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Attorney Liability for Tortious Interference: Interference with Contractual Relations or Interference with the Practice of Law?

ALEX B. LONG*

I. INTRODUCTION

Attorney misconduct and litigation sometimes go hand-in-hand. Sometimes, an attorney is accused of misconduct during litigation, sparking ethics charges or judicial sanctions. Other times, it is an attorney's litigation misconduct that spawns new litigation. In an age of increased concern from members of the bar and the public at large about declining standards of professionalism,[1] it is hardly surprising that there has been a perceived trend toward increasing attorney liability to third parties.[2]

Of course, intentional tort claims against attorneys for conduct that relates to the representation of a client are hardly a new phenomenon.[3] Typical claims include malicious prosecution or wrongful initiation of civil proceedings,[4] abuse of process,[5] civil conspiracy,[6] defamation,[7] and

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1. See William N. Clark, President's Page, 65 ALA. LAW. 8, 8 (2004) (noting "the dramatic change in the perception of the public regarding lawyers"); Van M. Pounds, Promoting Truthfulness in Negotiations: A Mindful Approach, 401 WILLAMETTE L. REV. 181, 187 (2004) (noting the use of "'Rambo-like' tactics that, while often prized by the client, are vilified by the remainder of society"); see also Skolnick v. Altheimer & Gray, 730 N.E.2d 4, 9 (Ill. 2000) (involving tortious interference claim stemming from defendant-attorneys' reporting of misconduct of another attorney in the law firm, allegedly with knowledge that allegations were false).

2. See Barbara Glesner Fines, Speculating on the Future of Attorney Responsibility to Nonclients, 37 S. TEX. L. REV. 1283, 1285 (1996); J. Randolph Evans & Ida Patterson Dorvee, Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability, 45 S.C. L. REV. 803, 803-04 (1994); Paul T. Hayden, Reconsidering the Litigator's Absolute Privilege to Defame, 54 OHIO ST. L.J. 985, 986 (1993).

3. See Evans & Dorvee, supra note 2, at 803-04.

4. See, e.g., Ely v. Whitlock, 385 S.E.2d 893, 896 (Va. 1989) (barring claim of malicious prosecution against attorney stemming from attorney's filing of disciplinary complaints against plaintiff-attorney).

5. See, e.g., id. at 897 (barring claim of malicious prosecution against attorney stemming from attorney's filing of disciplinary complaints against plaintiff-attorney, but permitting abuse of process claim to proceed).

6. See, e.g., McLaughlin v. Copeland, 455 F. Supp. 749, 753 (D. Del. 1978), aff'd 595 F.2d 1213 (3d Cir. 1979) (barring claim of civil conspiracy against attorney stemming from statements contained in a letter sent by attorney to judge).

7. See, e.g., id. at 751-52 (barring claim of defamation against attorney stemming from statements contained in a letter sent by attorney to judge).

intentional infliction of emotional distress.[8] What is perhaps new is the increasing attention in bar ethics opinions[9] and legal decisions[10] being paid to one type of tort claim in particular: tortious interference with contractual relations. The fact that there have been several recent cases involving tortious interference claims against attorneys for conduct or statements occurring during the representation of a client that more naturally might have sounded under a different tort theory, suggests that plaintiffs may be becoming more creative in their attempts to circumvent some of the bright-line rules that typically shield attorneys from liability in such situations.[11] Occasionally, some of these attempts to bypass the restrictions of other tort theories even prove successful.[12]

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8. See, e.g., Kinamon v. Staitman & Snyder, 136 Cal. Rptr. 321 (Cal. Ct. App. 1977) (permitting plaintiff to maintain action for intentional infliction of emotional distress based upon letter written to plaintiff by defendant-attorneys, which threatened criminal sanctions as a means to collect debt allegedly owed by plaintiff), overruled by Silberg v. Anderson, 786 P.2d 365 (Cal. 1990).

9. Phila. Bar Ass'n Prof'l Guidance Comm., Informal Op. No. 2004-1 (2004); Fla. Bar Ass'n Comm. on Prof'l Ethics, Op. No. 02-5 (2003); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-414 (1999); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Op. No. 99-100 (1999).

10. Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1261 (11th Cir. 2004); In re Berry Pub. Servs., Inc., 231 B.R. 676 (Bankr. N.D. Ill. 1999); Ingalsbe v. Stewart Agency, Inc., 869 So. 2d 30 (Fla. Dist. Ct. App. 2004); Horowitz v. Holabird & Root, 816 N.E.2d 227 (Ill. 2004); Salit v. Ruden, McClosky, Smith, Schuster & Rusell, P.A., 742 So. 2d 381 (Fla. Dist. Ct. App. 1999).

11. See Mantia v. Hanson, 79 P.3d 404 (Or. Ct. App. 2003) (involving interference claim stemming from law firm's filing of an allegedly baseless claim); Safeway Ins. Co. v. Guerrerro, 83 P.3d 560 (Ariz. Ct. App. 2004) (involving interference claim stemming from alleged scheme to manufacture a bad faith claim against plaintiff that was not permitted by state law); McKenna, Long & Aldridge, LLP v. Keller, No. A-4A0624, 2004 WL 859178 (Ga. Ct. App. Apr. 22, 2004) (involving allegation that defendant-attorney tortiously interfered with plaintiff's prospective employment relationship by sending allegedly defamatory letter to prospective employer); Salit, 742 So. 2d at 385-88 (holding that plaintiffs had stated a cause of action for tortious interference against law firm that helped client take over corporation, but holding that plaintiff had omitted one element of injurious falsehood claim); see also Berry Pub. Servs., Inc., 231 B.R. at 683 (dismissing tortious interference claim against client stemming from attorney's alleged tortious interference, but permitting tortious interference claim against attorney to proceed); Horowitz, 816 N.E.2d at 284 (dismissing claim attempting to hold client vicariously liable for attorney's tortious interference); Kennedy v. Kennedy, 819 S.W.2d 406 (Mo. Ct. App. 1991) (involving tortious interference claim stemming from allegedly defamatory statements made by attorney to government agency during representation of client); Maynard v. Caballero, 752 S.W.2d 719 (Tex. App. 1988) (involving tortious claim stemming from attorney's persuasion of plaintiff's attorney to limit cross-examination of witness).

12. Safeway Ins. Co., Inc., 83 P.3d at 567 (denying summary judgment for attorney); infra notes 87-143 and accompanying text (discussing this situation); Salit, 742 So. 2d at 386 (denying law firm's motion to dismiss); Kennedy, 819 S.W.2d at 409 (denying attorney's motion to dismiss). Compare Jackson, 372 F.3d at 1275 (holding that Florida's absolute litigation privilege barred plaintiff's tortious interference claim against

As is the case with other tort actions, courts face a difficult choice in deciding whether to permit an aggrieved litigation opponent or attorney to bring a tortious interference claim against an opposing attorney. These situations force courts to choose between furthering the tort law goals of deterrence of undesirable conduct and compensation of injury and preserving the ability of attorneys to act fearlessly as advocates on behalf of their clients. For example, while it is clearly unethical for an attorney to bring a frivolous claim on behalf of a client for the purpose of interfering with the defendant's relationships with others, should such an action amount to tortious interference? What if the attorney is accused of misrepresenting his client's intent to settle with an insurer, all in an attempt to drive a wedge between the insurer and its insured? Or if the attorney abuses the conflict of interest rules in order to force the withdrawal of opposing counsel, thereby depriving a client of his or her chosen counsel? Or if the attorney convinces a co-defendant's attorney to engage in questionable trial tactics, all in an attempt to keep secret the first attorney's disqualifying conflicts of interest?

While any tort claim in such scenarios might present a court with a difficult policy choice, tortious interference claims present some particularly vexing problems. Interference claims have generated a significant amount of scholarship, much of it critical.[13] To some critics, the basic test for determining the propriety of a defendant's successful attempt to induce another party to terminate a contractual or business relationship is so ill-defined as to be almost unworkable.[14] Others have attacked the torts on efficiency grounds, charging that, by making an outside party's successful attempt to induce another party to terminate its relationship with another into a tort, the torts discourage efficient breaches.[15] Still others have noted the potential for the torts to undermine other established bodies of law.[16] In the case of interference claims involving attorney conduct related to the representation of a client, the

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attorneys), with Ingalsbe, 869 So. 2d at 33 (holding that Florida's absolute litigation privilege did not bar plaintiff's tortious interference claim against attorney).

13. See Clark A. Remington, Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer, 47 BUFFALO L. REV. 645, 710 (1999); Mark P. Gergen, Tortious Interference: How It is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response, 38 ARIZ. L. REV. 1175 (1996); Gary Myers, The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law, 77 MINN. L. REV. 1097, 1099 (1993); Harvey S. Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Principles, 49 U. CHI. L. REV. 61, 61 (1982); Dan B. Dobbs, Tortious Interference with Contractual Relationships, 34 ARK. L. REV. 335, 343 (1980).

14. See Kutcher v. Zimmerman, 957 P.2d 1076, 1085 (Haw. Ct. App. 1998).

15. See Perlman, supra note 13, at 89-90.

16. See Alex Long, The Disconnect Between At-Will Employment and Tortious Interference with Business Relations: Rethinking Tortious Interference Claims in the Employment Context, 33 ARIZ. ST. L.J. 491 (2001); Gergen, supra note 13, at 1219.

interference torts pose an additional concern: a risk that they may chill legitimate advocacy on behalf of clients.

This Article focuses on attorney liability for tortious interference for conduct relating to the representation of a client and the potential for such claims to interfere with the ability of attorneys to practice law. Specifically, it deals with tortious interference claims against attorneys involving conduct occurring during the representation of a client and that lies close to the core of what it means to practice law. Such cases must be distinguished from interference cases involving attorney conduct that more closely resembles the business of law, rather than the practice of law. This latter category of cases often involves one attorney's solicitation of law firm clients after or before the attorney has departed a law firm;[17] one co-counsel's alleged interference with her co-counsel's relationship with a shared client;[18] a rival attorney's solicitation of the client of another attorney;[19] or a rival attorney's attempt to sabotage a competitor's relationship with a client out of simple spite or ill will.[20] These types of cases present their own set of problems and, in these cases, the actions of the defendant-attorney are somewhat removed from what can be classified as the pure practice of law. Nor does the Article discuss situations in which an attorney is charged with tortious interference after having advised a client to breach or not enter into a contract; courts have made it clear that an attorney has a conditional privilege to take such action, as long as the attorney is acting in good faith.[21] Finally (although the cases are legion), this Article does not address situations in which a non-lawyer is accused of tortiously interfering with an attorney-client relationship.[22]

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17. See Robert W. Hillman, Law Firms and Their Partners: The Ethics of Grabbing and Leaving, 67 TEX. L. REV. 1 (1988); Vincent R. Johnson, Solicitation of Law Firm Clients by Departing Partners and Associates: Tort Fiduciary and Disciplinary Liability, 50 U. PITT. L. REV. 1 (1988); Mark W. Bennett, You Can't Take It with You: The Ethics of Lawyer Departure and Solicitation of Firm Clients, 10 GEO. J. LEGAL ETHICS 395 (1997).

18. See, e.g., Krebbs v. Mull, 727 So. 2d 564, 565-66 (La. Ct. App. 1998).

19. See, e.g., Chaffin v. Chambers, 577 So. 2d 1125, 1127-28 (La. Ct. App. 1991), rev'd, 584 So. 2d 665 (La. 1991).

20. See Winiemko v. Valenti, 513 N.W.2d 181, 184 (Mich. App. Ct. 1994) (involving defendant-law firm that sent an improper lien letter to plaintiff-attorney's major client following a dispute between plaintiff and defendant, for whom plaintiff had formerly worked).

21. See, e.g., Los Angeles Airways, Inc. v. Davis, 687 F.2d 321, 326 (9th Cir. 1982) (holding that attorney was privileged to advise client to breach contract, even though his motivation may have been to enhance his position with his corporation, where his conduct was motivated in part by desire to benefit the corporation).

22. For an annotation of such cases, see Phoebe Carter, Annotation, Liability in Tort for Interference with Attorney-Client Relationship, 90 A.L.R.4th 621 (1991). The defendants in such cases, their forms of allegedly improper interference, and the decisions come in all shapes and sizes. Some of the more interesting cases involve adverse parties who seek to settle with a represented party behind the back of the party's attorney, see Ingalsbe v. Stewart Agency, Inc., 869 So. 2d 30, 31 (Fla. Dist. Ct. App.

Instead, the Article focuses only on those situations involving attorney conduct that can arguably be categorized as the practice of law. The Article argues that the primary concern with interference claims in this context is the potential for such claims to chill legitimate advocacy. However, it argues that interference claims, and tort law more generally, can serve an important role in maintaining professionalism among attorneys and preserving other important societal values. In an attempt to balance these competing concerns, the Article suggests that courts move toward a more context-specific approach in formulating rules for determining when an attorney has interfered improperly with the relationship of another.

