Inducing a Breach of Attorney-Client Relationship

In the recent case of *Jackson v. Traveler's Insurance Co.*, the Federal District Court for the Middle District of Tennessee stated: "While the law does not bind a client to an attorney merely because [the client] has entered into a contingent fee contract, the court will vigorously protect the contractual relationship when a third party wilfully interferes with this relationship by inducing the plaintiff-client to discharge [his] attorney and settle with the third party."[1] This language is typical of the approach taken by many courts in protecting an attorney from third parties who attempt to induce a breach of the attorney-client relationship.[2]

Generally the law protects the attorney from third-party inducement of a breach of his relationship with a client by giving the attorney an action in tort for damages. The general theory of recovery has been based on the traditional liability for tortious interference with a valid contract.[3] However, to speak in terms of such abstract generalities is not really helpful in an analysis of the problem, for courts formulate and decide issues upon a consideration of fact situations. Different fact situations call for different arguments by the parties and, consequently, for different treatments by the courts. Although these principles apply in the inducement to breach cases, it is possible to group fact situations in this area into three broad headings. Accordingly, the discussion below analyzes the inducement to breach problem in cases in which (1) insurance companies are involved in the inducement; (2) other non-lawyers are involved; and (3) lawyers themselves induce the breach.

Insurance Adjusters and Claims Representatives

Jackson v. Traveler's Insurance Co.[4] provides an excellent example of the classic situation in which an insurance adjuster induces a breach in the attorney-client relationship. Mrs. Edwards, a passenger, was seriously injured in a one-car collision. The automo-

1. 403 F. Supp. 986, 998-99 (M.D. Tenn. 1975).

2. *See* Annot., 26 A.L.R. 3d 679, 697 (1969). For a different focus on the same topic covering cases up to 1967 see Note, 55 Ky. L.J. 682 (1967).

3. *E.g.*, Bennett v. Sinclair Nav. Co., 33 F. Supp. 14 (E.D. Pa. 1940); Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945); Herman v. Prudence Mut. Cas. Co., 92 Ill. App. 2d 222, 235 N.E.2d 346 (1968).

4. 403 F. Supp. 986 (M.D. Tenn. 1975).

bile in which she was riding was covered by a liability policy issued by Traveler's Insurance Co. By an oral contingent fee contract Mrs. Edwards retained Jackson as her attorney while she was in the hospital, and, accordingly, Jackson notified Traveler's that he was Mrs. Edwards' lawyer. Several weeks later an adjuster from Traveler's went to the apartment of Mrs. Edwards and informed her that Traveler's would no longer continue to pay her medical expenses and to compensate her for loss of wages if she retained Jackson as her attorney. As the court points out, Mrs. Edwards at this time was permanently disfigured, sick, weakened, and totally disabled. She also had a dependent child. When the adjuster left the apartment he had obtained a written statement from Mrs. Edwards that Jackson did not represent her. Jackson was notified that his services were no longer needed, and Mrs. Edwards entered into a disputed settlement with Traveler's. Jackson brought suit for damages, alleging that Traveler's had wrongfully induced the breach of the attorney-client contract between himself and the insured.[5]

At trial Traveler's argued that it was not unlawful for an insurance company with a direct interest in a claim to enter into a settlement, despite the fact that the terms of the settlement may compromise the alleged contractual obligations of the settlor, and that it was desirable public policy for a party to be free to settle his own case without his attorney's consent.[6] Defendant also argued that the oral contingent fee agreement between Edwards and Jackson was not a lawful attorney-client contract because it violated Disciplinary Rule 5-103(B) of the *Code of Professional Responsibility* of the American Bar Association which prohibits an attorney from guaranteeing financial assistance to his client.[7] As to the latter argument, the court found that there were no facts showing a violation of the rule and that the oral contract between Edwards and Jackson was a lawful attorney-client contract.[8] As to the former argument, the court replied that it was better public policy to "vigorously

5. *Id.* at 988-94.

6. *Id.* at 998.

7. *See* ABA, CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE], Disciplinary Rule [hereinafter cited as DR] 5-103(B). The rule provides that while representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client except that a lawyer may advance or guarantee the expenses of litigation, including court costs, provided the client remains ultimately liable for such expense.

8. 403 F. Supp. at 999.

protect" the "solemn and serious" attorney-client contractual relationship.[9] The operative facts here showed that Edwards and Jackson had a valid oral contingent fee contract, that the defendant was informed of it, and that there was evidence that the defendant did not merely make a fair settlement with the client without his attorney's consent, but also overreached a vulnerable party to get the settlement. The court found that the defendant induced the breach of contract between attorney and client, and it awarded 1,000 dollars in damages to the attorney.[10]

There have been several similar cases in which courts have reached the same result.[11] Attorneys have even been successful in suing their client's own insurance company for inducing a breach in the attorney-client contractual relationship.[12] However, in at least two cases the defendant insurance companies have made arguments which have persuaded the courts.

In *Goldman v. Home Mutual Insurance Co.,* defendant insurance company argued that it had not been sufficiently notified of the attorney's contractual rights with his client, and the court agreed, holding for defendant, even though the evidence showed that defendant had notice of client's retainer with attorney.[13] One wonders what this court required as "sufficient notice" of an existing contractual relationship. Nevertheless, it appears that if the insurance company can prove no knowledge of the contractual substance of the attorney-client relationship, it cannot be found to have intentionally, wilfully, wrongfully, or unlawfully induced the breach.

Suppose the defendant can show that the settlement was fair and that the complaining attorney was paid the proper percentage of the settlement found in his contingent fee agreement. Here again insurance companies have met success, for at least one court has refused to find an actionable inducement of a breach of the

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9. *Id.* at 998-99.

