Lateral Moves and the Quest for Clients: Tort Liability of Departing Attorneys for Taking Firm Clients

The increasing frequency of lateral moves by attorneys and the competitive market for legal services have focused attention on the rules regulating competition for clients. Departing attorneys who take clients may be held liable to their former firms for intentional interference with economic relations. According to the Restatement (Second) of Torts, *liability in such cases will turn on whether the interference by the departing attorney is "improper." The* Restatement *enumerates seven factors to be considered in deciding the issue of impropriety. That formulation is problematic, however, in that it offers little guidance as to how to weigh those factors.*

This Comment argues for the development of a new test for use in departing-attorney cases. The proposed test evaluates the attorney's conduct and assesses liability where that conduct is independently unlawful or violative of ethical rules regarding lawyer communication with clients. This new test clarifies the application of the tort, thereby facilitating a freer flow of commercial information in the legal market.

INTRODUCTION

Gone are the days when young lawyers signed up with law firms directly out of law school and expected to remain with the same firms throughout their careers. An increasing number of associates are making at least one lateral move during their careers for a variety of reasons—job dissatisfaction, geographic preference, or greater opportunities for making partner.[1]

Partners, too, have recently demonstrated an increasing willingness to cut ties with their firms.[2] The reasons cited for this trend include a

1. *See* Hampton, *Associate Turnover: Why They Leave and Why They Stay—Part III,* 25 LAW OFF. ECON. & MGMT. 16 (1984).

2. *See, e.g.,* Adler & Baer, *The Final Shakeout,* Am. Law., June 1986, at 1, col. 1; Pollock, *Till A Better Deal Do Us Part,* Am. Law., Oct. 1985, at 1, col. 1; Stewart, *A Blue-Chip Law Firm Comes On Hard Times After a Coup d'Etat: Donovan Leisure Faces Risk Some Clients May Follow Top Partners in Leaving,* Wall St. J., Nov. 18, 1983, at 1, col. 6; Kaplan, *The Rush to Lateral Hires: Why Partners Switch Firms: Boredom, Power, Money,* Nat'l L.J., Oct. 31, 1983, at 1, col. 1; Low, *Departing Lawyers Could be Liable for Taking Clients,* L.A. Daily J., Aug. 22, 1983, at 1, col. 4; Courie, *Lateral Partnerships: No Longer Rare Occurrence,* Legal Times Wash., Apr. 6, 1981, at 32, col. 1; Fox, *Law Firm Sues Ex-Partners For Taking Clients With Them,* N.Y.L.J., Sept. 3, 1980, at 1, col. 2.

diminished sense of obligation to the partnership, as well as a greater tendency on the part of law firms to search out legal talent.[3] The latter tendency, in turn, derives from a more aggressive attitude on the part of law firms toward expanding existing, and developing new, practice areas. In general, law firms have become much more active in seeking out new business.[4]

While firms offering lateral partnerships are quick to avow that a candidate must be "an excellent lawyer," such firms also are clearly attracted to a lateral partner by the clients the partner will bring with her to the firm.[5] To a lesser extent, the same is true for a lateral associate. In some cases, even an associate may have developed a strong relationship with a client to be able to entice that client to follow her to the new firm. Therefore, the attorney leaving her firm for a new firm is keenly interested in bringing her clients with her to the new firm. The attorney's old firm has an equally keen interest in retaining the client. Out of this situation arises the issue of the permissible limits of competition for clients.

Several bodies of law dictate how attorneys may behave when competing for clients. Both the departing attorney and the attorneys at her former firm must conform their conduct toward the client to the requirements of the profession's ethical rules. The relevant rules in this regard are those regulating lawyer communications with potential clients, specifically the prohibitions of false or misleading statements, and of the "solicitation" of clients.[6] Such rules, while not defining "ethical" conduct, do provide a minimum "floor" for ethical behavior, below which a lawyer's behavior must not fall.

Departing attorneys, whether partners or associates, are also bound by certain fiduciary duties to their former firms. In the case of associates, these duties stem from their status as ex-employees and derive from principles of the law of agency. One duty of ex-employees is to account for profits arising out of employment.[7] For partners, these duties arise out of their status as ex-partners and are found in partnership law. One duty of ex-partners is the duty to wind up unfinished partnership business.[8]

In addition to these fiduciary duties, the departing attorney also acquires, as a new competitor with the firm, the duty to compete fairly for clients. In contrast to the fiduciary duties owed by the attorney as an ex-employee or as an ex-partner, the duty to compete fairly derives from the lawyer's status *as a competitor* of the firm. This duty to compete

3. Kaplan, *supra* note 2, at 1.

4. Courie, *supra* note 2, at 32.

5. *Id.*

6. *See infra* text accompanying notes 87-93.

7. *E.g.*, RESTATEMENT (SECOND) OF AGENCY § 388 (1958) (duty to account for profits arising out of employment); *id.* § 403 (liability for things received in violation of duty of loyalty).

8. UNIFORM PARTNERSHIP ACT § 37 (dealing with the winding-up of partnership affairs).

fairly finds expression, inter alia, in the common law tort of intentional interference with economic relations. Thus, the departing attorney may be held liable to her former firm for intentional interference with economic relations between the firm and a client. According to the *Restatement (Second) of Torts,* tort liability will turn on whether the interference by the attorney is "improper," which in turn is determined by a consideration of several enumerated factors.[9] The weight each factor should be assigned in the balancing process, as well as what constitutes a sufficient showing to establish liability, however, are issues not addressed by the *Restatement.*

The current means of determining liability for intentional interference raises several problems. One problem lies in the vagueness of the legal standards for determining liability. Lack of a concrete test of liability poses problems for the departing attorney who wishes to communicate with clients regarding her departure and willingness to represent them in the future. This uncertainty about liability may "chill" the behavior of the departing attorney, especially where, as here, the rules defining minimum acceptable behavior—the ethical rules—are in a state of flux. Moreover, the dimensions of a "chilling" effect are greater in a market such as the current legal market where attorneys are changing firms in ever-increasing numbers and firms are competing more aggressively for clients. In order to facilitate the transition of the legal market from highly uncompetitive to the competitive model now being pursued, the rules regulating "fair competition," such as the duty not to interfere improperly with economic relations, need to be more clearly defined.

Another problem with the existing means of determining liability for intentional interference is its unprincipled nature. Because there exists little guidance as to how to balance the array of factors enumerated in the *Restatement,* courts have wide discretion in determining which factors they find dispositive of the issue of liability. The open-ended balancing test of the *Restatement*[10] thus permits the courts to engage in inquiries that they are either ill-equipped to decide, or that raise concerns best handled by other bodies of law, namely partnership and agency law. Because partnership and agency issues often arise in a departing attorney situation, a vague liability standard risks confusing tort issues with fiduciary issues. This confusion is problematic because the respective duties address different values and should be kept distinct.

This Comment focuses on the liability of departing attorneys for intentional interference with the former firm's relations with its clients. Thus, it examines the duty owed by the departing attorney as a competi-

9. RESTATEMENT (SECOND) OF TORTS §§ 766, 767 (1979). *See infra* notes 23-50 and accompanying text.

10. *See infra* notes 23-52 and accompanying text.

tor with the firm, as distinguished from duties as an ex-partner or ex-employee. It argues that, because consistent factual patterns can be discerned in the departing-attorney context, a more focused test can be used to determine the liability of attorneys for intentional interference with economic relations.

The test proposed by this Comment offers two advantages over the current regime. First, it reduces the uncertainty surrounding the standards for liability by focusing on the factors that should determine liability. Second, by narrowing the focus of the inquiry, the proposed test avoids the problems associated with considering those factors which may be relevant to partnership or agency duties, but which are not relevant to the duty imposed by the tort of intentional interference with economic relations.

Part I of this Comment reviews the relevant background law. Section A examines the prevailing law on intentional interference with economic relations, focusing especially on the factors considered in the *Restatement* balancing test and notes how the interfering party's conduct is relevant to liability. Section B discusses existing standards for judging an attorney's conduct toward potential clients. This Section examines the relevant ethical rules and the constitutional limits placed upon such rules. Part II reviews the cases which have addressed the issue of intentional interference with economic relations in the departing-attorney context and discusses the patterns and problems raised by these cases.

Part III develops a new test by examining the *Restatement* factors for assessing liability in the departing-attorney context. The proposed test focuses on the underlying conduct of the departing attorney and imposes liability when the attorney's behavior is either independently wrongful or violative of ethical rules of professional conduct. No presumption of liability would arise as the result of a breach of fiduciary duty. This Part shows how the proposed test improves the law, addresses possible objections to the proposed test, and explains why it is appropriate to develop a test specific to the legal profession. This Part also applies the proposed test to the cases discussed in Part II, as well as to the situation of interference with prospective relations. This Part concludes that the proposed test better carries out the policy underlying the interference tort than does the *Restatement* balancing test, and that the proposed test benefits the legal profession and its clients by making clear the bases and limits of liability.

I
BACKGROUND LAW

A. *Liability for Intentional Interference with Contractual Relations or Prospective Economic Relations*

The "interference" torts—intentional interference with contractual relations and intentional interference with prospective economic relations—impose tort liability upon third persons for interfering with private economic relationships between two other parties.[11] The interference tort doctrine presents an interesting interplay between tort law and contract law in that tort law—collective allocation of loss—is used to protect, rather than override, the terms of a contract—private allocation of loss (or gain).[12]

The historical underpinnings of the interference tort grew out of the Black Plague in England in the 14th century, which had created a severe labor shortage. In recognition of the resulting strain on employers, the *Ordinance of Labourers*[13] was enacted, providing that no person, unless independently wealthy or engaged in a craft, could leave his work. To strengthen this prohibition, it was further provided that no other employer could hire such a person, thus introducing the notion of third-party liability for inducing the breach of a private economic relationship.

The modern origin of the interference tort dates from the 1853 English case, *Lumley v. Gye*.[14] The case marked the first extension of the tort to employees who were not "servants." In that case, the defendant, the manager of a theater, enticed an opera singer under contract to a competing theater to sing for his production instead.[15] In an action brought by the spurned producer against the enticer, the Queen's Bench announced a general rule of tort liability for "wrongfully and maliciously, or, which is the same thing, with notice," interrupting a personal service contract, regardless of the means used.[16] Courts later extended liability to a vari-

11. The two torts differ in that one—intentional interference with contractual relations—requires the existence of a contract, while the other—intentional interference with prospective economic relations—simply requires a prospective economic relationship. RESTATEMENT (SECOND) OF TORTS §§ 766, 766B (1979). *See also* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, §§ 129-130 (5th. ed. 1984) [hereinafter PROSSER AND KEETON]. The type of relationship interfered with—existing contractual relations or prospective economic relations—will affect the degree to which the interfering party can interfere with the relationship without being subject to tort liability. *See infra* note 40 and accompanying text.

12. *See* Perlman, *Interference with Contract and other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 62 (1982).

13. 23 Edw. 3 (1349).

14. 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853).

15. *See* Lumley v. Wagner, 91 Rev. Rep. 193, 193-95 (Ch. 1852).

