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Note

THE ATTORNEY AS PLAINTIFF: TORTIOUS INTERFERENCE WITH CONTRACT AND THE ATTORNEY-CLIENT RELATIONSHIP

I. INTRODUCTION

An attorney's right to compensation is protected by lien laws, sometimes criticized as inadequate, which vary substantially from state to state. For most of an attorney's practice, his own jurisdiction's lien statutes may be satisfactory. Yet in a particularly valuable case, he may suddenly discover their limitations. He may, for instance, discover that his lien has not properly attached because of failure to comply with statutory requirements. He may discover that he has inadvertently "waived" his lien. He may discover that the agreement he had with his client is scrutinized for anything vaguely resembling an impropriety, and if his contract is ineffective, his lien may likewise fail. There are even states where a lawyer has no lien on a cause of action which is non-survivable, as with personal torts. The lawyer may also discover that his client's unilateral settlement precludes a lien and relegates him to a separate action against his client for compensation. And if the client should be persuaded to drop the suit altogether, the lawyer may discover that there is nothing to which a lien can attach.

Therefore the lien laws do not guarantee security or recompense for one's efforts. But if a lawyer's lien proves to be of no avail, his principal alternative is an undesirable suit against his former client. The reluctance to proceed against one's former client to collect a fee is traditional and well advised. Moreover, the "fee" may be limited to res-

2 Wentworth, supra note 1, at 191; Stevens, note 1 supra.
3 7 AM. JUR. 2D ATTORNEY AND CLIENT § 287 (1963).
4 Wentworth, supra note 1, at 198; 7 AM. JUR. 2D ATTORNEY AND CLIENT § 292 (1963).
5 Wentworth, supra note 1, at 203; Stevens, supra note 1, at 15.
6 Wentworth, supra note 1, at 196.
7 7 AM. JUR. 2D ATTORNEY AND CLIENT § 297 (1963).
8 Lyman v. Campbell, 182 F.2d 700 (D.C. Cir. 1950).
9 MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 76 (1964).
10 "Attorneys are generally reluctant to enforce their right to compensation by suit because of fear that the adverse publicity of such an action will outweigh any gain that might be forthcoming." Wentworth, supra note 1, at 204. See also, Canon 14, A.B.A. CANONS OF PROFESSIONAL ETHICS.
titution for services actually rendered, even though the cause of action may have been for damages in the tens of thousands of dollars. And where the client has acted of his own free will, standard doctrine grants him an absolute right to dispense with his attorney.

In some cases, an alternative to the sullied image which would result from hounding a former client does exist. There is the possibility of suit against a person who has induced (or coerced) a settlement through superior economic or psychological leverage. Malicious interference with contract or with prospective economic advantage, a relative newcomer to the law of torts, has recently been extended to the attorney-client relationship. This development has begun to fill a gap in the protection afforded an attorney's interest. In a proper case, the attorney could entirely dispense with lien theories and proceed against an intermeddler, such as an insurance company, who was not a party to the prior litigation and who might not be reachable under the lien laws. It is also possible that lien statutes would inadequately protect an attorney from someone who had moved with great dispatch to settle and to eliminate the attorney from further proceedings. This would injure not only the attorney, but also the client, who might be induced to settle for far less than he might obtain with aid of counsel. Therefore, despite earlier hesitancy, the courts are gradually moving toward acceptance of an attorney's clear and vested right of action against persons who disrupt perfectly legitimate relationships with a client.

II. INTERFERENCE WITH ECONOMIC INTEREST AS A TORT

The standard opening gambit in any discussion of intentional inducement of breach of contract or other interference with economic advantages is a comment on its relatively recent appearance in legal

11 Although sometimes treated as if they were distinct torts, interference with contract and interference with prospective economic advantage tend to coalesce. Certainly, as Prosser points out, the kinds of interests protected differ only in degree and their development has been along singularly parallel lines. Prosser, Torts § 124, at 974-76 (3d ed. 1964). For our purposes, therefore, the terms are nearly interchangeable.

12 Stevens, supra note 1, at 15. It should be pointed out that many lien statutes, such as Ky. Rev. Stat. § 30.200 (1942) [hereinafter cited as KRS], provide for the lien to attach not only to the client's interests, but also render the defendant in the original cause of action liable under the lien in case of settlement. But see text at note 13 infra.

13 Stevens, supra note 1, at 14. The equities in such a situation would be particularly balanced in favor of the attorney if, during a short delay motivated by an ethical desire to investigate the facts before filing a complaint, the defendant or his insurer, in a position to already know the facts, rushed a settlement with the client.
Because of divergencies among various jurisdictions and differences of opinion among judges themselves, a standardized definition is difficult. Nevertheless, a working statement can be derived as follows:

Unless operating within a judicially cognizable privilege, one who induces or in some other manner intentionally causes a party not to perform a contract or not to maintain a business relation with the plaintiff is liable for the resultant harm.\textsuperscript{15}

If the gist of plaintiff’s action is interference with a contract, rather than merely prospective advantage, any enforceable (and some un-enforceable) contract should be sufficient. The essential elements are: (1) a valid contractual relationship or economic expectancy; (2) knowledge of the relationship on the part of the defendant; (3) actual causation of a breach by defendant; (4) intent to interfere; and (5) damage to the complaining party.\textsuperscript{16} Malevolence may be weighed against the defendant, or, on the other hand, ignored by the court as not a legal wrong it itself.\textsuperscript{17} However, reprehensible motivations will always bear upon questions of privilege.\textsuperscript{18}

As one commentator has remarked, there has been an “increasingly wide judicial recognition of tort liability for inducing breach of contract.”\textsuperscript{19} This general trend has doubtless influenced the attitude of the bench toward the attorney’s cause of action, in appropriate situations.

