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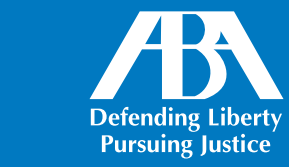

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Business Torts Journal

Tortious Interference Issue

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Tortious Interference in the Lawyering Community

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The legal community has transformed itself dramatically in the last three decades. At one time a learned society of genteel professionals, the lawyering profession has opened itself up to market forces and competition—sometimes fierce competition. Minimum fee schedules are gone; alternative billing arrangements are in. True partnerships—with shared ownership and liability—are gone; limited liability and faux partnerships ("partnerships" wherein one partner pays another a guaranteed salary) are in. The explosive growth of limited liability partnerships and limited liability companies has, for better or for worse, shattered the golden handcuffs that once held lawyers together. The handcuffs gone, the gloves are off, and attorneys are looking suspiciously at colleagues who, in another era, could be counted upon to watch their back.

In a previous *Business Torts Journal* article, I explained the difference between fierce, even vicious, competition on one hand, and tortious interference with contract on the other.[1] In this article, I discuss how these concepts apply to the practice of law. When does the competition for clients cross over to a tort that might expose an attorney to liability?

Review of Tortious Interference with Contract

Most jurisdictions that recognize the tort of tortious interference with contract have modeled it from *The Restatement (Second) of Torts* § 766. Under the standard articulated by the *Restatement*:

> One who intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.[2]

In a profession that should know better, some of the most vicious business torts have been seen in the lawyering community. Recent cases from California, Maryland, and Illinois provide valuable "what not to do" lessons for lawyers engaged in competition for clients. They also demonstrate the seriousness with which the judicial branch addresses attorney mistreatment of other attorneys. Those

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data, (2) near-line data and (3) offline storage/archives. 217 F.R.D. at 318-20. The principal distinction is that "accessible" data is stored in a readily useable format that may be accessed without restoration or other manipulation. *Id*. at 320. Some caution may be justified here. At least one circuit has found a duty to give notice that evidence was about to be destroyed even where the offending party did not own or control the evidence at the time of its destruction. *See Silvestri v. General Motors Corp*., 271 F.3d 583 (4th Cir. 2001). If the preservation duty can be breached by allowing the destruction of evidence that a party does not own or control as in *Silvestri*, the duty of preservation might extend to evidence that a party owns, but believes is "inaccessible."

11. 220 F.R.D. at 218.

12. *Id*. at 222.

13. *Id. Zubulake IV* did not describe the newly discovered e-mails. The opinion only referred to the newly discovered evidence when describing the plaintiff's motion for sanctions, *id*. at 215-16, and in identifying the relief ordered by the court. *Id*. at 222.

14. 220 F.R.D. at 220 & 220 n.47.

15. Zubulake v. UBS Warburg LLC, 2004 WL 1620866 (S.D.N.Y. July 20, 2004).

16. *Id*.

17. Since the destruction was "willful," an inference could be drawn that the information destroyed was relevant to the litigation and would have been unfavorable to the destroying party.

Tortious Interference in the Lawyering Community

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of you thinking about taking your first confident strides toward establishing your own firms are well advised to step gingerly, as liability trip wires might be closer to your ankles than you think.

The New Competitive Ethos in Obtaining and Retaining Clients

In a past era, the thought of "grabbing" clients from one's current firm inspired revulsion. As one judge described the prevailing sentiment, "It is noble and daring to embark on a career of law by cutting the umbilical cord that ties one to an employment contract. But taking the heart and soul of the benefactor is immoral, illegal, and repulsive. If they want their own firm, let them get their own clients."[3] Yet, with the rise of the free market and a preference for an open and competitive marketplace for legal skills, grabbing clients has become almost an expected part of changing affiliation.