Part II provides background concerning the interference torts and the criticisms that they have engendered. Part III discusses some of the special problems that interference claims may present when they are brought against attorneys for conduct relating to the representation of a

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2004) (holding that plaintiff-attorney stated claim); Goldberg v. Whitehead, 713 A.2d 204, 205 (R.I. 1998) (affirming dismissal of plaintiff-attorney's claim), and non-lawyer advisers who suggest to a represented client that an attorney be fired. See Calbom v. Knudtzon, 396 P.2d 148, 150 (Wash. 1964). One of the more common types of defendant is an insurance company. In numerous cases, attorneys have charged insurance companies with tortious interference after the companies settled directly with their clients. Cross v. Am. Country Ins. Co., 875 F.2d 625 (7th Cir. 1989); Edwards v. Travelers Ins. of Hartford, Conn., 563 F.2d 105 (6th Cir. 1977); Volz v. Liberty Mut. Ins. Co., Inc., 498 F.2d 659 (5th Cir. 1974); Employers Liab. Assurance Corp., Ltd. v. Freeman, 229 F.2d 547 (10th Cir. 1955); State Farm Ins. Co. v. Gregory, 184 F.2d 447 (4th Cir. 1950); Liston v. Home Ins. Co., 659 F. Supp. 276 (S.D. Miss. 1986); Brunswick v. Safeco Ins. Co., 711 A.2d 1202 (Conn. App. Ct. 1998); Ronald M. Sharrow, Chartered v. State Farm Mut. Ins. Co., 511 A.2d 492 (Md. 1986); Ross v. Woyan, 439 N.E.2d 428 (Ohio Ct. App. 1980); Knell v. State Farm Mut. Auto Ins. Co., 336 N.E.2d 568, 569 (Ill. App. Ct. 1975); State Farm Mut. Ins. Co. v. St. Joseph's Hosp., 489 P.2d 837 (Ariz. 1971); Fowler v. Nationwide Ins. Co., 124 S.E.2d 520 (N.C. 1962); Herron v. State Farm Mut. Ins. Co., 363 P.2d 310 (Cal. 1961); Keels v. Powell, 34 S.E.2d 482 (S.C. 1945); Lurie v. New Amsterdam Cas. Corp., 1 N.E.2d 472 (N.Y. 1936). In some of these cases, the insurance companies allegedly caused, see, e.g., Herron, 363 P.2d at 311, or in some cases required, see, e.g., Ronald M. Sharrow, Chartered, 511 A.2d at 494, a client to discharge an attorney before settlement. In others, the companies simply settled directly with the client, thereby depriving the attorney of the expected value of the attorney's contingency fee, see Liston, 659 F. Supp. at 280-82, or settled directly without making any effort to insure that the attorney's fee was paid. See Cross, 875 F.2d at 627 (involving unfulfilled promise by insurer to client that insurer would pay attorney's fee); Knell, 336 N.E.2d at 569-70 (involving insurer's settlement with client, despite the existence of an attorney's lien, and failure to protect the attorney's interest in the lien). The courts are split in their handling of such cases, with some basing liability on the mere act of intentional interference, despite the absence of any improper means such as fraud, see, e.g., Liston, 659 F. Supp. at 281, and others holding that the insurer must have engaged in some improper conduct apart from the mere act of interference. See, e.g., Volz, 498 F.2d at 663. This same question as to whether a mere act of intentional interference should be sufficient to support a finding of liability or whether a defendant must engage in some other type of improper conduct plagues interference case law in general. See infra notes 33-41 and accompanying text.

client. Part IV suggests several adjustments to the basic elements of an interference claim when such claims are asserted against attorneys for conduct relating to the representation of a client. Finally, Part V discusses several cases involving such claims in order to illustrate these problems and how the proposed adjustments would further the societal interests in preserving contractual relationships (and particularly those of attorneys and their clients) and insuring an ethical legal profession. Specifically, it focuses on cases involving interference claims stemming from the filing of a lawsuit,[23] pre-trial settlement strategy,[24] the use of the rules regarding conflicts of interest to disqualify opposing counsel,[25] and trial tactics.[26]

II. THE PROBLEM(S) WITH TORTIOUS INTERFERENCE WITH CONTRACT AND TORTIOUS INTERFERENCE WITH PROSPECTIVE RELATIONS

As described by the Restatement (Second) of Torts ("Restatement"), a prima facie case of tortious interference with contract exists where a defendant intentionally and improperly interferes with the performance of a contract between two parties by inducing or otherwise causing one party not to perform the contract.[27] The elements of a claim of tortious interference with prospective contractual relations are essentially the same, the difference being that a defendant is liable where the defendant induces or causes a third person not to enter into or continue a prospective relation or prevents the plaintiff from acquiring or continuing the prospective relation.[28] Despite the seeming similarity and simplicity of the torts, the interference torts have proven particularly difficult to deal with in practice.

To put some of the problems with interference claims in the legal setting in some perspective, consider the following situation: an attorney certifies his client's intent to call as a witness one of the attorneys from the law firm representing the opposing party.[29] Based on this conflict, the attorney moves to disqualify the other attorney's law firm from representing the opposing party. As it turns out, the attorney never had any intention of calling the other attorney as a witness and used the

23. Mantia v. Hanson, 79 P.3d 404, 406 (Or. Ct. App. 2003); infra notes 219-233 and accompanying text.

24. Safeway Ins. Co. v. Guerrerro, 83 P.3d 560 (Ariz. Ct. App. 2004); infra notes 234-70 and accompanying text.

25. Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606, 607 (Fla. 1994); Drummond v. Stahl, 618 P.2d 616 (Ariz. Ct. App. 1980); infra notes 273-293 and accompanying text.

26. Maynard v. Caballero, 752 S.W.2d 719 (Tex. App. 1988); infra notes 294-309 and accompanying text.

27. RESTATEMENT (SECOND) OF TORTS § 766 (1977).

28. Id. § 766B.

29. This "hypothetical" case is based on Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United Fire Ins. Co., 639 So. 2d 606 (Fla. 1994), and is discussed in greater detail infra Part V.C.

disqualification rules as a tactical device to remove the other attorney (who, as it turns out, had won thirty out of the last thirty-one cases he had tried in such matters)[30] and his firm. The other lawyer and his client are, understandably, upset. It seems unlikely that a malicious prosecution or abuse of process claim would be available to the plaintiffs, so a tortious interference claim would be the logical alternative.[31] But would such a claim provide a remedy in this instance? Is the mere fact that the defendant-attorney intended to bring about the end of the attorney-client relationship sufficient to impose liability or must the defendant's conduct have been improper beyond the mere fact of intentional interference? Does the fact that the client could have terminated the attorney-client relationship at any time and for any reason limit the aggrieved law firm's ability to recover damages? Should an interference claim be allowed to substitute for other causes of action that specifically address the type of conduct at issue but would not allow recovery? Even if the plaintiffs could clear these obstacles, would requiring the defendant to answer for his conduct chill legitimate advocacy by other attorneys in future cases?

A. PROBLEMS WITH THE PRIMA FACIE CASE

One problem has been the difficulty in determining which party bears the burden of proof on what is usually the essential issue—the propriety of the interference. The difficulty emerges in part from the question of whether the interference torts are torts designed to protect property interests or whether they are more relational in nature.[32] As the law originally developed, courts essentially took a property-rights view of the plaintiff's interest in a contract or prospective relation.[33] Thus, it was the act of intentional interference that formed the basis of liability.[34] In order to avoid liability, the defendant was forced to assert the defense of justification or privilege.[35]

The primary criticism of this approach is that it places too slight a burden on a plaintiff with regard to the ultimate question of the overall wrongfulness of the interference.[36] As with other intentional torts, a plaintiff need not establish that the defendant actually desired to interfere

30. Gail Diane Cox, Lawyers Still Wage Uncivil War: Civility Codes Are in Vogue, but Insults, Threats, Lies and Hardball Haven't Stopped, NAT'L. L.J. at A1 (July 17, 1995).

31. See infra notes 287-88 and accompanying text.

32. See Joseph M. Perillo, Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference, 68 FORDHAM L. REV. 1085, 1100 (2000).

33. See Remington, supra note 13, at 663; Dan B. Dobbs, Tortious Interference with Contractual Relationships, 34 ARK. L. REV. 335, 350-56 (1980); see Klauder v. Cregar, 192 A. 667, 668 (Pa. 1937) (stating that the existence of a contract "imposes on all the world the duty of respecting that contractual obligation").

34. RESTATEMENT (SECOND) OF TORTS § 766B cmt. b.

35. See, e.g., Chaves v. Johnson, 335 S.E.2d 97, 103 (Va. 1985).

36. See, e.g., Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 303 (Utah 1982).

in order to satisfy the intent element; it is enough that the defendant knew that interference was certain or substantially certain to result.[37] This focus on the defendant's mental state, rather than the means used to accomplish the interference, makes for a somewhat open-ended theory of liability. The concerns regarding intent are particularly pronounced in the commercial setting where one party's termination of a contract may have ripple effects on the relationships of others.[38] Thus, a defendant who convinces A to sell goods to defendant, rather than B, might be forced to justify the effect that such action had on B's ability to satisfy its contractual obligations to C, D, E, and F.[39]

In time, more courts began to move away from the view that mere intentional interference constituted a prima facie case and began imposing a requirement upon plaintiffs to establish that an interference was not only intentional but "improper."[40] Thus, under this approach, "the concepts of justification or privilege are ordinarily subsumed in the plaintiff's [burden of] proof."[41]

B. THE FAILURE TO DECOUPLE THE INTERFERENCE TORTS

The question of which party bears the burden of establishing the propriety or impropriety of an interference takes on greater significance in the case of an interference with prospective relations. In such cases, the plaintiff has not yet acquired a contractual relation.[42] Given the fact that a plaintiff in such a case has a lesser expectation and weaker security interest, it stands to reason that such relations should ordinarily receive less protection from outside interferences than existing contracts.[43] However, courts frequently fail to draw any distinction between the torts.[44] Thus, in jurisdictions that require a defendant to justify an intentional interference, a defendant is placed in the position of justifying an interference with a right that a plaintiff only hopes one day to attain.[45]

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37. RESTATEMENT (SECOND) OF TORTS §766 cmt. j.

38. See Perlman, supra note 13, at 72.

39. See RESTATEMENT (SECOND) OF TORTS § 767 cmt. h. The Restatement approach would seek to limit the defendant's possible liability in such cases by making the defendant's motive for interfering a relevant factor in the determination of the propriety of the defendant's actions, as well as taking into account "the proximity or remoteness of the actor's conduct to the interference." Id. § 767(f) cmt. h.

40. This is the approach adopted by the Restatement (Second) of Torts. Id. § 766.

41. Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 726-27 (Tex. 2001).

42. RESTATEMENT (SECOND) OF TORTS § 766B cmt. a.

43. Id. § 767 cmt. e.

44. See, e.g., Wal-Mart Stores, Inc., 52 S.W.3d at 721 (noting the importance of "decoupling" the interference torts and Texas' failure to do so); Four Nines Gold, Inc. v. 71 Constr. Inc., 809 P.2d 236, 245 (Wyo. 1991) (Urbigkit, C.J., dissenting) (referring to justification, privilege, and "not improper" as "all being the same concept").

45. See generally William J. Woodward, Jr., Contractarians, Community, and the Tort of Interference with Contract, 80 MINN. L. REV. 1103, 1138 (1996) (summarizing the criticism of others).

In recent years, this seeming disparity in the relative rights and obligations of the parties has led some courts to decouple the interference torts.[46] With claims of interference with existing contracts, the defendant retains the burden of asserting a justification or privilege for the interference. Where, however, the plaintiff's interest is in a prospective relation, the plaintiff bears the burden of proving that the defendant's conduct was somehow improper or wrongful apart from the mere act of intentional interference itself.[47] Therefore, in such jurisdictions, the defendant's mental state becomes significantly less important than the defendant's actual conduct. Typically, in such jurisdictions, the plaintiff must prove that the defendant's conduct was "independently tortious" or that the defendant employed wrongful methods to accomplish the interference.[48]

C. THE SPECIAL PROBLEM OF CONTRACTS TERMINABLE AT WILL

While a handful of jurisdictions have decoupled the interference torts and placed a greater burden upon a plaintiff attempting to prove tortious interference with a prospective contractual relation, most have failed to address the question of how to treat interferences with contracts terminable at will. While such relationships are certainly contractual, a plaintiff has far less security in these agreements than in other contracts. In terms of a plaintiff's expectation of return performance, such contracts closely resemble prospective contractual relations.[49] Indeed, in the case of competition as a form of interference, the Restatement specifically treats prospective contractual relations and contracts terminable at will in the same fashion: a defendant who interferes with either does not improperly interfere provided, inter alia, the defendant does not employ improper means.[50] The similarity between the two types of relations has led a few courts to either suggest that defendants have greater latitude to interfere with such contracts,[51] or more formally hold that interferences with such contracts should be analyzed under the same standard as interferences with prospective contractual relations.[52]

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46. See cases cited infra note 47.

47. See Trade 'N Post, L.L.C. v. World Duty Free Arms, Inc., 628 N.W.2d 707, 719 (N.D. 2001); Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 954 (Cal. 2003); Wal-Mart Stores, Inc., 52 S.W.3d at 726; Levee v. Beeching, 729 N.E.2d 215, 222 (Ind. Ct. App. 2000); McGeechan v. Sherwood, 760 A.2d 1068, 1081 (Me. 2000); 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).

48. Wal-Mart Stores, Inc., 52 S.W.3d at 726; Maximus, Inc., 493 S.E.2d at 378-79.

49. See RESTATEMENT (SECOND) OF TORTS § 766B cmt. c.

50. Id. § 768.

51. Belden Corp. v. InterNorth, Inc., 413 N.E.2d 98, 102 (Ill. Ct. App. 1980).

52. Reeves v. Hanlon, 95 P.3d 513, 520 (Cal. 2004); Maximus, Inc., 493 S.E.2d at 378.

By and large, however, courts have failed to draw any distinction between contracts terminable at will and more traditional contracts.[53] Aside from the rule regarding competition, contracts terminable at will are treated like other types of contracts.[54] As is the case with interferences with prospective relations, this failure to distinguish between the different interests involved has led some to question what "right" a defendant has interfered with if a plaintiff has no right to return performance to begin with.[55]

D. THE CONFUSING CONCEPT OF "IMPROPER" INTERFERENCE

In terms of the actual elements of the torts, the most consistent criticism has been with the requirement that a defendant must have "improperly" interfered before liability can attach.[56] The Restatement suggests that the question of whether a defendant improperly interfered with another's relationship can be resolved by balancing seven factors, including the nature of the defendant's conduct, the defendant's motive, and the interests of the plaintiff.[57] Like any balancing test, however, it is

53. See, e.g., Hall v. Integon Life Ins. Co., 454 So. 2d 1338, 1344 (Ala. 1984).

54. For example, aside from the section regarding competition as a form of proper or improper interference, none of the other sections in the Restatement draw any distinction between contracts terminable at will and other contracts, despite the fact that they draw distinctions between existing contracts and prospective contractual relations. See RESTATEMENT (SECOND) OF TORTS §§ 768-73.

