-17 *infra*. What could not then be termed extortionate might still be called unprofessional. See text accompanying notes 18-28 *infra*. What is clear from the Senate report is that the holding of United States v. Pignatelli, 125 F.2d 643 (2d Cir.), *cert. denied*, 316 U.S. 680 (1942), construing the predecessor to 18 U.S.C. § 876 (1976), see note 2 *infra*, was rejected. In that case Judge Augustus Hand had said: "Threats to damage another's reputation are no proper means for determining a controversy. It may be adjusted either by suit or by compromise but settlement must not be effected by using defamation as a club." 125 F.2d at 646.

The Model Penal Code provides a defense to extortion by threats to accuse of crime, to injure reputation, or to take or withhold official action where "the property obtained by threat . . . was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit, or other official action relates, or as compensation for property or lawful services." MODEL PENAL CODE § 223.4 (Proposed Off. Draft 1962). Interestingly, it is not a defense to a threat to "inflict any other harm which would not benefit the actor." *Id.*

2. The Arizona Revised Criminal Code concerns itself entirely with threats, regardless of any claim to the property so obtained. In addition to the conventional proscription of threats of physical injury, property damage, criminal conduct, and reputational injury, a general clause forbids threatening "any other act which would not in itself materially benefit the defendant but which is calculated to harm another person materially." ARIZ. REV. STAT. ANN. § 13-1804 (Spec.

ing legal rights immediately implicates lawyer conduct although that implication has rarely penetrated professional discussion.[3]

State v. Harrington[4] is a pointed illustration of the ease with which lawyers can drift into criminality. Harrington was retained by Norma Morin to obtain for her a divorce from her husband Armand Morin. In order to acquire proof of adultery, Harrington hired a woman to register in the motel owned by Mr. Morin and to so conduct herself before the owner as to appear "receptive and available."[5] By prearrangement Harrington was able to photograph and record the planned denouement. Several days later in the presence of Mrs. Morin, Harrington dictated a letter addressed to Mr. Morin containing an offer of settlement.[6] The offer provided that Mrs. Morin would give up her interest in various properties and certain other rights[7] in return for the receipt of $175,000. The letter further provided:

> [A]ny such settlement would include the return to you of all tape recordings, all negatives, all photographs and copies of photographs that might in any way, bring discredit upon yourself. Finally, there would be an absolute undertaking on the part of your wife not to divulge any information of any kind or nature which might be embarrassing to you in your business life, or your life as it might be

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Pamphlet 1978). It could be argued that "strike suits," meritless litigation brought in the expectation of payment of a sum less than the opponent's litigation costs to terminate the suit, would fit within this clause. *See* Williams, *Blackmail* (pt. 2), 1954 CRIM. L. REV. 162, 164.

Until the reconsideration of the matter by the drafters of the Model Penal Code and the Federal Criminal Code, S. 1437, 95th Cong., 2d Sess. (1978), most states had "held that the statutes prohibit use of the enumerated means and it is no defense that the threatener is or believes himself entitled to the property demanded." Note, *A Rationale of the Law of Aggravated Theft*, 54 COLUM. L. REV. 84, 99 (1954). *See also* People v. Fichtner, 281 App. Div. 159, 118 N.Y.S.2d 392, *aff'd*, 305 N.Y. 864, 114 N.E.2d 212 (1952); Annot., 135 A.L.R. 728 (1941); Comment, *Criminal Law—A Study of Statutory Blackmail and Extortion in the Several States*, 44 MICH. L. REV. 461 (1945). Present federal law provides no claim-of-right defense to mailing a threatening communication, under 18 U.S.C. § 876 (1976), or to collection of extensions of credit by extortionate means, under *id.* § 894. *See generally* United States v. Spears, 568 F.2d 799 (10th Cir. 1978).

