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The Business of Law and Tortious Interference The Fourth Annual Symposium on Legal Malpractice and Professional Responsibility.

Alex B. Long

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THE BUSINESS OF LAW AND TORTIOUS INTERFERENCE

ALEX B. LONG*

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* Assistant Professor of Law, Oklahoma City University School of Law. My thanks to Professor Vincent R. Johnson for reading an earlier draft of this Article and inviting me to participate in the symposium. Thanks also to Kim Williams and the other members of the *St. Mary's Law Journal* for their work in organizing the symposium. Finally, thanks to Lee Peoples, reference librarian extraordinaire, for his assistance in locating material.

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I. Introduction

A client who is unhappy with her attorney's handling of a matter approaches opposing counsel and indicates a willingness to settle without the assistance of counsel.[1] A prospective client who is dissatisfied with her current attorney contacts an attorney to discuss the client's concerns.[2] Tensions develop between two attorneys with joint responsibility for the representation of a client to the point where they are unable to work together any longer and cannot agree who will continue to represent the client.[3] An associate in a law firm plans to leave the firm and start up a new practice and contemplates contacting firm clients about the possibility of representing them after he departs.[4] Each of these scenarios is fraught with potential disciplinary peril for the attorneys in question. Depending upon how the attorney in each scenario proceeds, each scenario is also fraught with the potential for civil liability in the form of a claim of tortious interference with contractual relations.

Typically thought of as torts for the rough and tumble commercial world,[5] the basic elements of the interference torts are, in reality, malleable enough to be utilized in settings having little to do

1. *See* Liston v. Home Ins. Co., 659 F. Supp. 276, 280 (S.D. Miss. 1986) (involving a client who decided to handle the case herself after her attorney failed to keep her informed about the case).

2. Philadelphia Bar Ass'n Prof'l Guidance Comm., Informal Op. No. 2000-1 (2000).

3. *See* Madorsky v. Bernstein, 626 N.E.2d 694, 695 (Ohio Ct. App. 1993) (illustrating a situation where attorneys cannot work jointly on a case).

4. *See* Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175, 1177-78 (Pa. 1978) (noting that after his employment termination, attorney contacted clients to procure business for his new firm).

5. *See generally* Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097, 1098-99 (1993) (discussing broadly the torts in the antitrust context).

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with business.[6] Even in situations more closely resembling the standard commercial setting, a plaintiff who has limited or non-existent contractual rights is not necessarily barred from asserting a tortious interference claim. Most jurisdictions recognize a cause of action for interference with a contract terminable at will or interference with prospective contractual relations.[7]

One frustrating feature of the interference torts is the difficulty in defining precisely when an intentional interference becomes "tortious."[8] While there has been no shortage of proposals to better define the interference torts, there is widespread uncertainty and dissatisfaction concerning the current state of the law.[9] Questions as to which party bears the burden of proof regarding the question of the propriety of an interference, the relevance (if any) of the defendant's motive for interfering, and the means a defendant may use to accomplish the interference often go unaddressed by courts or, to the extent they are addressed, are treated in a somewhat careless manner.[10] The result has been that, despite over a century of experience, it remains extremely difficult to pre-

6. *See* William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985, 1030-31 (2001) (noting the similarity between the interference torts and the tort of alienation of affections); Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 BAYLOR L. REV. 79, 84-85 (2003) (discussing tortious interference with inheritance).

7. *See* William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985, 1030 n.238 (2001) (pointing out that Louisiana recognized the tort in 1989 and was the final state to do so).

8. *See* W. PAGE KEETON & WILLIAM L. PROSSER, PROSSER AND KEETON ON THE LAW OF TORTS § 129 (5th ed. 1984) (referring to the tort of interference with contract as "a rather broad and undefined tort in which no specific conduct is proscribed and in which liability turns on the purpose for which the defendant acts, with the indistinct notion that the purposes must be considered improper in some undefined way").

9. *See generally* Amy Timmer, *Interference with Prospective Contractual Relations: A Tort Only a Mind Reader Could Plead in the Michigan Courts*, 45 WAYNE L. REV. 1443, 1447 (1999) (discussing the wide spread confusion among Michigan courts as to what constitutes improper conduct).

10. *See* Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 721-24 (Tex. 2001) (cataloging the Texas Supreme Court's failed attempts to adequately define the interference torts).

dict in any given case whether a defendant's intentional interference will ultimately be determined to be improper or tortious.[11]

Attorneys have not been spared from the confusion. Attorneys have faced potential liability under a tortious interference theory for actions ranging from filing frivolous lawsuits[12] to questioning witnesses at trial.[13] However, it is on the business side of the practice of the law, rather than the practice side, that attorneys are more likely to actually be held liable for tortious interference. Business realities increasingly occupy the time and energy of attorneys.[14] Aside from the costs associated with malpractice insurance, advertising, and overhead, the ever increasing number of lawyers necessarily means increased competition for clients.[15] While few in the legal profession would be so crass as to refer to a client as "property,"[16] it is difficult to believe that some lawyers do not believe they possess something similar to property rights in their retainer agreements with clients.

Not surprisingly, a tortious interference claim is a viable option for an attorney who feels that another attorney has wrongfully "stolen" a client or otherwise interfered with the attorney's "property." In many situations, both the plaintiff and the defendant are attorneys and the relationship that the defendant is accused of interfering with is the plaintiff-attorney's relationship with a client. Courts have traditionally been reluctant to hold attorneys liable for *litigation* conduct that results in harm to adversaries or their attorneys.[17] However, plaintiff-attorneys generally have a better chance

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11. *See* Gary D. Wexler, *Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations*, 27 CONN. L. REV. 279, 295 (1994) (noting that "[e]very case turns out to be essentially an ad hoc determination").

12. Mantia v. Hanson, 79 P.3d 404, 406 (Or. Ct. App. 2003).

13. Maynard v. Caballero, 752 S.W.2d 719, 720 (Tex. App.—El Paso 1988, writ denied).

14. *See* William N. Clark, *President's Page*, 65 ALA. LAW. 8, 8 (Jan. 2004) (noting that one significant change in the legal profession over the last thirty-five years has been "the focus on the practice of law as a business rather than as a service profession").

15. David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203, 203-04 (2004).

16. Robert W. Hillman, *The Property Wars of Law Firms: Of Client Lists, Trade Secrets and the Fiduciary Duties of Law Partners*, 30 FLA. ST. L. REV. 767, 768 (2003).

17. *See* Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 607-08 (Fla. 1994) (concluding that the absolute litigation privilege applicable to defamation actions applies to any act occurring during the course of a judicial

of succeeding when they complain that another attorney, while engaging in the *business* of law, has interfered with an attorney-client relationship.[18]

As this Article argues, the risk that courts run in being too quick to classify such action as "improper" interference is that they may undermine two fundamental goals of the law governing lawyers: informed client decision making with respect to the goals of representation and informed client choice with respect to who will conduct the representation. Part II provides the basic background for understanding tortious interference claims and some of the definitional problems associated with such claims. Next, Part III discusses the special problems that interference claims may present when both parties are attorneys and the relationship in question is an attorney-client relationship. Finally, Part IV explores several reoccurring fact patterns involving attorney liability for tortious interference, including interference in the form of settlement of a client's claims, interference by a rival attorney, interference by an attorney providing advice to a represented client, and interference by an attorney who is, or was, associated with a plaintiff-attorney. This Article argues that the question of whether an attorney's interference is "improper" in these contexts should hinge less on whether a plaintiff's "property" interest in maintaining its relationship with a client has been disrupted and more on whether the defendant's conduct furthers or frustrates the goals of informed client decision making and informed client choice.

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proceeding, regardless of whether the act involved a defamatory statement or other tortious behavior); Toles v. Toles, 113 S.W.3d 899, 910-11 (Tex. App.—Dallas 2003, pet. denied) (explaining that attorneys are generally immune for torts resulting from litigation conduct with the exception of actions for fraud or civil conspiracy).

18. *Compare Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A.*, 639 So. 2d at 608 (concluding that the absolute litigation privilege applicable to defamation actions applies to any act occurring during the course of a judicial proceeding, regardless of whether the act involved a defamatory statement or other tortious behavior), *with* Ingalsbe v. Stewart Agency, Inc., 869 So. 2d 30, 33 (Fla. Dist. Ct. App. 2004) (holding that the absolute litigation privilege did not apply in the context of an interference claim involving a defendant who settled directly with a represented party without the approval of the party's attorney).

II. The Nature of Tortious Interference Claims

A. *Interference with Contractual Relations*

Although the phrase "tortious interference" is often used in a generic sense, there are in fact at least two distinct classes of tortious interference claims – interference with contract and interference with prospective contractual relations[19] (also known as interference with prospective economic relations, economic advantage, or business relations). According to the Restatement (Second) of Torts, common law had long recognized a cause of action against one who interfered with the prospective contracts of another.[20] In all of these cases, "the actor's conduct was characterized by violence, fraud or defamation, and was tortious in character."[21] The impetus for change in this state of affairs came from *Lumley v. Gye*,[22] an 1853 English case involving a defendant's inducement of an opera singer to breach her contract with another and sing for the defendant instead. Foreshadowing the view that would pervade American cases prior to the publication of the Restatement (Second) of Torts, it was the act of intentional interference itself that was the basis of liability in *Lumley*.[23] Eventually, the same standard was adopted in cases involving interference with relationships not reduced to contractual form.[24] Thus, throughout much of the twentieth century, the mere fact that the defendant knowingly and intentionally caused a third person not to perform a contract was a sufficient basis to impose liability.[25] It was then up to the defendant to establish that he or she was justified in taking such action or had a privilege to do so.[26] This approach to the tort reflected the view that, aside from creating obligations on the part

19. Restatement (Second) of Torts §§ 766, 766B (1977).

20. *Id.* § 766B cmt. b.

21. *Id.*

22. 118 Eng. Rep. 749, El. & Bl. 216 (1853).

23. Restatement (Second) of Torts § 766B cmt. b.

24. *Id.*

25. Clark A. Remington, *Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher As Wrongdoer*, 47 Buff. L. Rev. 645, 655 (1999).

26. *See* Chaves v. Johnson, 335 S.E.2d 97, 103 (Va. 1985) (noting that justification or privilege is an affirmative defense, the burden of which rests on the defendant).

of the contracting parties, a contract "imposes on all the world the duty of respecting that contractual obligation."[27]

In a case involving interference with a contract by an attorney, there are several recognized privileges that might apply. According to the Restatement (Second) of Torts, one who is charged with responsibility for the welfare of a third person (such as an attorney for a client) and who intentionally causes that person not to perform a contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor does not employ wrongful means and acts to protect the welfare of the third person.[28] Similarly, "[o]ne who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person . . . honest advice within the scope of a request for the advice."[29]

While some courts continue to recognize mere intentional interference as actionable,[30] the Restatement (Second) of Torts dispensed with the concepts of justification or privilege and instead clarified that a defendant's conduct is actionable, if he or she intentionally and *improperly* interfered with the contractual relation of another.[31] Thus, mere intentional interference ordinarily is not a basis for liability. Instead, the interference must be "improper."

Although questions of causation and intent are sometimes relevant, in most instances the chief dispute will center on whether the interference was improper. Section 767 of the Restatement (Second) of Torts lists seven factors to consider in making this determination:

(a) the nature of the actor's conduct,

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27. Klauder v. Cregar, 192 A. 667, 668 (Pa. 1937).
28. RESTATEMENT (SECOND) OF TORTS § 770.
29. *Id.* § 772(b).
30. Tiernan v. Charleston Area Med. Ctr., Inc., 506 S.E.2d 578, 591-92 (W. Va. 1998).
31. RESTATEMENT (SECOND) OF TORTS § 766. The Restatement explains that:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Id.

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(b) the actor's motive,
(c) the interests of the other with which the actor's conduct interferes,
(d) the interests sought to be advanced by the actor,
(e) the societal interests in protecting the freedom of action of the actor and the contractual interests of the other,
(f) the proximity or remoteness of the actor's conduct to the interference and
(g) the relations between the parties.[32]

One of the chief criticisms of tortious interference claims is the lack of clarity concerning when an interference becomes "improper."[33] The approach of the original Restatement of Torts, which required the defendant to establish a justification or privilege for the interference, has been criticized on the ground that it imposes too little of a burden on the plaintiff in the sense that it makes any knowing and intentional interference *prima facie* tortious.[34] While the authors of the Restatement (Second) of Torts abandoned the concepts of privilege and justification because they believed that the use of such concepts was not particularly helpful,[35] it is certainly debatable whether Section 767's seven-factor test represents a substantial improvement.[36] Given the difficulties inherent in applying such a test, some courts have simplified the inquiry by stating that an improper (or unjustified or unprivileged) interference is one in which the defendant either acted with an improper purpose or accomplished the interference through the use of improper means.[37] Still others have forthrightly concluded that

32. *Id.* § 767.

33. *See* Marina Lao, *Tortious Interference and the Federal Antitrust Law of Vertical Restraints*, 83 IOWA L. REV. 35, 54 (1997) (noting that many critics find "the liability standard for the tort . . . intolerably vague"); William J. Woodward, Jr., *Contractarians, Community, and the Tort of Interference with Contract*, 80 MINN. L. REV. 1103, 1129 (1996) (discussing how critics find it difficult to distinguish between actionable and nonactionable situations).

34. Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 303 (Utah 1982).

35. *See* RESTATEMENT (SECOND) OF TORTS § 767 cmt. b (indicating that because interference with contract is not as developed as other intentional torts, Section 767 "is expressed in terms of whether the interference is improper or not, rather than in terms of whether there was a specific privilege to act in the manner specified").

36. *See* Kutcher v. Zimmerman, 957 P.2d 1076, 1085 (Haw. Ct. App. 1998) (noting that other jurisdictions have concluded that the Restatement (Second) of Torts Section 767's list of seven factors to consider in assessing the wrongfulness of the defendant's conduct is unworkable).

37. Top Serv. Body Shop, Inc. v. Allstate Ins. Co., 582 P.2d 1365, 1371 (Or. 1978).

what constitutes improper or wrongful interference is incapable of precise definition[38] and that the ultimate test in such cases is simply whether the defendant's conduct was "right and just . . . under the circumstances."[39] Critics charge that the lack of clear standards results in inconsistent outcomes, with defendants sometimes being held liable for conduct involving some generalized and amorphous concept of wrongfulness or impropriety.[40]

B. *Interference with Prospective Contractual Relations and Contracts Terminable at Will*

With a claim of tortious interference with prospective contractual relations, the propriety of the defendant's interference is still in question.[41] While the analysis of interference claims involving contractual relations and prospective contractual relations is similar, courts often state that defendants have greater latitude to interfere in the case of a prospective contractual relation given the fact that no actual contract exists.[42] For purposes of this Article, the best example of this greater freedom of action is that legitimate competition is typically not considered improper in the context of an interference with a prospective relation or contract terminable at will, even if done with the specific intent of causing one party to terminate its relationship with another, provided, *inter alia*, the defendant does not employ improper means and acts, at least in part, to advance his own interest in competing with the plaintiff.[43] Indeed, the desirability of encouraging fair competition is most frequently cited as the basis for allowing defendants greater latitude to interfere in the non-contractual relationships of others.[44]

Aside from the need to preserve legitimate competition, the most obvious reason for affording existing contracts greater protec-

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38. Macklin v. Robert Logan Assoc., 639 A.2d 112, 119 (Md. 1995).

39. Myers v. Arcadio, Inc., 180 A.2d 329, 332-33 (N.J. Super. Ct. App. Div. 1962).

40. W. Page Keeton & William L. Prosser, Prosser & Keeton on the Law of Torts § 129 (5th ed. 1984); Marina Lao, *Tortious Interference and the Federal Antitrust Law of Vertical Restraints*, 83 Iowa L. Rev. 35, 56 (1997).

41. Restatement (Second) of Torts § 766B.

42. Della Penna v. Toyota Motor Sales U.S.A., Inc., 902 P.2d 740, 750-51 (Cal. 1995).

43. Restatement (Second) of Torts § 768(2) (1977).

44. *Della Penna*, 902 P.2d at 751 (advocating that the courts should recognize differing business relationships recognizing the "rewards and risks of competition"); Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 Minn. L. Rev. 1097, 1121-22 (1993).