III. GROWING APPLICABILITY TO THE ATTORNEY-CLIENT RELATIONSHIP

Of some thirty reported cases clearly dealing with litigation between a plaintiff-attorney and a defendant who interfered with the attorney-client relationship, the first is of 1931 vintage.\textsuperscript{20} The first thirty years, until 1961, saw many of these cases determined against the attorney. Frequently it was even held that he had no cause of action at all against the interferor. The past six years have seen one-third of the litigation in this area, and only one of the recent cases,

\textsuperscript{15} With apologies to RESTATEMENT, TORTS § 766 (1939), from which this statement was derived. See text at notes 57-59 infra, for other statements of definitional import.
\textsuperscript{17} PROSSER, TORTS § 123, at 950-52 (3d ed. 1964).
\textsuperscript{18} RESTATEMENT, TORTS § 767, comment a (1939).
\textsuperscript{19} 1961 DUKE L.J. 582.
\textsuperscript{20} Gordon v. Mankoff, 146 Misc. 258, 261 N.Y. Supp. 888 (N.Y. City Ct. 1931). This is also the conclusion of the writer of a student comment, 3 Ariz. L. Rev. 310 (1961).
Walsh v. O'Neill, flatly denied the attorney's cause of action and refused to extend ordinary interference-with-economic-advantage principles to the attorney-client relationship.\(^2\) Admittedly this statistical sample is too small for sweeping deductions, but increasing use by lawyers of a tort action against third-party interferors is clear enough. In a proper case, an attorney whose efforts have been short-circuited to his economic detriment has a strong line of well-reasoned authorities favoring him.

This more favorable stance of courts has been accorded treatment in the casual manner reserved for established principles in a treatise on contingent fees.

The interest of a discharged lawyer in a contingent fee contract has been protected by some courts against interference by third parties. For example, a California court recently gave an attorney a right of action against an insurance company which persuaded the client to discharge his attorney and settle the case without his participation. The court held that, although the client could discharge his lawyer and settle at any time, a third party could not persuade him to do so without some valid reason for the intervention. While some courts have not extended this protection to contingent fee contracts, all would prohibit fraudulent or illegal interference.\(^2\)\(^2\) (Footnotes omitted.)

Liberalizing forces which have made the attorney's cause of action against intermeddlers increasingly feasible as a remedy fall into three basic categories. In the first category, competing policies have been balanced and considered in various cases, until the interests favoring a posture of toleration for the attorney's cause of action have gained recognition. In the second, procedural and substantive law have undergone modification. In the third, there has been more liberality in matters of proof, in the sense that less weight is being demanded of the attorney's evidence. In earlier cases, a lawyer-plaintiff seemed required to present almost overwhelming proof of his allegations. Nagging little discrepancies in the defendant's proof, to which contemporary courts might prove more alert, were frequently ignored.\(^2\)\(^3\)

\(^{21}\) 215 N.E.2d 915 (Mass. 1966). The interferor-defendant here was another attorney whose advice contributed to or caused the dismissal of plaintiffs. The court (at p. 918) noted that no breach of contract was alleged and (at pp. 917-18) that Massachusetts precedent refused to extend the tort of interference with an existing business relationship to the attorney-client situation.

\(^{22}\) MACKINNON, op. cit. supra note 9, at 76.

\(^{23}\) Barnes v. Quigley, 49 A.2d 467, 468 (D.C. Munic. Ct. App. 1946) (defendant claimed lack of knowledge of plaintiff's contract). See text at note 91 infra. See also Dombey, Tyler, Richards & Grieser v. Detroit, T. & I.R.R., 351 F.2d 121 (6th Cir. 1965) (appellate court willing to find lack of defendant's knowledge of contingent fee nature of contract, although trial court had found such knowledge implicit and despite strong "concurring" opinion which was equivalent to a dissent).
IV. COMPETING POLICIES AND GROWING LIBERALITY IN ALLOWING AN ATTORNEY TO SUE INTERMEDDLERS

One authority has noted with approval the tendency of courts to lay aside earlier dependence on formulas and to explicitly analyze the interests of the parties involved in an interference-with-economic-interest situation. In an attorney-client context, what are these interests? While the following are not guaranteed to exhaust all possibilities, the more obvious fall under six categories of competing policies. These policies, which are in constant competition with each other, seem presently to strike a nearly equal balance between attorney-plaintiffs and defendant-interferors. As a result, many cases of this nature may hinge upon particular factual circumstances.

These competing policy considerations are as follows: (1) the lawyer’s (presumed) capability of fending for himself and protecting his own interest; (2) the client’s nearly absolute right to terminate the relationship with his attorney and its “logical” correlative—the impossibility of inducing a “breach” of such a relationship; (3) a policy strongly favoring settlements, but balanced against a policy, just as strong, against fraudulent or collusive settlements; (4) a policy slightly disfavoring contingent fee contracts; (5) a policy of disfavoring the novel, unfamiliar cause of action and of resorting to treatises which are sometimes out of date or inappropriate for a developing tort; and (6) a policy of protecting a client from his own attempts to dispense with necessary legal advice at the instance of another, who may well be interested in seeing the client unprotected.