3. Of the leading professional responsibility casebooks, only one has a section dealing with impermissible threats. M. PIRSIG & K. KIRWIN, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 483-86 (3d ed. 1976). Generally, the only reference to the problem is that one may not resort "to extra legal means to reach the settlement of the case." L. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 87 (1971). *See also* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 95 (1972).

Teaching materials on negotiation do not appear to disapprove of threats as a tactic. Freeman and Weihofen state that a negotiator may "[m]ake false demands, bluffs, threats; even use irrationality;" they then add the admonishment "learn to negotiate or learn to lose." H. FREEMAN & H. WEIHOFEN, CLINICAL LAW TRAINING 122 (1972); *accord*, C. PECK, LABOR RELATIONS AND SOCIAL PROBLEMS, CASES AND MATERIALS ON NEGOTIATION 188-89 (1972). Edwards and White state: "There is little doubt in my mind that some negotiations are best settled by the use of threat." H. EDWARDS & J. WHITE, THE LAWYER AS NEGOTIATOR 128 (1977), *quoting* C. KARRASS, THE NEGOTIATING GAME 192 (1970). Later, however, they at least invite discussion of the ethical propriety of such practices. *Id.* at 372-419. *See also* Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975).

4. 128 Vt. 242, 260 A.2d 692 (1969).

5. *Id.* at 245, 260 A.2d at 694.

6. *Id.* at 246, 260 A.2d at 695.

7. *Id.* at 247-48, 260 A.2d at 695-96. At the signing of the separation agreement $25,000 was to be paid, with the remaining $150,000 due over the next 18 months. *Id.*

> affected by the Internal Revenue Service, the United States Customs Service, or any other governmental agency.[8]

Mr. Morin was also advised that an immediate response to the offer was required:

> [Y]ou should have [this letter] in your possession by March 13, at the latest. Unless the writer has heard from you on or before March 22, we will have no alternative but to withdraw the offer and bring immediate divorce proceedings in Grafton County. This will, of course, require the participation by the writer's correspondent attorneys in New Hampshire. If we were to proceed under New Hampshire laws, without any stipulation, it would be necessary to allege, in detail, all of the grounds that Mrs. Morin has in seeking the divorce. The writer is, at present, undecided as to advising Mrs. Morin whether or not to file for 'informer fees' with respect to the Internal Revenue Service and the United States Custom Service. In any event, we would file, alleging adultery, including affidavits, alleging extreme cruelty and beatings, and asking for a court order enjoining you from disposing of any property, including your stock interests, during the pendency of the proceeding.[9]

The Vermont Supreme Court affirmed a conviction for attempted extortion under a statute reading:

> A person who maliciously threatens to accuse another of a crime or offense, or with an injury to his person or property, with intent to extort money or other pecuniary advantage, or with intent to compel the person so threatened to do an act against his will, shall be imprisoned . . . .[10]

The court's opinion is far from satisfactory. To the defendant's contention that he did not threaten to accuse Mr. Morin of crime but only "to bring an embarrassing reputation-ruining divorce proceeding,"[11] the court simply responded that the statute covered any threat of "public exposure of incriminating conduct."[12] And, to the argument that the defendant was only acting as an attorney, the court said: "[I]t was within the province of the triers of fact to accept the defendant's claim of innocence."[13] The court added that the "veiled threats" to reveal income tax liability "exceeded the limits of the respondent's representa-

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8. *Id.*

9. *Id.* at 248-49, 260 A.2d at 696. To assure Mr. Morin that he did possess discrediting evidence, Harrington concluded the letter with the following:

> With absolutely no other purpose . . . than to prove to you that we have all of the proof necessary to prove adultery beyond a reasonable doubt, we are enclosing a photograph taken by one of my investigators on the morning of March 8. The purpose of enclosing the photograph as previously stated, is simply to show you that cameras and equipment were in full operating order.

Id. at 249, 260 A.2d at 696.