The Iowa Supreme Court recently gave voice to the new ethos in an opinion handed down in September 2002. Responding to the claim that an associate at a law firm should be prevented from communicating, in advance of his departure, his desire to continue to represent clients after his departure, the court stated:

> While the grabbing of clients … raises professional issues, the primary concern, of course, is the best interest of the clients. … [D]isfavoring in-person grabbing communications may deprive the client of the very information he needs to make intelligent choice of counsel. [Moreover], grabbing is most likely to succeed when the client knows the lawyer well and is satisfied with the quality of her work; in such cases, disfavoring in-person contacts as improper solicitation does little more than restrain competition among lawyers. Finally, restrictions on grabbing assume a vulnerability and naïveté on the part of clients that may not exist. The sophistication of clients, especially that of larger institutions, may easily match that of their lawyers. ...[4]

The District of Columbia Bar Legal Ethics Committee reached a similar conclusion in Opinion No. 273, September 17, 1997. It stated that "[u]nder the Rules of Professional Conduct, a lawyer responsible for a client's matter would be obligated to inform that lawyer's clients of his/her planned departure and of the lawyer's prospective new affiliation, and to advise the client whether the lawyer will be able to continue to represent it." Citing an attorney's obligation to keep the client informed of the status of a matter and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," the committee concluded that:

> [N]ot only does Rule 1.4 require the lawyer to communicate his prospective change of affiliation to the client, but such communication must occur sufficiently in advance of the departure to give the client adequate opportunity to consider whether it wants to continue the representation by the departing lawyer and, if not, to make other representation arrangements.

Significantly, the committee noted that "[t]here appears to be no ethical significance to whether the client or the law firm is first informed of the lawyers' planned departure."

While an attorney who solicits a firm's current clients may not run afoul of ethical rules, such solicitation might put the employee attorney at risk for civil liability for violating his duty of loyalty to his law firm,[5] or the partner attorney at risk for civil liability for breach of fiduciary duty.

Competition for Clients Must Observe Limits

The competition for clients cannot be divorced from contract and tort obligations owed between attorneys. Attorneys who commit torts against each other can be expected to pay compensation for the damage inflicted. Yet, attorneys who inflict torts against other attorneys, the effect of which is to interfere with the victimized attorney's client or employment relations, can expect to pay additional damage for tortious interference with contract.

Do Not Use Unfair Tactics to Hire Away Employees from Your Old Firm

In establishing a new law practice, it would seem obvious that the associate attorneys and support staff you worked with at your prior

firm would be natural employees at your new firm. While this insight might well be true, attorneys thinking about populating their new office by depopulating their old office should be wary of the significant liability that can be incurred in this process.

Consider the recent case of *Reeves v. Hanlon*.[6] In that case, the California Supreme Court upheld a judgment against two young, upstart attorneys who left their firm in a manner that wreaked havoc on their former boss.[7] Daniel P. Hanlon started practicing immigration law with Robert L. Reeves in 1995 and became his partner in 1999; Colin T. Greene began working for Reeves in 1997. Yet, in a law-practice version of a "shock and awe" campaign, Hanlon and Greene orchestrated a departure that left Reeves reeling and seeking judicial relief.

Hanlon and Greene planned their departure five months in advance. They accessed Reeves's password-protected computer database to print out confidential name, address, and phone number information on 2,200 clients. They also began a campaign to foment dissatisfaction among Reeves's personnel. On "D-day," Hanlon and Greene resigned without notice or warning. The evening of their resignations, they began personally soliciting Reeves's key employees. As a result, Reeves lost nine employees over the next 60 days, six of them joining defendants' new firm. Hanlon and Greene also began a campaign to solicit Reeves's clients, contacting at least 40 of them by telephone without offering them a choice of counsel (in some cases exploiting the clients' lack of facility with English to force themselves on the clients as their counsel). While Reeves was accustomed to losing one or two clients a month, Hanlon and Greene's actions cost him 144 clients during the next year. With respect to the remaining clients, Hanlon and Greene left no status reports or list of matters or deadlines on which they had been working. Shortly before resigning, Greene intentionally erased extensive computer files in Reeves's computer server containing client documents and form files used by his remaining attorneys.

