2017

Threatening Litigation

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affixed German swastikas to the fuselage, and sent the plane to Germany.

At first, the Germans were suspicious of Monti. They soon decided, however, that he was the "real deal." In November 1944, they enrolled him as an *SS-Untersturmführer* (second lieutenant) in *SS-Standarte Kurt Eggers*, a Waffen-SS propaganda unit.

Monti began broadcasting English-language propaganda on the radio. He tried to persuade GIs listening to his broadcasts "all over the European theater" that Americans should be fighting with Germany against the Soviet Union, as Communist Russia was the "true enemy of world peace."

In April 1945, with defeat imminent and Germany needing all its assets on the front lines, *SS-Untersturmführer* Monti was ordered to join a combat unit in northern Italy. A month later, Monti surrendered to the U.S. Fifth Army in Milan.

In the weeks that followed, Monti was interrogated by a series of Army intelligence agents. He freely admitted that he had left his unit in Karachi but claimed that "he had done so in order to wage a one-man war against the Germans." Monti also admitted that he had wrongfully appropriated the airplane in Naples, but only to take the fight to the Luftwaffe. As for the Waffen-SS uniform that he was wearing when he surrendered, Monti explained that he had been shot down and taken prisoner by the Germans. He claimed to have been in German prisoner-of-war camps until he managed to escape. He then received help from Italian partisans, who dressed him in a German uniform so that he could more easily travel through Axis-held territory and return to Allied lines.

The Army did not buy his imaginative cover story and, in May 1945, charged him with desertion and with "wrongfully, knowingly and willfully" misappropriating "one P-38 aircraft." A few months later, he was tried and convicted by a general court-martial in Naples. Monti returned to American soil and was serving time in an Army prison in New York when the Army offered him the chance to get out of jail if he would reenlist as a private. No doubt realizing that rejoining the Army was preferable to finishing his long jail sentence, Monti returned to the ranks in February 1946. Two years later, Monti was wearing sergeant's stripes.

Meanwhile, Army intelligence operatives were going through thousands and thousands of pages of captured German documents. Soon, these men discovered references to *SS-Untersturmführer* Monti and his activities while in the Waffen-SS. With this evidence in hand, the Department of Justice moved quickly, and in October 1948, Sergeant Monti was indicted by a federal grand jury in the Eastern District of New York for the crime of treason; the indictment alleged 21 overt acts.

In January 1949, Monti appeared in the U.S. district court in Brooklyn, New York. He had previously entered a not-guilty plea to the crime. Now, standing before Chief Judge Robert A. Inch, Monti withdrew this plea and informed the judge that he desired to plead guilty.

The U.S. Constitution states that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Mindful of this requirement, Monti was advised of his rights, was sworn, took the stand, and confessed in open court that he had voluntarily performed acts constituting the crime of treason, including the various overt acts alleged in the indictment. Chief Judge Inch found Monti guilty and sentenced him to 25 years in jail and a $10,000 fine.

Why did Monti withdraw his not-guilty plea? Why did he not demand trial on the merits? It seems that Monti's attorneys believed that if they went to trial, their client would likely be sentenced to death, or at least life imprisonment, given the facts and circumstances of the treason and the aggravating factor that Monti had been an Army officer. As a result, Monti's two defense counsel told him that he should plead guilty and throw himself on the mercy of the court. This would avoid death or life imprisonment, and while Monti could expect a "severe" sentence, it would not be more than 30 years. When Chief Judge Inch sentenced Monti to 25 years in jail, Monti should have understood that he had received good legal advice.

Monti served his sentence at the U.S. Penitentiary in Leavenworth, Kansas. He was paroled from Leavenworth in 1960, after serving 11 years of his sentence. He resettled in his home state of Missouri and died there in 2000. He was 78 years old.

The court-martial of Lieutenant Monti, his restoration to active duty, and his subsequent treason trial in U.S. district court are a unique set of events in legal history. Certainly, his trial in federal court stands out as probably the only American treason case involving a confession—the single exception to the two-witness rule in treason cases. ■

ETHICS

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In *Ferster v. Ferster*, [2016] EWCA (Civ) 717, three disputatious brothers owned an English Internet gaming company. Two teamed up to cause the company to sue the third, Jonathan, for breach of fiduciary duty and then offered to resolve the dispute by selling Jonathan their shares in the company.

