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PERSPECTIVE

The conviction of Michael Avenatti: A 'lessons learned' analysis for hardball litigators

By Mathew Rosengart

Less than 15 months ago, attorney Michael Avenatti was a media darling, a fixture on cable television, and a self-proclaimed potential presidential candidate. Although it was his representation of adult film actress Stephanie Clifford, aka "Stormy Daniels," which brought him national attention (and later, a separate indictment for fraud), he previously obtained awards against large corporations that reportedly exceeded $100 million and appeared in two positive "60 Minutes" segments featuring his clients.

Today, he is a disgraced federal convict, incarcerated and awaiting sentencing and probable disbarment after a New York jury found him guilty last month of criminal extortion. While many political and other commentators have observed Avenatti's downfall with glee, or horror, there are lessons litigators can draw from his misconduct, particularly those who, like Avenatti, might be tempted to fly too close to the sun.

The government's extortion case against Avenatti was based on his efforts to extract more than $20 million from a public company (Nike), purportedly on behalf of his client who coached an amateur youth basketball team sponsored by Nike, by threatening to inflict "substantial financial and reputational harm" on Nike if his financial demands were not met.

New York Times News Service

Michael Avenatti outside the federal courthouse in Manhattan after a series of hearings on Tuesday, May 28, 2019.

Although Avenatti's misconduct appears especially obvious in hindsight, many practitioners undoubtedly come closer to the line than they might think.

Anticipating Avenatti's trial defense — that Avenatti was merely acting as an aggressive, "hard-ball" litigator engaged in the type of settlement negotiations that often occur in high-stakes cases — United States Attorney Geoffrey Berman announced at the time of Avenatti's arrest that although Avenatti used legal terms like "claims," "fees" and "settlements" during his allegedly-extortionate scheme, Avenatti was, in fact, "not acting as an attorney" and these terms were "mere devices to provide cover" for his criminal misconduct. As Berman pointedly stated, "By engaging in the conduct alleged in the complaint, Avenatti was not acting as an attorney. A suit and tie doesn't mask the fact that, at its core, this was an old fashioned shake down."

The charges were obviously serious, but the case was not a slam dunk. Unlike Avenatti's upcoming criminal case in California involving charges for fraud and embezzlement (the type of garden variety charges routinely brought by federal prosecutors), many practitioners were surprised by the charges brought in the New York case. Indeed, lawyers often make implicit or even explicit threats to opposing counsel that in the absence of a confidential settlement, a public lawsuit will generate negative publicity for his or her adversary. It is, in fact, fundamental that threats to file non-sham civil suits are typically "not within the scope of the extortion statutes, even though [counsel's] execution of the threat could result in public disgrace or prosecution." "A Rationale of the Law of Aggravated Theft," 54 Colum. L. Rev. 84, at 94 (1954). Where, then, did Avenatti cross the line? Why was his conduct criminal, and what lessons can litigators learn from his misconduct?

Although there is no clear, brightline test, an examination of the facts in *United States v. Avenatti* is instructive and will help ensure that good lawyers stay on the right side of the line, representing their clients zealously — and equally important, of course, also ethically.

Initially, although Avenatti's counsel mustered a potentially-viable trial defense — that Avenatti was a lawyer, retained by his client for precisely the brash, aggressive tactics that made him famous, and he was only doing his job as a lawyer by employing those tactics in seeking a settlement from Nike — the facts in *Avenatti* (and Avenatti's own, law enforcement-recorded, statements) were egregious. According to the charging documents, in direct exchange for refraining from holding his threatened press conference, Avenatti not only demanded $1.5 million for his client, he also demanded to be *retained by Nike* to conduct

an "internal investigation" and *personally paid* (along with his co-counsel) between $15 and $25 million. He also threatened, in a call recorded by law enforcement, that if Nike failed to agree to his financial demands immediately, "I'll go ... take ten billion dollars off [Nike's] market cap."

Ratcheting up his threats, Avenatti later demanded, this time during a surreptitiously-recorded in-person meeting, an immediate $12 million retainer to be "deemed earned when paid," with a minimum guarantee of $15 million. When Nike's counsel balked, Avenatti responded by asking, in part, whether that attorney had ever "held the balls of the client in your hand where you could take five or six billion dollars market cap off of them?" As part of this "negotiation" discussion, Avenatti then told opposing counsel that "If [Nike] wants to have one confidential settlement and we're done, they can buy that for twenty-two and half million dollars and we're done ... Full confidentiality, we ride off into the sunset," adding that "I just wanna share with you what's gonna happen, if we don't reach a resolution," stating that "as soon as this becomes public, I am going to receive calls from all over the country ... and the company will die — not die, but they are going to incur cut after cut after cut, and that's what's going to happen as soon as this thing becomes public."

Avenatti's own statements speak for themselves. The crux of his misconduct — which evidently emanated from greed and desperation (he was allegedly millions of dollars in debt, in the midst of fending off various civil claims and tax debts, and had filed bankruptcy) — was primarily his naked threats to expose sensational information *unrelated* to the putative litigation in order to damage Nike, both civilly and criminally; an explicit quid pro quo concerning his looming press conference designed to cost Nike "billions;" and seeking a massive "legal fee" *from his opponent*. Even putting aside his bombastic language and lack of nuance, as the government alleged and the jury determined, Avenatti misused his client's information in an effort to engage in what the U.S. Attorney labelled an "old fashioned shakedown." While seeking a $1.5 settlement for his client, Avenatti seemed far more fixated on extracting an inflexible $15-$25 "fee" for himself (and co-counsel), *from his adversary*. And if his financial demands were not met immediately, he would, in his own words and without "f-g around," hold a press conference disclosing unrelated information, which would "take ten billion dollars off your client's market cap."

While Avenatti's misconduct appears especially egregious in hindsight and, as such, might seem easy to dismiss, his case is actually very relevant because many practitioners undoubtedly come closer to the line than they might think. Indeed, competent litigators understand their obligation to represent clients zealously. In so doing, they must communicate with opposing counsel, sometimes aggressively — and sometimes the preferred method of dispute resolution (for both sides) is pre-litigation settlement, *before* a case gets to court. As a leading California case observed more than 40 years ago, commencing litigation is "only one means to achieve satisfaction for a client." To avoid litigation, it is a "well established legal practice to communicate promptly with a potential adversary [in a demand letter], setting out the claims made upon him, urging settlement, and warning of the alternative of judicial action." *Lerette v. Dean Witter Organization Inc.*, 60 Cal.App.3d 573, 577 (1976). Those "warnings," not unlike (but certainly more subtle than) Avenatti's, often reference economic or other costs associated with litigation.

Had Avenatti sent a demand letter stripped of his outrageous threats, which was nuanced and professional — even one that erred on the side of aggressiveness — he likely would have avoided indictment. He might have even obtained a handsome settlement for his client and proportional legal fees for himself.

For various reasons, including its necessity to the adversarial system, to save judicial resources, and having been endorsed by courts and scholars, the demand letter-paradigm will likely not change any time soon. When practiced prudently and ethically, it may well serve the clients' best interests. *See* ABA, Canon of Professional Ethics No. 15; *see also* ABA Canons of Professional Conduct 15. But given increased scrutiny that will likely come with the Avenatti conviction, thoughtful counsel should take heed and act with caution and care, learning the lessons from that case.

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