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## ■ THE 'EXTORTION' FACTOR

# Waging the P.R. battle

By Debra S. Katz & Andrew Schroeder SPECIAL TO THE NATIONAL LAW JOURNAL

IMAGINE THAT A client comes to you and says that her immediate supervisor, a prominent public figure, has engaged in conduct that she thinks constitutes sexual harassment. She says that he has demanded that she participate in phone sex and that he has subjected her to offensive conduct over her repeated objections. Instead of threatening to reveal the explosive material in the news media or to her boss's family, she has retained you—an experienced employment lawyer—to handle the matter discreetly and professionally.

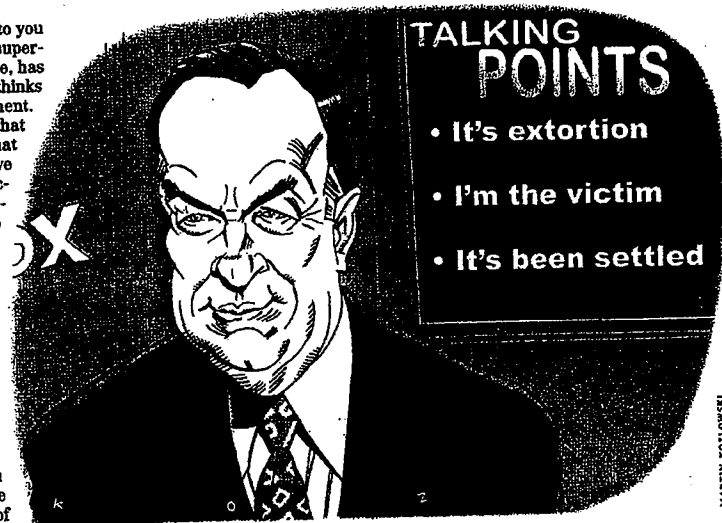
You carefully draft a confidential letter alerting your client's employer to a harassment claim and seeking to reach a settlement. The employer, in response to your letter, then engages in a number of confidential negotiations with you, during which you place a settlement figure on the table and even provide a draft of the complaint you would be prepared to file. But instead of a counteroffer or some other typical response, you, your client and your firm are answered with a suit for attempted extortion.

Imagine, in short, that you are Benedict Morelli, the attorney for Andrea Mackris. Morelli attempted to resolve, privately and confidentially, Mackris' sexual harassment claims against Bill O'Reilly, the outspoken host of *The O'Reilly Factor*, for which Mackris worked as an associate producer. After participating in confidential settlement negotiations, Fox News and O'Reilly sued her, Morelli and Morelli's law firm for attempted extortion.

O'Reilly's pre-emptive strike left Morelli no choice but to assert Mackris' claims in court. After a nasty public relations war, the parties have settled both lawsuits.

The settlement threatens to bury, and thereby shield from public censure, a defense strategy that should appall anyone concerned about abuse of the judicial system: O'Reilly's strategy was not a legal strategy at all, but a public relations ploy seeking to trade on a pernicious stereotype of female civil rights plaintiffs as wily dependents shaking the money tree (hence O'Reilly's rush to publicize Mackris' alleged financial woes). The attempted extortion claim, and the other torts tagged onto it, were destined to fail as a legal matter. Because neither Fox News nor O'Reilly paid the alleged "extortion," their claim translated into

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"attempted" extortion. But neither the state of New York nor any court system, state or federal, recognizes such a common law claim. Courts have overwhelmingly held that statements in demand letters and confidential settlement negotiations that ensue are privileged and cannot form the basis of such claims.

So perhaps Fox and O'Reilly thought their case merited a legal revolution. After all, Mackris had the audacity to threaten to bring a sexual harassment suit against O'Reilly and her lawyer allegedly demanded \$60 million. Forget that Fox and its parent corporation were engaged in active negotiations, forget that O'Reilly generates \$60 million in revenue per year at Fox and forget that this number would have been relevant to any determination of punitive damages against him and Fox News.

At the heart of extortion is duress. Yet in response to Morelli's demand, Fox and O'Reilly had numerous options. They could have counteroffered, rejected the offer, awaited the suit and then moved to dismiss it or sought sanctions once the suit was filed. (After filing an extortion suit that made Mackris' allegations public, it would have taken a lot of cheek for O'Reilly and Fox to have argued that the threatened disclosure of Mackris' allegations was coercive.)

Nor was the suit supported by any public policy rationale. If an extortion lawsuit was deemed an acceptable defense to a high settlement offer, plaintiffs would have no incentive to pursue a settlement—the type of resolution that the law favors—and plaintiffs would head directly to court. Moreover, in any settlement discussions that did survive, defense counsel would become the arbiters

of reasonableness, a prospect that is anathema to our adversarial system.

Ultimately, O'Reilly would have been the big loser, at least legally: Courts have uniformly held that filing a lawsuit against a woman claiming sexual harassment constitutes retaliation under federal and state anti-discrimination laws. Mackris amended her suit, adding claims for retaliation, which she likely would have won. So what was O'Reilly up to?

### Winning the P.R. wars

O'Reilly coveted the initial salvo in the public relations war. According to Mackris' complaint—which was so detailed that Fox's lawyers made a motion for the production of tape recordings—O'Reilly allegedly had numerous telephone conversations with Mackris during which he encouraged her to buy a vibrator, offered to help her use it, told her about his sexual liaisons with other women and subjected her to other vulgarities. According to the complaint, O'Reilly, a married father of two, also allegedly told Mackris that "[i]f any woman ever breathed a word I'll make her pay so dearly that she'll wish she'd never been born." He also told her that any woman who challenged him would not be believed, would be considered "unstable" and raked through the mud.

O'Reilly chose to marshal public opinion on the basis of a sexist stereotype. While a settlement is generally a favored and acceptable resolution of a sexual harassment suit, we must take care not to encourage the public-relations strategy pursued here. The allegations of civil rights plaintiffs are fairly tested in court—not on the front pages of tabloids or in calls to *The O'Reilly Factor*. ■

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