I. The Risks of the Profession. Implicit in many of the decisions regarding the attorney-plaintiff’s cause of action against a third party interferor is the feeling that an attorney, by virtue of his calling, must assume risks, one of which is the loss of dissatisfied clients, and another of which is strenuous competition in and out of court. A minimum of protection is customarily afforded the lawyer by the bench. The prevalent attitude seems to be that he is in a superior position for self-protection because of his legal knowledge, his capabilities, and his experience. Quite possibly an attorney would not be allowed to

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25 Marson v. Cuthbertson, 250 N.Y.S.2d 595, 597 (Civ. Ct. of City of N.Y. 1964). Regardless of the vicissitudes of litigation, it is the plaintiff’s chosen profession and if he is engaged in a hard-fought and exhausting legal battle, it is immaterial how exasperating or aggravating it may be. Situations, as they occur, must be accepted with fortitude and equanimity. Certain it is that an adversary attorney cannot seek damages (Continued on next page)
maintain an action against third parties in interference cases unless such interference could not reasonably or legitimately have been guarded against by preventive as well as remedial measures.\(^\text{26}\)

\section*{2 The Client's Right to Terminate. Beyond cavil, an attorney's grasp upon his client is limited by exceptionally strong legal and social policies. Because of the "peculiar nature and character of the [attorney-client] relationship, which in its very essence is one of trust and confidence . . . , a client has the right to [dismiss his attorney] . . . with or without cause."\(^\text{27}\) The right to terminate an unsatisfactory relationship at the will of the client is nearly absolute, and the question is therefore asked by some courts (and defendants), "How can a 'breach' of a contract at the will of one of the parties be said to have been 'induced' so that an action in tort for interference will lie?" This sort of "logic" seems to have been blindly accepted by some courts.\(^\text{28}\) The analogous right to settle without the consent or participation of the attorney, as distinguished from the right to terminate entirely, has been explicitly remarked upon in just such simplistic, deceptively logical terms.

The settlement made by the plaintiffs' client was within her contract rights. She committed no breach of her contract with the plaintiffs by making the settlement. It follows that the defendant who induced her to make it committed no legal wrong against the plaintiffs.\(^\text{29}\)

Thus, particularly in the earlier cases, intermeddlers might well be able to hide safely behind the skirts of the plaintiff's former client.

However, the stronger and more reasonable view seems to be prevailing. Concerning contracts terminable at the will of the promisor, a leading authority has pointed out that "the overwhelming majority of the cases have held that interference with employments or other contracts terminable at will is actionable, since until it is terminated the contract is a subsisting relation, of value to the plaintiff, and pre-

\footnotesize{Footnote continued from preceding page}

against the adverse litigant for strenuously or aggravatingly opposing any such attorney.

Appearing as this does in a recent case involving a suit against third parties allegedly interfering with the attorney's contract with his client, such a statement significantly underlines the continuing policy of demanding a maximum of self-reliance from attorneys.

\(\text{26}\) See Orr v. Mutual Benefit Health & Acc. Ass'n, 240 Mo. App. 236, 207 S.W.2d 511 (1947).


sumably to continue in effect.” Of itself, terminability at will is usually not a defense or justification for interference. Furthermore, a leading case in this area of interference with attorney-client contracts relied at least in part upon the principle that a contract “not only binds the parties to it... but also imposes on all the world the duty of respecting that contractual obligation.” Using this as the springboard of reasoning, even the most conservative court would be forced to admit the logic of making interference with arrangements terminable at the client’s will actionable.

3. The Favored Right to Settle. Related closely to the client’s privilege to terminate is the policy favoring settlements of claims, in good faith, and the avoidance of litigation. As with the right to terminate, the right to settle has sometimes proved determinative in actions instituted by a plaintiff-attorney against an interferor. However, the privilege to settle one’s own cause of action without the participation, or even against the advice of, one’s attorney is limited to settlements made in good faith. The policy against fraudulent or collusive settlements is just as strong as, if not stronger than, the policy favoring settlements. As a matter of practical tactics, a plaintiff-attorney would do well to emulate the lawyer who conceded the client’s right to settle but complained, “because the client, falsely denying the existence of a contract, repudiated it and assumed that position by reason of the wrongful instigation of these defendants.”

In balancing competing interests, it should be carefully noted that permitting third parties to induce a breach of attorney-client contracts

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34 If the attorney obtains an agreement not to settle or an agreement otherwise binding the client to what may become an unconscionable arrangement (such as a vaguely worded agreement to retain the plaintiff for the client’s lifetime and purporting to bind the executor of the estate, Hansen v. Barrett, 183 F. Supp. 831, 833 (D. Minn. 1960)), the right to settle overrides since such agreements are ordinarily void as against public policy. Mackinnon, op. cit. supra note 9, at 75.
35 See, e.g., Bauer v. Biel, 177 N.E.2d 269, 273 (Ind. App. 1961), where it was said, “dishonest settlements made to cheat attorneys out of their fees will be brushed aside...”
36 Lurie v. New Amsterdam Cas. Co., 270 N.Y. 379, 1 N.E.2d 472, 473 (1936). Unfortunately, under New York law, the plaintiff was relegated to only quantum meruit damages.
would not really result in more or better settlement of claims.\textsuperscript{36} Obviously, more litigation may arise when the attorney seeks compensation. Moreover, an induced settlement may prove unsatisfactory or inadequate, and breed further claims against the original defendant by the settlor.

4. Contingent Fee Arrangements. Other policy considerations arise when a defendant in an interference case attempts to attack the propriety or validity of a contingent fee contract. It should of course come as no surprise that most of the fact patterns in which interference with the attorney-client relationship is claimed involve contingent fees and personal injury actions. The struggle for respectability of the contingent fee arrangement, the abuses to which it is subject, and its less than enthusiastic acceptance by more idealistic jurists to this very day, is common knowledge. Very little documented support could be mustered for a thesis that the reluctance to accept contingent fee contracts was at least one factor in earlier decisions bearing unfavorably upon the attorney's right to proceed against third parties.\textsuperscript{37} But the fact remains that much of the resistance to contingent fee contracts was contemporaneous with the earlier negative attitude of some courts toward suits against intermeddlers.\textsuperscript{38} Moreover, it was not until general acceptance, or tolerance, of contingent fee contracts was established that suits for interference with such contracts were attempted.\textsuperscript{39} Defendants still collaterally attack contingent fee contracts, sometimes with a modicum of success.\textsuperscript{40} Yet direct attacks upon the contingent nature of a breached contract as champertous or contrary to public policy, made albeit a trifle desperately in some cases, have also been made. Generally the courts have treated them in deservedly summary