10. VT. STAT. ANN. tit. 13, § 1701 (1974); *see* 128 Vt. at 255, 260 A.2d at 700.

11. 128 Vt. at 252, 260 A.2d at 698.

12. *Id.* at 253, 260 A.2d at 698.

13. *Id.* at 253, 260 A.2d at 699.

tion of his client in the divorce action. Although these matters were not specified in the indictment, they have a competent bearing on the question of intent."[14]

Taking the opinion at face value,[15] very serious problems are created for every lawyer. Any time a cause of action involves behavior that is either criminal or embarrassing, a threat to bring the action would be extortionate. Obviously this would effectively preclude many lawyer demand letters. Anomalously, it would be permissible to destroy reputation by bringing suit but not to allow the defendant to avoid that destruction by paying the claim. Not only would this mean a net loss to the privacy that the extortion statute is, in part, aimed at protecting, but it would also involve significantly expanded litigation costs and burdens on efficient utilization of judicial resources. So read, the *Harrington* rule is obviously absurd.

There is, however, an understandable reluctance to say that it is permissible to use means—which in other contexts are clearly extortionate—unrelated to the legal validity of the claim for purposes of collecting money due the claimant. The problem to be addressed, therefore, is whether it is possible to distinguish permissible from impermissible threats in such a way as to create a coherent and understandable system of extortion enforcement.

THREATS AND EXTORTION

Some cases are easy. Thus, Harrington's implicit threat to reveal Morin's income tax evasion is plainly a violation of the extortion statute. Were a stranger to say to Morin that those facts would not be revealed if a fee were paid, there would be no question that extortion had occurred. Surely, practicing extortion to enforce a just claim cannot be made immune nor can an impermissible threat be "laundered" by transmitting it through counsel.

More difficulty is encountered if the threat is based on conduct related to the claim, as was the adultery in the *Harrington* case. Assuming the unavoidable, that a claim cannot be unenforceable simply because it relates to criminal or embarrassing conduct and that one may threaten to do what one is legally entitled to do to enforce that claim, are there any limitations on the uses that can be made of the

14. *Id.* at 254, 260 A.2d at 699.

15. It may be that the opinion masks outrage at the methods of acquiring evidence rather than concern over the demand letter. Describing it as a "nefarious plan," the court suspended Harrington's young associate from practice for three months solely because of his participation in the motel episode. *In re* Knight, 129 Vt. 428, 431, 281 A.2d 46, 48 (1971). Harrington was disbarred on the basis of his conviction. *In re* Harrington, 128 Vt. 445, 266 A.2d 433 (1970). After a gubernatorial pardon, he was readmitted. *In re* Harrington, 134 Vt. 549, 367 A.2d 161 (1976).

claim-related embarrassing or criminal facts? Two possibilities exist. First, it may be extortionate to use the embarrassing facts to recover more than the claim is legally worth. Second, it may be extortionate to threaten any publicity at all or greater publicity, and hence embarrassment, than the mere fact of litigation would necessarily involve.

The use of extortionate means to recover an amount greater than one's legal entitlement appears to involve all the evils of extortion generally.[16] A test case might be one similar to *Harrington* where known to the lawyer is the fact that, if the divorce case were litigated to judgment, the probable property settlement award would be $25,000. To seek to recover $175,000 by threatening to reveal embarrassing facts relevant to a legitimate cause of action is to seek to profit from the legally irrelevant value of those facts. If allowed, extortion would be a permissible activity so long as it was related to and conjoined with a legally supportable claim.

The one problem with this analysis is the difficulty of determining whether the settlement effected in litigation is in excess of the amount legitimately due and, thus, that the defendant was profiting by trading in silence. Of course, the fact that some cases may be difficult cannot be a reason to ignore clear cases of extortion. Beyond that, it is far from evident that the judicial system cannot effectively judge probable ranges of legitimate settlement of claims. What litigation would bring is reasonably calculable—a settlement in excess of that, with a threat of exposure of embarrassing facts, would seem at least prima facie extortionate.