55. See Woodward, supra note 45, at 1113 ("If 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'?"). This has been one of the primary attacks by those who argue that interference claims may discourage efficient breaches. See, e.g., Fred S. McChesney, Tortious Interference with Contract Versus Efficient Breach of Contract: Theory and Empirical Evidence, 28 J. LEGAL. STUD. 131, 136 (1999). 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. See Myers, supra note 13, at 1132-34. This is particularly true in the case of prospective contractual relations and contracts terminable at will where, by definition, there is no breach.

56. See, e.g., Amy Timmer, Interference with Prospective Contractual Relations: A Tort Only a Mind Reader Could Plead in the Michigan Courts, 45 WAYNE L. REV. 1443, 1445 (1999).

57. RESTATEMENT (SECOND) OF TORTS § 767. The full list of factors is as follows:

(a) the nature of the actor's conduct

difficult to predict from one situation to the next whether a defendant has interfered improperly. Aside from such virtually unanswerable questions as how much weight one should give to, for example, "the societal interests in protecting the freedom of action of the actor and the contractual interests of the other" as opposed to "the proximity or remoteness of the actor's conduct to the interference,"[58] questions as to a defendant's mental state continue to plague interference case law. The fact that the Restatement indicates that an interference must be both intentional and improper to be actionable would seem to indicate that a plaintiff must establish that an interference is wrongful by reason other than the mere fact of intentional interference. However, the comments to the Restatement suggest that the fact that a defendant actually desired to interfere may be important enough to trump all of the remaining factors, particularly if the defendant was motivated by ill will.[59] Not surprisingly, in light of these kinds of concerns, at least one court has concluded that the Restatement's approach is essentially unworkable in practice.[60]

In an effort to reduce the confusion, some courts have condensed the Restatement's seven-factor approach into the rule that a defendant interferes improperly where the defendant acts with an improper purpose or employs improper means.[61] While some courts continue to make reference to "malice" rendering an interference improper, malice in the sense of spite or ill will is not necessarily required.[62] The focus on the defendant's mental state, however, has triggered other criticisms. Some courts have rejected the idea that an improper purpose can render an interference improper as being inconsistent with the idea that a wrongful motive does not, by itself, make a lawful action tortious.[63] Others have charged that a defendant's purpose should rarely, if ever, be a legitimate consideration because motive is an imperfect predictor of socially undesirable results.[64]

E. THE POTENTIAL TO UNDERMINE OTHER BODIES OF LAW

Within the narrow scope of this Article, the greatest concern with interference claims is their potential to undermine other bodies of law. Some courts consider tortious interference claims as essentially serving as gap-fillers for other types of defective claims.[65] For example, in

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Id.

jurisdictions that have decoupled the interference torts and require a plaintiff to establish that the defendant's actions were "independently tortious," some have defined the phrase "independently tortious" in such a manner that the defendant's actions need not amount to a separate tort. Instead, the conduct must only violate some other recognized tort duty.[66] For example, the Texas Supreme Court has explained that "a plaintiff may recover for tortious interference from a defendant who makes fraudulent statements about the plaintiff to a third person without proving that the third person was actually defrauded," provided that the defendant acted with the intent to deceive.[67] Thus, the court explained, "an action for interference with a prospective contractual or business relation provides a remedy for injurious conduct that other tort actions might not reach . . . but only for conduct that is already recognized to be wrongful under the common law or by statute."[68]

While the Texas Supreme Court has at least attempted to establish some contours to the concept of independently tortious or wrongful means, other courts view the concept in a more elastic fashion. Violations of the standards of an established trade or profession might constitute improper methods, as might such amorphous actions as engaging in "sharp dealing" or "overreaching."[69] This willingness to allow certain actions to form the basis of an interference claim that might not be actionable under a different tort theory has meant that plaintiffs often bring such claims in addition to or in place of other, more obviously applicable claims based on the same general conduct.[70] Thus, for example, truth may be an absolute defense to a defamation claim, but not to a claim of tortious interference.[71] The danger in such cases is that interference claims may undermine the policy choices previously made with respect to other bodies of law that

66. Id. at 713.
67. Id. at 726.
68. Id. at 713.
69. Duggin v. Adams, 360 S.E.2d 832, 837 (Va. 1987); see RESTATEMENT (SECOND) OF TORTS § 767 cmt. c.

> Violation of recognized ethical codes for a particular area of business activity or of established customs or practices regarding disapproved

have developed, in large measure, to regulate the behavior of the defendant that is now the basis of an interference claim.[72]

F. IN DEFENSE OF THE INTERFERENCE TORTS

While acknowledging some of the concerns raised by critics, defenders of the interference torts posit that the torts nonetheless may serve an important purpose. These defenders argue that the criticisms suffer from an unnecessarily cramped view of the proper role of contract law. For instance, although the defenders of the interference torts admit that the standards for determining whether an interference is improper may be vague, they argue that the standards are no more vague than other concepts in the commercial setting, such as the implied duty of good faith and fair dealing.[73]

Defenders typically take a relational view of the torts.[74] Under this conception of the torts, there is a societal benefit to relational stability that the torts seek to advance.[75] While noting some of the contract-based criticisms of the torts, defenders contend that the interference torts rightfully protect interests beyond those that are protected under contract law.[76] One of the justifications that has been advanced for tort regulation of contractual relationships is the need to control the potential adverse effects on third parties that may flow from the behavior of the contracting parties.[77] At the same time, tort law has long been concerned with deterring socially undesirable conduct and reflecting community values.[78] In recognizing certain tort claims, courts, rightly or wrongly, occasionally take the pulse of the public and craft legal rules that hopefully advance the

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72. Long, supra note 16, at 529-30; Gergen, supra note 13, at 1220-21; Myers, supra note 13, at 1137-39.

73. See Woodward, supra note 45, at 1129-33; Marina Lao, Tortious Interference and the Federal Antitrust Law of Vertical Restraints, 83 IOWA L. REV. 35, 56 (1997).

74. See Woodward, supra note 45, at 1176 ("Viewing the tort as a mechanism to protect relationships rather than the promisee's expectation interests also frees analysis for direct consideration of the appropriate scope for the tort.").

75. See id. at 1171.

76. See id. at 1174.

77. Stewart L. Schwab, Wrongful Discharge Law and the Search for Third-Party Effects, 74 TEX. L. REV. 1943, 1945 (1996).

public's sense of morality or justice.[79] By focusing so heavily on the expectation interests of the contracting parties, defenders of the interference torts argue that critics tend to overvalue contract law and ignore the potential for interference claims to redress injuries to broader societal values inherent in certain contractual settings.[80] These interests may include the interests of third parties who are affected by the termination of an agreement or broader community values that are implicated whenever a relationship is ended prematurely or is prevented from coming into fruition.[81] In this respect, the fact that a defendant's intentional interference might not amount to an independent tort does not necessarily make the defendant's conduct any less improper.[82]

Indeed, the inherent need to look to societal value judgments is perhaps stronger in the case of the interference torts than in the case of other torts. In some respects, the interference torts more closely resemble the employment law tort of wrongful discharge in violation of public policy, where the defendant's actions must offend some substantial public policy to support liability,[83] than they resemble other traditional torts. In the wrongful discharge context, it is at least as much the harm to society that justifies the imposition of liability against a defendant as it is the harm to a particular plaintiff.[84] The law regarding tortious interference claims involves similar considerations. Aside from the Restatement's admonition that "the societal interests in protecting the freedom of action of the actor and the contractual interests of the other"[85] must be considered in assessing the propriety of an interference, the case law contains numerous references to the need to inquire whether the defendant's conduct is "both injurious and transgressive of generally accepted standards of common morality or of law."[86] Thus, both the interference and wrongful discharge torts require a resort to some expression of public values in order to determine the wrongfulness of a defendant's conduct, and both look beyond the harm to the plaintiff and to the more generalized harm to the public as a result of a defendant's actions as the underlying justification

79. See Foley, 765 P.2d at 418 (Kaufman, J., concurring and dissenting) ("[A] willful and malicious termination of employment is so offensive to community values that it may give rise to tort remedies.").

80. See Woodward, supra note 45, at 1128; Lao, supra note 73, at 60; see also Woodward, supra note 45, at 1133 (stating that most of tort law imposes "a limitation on individual freedom engendered by the community strain in our culture.").

81. See Woodward, supra note 45, at 1171-74; Lao, supra note 73, at 60.

for their existence. While wrongful discharge case law has hardly been without controversy, over time there has emerged a general understanding among employers as to what types of actions may ultimately subject them to liability.[87] There is no reason to believe that a similar result could not occur with the interference torts.

III. THE SPECIAL PROBLEMS POSED BY INTERFERENCE CLAIMS IN THE LEGAL SETTING (AND SOME POSSIBLE BENEFITS)

Tortious interference claims against attorneys that arise from actions taken during the representation of a client may stem from many sources. Such claims may involve an attorney advising a represented client concerning the other lawyer's handling of the client's representation;[88] an attorney's decision to file ethical charges against opposing counsel;[89] an attorney's negative statements about opposing counsel to the trial judge;[90] an attorney's public accusation that the opposing party has filed a baseless lawsuit against the attorney's client in an effort to extort money;[91] an attorney's misuse of the discovery process as a litigation tactic;[92] an attorney's failure to pursue a settlement offer;[93] an attorney's improper

87. Generally speaking, there are four widely (although not universally) recognized categories of wrongful discharge claims: (1) where an employee is fired for exercising some statutory or constitutional right, see, e.g., Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973) (filing workers' compensation claim); (2) where an employee is fired for refusing to commit an unlawful act, see, e.g., Petermann v. Int'l Brotherhood of Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959 (refusing to commit perjury); (3) where an employee is fired for reporting unlawful conduct (i.e., whistleblowing), see, e.g., Palmateer v. Int'l Harvester Co., 421 N.E.2d 876 (Ill. 1981); and (4) where an employee is fired for performing some civic duty, see, e.g., Nees v. Hocks, 536 P. 2d 512, 516 (Or. 1975) (serving on a jury).

88. Gilbert v. Jones, 370 S.E.2d 155, 155-56 (Ga. Ct. App. 1988).

89. Drummond v. Stahl, 618 P.2d 616, 618 (Ariz. Ct. App. 1980).

90. McLaughlin v. Copeland, 455 F. Supp. 749, 750-51 (D. Del. 1978), aff'd 595 F.2d 1213 (3d Cir. 1979).

91. Rothman v. Jackson, 57 Cal. Rptr. 2d 284 (Cal. Ct. App. 1996).

92. Horowitz v. Holabird & Root, 816 N.E.2d 272, 274 (Ill. 2004).

93. See Lettieri v. Perkins, No. 05-96-01609-CV, 1998 WL 430308 (Tex. App. July 31, 1998). It is unclear from the opinion exactly what the basis of the interference claim was. From the facts presented, it appears that the clients alleged that their attorney committed malpractice, in part, by failing to advise the clients of a settlement offer and to pursue the settlement offer. Id. at *3. On appeal, the clients pursued their malpractice claim, but

handling of a settlement offer;[94] an attorney's insistence upon special conditions in plea bargaining;[95] an attorney's tactical decision concerning the examination of a witness;[96] and possibly even the decision to file suit.[97] Although it is possible that an attorney's own client may assert such a claim,[98] more common is the situation in which an attorney faces the potential for liability to an opposing party or counsel for conduct relating to the representation of the attorney's client.

Tort claims founded upon attorney misconduct during the representation of a client pose special policy concerns for courts in general, most notably the concern that they may chill legitimate advocacy. However, the unusual nature of the interference torts presents perhaps even greater problems than most traditional torts in this setting. At the same time, the interference torts, and tort law more generally, may advance important societal interests in this context if their contours are properly defined.

A. THE OVERALL PROBLEM OF TORTS IN THE LEGAL CONTEXT

Courts have been cautious about permitting adverse parties and their attorneys to sue opposing counsel based upon conduct occurring during the litigation process. As a general rule, attorneys do not owe a duty to exercise care for the benefit of opposing parties or counsel.[99] Courts differ with respect to what exceptions to this general principle they will recognize. While most courts prohibit an adverse party from bringing a negligence action against an attorney based upon the attorney's performance of legal work,[100] they are likely to recognize an exception where the attorney's conduct is malicious, fraudulent, or tortious.[101] Some states take a strict approach and will only recognize a claim based upon fraudulent conduct on the part of an attorney; in these states, all other tort actions are barred, regardless of whether they are brought by an adverse party or opposing counsel.[102] Other courts permit actions only for certain torts, such as civil conspiracy[103] or wrongful initiation of civil

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the opposing party. Thus, the logical claim would have been tortious interference with contract. See id. at *3 (noting the clients' claim of tortious interference with contract).