\textsuperscript{36}1961 Duke L.J. 582, 585-86.
\textsuperscript{37}See Richetta v. Solomon, 410 Pa. 6, 187 A.2d 910 (1963) where the propriety of contingent fee arrangements vis-à-vis the attorney's right of action against interference was clearly recognized.
\textsuperscript{38}Denial of the lawyer's cause of action, in \textit{toto}, was the most frequent during the 1930's, and, as previously indicated, no such suits were even brought prior to 1930. See note 39 \textit{infra}.
\textsuperscript{39}The first case allowing the cause of action was in 1931. See note 20 supra. Canon 13, A.B.A. \textit{Canons of Professional Ethics}, recognizing the propriety of contingent fee arrangements, was amended in 1933 to read: "A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case... but should always be subject to the supervision of a court, as to its reasonableness." \textit{Dunkin, Legal Ethics} 313 (1953).
\textsuperscript{40}Dombey, Tyler, Richards & Grieser v. Detroit, T. & I.R.R., 351 F.2d 121 (6th Cir. 1965), reversing 226 F. Supp. 345 (S.D. Ohio 1964), and remanding for additional findings as to whether plaintiff-attorneys had agreed to advance client money for living expenses, i.e., "maintenance." The attitude of the majority in this case indicates a prejudice against contingent fee arrangements, particularly where the attorneys in the original action were brought into the picture through the auspices of a labor union.
fashion. Contingent fee contracts would not appear therefore to be vulnerable, as a matter of policy, to attack by a defendant seeking to excuse his own conduct.

5. The Novel Cause of Action, the Unknown. The relative novelty and resultant confusion surrounding an attorney's cause of action in tort against intruders has sometimes caused untoward results. A lack of firm precedent leaves some courts grasping at out-of-date treatises or poorly reasoned decisions from other jurisdictions which are only vaguely in point. For a tort which is still developing, such authorities can be more stifling and detrimental to sound decisions than an inadequate but self-reliant analysis of the situation.

On the other hand, some courts which were confronted with a new situation, particularly where the attorney-plaintiff included strong reminders that he was not proceeding on a lien theory but in tort, have selected different authorities and reached conclusions more favorable to the plaintiff. At any rate, the resort to treatises and decisions from other jurisdictions when confronted with a novel cause of action, though necessary, entails the danger of consulting mechanical rules and points of view which are inadequate to deal with new conditions and a still-developing tort concept.

6. The Client's Need for Legal Advice. One more policy consideration has recently been articulated. The law not only favors good faith settlements and scrutinizes the peculiarly fiduciary and terminable nature of attorney-client agreements, but it has also come to recognize that the interests of persons involved in legal disputes are best served by having competent legal advisors. Obviously, an advantageous tactic available to one's adversaries at law would be to persuade him to dispense with the services of counsel.

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42 Krause v. Hartford Acc. & Indem. Co., 331 Mich. 19, 49 N.W.2d 41, 44 (1951) (citing cases from other states and COOLEY, TORTS (1936)).

43 For example, an ordinarily competent state court, relying on weak, out of date authorities, can be led to make an overly broad denial of the entire cause of action. Krause v. Hartford Acc. & Indem. Co., 381 Mich. 19, 49 N.W.2d 41 (1951).


45 This was explicitly recognized by one of the most recent landmark cases in this area, where the client's potential liability to the discharged lawyer was also (Continued on next page)
One commentator emphasizes the detrimental "effect upon the administration of justice as a whole" were courts to allow easy interference with the attorney-client relationship at the instigation of interlopers. In doing so, noteworthy quotation is made from an article of limited availability.

From time immemorial, the relationship between attorney and client ... has enjoyed a peculiar and protected status in the law. It is rightly regarded as a unique and confidential relationship. It necessarily implies a special trust and confidence among its participants, and the law looks with jealous concern upon the protection of the relation and deplores incidents between attorney and client which lead to suit. To open the door to outside parties wantonly to come in and negotiate the destruction of the relationship would bode no good for either the practitioner, client, or the public as a whole.

V. LIBERALIZATION OF PROCEDURAL AND SUBSTANTIVE LAW IN ALLOWING AND DEFINING CAUSE OF ACTION FOR INTERFERENCE: THE EROSION OF DEFENSES

Whether evolution of more liberal policies caused a modification of the procedural and substantive law in this area, or the two developments were independent, or perhaps interdependent, there remains a pronounced drift away from earlier requirements which had placed onerous burdens upon an attorney seeking to recover from one who had intentionally disrupted his association with a client.

I. Procedure. The lawyer has incidentally benefited from procedural policies which were developed without regard to his cause of action in tort. The liberalizing trend symbolized and carried forward by the Federal Rules of Civil Procedure, and adopted substantially by more and more states, places emphasis upon reaching the merits of a dispute and preventing valid claims or defenses from being lost in a quagmire of technicalities. Thus one may contrast the earlier tendency to declare that allegations of interference with the attorney-client relationship do not state a "cause of action" with allowing proceedings to determine whether there is a claim upon which relief can

(Footnote continued from preceding page)


The conduct of the insurance company in inducing an injured person to repudiate his contract with an attorney may be detrimental not only to the interests of the attorney, but also to the interest of the client, since, as we have seen, the client, in addition to being deprived of the aid and advice of his attorney, may also be liable for the full contract fee.

48 Wright, FEDERAL COURTS § 68 (1963).
be granted. The salutary effect of liberalized rules of procedure is most pronounced in the federal courts, where many of the recent interference cases have been brought. The most extreme federal case to date presents an example of a court's literally bending over backwards to allow litigation under allegations which would have been fatally flawed under virtually all earlier decisions. In Hansen v. Barrett, it was held that an action would lie for interference with the lawyer-client relationship despite: (1) ambiguities in the agreement upon which the action was predicated; (2) its terminability at the will of the client; and (3) the fact that if strictly construed as alleging only a wrongful inducement of breach of contract, the court would have been disinclined to find a claim upon which relief could be granted. The complaint withstood defendant's motion for summary judgment because a liberal construction permitted the allegation of the tort of wrongful interference with prospective economic advantage.