Reeves sued Hanlon and Greene for intentional interference with prospective economic advantage (for stealing his clients) and tortious interference with contract (for stealing his employees). The defendants were found liable on both counts. They tried to shield themselves from liability with respect to the employment contracts by claiming that they could not be liable for tortious interference with contracts that were terminable at will. The California Supreme Court rejected this view stating that "[a] third party's interference with an at-will contract is actionable interference with the contractual relationship because the contractual relationship is at the will of the parties, not at the will of outsiders."[8]

Defendants also attempted to shield themselves from liability by claiming that the solicitation of an at-will employee by a competing employer is part of the competitive milieu in a free market. In rejecting this defense, the court pointed out, "[D]efendants did not simply extend job offers to plaintiffs' at-will employees. Rather defendants purposely engaged in unlawful acts that crippled plaintiffs' business operations and caused plaintiffs' personnel to terminate their at-will employment contracts."[9] The court made clear that such a tortious interference with an at-will contract can be maintained where a plaintiff pleads and proves "the defendant engaged in an independently wrongful—i.e., an act proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard that induced an at-will employee to leave the plaintiff."[10] To emphasize the necessity of the "wrongful" act component of the tort, the California Supreme Court reiterated, "[A] defendant is not subject to liability for intentional interference if the interference consists merely of extending a job offer that induces an employee to terminate his or her at-will employment."[11]

Do Not Destroy or Remove Client Files without Client Consent

The egregious conduct of Hanlon and Greene was so far beyond the pale of professional conduct that their negative example is easily avoided. Yet, a recent case heard by the Court of Appeals of Maryland might seem a more worrisome close call.

In *Attorney Grievance Commission of Maryland v. Potter*, the Court of Appeals of Maryland reversed the Circuit Court for Baltimore City, which had cleared the respondent attorney of ethics violations.[12] Mr. Potter, a former judicial clerk, practiced law with a more seasoned senior attorney named André R. Weitzman. Weitzman compensated Potter on a fee-sharing basis for the clients he brought to the firm. The retention agreements had Weitzman's name on them, but Potter was in fact the attorney for the clients he originated. Indeed, Weitzman had never even met some of these clients.

Potter decided to strike out on his own. Potter was careful not to solicit any clients before the date of his departure. He did, however, take certain steps in preparation for that event. Fearing a time-consuming and acrimonious fight over the client files, Potter took what he considered to be a precautionary step by removing files from his and Weitzman's office late at night and months in advance of his departure. While he was at it, Potter logged onto the computer network and deleted the client files from the office database as well.

Upon leaving his employment, Potter hired a lawyer. He reimbursed Weitzman for all funds advanced for expenses associated with two of the litigation matters and made an offer for fee sharing, which Weitzman rejected as inadequate.

As the court recites the facts, Weitzman moved aggressively to counter Potter. He threatened to initiate criminal proceedings if Potter did not acquiesce to his financial demands, and he took the unusual and hostile step of calling one of the clients Potter had taken with him and threatened her with legal action for leaving his law firm.[13]

Sure enough, the fight between Potter and Weitzman found its way to the Attorney Grievance Commission of Maryland. When the Court of Appeals of Maryland disposed of the case, it weighed in decisively by finding multiple ethics violations—by Potter.

The court accepted the finding of fact that the unraveling of the Potter-Weitzman relationship prejudiced none of the clients, and that none of the work that needed to be done for these clients suffered because, in part, Potter had the client files needed to do the work. Yet, the court was unimpressed by Potter's representations that his actions were motivated by his desire to shield his clients from the prejudice that might be occasioned by a dispute with Weitzman. It stated, "[t]he motive of the lawyer was not central to the finding of a violation of the ethical rules."[14]

What bothered the court was Potter's lack of candor and deceit:

> Respondent's unauthorized removal of the client files violated Rules [of Professional Conduct] 8.4(c) and (d). At the time respondent removed the client files, he did not have the authorization of the law firm or the clients. Although respondent's belief that [the clients he was serving] would choose ultimately to have him continue to provide legal services for them, they did not give respondent permission to remove their files nor could they have given him such permission while he was employed with the firm.[15]

The court was even less forgiving of Potter's "surreptitious conduct in the middle of the night"—deletion of the computer records—"at 1:00 or 2:00 a.m. on July 11, 2001, two weeks before respondent planned to quit his employment. …"[16] The court of appeals held that Potter's conduct was not simply an offense against Weitzman but constituted a crime under Maryland law, which provides, inter alia, that a person may not intentionally and willfully exceed that person's authorized access to a computer with the intent to "alter, damage, or destroy all or any part of data or a computer program stored, maintained, or produced by a computer."[17]