94. Safeway Ins. Co. v. Guerrero, 83 P.2d 560 (Ariz. Ct. App. 2004).

95. Clark v. Brown, 393 S.E.2d 134 (N.C. 1990).

96. Maynard v. Caballero, 752 S.W.2d 719 (Tex. App. 1988).

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

proceedings;[104] all other tort actions stemming from actions or statements made in the course of judicial proceedings, such as intentional infliction of emotional distress, are barred.[105] At least one jurisdiction takes a more absolute approach and extends an absolute immunity to any act occurring during the course of a judicial proceeding, regardless of the nature of the conduct.[106]

In the case of intentional torts, several policy justifications have been offered in support of the general climate of limited liability for conduct stemming from the litigation process. Most of these justifications are derived from the policy justifications underlying the absolute privilege to publish defamatory materials concerning another during the course of and as part of the proceeding as long as the matter has some relation to the proceeding.[107] As is the case with any recognized privilege, the privilege to defame in the course of judicial proceedings is based upon the conclusion that the harm to individual plaintiffs in permitting parties and their attorneys to publish defamatory statements is outweighed by the harm that would result if such individuals were not free to speak freely.[108]

In the case of parties to judicial proceedings, the existence of an absolute privilege is based in large measure "upon the public interest in according to all men the utmost freedom of access to the courts of justice for the settlement of their private disputes."[109] Aside from preserving the ability of parties to speak freely in support of their causes, the absolute privilege is said to preserve freedom of access to the courts by insuring that parties are not deprived of the benefit of legal representation by the specter of tort liability against their attorneys.[110] Permitting lawsuits based upon an attorney's conduct during the litigation process raises the dangers of increased time and cost to the client, the injection of an adversarial element into the attorney-client relationship, and the possible termination of the attorney-client relationship.[111] The specter of tort liability against an attorney may threaten the sanctity of the attorney-client relationship, thus depriving a client of chosen counsel and undermining the public interest in the administration of justice.[112] In order to protect

104. Silberg v. Anderson, 786 P.2d 365, 371 (Cal. 1990); Lewis v. Swenson, 617 P.2d 69, 72 (Ariz. 1980).

105. Franson v. Radich, 735 P.2d 632, 635 (1987).

106. Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States

this relationship, attorneys, like their clients, also enjoy an absolute privilege to publish defamatory materials.[113]

Another closely related justification for the existence of the absolute privilege is the need to secure for attorneys "the utmost freedom in their efforts to secure justice for their clients."[114] If, the argument goes, attorneys could be subject to defamation suits for statements made during the litigation process, they would be less inclined to vigorously assert their clients' rights.[115] Thus, the absolute privilege works to insure that attorneys are able to fulfill their ethical duty of zealous representation.[116]

At common law, the absolute litigator's privilege existed with respect to defamatory statements. As the same rationale that applies in the defamation context may apply with equal force to other tort actions, the privilege has been extended over time to cover a variety of intentional tort actions stemming from litigation conduct.[117] However, as evidenced by the varying approaches in different jurisdictions, one of the difficulties courts have faced is in deciding to which causes of action the absolute privilege should apply.[118] For example, in probably a majority of jurisdictions, attorneys do not enjoy an absolute privilege with respect to the torts of malicious prosecution and wrongful initiation of civil proceedings, despite the fact that they are expected to be zealous advocates on behalf of their clients.[119]

Courts have experienced other problems in attempting to define the contours of attorney liability. For instance, when one moves beyond the traditional courtroom setting and into quasi-judicial settings, such as the lawyer disciplinary process, courts have split on the question of how to balance the competing policy interests at issue. Society certainly wishes to encourage a resort to the disciplinary process in order to further the proper administration of justice and maintain public confidence in the legal profession; however, there are the countervailing concerns that it is simply unfair to deny attorneys remedies afforded to other individuals and that providing attorneys with immunity from tort liability would encourage the use of disciplinary charges as a weapon.[120] The result has been a split among courts and legislatures on the question of whether a non-lawyer is immune from liability in tort based upon the filing of an

113 RESTATEMENT (SECOND) OF TORTS § 586

ethics complaint.[121] Similarly, courts and bar associations have struggled with the question of whether complaints made to formal disciplinary agencies or local bar associations can form the basis of tort liability or professional discipline.[122]

B. SPECIAL PROBLEMS ASSOCIATED WITH THE INTERFERENCE TORTS

As if the interference torts were not already problematic enough, their entry into the legal setting brings with it a special set of concerns. One problem is the potential for the interference torts to overwhelm other recognized causes of action and, in the process, undermine the policy choices previously made with respect to those causes of action. This concern is particularly pronounced in the legal setting given the important policy values implicated by the practice of law.

Interference claims are, theoretically, a particularly useful tort for plaintiffs because the standard for improper interference is so amorphous. For example, a plaintiff bears a particularly heavy burden with respect to the tort of intentional infliction of emotional distress in establishing that the defendant-attorney's conduct was extreme and outrageous. The litigation process is not for the faint of heart; some conduct that might be considered extreme and outrageous in other settings is par for the course during litigation.[123] This is true even where the defendant-attorney's conduct might violate the rules of professional responsibility.[124] In contrast, to prevail on a claim of tortious interference against an attorney, a plaintiff simply needs to establish that the defendant's conduct was "improper." A plaintiff is theoretically helped by the fact that a violation of an ethical code may amount to the use of improper methods sufficient to render the interference improper.[125]

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121. See Drummond v. Stahl, 618 P.2d 616, 620 (Ariz. Ct. App. 1980) (recognizing the existence of an absolute privilege); Goldstein v. Serio, 496 So. 2d 412, 413-15 (La. App. Ct. 1986) (holding that the affirmative defense of absolute privilege does not defeat a malicious prosecution or abuse of process claim in the context of a case involving complaint with disciplinary authority); see also COLO. R. CIV. P. 251.32(e) (2004) (establishing a privilege from tort immunity in filing complaints of attorney misconduct).

122. See Preiser v. Rosenzweig, 646 A.2d 1166, 1170 (Pa. 1994) (holding that absolute privilege does not apply to allegedly defamatory statements made by one attorney about another in private arbitral proceeding conducted by special fee determination committee of local bar association); Drummond, 618 P.2d at 620 (recognizing the existence of an absolute privilege for anyone who files a complaint with the state bar alleging unethical

Another feature of the interference torts that makes them such an attractive alternative to another tort claim is the fact that the conduct in question need not necessarily amount to an independent tort in order to constitute improper interference. For example, the Restatement lists unfounded litigation as an example of improper conduct that might support a finding of tortious interference.[126] Thus, an interference claim might naturally serve as a substitute for a claim of wrongful initiation of civil proceedings. The tort of wrongful initiation requires that the allegedly baseless civil proceedings that were initiated first must have been terminated in favor of the party bringing the wrongful initiation claim.[127] If one adopts the view that a plaintiff need not be able to satisfy every element of a separate tort in order to establish that the defendant's interference was improper, this requirement would not necessarily prove to be a bar in the case of an interference claim filed prior to the conclusion of the underlying lawsuit; assuming that the underlying lawsuit was filed without probable cause and for an improper purpose, the defendant would have violated the essential duty underlying the tort of wrongful initiation.[128]

The danger in such cases is that the policy choices that courts have previously made in establishing the contours of the other tort may be undermined if an interference claim is permitted to serve as a substitute. For example, each element of the tort of wrongful initiation of civil proceedings serves an important purpose in maintaining the balance between the interest in preventing the judicial system from being used for the purpose of harassment and the interest in allowing access to the courts

126. Id. § 767 cmt. c (1977).

127. Although the term "malicious prosecution" is often used in a generic fashion, the Restatement (Second) of Torts actually distinguishes between actions for malicious prosecution and the wrongful use of civil proceedings. The most obvious distinction, of course, is that the former tort involves the initiation of criminal proceedings, rather than civil. See RESTATEMENT (SECOND) OF TORTS § 653 (1977). The Restatement (Second) of Tort describes the tort of wrongful use of civil proceedings as follows:

> One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if
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> (a) he acts without probable cause, and primarily for a purpose other than

without the threat of retaliatory litigation.[129] The requirement that probable cause exist before a proceeding can be initiated exists in order to further the goal of preventing individuals from being the subject of baseless allegations.[130] In the case of defendant-attorneys, an attorney need not believe that the client is actually likely to win in order to satisfy the probable cause requirement.[131] Thus, the requirement also protects the ability of attorneys to advocate for their clients even when the attorney believes the client is unlikely to prevail and increases the willingness of attorneys to accept unpopular causes or advocate for changes in existing law.[132] The requirement that a defendant must act for the purpose of securing the proper adjudication of the claim in which the proceedings are based is similarly geared toward preventing the judicial process from being used because of ill will or forcing a settlement that has no relation to the merits of the claim.[133] In the case of defendant-attorneys, the requirement insures that an attorney is actually seeking to fulfill the attorney's duty of loyalty to the client, rather than acting to harass the defendant or to coerce the settlement of another claim.[134] The requirement that the underlying proceedings have terminated in favor of the person against whom they are brought helps insure that the underlying proceeding truly was brought without probable cause and prevents the situation in which a defendant is found liable for wrongful initiation only to actually prevail on the underlying claim.[135] In the case of defendant-attorneys, the requirement works to prevent an attorney who is simultaneously facing a wrongful initiation claim and representing his client in the underlying proceeding from being inclined to protect his own interests rather than those of his client and from ultimately becoming a fact witness, thus forcing his withdrawal from his client's matter.[136]

Allowing a plaintiff to bypass any of these requirements while pursuing an interference claim against an attorney based upon the attorney's representation of a client could upset the balance struck by the elements of the wrongful initiation tort.[137] It could also have negative consequences for the legal process in general and for the defendant-

129. See Browning-Ferris Indus., Inc. v. Lieck, 881 S.W.2d 288, 291 (Tex. 1994). Ronald E. Mallen, An Attorney's Liability for Malicious Prosecution: A Misunderstood Tort, 46 INS. COUNSEL J. 407, 409 (1979).

130. Mallen, supra note 129, at 414.

attorney's client, who may lose her attorney's undivided loyalty or the services of her attorney altogether.

Permitting an interference claim to serve as a substitute for an abuse of process claim against an attorney raises similar concerns. The general purpose of the tort of abuse of process is to prevent parties from using a legal process for something other than the purpose for which the procedure was designed.[138] Like the interference torts, abuse of process is a catch-all tort, designed "to cover improper uses of the judicial machinery that d[o] not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution."[139] At first blush, the dangers in undermining the goals of the abuse of process tort by permitting an interference claim to lie for essentially the same allegedly wrongful conduct would appear to be substantially less. However, in the case of a defendant-attorney, the same concerns about insuring that clients have the undivided loyalty of their attorneys that exist in the context of wrongful initiation claims exist with respect to abuse of process claims.[140] Moreover, because an abuse of process claim may be founded upon a variety of "processes" not covered by the wrongful initiation tort, the potential to undermine the goal of zealous representation of a client's interests is greater. Perhaps not surprisingly, courts have generally been more willing to afford attorneys an absolute immunity for abuse of process claims than for wrongful initiation claims.[141]

Similar concerns exist with allowing a plaintiff to use an interference claim to avoid the absolute privilege afforded to attorneys for defamatory statements made in the course of judicial proceedings. In an effort to preserve the ability of attorneys to advocate zealously on behalf of their clients, courts have interpreted this privilege broadly so that it applies to statements made in good faith anticipation of a judicial proceeding and in the actual course of a judicial proceeding, so long as it is pertinent to the matter in controversy.[142] The existence of this absolute privilege reflects a policy choice that the dangers of permitting a tort action based upon statements having some relation to a judicial proceeding outweigh the

138. See Lyon v. May, 424 S.E.2d 655, 659 (N.C. Ct. App. 1993) (stating that an abuse of process claim would not lie where there was no evidence that a party tried to use a process for anything other than its real purpose); Syl. Pt. 2, Wayne County Bank v. Hodges, 338 S.E.2d 202 (W. Va. 1985) ("Generally, abuse of process consists of the willful or malicious misuse or misapplication of lawfully issued process to accomplish

occasional unfair result of affording immunity to attorneys whose statements are made for some purpose other than promoting the interests of justice.[143] If, for example, a court were to hold that the privilege did not apply to a claim of tortious interference involving defamatory statements, rather than improper conduct, the court would be undermining the policy choice previously made with respect to the privilege. Similarly, if a court were to hold (as a few courts have) that truth, while a bar to a defamation claim, is not necessarily a bar to an interference claim,[144] the court would likewise be inviting the same dangers it had previously concluded were sufficient to outweigh the benefits of permitting liability to attach.

Given the difficult choices that courts are forced to make with respect to tort claims involving litigation conduct on the part of attorneys, the danger of allowing a defendant to proceed with an interference claim in place of a defective claim based on the same type of conduct that the other tort seeks to prohibit becomes self-evident. While this same problem may exist in any situation in which interference claims serve in the stead of another tort claim, the concerns are particularly acute in the legal context where the policy ramifications of permitting the claim to proceed may be more substantial.

C. THE BENEFITS OF INTERFERENCE CLAIMS IN THE LEGAL CONTEXT

Despite the problems associated with the interference torts in the context of a defendant-attorney engaged in what is arguably the representation of a client, there are situations where recognition of the torts may further the basic goals of tort law—deterrence of harmful conduct and providing compensation for injured parties[145] —without undermining the policy choices previously made with respect to other bodies of law. Interference claims, like any tort claim, can, if properly restrained, help promote society's interests in fairly administering justice and preventing the legal system from being used for improper purposes. In the process, they may also serve as an additional deterrent to unethical conduct on the part of attorneys. Interference claims may also be uniquely situated to help preserve a relationship that society undoubtedly views as deserving of protection from outside influences—the attorney-client relationship.