2. Substantive Law. In addition to procedural policies favoring arrival at the merits of a case, trial of issues, and liberal implementation of the rules, the various aspects of the substantive law governing this area of tort law have likewise undergone gradual modification. There still remains no single, simple, or definitive statement of the elements of tortious interference, and courts have tended to play loosely with existing definitional language. Thus a 1932 case could speak of the necessity for "either actual ill will or purpose to harm (the finding of which is not here warranted) or the lack of legal justification" (Emphasis added.), and then proceed to give less than meticulous attention to defendant's "justification." And a commentator concluded, perhaps erroneously, that in almost all states, as of 1961, an attorney

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52 See generally, Prosser, Torts § 124 (3d ed. 1964). A less radical, but additional example of the liberality of federal courts is found in Greenberg v. Panama Transp. Co., 185 F. Supp. 320 (D. Mass. 1960). Conflict of laws problems and the matter of state substantive tort law in diversity actions were not allowed to stand in the way of results. The court, striking a note of patriotism and liberality, upheld an attorney's recovery against defendant company, which had cast aspersions upon "American" attorneys and their role in representing foreign nationals in injury litigation. As a proctor in admiralty functioning in a personal injury suit under federal statute (46 U.S.C. § 688), the nonstate character of the attorney's cause of action was emphasized, since he had been functioning when wronged as an officer of a federal court.
55 Id., 181 N.E. at 724.
on a contingent fee contract had no protection from a third party who
induced a client, without the knowledge or consent of his attorney, to
settle, even if the third party’s motives were “impeachable.”

Some statements of definitional import, garnered from attorney-
client interference cases, are as follows:

a). If one maliciously interferes in a contract between two parties and
induces one of them to break that contract to the injury of the other, the
party injured can maintain an action against the wrongdoer.

b). An action will lie for the intentional interference by a third person
with a contractual relationship either by unlawful means or by means
otherwise lawful when there is a lack of sufficient justification.

c). There are four elements of this tort. 1) valid contract relationship
or business expectancy; 2) knowledge of the relationship by interferor; 3)
intentional interference inducing or causing a breach or termination of
the relationship; 4) damage to the party complaining. Ill will, spite, de-
famation, fraud, force, coercion . . . are not essential ingredients, although
these elements may be shown for such bearing as they may have upon
the defense of privilege.

To further confuse the situation, the term “malicious” is frequently
prefixed to “interference with contract or business expectancy,” but
has been defined variously. Usually it is equated with merely “the
intentional doing of a wrongful act without legal or social justifica-
tion.” Indeed, a leading authority has expressed serious doubt con-
cerning the utility or desirability of using the term “malice” at all
when discussing interference.

The growing tendency for courts to balance competing interests
in an interference-with-economic-relationship situation has already
been noted. Instead of using catchwords and formulas purporting to
define the “cause of action” and to definitely express the substantive
law, the courts more frankly consider the interests at stake. Even those
recent cases which have denied the attorney’s cause of action in toto,
or rendered an unfavorable decision, have pointed out the policy
considerations which swayed the court.

As a result, the modification of substantive law in this area has not
been in the realm of more sophisticated or refined statements, but in

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61 Employer’s Liability Assur. Corp. v. Freeman, 299 F.2d 547, 549 (10th
 Cir. 1965); Klauder v. Cregar, 327 Pa. 1, 192 Atl. 667, 668 (1937); Keels v.
Powell, 207 S.C. 97, 34 S.E.2d 482 (1945).
312 (1961).
64 Klauder v. Cregar, 327 Pa. 1, 192 Atl. 667, 670; see also Employer’s
Liability Assur. Corp. v. Freeman, 299 F.2d 547, 549 (10th Cir. 1955).
66 See text at note 24 supra.
68 Dombey, Tyler, Richards & Grieser v. Detroit, T. & I.R.R., 351 F.2d
121 (6th Cir. 1965).
the recognition of a need for analysis of policies within a rather broad, even vague, definitional framework—a situation not unknown to tort law. Therefore, with two exceptions, a plaintiff-attorney would seem to be on fairly substantial ground in bringing an action where there has been intentional interference with a known, valid agreement and such interference is without legal justification. The first exception is that some courts demand that the interference result in actual breach of the attorney-client contract and outright, explicit refusal of the ex-client to pay the attorney. In these courts, mere damage to the attorney as a result of interference is not sufficient, and it seems that the tort action against an intruder is regarded as something of a last resort. The second exception is that a few courts demand that the manner of interference itself be tortious, i.e., fraudulent or coercive. Kentucky seems to be one of these.

Although good faith on the part of a defendant will go far toward protecting him, he has been accorded progressively less shelter from complaints sounding in the tort of malicious interference. The effectiveness of asserting defensively, as was customary in earlier cases, that a malicious motive does not of itself constitute a tort seems to have fallen more or less into disuse. And any arguments based on the proposition that the general tort rules regarding interference with contractual relations do not apply to the unique professional relationship of attorney and client would probably face the “why not?” position taken by several courts. As stated in Herron v. State Farm Mut. Ins. Co., “There is no valid reason why this rule should not be applied to an attorney’s contingent fee contract.” At the very least, as pointed out by other commentators, “fraudulent or illegal interference” or “unconscionable” inducement would support an action.