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tion from interference than non-contractual relationships is that a plaintiff's interest in an existing contract is stronger.[45] A party to a contract has a legal right to recover damages for non-performance for the other party's failure to render its promised performance. In contrast, a party doing business with another party without the benefit a contract has only the hope, not the legal assurance that, the other party will do what the first party desires. As no contract liability attaches for the failure to continue a non-contractual relationship, the freedom to interfere with such relationships is correspondingly greater.

The concerns surrounding the vagueness of the impropriety standard are particularly pronounced in cases involving interferences with non-contractual interests or contracts terminable at will. Here, Section 767 provides only limited guidance in determining whether an intentional interference is improper. The comments suggest that even where the defendant's interference is unrelated to competition with the plaintiff, the defendant should still have greater latitude to interfere.[46] However, it is one thing to say that a defendant enjoys greater latitude to interfere in such cases and another matter entirely to define precisely what this idea means in practice. Indeed, one frequent criticism of the interference torts is the failure of courts to decouple the torts of interference with contract and interference with prospective contractual relation and the tendency to treat them interchangeably.[47] Ultimately, a judge or jury is guided back to the same factors listed in Section 767 that determine whether an interference with a contract is improper – a test some have already criticized as being unworkable when applied to interferences with existing contracts.[48]

C. *Efficient Breach Criticisms*

Aside from the criticisms surrounding the uncertain impropriety standard, the most relevant criticism for purposes of this Article is that liability for intentional interference with contractual or pro-

45. *See* RESTATEMENT (SECOND) OF TORTS § 767 (indicating that the issue in each tortious interference case is whether it was proper under the circumstance).

46. *Id.* cmt. e.

47. Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 720-21 (Tex. 2001).

48. Kutcher v. Zimmerman, 957 P.2d 1076, 1088-89 (Haw. Ct. App. 1998).

spective relations may discourage efficient breaches.[49] As described most often, an efficient breach is one in which two of the three parties believe they are made better off by the fact of the breach and the other party is put in no worse a position.[50] By imposing liability upon a party who encourages another to take action that amounts to an efficient breach, critics charge, tortious interference with contract claims result in inefficiency and have the potential to discourage competition.[51] Thus, for example, some critics have charged that tortious interference claims are incompatible with the inherently competition-based principles underlying antitrust law.[52]

These efficiency concerns are most pronounced in instances of interference with prospective contractual relations. In such cases, the plaintiff obviously does not have an actual contract with which the defendant can interfere. In these instances, critics charge, the tort not only has the potential to discourage behavior that benefits two of the three parties, it also imposes liability on one party for encouraging another to do what that party already has a legal right to do.[53] In other words, "[i]f there is no right against the promisor for breach of contract, how can there be a right against a third party for interfering with 'it'?"[54]

While the privilege to engage in legitimate competition alleviates some of these concerns with respect to interferences with prospective relations, the privilege does not apply to interferences with existing contracts.[55] Moreover, the existence of a "competitor's privilege" does not completely eliminate the threat of discouraging efficient breaches. Even with respect to competition that results in

49. Fred S. McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUDIES 131, 136 (1999); Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 95-96 (1982); Clark A. Remington, *Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher As Wrongdoer*, 47 BUFF. L. REV. 645, 674 (1999).

50. Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085, 1091 (2000).

51. Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L REV. 1097, 1132-34 (1993).

52. *Id.* at 1137-38.

53. William J. Woodward, Jr., *Contractarians, Community, and the Tort of Interference with Contract*, 80 MINN. L. REV. 1103, 1113 (1996).

54. *Id.*

55. RESTATEMENT (SECOND) OF TORTS § 768(2) (1977).

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one party deciding not to enter into a contractual relation with a plaintiff, a defendant who employs improper means or acts with an improper purpose may lose the privilege to interfere. While some forms of conduct, such as bribery, obviously constitute the use of "improper means," others, such as conduct that allegedly violates established business customs, may fall into the netherworld between legally wrongful and morally wrongful conduct.[56] Reliance on the defendant's purpose in order to determine the propriety of interference may also prove problematic. Particularly in the commercial context, juries may be inclined to view competitive and otherwise accepted business practices (albeit it bare-knuckled) as objectionable, thus leading to a finding of some "ill-defined 'improper purpose.'"[57] Others have argued that the fact that a defendant may have acted from some improper purpose does not necessarily mean that a socially undesirable result occurs by virtue of one party ending its relationship with another; a breach or termination that results from a defendant's personal animosity may nonetheless be efficient.[58]

D. *Recent Attempts to Decouple the Interference Torts*

Despite *Lumley* and its progeny, some states remained wedded throughout the twentieth century to the pre-*Lumley* conception of the torts by requiring some independently tortious act in order to constitute actionable interference.[59] While most courts have never officially abandoned inquiry into the defendant's allegedly improper purpose as a basis for imposing liability, the defendant's use of allegedly improper means has more frequently become the focus

56. *See* RESTATEMENT (SECOND) OF TORTS § 767 cmt. c (1977) (noting that violation "of established customs or practices regarding disapproved actions or methods may also be significant in evaluating the nature of the actor's conduct as a factor in determining whether his interference with the plaintiff's contractual relations was improper or not").

57. Pratt v. Prodata, Inc., 885 P.2d 786, 789 n.3 (Utah 1994).

58. *See* Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 95 (1982) (explaining that a party "motivated by pure malice may choose competitive means to accomplish his purpose" producing socially beneficial results).

59. *See* Watson Rural Water Co., Inc. v. Indiana Cities Water Corp., 540 N.E.2d 131, 139 (Ind. Ct. App. 1989) (stating that in the context of an interference with a business relationship claim, a necessary element is that the defendant acted illegally in achieving his end and citing older cases to this effect); MacKerron v. Madura, 445 A.2d 680, 683 (Me. 1982) (stating that the plaintiff must establish that the defendant, through fraud or intimidation, induced the breach of a contract and citing older Maine cases to this effect).

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or at least the decisive factor in assessing whether an interference was improper, at least in the context of terminable at-will contracts or contractual expectancies.[60] In some instances, courts have formally adopted an improper means approach in cases involving interferences with contracts terminable at will and/or prospective contractual relations.[61]

In 2001, the Supreme Court of Texas adopted this standard in *Wal-Mart Stores, Inc. v. Sturges*.[62] The case involved Wal-Mart's successful attempt to prevent a prospective buyer from purchasing land that Wal-Mart desired. Wal-Mart held a right to restrict the development of a parcel of land adjacent to its store.[63] The plaintiff had a contract to purchase the lot. The contract gave the plaintiff a right to terminate the agreement if he was unable to lease the property or obtain Wal-Mart's approval to allow the plaintiff's desired use of the land.[64] The plaintiff had obtained a non-binding memorandum of agreement from a prospective lessor to lease the property.[65] Unbeknownst to the plaintiff, Wal-Mart itself wished to expand its store and desired the land in question.[66] In an effort to acquire the property, Wal-Mart decided not to grant the modification and informed the prospective lessor that Wal-Mart wished to purchase the property and that if it was unable to do so, it would close its store and relocate.[67] As the prospective lessor was not interested in the parcel without a Wal-Mart store next door, he canceled his letter of intent with the plaintiff.[68]

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60. *See* Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 725-26 (Tex. 2001) (suggesting the need to "look past the language of opinions and consider the conduct for which defendants have actually been held liable" and concluding that in most Texas cases in which defendants have been held liable for interference with prospective business relations, the conduct has been either independently tortious or in violation of state law).

61. Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 954 (Cal. 2003); Levee v. Beeching, 729 N.E.2d 215, 222 (Ind. Ct. App. 2000); McGeechan v. Sherwood, 760 A.2d 1068, 1081 (Me. 2000); Trade 'N Post, L.L.C. v. World Duty Free Arms, Inc., 628 N.W.2d 707, 719 (N.D. 2001); *Wal-Mart Stores, Inc.*, 52 S.W.3d at 726; Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co., 493 S.E.2d 375, 378 (Va. 1997); Duggin v. Adams, 360 S.E.2d 832, 836 (Va. 1987).

62. 52 S.W.3d 711 (Tex. 2001).

63. Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 713 (Tex. 2001).

64. *Id.*

65. *Id.* at 714.

66. *Id.*

67. *Id.*

68. *Wal-Mart Stores, Inc.*, 52 S.W.3d at 714.

In addressing the plaintiff's interference claim, the court took the opportunity to clarify what it perceived to be an unsettled state of affairs regarding the elements of a claim of tortious interference with a prospective business relation. After reviewing the evolution of the interference torts and reviewing the uncertainty in standards that had emerged both in Texas and nationwide, the court concluded that to recover for tortious interference with a prospective business relation a plaintiff must prove that the defendant's conduct was independently tortious or unlawful.[69] The court was careful to note that its announced rule treated interferences with business relations differently than interferences with contracts.[70] With an interference with a contract, the court explained, the burden is on the defendant "to show some justification or privilege for depriving another of benefits to which the agreement entitled him."[71] Given the lesser interest that a plaintiff has in a non-contractual relationship, however, a less stringent standard should apply.[72] As there was no evidence that Wal-Mart's communications with the prospective lessor were false, fraudulent, or in any other way independently tortious or wrongful, the court reversed the jury verdict in favor of the plaintiff on his tortious interference claim.[73]

The Texas Supreme Court also attempted to explain what it meant by its use of the phrase "independently tortious." According to the court, conduct is independently tortious where it is already recognized to be wrongful under common law or by statute.[74] However, a plaintiff need not establish that the defendant's conduct actually amounted to an independent tort; instead, a plaintiff must establish that the defendant's conduct violated some established tort *duty*.[75] Thus, for example, a defendant who threatens a third party with physical harm if the party does business with the plaintiff has engaged in independently tortious conduct, even if the conduct might not amount to the tort of assault.[76]

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69. *Id.* at 726.

70. *Id.* at 727.

71. *Id.*

72. *Id.*

73. Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 727-28 (Tex. 2001).

74. *Id.* at 713.

75. *Id.*

76. *Id.*

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III. The Trouble with the Interference Torts

"The practice of law is a profession, not merely a business."[77]

The interference torts pose several problems for courts when the relationship with which a defendant is accused of interfering is an attorney-client relationship. These problems arise from the terminable at-will nature of such relationships, the extent to which the law governing lawyers seeks to preserve the ability of clients to exercise the right to terminate an attorney-client relationship, and the difficulty in defining what constitutes "improper" interference by an attorney subject to competing duties and obligations.

A. *The Special Case of Contracts Terminable at Will*

One issue not addressed by the Texas Supreme Court is how to evaluate a claim of interference with a contract terminable at will. Contracts that are terminable at-will occupy something of a grey area in tortious interference theory. In the typical interference case, the fact that a contract is terminable at will is not necessarily a bar to a tortious interference claim.[78] According to the Restatement (Second) of Torts, such contracts are "valid and subsisting,"[79] thus leading one to believe that outsiders have less freedom to interfere with their performance than in the case of non-contractual expectancies. However, the comments go on to clarify that a party's interest in a contract terminable at will is primarily an interest in future relations between the parties; thus, it "is closely analogous to interference with prospective contractual relations."[80]

Furthermore, Section 768 of the Restatement (Second) of Torts continues the analogy by providing that legitimate competition is not an improper form of interference in the case of a contract terminable at will.[81] Thus, in this respect, the Restatement treats contracts terminable at will and non-contractual relationships in an identical fashion. When one moves away from interference claims involving competition, it is less clear how much protection from

77. Model Rules of Prof'l Conduct R. 1.17 cmt. 1 (2000).

78. *See* Sterner v. Marathon Oil Co., 767 S.W.2d 686, 688 (Tex. 1989) (upholding appellate court's conclusion that tortious interference with a terminable at will contract of employment was a valid cause of action).

79. Restatement (Second) of Torts § 766 cmt. g (1977).

80. *Id.*

81. *Id.* § 768 cmt. i.

interference contracts terminable at will are afforded. Some courts treat interference with contracts terminable at will and prospective relations interchangeably; thus, defendants have greater freedom to interfere than in the case of contracts terminable for cause.[82] Others, however, either through design or inattention, have failed to draw any distinction between terminable at-will contracts and terminable for-cause contracts for purposes of an interference claim, except in instances where the interference consists of competition.[83]

The question of how to classify an interference with a contract terminable at will takes on special importance in the case of an interference with an attorney-client relationship. The law governing the attorney-client relationship reflects certain policy choices that courts, legislatures, and the organized bar have made about the nature of such relationships. First, while an attorney who has been discharged by a client may recover on a *quantum meruit* basis for the value of the services rendered,[84] the attorney-client relationship is terminable at the will of the client for any reason.[85] This feature of such relationships reflects the high value society and the legal profession places on the ability of clients to control the direction of their representation and to end their relationships with their attorneys whenever they come to believe that a continuation of that relationship is not in their best interest. Beyond this generalized policy choice that makes all attorney-client relationships terminable at the will of a client, the law governing lawyers includes several rules that reflect a concern for the freedom of clients to form and terminate such relationships beyond that found in the law governing most terminable at-will contracts.

For example, restrictive covenants that prohibit attorneys from representing particular clients after the attorneys leave a law firm are *per se* invalid on the grounds that they restrict the right of a

82. Reeves v. Hanlon, 95 P.3d 513, 520 (Cal. 2004); Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co., 493 S.E.2d 375, 378 (Va. 1997); *see also* Hansen v. Barrett, 183 F. Supp. 831 (D. Minn. 1960) (refusing to classify a claim as one of tortious interference with a contract because the contract was terminable at-will and instead classifying it as one of interference with prospective economic advantage).

83. Hall v. Integon Life Ins. Co., 454 So. 2d 1338, 1344 (Ala. 1984).

84. MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 4 (2000).

85. *Id.*

client to have counsel of his or her own choosing.[86] In most other contexts, contract law permits the use of such covenants, provided that they are not overreaching.[87] Some courts have prohibited the use of nonrefundable retainers on the grounds that such retainers prevent a client from changing counsel.[88] The law governing lawyers also protects a client's freedom of action during the course of the relationship in a manner greater than contract law. For example, clients have an absolute right to settle their claims without the consent of their attorneys.[89] Any contractual provision so limiting a client's right to settle is void as against public policy.[90]

Likewise, tort law sometimes singles out attorney-client relationships for special treatment. While many jurisdictions recognize a claim for wrongful discharge in violation of public policy when an employee is fired for reporting suspected criminal behavior on the part of an employer, at least one court has held that in-house counsel may not pursue such a whistleblower theory based in part on the unique nature of the attorney-client relationship.[91] In *Balla v. Gambro, Inc.*,[92] the Illinois Supreme Court reasoned, in part, that permitting an attorney to sue the attorney's employer/client would invite an element of distrust into a relationship that depends on continued mutual trust.[93]

These limitations are based on the idea that the values of client freedom and client choice are so essential to the attorney-client relationship that any limitations on the exercise of those values are unenforceable. While it is debatable whether contract and tort law in general do (or should) encourage efficient breaches, it is clear that the specific law governing lawyer-client relationships goes to

86. Robert M. Wilcox, *Enforcing Lawyer Non-Competition Agreements While Maintaining the Profession: The Role of Conflict of Interest Principles*, 84 MINN. L. REV. 915, 918-19 (2000).

87. *Id.* at 918.

88. Joseph M. Perillo, *The Law of Lawyers' Contracts is Different*, 67 FORDHAM L. REV. 443, 450 (1998).

89. *See* Barnes v. Quigley, 49 A.2d 467, 468 (D.C. 1946).

90. *Id.*

91. *Balla*, 584 N.E.2d at 108. *But see* Wily v. Coastal States Mgmt. Co., 939 S.W.2d 193, 200 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (holding that in house counsel may bring a claim of wrongful termination if attorney maintains obligations of confidentiality to client).

92. 584 N.E.2d 104 (Ill. 1991).

93. Balla v. Gambro, Inc., 584 N.E.2d 104, 109-11 (Ill. 1991).

great lengths to ensure a client's right to terminate such relationships. Therefore, it is not surprising that courts sometimes actually pause to consider whether a cause of action for interference with the attorney-client relationship should even exist.[94] In practice, however, virtually every jurisdiction to be confronted by such a claim has explicitly[95] or implicitly[96] recognized the validity of a claim of interference with an attorney-client relationship.