16. Lumley v. Gye, 2 El. & Bl. at 224, 118 Eng. Rep. at 752 (opinion of Crompton, J.).

ety of contracts[17] and to economic relationships not yet formalized into contract.[18] Eventually, the requisite proof of malice became so flexible that it came to be regarded as superfluous and ceased to be a necessary element of the tort.[19] Due in part to the historically expanding nature of the tort and to the inability of courts and commentators to develop a coherent doctrine,[20] the interference tort has been criticized both for its scope and for its uncertainty in application.[21] The absence of a coherent doctrine, and the resulting problems of scope and uncertain application, can be attributed to the wide variation found in the context, terms, and subject matter of different economic relationships.[22]

The confusion surrounding the contours and application of the tort is well illustrated by the "codification" of the tort in sections 766[23] and 766B[24] of the *Restatement*. The elements of the tort as codified are intent to interfere,[25] actual interference,[26] and "improper" interfer-

17. *See, e.g.*, Temperton v. Russell, 1 Q.B. 715 (1893) (extending application of tort to non-service contracts and recognizing liability for interference with *prospective* economic relations). For an alternative view of the history of the tort, *see* Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 (1980).

18. Walker v. Cronin, 107 Mass. 555 (1871).

19. *See* Lamb v. S. Cheney & Son, 227 N.Y. 418, 125 N.E. 817 (1920) (defining malice as signifying neither ill will nor intent to injure, but rather as indicating the intentional interference with a known legal or contractual right).

20. *See* PROSSER AND KEETON, *supra* note 11, at 979.

21. *See* Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 356-58 (1980) (criticizing the tort on grounds of "justice"); Perlman, *supra* note 12, at 61-62 (criticizing the scope of the tort on efficiency grounds).

22. *See* Perlman, *supra* note 12, at 61-62. The significance of the wide variation in factual circumstances is that the acceptability of a particular interference depends on, among other things, the nature of the economic relationship, the relationships of the parties, and the means used to interfere. *See infra* text accompanying notes 26-50.

23. RESTATEMENT (SECOND) OF TORTS § 766 (1979) (Intentional Interference with Performance of Contract by Third Person):

> 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.

24. *Id.* § 766B (Intentional Interference with Prospective Contractual Relations):

> One who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

25. *Id.* §§ 766 & 766B. Negligent interferences nsually are not actionable; *see id.* § 766C. *But see* J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979), for a case upholding a claim for negligent interference with prospective advantage. The California Supreme Court based liability on the foreseeability of the plaintiff's injury and the absence of due care on the part of the defendant. It has been suggested, however, that the case is best understood as an extended form of third-party beneficiary contractual liability. *See* Note, *Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 COLUM. L. REV. 1491, 1507-08 (1981).

26. RESTATEMENT (SECOND) OF TORTS, §§ 766, 766B (1979).

ence.[27] The requirement of impropriety is both the most contentious and the least certain element of the tort.[28] The *Restatement* provides a list of seven factors to be balanced in determining whether a particular interference is "improper," and therefore actionable.[29]

The first listed factor, "the nature of the actor's conduct,"[30] relates to the means used to cause the harm.[31] The *Restatement* notes that some means may be independently tortious, while others may not.[32] The means must also be considered in conjunction with the circumstances of each case, because "the same means may be permissible under some circumstances while wrongful in others."[33] As a further consideration, the *Restatement* notes the potential importance of business ethics and customs for a particular area of business activity in evaluating the nature of the actor's conduct.[34]

The second factor, "the actor's motive,"[35] primarily concerns the issue of malice, that is, "whether the actor was motivated, in whole or in part, by a desire to interfere with the other's contractual relations,"[36] as opposed to a desire to contract with the third party, with the inevitable result of interference.[37] While malice is not a *necessary* element of the tort, its presence apparently weighs toward liability.

The third factor, "the interests of the other with which the actor's conduct interferes,"[38] examines the nature of the economic relationship

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27. *Id.* §§ 766 comment a, 766B comment a (stating that interference must be "improper" in order for the actor to be held liable).

28. *See* PROSSER AND KEETON, *supra* note 11, § 129, at 984. A related problem is the burden of proof, that is, whether a plaintiff has made out a prima facie case with proof of interference and intent, with the burden on the defendant to show justification, or whether a plaintiff must plead and prove that the interference was improper. *See id.* at 983-84; Perlman, *supra* note 12, at 65-69. The *Restatement* leaves this question open, recognizing the split among the states. *See infra* note 29.

29. RESTATEMENT (SECOND) OF TORTS, § 767 (1979). With respect to the burden of proof, the section notes that some of the listed factors are "sometimes treated as going to the culpability of the actor's conduct in the beginning, rather than to the determination of whether his conduct was justifiable as an affirmative defense." *Id.* § 767 comment b. The drafters, however, do not specify which factors might be considered as part of an affirmative defense. They note that "there is little consensus on who has the burden of raising the issue of whether the interference was improper or not and subsequently of proving that issue." *Id.* comment k.

30. *Id.* § 767(a).

31. *See id.* § 767 comment c.

32. *Id.*

33. *Id.*

34. *Id.*:

> Violation of recognized ethical codes for a particular area of business activity or of established customs or practices regarding disapproved actions or methods may also be significant in evaluating the nature of the actor's conduct as a factor in determining whether his interference with the plaintiff's contractual relations was improper or not.

35. *Id.* § 767(b).

36. *Id.* § 767 comment d.

37. *Id.* (noting that where the sole motivation is a desire to interfere, the interference is almost always improper).

38. *Id.* § 767(c).

interfered with.[39] Some economic interests receive greater protection than others; for example, existing contractual interests are more protected than prospective economic relations, and contracts terminable at will receive less protection than other contracts.[40]

The correlative factor to this consideration is "the interests sought to be advanced by the actor,"[41] that is, the interests of the interfering party. This fourth factor is considered most closely in conjunction with "the interests of the other," since, for example, where the interest of both is economic, and still only prospective (not yet formalized into contract), the interference by one party will usually be deemed permissible competition.[42] In such a situation, the interest in "free competition" requires that the economic interest of one actor not be protected over that of another actor. The obvious relevance is that both parties' interests must be considered in order to determine whether one is deserving of protection from the other.[43]

The fifth factor, "the social interests in protecting the freedom of action of the actor and the contractual interests of the other,"[44] recognizes that consideration of the economic interests of the respective parties will often be inconclusive, in which case the social interests should be examined.[45] The most significant social interests involved are those of encouraging free competition and discouraging persuasion by unsuitable (for example, tortious) means.[46]

The *Restatement* cites as the sixth factor a consideration of "the proximity or remoteness of the actor's conduct to the interference."[47] For example, the *Restatement* suggests examining whether the interference is a direct consequence of the actor's conduct or whether the interference is a more remote and indirect consequence of the actor's conduct.[48]

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39. *Id.* § 767 comment e. For example, the court should consider whether the party's economic expectancy has been formalized into contract or is merely prospective. The strength of the party's expectancy is significant in that the stronger the expectancy, the greater the claim to security and the less social utility in the interfering party's conduct. Other relevant considerations in evaluating the other's interest include whether the contract violates public policy or is otherwise not worthy of protection.

40. *Id.*

41. *Id.* § 767(d).

42. *Id.* § 767 comment f. For the discussion of competition as justification, *see infra* text accompanying notes 55-58.

43. Also of possible relevance is whether the actor is seeking to promote a public interest as well as his own, thus outweighing the interest of the other.

44. RESTATEMENT (SECOND) OF TORTS § 767(e) (1979).

45. *Id.* § 767 comment g.

46. *Id.*

47. *Id.* § 767(f).

48. *Id.* § 767 comment h.

Finally, "the relations between the parties,"[49] (between any two of the parties) may be significant. For example, the interfering party and the party complaining of the interference may be competitors, or the interfering party and the third party may have some special relationship, as where the interfering party is a business advisor or bears some fiduciary obligation toward the third party.[50]

While the *Restatement* provides a list of relevant factors to be considered in determining whether an interference is improper, the drafters conclude that, owing to the crucial nature of the particular circumstances of each case, no further generalizations about liability can be made.[51] How to balance each factor, and what weight to assign to each, remain tied to the circumstances of each case.[52] In recognition of the vagueness of such an approach, however, the drafters note that some factual patterns have developed such that "crystallized privileges or rules defining conduct that is not improper" can be discerned.[53] The results of the balancing process in several such situations are demonstrated in sections 768 through 777.[54]

One such "crystallized pattern" concerns society's interest in free competition. As a necessary incident to a free enterprise economic system, parties may be protected from liability for interference due to a "competition privilege."[55] The *Restatement* recognizes this privilege where the economic relationship interfered with is merely prospective or where it is an existing contract terminable at will.[56] In such cases, the

49. *Id.* § 767(g).

50. *Id.* § 767 comment i.

51. *Id.* § 767 comment b.

52. *Id.* The drafters here suggest a similarity between the standard for negligence and the standard for improper interference: each factual situation is unique. The enumeration of relevant factors by the drafters, however, demonstrates an attempt to derive a more specific standard than the negligence "reasonable person" standard. As will be shown later, in the departing-attorney context, the factors can be further refined, thus providing an even more specific standard.

53. *Id.*

54. *Id.* § 768 (Competition as Proper or Improper Interference); *id.* § 769 (Actor Having Financial Interest in Business of Person Induced); *id.* § 770 (Actor Responsible for Welfare of Another); *id.* § 771 (Inducement to Influence Another's Business Policy); *id.* § 772 (Advice as Proper or Improper Interference); *id.* § 773 (Asserting Bona Fide Claim); *id.* § 774 (Agreement Illegal or Contrary to Public Policy).

55. *Id.* § 768. "One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors." *Id.* comment b.

56. *Id.* § 768:

> One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if (a) the relation concerns a matter involved in the competition between the actor and the other and (b) the actor does not employ wrongful means and (c) his action does not create or continue an unlawful restraint of trade and (d) his purpose is at least in part to advance his interest in competing with the other. The fact that one is a competitor of another for the business of a

interfering party and the party interfered with stand in substantially the same position with respect to the third party since both parties enjoy only a hope of future relations with the third party. The societal interest in free competition thus favors allowing both parties freedom of action in seeking economic relations with the third party,[57] with neither party favored over the other.[58]

Another "crystallized pattern" relevant to the departing-attorney context concerns "Advice as Proper or Improper Interference."[59] Section 772 of the *Restatement* deals with two situations: (1) the giving of truthful information; and (2) the giving of honest advice.[60] The latter situation protects the interfering party whenever three requirements are met: (1) the advice is requested; (2) the advice given is within the scope of the request; and (3) the advice is honest.[61] This protection is essential to protect certain professionals, such as lawyers, doctors, and investment advisors in the performance of their jobs. Immunizing such persons from liability for giving truthful information and honest advice allows them to fulfill their fiduciary obligations to their clients.[62]

The *Restatement* thus lays out several factors which may be relevant in a given case to determine whether a party's interference was "improper" and thus actionable under an interference tort theory. The "crystallized patterns" identified by the *Restatement* also suggest ways of analyzing an interference where certain factors are present. Even with these "crystallized patterns," however, the *Restatement* approach to analyzing interferences remains vague in two respects. First, it doesn't assign a hierarchy of values in the balancing process, that is, the relative weight of each relevant factor is not specified. Second, the *Restatement* does not indicate what constitutes a sufficient showing to establish liability; that is, it does not reveal what is necessary to "tip the balance."