1. USING TORT LAW TO DETER UNETHICAL BEHAVIOR

consequences on the administration of justice.[146] Judges and lawyers have grown increasingly frustrated at the inability of lawyer civility codes,[147] the disciplinary process,[148] and judicial sanctions[149] to curb unethical conduct during the litigation process. This frustration has led commentators to suggest various non-traditional solutions to the problem of unethical lawyers, including imposing harsher sentences on criminal defendants whose attorneys abuse the judicial process.[150] The increased use of tort law as a vehicle to curb overly zealous representation should, therefore, hardly be considered surprising or revolutionary.[151]

Assuming one recognizes the potential for tort law to serve as a deterrent to wrongful conduct, the question becomes whether the salutary effects of recognizing tort claims based on wrongful litigation conduct outweigh the risk of chilling legitimate advocacy. As a general matter, courts have concluded that it does not. Aside from the frequent observation that limited liability is essential to preserve the ability of attorneys to advance the interests of their clients, the most common justification for the general state of limited liability is that a remedy for

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146. See Margareth Etienne, Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers, 78 N.Y.U. L. REV. 2103, 2104 (2003) ("While judges recognize the importance of zealous advocacy, they realize too that zeal and efficiency in criminal proceedings are often inversely related.").

147. Brenda Smith, Comment, Civility Codes: The Newest Weapons in the "Civil" War over Proper Attorney Conduct Regulations Miss Their Mark, 24 U. DAYTON L. REV. 151, 162 (1998) ("[C]ivility codes fail to actually change attorney behavior or to set higher standards.").

148. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,761 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205); Nikki A. Ott & Heather F. Newton, A Current Look at Model Rule 8.3: How is It Used and What Are Courts Doing About it?, 16 GEO. J. LEGAL ETHICS 747, 748-49 (2003) ("[C]urrent scholarship agrees that Model Rule 8.3 is underenforced and does not act as a deterrent to attorney misconduct."); Hayden, supra note 2, at 1039 (arguing that there is "scant evidence" that professional responsibility codes deter some forms of misconduct and "plenty of evidence . . . that attorneys are not being deterred from such conduct by fear of disciplinary action"); Judith Kilpatrick, Regulating the Litigation Immunity: New Power and a Breath of Fresh Air for the Attorney Disciplinary System, 24 ARIZ. ST. L.J. 1069, 1091 (1992) ("Disciplinary sanctions have not been considered effective in catching and preventing unethical conduct.").

149. See Etienne, supra note 146, at 2109-10 (stating that individual sanctions such as fines and contempt rulings are not often used by judges); Hayden, supra note 2, at 1039 (stating that judicial sanctions "are not commonly applied, and when they are they are

misconduct already exists in the form of "the discipline of the courts, the bar associations, and the state."[152] Of course, Rule 11 sanctions and the discipline of bar associations and the state rarely compensate an attorney for the loss of an expected fee resulting from an interference; more importantly, such "remedies" do not compensate a client for the diminished quality of services he or she receives as a result of an interference or the time, expense, and aggravation associated with finding a new attorney if the interference has resulted in termination of the attorney-client relationship.[153] And while courts may have the inherent authority to award attorneys' fees for bad faith conduct against a party, such action is rarely taken.[154]

As importantly, if the criticisms concerning the deterrent effect of judicial sanctions and bar discipline are accurate, it is questionable whether the public's interest in securing justice, which is supposedly served by the existence of an absolute litigator's privilege, is vindicated by relying solely on these mechanisms. Litigation abuses by attorneys have harmful consequences not only for the attorneys' opponents,[155] but for the legal profession and the administration of justice.[156] The perception that there are too many lawyers in practice who are willing to say or do anything to win diminishes public confidence in the legal profession and the legal process as a whole,[157] leads to increasing dissatisfaction with the practice of law among attorneys,[158] and places an even greater burden on

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152. Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994).

153. See Deborah L. Rhode, Opening Remarks: Professionalism, 52 S.C. L. REV. 458, 469-70 (2001) ("Seldom does the system impose requirements like reimbursement that could benefit clients . . . .").

154. Moakley v. Smallwood, 826 So. 2d 221, 224 (Fla. 2002).

155. Aranson v. Schroeder, 671 A.2d 1023, 1028 (N.H. 1995) ("[W]hen a defense is commenced maliciously or is based upon false evidence and perjury or is raised for an improper purpose, the litigant is not made whole if the only remedy is reimbursement of counsel fees.").

156. Jonathan K. Van Patten & Robert E. Willard, The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation, 35 HASTINGS L.J. 891, 917 (1984).

157. Hayden, supra note 2, at 1020.

158. See J. Thomas Greene, A Kinder, Gentler Justice System?, 181 F.R.D. 559, 561 (1998) ("[T]he sense of dissatisfaction being experienced by many lawyers, in large part has been brought on by an unsavory minority who have abused the system and employed sharp or Rambo practices which have tended to discredit and demoralize the profession

already overburdened courts to deal with overzealous tactics.[159] If, as others have charged, the state disciplinary agencies and reviewing state supreme courts are underfunded[160] or overly lenient in their imposition of discipline,[161] the current system does little to deter litigation abuses. If these assumptions are correct, then it is difficult to see why conduct that offends the rules of a game in which society has such a clear interest and which causes immediate harm to opponents involved in the game should not, in at least some instances, subject a defendant to liability.

Society's interest in preserving the ability of attorneys to secure justice for their clients is equally compelling. However, while most lawyers would acknowledge the importance of being able to speak fearlessly on behalf a client, one is left to wonder whether such an absolute privilege is essential to protect this ability when it is the defendant-attorney's conduct, rather than his or her words, that causes the injury to the plaintiff. Any representation involves speaking or writing on behalf of a client. However, there is a fundamental distinction between wrongful conduct, accomplished by words, and wrongful words themselves. The Restatement's recognition that the defamation privilege does not extend to actions for malicious prosecution and wrongful initiation of civil proceedings is proof of this.[162] In some respects then, the question of when and in what form tortious interference claims against attorneys should be recognized is simply a subset of the larger question of when and in what form tort liability against attorneys should be allowed.

In light of the growing frustration over the use of so-called "Rambo" litigation tactics,[163] the legal profession may be at an appropriate point at which to reconsider whether an absolute litigation privilege for all or most intentional tort liability is essential to protect the ability of lawyers to act fearlessly in order to secure justice for their clients or whether some form

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> and lawyers are perceived by themselves as well as the public as dishonest, unethical, overwhelmingly materialistic, uncaring, and rude.

Id.

159. See Etienne, supra note 146, at 2104 (arguing that judges recognize that "zeal is a 'cost' of judicial efficiency that judges have an incentive to minimize"); Van Patten & Willard, supra note 156, at 917 (noting the problem of congestion and delay in the court system caused by litigation abuses).

of qualified litigation immunity might accomplish the same goal.[164] For the reasons discussed above, it may be that affording attorneys broad tort immunity is actually counterproductive to the goal of insuring the ability of attorneys to secure justice for their clients that such immunity seeks to promote.[165] Similarly, in those jurisdictions that extend the absolute privilege to all intentional torts, save malicious prosecution and wrongful initiation, it might be time to reconsider whether other intentional tort theories might serve to advance important societal values not currently served by the malicious prosecution and wrongful initiation torts.[166] As argued in the following section, in some limited circumstances, the interference torts may serve such a role.

2. PRESERVING THE SPECIAL NATURE OF THE ATTORNEY-CLIENT RELATIONSHIP

Aside from the broad societal harm that results from unethical litigation conduct, it remains to be considered whether the harm to an individual plaintiff flowing from such conduct is of sufficient weight to help counterbalance the important interest of preserving attorneys' ability to serve the interests of their clients. There are any number of potential injuries an adversary may suffer as a result of unethical litigation conduct, including increased time, money, and mental distress.[167] Such injuries are compensable where a defendant has wrongfully initiated a civil proceeding,[168] and most courts permit this cause of action against an attorney.[169] Therefore, it is difficult to see why, in theory, the same types of harm that might naturally flow from an intentional interference with a contractual relationship during the course of litigation are not significant enough in at least some instances to justify liability, even where the defendant-attorney's conduct does not amount to the independent tort of wrongful initiation.[170]

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164. Kilpatrick, supra note 148, at 1094; see also Hayden, supra note 2, at 1042-43 (suggesting that states abandon the absolute litigator's privilege to defame).

165. Hayden, supra note 2, at 1020.

166. See Kilpatrick, supra note 148, at 1093 (stating that the absolute litigation privilege "causes harm and encourages irresponsible, if not unethical, conduct"); Hayden, supra note 2, at 1043 (suggesting that the absolute privilege to defame be replaced with a qualified privilege).

167. See Aranson v. Schroeder, 671 A.2d 1023, 1028 (N.H. 1995).

168. RESTATEMENT (SECOND) OF TORTS § 681 (1977).

There is one situation in particular for which the interference torts are uniquely suited to address unethical litigation conduct: interference with an attorney-client relationship. According to the Restatement, some contractual interests receive more protection from outside interference than others.[171] Typically, this means that existing contracts are entitled to more protection than mere prospective contractual relations and, at least in some jurisdictions and instances, contracts terminable at will.[172] However, there is no reason why a consideration of the interest with which the defendant has interfered must be confined to such a mechanical formula. According to the Restatement, other factors to consider in assessing the propriety of the defendant's interference include the social interests in both protecting the freedom of action of the actor and the contractual interests of the other, and the relations between the parties.[173] This would require consideration of the social utility of the private interests of the persons involved, as well as a consideration of whether there is any kind of significant relationship between any two of the three parties.[174] The comments to the Restatement suggest that there may be certain kinds of interests that are entitled to more protection from outside interference, regardless of whether the relation in question is a contract terminable for cause, a contract terminable at will, or a prospective contractual relation.

The attorney-client relationship would certainly seem to constitute the type of significant relationship that would justify the creation of special rules regarding interference by third parties. There are essentially two competing strains in the law governing lawyers concerning just how sacred such relationships should be from outside interference. The first, while perhaps not encouraging others to induce a client to terminate a relationship with an attorney, can be seen as at least being receptive to the notion that mere intentional interference with such relationships is not always improper. While attorney-client relationships are contractual in nature, contract law treats them quite differently than it does other types of contracts.[175] There are numerous contractual provisions, such as non-compete agreements between lawyers[176] and provisions limiting a client's ability to settle a matter without the approval of his or her attorney,[177] that are void as against public policy when they impact attorney-client relationships that would be perfectly acceptable if employed outside the attorney-client relationship context. Most of these special contractual rules are based on the goal of preserving a client's unfettered right to

counsel of his or her own choosing.[178] This principle of client choice is deeply imbedded within the law governing lawyers and the rules of professional responsibility.[179]

Extrapolating from these principles, one could assume that the attorney-client relationship is entitled to significantly less protection than other relationships based on the fact that it is terminable at the will of the client and the fact that ethical rules and case law go to such lengths to insure a client's ability to exercise that right. Thus, for example, courts have consistently held that an attorney who provides advice to a represented client that leads the client to terminate the client's relationship with an attorney does not improperly interfere with that relationship, provided that the attorney acts in good faith.[180] This conclusion is only justified, however, with respect to interferences that, at least in the client's view, may ultimately benefit the client.

The law governing lawyers takes a much dimmer view of interferences that may actually adversely impact an attorney's ability to adequately represent a client. The law governing lawyers contains several rules that seek to protect the sanctity of the attorney-client relationship and seek to protect clients from being influenced by other individuals, particularly other lawyers. For example, the attorney-client privilege exists in part so that clients can provide full information to their attorney sufficient to enable adequate representation without fear of disclosure to outside parties.[181] The case law is replete with references to the special relationship between a client and attorney, the client's "advocate and champion."[182] The rules of professional responsibility also speak to the special relationship between attorney and client and the need to protect such relationships from potentially harmful outside influences, particularly those of other attorneys. The ABA Model Rules of Professional Conduct's prohibition against direct contact with persons represented by other lawyers involved in the matter, for example, reflects a concern over the potential for one lawyer to influence the decision of another lawyer's client.[183] Indeed, the comments to the relevant rule expressly caution against the dangers of interference with the attorney-client relationship by other lawyers.[184]

178. Robert M. Wilcox, Enforcing Lawyer Non-Competition Agreements While Maintaining the Profession: The Role of Conflict of Interest Principles, 84 MINN. L.

In short, the law governing lawyers reflects a deep concern for the potential of adversaries to adversely impact the ability of an attorney to adequately represent his or her client. If one is willing to recognize these prohibitions on outside interferences as expressions of public policy,[185] it is clear that society wishes to encourage the stability of attorney-client relationships in this specific context. Indeed, this societal recognition that client choice is an essential component of the administration of justice is reflected in the rationales underlying the absolute litigator's privilege. As mentioned, one of the justifications for the privilege is that the possibility of attorney liability might lead to the disruption or destruction of an attorney-client relationship, thus hindering the administration of justice.[186] That being the case, interference claims, if properly restricted, can protect interests broader than the mere contractual interests of the attorney and client.[187]

None of the foregoing should be read as implying that an interference claim stemming from an interference with a different kind of relationship in a legal setting should not be actionable under appropriate circumstances. There may be instances in which interference claims might be entirely appropriate. However, an interference with an attorney-client relationship is a situation in which recognition of a tort claim is most easily justified. The argument that an attorney needs to be free from the specter of an intentional tort claim in order to adequately represent the interests of a client holds little weight when the attorney is engaging in unethical conduct with the intent of preventing an opposing attorney from fulfilling that same duty for his or her client.