More difficult is the threat of publicity incident to the filing of a lawsuit. If publicity is inevitable when filing takes place, how can it be wrong to tell an adversary of that consequence and allow it to be avoided. It would appear anomalous to argue that Harrington could say "divorce will be sought on grounds of adultery," but could not say "your adultery, of course, will become public." Nonetheless, because extortion has traditionally focused on means, that may well be the distinction that must be drawn. Results may not change because threats are not uttered. The adulterous defendant would almost certainly conclude, on his own, that privacy could be preserved and embarrassment avoided by settling in advance of litigation. But that is a conclusion for him to reach, not one we should say can be legally urged upon him. The fact that one may decide to pay a claim, fearing an assault by the claimant if payment is not made, would not justify a rule permitting collection by threatening assault.

Threatening publicity in excess of that necessarily involved in fil-

16. MODEL PENAL CODE § 223.4, Comment (Proposed Off. Draft 1962).

ing a complaint would seem to be plainly extortionate.[17] Had Harrington said, "Suit will be brought on grounds of adultery and a copy of the complaint will be mailed to everyone who knows you," would it not be plain that profit was sought by threat? A similar result might follow from the statement: "The newspapers will be informed of the suit."

Another potential problem is the lawyer who frames a complaint to maximize exposure and embarrassment. In a jurisdiction permitting a divorce or dissolution on grounds of irreconcilable differences, the lawyer proposes to allege adultery, or proposes to allege forty-seven instances of adultery with named prominent people, or proposes to allege homosexuality. While all these allegations are relevant to the reason for irreconcilability, in fact little attention is paid to those reasons in dissolution litigation, and it ought not be hard to conclude that an extortionate purpose is present if the proposed allegations are communicated to the potential defendant in advance of filing.

It is possible to multiply instances of this sort for pages but the point has been made. Much of the threatening that some lawyers have engaged in can violate long-standing criminal proscriptions against extortion. Essentially this is true whenever money or property is sought as the price of secrecy. But apart from whether lawyer conduct of this sort is criminal, one might well ask whether it, or other kinds of threatening, ought to violate standards of professional responsibility. Intuitively, at least, warm zeal on a client's behalf might well stop short of the edge of criminality. Threats of exposure or other harm unnecessary to the pursuit of a legitimate claim ought not to be permitted. And, of course, mere utility ought not to define necessity.

THREATS AND THE CODE OF PROFESSIONAL RESPONSIBILITY

The ABA Code of Professional Responsibility speaks only obliquely to these matters.[18] Disciplinary Rule [DR] 7-105 prohibits threatening "to present criminal charges solely to obtain an advantage in a civil matter."[19] Beyond that one specific, all that is said is con-

17. *See* Williams, *supra* note 2, at 168-69.

18. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-107(G) (1976), and its predecessor, ABA CANONS OF PROFESSIONAL ETHICS No. 20, prohibit publicity, apart from public documents, respecting pending litigation. These rules were aimed, however, not at the use of publicity for negotiating value but at the risks of lawyer self-laudation and prejudicing the tribunal. *See* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 334 (1974); *id.* INFORMAL OPINIONS, No. 1230 (1972); *id.* No. 1172 (1971); *id.* No. 805 (1965).

19. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-105 (1976). Most criminal and disciplinary matters have fallen under this section. *See, e.g.*, Bluestein v. State Bar, 13 Cal. 3d 162, 529 P.2d 599, 118 Cal. Rptr. 175 (1974); Librarian v. State Bar, 38 Cal. 2d 328, 239 P.2d 865 (1952); People v. Beggs, 178 Cal. 79, 172 P. 152 (1918); Montgomery County Bar Ass'n v. Haupt, 277 Md. 326, 353 A.2d 727 (1976); *In re* Joyce, 182 Minn. 156, 234 N.W. 9 (1930); *In re* Bunston, 52 Mont. 83, 155 P. 1109 (1916); *In re* Dworkin, 16 N.J. 455, 109 A.2d 285 (1954); *In re* Beach-

tained in Ethical Consideration [EC] 7-10: "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."[20] There is, as well, the general—and vague—rule in DR 1-102(A)(6) that a lawyer shall not "engage in any other conduct that adversely reflects on his fitness to practice law."[21] Drinker, in a very short section on coercive tactics, contents himself with the injunction: "He may not threaten more than he can reasonably do . . . ."[22]

Illustrative of the kind of threatening behavior, short of extortion, that might properly be reached by ethical proscription is this: A dispute arose within a condominium development during the sale of one of the units as to whether a covered parking space belonged to that unit. The owners' association board decided that it did not. The buying individual's father, an attorney, approached the board and said, "If you persist in this conduct toward my daughter, I will sue each of you individually for damages." Whatever the legal merits, it would be appropriate to test the board's action by a quiet title action. Equally legitimate would be an opinion letter as to the impropriety of the board's action. But to threaten individual liability for damages, in a situation that appears to involve little, if any, pecuniary liability of the board, suggests simply the use of fear to cause the board to back down. There is no sound reason to allow lawyers to threaten what is legally unavailable to them to influence actions of others. This is especially inappropriate in circumstances where the persons threatened are laymen and the threat will be perceived to be well grounded because uttered by an expert.

board, 263 N.Y.S. 492 (App. Div. 1933); *In re* Hyman, 226 App. Div. 468, 235 N.Y.S. 622 (1929); *In re* Carpenter, 250 Or. 394, 443 P.2d 238 (1968); *In re* Sherin, 27 S.D. 232, 130 N.W. 761, *modified*, 28 S.D. 420, 133 N.W. 701 (1911). *See also* MacDonald v. Musick, 425 F.2d 373 (9th Cir.), *cert. denied*, 400 U.S. 852 (1970).

20. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-10 (1976).

21. *Id.* DR 1-102(A). This disciplinary rule was relied on to uphold the indefinite suspension of a lawyer for sending the following letter:

"OH! THE JOY OF BEING SUED!!

"How do you explain to the neighbors and the kids when the Sheriff's car pulls up front and an officer hands you the summons?

"OR, how do you explain a garnishment to the boss, and the other fellows at work???

"I don't know, but I guess you do; at least you didn't bother to answer my letter. You do not need to send me your check immediately to pay your account, because I am not going to bother you any more . . . but the Sheriff will. Oh yes, I will see you in court.

"You owe ————————$——

"PAY ME NOW! ! !"

State v. Zeigler, 217 Kan. 748, 749, 538 P.2d 643, 644 (1975). Also involved in that case was attempted collection by simulation of legal process. This was found violative of DR 1-102(A)(4) prohibiting "conduct involving dishonesty, fraud, deceit, or misrepresentation." ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102(A)(4) (1976). *See also In re* Carroll, 416 F.2d 585 (10th Cir. 1969), *cert. denied*, 396 U.S. 1011 (1970); *In re* Dows, 168 Minn. 6, 209 N.W. 627, 47 A.L.R. 265 (1926); *In re* Weiss, 317 Pa. 415, 176 A. 924 (1935).

22. H. DRINKER, LEGAL ETHICS 153 (1953).

Indeed, if flagrant enough, such conduct could be theft by false pretenses.[23] But even when it is not a crime, threats of this sort ought to fall well short of that standard of conduct a respectable profession would endorse.[24]

In a litigious society that prides itself on providing ready access to a judicial resolution of disputes, the cry "I'll sue you," of course, ought

23. Under MODEL PENAL CODE § 223.3 (Proposed Off. Draft 1962), one is guilty of theft by deception for obtaining property by purposely creating or reinforcing "a false impression, including false impressions as to law, value, intention or other state of mind." The comment to that section states that the presumption, theretofore applied to deny criminal responsibility, that everyone knows the law "is an extraordinary misapplication of this fictional knowledge of law to use it to relieve an offender who did know the law and consciously misrepresented it." MODEL PENAL CODE § 71 (Tent. Draft No. 2, 1954). To this is appended:

> Of course, a legal opinion, like other statements in the course of bargaining might be made with the understanding that the opposite party is not taking such utterances at their face, in which case the defense must be on the ground that the actor did not purposely create a false impression.