Other incidental defenses, such as arguments based on the “champertous” nature of a contingent fee contract, or the plaintiff’s conflict of interests, would probably be given short shrift unless there

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66 Prosser, Torts § 123, at 954 n.64 (3d ed. 1964).
67 Ibid.
69 At least no such defenses have been noted in recent opinions.
72 MacKinnon, Contingent Fees for Legal Services 79 (1964).
74 See text at note 41 supra.
were irregularities in the original arrangement between the attorney and his former client. Nor would a defendant be well-advised to rely on the novelty of the cause of action in his state, in view of the increase in the number of cases and commentary, most pointing out a trend favorable to plaintiffs. The increased availability of such authority undermines the diminishing proportion of decisions which have denied relief to an attorney.

On the other hand, as noted above, some few jurisdictions still cling to a rule which is highly beneficial to a defendant intermeddler, namely that the interference must itself be unlawful in nature, and not merely unjustified. In such jurisdictions, the plaintiff faces a serious handicap under fact patterns which might elsewhere be actionable. Yet it would not be entirely quixotic for an attorney who has been outflanked by an interferor to try carving out an exception to such a rule. As pointed out by one commentator, and this will bear repeating later, "the courts have relied more upon a 'rule of reason' than an ambiguous 'rule of law.' Thus if the third party has acted in a manner which reasonable men would condemn or reproach, he will be held liable to the injured lawyer."

With regard to the affirmative defense of justification, the courts have generally been moving away from the former position that almost any interest of a defendant is equivalent to the "equal or superior right which comes in conflict with the right of a plaintiff under his contract." A sufficiency of justification has come to be required, as opposed to merely some degree of justification. Thus, in a recent landmark case it was indisputably held that an insurer of the person in the primary action wherein the plaintiff-attorney had been retained was not justified in interfering with the contract between the attorney and his client. Nor, as was shown by Greenberg v. Panama Transp. Co., does a pre-existing contract with an injured workman necessarily furnish a defense of justification for interference. The terms of the contract asserted as a defense may be examined to see if they specifically cover the situation, and even if they do, they may be declared void as against public policy.

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76 See text at note 42 supra, on "novelty" of the cause of action.
82 Id. at 325.
83 Ibid.
In all likelihood, no formula can ever properly describe all possible claims and types of justification available to a defendant, e.g., pre-existing contract, competition, fiduciary or other special relationship. Once again, it would seem that policy considerations should predominate; perhaps the best statement of an adequate approach is found in the Herron case.

Whether an intentional interference by a third party is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all the circumstances, including the nature of the actor's conduct and the relationship between the parties.\textsuperscript{84}

Such a balancing approach, handled adeptly, should prove very fruitful; the case in which it was enunciated, for example, threw two significant, but heretofore unraised, factors into the balancing process. One was the rules of the National Conference Committee on Adjusters (which had been violated by defendant insurer when it dealt directly with the attorney's client). The second was the interest of the client in retaining legal advice.\textsuperscript{85}

The related defense of privilege can be remarked upon in much the same tenor as justification. In fact, it frequently seems that the terms "justification" and "privilege" are used almost synonymously, although "privilege" relates more to the defendant's status, while "justification" refers more to his actions.\textsuperscript{86} An accountant-tax consultant has been held not privileged to interfere with his own client's legal counsel,\textsuperscript{87} and a federal court pronounced itself "not persuaded that the defendant, who is the sister of the plaintiff's former client, was privileged as a matter of law to [interfere]..."\textsuperscript{88} This court seemed to regard the question of reasonableness as, per the Restatement view, for the jury.\textsuperscript{89}

Likewise, there is authority for the proposition that "good faith" in making certain remarks is a matter for the jury\textsuperscript{90} where the issue of what the court termed "excuse" hinged upon the good faith of the

\textsuperscript{84} Herron v. State Farm Mut. Ins. Co., 14 Cal. Rep. 296, 363 P.2d 310, 312 (1961) (citing \textit{inter alia}, \textsc{Restatement}, \textsc{Torts} \S 767; Prosser, \textsc{Torts} 735 et seq. (2d ed. 1955)).
\textsuperscript{85} Id. at 311, 313.
\textsuperscript{86} For an example of the confusion, see Greenberg v. Panama Transp. Co., 185 F. Supp. 320, 325 (D. Mass. 1960), where a prior contract between ex-client and present defendant was asserted as a "privilege" rather than a "justification" for interference.
\textsuperscript{87} Calbom v. Knudtzon, 396 P.2d 148 (Wash. 1964).
\textsuperscript{89} Ibid.
\textsuperscript{90} Employer's Liability Assur. Corp. v. Freeman, 229 F.2d 547 (10th Cir. 1955).
insurer which induced plaintiff's client to discharge him. Evidently the
jury's role in determining the good faith of the intruder as a justification
is expanding. The jury, probably more so than the judge, is likely
to regard underhanded maneuvering by the intruder, or his impeach-
able motives, as a wrong in itself.

VI. EVIDENCE

Making allegations which will withstand a defensive pleading that
they do not state a legally recognizable claim, and proving such allega-
tions, are two entirely different problems. The confidential nature of
the attorney-client relationship is such that a heavy burden usually
weighs upon the attorney to prove that he has been bilked out of his
fee. A jaundiced eye would be cast upon an attorney's claim that he
had been dismissed because of the intermeddling of a third party,
rather than because he had proved unsatisfactory to his client. Ac-
quired through generations of relative distrust of lawyers, the natural
tendency exists to require an attorney to produce more than mildly
corroborating circumstances to support his word.

It is not surprising, therefore, that the evidentiary requirements
during the earlier stages of development of the attorney's cause of ac-
tion were quite stringent. In fact, it might be argued that only the
exercise of greater care in amassing proof has caused the recent
success in recovering damages. At any rate, if there has been a
lightening of the evidentiary requirements, it has occurred on an in-
formal level and resulted from a more tolerant attitude toward the
cause of action, rather than from any judicial desire to be more
sympathetic with lawyers as plaintiffs.