As a means to developing a more precise liability standard, the following Section isolates one of the *Restatement* factors, "the nature of the

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third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.

57. *See* PROSSER AND KEETON, *supra* note 11, §§ 129-130, at 987-88, 1012-13.

58. The qualifying phrases of section 768 of the *Restatement* recognize that other factors, such as the means of inducement and the motive of the actor, may justify protecting the other from the interference. For example, an interference otherwise proper because of a privilege to compete, may be improper where the actor uses tortious means.

59. RESTATEMENT (SECOND) OF TORTS § 772 (1979):

One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person (a) truthful information, or (b) honest advice within the scope of a request for the advice.

60. *Id.*

61. *Id.* comment c.

62. *Id.*

actor's conduct,"[63] in the departing-attorney context in an effort to elucidate the meaning of "improper" for that situation. In doing so, the Section looks at ethical restraints upon the conduct of attorneys and identifies specific limitations thereby imposed upon the competition for prospective clients.

B. Ethical Restraints Upon the Conduct of Attorneys

In addition to the tort law's proscription against improper interferences with economic relations, ethical rules independently constrain attorneys in their dealings with clients and prospective clients. Ethical codes and the accompanying bodies of case law inform the inquiry of whether an attorney has "improperly" interfered with an economic relationship.[64] Thus, a review of the constraints imposed by the ethical rules and of the cases interpreting those rules will help define what conduct is "improper" in the departing-attorney context.

Traditionally, lawyers were absolutely prohibited from seeking out clients.[65] The evolution of the doctrine of commercial speech,[66] however, has altered the extent to which the profession may restrict lawyers in their search for business. The recognition of a limited amount of constitutional protection for commercial speech signifies that not all active searches for legal business may be prohibited. In several cases, the United States Supreme Court has explicitly dealt with the limits which the states may place on lawyers in publicizing their practice. Examining these cases will identify these limits, as well as the policy reasons underlying the ethical rules dealing with communications with potential clients. The factual context of each case, while not involving the departing-attorney situation, should also help to illustrate the potential dangers that the ethical rules seek to address.

In *Bates v. State Bar of Arizona,*[67] the Court relied on the first amendment to hold that states may not prohibit the truthful advertising of routine legal services.[68] In that case, two members of the Arizona State Bar were disciplined for advertising their legal clinic in a newspaper. The advertisements stated that the attorneys were offering "legal services at very reasonable prices," and listed their fees for certain services.[69]

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63. *Id.* § 767(a).

64. For example, violation of an ethical code is relevant to the examination of "the nature of the actor's conduct." The *Restatement* also explicitly notes the possible importance of business ethics and customs in evaluating such conduct. *See supra* text accompanying notes 30-34.

65. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 comment (1983).

66. *See, e.g.,* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976).

67. 433 U.S. 350 (1977).

68. *Id.* at 384.

69. *Id.* at 354.

The Court ruled that the advertising of legal services is not inherently misleading,[70] and that the other justifications advanced by the state for the prohibition were not sufficient to justify burdening the speech.[71] The Court also cited "the consumer's concern for the free flow of commercial speech."[72] The Court did say, however, that advertising by lawyers *could* be regulated, citing as examples advertising that is false, deceptive, or misleading. Due to the public's lack of sophistication concerning legal services, misstatements that were acceptable in other areas of advertising might be "quite inappropriate in legal advertising."[73] The Court also specifically noted that the case did not raise the issue of whether states could prohibit in-person solicitation of clients by attorneys.[74]

The Court subsequently addressed the issue of in-person solicitation by attorneys in *Ohralik v. Ohio State Bar Association*.[75] The case

70. *Id.* at 372. Commercial speech that is false, deceptive, or misleading is subject to restraint. *Id.* at 383 (citing *Virginia Pharmacy Bd.*, 425 U.S. at 771-72 & n.24).

71. *Id.* at 368-72, 375-79. Among the justifications rejected by the Court were adverse effects on professionalism, adverse effects on administration of justice, undesirable economic effects, adverse effects on the quality of service, and difficulties of enforcement.

72. *Id.* at 364.

73. *Id.* at 383.

74. *Id.* at 384. The Court has since decided two more cases challenging restrictions on lawyer advertising. In *In re* R.M.J., 455 U.S. 191 (1982), a lawyer was disciplined for publishing advertisements listing areas of practice in language other than that specified in the state's disciplinary rule, and listing courts in which the lawyer was permitted to practice although this information was not permitted by the rule. *Id.* at 196-98. The lawyer was also disciplined for mailing announcement cards to persons other than those permitted by the rule (other lawyers, clients, former clients, personal friends, and relatives). *Id.* The Court held that none of the restrictions upon the lawyer's first amendment rights could be sustained, noting that none of the information in the advertisements or announcements had been shown to be false or misleading, and that the state had failed to advance any other substantial interest justifying the restrictions. *Id.* at 205-07.

In Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), an attorney was disciplined for two allegedly deceptive advertisements. One of the advertisements offered to represent defendants in drunk driving cases and to refund full legal fees if they were convicted of drunk driving, and the other advertisement offered to represent women who had suffered injuries from the Dalkon Shield. *Id.* at 629-35. The latter advertisement represented that "[i]f there is no recovery, no legal fees are owed by our clients," and featured an illustration of the Dalkon Shield. *Id.* at 630-31. The Ohio Supreme Court adopted the disciplinary board's findings that the drunk driving advertisement's failure to mention the common practice of plea bargaining might be deceptive (and thus prohibited), *id.* at 635-36, that the Dalkon Shield advertisement violated a rule prohibiting the use of illustrations in lawyer advertisements, *id.* at 632 n.4, 636, and that the Dalkon Shield advertisement's failure to disclose the client's potential liability for costs even if her suit was unsuccessful violated the rule prohibiting "false, fraudulent, misleading, deceptive" public communications. *Id.* at 631 n.3, 635-36.

The Supreme Court held the disciplinary action sustainable to the extent that it was based on the drunk driving advertisement and the omission of information in the Dalkon Shield advertisement, noting the state's interest in preventing deceptive advertising. *Id.* at 650-55. The Court held, however, that the state had failed to establish a substantial interest sufficient to justify its prohibition against illustrations in lawyer advertisements. *Id.* at 647-49.

75. 436 U.S. 447 (1978).

involved classic "ambulance-chasing": a lawyer, upon hearing about an automobile accident, visited one of the young women involved in the accident at her hospital room. After advising the woman of the possibility of a recovery and of his availability to represent her, the lawyer induced the woman to sign a contingency fee contract to be represented by the lawyer.[76]

The woman later discharged the lawyer, who then sued her for breach of contract and received one-third of her settlement. The woman filed a complaint against the lawyer with a bar grievance committee, which referred the complaint to the disciplinary board of the Ohio Supreme Court. The board found the lawyer to be in violation of the disciplinary rules prohibiting self-recommendation for employment and employment resulting from unsolicited legal advice.[77] The lawyer appealed, arguing that the application of the disciplinary rules to him violated the first and fourteenth amendments.[78]

The Supreme Court held that a state may discipline a lawyer for soliciting clients "in person, for pecuniary gain, under circumstances likely to pose dangers that the state has a right to prevent."[79] The Court noted the state's interests in "maintaining standards among members of the licensed professions,"[80] and in "preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching and other forms of 'vexatious conduct.' "[81] The Court concluded that since these potential dangers were inherent with in-person solicitation of clients by lawyers, the prophylactic regulations were justified.[82]

From the foregoing cases, several principles emerge regarding the extent to which states may restrict lawyers in their communications with the public. First, the Court has recognized the legitimate interest of clients and potential clients in receiving adequate information to choose

76. *Id.* at 450. The lawyer also succeeded in inducing the woman's passenger to be represented by him. *Id.* at 451.

77. *Id.* at 451-53. The Ohio codes were essentially identical to DR 2-103(A) and DR 2-104(A), respectively, of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980). Disciplinary rule 2-103(A) provides in pertinent part: "A lawyer shall not . . . recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer." Rule 2-104(A) provides in pertinent part: "A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice . . . ."

78. Ohralik, 436 U.S. at 453-54.

79. *Id.* at 449.

80. *Id.* at 460.

81. *Id.* at 462.

82. *Id.* at 468. The companion case to Ohralik, *In re* Primus, 436 U.S. 412 (1978), involved an offer of frec legal services by a civil rights attorney. Because the motives of the attorney with respect to the solicitations involved "a form of political expression," the solicitations constituted expressive and associational conduct and hence were more protected than the pure commercial speech in Ohralik. *Id.* at 431-34.

how to be represented.[83] Second, states may absolutely prohibit information that is false, misleading or deceptive.[84] Third, states may regulate those communications which present a significant "potential for abuse," including the dangers of undue influence, intimidation, and overreaching.[85] Finally, the Court has held that direct in-person solicitation (even if not false, misleading, or deceptive) presents these potential dangers and can be regulated.[86] These principles are relevant in that they recognize the interest in providing clients with a meaningful choice as to representation, while defining the basic contours of how lawyers may be regulated in their quest for clients.

While the Court has established the basic parameters within which attorneys must operate, the more precise contours of ethical duties imposed on attorneys in their competition for business can be found in state ethical rules. By carefully examining the minimum conduct demanded of attorneys by these rules, the intentional interference tort's requirement of "impropriety" can be better understood.

The *Model Rules of Professional Conduct,*[87] promulgated by the American Bar Association in 1983, reflect a consideration of the constitutional limitations imposed by the Court in its series of lawyer publicity cases. Rule 7.1 generally prohibits false or misleading "communication" about the lawyer or the lawyer's services.[88] A communication is "false or misleading" if it: "(a) contains a material misrepresentation of fact or law . . . (b) is likely to create an unjustified expectation about results the lawyer can achieve . . . or (c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated."[89] This rule would apply for any type of communication by an attorney, whether deemed "advertising" or "solicitation."[90]

Rule 7.3, "Direct Contact With Prospective Clients," prohibits the "solicitation" of professional employment from prospective clients "when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."[91] "Solicitation" includes all communications directed at "specific recipients," but does not include communications "distributed

83. Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977).

84. *Id.* at 383.

85. Ohralik, 436 U.S. at 462.

86. *Id.* at 468.

87. MODEL RULES OF PROFESSIONAL CONDUCT (1983).

88. *Id.* Rule 7.1. The precursor to Rule 7.1 in the *Model Code of Professional Responsibility,* is DR 2-101(A), which is basically identical in its prohibitions.

89. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983).

90. *Id.* Rule 7.1 comment.