Id.

24. Another instance is the litigation involving charges that members of the CIA and FBI have violated criminal statutes. There, the press has intimated that a defense tactic directed at the reduction or dismissal of those charges is to threaten to reveal secrets including other unprosecuted instances of misconduct or, to put it more directly, to wash the Government's dirty linen in public. *See*, Harris, *Reflections: Secrets,* NEW YORKER, Apr. 10, 1978, at 44-86; *What National Security*, 225 NATION 546 (1977); NEWSWEEK, Nov. 14, 1977, at 31; TIME, Nov. 14, 1977, at 18; Wicker, *Which Rule of Law?*, N.Y. Times, Nov. 4, 1977, § A, at 33, col. 5; Wicker, *Between the Law and the Secrets*, N.Y. Times, Nov. 2, 1977, § A, at 26, col. 1. It may be that this is no more than a claimed defense of selective prosecution or that the secret or embarrassing material is itself independently relevant, but to the extent that it is intended as extra-legal coercion, it is extortionate. Whether it is criminal depends on whether the greater charge is "property." *See* Annot., 67 A.L.R. 3d 1021 (1975). Consider also the threats of F. Lee Bailey after Patricia Hearst asserted a defense of incompetence of counsel. NEWSWEEK, Aug. 21, 1978, at 22.

In an old New York case, a lawyer was suspended for six months for use of a non-criminal threat to reveal sexual misconduct if certain letters incriminating the lawyer's client were not returned. The court stated:

> If the same threats had been made with a view to extorting money, whether for the benefit of the respondent or his client, we should have no difficulty in finding respondent guilty of an attempt at blackmail. They were not made with a view to extorting money and he was not therefore guilty of a criminal offense; but from a professional point of view it is as culpable to use threats to obtain possession of incriminating papers as it is to extort money.

In re Chadsey, 141 App. Div. 458, 462, 126 N.Y.S. 456, 459 (1910), *aff'd*, 201 N.Y. 572, 95 N.E. 1124 (1911). And in People *ex rel.* Brundage v. Blakemore, 209 Ill. 311, 141 N.E. 138 (1923), an attorney was disbarred where he,

> having a claim against a corporation and having access to the colums of a newspaper, threatened to use, and did use, the columns of that newspaper for the purpose of attacking the persons against whom he had the claim, in order to enforce the payment of the claim by blackmail.

Id. at 312, 141 N.E. at 138. Finally, in Kentucky State Bar Ass'n v. Taylor, 482 S.W.2d 574 (Ky. 1972), the court found improper a threat by a lawyer against a potential witness, a newspaper reporter, to sue for "libel, slander, defamation of character and perjury" for an earlier newspaper report on the lawyer's conduct. *Id.* at 578, 583.

Related to this are the rules contained in old Canon 30 and present DR 7-102(A)(1-2) forbidding asserting a position "unwarranted under existing law" or "when it is obvious that such action would serve merely to harrass or maliciously injure another." *See In re* Sarelas, 50 Ill. 2d 87, 98-99, 277 N.E.2d 313, 319 (1971), *cert. denied*, 406 U.S. 968 (1972) (lawyers "will not be permitted to abuse the license and privilege to practice law by instituting groundless lawsuits against . . . laymen who cross them."). *See also In re* Avallone, 83 N.M. 189, 490 P.2d 235, *cert. denied*, 404 U.S. 906 (1971). These provisions of the Code, however, have never been considered much of an impediment to lawyers' claims unsubstantiated under existing law. *See* Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 733-39 (1977).

not be too readily considered improper. Neither, however, should such ready access mean that the legal system and its threatened use will become an imposition on the ordinary conduct of human beings. The idle lay threat is something that must be endured. The unfounded, or questionable, or excessive professional threat is another matter. A profession that claims to be learned and that is licensed as a monopoly to serve the public interest ought to speak in a more measured, intelligent, and reflective manner than an upset and outraged client.