As a practical matter, it is unlikely that allowing a cause of action for tortious interference with an attorney-client relationship in the litigation context would lead to a dramatic increase in the number of such claims. The expense of pursuing any legal action and the speculative quality of damages would likely serve as a disincentive for many non-lawyers to bring such claims based on the misconduct of an opposing attorney that results in a decrease in the quality of representation or a complete termination of such a relationship.[188] To the extent non-lawyers are willing to assume these risks and to the extent that the availability of such a remedy might serve to deter litigation abuses, they are the most appropriate parties to bring such claims. Because of the cost and difficulty of hiring an attorney to pursue such a claim, the most likely plaintiffs in

such cases would be other lawyers who have been denied an anticipated fee as a result of an interference. Given the fact that most rules concerning litigation abuses are designed to protect adverse parties from misconduct, rather than their lawyers, non-lawyers would be the more appropriate vehicle to vindicate the societal interest in fair play during litigation. However, because a discharged lawyer's damages are likely to be less speculative than those of an aggrieved client, the availability of an interference claim on the part of an attorney might have a greater deterrent effect than in the case of non-attorneys and should thus be allowed in appropriate cases.

IV. LIMITING THE SCOPE OF THE INTERFERENCE TORTS SO THAT THEY DO NOT INTERFERE WITH THE PRACTICE OF LAW

While interference claims may play a role in deterring attorney misconduct and compensating plaintiffs for the injuries flowing from such misconduct, there still remains the problem of ensuring that legitimate advocacy is not chilled by the recognition of such a cause of action. There is also the related problem of ensuring that interference claims do not undermine the policy choices embodied in other bodies of law. The following Part proposes a redefinition of the interference torts for use in the context of litigation misconduct resulting in interference with a contractual relation.

A. MOVING BEYOND THE "ONE SIZE FITS ALL" APPROACH

The first step in constructing a workable rule is to move beyond the approach of most courts that applies the same legal test for determining the ultimate propriety of an interference, regardless of the type of interest in question. Given the difficulties inherent in weighing each of the seven factors listed in the Restatement in each and every case in order to arrive at a conclusion as to whether a defendant's interference was improper, courts have largely forsaken the Restatement's approach and tried to construct more simple tests.[189] The problem with such an approach—regardless of the rule that ultimately emerges—is that it may fail to adequately take into account the fact that society may view certain forms of intentional interference as inherently more or less wrongful, depending upon the type of interest at issue.

The reason why the authors of the Restatement chose not to rely on the

authors realized that a determination of impropriety in one case would not necessarily be controlling in a future case.[191] However, they did believe that, in time, crystallized privileges and rules defining when an interference is improper could develop.[192] According to the authors, the determination of whether an interference is improper "depends upon a judgment and choice of values in each situation,"[193] therefore there is no reason why a court could not, in certain situations, make those judgments and choices and construct clear rules to guide the analysis of interference claims in particular situations.

B. REDEFINING THE INTENT ELEMENT

In keeping with this approach of defining "improper" interference differently for different types of situations, the next step is to redefine the intent element in the specific context of an attorney or adverse party charged with interference with an attorney-client relationship preliminary to a proposed judicial proceeding, in the institution of a judicial proceeding, or during the course and as a part of a judicial proceeding.[194] At present, a defendant acts with intent for purposes of the interference torts if the defendant desires to interfere or knows that interference is certain or substantially certain to occur.[195] In the specific context of an interference stemming from the representation of another client, the intent element should be redefined so as to exclude situations where the interference was simply incidental in character.[196]

This redefinition is important for several reasons. First, where the interference is not desired by the defendant but is simply known to be a consequence, the injury to the plaintiff is more likely to be a more indirect consequence of the defendant's actions than the actions of the plaintiff's contractual partner.[197] According to the Restatement, the fact that the defendant did not desire to interfere, generally speaking, makes the defendant's conduct less inherently wrongful than in the situation where the defendant desires to interfere.[198] According to the comments, if the defendant acts with the sole desire of interfering, the interference "is

191. Id.
192. See id.
193. Id.
194. The language relating the judicial proceedings is borrowed from the Restatement

almost certain to be held improper."[199] Even if interference is only a primary motive, this fact "may carry substantial weight in the balancing process" concerning the propriety of the defendant's actions.[200] In the specific context of an interference with an attorney-client relationship, the fact that the defendant actually intended to interfere with the relationship makes it more likely that the societal interest in insuring that a client is adequately represented by an attorney of his or her choice would be offended.

The redefinition is also important so as not to unduly restrict the ability of attorneys to represent their clients. Attorneys routinely take action on behalf of their clients that they can reasonably anticipate may interfere with the relationships an adverse party has with others. The decision to file a lawsuit, for example, carries with it an understanding that the other party will incur time and expense that may impede its ability to live up to other obligations. Similarly, an attorney may know with substantial certainty that exposing opposing counsel as incompetent during trial will cause the other party to fire his or her attorney. Redefining the intent element makes it less likely that mere knowledge as to the existence of a relationship and the harm that is likely to ensue after taking action in the best interest of a client can ever amount to improper interference.

C. REQUIRING A SHOWING OF INDEPENDENTLY WRONGFUL CONDUCT

Even where an attorney acts with the specific intent of interfering with an attorney-client relationship, such intent should not render an interference wrongful absent some type of independently wrongful conduct. Again, the requirement of some additional indicia of wrongfulness apart from mere intentional interference is necessary to prevent attorneys from being chilled in their representation of clients. When an attorney moves to disqualify opposing counsel, for example, the attorney desires to interfere with an attorney-client relationship. Assuming the attorney has brought the motion with a good faith belief that it is not frivolous or has not engaged in any other type of wrongful conduct, such intentional interference is not wrongful. It is the practice of law.

In contrast, there will be instances in which an attorney's client is the one who actually desires to interfere and the attorney is simply following the client's instructions in taking some action during the course of

action where it would amount to a violation of the law or the rules of professional responsibility.[201] Therefore, the additional requirement that a plaintiff must establish that the defendant's conduct was independently wrongful is necessary to vindicate society's interests in zealous, but ethical, advocacy.

Part V provides some specific examples of how the concept of "independently wrongful" litigation conduct might be defined in various situations.[202] However, as a general matter the term should mean that the defendant's conduct was wrongful in the sense that it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.[203] These references should be sufficiently clear to put a reasonable person on notice as to prohibited conduct. As is the case in Texas, the defendant's conduct should not have to be unlawful in the literal sense to be "independently tortious." Instead, it should be sufficient that a defendant has violated the duty established by the legal standard.[204] In most cases it is reasonable and simply easier to assume that some other recognized legal standard establishes a minimum level of proper conduct. At the same time, such sources are appropriate references from which one can base a defensible conclusion as to whether the defendant's conduct is at odds with substantial societal interests.

In other situations, a violation of a lawyer ethics code could amount to an independently wrongful conduct. According to the Restatement, one factor to be considered in determining whether an interference is improper is whether the defendant's actions amount to "fair play" that is "sanctioned by the rules of the game."[205] The Restatement thereby suggests that conduct that violates a professional ethical code of conduct might help support a conclusion that a defendant has improperly interfered with another's relation.[206] If litigation is the game in question, lawyer ethics codes help establish the rules. Ordinarily, it might be problematic to recognize a professional ethics code as establishing general standards of proper behavior, either because the rules are vague, because they do not implicate broader social concerns, or because they are designed for the benefit of members of the profession rather than the protection of the public.[207] These concerns are alleviated in the case of legal ethics rules that regulate litigation conduct. The rules concerning proper conduct in the course of representation (the conflict of interest rules, the rules

201. MODEL RULES Rule 1.2 (a); id. Rule 1.16(a).

regarding candor to the court and opposing parties, etc.) are clearly designed for the welfare of the judicial system and those individuals who interact with attorneys during this process.[208] These standards are adopted and enforced by the highest courts of the states. Courts have relied on these sources of public policy in other contexts to define what constitutes proper behavior.[209] Accordingly, conduct in violation of these rules most decidedly offends important societal interests and, when appropriate, should constitute improper conduct for purposes of an interference claim.

This generic independently tortious standard should not apply, however, where its application would undermine the core values associated with another area of the law that is designed specifically to cover the type of conduct in question.[210] This notion will be fleshed out in greater detail in Part V, but a quick example will help illustrate this approach. Currently, virtually every jurisdiction recognizes an absolute privilege for attorneys to make defamatory statements during the course of a proceeding.[211] For good or for ill, this is the well-established rule and it is based on a balancing of competing interests. Assume that in the course of a deposition, one attorney makes false and defamatory statements about opposing counsel during a heated exchange. The statements are made with the specific intent of interfering with the other attorney's relationship with her client, but are relevant to the deposition. The attorney would enjoy an absolute privilege in a defamation action.[212] One can question whether this should be the case, but unless and until courts are willing to alter the rule, a plaintiff should not be permitted to circumvent the privilege unless the defamation tort does not address the plaintiff's specific injury.[213] Unfortunately for the defamed attorney in this instance, the tort of defamation exists in large measure to prevent injuries to a

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208. In contrast, it might be argued that some of the rules of professional responsibility regulating the business of law, such as the rules regarding multi-jurisdictional practice, are designed primarily to serve the interests of existing members of the profession. See Barton, supra note 161, at 1233-34.

209. See Thompto v. Coburn's, Inc., 871 F. Supp. 1097, 1120 (N.D. Iowa 1994) (finding that Iowa's Code of Professional Responsibility is a source of public policy for purposes of a wrongful discharge claim); Chapman v. Adia Servs., 688 N.E.2d 604, 609 (Ohio Ct. App. 1997) (stating that Ohio's Code of Professional Responsibility is a source of public policy for purposes of a wrongful discharge claim); General Dynamics Corp. v. Superior Court, 876 P.2d 487, 498 (Cal. 1994) ("Some (but not all) of [lawyers'] professional norms incorporate important public values.")

plaintiff's reputation that deter others from associating with the plaintiff.[214] Surely, by extending the absolute privilege to defame to attorneys, courts have realized that one of those who might be deterred from dealing with a defamed lawyer is the lawyer's own client. As recognizing an interference claim in this instance would undermine the policy choice previously made in virtually every jurisdiction, it should not be recognized in this instance.[215]

This is not to say that an interference claim should not be permitted where a court has extended the defamation privilege to other causes of action. The absolute privilege regarding defamatory statements is a special case and involves a rule that is so well-established and so dominates the field of speech-related litigation misconduct that it can be said to almost pre-empt other tort claims.[216] Where, however, the alleged wrong consists of wrongful conduct, accomplished by words (such as knowingly filing a complaint containing false and defamatory allegations), courts have been more willing to recognize the potential for liability.[217] Even where courts have extended the absolute privilege to other tort actions, it should be recognized that the privileges in these other areas did not originally exist at common law and are not nearly as well-established as the defamation privilege.[218] Consequently, courts should not be nearly as reluctant to reconsider prior holdings extending the privilege to other causes of action as they might be with respect to the defamation privilege.

V. ATTORNEY LIABILITY FOR TORTIOUS INTERFERENCE: LITIGATION TACTICS AS INTERFERENCE

The following Part examines four different situations in which an attorney might face liability for tortiously interfering with a relationship while, at least in theory, acting on behalf of a client during the course of litigation. These cases illustrate the ease with which an interference claim can be asserted in place of, or in addition to, a more obvious cause of action. More importantly, they illustrate the tension between permitting recovery for the improper interference with contractual relationships and permitting attorneys to engage in the practice of law without fear of

214. RESTATEMENT (SECOND) OF TORTS § 559 (defining a defamatory statement as one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him")

liability from opposing parties or counsel. Finally, they illustrate how the proposed reformulation of the interference torts in this particular context can be accomplished without upsetting other important policies.

A. FILING SUIT AS A FORM OF IMPROPER INTERFERENCE

While an interference claim could conceivably lie for any number of actions taken during the litigation process,[219] perhaps the most obvious basis for such a claim is the decision to file a lawsuit. The most logical tort action stemming from the filing of a lawsuit would naturally be malicious prosecution or wrongful initiation of civil proceedings. However, a tortious interference claim could potentially be more viable.

First, as currently defined, the intent element could easily be established in most cases because one necessary or likely consequence of the filing of a lawsuit may also be the interference with an existing or prospective contractual relationship.[220] Second, while attorneys enjoy an absolute privilege from a defamation action for statements made during the course of a judicial proceeding, in a majority of jurisdictions they nonetheless potentially remain subject for wrongfully initiating legal proceedings.[221] In some instances, however, a wrongful initiation suit may be barred by existing law; for example, the fact that the proceeding on which the claim is based has not yet terminated in favor of the person against whom the charge is brought would ordinarily bar a wrongful initiation claim.[222] Under the "independently tortious" standard used in some jurisdictions, this failure to satisfy an element of the wrongful initiation claim might not bar an interference claim based on the same conduct.[223] Unless a court were to define the contours of an interference claim so that they tracked the elements of a wrongful initiation claim, a plaintiff could theoretically state an interference cause of action, despite the fact that the underlying proceeding has not yet terminated, as long as the defendant acted with an improper purpose or used improper means.

A 2003 opinion from the Oregon Court of Appeals wrestled with these issues. In *Mantia v. Hanson*, the plaintiff sued one of its former employees for tortious interference as a result of the employee's filing of supposedly frivolous claims as part of an attempt to interfere with the plaintiff's business.[224] In addition, the plaintiff asserted the same claim against the defendant-law firm for asserting the claims on behalf of the law firm's client.[225] As the allegedly baseless claims had not been

claim of wrongful initiation of civil proceedings would have been barred.[226] The question facing the court then was whether a tortious interference claim could nonetheless lie based upon the identical conduct.