91. *Id.* Rule 7.3. The qualification of "pecuniary gain" apparently recognizes that solicitations may in some cases be a form of political expression, as in *In re* Primus, 436 U.S. 412 (1978), and thus entitled to greater protection. *See supra* note 82. *See also supra* note 77 and accompanying text (discussion of MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103 and DR 2-104).

generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter."[92] Significantly, the prohibition against "solicitation" does not extend to persons with whom the lawyer has had a "prior professional relationship."[93]

The drafters note that direct solicitation carries with it an inherent "potential for abuse" due to the respective positions of lawyers and laypersons. This "abuse" may take the form of undue influence, intimidation or overreaching.[94] Advertising is considered more appropriate because it fulfills the function of solicitation while subjecting the communications to public scrutiny. This scrutiny minimizes the possibility of false or misleading communications.[95]

The line between permissible "advertising" and prohibited "solicitation" is not always clear. The *Model Rules* themselves implicitly recognize a potential overlap between "advertising" and "solicitation." Rule 7.2 permits, subject to Rule 7.1, any advertising of services "not involving solicitation as defined in Rule 7.3."[96]

A particular communication may share some characteristics of "advertising," and some of "solicitation." In such cases, the problem is how to classify properly the communication in order to determine whether it violates the ethical rules. For example, several state courts have differed on whether form letters directed at specific types of businesses are (prohibited) solicitations or (permitted) advertisements. In *Allison v. Louisiana State Bar Association,*[97] the Supreme Court of Louisiana held that the sending of letters by attorneys to employers describing prepaid legal plans for employees was "solicitation" and prohibited.[98] In *Kentucky Bar Association v. Stuart,*[99] the Kentucky Supreme Court held that the sending of letters to real estate agencies stating prices for transactions and the qualifications of the attorneys, was "advertising" and

92. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983).

93. *Id.*

94. *Id.* Rule 7.3 comment. The Supreme Court has identified "potential for harm" in this context as a substantial state interest justifying regulation of lawyer publicity. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464 (1978).

95. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 comment (1983).

96. *Id.* Rule 7.2. In contrast, the *Model Code* provision, promulgated in 1979 and adopted in various forms by many states, specified in detail the information that could be publicized. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1980). *See* discussion of Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), *supra* note 74. The drafters acknowledged the rule's departure from tradition: "[t]he interest in expanding public information about legal services ought to prevail over considerations of tradition." Model Rules of Professional Conduct Rule 7.2 comment (1983). Note how this statement echoes the concerns raised by the Court in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). *See supra* text accompanying notes 67-74.

97. 362 So. 2d 489 (La. 1978).

98. *Id.* at 496.

99. 568 S.W.2d 933 (Ky. 1978).

permitted.[100] Finally, in *Koffler v. Joint Bar Association,*[101] the New York Court of Appeals, on facts similar to those in *Stuart,* reversed the lower court's decision and held that such letters were not proscribed as "solicitation."[102]

The Comment to the *Model Rules*[103] attempts to resolve this difficulty in classifying such lawyer communications as "advertising" permitted under Rule 7.2,[104] or as "solicitation" prohibited by Rule 7.3.[105] The drafters note that "[g]eneral mailings not speaking to a specific matter" would not fall within the definition of Rule 7.3.[106] The drafters reason that where a mailing does not address persons involved in a specific legal matter or incident, the recipients are unlikely to be particularly vulnerable to abuse. Hence, the dangers of solicitation—intimidation, undue influence, and overreaching—are not present in such a situation.[107] However, in a situation where a lawyer addresses a person's known pending matter, the potential for abuse *is* present, and such communications are prohibited.[108]

The *Model Rules* provide the departing attorney with guidelines on how to tailor her communications with former clients. First, the attorney must not make any false or misleading representations to a former client, particularly with respect to any factor bearing on the client's choice about representation.[109] An example of such a misrepresentation would be telling the client that the firm, without the attorney, would be disqualified from representing the client. Another prohibited category of communication would be one "likely to create an unjustified expectation" of success in the client.[110] This category would include statements about the results obtained on behalf of other clients, such as the size of damage awards or the number of favorable verdicts.[111] Similarly, the attorney could not predict the outcome she could obtain on behalf of the client. Finally, with respect to false and misleading statements, the attorney could not draw comparisons between the attorney and the firm that could not be factually substantiated.[112] Thus, for example, the attorney

100. *Id.* at 934.

101. 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980), *cert. denied,* 450 U.S. 1026 (1981).

102. *Id.* at 143, 412 N.E.2d at 929, 432 N.Y.S.2d at 873.

103. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 comment (1983).

104. *Id.* Rule 7.2.

105. *Id.* Rule 7.3.

106. *Id.* Rule 7.3 comment.

107. *Id.*

108. *Id.*

109. *Id.* Rule 7.1.

110. *Id.*

111. *Id.* Rule 7.1 comment.

112. *Id.* Rule 7.1.

could point to differences in billing rates (where ascertainable), but she could *not* claim to perform higher quality services.

The other area in which the *Model Rules* codify the principles set forth in the Supreme Court cases has to do with the proscription against solicitation. This proscription does not extend to potential clients with whom the attorney has had a "prior professional relationship."[113] This is significant because, presumably, in most departing-attorney scenarios the attorney leaving the firm will have performed work for the client in the past. For such attorneys, the broad rule against "solicitation" would not apply. These attorneys could offer their services to the client, even on a known pending matter, so long as they make no false or misleading representations.

Where a departing attorney has not previously enjoyed a professional relationship with a firm client, the rule against solicitation would apply. Thus, she could not contact the client, offering her services. The attorney could, however, send out announcements introducing her new practice and providing other general information about the practice, such as the types of services offered and the basis on which fees would be determined.[114]

In summary, the profession's ethical rules codify, in part, the scope of proper competition for firm clients by departing attorneys, and thus inform the inquiry of whether an interference was "improper." Part II discusses how courts have applied the interference tort in the departing attorney context, and illustrates the utility of the ethical rules in determining tort liability.

II
LIABILITY FOR INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS IN THE LEGAL PROFESSION

Only two reported cases have addressed an attoruey's liability for intentional interference with economic relations between his former firm and a firm client. Despite the relative paucity of case law on the subject, the recent phenomena of lateral movement of attorneys and the heightened competition for legal business magnify the potential problem.[115] One case, holding departing attorneys liable to their former firm for intentional interference with contractual relations, is useful for its analysis of the issue. In the other case, the liability issue was raised, but not resolved by the court; nonetheless, the case provides a factual context for

113. *Id.* Rule 7.3.

114. The *Model Rules* regard general information of this sort as "advertising." *See id.* Rule 7.2 comment.

115. *See supra* notes 1-5 and accompanying text.

developing an appropriate basis for liability, and also identifies those factors which should not be considered in assessing interference tort liability. Since the firm in each case had a contingency fee contract with its client, the alleged interference gave rise to claims of intentional interference with existing contractual relations. However, since contingent fee contracts (as well as all other lawyer-client contracts) are terminable at will,[116] the problems raised by these cases apply as well to situations involving interferences with prospective economic relations between the firm and the client.[117]

A. Adler, Barish, Daniels, Levin & Creskoff v. Epstein

In *Adler, Barish, Daniels, Levin & Creskoff v. Epstein,*[118] several associates leaving the plaintiff law firm sent announcements to firm clients informing them that they were forming a partnership and that the clients were free to terminate their relationship with the firm and be represented by the associates. The associates also sent blank change of attorney forms to the clients, all of whom had existing contingent fee contracts with the law firm.[119] The firm brought an action against the former associates for intentional interference with contractual relations and sought an injunction preventing the former associates from contacting the firm's clients. The trial court granted the requested relief, concluding that the associates had " 'engaged in illegal solicitation in complete and total disregard for the Code of Professional Responsibility' and had thereby 'tortiously interfered with the contractual and business relations that exist between Adler, Barish and its client.' "[120]

The associates appealed, and the Superior Court of Pennsylvania reversed and dissolved the injunction.[121] The court, "[b]alancing the competing interests delineated by section 767 of the Restatement of Torts," held that the associates' conduct was privileged.[122] The court stated that allowing the associates to contact the firm's clients might further significant interests of the clients, which it equated with the policy

116. *See, e.g.,* Fracasse v. Brent, 6 Cal. 3d 784, 790-91, 494 P.2d 9, 13, 100 Cal. Rptr. 385, 389 (1972) (noting that "the client's power to discharge an attorney, with or without cause, is absolute . . . the client may terminate that contract at will").

117. As explained above, interfering actors enjoy the "competition privilege" where the relationship interfered with is either a prospective relationship or a contract terminable at will. *See supra* text accompanying notes 54-56.

118. 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied,* 442 U.S. 907 (1979).

119. *Id.* at 421, 393 A.2d at 1178.

120. *Id.* at 423, 393 A.2d at 1178 (quoting the trial court).

121. 252 Pa. Super. 553, 566-67, 382 A.2d 1226, 1228 (1977).

122. *Id.* at 566, 382 A.2d at 1233 (referring to the RESTATEMENT OF TORTS §§ 766-767 (1939)). The *Restatement* no longer uses the term "privileged" in this context, but instead speaks of "improper" interferences. *Compare* RESTATEMENT OF TORTS § 766 (1939) *with* RESTATEMENT (SECOND) OF TORTS § 767 (1979).

underlying *Bates:* "the consumer's concern for the free flow of commercial speech."[123] The court also noted in dictum that it had "difficulty accepting the . . . conclusion that [the associates'] conduct amounted to solicitation in a legal sense," since the associates did not seek to stir up litigation or additional legal work.[124]

The Pennsylvania Supreme Court reversed, holding the regulation of communication between the associates and Adler, Barish clients constitutionally permissible and reinstating the trial court's decision in favor of Adler, Barish.[125] The court found that the associates had "clearly violated" the *Code of Professional Responsibility's* "proscription against self-recommendation" by recommending their own employment even though the clients had not sought their advice.[126]

Turning to the law firm's claim of intentional interference with existing contractual relations, the court determined that the sole dispute was whether the associates' conduct had been "improper."[127] Utilizing the *Restatement* approach,[128] the court held the interference to be improper. Focusing on clause (a) of section 767, "the nature of the actor's conduct," the court, in its opinion, stated that the associates had violated the state's disciplinary rules, thereby violating the " 'rules of the game' which society has adopted."[129] Moreover, the associates' conduct had adversely affected the interests of the clients in making informed and reliable decisions, as well as the firm's interest in maintaining the expectation of revenue without outside interference.[130]

Justice Manderino, dissenting, considered injunctive relief to be "completely unwarranted."[131] He distinguished this case from *Ohralik* since there had been no "coercive *in-person* solicitation . . . *no* false and misleading statements which would confuse, deceive, or mislead prospective clients," and the associates "did not attempt to motivate these clients to stir up litigation."[132] Justice Manderino concluded that the court's

123. 252 Pa. Super. 553, 565, 382 A.2d 1226, 1232 (1977) (quoting Bates v. State Bar of Arizona, 433 U.S. 350, 363 (1977)).

124. *Id.* at 561-62, 382 A.2d at 1230-31. The court noted, however, that even if the associates' conduct did amount to "solicitation," their conduct could nonetheless be privileged. *Id.* at 562, 382 A.2d at 1231. One judge, concurring in the judgment and relying on *Bates,* felt that the injunction should be dissolved because it infringed upon the associates' first amendment rights. *Id.* at 568, 382 A.2d at 1236 (Spaeth, J., concurring).

125. 482 Pa. 416, 428, 435, 393 A.2d 1175, 1181, 1186 (1978), *cert. denied,* 442 U.S. 907 (1979).

126. *Id.* at 425, 393 A.2d at 1179-80.

127. *Id.* at 431, 393 A.2d at 1183.

128. *See* RESTATEMENT (SECOND) OF TORTS § 767 (1979) (listing those factors to be considered in determining whether an interference is "improper").

129. 482 Pa. at 433, 393 A.2d at 1184 (quoting Glenn v. Point Park College, 441 Pa. 474, 482, 272 A.2d 895, 899 (1971)).