Of course, there are clearly instances in which the goals of informed client choice and decision making are not threatened by the recognition of interference claims. Unlike some other types of contractual arrangements, the attorney-client relationship exists in large measure specifically to protect a client from potentially harmful outside influences. Thus, recognizing an interference claim based upon unethical conduct by another attorney might, in some instances, actually further the goals of informed client choice and decision making. Similarly, it should matter little whether an opposing counsel, outside the presence of a party's attorney, affirmatively lies to a represented party or tells the truth while negotiating a settlement directly with a represented party; in either situation, opposing counsel is likely to take advantage of the less knowledgeable client.[97]

At the same time, there exists a certain tension in recognizing interference claims against attorneys based upon competitive *busi-*

94. State Farm Mut. Ins. Co. v. St. Joseph's Hosp., 489 P.2d 837, 840 (Ariz. 1971).

95. Conners, Fiscina, Swartz & Zimmerly v. Rees, 599 A.2d 47, 51 (D.C. 1991).

96. *See* Stuessy v. Byrd, Davis & Eisenberg, 381 S.W.2d 126, 129 (Tex. Civ. App. 1964) (discussing, in the context of a case involving interference with an attorney-client relationship, the court's wide discretion in granting temporary injunctions in attorney-client relationships). *See generally* Phoebe Carter, Annotation, *Liability in Tort for Interference with Attorney-Client Relationship*, 90 A.L.R. 4th 621 (1991) (listing cases involving interference with attorney-client relationships).

97. The same argument might apply with equal force to the situation in which an insurer negotiates directly with a represented party outside the presence of the party's attorney. *See* ERIC MILLS HOLMES & JOHN ALAN APPLEMAN, HOLMES' APPLEMAN ON INSURANCE 2D § 49.23, at 653-56 (1998) (noting statement of principles by the National Conference of Lawyers, Insurance Companies, and Adjusters, which prohibits insurance companies or their representatives from dealing directly with any claimant known to be represented by an attorney without the attorney's knowledge); Office of General Counsel, State of N.Y. Ins. Dep't, Op. 01-07-04 (July 12, 2001), *available at* http://www.ins.state.ny.us/rg107121.htm (on file with the *St. Mary's Law Journal*) (concluding that that it is improper for an independent adjuster to communicate directly with a claimant known to be represented by counsel and that such conduct may be prosecuted by New York insurance law, despite the absence of any statutory provision expressly prohibiting such action).

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ness practices that interfere with an existing attorney-client relationship. If, in each case, all a plaintiff-attorney needs to prove in order to establish a *prima facie* case of interference is the mere act of intentional interference on the part of a defendant, the specter of an interference claim may discourage third parties from providing honest advice or necessary information to represented parties that leads to the discharge of the plaintiff-attorney. As discussed, interference case law is far from uniform, and some of the recognized affirmative defenses rely heavily on the propriety of a defendant's motives in determining the validity of the defenses.[98] In some cases, a client might actually benefit from receiving such information, but would be prevented from doing so because the third party is unwilling to risk being charged with tortious interference. Thus, tortious interference claims in the attorney-client context also have the potential to undermine the values of informed client choice and decision making.

A limitation of nearly all the working approaches to the interference torts is the tendency to propose the establishment of legal rules based on the designation that the law gives a relationship, rather than acknowledging that not all contracts or contractual expectancies are created equal. A one-size-fits-all approach may result in the application of a rule to a case in which there are compelling reasons to view the mere existence of an intentional interference as more or less objectionable than in other cases, depending upon the policy judgments reflected in positive statements about such relationships. In short, mere reliance on such labels as "contract," "terminable at-will contract," or "prospective contractual relation" will often prove inadequate to capture the nuances in certain relationships and the policy choices society has made about such relationships.

In at least some instances, it would make sense to impose a higher burden on a plaintiff-attorney attempting to establish a claim of tortious interference with an attorney-client relationship, rather than the lower burden established for interferences with other kinds of existing contracts. A few judicial opinions in the specific context of interferences with attorney-client relationships contain language that seems to suggest that there must be particu-

98. *See* RESTATEMENT (SECOND) OF TORTS §§ 768, 770 (1977).

larly egregious conduct on the part of a defendant in order to support a finding of liability.[99] However, by and large, most courts have failed to establish a different test for interferences with attorney-client relationships than for interferences with other types of relationships.

At a minimum, there are compelling reasons to forsake reliance on any generic standard of "improper" interference and to establish special rules for certain types of situations. As is the case with legitimate competition in the business world, there are certain forms of "interference" with attorney-client relationships that society does not want to discourage. Where such situations can be identified, courts could establish bright-line rules defining what constitutes "improper" interference in the attorney-client context so as to preserve a client's interest in receiving useful information, while still preserving society's interest in protecting such relationships from harmful interference and a plaintiff-attorney's legitimate business interests. If society truly values the ability of a client to make decisions concerning *how* the representation will be conducted and *who* will conduct it, clients should not be frustrated in their ability to make these decisions by the threat of a tortious interference claim against a third party, assuming the third party has not otherwise acted improperly in interfering.

B. *The Difficulty in Defining "Improper" Interference*

Another difficulty in addressing interference claims against attorneys stemming from actions that are primarily business-related in nature is the difficulty in defining what constitutes "improper"

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99. *See Walsh*, 215 N.E.2d at 917-18 n.1 (holding, in the context of interference with attorney-client relationship, that a plaintiff must establish that the defendant employed unlawful means to accomplish the interference, even if the defendant's conduct was willful or without justification); *see also* Sharrow v. State Farm Mut. Auto. Ins. Co., 492 A.2d 977, 981 (Md. Ct. Spec. App. 1985), *rev'd*, 511 A.2d 492 (Md. 1986) (stating that "[i]n most of the cases finding such liability, there has been the presence of some more egregious conduct on the part of the defendant"); Richette v. Solomon, 187 A.2d 910, 912 (Pa. 1963). The *Richette* court stated that:

> A claimant or patient may, of course, disengage himself from a professional relationship provided he has met all obligations owing to his legal or medical counsellor [sic], but if that disassociation is the result of coercion or misrepresentation practiced by others, the intervenors are answerable in law as anyone else would be liable for causing the rupture of a binding contract.

Richette, 187 A.2d at 912.

interference in such situations. While this general problem permeates much of the discussion of interference claims in general, the problem is particularly pronounced in the context of an attorney who engages in primarily business-related activities that interfere with an attorney-client relationship.

1. The Murky "Independently Tortious" Standard

One of the supposed benefits of restricting interference claims to situations in which a defendant's actions were "independently tortious" is that it would allow courts and juries to focus on a more concrete standard – whether the defendant's *conduct* was improper – instead of the vague standard of whether the defendant's *purpose* was improper.[100] One possible problem with that approach is the basic difficulty in defining "independently tortious" conduct. While several courts have decoupled the interference torts and adopted "wrongful methods" or "independently tortious" standards in the case of interferences with unenforceable relationships, no clear definition of what constitutes improper conduct has yet emerged. Similar to Texas, California requires that the defendant's act must be improper or wrongful in the sense that it is "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard."[101] While Virginia requires the use of improper methods in the case of an interference with a business relationship or a contract terminable at will, the phrase "improper methods" does not necessarily mean illegal or even independently tortious.[102] Instead, improper methods may include a violation of an established standard of a trade or profession, unethical conduct, or "sharp dealing"[103] – an inherently vague concept the Texas Supreme Court rejected in *Wal-Mart Stores, Inc. v. Sturges*.[104] In contrast, Indiana requires that a plaintiff must establish that the defendant acted *illegally* in interfering with a business

100. Pratt v. Prodata, Inc., 885 P.2d 786, 789 n.3 (Utah 1994); Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 95 (1982).

101. Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 953 (Cal. 2003).

102. Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co., 493 S.E.2d 375, 378-79 (Va. 1997).

103. *Id.*

104. Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 726 (Tex. 2001).

relationship,[105] but the making of defamatory statements does not qualify.[106] The Maine Supreme Judicial Court has held in the context of an interference with a contract terminable at will that a plaintiff must establish that the defendant, through *fraud or intimidation*, induced the breach of the contract.[107]

2. Is Conduct Amounting to a Violation of a Legal Ethics Code "Improper Conduct"?

Another problem, particularly relevant to attorneys, is whether a violation of an ethical rule amounts to "independently tortious" conduct. The question of how improper conduct should be defined is particularly pronounced in the case of interference by attorneys because the behavior of attorneys is regulated, not just by statute or common law, but by ethical standards that may impose different obligations than exist under positive law. In California, for example, conduct is independently wrongful where it is "proscribed by some constitutional, statutory, regulatory, common law, or *other determinable legal standard*."[108] Would a lawyer's violation of a legal ethics code amount to a violation of a "determinable legal standard"? If not, would such conduct be "independently tortious" under another jurisdiction's definition?

As others have noted, however, there is a danger in relying upon the standards set forth in professional ethics codes to establish standards of proper conduct. As Judge Richard Posner has stated,

> the established standards of a trade or profession in regard to competition, and its ideas of unethical competitive conduct, are likely to reflect a desire to limit competition for reasons related to the self-interest of the trade or profession rather than to the welfare of its customers or clients.[109]

In the case of ethical rules prohibiting misconduct directed toward the court or a party opponent during *litigation*, such concerns are limited. Such rules are clearly designed for the benefit of the parties involved in litigation and to promote the public's interest in

105. Bradley v. Hall, 720 N.E.2d 747, 751 (Ind. Ct. App. 1999).

106. Levee v. Beeching, 729 N.E.2d 215, 222 (Ind. Ct. App. 2000).

107. MacKerron v. Madura, 445 A.2d 680, 683 (Me. 1982).

108. Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 953 (Cal. 2003) (emphasis added).

109. Speakers of Sport, Inc. v. ProServ, Inc., 178 F.3d 862, 867 (7th Cir. 1999).

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the fair administration of justice.[110] However, in the case of ethical rules that regulate the *business* of law, the concerns raised by Judge Posner are particularly acute.

One recurrent criticism of the legal profession is that many of the ethical rules governing lawyers exist primarily to benefit existing members of the legal profession, rather than the public at large.[111] Scholars have pointed to numerous supposed examples of this dynamic. Early legal ethics codes warned lawyers not to "encroach" upon the employment of other attorneys, including the clients of a lawyer's former employer.[112] Several of the American Bar Association's Model Rules of Professional Conduct have been singled out as devices to discourage competition from other lawyers and non-lawyers alike, including the rules concerning the solicitation of clients,[113] bar admissions,[114] multi-jurisdictional practice,[115] and the unauthorized practice of law.[116] Although the Model Rules make clear that "[c]lients are not commodities that can be purchased and sold at will,"[117] the inescapable business reality is that clients have value, and many of the professional responsibility rules arguably exist to protect the business interests of lawyers, rather than the interests of clients.

As such, it should not be surprising to find judges more willing to lower the bar as to what constitutes "improper interference" in the case of one attorney engaging in competitive practices that deprive another attorney of the monetary benefits of the attorney-client relationship. While the organized bar obviously has an interest in limiting the ability of other lawyers and non-lawyers to lure clients away from their current attorneys, there are several reasons why

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110. Alex B. Long, *Attorney Liability for Tortious Interference: Interference With Contractual Relations or Interference With the Practice of Law?*, 18 GEO. J. LEGAL ETHICS 471, 502 (2005).

111. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1169 (2003).

112. CANONS OF PROF'L ETHICS Canon 7 (1908); ABA Comm. on Prof'l Ethics, Formal Op. 300 (1961).

113. MODEL RULES OF PROF'L CONDUCT R. 7.2, 7.3 (2000).

114. *Id.* at R. 8.1.

115. *Id.* at R. 5.5.

116. *Id.*; Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1195, 1234 (2003).

117. MODEL RULES OF PROF'L CONDUCT R. 1.17 cmt. 1.

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judges might be more receptive to one attorney's claim that another lawyer's competition for a client amounts to tortious interference than a judge might in a run of the mill interference case. For one, as former practicing attorneys (and often successful ones at that), judges might naturally be expected to have a better understanding of, and natural sympathy toward, the business concerns of lawyers.[118]

Scholars have suggested other reasons why judges might naturally be more sympathetic to the special concerns of lawyers. At the most basic level, attorneys are the primary source of judicial campaign contributions, and, in states that elect their judges, bar associations frequently poll their members or make endorsements in judicial races.[119] In addition, as members of bar associations and simply as lawyers, judges have frequent informal contacts with members of the practicing bar and are able to hear the concerns and frustrations of practicing attorneys,[120] many of which, undoubtedly, involve the business realities of the modern practice of law. Thus, one should not be surprised, for example, to find a judge perhaps more offended when a lawyer lures away a client from another attorney than when one widget manufacturer lures a client away from another widget manufacturer.

None of which is to say that judges should not rightfully be concerned about predatory practices. There exists a real danger of abuse for lawyers, with their increased understanding of the legal process, to coerce or mislead clients into abandoning their current attorneys. Nor should any of the preceding be read to suggest that interference claims cannot serve a valid purpose outside the context of competition for clients. There are certainly instances in which lawyers and non-lawyers might interfere with an attorney-client relationship in such a way that merits liability while engaging in activities that more closely resemble the actual *practice* of law,

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118. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1197-98 (2003); *see generally* Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 690-91 (2003) (stating that "the discipliners may be more sympathetic to the pressures accused lawyers face and more concerned than criminal prosecutors usually are about damaging the reputations of the targets of their investigations").

119. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1198-99 (2003).

120. *Id.* at 1200.

rather than the *business* of law. For example, a lawyer's attempts to settle with a represented party outside the presence of the party's attorney would amount to a violation of ethical rules[121] even without fraud, coercion, or other types of improper conduct, and would almost certainly justify a finding of liability for tortious interference. One could defensibly argue, as some courts have, that other parties that settle directly with a represented party have tortiously interfered with an attorney-client relationship, despite the absence of predatory means.[122] However, the wrongfulness of such conduct is *at least* as dependent on the harm to the proper administration and functioning of the legal process as it is on the harm to the attorney who has lost a client or whose fee has been reduced as a result of a settlement.

3. The Problem of Conflicting Duties

Even where it could be established that the failure to comply with legal ethical rules might be an appropriate measure of improper conduct, there remains the problem that lawyers are sometimes subject to conflicting duties. Take the case of an attorney who leaves a law firm and solicits firm clients prior to leaving. As explained in greater detail *infra*, a lawyer may actually have an ethical obligation to provide a client, for whom the lawyer has done substantial work, with complete information about the lawyer's de-

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121. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2000) (stating that, "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so").

122. *See, e.g.*, Ingalsbe v. Stewart Agency, Inc., 869 So. 2d 30, 34 (Fla. Dist. Ct. App. 2004) (holding that an attorney who brought a suit against a party who settled directly without attorney's assistance stated a claim for tortious interference with attorney-client relationship); Liston v. Home Ins. Co., 659 F. Supp. 276, 281 (S.D. Miss. 1986) (holding insurer liable for tortiously interfering with attorney-client relationship where client initiated settlement discussions with insurer). The outcomes of such cases are far from uniform. In cases involving insurers' attempts to settle directly with clients, the opinions vary wildly, often depending upon a jurisdiction's test for wrongful interference. *See* Volz v. Liberty Mut. Ins. Co., 498 F.2d 659, 663 (5th Cir. 1974) (holding that an insurer that settled directly with a client had not tortiously interfered with attorney-client relationship because the insurer had not engaged in "fraud, force, or some form of coercion"). Of course, where a non-lawyer (or a lawyer for that matter) actually uses fraud or misrepresentation during settlement negotiations and procures a favorable settlement, an attorney might have a valid claim for tortious interference. Bernard v. Lorino, No. A14-86-772-CV, 1987 WL 13549 (Tex. App.—Houston [14th Dist.] July 9, 1987, no writ) (not designated for publication).

parture and its possible effect on the client's representation.[123] At the same time, such action might amount to a breach of the lawyer's fiduciary duty to the law firm.[124] Typically, a defendant's breach of a fiduciary duty constitutes improper conduct for purposes of an interference claim.[125] Thus, an attorney's conduct might be perfectly proper under, and even compelled by, ethical standards, but improper for purposes of an interference claim.