What was a bit surprising was the court's almost exclusive focus on the harm incurred by Weitzman rather than the lack of prejudice the clients suffered. It found that, "Mr. Weitzman was harmed because respondent's taking of the paper files extinguished whatever ability Mr. Weitzman might have had to exercise a retaining lien on those files in order to secure any payment to which he may have been entitled."[18] The court made no reference to the fact that such liens are not even permitted in some jurisdictions, for example, across the border in the District of Columbia where placing such a lien on client files would be an ethics violation.[19]

While the tortious interference cause of action was not before the court,[20] all the elements to sustain the cause of action were present. Weitzman had a contract with each of his clients in the form of a retention agreement; Potter knew of the existence of these agreements, and Potter then committed the requisite "third" act leading to a breach of contract by misappropriating the clients' files and arguably committing a crime by destroying computer data.

Do Not Breach Fiduciary Duties to Your Partners

A recent case from the State of Illinois, *Dowd and Dowd, Ltd. v. Gleason*,[21] affirmed tortious interference liability for two attorneys who breached their fiduciary duties to their former law partners. In that case, the partners, one of whom for 13 years had been the primary person handling Allstate Insurance Company's legal work at Dowd & Dowd, Ltd., made plans to leave that firm and continue representing Allstate. Prior to leaving Dowd, these partners obtained a commitment from Allstate to terminate its relationship with Dowd upon their departure,[22] used confidential Dowd information to apply for and obtain a line of credit for their new firm, paid down more than $180,000 in Dowd's credit to present a better financial statement for themselves when they applied for that letter of credit, arranged a "mass exodus" of employees prior to announcing their resignations in 1990, and used confidential information from Dowd to facilitate the transfer of cases to their new firm.[23] Yet, they engaged in their preparatory activities while drawing salaries and bonuses from their Dowd partnership.[24]

By engaging in activities that would have a future detrimental impact on their partners while still accepting all the benefits of the partnership, the appellate court affirmed the trial court's finding that the partners breached their fiduciary duties to their partners. This breach of fiduciary duty interfered with Dowd's expectancy that it would continue representing Allstate. Accordingly, the attorneys were saddled with additional compensatory and punitive damages for tortious interference with business expectancy.[25]

Defendants in *Dowd* attempted to avoid liability for soliciting Allstate in much the same way that Hanlon and Reeves attempted to avoid liability for their solicitation of employees. They claimed that, since Allstate's client relationship with Dowd was terminable at will, there could be no tortious interference when the client chose to transfer its legal needs to their new law firm. Like the *Reeves* court, the appellate court in *Dowd* rejected this defense stating:

> Until terminated, the relationship created by a contract terminable at will is subsisting and will presumptively continue in effect so long as the parties are satisfied. [The] focus here is not on the conduct of the client in terminating the relationship, but on the conduct of the party inducing the breach or interfering with the expectancy.[26]

And as had the court in *Reeves*, the *Dowd* court made clear the limits of its ruling, stating:

> [To] prevail on the claim, a plaintiff must show not merely that the defendant has succeeded in ending the relationship or interfering with the expectancy, but [must demonstrate] purposeful interference, meaning the defendant has committed some impropriety in doing so.[27]

In other words, it was not the fact that the departing attorneys solicited their client that incurred their tort liability; it was the fact that they breached their fiduciary duties to their partners in

the process of soliciting their client. The appellate court made clear that its ruling reaffirmed "the tenet that preresignation solicitation of firm clients for a partner's personal gain is a breach of the partner's fiduciary duty to the firm."[28]

Lessons to Be Learned

Some may regard the departure of lawyers from law firms as part of a creative process that ensures vibrancy and innovation in our profession. Others may regard it as a destructive event motivated largely by greed. Whatever one's views, the competition for clients is an obvious by-product of such departures. A brisk competition for clients is increasingly accepted as a necessary part of ensuring client satisfaction and the competent provision of legal services. Yet, the age-old revulsion toward destructive conduct towards others remains. The profession and the courts must protect both the interests of clients and also those of lawyers who have worked hard to develop and maintain client relationships.