130. *Id.* at 434, 393 A.2d at 1184-85.

131. *Id.* at 441, 393 A.2d at 1187 (Manderino, J., dissenting).

132. *Id.* at 441, 393 A.2d at 1187-88 (Manderino, J., dissenting) (emphasis in original).

holding not only denied the associates their first amendment rights, but also deprived the clients of truthful information about their rights.[133]

B. Rosenfeld, Meyer & Susman v. Cohen

In *Rosenfeld, Meyer & Susman v. Cohen,*[134] the plaintiff law firm had a contingent fee contract with a client regarding a major patent antitrust action. The defendants were two former litigation partners of the firm who had handled the suit from its inception.[135]

Approximately five years after the firm began work on the case, the defendants came to believe that the case would settle for between $20 million and $50 million, or if tried, result in a judgment of approximately $100 million before trebling.[136] At that time, the defendants demanded that their partnership allocations from the case be increased and threatened withdrawal from the firm if their demands were not met.[137] After negotiations between the firm and the partners proved fruitless, the defendants withdrew from the firm and formed their own partnership. One month later, the client in the antitrust case discharged the firm and retained the defendants as attorneys in the action.

The client and the defendants signed a contingent fee contract whereby the defendants would receive approximately twice what they would have received as partners in the firm, and the client would pay substantially less than what it would have paid the firm under the original agreement.[138] The firm brought suit against the former partners and the client, alleging among other things, breach of fiduciary duty, interference with contractual relations by the former partners, and conspiracy by the former partners and the client to interfere with the contractual relations between the client and the firm.[139]

The trial court found that the firm had failed to state a cause of action for breach of fiduciary duty.[140] With respect to the tort cause of action, the court confined the firm's argnment to proving active interfer-

133. *Id.* at 441, 393 A.2d at 1188 (Manderino, J., dissenting).

134. 146 Cal. App. 3d 200, 194 Cal. Rptr. 180 (1983).

135. The law firm was a dissolved at-will law partnership consisting of the defendants and seventeen other partners. *Id.* at 208, 194 Cal. Rptr. at 184.

136. *Id.* at 209, 194 Cal. Rptr. at 185.

137. While the defendants devoted substantially all of their time to the case during the five year period, they continued to draw their partnership share of firm profits—approximately $800,000 combined—even though the case produced no revenue during this period. *Id.*

138. *Id.* at 210-11, 194 Cal. Rptr. at 185-86.

139. *Id.* at 211-12, 194 Cal. Rptr. at 186-87.

140. *Id.* at 213, 194 Cal. Rptr. at 187. The court held that, because the law firm was an at-will partnership, the former partners had an absolute right to dissolve the partnership, even in bad faith. *Id.* The court also held that the former partners could not be held liable for breach of fiduciary duty to wind up unfinished partnership business, reasoning that the client's discharge of the firm precluded liability. *Id.* at 217, 194 Cal. Rptr. at 190.

ence, that is, that the former partners had told the client they were essential to the case and that the firm could not adequately represent the client's interests. At the close of the firm's case, the trial court granted the former partners' motion for a nonsuit.[141] The court also dismissed the cause of action against the client for conspiracy to interfere with its own contractual relations.[142]

The California Court of Appeal reversed as to both the fiduciary duty and the tort causes of action.[143] With respect to the tort cause of action, the court held that the trial court had erroneously limited the firm's proof of interference with contractual relations, since "[i]n California, pleading ultimate facts of interference, such as advising, counseling and persuading termination of a contract, is sufficient to state a cause of action for interference with contract."[144] The court pointed out that the firm had successfully pleaded these ultimate facts and concluded that the firm should have the opportunity to substantiate its claim at trial.[145]

Finally, the court held that neither the attorney-client relationship nor the statute relating to publications made in the course of judicial proceedings granted the former partners an absolute privilege to interfere with the firm's contract with its clients.[146] With respect to the attorney-client privilege, the court noted that the privilege applies only where the relationship between the parties involves the type of interests that the privilege is intended to protect, and where the advisor's intent in inducing the breach is proper, that is, not self-serving.[147] The court then stated that the existence of a particular relationship between two parties is only one factor to be considered in determining whether the interference was "improper,"[148] and that the inquiry "is peculiarly a question for determination by the trier of fact."[149]

Thus, while the tort liability issue was raised in *Rosenfeld,* the court was unable to decide the question as certain factual issues remained unresolved due to the procedural posture of the case (nonsuit at the trial

141. *Id.* at 212, 194 Cal. Rptr. at 187.

142. *Id.*

143. *Id.* at 208, 194 Cal. Rptr. at 184. With respect to the cause of action for breach of fiduciary duty, the court held that the former partners could be held liable for bad faith dissolution of the law firm partnership and for not winding up unfinished business of the firm. *Id.* at 212-20, 194 Cal. Rptr. at 187-92.

144. *Id.* at 221, 194 Cal. Rptr. at 193.

145. *Id.* at 223, 194 Cal. Rptr. at 194. The California standard for intentional interference with contract (or prospective economic relations) as stated by the *Rosenfeld* court is identical to the *Restatement* standard—to be actionable, an interference must be "improper." *Id.* at 230, 194 Cal. Rptr. at 199.

146. *Id.* at 227-34, 194 Cal. Rptr. at 197-202.

147. *Id.* at 228, 194 Cal. Rptr. at 198.

148. *Id.* at 230, 194 Cal. Rptr. at 199. The court set out the approach advanced by RESTATEMENT (SECOND) OF TORTS § 767 (1979).

149. 146 Cal. App. 3d at 230, 194 Cal. Rptr. at 199.

court level). Nonetheless, *Rosenfeld* is useful to this analysis for more than its factual setting. First, the court's announced standard mirrors that of the *Restatement*—requiring that an interference be "improper," yet not giving much guidance in defining that term. Second, the court rejected the trial court's attempt to narrow the types of conduct by which the plaintiff-firm could prove that the defendants had "improperly" interfered with the relationship. As will be developed later, this Comment argues that narrowing the impropriety inquiry is precisely the approach courts should take.[150]

C. *Problems Raised by* Adler, Barish *and* Rosenfeld

The decisions in *Adler, Barish* and *Rosenfeld* illustrate the *Restatement's* problem of uncertainty. Both courts employed the *Restatement* factors for determining whether the departing attorneys' conduct was "improper," yet they gave little insight into how the factors, taken together, should be considered. The *Restatement* itself acknowledges the case-specific nature of the inquiry,[151] but offers that "factual patterns develop and judicial decisions regarding them also develop patterns for holdings that begin to evolve crystallized privileges or rules defining conduct that is not improper."[152] In the case of departing attorneys, a consistent factual pattern can be discerned. Consequently, a narrower, more concrete test for tort liability can be developed that furthers the policy goals of the tort and sends a clear message to affected parties. Such a test would reduce the problem of uncertainty by eliminating consideration of irrelevant and inconclusive factors.

The existence of fiduciary relationships in a case, such as in *Rosenfeld,* illustrates another potential problem. Where the breach of such duties is also at issue, there is the danger that a court may analyze the dispute as a breach of a fiduciary duty rather than as an interference tort in determining whether the conduct is "improper." Because the duties are distinct, and speak to different values, this is not desirable. Developing a test that narrows the courts' focus in determining liability would serve the goal of foreclosing courts from considering issues which are more properly relevant to different legal duties. The following Part explains how a more narrowly focused test can be developed for the departing-attorney situation, develops the test, and suggests its benefits.

150. *See infra* Part III.

151. RESTATEMENT (SECOND) OF TORTS § 767 comment b (1979).

152. *Id.*

III
DEVELOPING A NEW TEST

Adherence to the law is difficult when the boundaries defining permissible conduct in a given situation are unclear. This is especially true where the courts speak of the standard in such vague terms as " 'the rules of the game.' "[153] It is true that some standards, most notably the negligence standard, remain fact-oriented and are generally determined on a case-by-case basis. Yet the liability standard for the interference tort purports to be more precise than the general "reasonableness" standard of negligence. The *Restatement* narrows somewhat the factors to be considered, but where the relevant factors can be further pared down without sacrificing any values embodied in the tort duty, this should be done.

Another relevant distinction between the duty of ordinary care (negligence) and the interference tort is that the latter is an *intentional* tort. Where intent is a necessary element, a well-defined duty of care will benefit parties because they will be able to consciously order their behavior to the legal requirement. Hence, a more concrete standard of liability is desirable.

As was explained above,[154] the current standard has two main problems. First, it is uncertain what factors will be dispositive of the liability issue—particularly, what will determine whether an interference was "improper." Second, the scope of factors that a court will consider is uncertain since courts sometimes consider factors that are relevant to other legal duties—such as the breach of a fiduciary duty. The interference tort is not designed to enforce the duties partners owe one another *as partners;* its focus is on the duty owed by *competitors.*

The following Section will show why, in determining whether an interference was "improper" in the departing-attorney context, it is appropriate to focus exclusively on the *conduct* of the departing attorney, rather than any of the other factors listed by the *Restatement.* The next Section discusses how the propriety of an attorney's conduct can be evaluated. It then develops a new test which asks whether the attorney's conduct was either independently unlawful or violative of ethical rules regulating lawyer communications. The new test will then be compared to present law, demonstrating how the test would be an improvement. Finally, possible objections to the new test will be addressed.

153. *See* Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 434, 393 A.2d 1175, 1184 (1978), *cert. denied,* 442 U.S. 907 (1979).

154. *See supra* Part II, Section C.

A. *"Crystallized Patterns" in the Departing-Attorney Context Make the Attorney's Conduct the Appropriate Focus*

As previously noted, while the *Restatement* does not give definite substance to the meaning of "improper," it does recognize that factual patterns develop for given situations that may allow for the development of a more concrete test.[155] An examination of the *Restatement* factors for determining whether an interference is "improper," together with an examination of the factual patterns representative of the departing-attorney situation, demonstrate that in determining liability, the focus should be upon the nature of the attorney's conduct. Such a focus is proper because in the departing-attorney context, the other factors laid out in the *Restatement* do not vary in a legally significant manner and thus will never be determinative in a given case. A brief consideration of the factors will bear out this point.

The "actor's motive"[156] in the departing-attorney situation is primarily economic, although the attorney may also have a desire to take care of the client's legal interests. Whether the departing attorney is purely greedy or purely conscientious, however, is essentially irrelevant to this inquiry. By way of contrast, this fact *is* relevant when a party's sole motive is to injure the other party. Since the departing attorney seeks to lure away clients for economic reasons, and not to harm her former firm, the motive issue is irrelevant and need not be addressed in assessing liability.

The "interests of the other,"[157] that is, the interests of the law firm, may be an existing contract terminable at will[158] or prospective economic relations, such as an ongoing business relationship.[159] While the law firm's interest may take either of these forms, there is no legal significance to the distinction between the two in this context. In either case, the firm maintains only a hope of future relations. Here, one of the "crystallized privileges" of the *Restatement* is relevant. All other factors being neutral, the policy of free competition justifies interference with contracts terminable at will and prospective economic relations.[160] That being so, resort must be had to the other factors; this factor will not be outcome determinative. A new test need not address it.

Similarly, "the actor's interest,"[161] that is, the departing attorney's

155. RESTATEMENT (SECOND) OF TORTS § 767 comment b (1979).

156. *Id.* § 767(b).