4. The Murky "Improper Purpose" Standard

Finally, because attorneys may be fiduciaries both with respect to clients and other attorneys, it will often be difficult to completely eliminate the thorny question of whether an attorney acted with an improper purpose in interfering. Several of the recognized privileges that would most naturally apply in the case of attorney interference (including the competitor's privilege and the advisor's privilege) require some analysis into the defendant's purpose for interfering.[126] If, for example, an attorney's advice is based on an ulterior motive to harm the plaintiff or benefit the attorney, it may no longer be "honest" and the attorney would lose the privilege to interfere.[127] The rules of professional responsibility likewise sometimes necessitate an inquiry into an attorney's mental state. Where, for example, an attorney's independent professional judgment is limited by the attorney's personal interests, a disqualifying conflict of interest exists.[128] In short, given the nature of attorney-client relationships, it is virtually impossible to ever completely eliminate the need to inquire into the purposes behind an attorney's alleged intentional and improper interference.

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123. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2000) (noting an attorney must keep a client reasonably informed and explain matters to the extent necessary so the client can make informed decisions).

124. *See* Jet Courier Serv. v. Mulei, 771 P.2d 486, 494 (Colo. 1989) (stating that the duty of loyalty is violated when an employee solicits customers as well as co-employees to follow the employee to a new venture).

125. Outsource Int'l, Inc. v. Barton & Barton Staffing Solutions, 192 F.3d 662, 671 (7th Cir. 1999) (Posner, J., dissenting); *see also* McCrea & Co. Auctioneers v. Dwyer Auto Body, 799 P.2d 394, 398 (Colo. Ct. App. 1998) (holding that a "breach of a fiduciary duty constitutes constructive fraud").

126. RESTATEMENT (SECOND) OF TORTS § 768 (1979).

127. *See* Haupt v. Int'l Harvester Co., 582 F. Supp. 545, 550-51 (N.D. Ill. 1984) (holding that advice based in illegitimate ulterior motive is not "honest").

128. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2000).

IV. Interference with the Business of Law

The following Part examines several situations in which attorneys face potential liability for tortiously interfering with another attorney's relationship with a client. Specifically excluded are cases involving interference claims stemming from litigation misconduct. While it is sometimes difficult to draw a distinction between interference involving the practice of law and interference involving the business of law,[129] this Part deals only with cases where the alleged harm is to another attorney and is primarily pecuniary in nature, as opposed to the more generalized harm to a client that flows from litigation misconduct resulting in interference with an attorney-client relationship. Similarly excluded are cases involving attorneys accused of interfering with relationships other than attorney-client relationships.[130]

In reviewing each situation, this Part attempts to illustrate some of the special problems posed by interference claims involving the business of law. In the process, it argues that the determination of what constitutes "improper" interference in these situations should be informed by the goal of devising specific rules that give equal weight to an attorney's contractual interests and the important policies of informed client choice and decision making.

A. *Interference with an Attorney's Ability to Recover Fees*

One situation in which attorneys have been quick to allege tortious interference is where the defendant has acted in such a way

129. For example, the act of settling a lawsuit could be said to involve the practice of law because settlement is an essential part of many judicial proceedings. *See* Jackson v. Bellsouth Telecomms., 372 F.3d 1250, 1276-77 (11th Cir. 2004) (concluding that Florida's absolute litigation privilege for conduct occurring during the course of a judicial proceeding and having a substantial relation to the proceeding applied where an interference claim stemmed from improper conduct during settlement). In contrast, the act of settling a lawsuit might relate more to the business of law in some instances because such action involves the payment of money, some of which goes to an attorney. *See* Ingalsbe v. Stewart Agency, Inc., 869 So. 2d 30, 35-39 (Fla. Dist. Ct. App. 2004) (concluding that Florida's absolute litigation privilege should not apply to plaintiff-attorney's claim that a defendant tortiously interfered with the attorney-client relationship by settling directly with client and limiting attorney's recovery under the settlement agreement).

130. *See* Duggin v. Adams, 360 S.E.2d 832, 837-38 (Va. 1987) (involving attorney accused of using confidential information obtained during representation of a client to his advantage and interfering with plaintiff's prospective business relationship with another party).

so as to somehow frustrate the ability of an attorney to collect his or her expected attorney's fees.[131] In such cases, the malleable nature of the interference torts may work to a plaintiff-attorney's advantage. The interference torts are normally thought to apply in situations in which a defendant has induced or caused another party to breach or terminate a contract with the plaintiff or has induced or caused another party not to enter into a relationship with the plaintiff.[132] However, in many instances, the question as to whether the defendant actually caused or induced the other party to breach its contract with the plaintiff becomes subsumed into the broader question of whether the defendant simply interfered with or disrupted the plaintiff's relationship or otherwise hindered the plaintiff's ability to reap the full benefits of the contract.[133] Thus, the fact that the defendant simply made it possible for the plaintiff's contracting partner to breach his or her contract with the plaintiff may be sufficient to satisfy the causation element, despite the fact that the party most directly responsible for the breach was the plaintiff's contracting partner.

One situation in which this dynamic may occur is in the case of a defendant who fails to protect an attorney's lien for fees or who otherwise fails to ensure that the other attorney gets paid. In such cases, the defendant is not so much being charged with causing a client not to honor his or her contractual obligation, but with facilitating the client's breach. For example, in *Levin v. Gulf Insurance*

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131. *See, e.g.*, Law Offices of Lin & Assocs. v. Ho, No. 14-01-01265-CV, 2002 WL 31319191, at *1 (Tex. App.—Houston [14th Dist.] Oct. 17, 2002, no pet.) (not designated for publication) (involving a claim by an attorney against a defendant who allegedly settled directly with attorney's client "under the table"); Bernard v. Lorino, No. A14-86-772-CV, 1987 WL 13549, at *2 (Tex. App.—Houston [14th Dist.] July 9, 1987, no writ) (not designated for publication) (denying summary judgment in favor of defendant where defendant had allegedly lied to the attorney's client during settlement discussions, causing the client to settle the matter without the attorney's input); *see also* Meros v. Mazgaj, No. 2001-T-0100, 2002 WL 819219, at *1 (Ohio Ct. App. Apr. 30, 2002) (involving failure of a successor attorney to protect the fee of a discharged attorney who had been discharged after being suspended from the practice of law and ultimately disbarred).

132. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

133. *See, e.g.*, Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 950 (Cal. 2003) (holding that the elements of intentional interference require conduct intentionally engaged in to disrupt or interfere with the relationship); Clark A. Remington, *Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher As Wrongdoer*, 47 BUFF. L. REV. 645, 650-52 (1999) (stating that to have a successful tort claim of interference the interference must be improper).

Group,[134] an attorney who had been discharged by his client brought a tortious interference claim against an insurance company and its attorneys for their refusal to honor his lien for attorney's fees and costs against any future settlements or judgments. After losing at trial on the underlying matter, the insurance company and its attorneys caused a check to be issued to the former client and his new attorneys, despite having knowledge as to the existence of the lien.[135] A California appellate court concluded that such action could constitute tortious interference.[136]

An opposing attorney may also face potential liability for actions taken during settlement negotiations that result in an attorney not being paid by a client. In *Skelly v. Richman*,[137] a California appellate court found itself confronted with a bewildering set of facts involving one attorney's attempt to settle a matter with an opposing party that resulted in a claim that the attorney had induced the other party to discharge his attorney. In general, an attorney is not permitted to communicate with a represented party about the subject of the representation without the consent of the other lawyer.[138] Therefore, attorneys normally will have little call to conduct settlement negotiations directly with adverse parties. In *Skelly*, however, the plaintiff-attorney had given opposing counsel permission to speak directly with the client concerning settlement.[139] After a bizarre series of twists and turns, an agreement was finally reached, but the settlement check was made payable directly to the client, rather than the plaintiff-attorney.[140] After the client refused to pay the plaintiff-attorney's contingent fee, the plaintiff sued the opposing counsel, who had allegedly induced the client to breach his agreement with the plaintiff.[141] Aside from serving as a cautionary tale about the dangers of getting involved in direct negotiations with a represented party outside the presence of that party's attorney, *Skelly* also stands for the proposition that an attorney who does get so involved may be held liable under an interference

134. 82 Cal. Rptr. 2d 228 (Cal. Ct. App. 1999).
135. Levin v. Gulf Ins. Group, 82 Cal. Rptr. 2d 228, 229 (Cal. Ct. App. 1999).
136. *Id.* at 231.
137. 89 Cal. Rptr. 556 (Cal. Ct. App. 1970).
138. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2000).
139. Skelly v. Richman, 89 Cal. Rptr. 556, 561 (Cal. Ct. App. 1970).
140. *Id.* at 562.
141. *Id.* at 562-63.

theory; at trial, the defendant-attorney was found to have to have tortiously interfered with the plaintiff's contingent fee agreement.[142]

Finally, the natural inclination of some judges to protect the business interests of attorneys might improve the likelihood of success of such claims. In several insurance cases, an insurance company's mere act of settling directly with a represented party outside the presence of the party's attorney has resulted in a successful interference claim by the representing attorney. The theory of recovery in such cases has ranged from the fact that the insurance company failed to ensure that the attorney's fee was paid[143] to the fact that the attorney wound up not getting paid as much as the attorney would have earned had the attorney handled the settlement negotiations.[144] In one such case, the insurance company was held liable despite the fact that it was the attorney's client, financially distressed and tired of her attorney's inaction in the matter, who initiated the settlement discussions after informing the insurer that she wished to handle the settlement herself without the help of her lawyer.[145]

In short, judges sometimes tend to take a dim view of settling with a client "behind the back" of the client's attorney – a fact that should give attorneys pause even when it is an attorney's client, rather than the attorney himself, who attempts such a settlement. In *Ingalsbe v. Stewart Agency, Inc.,*[146] a 2004 Florida case, an attorney charged a party opponent with tortiously interfering with the attorney's relationship with his client.[147] The attorney's contract with his client provided a staggered formula dictating the attorney's fees. Under the contract, the attorney's fees would be as follows:

> (A) 40% of the amount recovered plus an additional 5% (or $10,000 if greater than 5%) for any appeal, or
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> (B) the amount set by the Court under the attorney's fee statutes in Lemon Law cases if greater than 40% of Client's recovery; or

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142. *Id.* at 565.

143. Knell v. State Farm Mut. Auto Ins. Co., 336 N.E.2d 568, 569-70 (Ill. App. Ct. 1975) .

144. Liston v. Home Ins. Co., 659 F. Supp. 276, 281-82 (S.D. Miss. 1986).

145. *Id.* at 280.

146. 869 So. 2d 30 (Fla. Dist. Ct. App. 2004).

147. Ingalsbe v. Stewart Agency, Inc., 869 So. 2d 30, 31 (Fla. Dist. Ct. App. 2004).

(C) if Client settled the case against the advice of the Lawyer, Client would pay $300 per hour for all time reasonably spent on the matter.[148]

After a verdict in favor of the client in the underlying matter was reversed and the case remanded for trial, the defendant approached the attorney's client personally and suggested that they settle without any lawyers.[149] The two sides struck a bargain, and, as part of the settlement, the defendant agreed to pay the client's attorney what might have amounted to the lowest possible fee allowed under the client's contract: 40% of the recovery, plus $10,000 for the appeal that had been previously taken.[150] A Florida appellate court concluded that the plaintiff-attorney had stated a claim of tortious interference based on the defendant's settlement with the client.[151] While acknowledging that a party is privileged to propose and conclude a settlement, the court stated that the defendant was not privileged to interfere with the lawyer's contract "in such a way as to restrict the fee due to only the lowest among the contract's reasonable alternatives."[152]

Several aspects of the case make the court's decision somewhat remarkable. First, the defendant wound up settling with the client for $35,000—an amount 70% more than the client had received at trial.[153] The defendant actually agreed to pay the attorney $34,000, including the contingent and appellate fees. Moreover, this was after the client had seen his jury verdict reversed and his case remanded for a new trial based on the fact that defensive evidence had been improperly excluded.[154] Second, there was no allegation that the defendant, a non-attorney, had pressured or lied to the client in any manner so as to accomplish the settlement. Third, the court held that the absolute litigation privilege, which the Florida Supreme Court had previously determined applied to *all* theories of tort liability stemming from litigation conduct, did not apply in this particular context.[155]

148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 33.
152. *Ingalsbe*, 869 So. 2d at 33.
153. *Id.* at 35 (Gross, J., dissenting).
154. *Id.* at 31.
155. *Id.* at 33.

Most importantly, the Florida appellate court held that the plaintiff-attorney had stated a claim for tortious interference with a contract that was quite possibly both in violation of the rules of professional responsibility and unenforceable as a matter of a law. A provision in a fee agreement that limits a client's ability to settle a matter is in violation of the rules of professional responsibility and is void as against public policy.[156] There are several state and local ethics opinions that have concluded that fee agreements, similar to those at issue in *Ingalsbe*, that impose adverse financial consequences on a client due to the client's decision to settle a matter amount to an unethical attempt to limit a client's ability to settle.[157] The lawyer's fee agreement in *Ingalsbe* clearly contemplated that the client might not follow the attorney's advice regarding settlement and imposed on the client what amounted to a penalty for rejecting the attorney's advice.[158]

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156. *See, e.g., In re* Lansky, 678 N.E.2d 1114, 1115 (Ind. 1997) (holding that a provision in the fee agreement which deprived client of the right to accept settlement offer violated rules); Barnes v. Quigley, 49 A.2d 467, 468 (D.C. 1946) (stating that public policy voids agreements that do not allow a client to settle the case).

157. *See* Philadelphia Bar Ass'n Ethics Op. No. 2001-1 (June 2002), *available at* http://www.philabar.org/public/ethics/displayethics.asp?id=96326212002 (concluding that a provision that gave a law firm the right to collect fees on a hourly basis, rather than on a contingent-fee basis, in the event a client settled against the advice of the firm violated Rule 1.2(a) of the Pennsylvania Rules of Professional Conduct); Nebraska State Bar Ass'n Ethics Advisory Op. No. 95-1, 5, *available at* http://Court.nol.org/ethics/lawyers/opinions/1990s/95-1.htm (concluding that "a contractual agreement whereby a client electing to settle a case for an amount less than the amount which the attorney believes is the reasonable value of the case, may be charged an hourly fee, instead of the contingent fee otherwise agreed upon" is impermissible because it "unduly restricts the client's ability to accept settlement offers and may result in excessive charges"); *see also* Connecticut Bar Ass'n, Committee on Professional Ethics, Informal Op. No. 99-18 (June 17, 1999), 1999 WL 958024 (concluding that a contingent fee agreement that provided that the "client would become obligated to compensate [lawyer] for services rendered at [lawyer's] usual hourly rate(s) if the client rejects a settlement offer that [lawyer] recommend[ed], and thereafter the defendant prevails" violated Rule 1.2(a) of the Connecticut Rules of Professional Conduct); Washington State Bar Ass'n Formal Op. No. 191 (1994), *available at* http://www.wsba.org/lawyers/ethics/formalopinions/191.htm (concluding that a lawyer may not " include a provision in a contingent fee contract which states that if the client rejects a settlement offer that the lawyer deems 'reasonable in light of all the circumstances,' then the contingent fee will be based upon the larger of the recovery obtained at trial/arbitration or the amount offered in settlement").

158. *Ingalsbe*, 869 So. 2d. at 36. In reaching its conclusion, the court made much of the fact that the fee agreement contemplated the award of attorney's fees under Florida's Lemon Law. The court suggested that by structuring the settlement so as to limit the attorney's fees to only the first alternative under the fee agreement, the defendant "was interfering with Lawyer's entitlement to a fee under the alternative fee provisions regard-

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Later that same year, a different Florida appellate court took a similarly dim view of a non-lawyer intermediary's attempts to help two parties resolve their differences.[159] In *Rubin v. Alarcon*,[160] a mutual friend of the two adverse parties acted as a go-between and wound up negotiating a settlement on behalf of the defendant.[161] In attempting to negotiate the settlement, the intermediary allegedly told the plaintiff that the plaintiff's attorneys would keep most of the money the plaintiff would receive if he pursued the lawsuit and advised the plaintiff not to inform his attorneys about the settlement.[162] Upon learning that the matter had been settled, the plaintiff's attorneys brought a tortious interference claim against the intermediary.[163]

The appellate court held that the attorneys had successfully pled a cause of action.[164] While noting that parties are free to communicate directly with each other and to settle their claims without their attorneys, the court concluded that the intermediary's actions, as alleged, amounted to fraud and collusion in that he had persuaded the plaintiff to falsely represent that the plaintiff "had simply dropped the . . . case, while concealing that the settlement of [the] . . . case involved a promise to pay [the defendant] substantial sums."[165] Hence, the interference was unjustified.[166]

The intermediary's actions in this respect were certainly objectionable; however, they begin to look somewhat more justified upon closer examination of the attorneys' fee agreement with their client. As part of the contingency fee agreement, the attorneys had, in violation of Florida's Rules of Professional Conduct, pro-

ing a fee set by the court . . . ." *Id.* at 34. In the process, the court suggested, the defendant was undermining the legislative decision to allow the recovery of attorney's fees in these types of cases. *Id.* However, it appears that the attorney was limited in his ability to collect such fees by the very terms of the agreement. The fee agreement provided for three alternative methods of calculating attorney's fees. The third alternative contemplated that the client might settle without the attorney's approval, thus resulting in an hourly fee. *Id.* at 31. As this appears to be what happened, this is the relevant contractual provision.