Thus, a career move should be carefully planned. While an attorney can and should inform a client of his or her planned departure, the more cautionary path is to wait until after you have left your current firm before actively soliciting your current client's business.[29] Examine the applicable law—especially when it comes to destroying or excluding others from property gained during the course of your prior employment. Examine your motives in preparing your departure. Ask yourself whether your various acts in preparation for departure are designed to assist you establishing your own practice, or harm your soon-to-be former colleague's practice? Often no clear answer will be apparent, and it may be that both elements will be present. In that case, consider getting advice either from counsel or from your local bar association. One thing you do not want in your new practice is a lawsuit in which you are a defendant. n

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Endnotes

1. Hennessey, Joseph A., *Checking Misconduct in Competition Through the Tortious Interference Cause of Action*, BUS. TORTS J., Vol. 10, No. 1 (Fall 2002).

2. Courts articulate the elements of such a cause of action differently, but generally speaking they are: (1) the plaintiff had a valid contractual relationship with a third party, (2) the defendant knew of that relationship, (3) the defendant intentionally interfered with that relationship, (4) the defendant's action caused the third party to breach its contractual relationship with the plaintiff, and (5) the plaintiff suffered damages. *See, e.g.*, Borough of Olyphant v. PP&L, 2004 WL 1858045 *5 (E.D. Pa. August 19, 2004); Anderson v. Aset Corp., 329 F. Supp. 2d 380, 2004 WL 1777593 *1 (W.D.N.Y. August 10, 2004); Price v. Morequity, Inc., 2004 WL 1774837 *4 (Wash. App. Div. 1, August 9, 2004).

3. *See* Adler, Barish, Danies, Levin & Creskoff v. Epstein, 382 A.2d 1226, 1233 (Pa. Super. 1977) (Spaeth, J., concurring), *order reversed by* 482 Pa. 416, 393 A.2d 1175 (1978).

4. Phil Watson, PC v. Peterson, 650 N.W.2d 562, 566 (Iowa 2002).

5. *See* RESTATEMENT (SECOND) OF AGENCY §§ 387, 396 (1958).

6. 95 P.3d 513, 17 Cal. Rptr. 3d 289 (2004); 2004 WL 1794708 *7 (August 12, 2004).

7. *See* ABA JOURNAL E-REPORT, August 27, 2004.

8. Reeves v. Hanlon, 95 P.3d 513, 517, 17 Cal. Rptr. 3d 289, 295.

9. *Id*. at *8.

10. *Id*. (internal quotations and citations omitted).

11. Reeves v. Hanlon, 95 P.3d 513, 520, 17 Cal. Rptr. 3d 289, 298.

12. 844 A.2d 367 (Md. 2004).

13. *Id.* 372-73.

14. *Id.* at 384.

15. *Id*. at 382.

16. *Id.*

17. *Id.* at 381. Maryland Code (2002, 2003 Cum. Supp.) § 7-302 of the Criminal Law Article, entitled "Unauthorized access to computers and related material," provides, in pertinent part:

> (c) Prohibited.—(1) A person may not intentionally, willfully, and without authorization access, attempt to access, cause to be accessed, or exceed the person's authorized access to all or part of a computer network, computer control language, computer, computer software, computer system, computer services, or computer database.
>
> (2) A person may not commit an act prohibited by paragraph (1) of this subsection with the intent to: . . . (ii) alter, damage, or destroy all or any part of data or a computer program stored, maintained, or produced by a computer, computer network, computer software, computer system, computer services, or computer database.

18. *Id.* at 387.

19. *See* Comments [8]-[11] to D.C. Rule 1.8; *see also* D.C. Bar Legal Ethics Comm. Ops. 250 (1994), 230 (1992).

20. Messrs. Weitzman and Potter have settled all their outstanding differences.

21. __ N.E.2d ___; 2004 WL 2035028 (Ill. App. 1 Dist. September 14, 2004).

22. *Id*. at 12.

23. *Id.* at 4.

24. *Id*. at 13.

25. *Id*. at 12-13.

26. *Id*. at 11.

27. *Id* (internal citations omitted).

28. *Id*. at 4.

29. *See* Jacob A. Stein and Joseph A. Hennessey, *The Return of the Sophisticated Traveler, More Pointers for Attorneys on the Move*, WASH. LAW., June 2004, 30 and 35.