The proposition that some means of enforcement of legal claims are improper, however strong and just the claim, might appear naive to some. It would be argued that those legally indebted have no right to demand undue civility of enforcement. The recent furor over debt collection practices, culminating in the passage of the Federal Fair Debt Collection Practices Act,[25] suggests the opposite. Prohibited, among other things, are "the threat to take any action that cannot legally be taken or that is not intended to be taken,"[26] "the use of any false representation or deceptive means to collect or attempt to collect any debt,"[27] and "any conduct the natural consequence of which is to harass, oppress, or abuse any person."[28] One would hope that the ethical proscriptions of the legal profession would be at least as strong as those thought necessary for debt collectors. Tactics such as bluff, stridency, and bombast, designed to overreach, ought to be as forbidden to lawyers as harassment, threat, abuse, and deception are in collection work.

If all that has been suggested to be forbidden were, in fact, proscribed, a lawyer would, of course, remain free to threaten that legal action which is available to his client. Even that degree of threatening was considered vindictive and overreaching by a substantial minority of the Supreme Court in a recent plea bargaining case.[29] To move beyond threats of legal action plainly open to one's client to those which are unavailable or questionable or obviously excessive is to in-

25. Pub. L. No. 95-109, 91 Stat. 874 (to be codified at 15 U.S.C. §§ 1692-1692o (1977)).
26. 15 U.S.C.A. § 1692e(5) (Supp. 1978).
27. *Id.* § 1692e(10).
28. *Id.* § 1692d. The statute does not apply to lawyers. *Id.* § 1692a(6)(F). *See generally* S. REP. No. 95-382, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1695; Greenfield, *Coercive Collection Tactics—An Analysis of the Interests and the Remedies*, 1972 WASH. U.L.Q. 1; Comment, *Recent Statutes Regulating Debt Collection, or Nunc, De Minimis Curat Lex*, 14 B.C. INDUS. & COM. L. REV. 1274 (1973).
29. Bordenkircher v. Hayes, 434 U.S. 357, 365-73 (1978) (opinions of Blackmun, J., with whom Brennan & Marshall, JJ. join, and Powell, J., dissenting). The dissenters there argued that the charges the prosecutor was legally entitled to bring, and which he initially refused to bring because they were thought inappropriately severe, ought not to be used to club the defendant into foregoing his constitutional right to trial of the charges. To the extent that this is an argument against inflation of the claim, prompted by fertility of lawyer imagination, it appears not an unreasonable standard of professional responsibility regardless of its standing as a constitutional demand. *See generally* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85-105 (1968).

vite application to this problem of Mr. Justice Stewart's prescription, in another context, that a lawyer ought not be "free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his [lawyering] capacity."[30]

CONCLUSION

For too long lawyers have tended to think that so long as the interest of the client is served, any tools at hand may be used. The *Harrington* case disproves that proposition. Even momentary reflection about the problems raised by that case suggests the need for much more professional thought about the means by which claims are enforced. The absence of such thought has made this discussion tentative in nature. For the profession to ignore, however, either the prevalence of conduct of this sort or the anger it excites would be to invite in greater measure, and more justifiably, the contempt with which our efforts at self-regulation are now viewed.

30. Stump v. Sparkman, 435 U.S. 349, 367 (1978) (Stewart, J., dissenting).