159. Rubin v. Alarcon, No. 3D04-490, 2004 WL 2389646, at *1 (Fla. Dist. Ct. App. Oct. 27, 2004).

160. No. 3D04-490, 2004 WL 2389646 (Fla. Dist. Ct. App. Oct. 27, 2004).

161. *Id.* at *1.

162. *Id.*

163. *Id.* at *2.

164. *Id.* at *1.

165. *Rubin*, 2004 WL 2389646, at *3.

166. *Id.*

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hibited the client from settling the matter without the prior written approval of the attorneys.[167] While the client and the intermediary may certainly be faulted for misleading the attorneys and seeking to avoid payment of what the attorneys may rightfully have earned, their actions may have been motivated in no small part by the fact that the attorneys had unethically sought to limit the client's ability to settle in the first place. According to the appellate court, however, the unethical fee provision made no difference to the outcome of the interference action.[168]

Ingalsbe and *Rubin* represent situations in which the legitimate interests of an opposing party and a represented client were held to be of less importance than a lawyer's "property" rights. While attorneys operating under contingency fee agreements are understandably concerned about the prospect of a client settling directly with an adverse party and thereby depriving the attorneys of their expected fee, the decisions undermine two of the most important policies of the law governing lawyers: a client's right to settle a matter and a client's right to make decisions concerning the representation.

In contrast, *Marks v. Struble*,[169] a 2004 decision from a federal district court in New Jersey, strikes the appropriate balance between an attorney's interest in collecting a fee and society's interest in the fair administration of justice. In *Marks*, an employee of one of the parties to the underlying dispute convinced the attorney's client to settle the matter without the attorney's knowledge or involvement. According to the attorney, the employee visited the client's home with a settlement agreement prepared by the corporate party's in-house counsel and informed the client that the client would not have to pay his attorney if the client fired the attorney before signing the agreement.[170]

While there is nothing inherently wrong about a layperson settling a dispute directly with another party without the consent of the other party's attorney, there was more at issue in *Marks*. First, the employee may have engaged in independently tortious conduct by incorrectly telling the client that he would not owe his attorney

167. *Id.* at *3 n.5.
168. *Id.*
169. 347 F. Supp. 2d 136 (D.N.J. 2004).
170. Marks v. Struble, 347 F. Supp. 2d 136, 147 (D.N.J. 2004).

money if he settled directly without the attorney's consent. Because even an attorney under a contingent fee agreement may be entitled to recover on a *quantum meruit* basis if discharged, the employee's statement arguably amounted to fraudulent misrepresentation.[171] More alarming is the possibility that the other attorneys who prepared the settlement agreement may have instructed the employee as to how to persuade the plaintiff-attorney's client to settle directly.[172] If that is the case, the attorneys not only would have participated in the fraud, but would have used a non-lawyer to do what they, as lawyers, could not – make direct contact with a represented party concerning the matter in question.[173] In the process, the defendants may have persuaded the client to settle for an amount less than the value of his claim *and* exposed the client to another potential lawsuit brought by the client's own attorney to collect his fee.[174] Accordingly, the wrongfulness of such conduct is not determined so much by the harm to the plaintiff-attorney, but by the harm to the client's interests and society's interest in the proper functioning of the legal system.[175]

B. *Solicitation As Interference*

One of the more commonly-asserted grounds for a tortious interference claim against an attorney is improper solicitation of clients. Such claims have arisen in a variety of contexts, including an accusation by a physician that a lawyer's advertisements soliciting clients for malpractice actions against the physician amounted to tortious interference with the physician's relationships with his patients and an attorney's successful attempts to obtain clients by accessing messages from prospective clients left on an another law

171. *Id.* at 147-48.

172. *Id.* at 150.

173. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002).

174. *Marks*, 347 F. Supp. 2d at 147-48.

175. Unfortunately for the plaintiff-attorney in *Marks*, he failed to allege all of these facts and instead asserted them in an affidavit filed in response to the defendant's motion to dismiss. *Id.* at 148. And as the applicable law required there to be some type of wrongful conduct, apart from the defendant's knowledge of the existence of the contract, the attorney's complaint failed to state a claim upon which relief could be granted. *Id.* at 144, 148. The district court did, however, provide a virtual roadmap for the plaintiff to follow if he chose to refile his complaint. *Id.* at 148.

firm's answering machine.[176] Perhaps most common are claims alleging that one attorney improperly solicited the existing client of another attorney.

1. Rival Attorney Interference

In some cases, the defendant-attorney closely resembles the typical business competitor who offers what the client perceives to be a better deal.[177] In such cases, the defendant-attorney often apparently did not have prior contact with the client represented by another attorney and is accused of actively soliciting the client.[178] Because the attorney-client relationship is terminable at the will of the client, the standard conception of the tort would permit the defendant-attorney to engage in legitimate competition.[179] However, the special ethical constraints on lawyer solicitation may limit the ability of an attorney to compete for the business of a client that the attorney knows to be represented by another attorney. Rule 7.3 of the Model Rules of Professional Conduct limits an at-

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176. *See* Russo v. Nagel, 817 A.2d 426, 430-34 (N.J. Super. Ct. App. Div. 2003) (affirming a dismissal of physician's interference claims because of the absence of defamatory statements); *In re* Pimsler, 731 N.Y.S.2d 51, 52 (2001) (involving disciplinary proceedings against an attorney who retrieved messages from prospective clients from the answering machine of another law firm by pretending to be an attorney in the firm); *see also* Daimler-Chrysler Corp. v. Kirkhart, 561 S.E.2d 276, 280-82 (N.C. Ct. App. 2002) (involving interference claim stemming from attorney's alleged use of discovery material to solicit clients).

177. *See* Chaffin v. Chambers, 577 So. 2d 1125, 1127-28 (La. Ct. App. 1991), *rev'd*, 584 So. 2d 665 (La. 1991) (analyzing the actions of the defendant-attorney who solicited a client to switch attorneys in order that the defendant-attorney could "peddle" the client to another law firm for fifty percent of the fee); Frazier, Dame, Doherty, Parrish & Hanawalt v. Boccardo, Blum, Lull, Niland, Teerlink & Bell, 70 Cal. App. 3d 331, 337 (Cal. Ct. App. 1977) (involving an alleged agent of a law firm who stated that the "firm could get her more money than plaintiff [law firm] and that she would be 'better off' if she were represented" by the other firm); *see also* Hunt v. Riley, 909 S.W.2d 329, 331 (Ark. 1995) (involving a claim of improper solicitation of prospective clients); Snell v. Sepulveda, 75 S.W.3d 142, 143 (Tex. App.—San Antonio 2002, no pet. h.) (involving an interference claim against defendant-attorney stemming from the fact that a former employee of the plaintiff-attorney left plaintiff's employ and brought plaintiff's clients with him when he began working for defendant).

178. *See Frazier, Dame, Doherty, Parrish & Hanawalt*, 70 Cal. App. 3d at 336-37 (showing the partner in the defendant law firm did not have any direct contact with the client until an investigator, who was allegedly an agent of the law firm, convinced the client to meet with the law firm).

179. *See* RESTATEMENT (SECOND) OF TORTS § 768(1) (1979) (explaining the circumstances under which competition is not improper interference in the context of a contract terminable at will).

torney's ability to directly solicit employment from prospective clients.[180] According to the comments, one of the concerns underlying this rule is that a prospective client, particularly one already in need of legal services, "may find it difficult to fully evaluate all available alternatives with reasoned judgment" and is particularly susceptible to overreaching on the part of the soliciting attorney.[181] Thus, the Model Rules state

> [an attorney may not] by in-person[,] live telephone [or real-time electronic] contact solicit professional employment from a prospective client . . . when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain[, unless the person contacted (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.][182]

Case law suggests that an attorney who engages in conduct that violates Rule 7.3 may also have improperly interfered with an attorney-client relationship.[183] Because there is a violation of an ethical standard that protects a substantial public interest, such conduct should be considered independently tortious for the purpose of an interference claim. While the anti-solicitation rules might, in some instances, be seen as an attempt to discourage competition and to protect the "property" interests that attorneys have in their existing clients,[184] in this particular instance they also serve an important public purpose. Rule 7.3's prohibition on direct solicitation of prospective clients with whom a lawyer has no prior relationship is designed at least in part to protect the public from overreaching and undue influence on the part of "trained advocates" at a time when the prospective client may be particularly vulnerable to such influences.[185] According to the comments, clients "may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immedi-

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180. MODEL RULES OF PROF'L CONDUCT R. 7.3 (2002).

181. *Id.* at R. 7.3 cmt. 1.

182. *Id.* at R. 7.3(a).

183. *Frazier, Dame, Doherty, Parrish & Hanawalt*, 70 Cal. App. 3d at 337.

184. *See* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation – Courts, Legislatures or the Market?*, 37 GA. L. REV. 1167, 1233-34 (2003) (discussing how the ABA's Model Rules are aimed at decreasing competition).

185. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 1.

ately."[186] Thus, the rule serves to further the goal of informed client choice. In such cases, a defendant-attorney's violation of the rule regarding solicitation of prospective clients impacts not only the plaintiff-attorney, but broader societal interests in the proper functioning of the legal system.

2. Advising Attorney Interference

A slightly different fact pattern involves a represented client who actively seeks out the advice of a defendant-attorney concerning another attorney's representation of the client.[187] These cases can be divided into two basic categories. In the first, the defendant-attorney simply provides advice that leads the client not to pay the original attorney for services rendered or to discharge the original attorney. In such cases, the defendant-attorney's motive for giving the advice is often the primary issue regarding the propriety of the interference. As long as the defendant-attorney is acting within the capacity of an attorney advising his or her client in good faith, liability is unlikely to attach.[188] Where, however, the defendant-attorney is alleged to have acted out of simple spite, ill will, or prohibited self-interest, there is typically a jury question as to whether the attorney interfered improperly.[189]

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186. *Id.*

187. Weiss v. Marcus, 51 Cal. App. 3d 590, 596 (Cal. Ct. App. 1975); Brown v. Larkin & Shea, P.A., 522 So. 2d 500, 501 (Fla. Dist. Ct. App. 1988); Gilbert v. Jones, 370 S.E.2d 155, 156 (Ga. Ct. App. 1988); Canel & Hale, Ltd. v. Tobin, 710 N.E.2d 861, 866-68 (Ill. App. Ct. 1999); Lloyd I. Isler, P.C. v. Sutter, 554 N.Y.S.2d 253, 254-55 (N.Y. App. Div. 1990); Ramirez v. Selles, 784 P.2d 433, 436 (Or. 1989) (en banc); *see also* Friese v. Kahr, No. 44149-3-I, 2000 WL 1250765, at *1 (Wash. Ct. App. Sept. 5, 2000) (involving interference claim against attorney who was representing client in a related matter).

188. *See Lloyd I. Isler*, 554 N.Y.S.2d at 254 (holding that there is not a cause of action for tortious interference if there is not evidence "that the law firm acted other than in its capacity as the individual['s]" defendant-attorney). *See generally* Los Angeles Airways, Inc. v. Davis, 687 F.2d 321, 326 (9th Cir. 1982) (holding that an attorney was privileged to advise a client to breach a contract, even though the attorney's motivation may have been to enhance his position with his corporation where his conduct was motivated in part by a desire to benefit the corporation).

189. *See, e.g.*, *Canel & Hale*, 710 N.E.2d at 866 (involving a defendant-attorney accused of participating in the discharge of the plaintiff and in transferring the representation of the client to the law firm of defendant-attorney's brother for the benefit of herself and brother); *Ramirez*, 784 P.2d at 436 (involving allegation that defendant-attorney was motivated by malice and personal ill will toward plaintiff-attorney and had a prohibited conflict of interest in advising clients to terminate the plaintiff-attorney and hire a new attorney).

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In such situations, the rules of professional responsibility, agency principles, and the more generalized privileges that have developed in interference case law all work in relative harmony to define standards of proper conduct. Under the Model Rules of Professional Conduct, an attorney is not prohibited from communicating with a represented person who is seeking advice from the lawyer as long as the lawyer is not otherwise representing a client in the matter.[190] All lawyers owe a duty of competent representation, a duty to render candid advice, and a duty of loyalty.[191] If a lawyer's ability to exercise independent professional judgment and render candid legal advice is materially limited by the lawyer's own personal interests, the lawyer has an ethical obligation to withdraw from representation.[192] Thus, an attorney who provides advice to a client that leads to the discharge of another attorney has violated the rules of professional responsibility if the attorney provided such advice in bad faith or if the lawyer's independent professional judgment was materially limited by the lawyer's own interests.

Here, the rules of professional responsibility largely track the recognized privileges of a defendant to cause another not to perform a contract where the defendant provides "honest advice within the scope of a request for the advice" or employs proper means to protect the welfare of another for whom the defendant has responsibility.[193] The comments to the Restatement (Second) of Torts recognize the applicability of the privileges to the case of an attorney providing advice to a client.[194] These cases present a situation in which some inquiry into the defendant's mental state is unavoidable. The mere fact that the defendant-attorney may have some personal interest in seeing the advice carried to its logical conclusion does not necessarily mean that the attorney has violated the rules of professional responsibility or lost the privilege to interfere. Instead, it is only where the attorney's advice is so compromised by her personal interests that her advice is no longer truly "honest," "in good faith," or for the purpose of protecting the cli-

190. Model Rules of Prof'l Conduct R. 4.2 cmt. 4 (2002).

191. *Id.* at R. 1.1, 1.7, 2.1.

192. *Id.* at R. 1.7(a)(2).

193. Restatement (Second) of Torts §§ 770, 772(b) (1977); *see also* Joseph P. Caulfield & Assocs., Inc. v. Litho Prods., Inc., 155 F.3d 883, 890 (7th Cir. 1998) (applying Section 772(b) to a claim of privilege by an attorney).

194. Restatement (Second) of Torts § 770 cmt. b, § 772 cmt. c.

ent's welfare that the attorney's conduct amounts to a violation of the rules of professional responsibility and improper or unprivileged interference.[195]

The second category of cases involves defendant-attorneys who not only advise a client, but who also end up representing the client after the client fires his or her original attorney.[196] Such cases raise the possibility that the defendant-attorney has not only provided advice that led to the discharge of the plaintiff-attorney, but actually solicited employment while doing so. Thus, the defendant-attorney's actions arguably implicate the rules concerning the solicitation of prospective clients, possibly forming the basis for a tortious interference claim. Interestingly, in at least two of the reported decisions involving this basic fact pattern, the reviewing courts have concluded that the fact that the defendant-attorney's conduct might have violated the rules against improper solicitation is not, by itself, a sufficient basis for liability for tortious interference.[197] Instead, these kinds of cases tend to be resolved on causation grounds – either the client had already made a decision to fire the plaintiff-attorney or was already predisposed toward doing so.[198]

As a preliminary matter, it is unlikely that an attorney who solicits employment in such cases has violated the rules concerning the solicitation of prospective clients. By providing advice to the represented client, the defendant-attorney has already established a

195. *See id.* § 772 cmt. c (stating that if the requirements of Section 772(b) are satisfied "it is immaterial that the actor also profits by the advice or that he dislikes the third person and takes pleasure in the harm caused to him by the advice"); *see also Joseph P. Caulfield & Assocs.,* 155 F.3d at 891 (quoting Section 772 comment c with approval); Wyatt v. Ruck Constr., Inc., 571 P.2d 683, 687 (Ariz. Ct. App. 1977) (concluding that "where the defendant has a proper purpose in view, the addition of ill will toward [ ] the plaintiff will not defeat the privilege").

