

Career Transitions
Cleaving to Clients and Colleagues
Attorney Liability for Tortious Interference

By Eric P. Voigt

Are you thinking about soliciting clients of a competing law firm or leaving your current firm and taking clients and colleagues with you? You should pause before doing so and consider the possibility of being liable for a claim of tortious interference. In one lawsuit, two partners paid over \$2.5 million to their former firm for tortiously interfering with the firm's relationship with one corporate client.

In most states, tortious interference occurs when (1) you use improper means to intentionally induce the breach or termination of another party's contract or business relationship, and (2) the improper act causes the breach or termination, which results in damages. *Restatement (Second) of Torts* § 766. This claim applies to binding contracts (e.g., an employment agreement with a definite duration) and business relationships (e.g., prospective and existing business relationships and contracts terminable at will). The grant of summary judgment for an alleged interferer often hinges on the elements of intent and improper means.

Intent and improper acts. Many states define intent to include either acting with a purpose to interfere or acting with knowledge that interference is certain or substantially certain to occur. Knowledge of another's contract, alone, does not create a presumption of an intent to interfere. Whether conduct is improper should be determined by the binding nature of the interfered interest. In many jurisdictions, binding contracts receive greater protection against outside interference than mere business relationships because parties to binding contracts have a legal obligation to perform the contracts; however, individuals in business relationships have no legal duty to perform. Accordingly, when the interfered interest is a mere business relationship, many states require proof that the alleged improper conduct was independently actionable—meaning, the conduct violated a civil or criminal statute or a common law duty. Acts that are independently actionable include, without limitation, misappropriation of trade secrets, defamation, and malicious prosecution. This article discusses attorney conduct that may be improper.

Lawful solicitation of clients. As a lawyer, you have the right to ask clients of your former firm if they want to retain you as their attorney for pending and future matters and the right to lure away clients of your competitors. The relationships between clients and their attorneys are at-will business relationships, so you are usually not liable for tortious interference unless your conduct is independently actionable. Thus, you may advance your economic interest to the detriment of your competitors and solicit clients by offering them a lower billable rate or using public information about the clients to convince them to hire you. However, you should not solicit clients of your former firm until you have first notified the employer of your departure (secretly luring clients may be a breach of a fiduciary duty, which is independently actionable).

You must avoid certain improper acts when soliciting clients to avoid liability for tortious interference. If you are planning to leave your current firm or have already left, you should not take client files (they do not belong to you) and not delete electronic information about the solicited clients (a crime in some states). Instead, ask the clients you want to retain to request their entire files from their soon-to-be former attorneys. Under Rule 1.16 of the ABA Model Rules of Professional Conduct (adopted by almost every state), attorneys must surrender "papers and property to which the client is entitled," including final documents prepared for the client's use and communications sent to third parties. In a few jurisdictions, legal research memoranda and attorney notes must also be returned to the client. Other improper acts may include (1) violating an ethical rule (in states like New York), such as stating or implying to the client that it must continue to retain you (ABA Formal Opinion 99-414); (2) asserting false statements about the client's current attorney; and (3) using your former firm's client lists to contact clients that you did not personally represent (client lists are trade secrets in some jurisdictions).

Lawful solicitation of employees. You may hire the at-will employees at competing firms or your former firm and not be liable for tortious interference as long as you act properly. For instance, inducing an at-will employee to resign from a competitor by offering the employee a better compensation package than the competitor is proper conduct. Nonetheless, if an employment agreement exists that is terminable only for cause, then the act of inducing a breach of the binding agreement, itself, is likely improper and actionable. *Restatement (Second) of Torts* § 768.

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The take-home lesson is that before you lure away clients or colleagues you should review the applicable ethical rules and law of tortious interference. The jurisdiction where you (the potential interferer) reside is not necessarily the controlling law. Under the conflict-of-laws rules, the place of injury determines the applicable law or is at least a significant factor. Thus, the law of the state where the injured law firm is located applies or likely applies. For a detailed discussion of tortious interference law, see *Driving Through the Dense Fog: Analysis of and Proposed Changes to Ohio Tortious Interference Law*, 55 Clev. St. L. Rev. 339 (2007).

NEXT STEPS

[Partner Departures and Lateral Moves: A Legal and Ethical Guide](#). PC # 5110693. Law Practice Management Section.

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