During mediation, the two brothers' counsel increased the sales price and threatened that if Jonathan did not pay, the brothers would accuse him of perjury

Published in *Litigation*, Volume 44, Number 1, Fall 2017.

and contempt in the pending lawsuit. That could lead to his imprisonment, the destruction of his reputation, his debarment from the online gaming business, and, eventually, to claims against third parties to whom he had transferred assets.

Jonathan, in turn, complained that his brothers were making improper threats in order to extort a ransom price for their shares. The English trial and appellate courts agreed with the lone brother, holding that the threats "exceeded what was 'permissible in settlement of hard fought commercial litigation.'"

The English courts found that even if Jonathan committed the alleged crimes, the threats against him were improper for five reasons: (1) his brothers were threatening criminal action; (2) their threats had "serious implications for Jonathan's family"; (3) they also threatened to publicize the allegations; (4) the threats were meant to benefit the brothers, not the company; and (5) there was no connection shown between Jonathan's alleged misconduct and the increased demand.

Would the threats be viewed just as unfavorably by United States courts, which tend to be more tolerant of rough-and-tumble negotiation and trial practice?

In the United States, "prelitigation letters airing grievances and threatening litigation if they are not resolved are commonplace." *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 80 (2d Cir. 2000). Litigators may threaten to assert colorable claims and comment on the reputational or other harm that may ensue. But there are limits.

The ethics codes used to forbid lawyers from "threaten[ing] to present criminal charges solely to obtain an advantage in a civil matter." Model Code of Prof'l Responsibility DR 7-105(A) (Am. Bar Ass'n 1980). The rule was based on the concept of extortion but went farther. Lawyers could not coerce a civil remedy by threatening criminal accusations unrelated to the civil wrong—for example, by threatening a thief, "Return the stolen money or we will tell the prosecutor that you possess child pornography."

But the rule also seemed to forbid some threats that were non-extortionate and reasonable—e.g., "Return the stolen money or we will report the theft to the prosecutor." Given the rule's overbreadth, the drafters of the ABA Model Rules of Professional Conduct decided to scrap it and leave the problem to the law of extortion, which makes the relevant distinction. ABA Comm. on Ethics & Prof'l Responsibility, Formal Ops. 94-383 (1994) & 92-363 (1992).

But even in states without the old rule, lawyers still may not advance a civil claim by threatening unrelated criminal allegations. That's extortionate even if the criminal accusation and the civil claim are factually supported, not fabricated. Authorities will find extortionate threats to be "prejudicial to the administration of justice" under Model Rule of Professional Conduct 8.4(d) or "to have no substantial purpose other than to embarrass . . . a third person" under Model Rule 4.4(a).

And it is not only threats to instigate criminal charges that are extortionate. Threats to cause other harms may also be improper if they are unconnected to the underlying civil claim. For example, a defense lawyer who knows that the plaintiff is an undocumented immigrant may not threaten to report the plaintiff to immigration authorities in order to extract a settlement of a lawsuit that has nothing to do with the plaintiff's immigration status. N.C. State Bar, Formal Ethics Op. 2005-3 (2005).

Litigators also risk sanction—or worse—if there is no legitimate basis for their threatened action. In *State v. Hynes*, 978 A.2d 264 (N.H. 2009), for example, the court upheld a lawyer's extortion conviction for baselessly threatening to sue a beauty salon for discriminatory pricing if it did not compensate him.

And litigators may be punished for threatening to cause more than the ordinary embarrassment that comes with litigation. For example, a lawyer was recently sanctioned for trying to compel a settlement by threatening to issue press releases and use other extrajudicial means to embarrass the opposing party. *In re Matter of Strojnik*, No. PDJ 2016-9083 (Ariz. Nov. 16, 2016).

The threats in the English *Ferster* case probably crossed the line even by U.S. standards. On the other hand, it is easy to stay on the right side of the line, and U.S. litigators don't often cross it. They may still threaten to bring colorable civil lawsuits, inflicting all the pain that such lawsuits conventionally entail. ■