196. Potts v. Mitchell, 410 F. Supp. 1278, 1281 (W.D.N.C. 1976); Brown v. Larkin & Shea, P.A., 522 So. 2d 500, 501 (Fla. Dist. Ct. App. 1988); Gilbert v. Jones, 370 S.E.2d 155, 155 (Ga. Ct. App. 1988); *see also* Freise v. Kahr, No. 44149-3-I, 2000 WL 1250765, at *1 (Wash. Ct. App. Sept. 5, 2000) (involving allegation that defendant-attorney, who was representing client in a related matter, engineered the termination of the defendant-attorney's relationship with client).

197. *Potts*, 410 F. Supp. at 1281; *Brown*, 522 So. 2d at 501.

198. *Potts*, 410 F. Supp. at 1281; *Gilbert*, 370 S.E.2d at 155-56; *see also Brown*, 522 So. 2d at 501 (denying summary judgment in favor of plaintiff-attorney where client had instigated the meeting with the defendant-attorney because of the client's dissatisfaction due to his inability to maintain contact with the plaintiff-attorney).

limited attorney-client relationship. Thus, the lawyer arguably has a professional relationship with the represented client which would permit solicitation.[199] Even if the defendant-attorney's actions could be seen as constituting a technical violation of the solicitation rules, this is a situation where rote application of an "independently tortious" standard would be at odds with the policies underlying the law governing lawyers. Instead, a more careful balancing of the competing interests is required. Ultimately, one of the policies underlying the solicitation rules is to preserve a client's ability to choose counsel, free from undue influence.[200] If a client is already concerned enough about the representation being provided by her current attorney that she has sought out the advice of another attorney, the concerns about unduly influencing a client's decisions are greatly reduced. In such cases, the policy of encouraging client choice should prevail. Provided the defendant-attorney refrains from obviously improper means of persuasion (such as fraud or defamatory statements), the disciplinary process should be an adequate device to address the propriety of the defendant-attorney's conduct.

C. *When Good Associations Go Bad: Departing Attorney Interference*

Given the increased mobility of attorneys in today's legal profession, one of the more frequently discussed instances in which an interference claim can arise in the context of the attorney-client relationship is in the case of an attorney who departs a law firm and attempts to solicit business from clients associated with the firm.[201] While such departures can generate any number of poten-

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199. *See* MODEL RULES OF PROF'L CONDUCT R. 7.3(a)(2) (2002) (prohibiting solicitation of employment from a prospective client in certain circumstances).

200. *See id.* at R. 7.3 cmt. 1 (explaining that "[t]he prospective client . . . may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence. . .").

201. *See* Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 1-4 (1988) (explaining the economic and ethical factors that law firms must evaluate when gaining and losing partners); Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 5-8 (1988) (describing the conflicts created when an attorney departs a firm and questioning the rules of attorney conduct relating to client solicitation); Mark W. Bennett, Note, *You Can Take It with You: The Ethics of Lawyer Departure and Solicitation of Firm Clients*, 10 GEO. J. LEGAL ETHICS 395, 395-96

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tial claims, including breach of fiduciary duty and misappropriation of trade secrets,[202] tortious interference claims often end up in the mix of asserted claims.[203]

1. The Rules Regarding Attorney Departure and Solicitation of Clients

The organized bar has long been concerned about situations in which an attorney attempts to solicit the clients of a former employer.[204] In 1961, the ABA concluded that a lawyer should "refrain from *any* effort to secure the work of clients of his former employer."[205] While the 1969 ABA Model Code of Professional Responsibility advised that a lawyer should not accept employment in a matter in which the attorney knows the client is represented by other counsel until the client actually discharges the other attorney,[206] neither the Model Code nor the current Model Rules of Professional Conduct specifically address one lawyer's attempts to "encroach" upon the client base of a former employer or law firm.[207] Instead, such action is addressed primarily by the rules regarding advertising and solicitation of clients.

Assuming the attorney had been actively involved in the client's case in the past, Rule 7.3 of the Model Rules would not prohibit an attorney from directly soliciting a client either prior to the attorney's departure from a law firm or after departure.[208] Indeed, ABA Formal Ethics Opinion 99-414 opined that an attorney who is responsible for the client's representation or who plays a principal

(1997) (considering the increase in lateral moves of associates and partners in the current legal practice environment as creating more visible conflicts between the lawyers and the former firms).

202. Gibbs v. Breed, Abbott & Morgan, 271 A.D.2d 180, 184 (N.Y. App. Div. 2000); Fred Siegel Co., L.P.A. v. Arter & Hadden, 707 N.E.2d 853, 856 (Ohio 1999).

203. Dowd & Dowd, Ltd. v. Gleason, 816 N.E.2d 754, 754 (Ill. App. Ct. 2004).

204. CANONS OF PROF'L ETHICS Canon 7 (1908).

205. ABA Comm. on Prof'l Ethics, Formal Op. 300 (1961) (emphasis added).

206. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-30 (1983).

207. *See* Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 5-8 (1988) (expressing surprise that departure-based solicitation has not been reviewed by the ABA for revisions to the Model Rules of Professional Conduct while conflict of issues have received attention).

208. *See* MODEL RULES OF PROF'L CONDUCT R. 7.3 (2002) (prohibiting in-person or live telephone solicitation from a prospective client when the lawyer has no family or prior professional relationship with the client if the lawyer's motive is pecuniary gain).

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role in the law firm's delivery of legal services in an active matter has a *duty* to notify the client of the attorney's impending departure.[209] While the departing attorney should not urge the client to sever the client's relationship with the firm or disparage the firm, the departing attorney is permitted to indicate a willingness to continue her representation of the client.[210] Moreover, if the client *asks* about the attorney's new firm, the departing attorney "should provide whatever is reasonably necessary to assist the client in making an informed decision about future representation, including, for example, billing rates and a description of the resources available at the new firm to handle the client matter."[211] Although the opinion speaks of an attorney responding to a request for more information, a departing attorney arguably has a duty to *volunteer* such information to a client with an ongoing matter as part of an attorney's duty to keep a client informed about the status of the matter and to explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation.[212]

The problem for a departing attorney is that by abiding by the attorney's ethical obligations, the attorney faces a risk of tortious interference or a breach of fiduciary duty claim. There exists a fiduciary duty between a law firm and its associate attorneys.[213] Similarly, partners in a firm are fiduciaries to each other.[214] Thus, under traditional agency principles, attorneys in a firm owe a duty not to compete with the partnership while still a part of the firm[215] and, therefore, may not solicit customers for the establishment of a rival firm before the end of employment.[216] According to the Restatement (Second) of Agency, an attorney who plans to leave a

209. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-414 (1999).

210. *Id.*

211. *Id.*; *see also* D.C. Bar Legal Ethics Op. 273 (1997), http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opin273.cfm (last visited Feb. 16, 2005) (directing that "[t]he lawyer should also *be prepared* to provide to the client information about the new firm (such as fees and staffing) sufficient to enable the client to make an informed decision concerning continued representation by the lawyer at the new firm") (emphasis added).

212. MODEL RULES OF PROF'L CONDUCT R. 1.4.

213. Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 99 (1988).

214. *Id.* at 100.

215. RESTATEMENT (SECOND) OF AGENCY § 393 (1957).

216. *Id.* cmt. e.

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firm would be permitted to make arrangements to compete prior to leaving, but could not use confidential information peculiar to the firm's business, such as trade secrets or lists of names.[217] Even after termination of the relationship, there may still be limitations on an attorney's ability to compete with the former firm. Under traditional agency principles, an attorney would be free to compete with the partnership after leaving the firm, but still could not use lists of customer names unless those names were "retained in his memory."[218]

Compounding the difficulty in these cases is the tension between the interference torts and agency law. The standards of permissible conduct for purposes of interference claims and breach of fiduciary duty claims are not necessarily co-extensive.[219] Thus, the fact that an agent is found not to have engaged in improper interference by competing with the agent's principal prior to departure does not necessarily mean that the agent has not violated the agent's duty of loyalty to the principal.[220] The duty of loyalty imposed by an agency relationship may be greater than the duty imposed by tort law to refrain from improper interference, despite the fact that tort law might allow the agent greater latitude to interfere in the case of a contract terminable at will or business relationship not reduced to contract form.[221]

Thus, there are a number of potential fiduciary limitations on a departing attorney's ability to solicit clients. Defining the scope of these limitations has proven difficult in practice, however. Given the unique nature of the attorney-client relationship, several courts and commentators have suggested that lawyers should not necessarily be subject to the same fiduciary constraints that apply to non-lawyers who depart firms in commercial settings.[222] While some

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217. *Id.* § 395 cmt. b.

218. *Id.* § 396(b).

219. *See* Jet Courier Serv. v. Mulei, 771 P.2d 486, 496 (Colo. 1989) (holding that a fiduciary duty is greater than the duty to not interfere with contractual relations).

220. *See id.* (concluding that the standard used to distinguish the tort of intentional contractual interference is not the standard to determine a breach of the duty of loyalty).

221. *Id.*

222. *See, e.g.,* Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358, 364-65 (Ill. 1998), *aff'd,* 816 N.E.2d 754 (Ill. App. Ct. 2004) (opining that lawyers are not bound by the same fiduciary restraints as other non-lawyer professionals); Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability,* 50 U. PITT. L. REV. 1, 102-03 (1988) (asserting support for the view that "the

courts have been receptive to this general idea, they have still had difficulty drawing a line between the impermissible pre-departure "luring" of clients and the permissible pre-departure provision of information relevant to the clients' representation.[223] Thus, the fact that the application of traditional notions of fiduciary duties raises special concerns in the context of the attorney-client relationship has perhaps resulted in even greater confusion in cases involving alleged interferences with the attorney-client relationship than in other situations.

2. Departing Attorney Interference

Reflecting some of the overall uncertainty concerning the interference torts, courts have taken differing approaches to such cases. Reflecting the older "clients as property" view, in 1978 the Supreme Court of Pennsylvania concluded in *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*[224] that the solicitation of law firm clients with open cases by former associates of the firm constituted tortious interference.[225] The associates, who had already ended their employment with the firm, contacted clients with whom they had worked over the phone and in person and advised them that they were leaving the firm and that the clients could choose to be represented by them, the firm, or any other firm or attorney.[226] In addition, at least one of the associates mailed form letters to clients that could be used to discharge the firm as counsel and name the associate as new counsel.[227] Despite the fact that the associates apparently limited their solicitation to clients with whom they worked and did not in any way defame the law firm or make any false

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interests of clients in obtaining information relevant to deciding who shall provide future representation must take precedence over the usual fiduciary duty roles").

223. *See* Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1183 (N.Y. 1995) (finding actionable an attorney's pre-departure solicitation of clients for personal gain); D.C. Bar Legal Ethics Op. 273 (1997), http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opin273.cfm (last visited Feb. 16, 2004) (advising that "[t]here may be a cloudy area between communications required by ethics principles and communications that violate the lawyer's obligations under other law").

224. 393 A.2d 1175 (Pa. 1978).

225. Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175, 1177-78 (Pa. 1978).

226. *Id.*

227. *Id.* at 1178.

representations, the court found that such action amounted to improper interference.[228]

Part of the court's concern in *Adler* was that the defendants' attempts to lure away clients with open cases "posed too great a risk that clients would not have the opportunity to make a careful, informed decision."[229] However, another theme running through the opinion is the idea that the defendants' conduct was wrongful, in part, because the departing attorneys had betrayed the trust bestowed upon them by the law firm by contacting clients to whom they otherwise would not have had access.[230] Indeed, this sentiment was expressed clearly by the trial judge in the matter, who punctuated his opinion by stating, "Taking the heart and soul of the benefactor is immoral, illegal and repulsive. If they want their own firm, let them get their own clients."[231] The idea that an attorney's solicitation of clients is somehow more wrongful by virtue of the fact that the attorney's affiliation with the firm made the solicitation of clients possible is a theme that emerges in several of the "departing attorney" cases.[232]

Other courts have relied upon agency principles in concluding that the distinction between pre-departure solicitations and post-departure solicitations is relevant. Pre-departure solicitations, at least without notice to the firm, are usually found to be sufficient to support a claim for improper interference or breach of fiduciary

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228. *Id.* at 1184.

229. *Id.* at 1181.

230. *See Adler*, 393 A.2d at 1185 (explaining that the opportunities to gain case details were made possible by the high level of responsibility entrusted by the firm).

231. Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 382 A.2d 1226, 1233 (Pa. Super. Ct. 1977) (quoting trial judge's opinion), *rev'd*, 393 A.2d 1175 (Pa. 1978) (Spaeth, J., concurring).

232. *See* Wistow & Barylick, Inc. v. Bowen, No. CIV.A. PC 94-6341, 2002 WL 1803926, at *10 (R.I. Super. July 24, 2002) (distinguishing an agent's duty to the principal not to violate the trust and confidential relationship from those instances where client contacts were not made possible by the agency relationship); *see also* Saltzberg v. Fishman, 462 N.E.2d 901, 907 (Ill. App. Ct. 1984) (stating that cases of clients whom departing attorney had lured away from the firm "belonged to the firm"); Fred Siegel Co., L.P.A. v. Arter & Hadden, 707 N.E.2d 853, 859 (Ohio 1999) (emphasizing that the "[defendant] herself acknowledged that the parties for whom she worked while an associate at the Siegel firm were not 'her' clients but were clients of Fred Siegel Co., L.P.A."); Shein v. Myers, 576 A.2d 985, 989 (Pa. Super. Ct. 1990) (citing *Adler* and referring to the departing attorneys throughout the opinion as "breakaway attorneys").

duty.[233] In some of these pre-departure solicitation cases, the defendants took actions (such as removing client files prior to departure) that might arguably have been wrongful independent of the fact that solicitation occurred prior to departure.[234] In contrast, post-departure solicitations are usually not found to be improper, at least absent the use of any improper means, such as defamatory statements.[235] In such cases, the formerly associated attorney has now become a competitor, so the generally-recognized privilege to compete applies.[236]

Occasionally, courts resort to ethics code or opinions in an effort to determine whether the interference was improper.[237] For exam-

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233. *See* Vowell & Meelheim, P.C. v. Beddow, Erben & Bowen, P.A., 679 So. 2d 637, 639 (Ala. 1996) (precluding summary judgment pending resolution of factual issues surrounding the defendants' pre-departure conduct involving possible client solicitation); Dowd & Dowd, Ltd. v. Gleason, 816 N.E.2d 754, 761 (Ill. App. Ct. 2004) (noting that firm clients are not property in terms of "chattel," but preresignation solicitation of clients of the law firm is a breach of fiduciary duty); Meehan v. Shaughnessy, 535 N.E.2d 1255, 1264-65 (Mass. 1989) (holding that a departing attorney's conduct involving secret preparations to secure firm's clients violated their fiduciary duties to the firm); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 9 cmt. i reporter's note (2000) (stating that "apparently all decisions agree" that pre-departure solicitations of clients without notice to the firm may be actionable).

234. *See* Phil Watson, P.C. v. Peterson, 650 N.W.2d 562, 563 (Iowa 2002) (involving an attorney who prior to departure "quietly" removed clients' files from the firm where he would eventually resign); *Meehan*, 535 N.E.2d at 1265 (involving letters to clients that did not clearly advise clients that they had a right to decide who will continue the representation); *see also* Connors, Fiscina, Swartz & Zimmerly v. Rees, 599 A.2d 47, 48 (D.C. 1991) (involving attorney who "blatantly lied" to clients he solicited prior to departure, but who was not found liable because plaintiff failed to establish causation).

235. *See Fred Siegel Co., L.P.A.*, 707 N.E.2d at 861 (concluding that a factual issue concerning defendant's alleged use of information protected as a trade secret or disclosure of confidential information precluded summary judgment); *Shein*, 576 A.2d at 989 (involving the surreptitious removal of client files, "scurrilous statements" about the plaintiff-law firm, and misleading letters directed to clients being solicited); Koeppel v. Schroder, 122 A.D.2d 780, 782 (N.Y. App. Div. 1986) (holding that departing attorneys did not improperly interfere when they solicited clients after departing from the firm where there was no evidence of wrongful interference, such as fraudulent representations or threats); Bray v. Squires, 702 S.W.2d 266, 270-71 (Tex. App.—Houston [1st Dist.] 1985, no writ) (concluding that there was no breach of fiduciary duty where evidence supported conclusion that departing attorneys did not solicit clients prior to departure).