157. *Id.* § 767(c).

158. All law firm contracts are terminable at will. *See supra* note 116.

159. An "ongoing business relationship" might be further broken down into arrangements where a firm is on retainer, and those where the firm works on an hourly basis. In both cases, the contracts are terminable at will.

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

161. *Id.* § 767(d).

interest, will always be prospective, since she will not have an existing contract with the client.[162] Viewed in conjunction with the law firm's interest (prospective relations or contract terminable at will), interference by the attorney would normally be justified as "competition," since the two interests are legally equivalent.[163] Therefore, this factor is inconclusive.

The "social interests"[164] involved in this situation also do not vary: there are interests both in allowing the firm to maintain existing relations and in allowing the departing attorney to acquire new relations (or continue existing relations under new terms). These interests are subsumed in the "competition privilege." Thus, they will not, of themselves, be outcome determinative. Also, there is an interest in affording the client the opportunity to be represented by the attorney of her choice. This can only be achieved by encouraging "the free flow of commercial information."[165] Finally, there is an interest in preventing inducement by unlawful means, such as fraud, slander, or battery. What is important to note with respect to all of these interests is that they find expression in the respective sources of liability (tort and criminal law, ethical rules) of the proposed test. In other words, the respective bodies of law which serve as the sources of liability in the proposed test recognize and serve these interests.[166] Hence, adoption of the proposed test would take cognizance of the social interests affected in the departing-attorney situation since to the extent those interests have any effect on the outcome of any case, they are subsumed in the conduct factor of the proposed test.

The "proximity . . . of the actor's conduct to the interference"[167] does not vary in any significant manner in the departing-attorney context: the departing attorney induces the client to establish relations with her, rather than to sever relations with the firm, although the latter is a necessary consequence of the former.[168] In this context, the relationship

162. In situations not involving departing attorneys, this factor may be relevant under the *Restatement* test because the party interfered with might have an existing contract (not terminable at will), and thus would have a superior claim to protection than an interfering party who enjoyed only a prospective interest.

163. The "privilege to compete" is, however, more circumscribed in the attorney-client setting (than in other commercial settings) due to ethical restraints on how attorneys may compete for business. For a discussion of the ethical rules and case law, see *supra* notes 64-114 and accompanying text.

164. RESTATEMENT (SECOND) OF TORTS § 767(e) (1979).

165. Bates v. State Bar of Arizona, 433 U.S. 350, 365 (1977).

166. The ethical rules, and the cases placing limits upon them, balance the potential dangers of unrestrained solicitation against the benefits of increased competition through broader publicity. *See id.* Tort and criminal law represent the balance struck between freedom of action on the one hand and personal interests on the other.

167. RESTATEMENT (SECOND) OF TORTS § 767(d) (1979).

168. The *Restatement* is especially unclear about how this factor should be evaluated or even what it means for an interference to be a "direct" versus "indirect" consequence of a person's

will *always* be very direct since the departing attorney is taking a known client from her former firm. For this reason, liability will not turn on this factor. This factor will only be considered in those situations where the relationship between the actor's conduct and the interruption of economic relations is so attenuated that tort liability is inappropriate.[169] Because the attenuated-relationship situation is never present in the departing-attorney context, this factor is irrelevant and thus may be ignored in developing a new test.

Finally, analysis of the "relations between the parties"[170] will not, of itself, resolve the question of whether an interference was "improper." The departing attorney will bear some fiduciary obligation (as an advisor) to the client. Initially, then, it may seem that the *Restatement's* "crystallized privilege" of "[a]dvice as proper or improper"[171] may be relevant. The firm, however, will also bear a fiduciary obligation to the client. Ultimately, the balancing of these competing interests requires one to look to the attorney's conduct to determine which interest should prevail. This is so because the ethical rules—which regulate attorney *conduct*—provide the only basis for determining whether, in a given situation, a fiduciary relationship justifies self-promotion.

Another relevant relationship in this situation is that between the attorney and the firm. The attorney will have a fiduciary relationship to the firm, either as an agent (in the case of an associate) or as an ex-partner. Assessing the appropriate consequences of this relationship requires one to look at the attorney's *conduct*.

As demonstrated above, six of the seven factors delineated by the *Restatement* for determining whether an interference is "improper" are either totally inconclusive in the departing-attorney situation or are inconclusive except to the extent they are implicitly factored into "the actor's conduct." These factors can, therefore, be eliminated from a liability standard in the departing-attorney context. Thus, it is the *conduct* of the departing attorney which does and should resolve the inquiry of whether the attorney will be held liable for intentional interference with contractual relations or prospective economic relations.

B. Sources of Liability Under the Proposed Test

There are two sources of standards for evaluating whether an attor-

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conduct. Nonetheless, since this factor does not vary in the departing-attorney context, the factor will not determine liability.

169. An example of this type of situation might be where *A* contracts to sell *B* a car. *B* no longer needs to share rides to work with *C*, and thus severs that relationship. The proximity of *A's* conduct to *B's* relationship with *C* is such that *A* is not liable to *C* for interference with contractual relations, even if *A* knew of *B's* relationship with *C*.

170. RESTATEMENT (SECOND) OF TORTS § 767(g) (1979).

171. *Id.* § 772; *see supra* text accompanying notes 59-62.

ney's conduct follows recognized rules of behavior: tort and criminal law; and rules of professional conduct. These standards, in turu, are readily ascertainable and codify the societal rules of fair competition which the interference tort seeks to address.[172]

The first source of liability under the proposed test attaches where the underlying behavior (that is, means of interference) of the attorney is independently wrongful. "Wrongful" in this sense includes intentional torts and crimes.[173] For example, the interfering party may, through her overtures, libel or slander the firm. The interferer might also effect the interference fraudulently, by misrepresenting to the client what a change of attorneys would entail.[174] It seems clear that under any test of liability, such an interference should be regarded as "improper." For example, even in the *Restatement* sections defining "crystallized privileges" exempting interferences from tort liability,[175] the privileges do not apply where the underlying behavior of the interfering party is "unlawful." Common sense tells one that, however viewed, independently unlawful conduct causing interference with another's economic relations constitutes an improper form of economic competition, and thus should subject the interfering party to tort liability.[176]

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172. Using the terminology of RESTATEMENT § 767 comment b, the "factual pattern" for the departing-attorney situation has "crystallized," which permits compressing the § 767 balancing test into the proposed test.

173. Because the interference tort is an intentional tort, only intentional torts, such as libel, slander, or fraud may serve as the basis for wrongful conduct. Thus, for example, a negligent misrepresentation could not subject a party to liability for intentional interference.

174. It bears noting that where the interference is effected by unlawful means, such as slander or fraud, the client may also have a cause of action for that conduct, quite apart from the interference tort. In the case of fraud, the law firm would not have a direct action against the lawyer for the fraudulent representation. The client, however, would have a cause of action against the lawyer for fraud.

175. RESTATEMENT (SECOND) OF TORTS §§ 768-774 (1979).

176. One commentator, arguing for limitation of the interference torts *solely* to instances where wrongful means have been used, explains how the imposition of liability in such cases carries out the underlying policy of the tort. Perlman, *supra* note 12, at 69. According to Professor Perlman, the interference tort historically provided an alternative to a claim based directly on the underlying unlawful behavior, where the loss was purely economic. *Id.* Many actions on the part of an actor might cause economic loss to another party, such as offering a lower price on a competing good, thereby diverting potential business from the other. It is clear, however, that not all such actions causing economic harm to another should subject the actor to tort liability. On the other hand, it is also true that actors should not always be immune from liability to others for causing purely economic harm. The difficult distinction is between injuries flowing "directly" from the actor's conduct and those which are more "indirect": "[b]y requiring the plaintiff to show intent by the defendant to interfere with a particular contract, the tort distinguishes the plaintiff's loss from injuries resulting more indirectly from the defendant's act." *Id.* at 76. The torts—with the intent requirement—thus provide a convenient limit to compensable economic losses.

Professor Perlman proposes an "unlawful means" test in order to "distinguish recoverable losses from more indirect losses so that some workable limits on liability may be maintained." *Id.* at 78. Professor Perlman argues that "inducer tort liability" for interference by otherwise lawful means interferes with economic efficiency. To him, it is "startling that a doctrine of this sort is

There is, however, one important exception to the "independently wrongful" source of liability: A breach of fiduciary duty by the departing attorney to her former firm would not be considered a proper basis for liability.[177] There are several reasons for this. First, whether the departing attorney has breached a duty of loyalty owed to her former firm as the result of her status as an ex-partner or as an ex-employee is not relevant to whether she has breached a duty as a competitor. Second, utilizing a breach of fiduciary duty as a basis for finding interference tort liability would result in undesirable overlap. Partnership law[178] and agency law[179] both contain restrictions on the extent to which a fiduciary may compete with her principal. Enforcing these restrictions through the interference tort risks confusion and double liability. Thus, breaches of fiduciary duties should be kept apart from tort liability.

The second source of liability under the proposed test arises when the attorney's conduct violates the ethical rules which regulate the professional conduct of attorneys in their relations with clients and potential clients. Such regulations are normally promulgated by state bar associations and are often identical to model regulations drafted by the American Bar Association. Ethical rules represent a codification of minimum acceptable standards of behavior for members of the bar with respect to their relations with one another, with the general public, and with the

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superimposed on an economic order committed to competition." *Id.* Thus, only those interferences in which the interfering party's underlying conduct is "unlawful" should give rise to liability.

This Comment agrees that the interfering party should be subject to tort liability when the underlying conduct of the interfering party is independently wrongful. It seems plausible, however, that some situations might call for liability even where the underlying conduct is not strictly "unlawful." If one identifies economic efficiency as the sole goal of the tort, Professor Perlman's argument is persuasive. If, however, the interference tort is viewed as serving other policies, such as the protection of contractual integrity, then one might favor imposing liability even where the actor's conduct was not independently tortious or criminal in nature. This Comment argues that such a view is more appropriate, and that if the aim is to prevent "improper" interferences, liability should attach to one who interferes with a contract by unethical means. The proposed test is therefore somewhat broader than Professor Perlman's in that it imposes liability for some conduct which is not independently tortious or criminal. Also, while Professor Perlman, on efficiency grounds, favors scrapping the entire present regime, this Comment works within the existing framework and finds that the framework itself provides the solution.

177. The proposed test makes this distinction even though, strictly speaking, a breach of fiduciary duty is a "tort" since it is "a civil wrong, other then breach of contract, for which the court will provide a remedy in the form of an action for damages." PROSSER AND KEETON, *supra* note 11, § 1, at 2. A breach of a fiduciary duty, however, is a special kind of tort, since it depends upon the existence of a relationship of trust between the tortfeasor and the plaintiff. The unique nature of fiduciary duties is underscored by their omission from the RESTATEMENT (SECOND) OF TORTS (1979) and by the American Law Institute's special treatment of fiduciary duties in the RESTATEMENT (SECOND) OF TRUSTS (1957), THE RESTATEMENT (SECOND) OF AGENCY (1958), and the UNIFORM PARTNERSHIP ACT.