Examination of earlier cases shows a distinct tendency to find
against plaintiff-attorneys, despite a fair amount of evidence in their
favor. Thus, although a client maintained he had not employed the
attorney (to whom he had paid a twenty-five dollar retainer), and
the defendant lamely explained the client's testimony that a letter with
plaintiff's letterhead had been on defendant's desk (by saying that
there had been a mail delivery during settlement proceedings), the
trial court found that defendant was unaware of the attorney-client
relationship. This finding was upheld on appeal.

92 Ibid. Although the conclusion that courts were rigorous in their demands
for proof from complaining attorneys does not automatically flow from the few
available examples, they certainly point in such direction. The earlier reported
cases were for the most part concerned with establishing the attorney's cause
(Continued on next page)
One item which should give pause to anyone claiming a warming trend in the evidentiary requirements is the demand still made by courts that the plaintiff establish that the defendant really induced the client to sever the relationship. The necessity for proving inducement is a link in the evidence upon which plaintiff stands or falls. Even a liberal court would still demand evidence of causation, and there is consistency among all courts in refusing to fall into any post hoc, propter hoc fallacy of presuming inducement from the fact of termination alone.

Perhaps the best way to test the thesis that there has been liberalization in evidentiary requirements is to trace one particular type of evidence which has proved less immune to defendant's rebutting proof as years have passed, namely, letters and statements obtained by defendant-intruders from the ex-client. In at least two early cases, such statements were accepted virtually at face value, and in one instance, plaintiff's claim that such statement was fraudulently obtained counted for naught. In later cases, however, defendant's aid in drafting the letter of dismissal has weighed heavily against him. At least one court has pointed to the inconsistency of the language used in such a letter with the ex-client's own "limited education" as evidence against the defendant. And in another case, an excellent concurring opinion, which amounted to a dissent, took the same factor into consideration. At any rate, such aid in writing letters can be counted as one element of defendant's conduct rendering him liable.

(Footnote continued from preceding page)

93 See Klauder v. Cregar, 327 Pa. 1, 192 Atl. 667, 670 (1937), where the Herbits case was distinguished: "In that case it did not appear that any statements were made which would lead the client to breach her contract to pay the attorneys." See also Employer's Liability Assur. Corp. v. Freeman, 229 F.2d 547, 549 (10th Cir. 1955); Saul v. United States Fid. & Guar. Co., 203 A.2d 424 (D.C. App. 1964).


97 Richette v. Solomon, supra note 96, 187 A.2d at 914.


As a practical matter, evidentiary requirements have proved to be best satisfied by two types of evidence—the ex-client’s own testimony, and/or admissions of the defendant himself. Although a former client may be reluctant to admit that he settled the case at a lower figure to eliminate attorney’s fees, his testimony can be quite damaging to the defendant who has persuaded him to terminate the attorney-client relationship. Such testimony may show misrepresentation concerning the attorney’s rights or assurances that the interferor would take care of the matter;\(^{100}\) it might also take the form of an admission by the alleged client that defendant’s agent wrote the letter which claimed that the plaintiff-attorney had never represented him;\(^{101}\) but most damaging to the defendant, the ex-client’s testimony may reek of the defendant’s coercive tactics in “persuading” him to discharge his attorney.\(^{102}\) When the ex-client testifies, “I know I was getting shed of my lawyer on account of the pressure that was on me,”\(^{103}\) very little remains to prevent verdict and judgment for plaintiffs. Evidence of coercion, being a wrong to both client and attorney, has a tendency to raise the ire of the bench.\(^{104}\)

Finally, there are instances where the defendant’s own assertions, whether ill-advised, careless, or overconfident, have been put to good use against him. In one case, the interferors (tax advisors for an estate) boasted of their power to terminate the attorney’s contract, and they openly admitted giving a “line of hot air” to the attorney-plaintiff.\(^{105}\)

As a practical matter, then, the aggrieved party should be alert to indiscriminate and overconfident assertions by an intermeddler, as well as careful to maintain friendly relations with his ex-client, whose testimony can be invaluable.

VII. DAMAGES

With regard to damages, there is another liberalizing trend. Formerly, the measure of damages against interfering third parties was limited to the recovery of the fair value of actual services or to

\(^{100}\) Klauder v. Cregar, 327 Pa. 1, 192 Atl. 667, 669 (1937).
\(^{103}\) Ibid.
following state law vis-a-vis the attorney's rights against the client himself.  

More recently, some courts have discarded many of the old c- 
punctions against loose estimates of the plaintiff's damages, some-
times frankly making an educated guess as to what a fair measure 
would be.  

Others have harked to a relativistic tort formula, such 
as "damages for the wrong should embrace all elements reasonably 
flowing therefrom and not be limited by the amount of the settlement 
made in its perpetration."  As an added precaution, attorney-plaintiffs 
should make it clear that traditional lien-measures of damages are not 
necessarily valued in the same manner as tort damages.  

Furthermore, there has been a decided tendency for plaintiff-at-
torneys to seek and, in appropriate cases, to receive punitive dam-
ages.  Clearly, the more unconscionable a defendant's behavior, the 
greater the likelihood he will be assessed punitive damages. As was 
noted in one leading case, 

the jury was justified in imposing punitive damages on the defendants 
to the end that they, as well as all other persons and entities, should be-
come aware that it is contrary to law and fair dealings in the United 
States, to sledgehammer a wedge between a lawyer and his client when 
both are satisfied with each other and have not invited intermeddling and 
officious intervention.  