236. *Fred Siegel Co., L.P.A.*, 707 N.E.2d at 860.

237. *See Phil Watson, P.C.*, 650 N.W.2d at 564 (using a 1982 Iowa State Bar ethics opinion); *Wistow*, 2002 WL 1803926, at *6 (referring to the Restatement (Third) of the Law Governing Lawyers to determine if the departing attorney owed a duty to his employer); *Fred Siegel Co., L.P.A.*, 707 N.E.2d at 860 (referencing the ABA's Model Rules and Ohio's disciplinary rules regarding client solicitation and advertising); Adler, Barish, Daniels,

ple, in *Adler*, the court referenced the fact that the departing associates had violated the older Model Code's proscription against an attorney recommending employment of himself as evidence that the attorney's interference was improper.[238] While the violation of such rules may be relevant in determining whether an interference is improper, the Supreme Court of Ohio held in *Fred Siegel Co. v. Arter & Hadden*[239] that it is not determinative.[240] Instead, according to the court, all relevant factors must be considered in assessing the propriety of the departing attorney's actions, including clients' interests "in being fully apprised of information relevant to their decisionmaking," attorneys' "interests in engaging in constitutionally protected free speech," and the general presumption in favor of fair competition.[241]

Even in the case of post-departure solicitations where at least something approximating a bright-line rule has developed, considerable grey area exists as to whether the competing attorney employed improper means of interference. In an Illinois case, the appellate court upheld the trial court's issuance of an injunction on the grounds that the defendant-attorneys were improperly soliciting the plaintiff-law firm's clients.[242] One of the allegedly improper means at issue involved the circulation of (presumably truthful, but damaging) newspaper accounts of the plaintiff-law firm by one of the defendants' *clients* in an attempt to persuade other clients to fire the firm and hire the defendants.[243] In *Fred Siegel Co.,* the Ohio Supreme Court denied the summary judgment motion of a departing attorney and her new law firm on the plaintiff-law firm's charge of tortious interference.[244] After leaving her old law firm, the departing attorney wrote letters to clients for whom she had done legal work while at the old firm, and notified them of her change of firms and her willingness to continue representation.[245] While acknowledging that the competitor's privilege to solicit cus-

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Levin & Creskoff v. Epstein, 393 A.2d 1175, 1184 (Pa. 1978) (referring to the Restatement (Second) of Torts to determine if conduct is improper).

238. *Adler*, 393 A.2d at 1184.

239. 707 N.E.2d 853 (Ohio 1999).

240. Fred Siegel Co., L.P.A. v. Arter & Hadden, 707 N.E.2d 853, 860 (Ohio 1999).

241. *Id.*

242. Paul Pratt, P.C. v. Blunt, 488 N.E.2d 1062, 1069 (Ill. Ct. App. 1986).

243. *Id.*

244. *Fred Siegel Co., L.P.A.*, 707 N.E.2d at 861.

245. *Id.* at 859.

tomers applied in this instance, the Ohio Supreme Court concluded that a genuine issue of material fact existed as to whether the departing attorney had employed wrongful means in competing with the old law firm.[246] Specifically, the departing attorney had relied upon the old firm's client list to identify recipients and addresses for her mailings.[247] According to the court, a firm's client list may constitute a protectable trade secret, and by relying upon the list the plaintiff may have misappropriated the firm's trade secrets.[248]

3. Toward a Definite Rule

Situations involving attorneys who leave a law firm and take clients with them present a particularly challenging dilemma because of the conflicting public policies at stake and the potentially confusing interplay between the ethical rules governing lawyers and fiduciary duty principles.[249] The easy cases can be handled simply by resorting to the ethical rules governing lawyers. If a departing attorney had little or no prior direct contact with a client, but solicited the client by in-person, live telephone, or real-time electronic contact, the attorney would be in violation of Rule 7.3.[250] Even if an attorney is permitted to solicit a client through such means, the making of false or misleading statements or coercive actions on the part of the attorney would amount to a violation of the rules.[251] Hence, absent some unusual circumstances, such conduct should also amount to improper interference for purposes of an interference claim. In the truly difficult cases, however, rote application of the independently tortious standard will be inadequate to resolve the competing policy concerns present.

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246. *Id.* at 861.

247. *Id.*

248. *Id.* at 862.

249. Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 23 (1988).

250. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-414 (1999).

251. *See* MODEL RULES OF PROF'L CONDUCT R. 7.1, 7.3 (2002) (prohibiting a lawyer from making "false or misleading communication[s]" about the lawyer or soliciting employment in a manner involving "coercion, duress or harassment").

a. Pre-Departure Solicitation

An attorney who violates a fiduciary duty has almost certainly engaged in independently tortious conduct.[252] While most commentators agree that post-departure competition is generally permissible under agency principles,[253] one obvious problem with classifying pre-departure solicitation as improper interference is that it gives paramount importance to the principles of fiduciary duty at the expense of the values of informed client choice that underlie so much of the law governing lawyers.[254] While the solicitation rules of the Model Rules are designed in part to protect a client "from coercion, overreaching, or undue influence," agency principles are designed primarily to define the rights of competing lawyers.[255] Thus, using fiduciary principles as the basis for determining the propriety of the defendant's conduct may undervalue the important interest a client has in obtaining counsel of choice.

Another problem is that one person's improper solicitation may be another person's ethical duty. ABA Formal Ethics Opinion 99-414 suggests that a departing attorney should be able to abide by the attorney's ethical duties *and* avoid a lawsuit by going no further than simply notifying clients of the attorney's impending departure and reminding them of their right to choose their own counsel.[256] What happens when an attorney goes beyond such action, how-

252. *See* Outsource Int'l, Inc. v. Barton & Barton Staffing Solutions, 192 F.3d 662, 671 (7th Cir. 1999) (Posner, J., dissenting) (stating that the violation of a fiduciary duty amounts to the use of independently tortious means for purposes of an interference claim).

253. Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 106 (1988).

254. *See generally* Geoffrey C. Hazard, Jr., *Ethical Considerations in Withdrawal, Expulsion, and Retirement*, *in* WITHDRAWAL, RETIREMENT & DISPUTES 36 (E. Berger ed. 1986) (arguing that attorneys should be permitted to negotiate with firm clients regarding future employment prior to departure); Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 25 (1988) (noting that "[t]he client's power to choose, discharge, or replace a lawyer borders on the absolute"); Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 103 (1988) (stating that "[i]f an exiting lawyer believes in good faith that the interests of his client will be best served by pre-departure disclosure of the facts and circumstances of his departure, then he should not be dissuaded from making those revelations by reason of conflicting obligations to his firm").

255. Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 25 (1988).

256. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-414 (1999).

ever, remains unclear at best.[257] In short, any proposed solution that seeks to draw a distinction between impermissible "solicitation" or "luring" and permissible "information providing" is unlikely to clarify matters greatly.[258]

Regardless, there also remains the question as to why principles of fiduciary duty should trump the principle of informed client choice to begin with. An attorney who informs a client of her impending departure and *volunteers* information about the new firm's billing structure and resources would go beyond what the ABA advises is appropriate and would seem to venture dangerously close to the realm of improper "luring" of clients. Indeed, it should reasonably be assumed that this was at least one of the lawyer's purposes in volunteering such information. Such actions, however, would also be entirely consistent with (if not compelled by) a lawyer's duty to provide sufficient information to enable a client to make an informed decision regarding the representation, at least in the case of a client with an active, ongoing matter.[259] The concern over denying clients relevant information may be particularly pronounced where the client in question has an active matter, a longstanding relationship with the departing attorney, or where there is a possibility that the new firm will have a conflict of interest in the client's matter.[260]

At the same time, there is a risk of allowing the principle of informed client choice to overpower the principles contained in agency and partnership law.[261] In sum, the truly difficult cases pre-

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257. Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1183 (N.Y. 1995).

258. This same basic distinction has been offered by at least one commentator. *See* Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 124 (1988) (proposing that departing attorneys should be permitted to inform clients of the fact and circumstances of the lawyer's departure, the lawyer's willingness to provide future legal services, and the client's right to choose his or her own counsel, provided that the attorney promptly notifies the firm).

259. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2002) (requiring a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding . . . representation").

260. *Cf. Moskovitz*, 653 N.E.2d at 1183 (involving an attorney who raised these concerns when charged with breaching his fiduciary duty by soliciting firm clients prior to departure).

261. *See* Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 27 (1988) ("The principle of informed client

sent a situation in which a court has no choice but to look beyond the competing standards contained in legal ethics codes and agency and partnership law and toward to the policies underlying such standards. By examining these policies, courts should be able to craft a rule defining proper conduct that strikes the appropriate balance.

One solution, contained within Section 9 of the Restatement (Third) of the Law Governing Lawyers, would be to permit a departing attorney to solicit clients "on whose matters the lawyer is actively and substantially working" prior to departure, but only after the lawyer has informed the firm of the lawyer's intent to contact firm clients for that purpose.[262] Importantly, Section 9 makes no attempt to distinguish between permissible information-providing and impermissible "luring." Instead, it recognizes a lawyer's right to "solicit" clients,[263] which, by definition, means the right to "lure" (to use the pejorative term).

The fact that Section 9 references a client "on whose matters the lawyer is actively and substantially working"[264] necessarily means that the section draws a distinction between clients with ongoing matters and clients who do not have ongoing matters (or at least ongoing matters with which the attorney is actively involved). With regard to clients with ongoing matters, Section 9 comes close to striking the appropriate balance between the competing interests. The rule takes into account the departing lawyer's duty of loyalty to the firm, a departing lawyer's interest in earning a living, and "the interests of clients in continued competent representation, in freely choosing counsel, and in receiving accurate and fair information from both the departing lawyer and the firm on which to base such a choice"[265] and arrives at a generally fair balance.[266]

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choice is not, or at least should not be, so overpowering that it shields all pre-termination competition by members of a firm.").

262. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 9(3)(a) (2002).

263. *Id.*

264. *Id.*

265. *Id.* cmt. i.

266. *See* Wistow & Barylick, Inc. v. Bowen, No. CIV.A. PC 94-6341, 2002 WL 1803926, at *6 (R.I. Super. July 24, 2002) (explaining that "Section 9(3) of the *Restatement* is a fair and reasonable resolution to the problems arising out of the mobility of lawyers in current practice").

The rule protects the firm's interests by proceeding from the assumption that the client is a client of the firm.[267] From there, the rule prevents a departing attorney from generally raiding the firm's client base with respect to clients on whose cases the departing attorney has done little work. It also prevents the departing attorney from surreptitiously soliciting clients, thereby depriving the firm of the chance to make its case as to why the client should remain with the firm.

While a rule that proceeds from the assumption that a client is a client of the firm might arguably be at odds with the fundamental notion that a client has a right to choose his or her own counsel,[268] Section 9 stops short of declaring that the client "belongs" to the firm. Instead, the rule seeks to maintain a departing attorney's ability to earn a living and a client's ability to receive information and make informed decisions. By requiring a departing attorney to notify the firm of the attorney's intent to solicit firm clients, the rule creates the opportunity for the firm "to make its own fair and accurate presentation to relevant clients," thus allowing a client to make an informed decision.[269] Furthermore, the comments make clear that the departing attorney must do more than merely refrain from making affirmatively false or misleading statements.[270] A departing attorney must "provide accurate and reasonably complete information to the client, and must provide the client with a choice of counsel."[271] Thus, the rule furthers the goals of preserving a client's interest in freely choosing counsel and in receiving accurate and fair information.

Another benefit of the rule is that it reduces the prospect for overreaching or undue influence on the part of the departing attorney. As mentioned, one of the concerns behind Model Rule 7.3 is that clients who are in need of legal representation may be particularly susceptible to persuasion by lawyers and may have a difficult time making an informed decision in the face of direct solicita-

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267. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 9(3) cmt. i (2002) (stating that a lawyer may solicit clients only on cases he or she is actually working).

268. Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 15 (1988).

269. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 9(3) cmt. i.

270. *See id.* (stating that the departing lawyer "must provide accurate and reasonably complete information to the client, and must provide the client with a choice of counsel").

271. *Id.*

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tion.[272] This concern would seem to be magnified where the client is aware that the departing attorney is surreptitiously attempting to lure the client away from the firm. By requiring that a departing attorney provide complete and accurate information and notification as to the client's right to choose counsel, Section 9 helps reduce some of these concerns. More importantly, by requiring that all such solicitations be above board, some of the pressure on the client in choosing counsel should be alleviated. Finally, the departing attorney's notification to the firm almost guarantees that the client will be reassured not once but twice of the right to choose counsel when the firm makes its own case, and the client will receive sufficient information to enable the client to make an informed decision.

The most significant drawback to Section 9 is its requirement that a departing attorney notify the law firm of the attorney's intent to solicit clients *prior* to departure.[273] The reality is that in many cases, such notification is simply unlikely to occur. The result would either be that the departing attorney would nonetheless engage in surreptitious solicitation, which directly implicates the policy concerns underlying Rule 7.3, or would refrain from soliciting the client until after the attorney departs, which may deny the client information in which the client has a substantial interest. The better solution would be to require a departing attorney to promptly notify the firm of the solicitation either before or after it occurs.[274] Such a rule would ensure that departing attorneys are not discouraged from providing the information clients may need to make an informed decision, while preserving a firm's ability to protect its client base. With this one modification, Section 9 should establish the standard for purposes of both interference and breach of fiduciary duty claims.

The other shortcoming of Section 9 is that it fails to address the situation in which an attorney has done substantial work for a client in the past, but the client does not have an ongoing matter.[275] By inquiring into the policies contained in the relevant bodies of

272. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 1 (2002).

273. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 9(3)(a)(ii).

274. Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 124 (1988).

275. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 9(3)(a) (setting forth the rules when a lawyer may solicit firm clients).

law, however, a court should be able to craft a rule that effectively balances the competing interests. Where a client does not have an active, ongoing matter, the client's need for information about the impending departure of an attorney who has worked with the client in the past is significantly less. Indeed, in such cases, a departing attorney arguably no longer has an ethical obligation to inform the client of the departure prior to its occurrence.[276] Ordinarily, the client's interest in such a case can be protected by permitting an attorney to solicit the client after departure. Moreover, such a rule would protect a firm's interest in its client base and would generally be consistent with agency principles. Thus, soliciting a client in such situations without the prior notification of the law firm should amount to independently tortious conduct for purposes of an interference claim, as well as a breach of the attorney's fiduciary duties.

b. Post-Departure Solicitation

In the case of post-departure solicitation, Section 9 provides that an attorney would be free to solicit firm clients to the same extent as any other non-firm lawyer.[277] With regard to post-departure solicitation, Section 9 is consistent with most existing case law and agency principles[278] and also promotes the goal of informed client choice. Most states' ethics codes would permit an attorney who has already left a firm to contact directly a client with whom the attorney had a prior professional relationship, provided that the communication did not amount to coercion, duress, harassment, or contain false or misleading statements.[279] Because Section 9, in this respect, is consistent with agency principles, allows for client choice, and protects clients from coercion and other obviously im-

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276. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002) (imposing upon a lawyer a duty to keep the client informed about "the status of *[the] matter*" or to provide information "necessary to permit the client to make informed decisions regarding *the representation*") (emphasis added).

277. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 9(3)(b).

278. Fred Siegel Co., L.P.A. v. Arter & Hadden, 707 N.E.2d 853, 861 (Ohio 1999); Shein v. Myers, 576 A.2d 985, 989 (Pa. Super. Ct. 1990); Koeppel v. Schroder, 122 A.D.2d 780, 782 (N.Y. App. Div. 1986); Bray v. Squires, 702 S.:W.2d 266, 270-71 (Tex. App.—Houston [1st Dist.] 1985, no writ); Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 106 (1988).