Making the matter more complicated was the fact that Oregon law was far from clear on the subject of attorney liability stemming from actions occurring during the litigation process. Indeed, over twenty years earlier, the same court dismissed a wrongful initiation claim against an attorney, who had allegedly instituted a civil action without probable cause, because the plaintiff had failed to allege that the other proceedings had terminated, but allowed a tortious interference claim based upon the same conduct to proceed.[227] However, in subsequent decisions, the court extended the absolute privilege to publish defamatory statements in the course of, or as part of, judicial proceedings to tort actions outside the defamation context.[228] This included, in one instance, an interference action stemming from allegedly defamatory statements.[229] Additionally, in one of these later decisions, the court extended the absolute litigation privilege to a claim of intentional infliction of emotional distress. The claim stemmed, in part, from the filing of legal proceedings[230]—conduct that might more logically have sounded under a wrongful initiation theory.

In light of the seemingly conflicting case law and the fact that the defendant's underlying claim in Mantia had not been resolved at the time the plaintiff brought his interference claim, the court was confronted with essentially two questions: (1) whether to extend the absolute privilege to all tort claims (including interference claims) based on the wrongful initiation of legal proceedings, with the exception of wrongful initiation claims; and (2) whether the institution of legal proceedings could amount to the wrongful means necessary to support an interference claim, despite the fact that the underlying proceedings had not yet terminated.

In attempting to reconcile the conflicting case law, the court chose not to extend the absolute privilege to all tort claims, save wrongful initiation of legal proceedings.[231] Thus, a tortious interference claim remained at least a theoretical possibility for the plaintiff in Mantia. However, the court also limited the potential reach of the interference cause of action by defining the term "improper means" in such a way that it tracked exactly the elements of a wrongful initiation claim:

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226. See supra note 222 and accompanying text.

> [T]he prosecution of unfounded litigation constitutes actionable "improper means" for purposes of tortious interference where (1) the plaintiff in the antecedent proceedings lacked probable cause to prosecute those proceedings; (2) the primary purpose of those proceedings was something other than to secure an adjudication of the claims asserted there; and (3) the antecedent proceedings were terminated in favor of the party now asserting the tortious interference claim.[232]

Because the plaintiff in Mantia had filed his tortious interference claim prior to the time the defendant's underlying claim had been adjudicated, his tortious interference claim failed as a matter of law.[233] By defining "improper means" in this fashion, the court prevented the interference torts from undermining the policy judgments previously made with respect to the tort of wrongful initiation of civil proceedings.

Even if the plaintiff in Mantia could have garnered enough evidence to create a jury question on the defendant's allegedly improper means, the approach described in Part IV quite likely would have prevented the plaintiff from reaching the jury on the interference claim. If the intent element is redefined so that a defendant must actually desire to interfere, it is unlikely that the court would have ruled the defendant in Mantia intentionally interfered with the plaintiff's business relationships. According to the complaint, the law firm

> pursue[d] the frivolous claims of plaintiff Mantia against defendant Hanson . . . with the intent to interfere with defendant's business by requiring Hanson to devote substantial time and money defending against the false claims of the plaintiff, by ruining Hanson's business, or by putting Hanson out of business.[234]

The allegation that the law firm filed an action on behalf of its client with this intent seems dubious at best if, by "intent," Hanson was alleging that the firm desired these results. Instead, it is more likely that the law firm knew with substantial certainty that Hanson might face these potential problems as a result of the litigation. While the client may have desired to put Hanson out of business, absent some evidence of bad blood between

purpose in bringing a lawsuit without hindering their willingness to accept unpopular causes.[235]

B. IMPROPER HANDLING OF SETTLEMENT OFFERS AS A FORM OF IMPROPER INTERFERENCE

Once litigation is fully underway, interference claims can materialize in any number of possible ways. A 2004 decision from the Arizona Court of Appeals illustrates the risks that attorneys may face when attempting to obtain the best deal possible for their clients (and themselves). In Safeway Insurance Co. v. Guerrero,[236] Roush, the defendant-attorney, was accused of tortiously interfering with the contract between an insurer and its insured in a somewhat complicated insurance matter. Specifically, Roush represented the mother and guardian of an injured party in her action against the driver of an automobile. The driver was insured by Safeway Insurance Co. under a policy for coverage up to $15,000. As it turned out, the injured party's injuries were in excess of $7 million. Initially, Roush made a settlement offer on behalf of his client that included a demand of policy limits in the amount of $15,000. While Safeway contended that it accepted the offer, Roush claimed to have withdrawn the offer prior to Safeway's acceptance.[237] According to Safeway, Roush withdrew the offer because he realized that he stood to collect significantly less under his contingent fee agreement if the policy limits were paid, and therefore "devised a scheme that would allow [him] to make a substantially larger fee."[238] Specifically, Roush allegedly withdrew the offer for the purpose of manufacturing a bad faith claim on the part of the insured that would enable Roush's client to enter into an agreement (known in Arizona as a "Damron/Morris agreement") with the insured whereby Roush's client would be able to pursue the insured's bad faith claim against Safeway.[239]

Arizona follows the Restatement's approach to interference claims; therefore, Safeway had the burden of establishing not only that Roush had intentionally interfered with Safeway's contract with its insured, but that Roush had acted improperly.[240] The court offered two possible bases on which a reasonable juror could conclude that Roush had improperly interfered. In one portion of the opinion, the court stated that Roush had allegedly misrepresented his client's intent to settle in order to generate a bad faith claim against the insurer.[241] According to the Restatement, misrepresentation is a form of improper conduct sufficient to support a

accomplish the same result through more suitable means.[242] Thus, because Roush had allegedly engaged in misrepresentation as part of a scheme to interfere with the insurer's relationship with its insured, Roush had acted intentionally and improperly.

Had the court concluded its analysis at this point, there would be little to criticize, unless one is of the opinion that an attorney should always be shielded from liability to an opposing party for actions taken during the course of litigation.[243] As alleged, Roush had engaged in misrepresentation with the specific intent of interfering with the relationship between the insurer and its insured. While garden-variety misrepresentation could certainly constitute improper means, Roush's alleged actions were all the more wrongful because they involved unethical litigation conduct. "Puffing" about a client's intentions as to an acceptable settlement in order to pressure the other side into offering a better deal might be an accepted convention in negotiation.[244] However, there is a fundamental difference between this type of action, and the assertion of a false desire to settle in order to drive a wedge between one's negotiation partner and that partner's contractual partner in order to make it appear as if the negotiation partner is actually the party negotiating in bad faith. The attorney in the former situation might be playing within the rules of a tough game. The attorney in the latter situation has committed a foul that smacks of misrepresentation.[245] If one is willing to recognize the existence of tort liability to opposing parties for acts occurring during the litigation process, Roush's actions, as alleged, amounted to improper interference.

Instead of stopping here, however, the court pressed on and determined that, according to the insurer's allegations, Roush's actions were improper because he had no basis for entering into the bad faith agreement with the insured. The crux of the court's reasoning is that Roush engaged in the type of unfounded litigation that the Restatement cautions against.[246] Roush's alleged reason for withdrawing the settlement offer was that he planned to pursue a products liability action against the manufacturer of the automobile and did not want the driver unrepresented

242. RESTATEMENT (SECOND) OF TORTS § 767 cmt. c.
243. See infra notes 274-278 and accompanying text.
244. See MODEL RULES Rule 4.1 cmt. 2.
245. See generally Plattner v. State Farm Mut. Ins. Co., 812 P.2d 1129 (Ariz. Ct. App.

as an "empty chair."[247] Unfortunately for Roush, this was not a permissible reason for withdrawing the settlement offer and entering into an agreement with the driver concerning the bad faith claim. While Arizona law permits parties to enter into the type of agreements that Roush's client and the driver entered into concerning the bad faith claim (the Damron/Morris agreement), they are only permitted to do so under limited circumstances.[248] Because the desire to avoid facing an "empty chair" is not a permissible basis for entering into a Damron/Morris agreement, Roush had, in effect, wrongfully initiated a legal proceeding by being a party to the Damron/Morris agreement.[249] Thus, a jury question existed as to whether his actions were improper.[250]

As a jurisprudential matter, the problem with the court's analysis in this regard is that it was simply unnecessary. Roush's act of interference was his withdrawal of the settlement offer. His goal in withdrawing the offer was to manufacture a bad faith claim. And he accomplished this goal by misrepresenting his client's intent to settle. Once one reaches this conclusion, there is simply no reason to analyze whether Roush had a legitimate reason for misrepresenting his client's intent or whether the bad faith claim was cognizable under existing law. All of the recognized privileges for interference condition the existence of the privilege on honest behavior.[251] In short, it does not further the purpose of tort law to inquire into why an attorney has made a false statement of fact with the desire to interfere with a contractual relationship once it has been established that the attorney has in fact done so.

On a broader level, the problem with classifying Roush's decision to enter into a bad faith agreement as an independent basis for a finding of wrongful conduct is that it could potentially chill legitimate advocacy. As the court's decision makes clear, the insurer's interference claim essentially tracked a wrongful initiation claim.[252] However, it is not entirely clear that Roush's actions actually amounted to the wrongful initiation of civil proceedings as that tort is defined at common law. According to the Restatement, an attorney is liable for the tort only where the attorney does not reasonably believe that a claim is valid under applicable law and asserts the claim for an improper purpose.[253] The decision contains numerous references to the fact that Roush's actions went beyond the "established" and "accepted" boundaries of Arizona law

247 Safeway Ins. Co., 83 P.3d at 571

on the subject,[254] thus leading one to believe Roush lacked probable cause to proceed. However, the fact remains that the trial court actually approved the reasonableness of the agreement between Roush's client and the insured.[255] Thus, the trial judge at least did not believe Roush had exceeded the accepted boundaries of Arizona law.

More importantly, at the time the insurer filed the interference claim, the underlying bad faith claim was still pending.[256] While the underlying bad faith claim was decided in favor of the insurer prior to the decision in Safeway Ins. Co., that decision was still under appeal at the time of the opinion.[257] Thus, the proceeding that was allegedly initiated without probable cause had not been terminated.[258] Under the majority rule, these facts would have been fatal to a wrongful initiation claim had the insurer brought such a claim.[259] However, by allowing the interference claim to act as a substitute for a flawed wrongful initiation claim, the Arizona Court of Appeals reached a result that the Oregon Court of Appeals had strained to avoid in Mantia v. Hanson.[260]

Roush raised several additional arguments in defense of the propriety of his actions. Perhaps the most obvious was that, as an attorney, Roush had an ethical duty to maximize recovery for his client.[261] Thus, Roush argued, if he was zealously representing his client as was his duty, he could not have interfered improperly.[262] The court dismissed this argument, noting that, while maximizing recovery may be part of a lawyer's duty, that duty is bound by a lawyer's duty to represent a client within the confines of the law and ethical rules.[263] Roush also raised several privilege arguments, similar to those at issue in Mantia v. Hanson.[264] First, Roush argued that the only cause of action that Arizona law permitted opposing parties or counsel to bring against an attorney was

254. See, e.g., Safeway Ins. Co., 83 P.3d at 567.

255. Himes v. Safeway Ins. Co., 66 P.3d 74, 78 (Ariz. Ct. App. 2003). This decision was subsequently vacated on appeal. Id. at 88.

256. Safeway Ins. Co., 83 P.3d at 563.

257. Id.

258. According to the Restatement (Second) of Torts, a proceeding is not terminated until the final disposition of the appeal. RESTATEMENT (SECOND) OF TORTS § 674 cmt. j.

259. Id. § 674 Reporter's Note (noting that the Restatement's rule represents the majority rule and listing Arizona as a state that follows the majority approach); see Safeway Ins. Co., 83 P.3d at 567 (listing one of the elements of a wrongful initiation

malicious prosecution.[265] Earlier decisions had seemed to adopt just such a sweeping rule.[266] The court quickly dispensed with this argument, however, finding that the statements from prior decisions simply amounted to dicta.[267]

Roush also made a more narrow privilege argument. Specifically, he argued that the absolute privilege recognized in Arizona for defamatory statements made in the course of judicial proceedings should also apply to interference claims.[268] While acknowledging the continued validity of the absolute privilege to defame in the context of a judicial proceeding, the court noted that the insurer's interference claim more closely resembled a claim of wrongful initiation of civil proceedings than a claim of defamation.[269] The insurer was not primarily complaining about what Roush said, but rather what Roush did, i.e., manufacturing a bad faith claim for an improper purpose.[270] Thus, it was Roush's conduct that constituted the basis of the interference claim.[271] The court explained that if it were to extend the absolute privilege to defame to such a situation, it would create a conflict with Arizona case law, which recognized a cause of action against an attorney for wrongfully initiating civil proceedings; thus, the court permitted the insurer's interference claim to proceed.[272]

This distinction between speech and conduct is a sensible one. Extending the absolute privilege applicable to defamatory statements is only desirable where the interference claim more logically resembles a defamation claim. The court's willingness not to blindly extend the privilege to this situation is to be commended, as is the court's recognition that zealous advocacy should not automatically be a defense to a tort action by an opposing party. However, by defining "improper means" in the manner the court did, the court allowed the plaintiff to bypass the very carefully-constructed rules relating to wrongful initiation claims and, in the process, undermined the policy choices previously made with respect to that tort. The elements of the wrongful initiation tort have been constructed too carefully to allow an interference claim, based upon the same allegedly wrongful conduct, to serve as a substitute for such a claim, unless there is some value the interference claim can advance that is not advanced by the wrongful initiation tort. As such, the fact that Roush

265. Safeway Ins. Co., 83 P.3d at 565-66.

266. Lewis v. Swenson, 617 P.2d 69, 72 (Ariz. 1980); Linder v. Brown & Herrick, 943 P.2d 758, 766 (Ariz. Ct. App. 1997).

allegedly engaged in independently wrongful conduct by engaging in "unfounded litigation" should not, by itself, have been sufficient to allow the interference claim to proceed.