VIII. KENTUCKY ON THE LAWYER'S CAUSE OF ACTION IN TORT FOR 
INTERFERENCE  

Fortunately, Kentucky is one of the states whose lien laws cover 
a portion of the territory connected with a lawyer's tort action against 
third parties. Examination of the applicable statute and the cases 
arising thereunder shows that the attorney has a lien on claims "put 
into his hands," upon judgments, and even upon settlements if the 
defendant in the primary case had notice of the attorney-client 

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The argument that damages should be measured according to the rules of contract 
law was dealt with by another case. The court there pointed out that an inten-
tional tort was involved, as were professional services replete with intangible 
factors; that the damage claimed was the value of "professional business ex-
pectancy," prima facie proof of which is their reasonable value; and that 
evidence of the amount and value of actual time and effort is readily available.  

110 Richette v. Solomon, supra note 109, 187 A.2d at 914-15. The court 

further remarked: "[The defendant's behavior might] well be interpreted as 
reflecting malice, vindictiveness and wanton disregard of the lawyer's . . . 
rights which would call for punitive damages."
relationship. With this type of protection, recourse to tort actions is less likely to arise; in fact, there are no reported cases of a lawyer bringing an action for interference with his professional relationship in this state.

An early case, under the old lien provisions, identical in pertinent portion to the present statute, emphasized that the plaintiff and defendant could not settle and compromise with one eye on saving the attorney's fee by cutting him entirely out of the picture. Settlement must be in good faith. Therefore, a tort theory would be of value principally in situations where the lien itself failed or proved otherwise inadequate.

In view of the lack of decided cases on the attorney's cause of action in particular, what is the status generally of the tort of malicious interference with contract or economic relations in Kentucky? Kentucky still seems to adhere to the minority view that the interference itself must be unlawful or fraudulent in nature to be actionable. But there are only two cases which have dwelt at any length upon the topic. In 1930, Brooks v. Patterson held that no action in tort lay against an intermeddler who induced a breach of contract, absent fraud or coercion and resultant damage. That case dealt with an intermeddling landlord who took it upon himself to advertise for sale a tenant's drug store. The price he was offering turned out to be less than what the tenants could have obtained from a prospective buyer who read the advertisement and withdrew from the negotiations. In reaching its decision, the Court discussed an earlier case which had stressed the element of causation as necessary to an interference-with-contract action. Damage must be directly caused by the interference of the defendant-intruder, the Court indicated, and in Brooks v. Patterson, the loss of the would-be buyer

111 KRS § 30.200 (1942) reads as follows:
Each attorney shall have a lien upon all claims, except those of the state, put into his hands for suit or collection or upon which suit has been instituted, for the amount of any fee agreed upon by the parties or, in the absence of such agreement, for a reasonable fee. If the action is prosecuted to a recovery of money or property, the attorney shall have a lien upon the judgment recovered, legal costs excepted, for his fee. If the records show the name of the attorney, the defendant shall be deemed to have notice of the lien. If the parties, before judgment, in good faith compromise or settle their differences without the payment of money or other things of value, the attorney for the plaintiff shall have no claim against the defendant for any part of his fee.

112 Hubble v. Dunlap, 101 Ky. 419, 41 S.W. 482 (1897); see also Jellico Coal Mining Co. v. Pope, 292 Ky. 171, 166 S.W.2d 287 (1942); Proctor Coal Co. v. Tye & Denham, 123 Ky. 381, 96 S.W. 512 (1906).

113 See text at note 3 supra.

114 See text at note 77 supra.

115 234 Ky. 757, 29 S.W.2d 26 (1930).

116 See text at note 93 supra.
was occasioned by the buyer’s own voluntary withdrawal from the deal, not by any active inducement by the intermeddling landlord.\textsuperscript{117}

Dicta in a later case comports strangely, if at all, with these two cases.

As strangers to the contract, the utility companies could be held liable only for having wrongfully procured or induced the Department of Highways not to perform the contract. Such liability is predicated upon an intentional interference, malicious or without justification, with known contractual rights possessed by the party suing to recover damages there for.\textsuperscript{118} (Emphasis added.)

Also interesting is the declaration of policies incorporated into the \textit{Frazee v. Citizens Fid. Bank and Trust Co.} opinion, one of which concerns the trust companies’ promise to respect the choice of lawyer made by its customers and do nothing to interfere.\textsuperscript{119} Apparently, in view of decisions in other jurisdictions and the \textit{Restatement of Torts}, which was written after \textit{Brooks v. Patterson}, Kentucky might be persuaded to pursue the more moderate path already pointed out by this later dicta. Furthermore, the \textit{Brooks v. Patterson} decision is of itself no insuperable barrier to an attorney’s action for inducing breach of contract against a third party, for that case is distinguishable on its own terms: “We are not here concerned with the subject where the personal element or the relation of employer and employee is involved. . . .”\textsuperscript{120} The case does not necessarily apply to contracts of personal relationship, such as attorney-client.

In conclusion, no insurmountable barriers would seem to exist to an attorney’s tort action for interference with contract in Kentucky. Certainly under proper facts of coercion or indefensible behavior by the intermedler, a tort action, with the possibility of punitive damages, would lie for interference with economic interests. And because of the personal, employment nature of the attorney-client contract, it might well be that the means of interference themselves need not be coercive or fraudulent. Where the lien statute proves inadequate, the lack of case law in this Commonwealth should not be a deterrent. As pointed out before, courts tend to follow a “rule of reason,” rather than rules of law, in affording redress where a man’s property rights in his source of livelihood, his legal practice, are disrupted.\textsuperscript{121}

\textit{Eugene Mullins}

\textsuperscript{117} 234 Ky. 757, 758, 29 S.W.2d 26, 28 (1930).
\textsuperscript{118} Derby Road Bldg. Co. v. Commonwealth, Dep’t of Highways, 317 S.W.2d 891, 895 (Ky. 1958).
\textsuperscript{119} 393 S.W.2d 778, 784 (Ky. 1964).
\textsuperscript{120} 234 Ky. 757, 761, 29 S.W.2d 26, 28 (1930).
\textsuperscript{121} See text at note 78 supra.