279. MODEL RULES OF PROF'L CONDUCT R. 7.1, 7.3 (2002).

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proper forms of solicitation, it should be the standard for determining the propriety of a post-departure solicitation that results in an interference claim.[280]

The problem in such cases, however, is the same problem that plagues much of the interference case law concerning competitive business practices: How to define "improper means" of competition. In the case of attorney interference, the problem is more pronounced. For example, in *Fred Siegel Co., L.P.A. v. Arter & Hadden*,[281] a departing attorney took with her a rolodex containing information about clients for whom she worked and a sixty-three page client list containing information about hundreds of the firm's clients, which she used to solicit clients after leaving the firm.[282] The complaining law firm did not challenge the court of appeals' finding that, because the client names contained in the rolodex were clients the departing attorney had represented while with the Siegel firm, the departing attorney was permitted to retain the rolodex.[283] However, the Ohio Supreme Court did conclude that the departing attorney's use of the much larger client list might constitute a misappropriation of a trade secret.[284] This begs the question as to why it was permissible for the departing attorney to use the rolodex to contact former clients, but impermissible to use the firm's client list for the same purpose.[285]

Putting aside the question of whether a law firm client list *can*, in theory, amount to a trade secret, the more pressing question raised by *Siegel* is whether a law firm client list *should* be recognized as a trade secret and whether a departing attorney's use of such a list to contact clients for whom the attorney has worked *should* constitute a misappropriation of a trade secret.[286] While a law firm unquestionably has an interest in protecting its intellectual property, limit-

280. Such a rule would also be consistent with traditional agency law. *See* RESTATEMENT (SECOND) OF AGENCY § 393 (1986) (noting that absent an agreement to the contrary, an agent may compete with his principal after the termination of his employment).

281. 707 N.E.2d 853 (Ohio 1999).

282. Fred Siegel Co. v. Arter & Hadden, 707 N.E.2d 853, 857 (Ohio 1999).

283. *Id.* at 863 (Cook, J., dissenting).

284. *Id.* at 862.

285. *Id.* at 863 (Cook, J., dissenting).

286. *See* Robert W. Hillman, *The Property Wars of Law Firms: Of Client List, Trade Secrets and the Fiduciary Duty of Law Partners*, 30 FLA. ST. U. L. REV. 767, 778-79 (2003) (noting the competing interests at stake and the court's failure to fully address the interests of clients).

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ing the ability of a departing attorney to use such a list directly limits the ability of the departing attorney to compete with a former firm.[287] Perhaps more importantly, it limits the client's ability to receive information that might enable him or her to make an informed decision regarding his or her choice of legal counsel.[288] Prohibiting former employees from using client lists in other contexts might be perfectly acceptable. However, focusing on the legal profession, such an approach seems inherently at odds with the overwhelming body of law prohibiting anti-competitive behavior on the part of lawyers due to its effect on the client choice.[289]

D. *When Good Associations Go Bad, Part II: Co-Counsel Interference*

One of the more common, reoccurring scenarios involving good relationships that have gone bad involves a co-counsel relationship that turns sour, leading to charges that one attorney has interfered with the other attorney's relationship with a shared client.[290] Sometimes two attorneys who are jointly responsible for the representation of a client are no longer able to peacefully co-exist, prompting one to either attempt to poison the client's opinions of the other,[291] or present the client with an "either he goes or I go" ultimatum.[292] Other times, some external force triggers a breakup between the once amicable lawyers, resulting in a scramble to see

287. *Id.* at 785.

288. *Id.*

289. *See* Robert M. Wilcox, *Enforcing Lawyer Non-Competition Agreements While Maintaining the Profession: The Role of Conflict of Interest Principles*, 84 MINN. L. REV. 915, 916-18 (2000) (describing non-competition agreements in non-legal professions, while discussing policy reasons for excepting the legal profession from the normal rules governing such agreements).

290. *See* Anderson v. Anchor Org. for Health Maint., 654 N.E.2d 675, 685 (Ill. 1995); Krebbs v. Mull, 727 So. 2d 564, 565-66 (La. Ct. App. 1998); Madorsky v. Bernstein, 626 N.E.2d 694, 695 (Ohio App. Ct. 1993), *appeal dismissed*, 624 N.E.2d 194 (Ohio 1993); *see also* Beck v. Wecht, 48 P.3d 417, 418 (Cal. 2002) (involving a breach of fiduciary duty claim, in which one co-counsel allegedly alienated the other co-counsel from client); People v. Harding, 967 P.2d 153, 154 (Colo. 1998) (en banc) (per curiam) (involving ethics charges against an attorney who was hired by another to work on a case and was sued by that attorney for interfering with the attorney-client relationship).

291. *See Beck*, 48 P.3d at 418 (providing examples of co-counsel undermining negotiations, misconduct, and alienation of clients).

292. *See Krebbs*, 727 So. 2d at 566 (describing how an attorney notified clients that he could no longer work with co-counsel and that clients must choose between the two attorneys).

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which one will maintain the client's affection.[293] When these previously good associations go bad, charges of breach such as fiduciary duty and/or tortious interference may result.[294]

Where attorneys agree to share a fee resulting from the representation of a client, a joint venture relationship may exist, resulting in the creation of fiduciary duties owing to each attorney.[295] Accordingly, each attorney in such a relationship may owe a duty of full disclosure and a duty not to take advantage of the other joint venturers.[296] The breach of such a duty may also constitute an improper form of interference.[297] In the case of an "either he goes or I go" ultimatum, the defendant's interference should not be considered improper, absent bad faith on the defendant's part.[298] While an attorney may owe a fiduciary duty to other attorneys engaged in the joint venture, an attorney also owes a duty of competent representation to a client. If an attorney honestly believes that the attorney can no longer peacefully co-exist with co-counsel and that continued joint representation may have adverse consequences for the client, the attorney has an ethical duty to communicate this fact to the client.[299] Moreover, such action might not be improper (or privileged) as a general matter on the grounds that the attorney has a responsibility for the client's welfare.[300]

Where, however, one attorney either poisons the co-counsel's attorney-client relationship or takes advantage of another joint venturer, the situation becomes more complicated. *In re Wright v.*

293. *See In re* Wright v. Stone, No. ADV. 98-5119-LMC, 98-53314, 1999 WL 33734469, at *1 (Bankr. W.D. Tex. June 10, 1999) (illustrating an example of a falling apart of two attorneys and the subsequent rush to secure clients); *Krebbs*, 727 So. 2d at 567 (discussing tortious interference claims among attorneys).

294. *See Beck*, 48 P.3d at 418 (providing an illustration of an attorney complaining of a breach of fiduciary duty).

295. *Krebbs*, 727 So. 2d at 569.

296. *Id.*

297. *See* McCrea & Co. Auctioneers v. Dwyer Auto Body, 799 P.2d 394, 398 (Colo. 1998) (stating that "wrongful means" includes a breach of the fiduciary duty and does not allow for a privilege to be raised relieving one of liability).

298. Madorsky v. Bernstein, 626 N.E.2d 694, 696 (Ohio App. Ct. 1993), *appeal dismissed*, 624 N.E.2d 194 (Ohio 1993).

299. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2000) (stating that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

300. *See* RESTATEMENT (SECOND) OF TORTS § 770 cmt. b (1977) (describing the nature of the relationship existing between an attorney and another).

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Stone,[301] an unpublished Texas bankruptcy opinion, illustrates the risks involved when one co-counsel covets his co-counsel's clients.[302] Attorneys Wright and Stone had a somewhat unusual relationship.[303] Wright previously had a successful solo personal injury practice for a number of years,[304] but apparently was not fond of litigation. Eventually, he entered into a relationship with Stone, whereby the two attorneys would "associate" on matters.[305] The word "associate" in this instance, meant that Wright would secure the clients, attempting to first settle their personal injury cases.[306] If he was unable to settle, he would refer the matter to Stone, who then assumed complete responsibility for the matters.[307] The attorneys were not partners in the literal sense, in that the clients' contingent fee agreements were exclusively with Wright.[308] Wright would fund the representation to its conclusion and give Stone a cut of what was eventually recovered.[309] Thus, because Stone did not have a contract with the clients, he was entirely dependent on the arrangement with Wright for his compensation.[310] Unfortunately for Stone, as he later discovered, the lawyers' fee-splitting arrangement was unenforceable because it had not been communicated to the clients in writing.[311] In other words, Stone had no legal right to collect under the arrangement.[312]

Eventually, Wright was convicted of tax evasion.[313] After Wright's conviction was reported in the newspapers, Stone contacted some of the shared clients on whose matters he was working, informed them that Wright had recently been convicted, and suggested that the conviction could have an adverse impact on

301. 1999 WL 33734469 (Bankr. W.D. Tex. June 10, 1999).
302. *In re* Wright v. Stone, No. ADV. 98-5119-LMC, 98-53314, 1999 WL 33734469, at *1 (Bankr. W.D. Tex June 10, 1999).
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *In re Wright*, 1999 WL 33734469, at *1.
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *In re* Wright v. Stone, ADV. No. 98-5119-LMC, 98-53314, 1999 WL 33734469, at *1 (Bankr. W.D. Tex. June 10, 1999).
313. *Id.* at *2.

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their cases.[314] He then helped the clients draft a termination letter discharging Wright and entered into contingent fee agreements with these clients.[315] Interestingly, Stone only contacted those clients whose cases had the best potential for a big payoff.[316] With the other clients, Stone apparently continued to represent them in keeping with the lawyers' arrangement, then refused to give Wright a share of the proceeds.[317] After a bench trial, Stone was held liable for conversion in the case of the latter category of clients, and tortiously interfering with Wright's relationships with the more lucrative clients.[318]

One plausible explanation for the outcome in this case is that the court, in keeping with one view of the interference torts, viewed the clients in question as the "property" of Wright. Viewed in this light, Stone's actions were inherently wrong because Wright had originally secured the clients, paid for Stone's overhead, entirely funded the litigation, and allowed Stone to gain the client's trust, only to be stabbed in the back when misfortune befell Wright. The court's opinion gives several indications that the court viewed Stone's attempts to sign up the clients as almost inherently wrong. The court noted that Stone was in the unenviable position of owing a duty of loyalty to the clients by virtue of his representation, while simultaneously having no contractual right to collect a contingency fee until the clients discharged Wright and hired Stone. However, the court had little sympathy for Stone's plight, noting that Stone never complained about the arrangement while Wright secured clients and paid for Stone's overhead, thus relieving Stone of the burden of having to concern himself with the business realities of legal practice.[319] The court also colorfully characterized Stone's decision to solicit only the potentially most profitable clients as "cherry-pick[ing]."[320] In its recital of actionable conduct on the part of

314. *Id.*

315. *Id.*

316. *Id.*

317. *In re* Wright, 1999 WL 33734469, at *2, *7.

318. *Id.* at *7, *13. Stone was not liable for breach of fiduciary duties arising out of his joint venture with Wright because their agreement to split fees was not enforceable. Thus, an essential element of a joint venture – an agreement to share fees – was absent. *Id.* at *14.

319. *Id.* at *12 n.21.

320. *In re* Wright v. Stone, ADV. No. 98-5119-LMC, 98-53314, 1999 WL 33734469, at *11 (Bankr. W.D. Tex., June 10, 1999).

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Stone, the court also referenced the fact that Stone solicited the clients (rather than waiting for them to approach him with any concerns they might have about Wright)[321] and seemed particularly irked by the fact that Stone "'generously' offered to draft up a termination letter" for the clients and "just happened" to have a new retainer agreement with him.[322]

The court's somewhat cursory handling of Stone's affirmative defense argument also suggests that the court viewed Stone's communications with the clients as almost inherently wrong. In this instance, there were at least two privileges that could have arguably applied. As a lawyer, Stone had a duty to inform his clients about any matters that might affect the status of the representation.[323] This duty follows the recognized privilege of one having responsibility for the welfare of a third person to cause that person not to perform a contract with another, provided that the defendant does not employ improper means and acts to protect the welfare of the influenced person.[324] Based on the fact that Stone's primary motivation appeared to have been to protect his own interests, rather than those of the clients, the court understandably rejected Stone's privilege argument.[325] However, the court failed to address (or Stone failed to raise) a second, more plausible privilege argument.[326] Under Texas law, "a party to or interested in a contract may, by legal proceedings or otherwise in good faith, interfere with the execution of the contract where there is a bona fide doubt as to his rights under it."[327] While Stone may not have

321. In some cases, Stone actually visited clients at their homes (and, as the court pointed out, on a Sunday afternoon no less(!)). *Id.* at *12.

322. *Id.* at *11, *12.

323. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(3) (2002) (stating that a lawyer shall "keep the client reasonably informed").

324. *See* RESTATEMENT (SECOND) OF TORTS § 770 cmt. b (1977) (noting that this rule frequently applies in the case of those who "stand in a fiduciary relation toward another").

325. *In re Wright*, 1999 WL 33734469, at *13.

326. *Id.* at *16. It is unclear exactly what privilege argument Stone raised. In the court's words, "[t]o the extent the Court can make sense of [Stone's justification argument], the defense refers to Stone's argument that he was under a duty to inform clients of Wright's legal problems." *Id.*

327. Hardin v. Majors, 246 S.W. 100, 102 (Tex. Civ. App. 1922). This rule roughly parallels a provision of the Restatement (Second) of Torts:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual

been a party to Wright's contract with the clients, he certainly had an interest in those contracts. With Wright facing possible jail time and suspension from the practice of law, and with the enforceability of Stone and Wright's fee-splitting arrangement possibly in question, Stone might have had a bona fide doubt as to his rights to collect if and when the clients' cases paid off.[328] While Stone may have solicited and "cherry-picked" some of Wright's more profitable clients, these actions, alone, seem more legitimate when one pauses to consider that Stone conceivably could have ended up with nothing after representing these clients.

If the court was influenced by a primarily business-oriented view of the practice of law that places a premium on the protection of a lawyer's client base, Wright hardly seems like the most deserving beneficiary of such protection. Putting aside his tax evasion conviction that ultimately resulted in his suspension from the practice of law, Wright's fee-sharing agreement with Stone was in violation of the Texas Rules of Professional Responsibility and hence unenforceable as a matter of public policy.[329] Moreover, while it is unclear exactly how much work Wright performed on client matters prior to turning them over to Stone, it appears that Stone did the majority of the actual legal representation. Nonetheless, it was Wright, not Stone, who collected two-thirds of a forty percent contingent fee.[330] Moreover, the mere act of intentional interference, by itself, hardly seems like a strong enough basis upon which to attach liability in this instance, given the fact that an attorney-client relationship existed between Stone and the clients at the time of the interference and that Stone was the attorney of record for the clients he contacted.[331] Instead, if the outcome in favor of Wright is justified, it is justified on the grounds that Stone's conduct offended public policy even more so than Wright's.

> relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

RESTATEMENT (SECOND) OF TORTS § 773.

328. *In re Wright*, 1999 WL 33734469, at *13. In fact, Wright was suspended from the practice less than a year after being convicted. *Id.*

329. *Id.* at *1.

330. *Id.* at *1, *5.

331. *Id.* at *12 n.21.

Indeed, a close reading of the court's opinion suggests that this may have been the reason for its harsh opinion of Stone and ultimate finding of liability against Stone. It was not simply the fact that Stone solicited Wright's clients that warranted liability; it was the *manner* in which Stone solicited the clients. According to the court, Stone misled the clients into believing that they needed to fire Wright in order to preserve their lawsuits.[332] In so doing, the court intimated that he may have violated his ethical duties of candor and communication to his clients.[333] Thus, while Stone's actions may have been "wrongful" as toward Wright only in the general sense, they were "wrongful" in the legal sense because they were contrary to the strong public policy of promoting informed client choice. Thus, when one views the case through a lens that attaches the greatest significance to whether an attorney is fulfilling his or her ethical obligation to act in the best interest of a client and to keep a client informed with respect to the representation, the outcome of *In re Wright* is entirely justified.

V. Conclusion

While tortious interference claims may undoubtedly serve a valid function in ensuring ethical representation and protecting the right of attorneys to collect under a fee agreement, the considerable confusion surrounding the interference torts makes resolution of claims involving interference with the business of law particularly difficult. The amorphous nature of the torts presents special problems when the torts are thrust into an arena with such specialized rules and concerns. The greatest risk, however, is that the torts may be used to protect a lawyer's "property" interest in a client that the ethical rules governing lawyers at times goes to great lengths to emphasize a lawyer does not have. Given the paramount importance that the law governing lawyers places on the goals of informed client choice and decision-making, courts and lawyers should be hesitant to seek to impose liability for actions on the part of other attorneys that are consistent with these goals.

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332. *In re Wright*, 1999 WL 33734469, at *12 n.21.

333. *Id.* Moreover, in at least one instance, Stone convinced a client to sign a retainer agreement with him, but failed to insure that the client discharged Wright. Thus, both lawyers were entitled to collect the same fee from the client. *Id.* at *14. While Stone's actions may have amounted to a breach of fiduciary duty, it is unclear from the opinion whether such action also amounted to tortious interference. *Id.*