178. UNIFORM PARTNERSHIP ACT § 37.

179. RESTATEMENT (SECOND) OF AGENCY §§ 388, 393 (1958).

judicial system.[180] Violation of such rules may subject an attorney to disciplinary action.[181]

The *Restatement* recognizes the relevance of "recognized ethical codes for a particular area of business activity" in evaluating the nature of the interfering party's conduct.[182] Such ethics are particularly relevant where, as in the legal profession, the recognized ethics have been codified by statutes that impose punitive sanctions for violations. Reference to ethical codes will help to analyze the nature of the departing-attorney's conduct. If the conduct indicates a breach of ethical codes, such as improper communication directed to the client, it will be "improper" under the *Restatement* test. Thus, this part of the proposed test reaches the same result as *should* obtain under the *Restatement* approach.

As indicated earlier,[183] the relevant ethical rules in this situation are those prohibiting false and misleading statements,[184] and prohibiting solicitation where the attorney has had no prior professional relationship with the potential client.[185] A departing attorney can stay within these limitations by carefully tailoring her oral and written communications to clients in a manner allowed by the ethical rules as previously set forth in Part I, Section B.

C. *The Benefits of the Proposed Test*

1. *The Proposed Test Alleviates the Problem of Uncertainty*

As indicated earlier, a major problem in the application of the interference tort to the departing-attorney context is its uncertainty: attorneys are unsure of how they may advise a client with respect to their imminent departure from the firm without exposing themselves to tort liability. As a consequence, both attorney and client suffer. The attorney may behave too cautiously, thus limiting her legitimate interest in prospective future relations with clients she has served for some time. In turn, the client may suffer by being effectively deprived of information necessary to make an informed decision about how her legal interests might best be served. In sum, the attorney's caution may translate to inaction on the part of the client.

The proposed test will go a long way toward alleviating the problem of uncertainty. An attorney faced with an imminent departure from her firm will have relatively well-defined standards of behavior to consult:

180. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1980).

181. The most frequent disciplinary procedure entails hearings before a state disciplinary board and possible appeal to the state courts.

182. RESTATEMENT (SECOND) OF TORTS § 767 comment c (1979).

183. *See supra* notes 87-114 and accompanying text.

184. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983).

185. *Id.* Rule 7.3.

tort and criminal law, and state ethical rules.[186] Thus, the attorney who carefully tailors her communications with clients regarding her departure need not fear liability for intentional interference.

Conduct that is independently unlawful will subject the attorney to liability for intentional interference (as well as any other independent tort or crime that may have been committed). As for the evaluation of conduct on the basis of ethical rules, truthful, nonmisleading statements of fact will pass scrutiny.[187] Representations as to the comparative quality of the lawyer's services or those of the former firm will clearly be improper, as will any other representation that cannot be factually verified.[188] Statements likely to create unjustified expectations in the potential client, such as the promise of a favorable outcome, will also be improper.[189] Where the attorney has no prior professional relationship with the potential client, she may not solicit business by offering services to the client.[190] Where there *has* been a prior professional relationship, this prohibition does not apply; thus, the attorney would be permitted to offer her services to the client.[191] If the attorney follows these guidelines in seeking to represent the firm client, she need not fear liability for intentional interference.

The increased clarity of the proposed test will benefit clients as well. Since it is likely that clients will receive the maximum amount of permissible information from departing attorneys, they will be able to make better informed choices as to representation. Additionally, the restraints imposed by the rules of professional conduct will also ensure that clients will not be subjected to the types of dangers posed by false or misleading statements and solicitation by unknown persons.

2. *The Proposed Test Appropriately Limits the Scope of Inquiry*

The interference tort seeks to regulate the economic behavior of parties in an economy based on free competition. The tort imposes a duty on *competitors* to compete fairly by not improperly interfering with their competitors' economic relations. The proposed test addresses the policy of preventing improper interferences by requiring all lawyers, as competitors in the legal market, to follow uniform guidelines. At the same time,

186. A possible objection is that tort and criminal law are not themselves perfectly clear. The proposed test, however, does not purport to provide crystal-clear guidelines for behavior. What it *does* attempt to do is make the test for liability *clearer* than the present amorphous test. In this regard, the limits of the tort and the criminal law are at least *doctrinally* clearer than the present standards for the interference tort. With respect to *criminal* law, it is *by definition* quite clear: Due Process requires it be so.

187. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

the narrowed focus of the proposed test eliminates concerns more properly resolved by bodies of law that impose different duties on competing lawyers. For example, in analyzing the departing attorney's conduct, attention will not be given to whether she has breached a fiduciary duty to the former firm. Whether the departing attorney has breached a duty *as an ex-partner* or *as an ex-associate,* as opposed to a duty *as a competitor,* is relevant to partnership or agency law, not the interference tort.[192] The limited inquiry of the proposed test precludes judges from considering the fiduciary aspect of the situation, a temptation which is particularly strong where the court feels that "something" is amiss even though the elements of a breach of a fiduciary duty cannot be established. Thus, the proposed test precludes use of the interference tort as a residual source of liability for all intuitively "bad" conduct.

The proposed test's narrowed focus similarly forecloses courts from considering other factors which are tempting to consider, but which are ultimately beyond their competence. The best example of such an inappropriate factor is the determination of who actually represents the client. There is no clear way to resolve this issue, since the client employs "the firm," but may be drawn to the firm in order to be represented by the departing attorney. The *Model Rules* do not address this issue. Yet, where liability depends solely on the amorphous concept of whether an action was "improper," courts may intuitively address this issue. The proposed test would eliminate such inquiries from bearing on the issue of liability.

D. Potential Arguments Against the Proposed Test

1. Ethical Rules as a Standard of Liability

Several objections might be raised to using state ethical rules as a standard of liability. First, it may be argued that the legal profession is self-regulating (that is, it promulgates the rules which regulate it), thus raising a conflict of interest problem. Second, it may be contended that the rules regulating attorneys are themselves unclear and relatively weak. Finally, it may be argued that the ethical rules are an inappropriate standard for tort liability since they were not intended for such a purpose.

There are two answers to the self-regulation argument. First and foremost, state bar associations (those promulgating the rules) have been, if anything, *less* willing than the courts to grant freedom of action to

192. For example, whether the departing attorney has failed to wind up unfinished partnership business is relevant to *partnership* law; whether she has misappropriated firm "property," such as goodwill, is relevant to *agency* law. These bodies of law deal exclusively with their respective discrete duties, and they set forth specific standards for demonstrating a breach of those duties. A breach of one of these duties should not be relevant to the interference tort, since the interference tort's focus is on an actor's duty as a *competitor,* not as a fiduciary.

attorneys in their efforts to procure business. Traditionally, the legal profession has strictly regulated lawyer communications with potential clients; it is only since *Bates,* when the Supreme Court held, on constitutional grounds, that state rules of professional conduct regulated such communications too strictly, that state bar associations have promulgated more permissive regulations.[193]

The second answer to the self-regulation objection is that, as far as any problem of conflict of interest goes, lawyers sit on both sides of the dispute. Both the injuring and injured parties are attorneys or associations of attorneys. Hence, the "private" nature of the action obviates any danger of self-interest.

As to the objection that present regulations are unclear and relatively weak, it may be true that there are some gray areas in the regulations regarding permissible communications, that is, what the line is between permissible "advertising" and prohibited "solicitation."[194] However, in the context of an existing client of a law firm, the line is actually quite clear. Where the attorney has had a prior professional relationship with the client (while the attorney was still at the firm), she is not subject to the rule against solicitation; only the rule against false or misleading statements. Where there is no prior relationship, the attorney may not take the initiative in offering services to the client. Announcements setting forth general information about the attorney's new practice may be sent, and, of course, the rule against false or misleading statements applies. The most problematic "gray area" cases, those involving mailings directed toward specific persons in need of specific services, are not relevant in this context.

As for the alleged weakness of the regulations, present regulations are in fact quite stringent against false and misleading statements and solicitation of clients. Indeed, they go as far as is constitutionally permitted, as the Supreme Court's scrutiny of them in a series of cases demonstrates.[195] In sum, state regulations provide stringent guidelines for the conduct of attorneys. Also, the application of such guidelines to the departing-attorney context does not pose constitutional problems.[196]

193. For a discussion of *Bates v. State Bar of Arizona,* see *supra* text accompanying notes 67-74.

194. For a discussion of *In re Koffler* and *Kentucky Bar Ass'n. v. Stuart,* see *supra* text accompanying notes 99-102.

195. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); *In re* R.M.J., 455 U.S. 191 (1982); Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447 (1978).

196. It should be noted that using state ethical rules as the standard for a private cause of action does not raise the types of problems raised by implying a private cause of action from a federal or state regulation. *See, e.g.,* Cort v. Ash, 422 U.S. 66 (1975) (private cause of action not implied from Federal Election Campaigu Act, 18 U.S.C. § 610). In the latter situation, *implying* a cause of action may raise problems of conflict with the regulatory scheme. In contrast, using rules of professional conduct as a standard for an *existing* private cause of action does not enlarge or diminish the regulatory scheme.

Finally, the proposed test's use of ethical rules as a basis for liability does not represent an attempt to enforce the ethical ideals of the legal profession through private litigation. The ethical rules do not define "ethical" behavior, but merely define a minimum floor for ethical conduct. Thus, utilizing the ethical *rules* (as opposed to broader ethical "considerations" or principles) as a standard for evaluating conduct amounts to enforcement of the minimal requirement of all attorneys, not of the ideal ethical model. Also, the interference tort proscribes "improper" interferences with economic relationships. "Improper" in the context of an *attorney's* economic relationships necessarily includes the question whether she improperly "solicited" business. Thus, in this particular situation, the legal duty not to interfere "improperly" is, in part, defined by the ethical duty not to "solicit" business. Consequently, in this situation it is appropriate to use the ethical rules as a source of legal liability.[197]

2. *A Separate Standard for the Legal Profession*

A fair objection to the proposed test is that it attempts to set up a separate standard of liability for the legal profession. This would seem to conflict with the policy to make laws uniform and to develop general principles to govern all situations. The problem may appear even more acute given the distrust of the legal profession by some sectors of society.

This issue is a part of the famous Holmes-Cardozo debate over the specificity with which legal standards should be framed.[198] Justice Cardozo argued that standards should be formulated in general terms, thus allowing consideration of relevant variables in any given case.[199] Justice Holmes implied that tests of liability should be stated in more concrete terms for a special class of cases, where there is, for example, only one

197. It is appropriate to use state ethical rules as a standard of liability for the interference tort notwithstanding the admonition by the drafters of the *Model Rules* that "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983). This is because the possible underlying fear of the drafters—that the *Model Rules* might be used out of context as bases for causes of action—does not appear justified in the context of determining the liability of departing attorneys for intentional interference with the former firm's relations with its clients.

The drafters' concerns regarding using ethical rules as a source of legal liability are valid with a tort such as legal malpractice, which takes into consideration many "subjective" factors, such as the appropriate duty of care, and in which the legal duty does not necessarily coincide with the ethical duty. The drafter's concerns, however, are not valid with the interference tort. With the interference tort, the basic standard of "improper" can be defined with relative objectivity by utilizing established guidelines of conduct. Additionally, the legal duty coincides with the ethical duty.

198. *See* Pokora v. Wabash Ry. Co., 292 U.S. 98 (1934) (Cardozo, J.); Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927) (Holmes, J.). The debate in these cases was over the specificity of the definition of the reasonably prudent person standard in the context of railway crossings.