In contrast, the fact that Roush allegedly engaged in misrepresentation with the specific intent of interfering with the insurer's relationship with its insured should be sufficient to constitute a case of tortious interference. Recognizing a cause of action in this context would further the goals of deterrence and compensation without undermining any existing body of law.

C. USE OF THE DISQUALIFICATION RULES AS INTERFERENCE

With the above examples, the defendant-attorneys allegedly used the litigation process to interfere with the plaintiffs' relationships with those other than their attorneys. In some instances, however, a defendant-attorney may use the litigation process to drive a wedge between an opposing party and his or her attorney in an effort to advance the cause of his or her client.[273] In Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co.,[274] an insurance company involved in a bad faith action certified to the trial court its intent to call as a witness at trial one of the attorneys from the law firm representing the opposing party. The insurer then moved to disqualify the law firm from representing the opposing party.[275] After the court granted the insurer's motion, the insurer never called the attorney as a witness and, in fact, never even bothered to subpoena the attorney as a witness or notify the court that it would not be calling the attorney as a witness.[276] The law firm then sued the insurer for tortiously interfering with its relationship with its client.[277] The Florida Supreme Court concluded that the absolute litigation privilege applicable to defamation actions applied to any act occurring during the course of a judicial proceeding, regardless of whether

273. These situations need to be distinguished from those in which an attorney files an ethics complaint against an attorney simply out of spite or a desire to harm the other attorney. See Skolnick v. Altheimer & Gray, 730 N.E.2d 4 (Ill. 2000) (involving a tortious interference claim stemming from two attorneys in a law firm notifying the state bar that another attorney in the firm had been questioned about the creation of a forged document).

274. 639 So. 2d 606 (Fla. 1994).

275. Id. at 607. The defendant in the ensuing tortious interference action was the insurance company, not the company's attorney. Id. Despite the fact that no attorney

the act involved a defamatory statement or other tortious behavior.[278] Hence, the law firm's interference action was barred.

Similarly, in Drummond v. Stahl,[279] the defendant-attorney moved to disqualify opposing counsel on the basis of a conflict of interest and filed an ethics charge with the state bar on the same grounds.[280] Because of the delay in the litigation associated with the motion and investigation of the complaint, opposing counsel was fired by his client.[281] The state bar ultimately concluded that there was no conflict of interest, although counsel for the bar concluded that the question was a difficult one and that the defendant-attorney had brought the complaint in good faith.[282] The discharged attorney subsequently brought an action against the defendant-attorney, alleging that the defendant had intentionally and maliciously interfered with the attorney's relationship with his client by filing the motion to disqualify and bringing the ethics complaint.[283] Although the Arizona Court of Appeals did not extend the absolute privilege to cover all tort actions, it concluded that the absolute privilege applying to defamatory statements made in the course of litigation should apply to the interference claim as well as the defamation claim.[284]

This pair of cases illustrates both the potential utility and potential dangers of permitting tortious interference claims to lie against attorneys for conduct occurring during the course of representation. In reaching its conclusion in Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., the Florida Supreme Court reasoned that "[j]ust as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct."[285] By that same logic, a defendant involved in litigation should enjoy the same immunity if the defendant decides to file a counterclaim or cross complaint for strategic purposes. Yet, in many jurisdictions, filing such an action would amount to the institution of a proceeding, thus forming the basis for a wrongful initiation claim, assuming the other elements of the tort were satisfied.[286]

278. Id. at 608.
279. 618 P.2d 616 (Ariz. Ct. App. 1980).
280. Id. at 618.
281. The court characterized the turn of events as involving the client "request[ing]" his attorney to withdraw from the case. Id.

However, because filing a motion to disqualify does not amount to the institution of a proceeding, a wrongful initiation claim would not be available.[287] An abuse of process claim might not have succeeded because there was no indication that the defendant filed the motion to disqualify the law firm primarily to accomplish a purpose for which the disqualification process was not intended.[288] That being the case, the only potentially viable claim the plaintiff in Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. might have been able to assert was the tortious interference claim. The timing of events suggests that the defendant never actually intended to call a member of the opposing law firm as a witness and that the defendant intentionally deceived the court. If that is the case, then the defendant not only deceived the court but did so with the intent of forcing the law firm to withdraw, thereby denying the law firm its anticipated fee and, more importantly, the client its chosen counsel.

This would seem to be precisely the type of situation for which the interference torts exist. The defendant's actions smack of both wrongful initiation of civil proceedings and abuse of process, but arguably amounted to neither. Both torts are designed to prevent the litigation process from being used improperly. An interference claim in this situation would more closely resemble an abuse of process action than a wrongful initiation action, given the fact that the abuse of process tort is much broader in terms of the processes that can form the basis for such claims.[289] Yet, if one recognizes attorney-client relationships as having special inherent value and deserving of increased protection from adversarial interference, recognizing an interference claim in this context would promote a value that the abuse of process tort is not specifically designed to promote.[290] The paradigmatic abuse of process case involves a defendant filing a motion for the purpose of coercing the plaintiff into settling some other dispute.[291] Yet, if one views the loss of the benefits of an attorney-client relationship as a harm unto itself that should only be justified if achieved for a proper purpose (such as protecting the interests

287. Silver v. Gold, 259 Cal.Rptr. 185, 188 (Cal. Ct. App. 1989).

288. See RESTATEMENT (SECOND) OF TORTS § 682. According to the comments, the elements of the tort of abuse of process are designed to exclude liability when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant. Id. cmt. b. "The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other

of a client) and through the use of proper means (such as bringing a motion to disqualify in good faith), a tortious interference claim would advance the same goals of the abuse of process tort while furthering the important interest in preserving attorney-client relationships.

At the same time, Drummond v. Stahl illustrates the wisdom in not permitting interference claims to serve as substitutes for other types of tort claims in some instances. To the extent the interference claim in that case stemmed from the filing of an ethics complaint, it essentially was serving as a substitute for a defamation or wrongful initiation claim. Because probable cause existed for the filing of the complaint, the court reached the correct result by not permitting the interference claim to proceed.[292] To the extent the interference claim stemmed from the motion to disqualify, it was essentially serving as a substitute for an abuse of process claim. The court was again justified in barring the interference claim. Although it was unnecessary to extend the absolute litigation privilege to the interference claim, the interference claim was defective because the defendant-attorney's conduct was not independently tortious. There was no allegation that the defendant-attorney engaged in the same type of deception as the defendant in Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., nor was there any evidence that the motion lacked probable cause or was in any way frivolous.[293] Therefore, despite the fact that the defendant-attorney may have acted with the specific intent of interfering with the plaintiff's relationship with his client, there was nothing to indicate that the case involved anything more than an attorney acting in good faith on behalf of his client.

D. TRIAL TACTICS AS A FORM OF IMPROPER INTERFERENCE

While several of the above decisions stand for the general proposition that an interference claim may lie against an attorney for conduct occurring in the course of and related to the litigation process, a 1988 Texas case illustrates the lengths to which some courts will go to shield attorneys from liability in such cases. In Maynard v. Caballero,[294] a criminal defense attorney was charged with improperly interfering with the relationship between a co-defendant and his attorney. According to the plaintiff (the co-defendant in a prior criminal matter), the defendant-attorney convinced the plaintiff's attorney to limit the cross examination of a prosecution witness, to the apparent detriment of the plaintiff.[295]

malpractice and the defendant-attorney for tortious interference.[296] The Texas Court of Appeals made quick work of the plaintiff's interference claim, stating that the defendant-attorney's actions were privileged because the defendant-attorney had a contractual duty to represent his client zealously within the bounds of the law.[297] While recognizing the potential for discord in any case involving the joinder of criminal parties, the court nonetheless stated that an aggrieved party's proper recourse was against the party's own attorney, lest the public's interest "in loyal, faithful and aggressive representation by the legal profession . . . be severely hampered to the detriment of all."[298]

Later Texas cases have built upon the reasoning of *Maynard* and similar cases to construct a broad rule that limits attorney liability for actions taken in the litigation process to only the most egregious behavior.[299] As a general rule, attorneys cannot be held liable for wrongful litigation conduct under virtually any theory, either to an opposing party or opposing counsel.[300] If, in the course of representing a client, an attorney engages in unethical conduct that harms another attorney or an opposing party, the "remedy" is public (in the form of professional discipline) rather than private.[301] The Texas courts have said,

> Any other rule would act as a severe and crippling deterrent to the ends of justice for the reason that a litigant might be denied a full development of his case if his attorney were subject to the threat of liability for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights to which he is entitled.[302]

The only exception to this general immunity is where an attorney engages in fraudulent activity that injures a third person, the theory being such action is "foreign to the duties of an attorney."[303]

A closer examination of the *Maynard* case raises a question as to whether permitting an interference claim in some limited situations would truly constitute an improper interference with a lawyer's ability to practice law. As the dissenting opinion in *Maynard* pointed out, the defendant-attorney, who convinced the plaintiff's attorney to limit the cross

296. Id.
297. Id. at 721

examination of a prosecution witness, allegedly did so, in part, in order to avert attention from the fact that the defendant-attorney was a suspect in a related case.[304] Furthermore, the plaintiff had alleged that another motivation behind the defendant-attorney's actions was the fact that the prosecution witness was actually a former client of the defendant-attorney, and the defendant-attorney feared that rigorous cross examination would reveal this relationship, thereby necessitating the disqualification of the defendant-attorney from the case and the surrender of the attorney's fee.[305] In sum, the defendant-attorney was alleged to have interfered in order to hide his own conflicts of interest so that he could recover his full attorney's fee, when the rules of professional responsibility might have prohibited him from doing so had the truth come to light. Surely, action that violates some of the cardinal rules of professional responsibility is, almost by definition, "foreign to the duties of an attorney."[306] Yet, the majority opinion dispensed with any argument concerning the defendant-attorney's allegedly self-interested actions, instead stating that the defendant-attorney's motives "were not for [the plaintiff] to pass judgment on."[307]

The court's holding might have been justified had it been limited to criminal matters. Arguably, the plaintiff brought the interference claim in an attempt to seek recovery from the defendant when he probably would have been prohibited from recovering from his own attorney under the rule that a criminal defendant may not recover on a malpractice theory unless there is proof of actual innocence.[308] Allowing an interference claim to lie in such a case would arguably undermine the policy choices previously made with respect to the rules regarding malpractice in the criminal setting. However, the court's holding is not limited to the criminal context.[309] If the facts of *Maynard* are changed so that an unhappy civil defendant is bringing the interference claim, the rule announced by the court is much harder to justify. While the concerns over recognizing a duty owed to a co-defendant on the part of an attorney might be justified in the context of a negligence claim, the co-defendant in *Maynard* was not unhappy about the fact that his co-defendant's attorney's negligence had caused his own attorney to do a poor job. He was unhappy about the fact that this attorney had intentionally caused his own attorney to do a poor job in order to protect the attorney's own interests, rather than those of his client. If one views an intentional interference with an

attorney-client relationship, carried out in such a way so as to potentially subject an attorney to disbarment, as having adverse consequences not just for the plaintiff and his or her attorney, but also for society's interests in an ethical legal profession and the fair administration of justice, it is difficult to see why an interference claim should not be recognized.

VI. CONCLUSION

Cases such as those discussed throughout this Article present courts with difficult policy choices. Recognizing the availability of tortious interference claims (or any tort claims brought by third parties) for actions that lie close to the core of what it means to practice law may chill lawyers in the exercise of their professional duties, thus limiting the effectiveness of counsel. Furthermore, there is an undeniable logic to the position of the *Maynard* court that the remedy of a client who receives inadequate representation because of the actions of another attorney should lie against the client's own attorney, rather than the interfering attorney.[310] Finally, there is also clearly a danger in allowing an interference claim to substitute for a more logical tort action (such as defamation or malicious prosecution) when the other tort action is barred by existing law. The danger in such cases is that by permitting interference claims to serve as a substitute for another, flawed claim, interference claims have the potential to undermine the policy choices previously made in establishing the contours of the other cause of action. These are precisely the same types of arguments that have been advanced in settings not involving attorneys.

Yet, there are ways to limit the potentially expansive sweep of the interference torts short of prohibiting any type of tort action by a third party against an attorney or specifically barring tortious interference claims. If courts are willing to move beyond the "one size fits all" approach that currently dominates much of interference case law and construct context-specific rules defining what constitutes an intentional and improper interference in the case of misconduct on the part of an attorney during the litigation process, the goals of tort law and the legal profession can be adequately balanced.

Redefining the intent and improper interference elements as described would almost certainly limit the number of interference claims in the specific context of a defendant-attorney engaged in the practice of law,[311] while still preserving the ability of plaintiffs to pursue such actions in truly

in cases such as Mantia v. Hanson, where the defendant does not actually desire to interfere with the plaintiff's relations with other parties. However, it would preserve the ability of plaintiffs to pursue such a claim where the defendant has intentionally used the litigation process as a tool to drive a wedge between the plaintiff and a contracting partner and used improper means to do so, as was alleged in Safeway Insurance Co. v. Guerrero. Additionally, it would preserve a plaintiff's ability to pursue claims where the defendant has acted with the desire to limit the effectiveness of the plaintiff's contracting partner while violating the rules of professional responsibility, as was alleged in Maynard v. Caballero.

In so doing, the interference torts could serve as an important tool in compensating legitimate injuries while deterring the type of misconduct that endangers the legal profession as a whole.