199. *Pokora*, 292 U.S. at 105-06.

variable.[200] The latter approach has several characteristics that may be desirable: (1) it promotes uniformity (and thus predictability); (2) it takes value judgments away from the jury (or judge); and (3) it views law like a code, similar to the criminal law.[201]

The liability standard for intentional interference in the departing-attorney context should take the Holmes approach for several reasons. First, the premise underlying this approach is present: the departing-attorney situation provides a "special class of cases." Second, the benefits of uniformity and predictability are especially important and useful in the context of an *intentional* tort since they enable parties to conform their behavior to the requirements of the law. Third, it is important in this context to narrowly define the duty since there are potentially overlapping legal duties (agency or partnership with tort). Thus, the arguments in favor of Justice Holmes' view have special force in the departing-attorney situation.

A number of other aspects of the legal profession also favor applying a separate tort standard to it. First, the legal profession is a highly regulated industry; it has significant entry barriers (for example, the bar examination), and the means by which attorneys can compete for clients is restricted.[202] Thus, special rules regulating competition within the industry already exist. Creation of a separate tort standard for such an industry allows recognition of such rules. A second factor is the fact that these restrictions have been codified.[203] The codification of these standards makes it particularly useful to use these rules to determine liability for a tort that governs one aspect of the duty to compete fairly. This is particularly true where, as in the legal profession, two developments have taken place: (1) the ethical standards governing competition have become more permissive; and (2) actual competition for clients has increased. To carry out the policies underlying the loosening of restrictions on competition—to allow freer competition for clients, and to provide clients with greater opportunities to make a meaningful choice as to representation—the standards of a tort that regulates one aspect of that competition should, if possible, be made more clear. Therefore, given the regulated nature of the legal profession, and the recent move toward increased competition, a separate tort standard for the profession is appropriate.[204]

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200. *Goodman*, 275 U.S. at 70.

201. *Cf.* Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) (discussing the intuitive appeal of a "scientific law" that conforms to reason, uniformity, and certainty).

202. *See supra* notes 87-114 and accompanying text.

203. *Id.*

204. The same considerations may suggest a similar approach to other regulated professions and areas of business.

3. *Using the Proposed Test as a Framework for Analysis Rather Than as a Separate Test*

For those who object to adopting such a tailored standard as the one proposed here, I would offer the proposed test at least as an example of how courts should think about the interference tort in the departing-attorney context. As this Comment has demonstrated, all departing-attorney situations share a common factual pattern. By focusing on this pattern, some of the factors identified by the *Restatement* can be pared away from the liability analysis; other factors can be eliminated from consideration completely. As a consequence, the courts' inquiry will be more focused on the truly relevant factors, thereby allowing departing attorneys to more accurately predict what they can and cannot do.

The proposed test need not be regarded as an exception to the general rule of liability. Rather, the test can be used to focus the courts' inquiry on the factors truly relevant to assessing whether a departing attorney's conduct was improper.

IV
APPLYING THE PROPOSED TEST

A. Adler, Barish, Daniels, Levin & Creskoff v. Epstein

The *Adler, Barish* courts directly addressed the issues of whether the departing associates' conduct had violated the Pennsylvania Code of Professional Responsibility, and whether the Code's proscription could constitutionally be applied to the associates.[205] While the appellate court held that the conduct did *not* violate the Code, it also noted that "[e]ven if [the associates'] conduct did amount to solicitation . . . [a] finding of 'solicitation' does not foreclose the possibility that the conduct is nonetheless privileged."[206] In other words, the court suggested that certain conduct could be "solicitation" and prohibited by the Code, yet at the same time not be "improper" for purposes of determining liability for interference with contractual relations.

The Pennsylvania Supreme Court, on the other hand, explicitly found that the associates' conduct *did* violate the Code, and that the Constitution permitted regulation of that conduct.[207] In evaluating whether the associates' conduct was "improper," the court found that the associates' departure from recognized ethical codes was significant in

205. 252 Pa. Super. 553, 382 A.2d 1226 (1977). The constitutional issue was raised because the law firm sought injunctive relief. *See supra* text accompanying notes 118-33.

206. *Id.* at 562, 382 A.2d at 1231. The court argued that such a finding would not be dispositive since "the instant proceeding is not a disciplinary one." *Id.* Perhaps because the court did not find the conduct to be "solicitation," it did not feel compelled to address the issue of what weight such a finding would have on the private action.

207. 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied*, 442 U.S. 907 (1979).

evaluating the associates' conduct.[208] Indeed, while invoking the full array of *Restatement* factors for determining whether an interference is improper, the court ultimately focused almost exclusively upon the nature of the associates' conduct, and the effects such conduct might have upon the clients and the law firm.[209]

If the associates' conduct did violate the Pennsylvania ethical code, the proposed test would reach the same result as that of the Pennsylvania Supreme Court. Analyzing the facts of the case under the proposed test, however, would explicitly recognize that liability should be determined by the nature of the associates' conduct: if violative of the Pennsylvania Code of Professional Responsibility, the interference would be "improper."[210] Thus, the approach of the test would be to focus *exclusively* upon the relationship between the associates' conduct and the Pennsylvania ethical rules, with particular attention to whether the purposes behind the rules, the state interests in preventing false and misleading statements and situations presenting danger of undue influence, are present.

Under the proposed test, the inquiry in this case would proceed as follows. First, did the departing associates make any false or misleading statements? As noted before, this would include material misrepresentations, statements that cannot be factually verified (such as quality comparisons), and statements likely to cause nnjustified expectations (such as the promise of a favorable outcome). The defendants in *Adler, Barish* did not make any such statements and thus would pass the first hurdle. Second, did the departing associates have prior professional relationships with the clients? If so, the prohibition against solicitation would not apply, and they could offer services to the clients. If no prior relationship existed, they could not do so. It is not clear from the court's recitation of the facts whether the defendants had any prior relationships with the clients in question. Therefore, it is unclear whether their efforts to lure the clients away from the firm ran afoul of the prohibition against solicitation. If there was no prior relationship, the defendants would be subject to tort liability under the proposed test.

B. Rosenfeld, Meyer & Susman v. Cohen

Analysis of *Rosenfeld* [211] under the proposed test requires distinguishing between acts by the ex-partners which violate their fiduciary

208. *Id.* at 434, 393 A.2d at 1184 (quoting RESTATEMENT (SECOND) OF TORTS § 767 comment c (1979)).

209. *Id.* at 434-37, 393 A.2d at 1184-86.

210. The proposed approach therefore rejects the dictum of the intermediate appellate court to the effect that a finding of a violation of ethical rules does not resolve the inquiry of impropriety.

211. 146 Cal. App. 3d 200, 194 Cal. Rptr. 180 (1983). *See supra* text accompanying notes 134-50.

duties *as partners* (and are best resolved under prevailing partnership law) and acts by the ex-partners which may have amounted to "improper" interference. The behavior of the ex-partners which allegedly caused the interference included statements made to the client to the effect that the firm could not adequately represent the client, and that only the ex-partners could effectively represent the client. This allegation raises two potential sources of liability under the proposed test.

First, the statements regarding the law firm's ability, if shown to be defamatory, would subject the ex-partners to liability under the first part of the test as independently unlawful behavior. Interfering with the firm's contract with the client in this manner is improper and should not be permitted.[212]

Another potential ground upon which the firm in *Rosenfeld* would be able to hold the ex-partners liable under the proposed test is if their conduct violated ethical rules. Under the *Model Rules,* the ex-partners may have violated the rule against false or misleading statements in two respects. First, representations as to the quality of their services versus those of the firm would be misleading because they are factually unverifiable. Second, if the ex-partners promised the client a favorable outcome in the case, this would be misleading because it would create an unjustified expectation of success in the client.

In sum, analysis of *Rosenfeld* under the proposed test would scrutinize the conduct of the ex-partners in light of the standards of tort law and ethical rules. Liability would arise from a violation of one of these bodies of law. Other issues concerning the ex-partners' violation of fiduciary duties *owed as ex-partners* would not be considered in connection with the determination of interference tort liability. On the facts as recited by the appellate court, the ex-partners may have slandered the firm by disparaging its ability to handle the case, and they may have violated ethical rules by making misleading representations as to their comparative abilities. If they violated either tort law or ethical rules, the proposed test would hold them liable for intentional interference.

C. *Interference With Prospective Relations*

While *Adler, Barish* and *Rosenfeld* involved situations in which the firms had existing contingent fee contracts with the clients, the proposed test would also cover claims by a firm against departing attorneys for interference with *prospective* relations with firm clients. For example, while there is no existing "contract" in the case where the firm represents

212. Of course, the firm might also have a cause of action against the ex-partners for defamation. However, where the interfering party induces breach by making fraudulent representations to the *client,* the interference tort provides the party interfered with (here, the firm) with its only recourse against the interfering party.

the client on an hourly basis, the firm does maintain an economic relationship with the client. Departing attorneys may seek to establish ongoing business relations with those clients. Under prevailing interference tort doctrine, the firm, under these circumstances, is entitled to protection from "improper" interference.

Under the proposed test, the departing attorney would have a clear standard against which she could tailor her communications with the client. The departing attorney would have to be sure not to violate tort or criminal law in her actions, and to keep her communications with the potential client within the ethical rules by not making "false or misleading" statements as defined by the *Model Rules*. So long as she stayed within these limits, there would be no fear of liability for interference with the firm's relationship with the client.

Breach of fiduciary duties to the former firm would not be relevant to interference tort liability. The departing attorney also need not worry about whether the client relies primarily on the firm or the individual attorney for representation. As long as the attorney does not act unlawfully or in a way violative of the ethical rules, the attorney has as much right to seek future representation of the client as does the firm.

CONCLUSION

The "interference" torts protect parties in their economic relations from interference by third parties where the interference is "improper." The *Restatement* provides a list of seven factors to be considered in determining whether an interference is "improper," but gives little guidance as to how the factors should be considered together. Because the factual patterns in the departing-attorney context are sufficiently crystallized to permit a more developed test, this Comment argues that the courts should focus on the behavior of the departing attorney and avoid consideration of irrelevant and inappropriate factors. This Comment proposes two bases of liability.

The first source of liability arises where the attorney's behavior is independently wrongful. If the attorney's behavior, under prevailing state law, is either independently tortious or criminal, the attorney should be held liable to the firm for improper interference with relations between the firm and the client.

The second source of liability arises where the attorney's conduct violates state ethical rules regulating the conduct of attorneys. Such a violation would similarly subject the attorney to liability for improper interference.

This Comment applied the proposed analysis to two reported cases which have raised the issue of improper interference in the departing-attorney context, as well as to the prospective relations situation. The

examples demonstrate that the proposed test carries out the goals of the tort while remaining sufficiently flexible to take account of factual permutations. This approach also avoids the consideration of factors relevant to different duties of the departing attorney, as well as of questions which are not resolvable.

Acceptance of the proposed test would probably make it more difficult for law firms to hold ex-partners and ex-associates liable for interference with economic relations between the firm and a former client, since the proposed test narrows the permissible bases of liability. This result is consistent with the recent movement of the legal profession toward a more competitive market,[213] without preventing the interference tort from proscribing the types of unfair competition with which it has traditionally been concerned.

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213. *See supra* text accompanying notes 2-5.

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