10. *Id.* at 999-1000.

11. *See* Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945); Employers Liab. Assurance Corp. v. Freeman, 229 F.2d 547 (10th Cir. 1955) (similar facts pointing to overreaching—even to fraud by adjuster); Herron v. State Farm Mut. Ins. Co., 14 Cal. Rptr. 294, 363 P.2d 310 (1961) (court found the inducement of the breach of contract need not be unlawful, but could also be unjustified); State Farm Mut. Ins. Co. v. St. Joseph's Hosp., 107 Ariz. 498, 489 P.2d 837 (1971).

12. State Farm Fire Ins. Co. v. Gregory, 184 F.2d 447 (4th Cir. 1950).

13. Goldman v. Home Mut. Ins. Co., 22 Wis. 2d 334, 126 N.W.2d 1 (1964).

attorney-client contractual relationship.[14] Courts in this situation seem to be receptive to the argument that public policy favors allowing the client complete freedom to settle even though the client has retained counsel. As one court has reasoned, the claim belongs to the client not to the attorney; settlement by the client minimizes public as well as private expense.[15]

But suppose, unlike in *Jackson,* that the insurance adjuster causes a breach in an attorney-client contract which contains some invalid provision such as prohibiting the client from compromising and settling his claim out of court or requiring the client to secure approval of counsel before settling. The courts have split in their treatment of this question. Some have found that the facts justify accepting the defendant's argument that the invalid provision was so material to the attorney-client contract that the entire contract was void and unenforceable, and consequently that there could be no liability for inducing a breach of it.[16] And at least one court has been willing to accept the injured attorney's argument that the invalid provision could be separated from the rest of the otherwise valid contract leaving a valid contract on which to base a cause of action.[17]

When the facts have shown that the attempted inducement of the breach of the attorney-client relationship by the insurance adjuster has actually caused no damage to the attorney, defendant insurance company typically has argued that the tort action must show ascertainable damages as an element of the cause of action, or else it fails. If the attorney was not dismissed by his client or in some other way suffered actual monetary damage, he has not been able to bring suit in some courts.[18] Does this mean that an attorney

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14. *See* Krause v. Hartford Accident & Indem. Co., 331 Mich. 19, 49 N.W.2d 41 (1951).

15. Goldman v. Home Mut. Ins. Co., 22 Wis. 2d 334, 126 N.W.2d 1, 5 (1964).

16. Barnes v. Quigley, 49 A.2d 467, 468 (Mun. Ct. App. D.C. 1946) (contract provision binding client not to compromise and settle his claim out of court held invalid). *See* Cummings v. Patterson, 59 Tenn. App. 536, 442 S.W.2d 640 (1968) (invalid provision was that client must secure approval of counsel before settling); *cf.* Marcus v. Wilson, 16 Ill. App. 3d 724, 306 N.E.2d 554 (1973) (contract to collect on invalid note held invalid).

17. *See* Richette v. Soloman, 410 Pa. 6, 187 A.2d 910 (1963) (clause of irrevocability held invalid but separable).

18. *See* Jamail v. Thomas, 481 S.W.2d 485 (Tex. Civ. App. 1972). *See also* Harmatz v. Allstate Ins. Co., 170 F. Supp. 511 (S.D.N.Y. 1959)(attorney tried to

who has a faithful client is at the mercy of an insurance adjuster who constantly attempts to induce a breach of the attorney-client contractual relationship by trying to make unfair settlements with the client without the attorney's knowledge or consent? *Herman v. Prudence Mutual Casualty Co.* provides one solution.[19] There the court held that the plaintiff-attorney was entitled to injunctive relief against defendant insurance company and one of its adjusters since there were no damages and no adequate remedy at law.[20]

Other Non-Lawyers

Situations involving insurance adjusters and claims representatives are not the only examples of inducements by third parties to breach the attorney-client relationship. Take for example the case in which the employer of the attorney's client threatens to fire the client and to withhold injury compensation funds if the client-employee does not discharge his attorney. In fear of losing all means of support, the client thus discharges his attorney. Such extortionate behavior by the employer clearly seems to be malicious interference with the attorney-client relationship and it has been so judicially interpreted.[21] A harder case, however, arises when the employer does not threaten the employee who has retained an attorney but instead convinces the employee-client that it is in his best interest to settle out of court and not to sue. As a result, the client discharges the attorney. The result of such a case would seem to depend on the manner in which the employer convinces his employee not to bring suit. If the employer induces a breach of the attorney-client contract in an unjustifiable or unlawful manner, however, one can analogize from the insurance adjuster cases to find the employer liable for inducing a breach of the relationship. *Greenberg v. Panama Transport Company* is an example of this result.[22] There the foreign corporate employer, through its agents and in bad faith, falsely led its foreign seaman employee to believe

base his claim on an unauthorized medical examination of his minor client by insurance company).

19. Herman v. Prudence Mut. Cas. Co., 92 Ill. App. 2d 222, 235 N.E.2d 346 (1968).

20. *Id.*, 235 N.E.2d at 352.

21. Richette v. Soloman, 410 Pa. 6, 187 A.2d 910, 914 (1963) (Because the interference was malicious the court allowed the attorney to recover punitive damages).

22. Greenberg v. Panama Transport Co., 185 F. Supp. 320 (D. Mass. 1960).

that he would be financially better off to rely on his Spanish contract for compensation rather than to bring suit in an American court using an American attorney. The employer painted a false picture of the American system of justice to the unknowing seaman who then discharged his attorney and left the United States. The court found that the plaintiff-attorney had a cause of action.[23]

Whether a husband can be found liable for inducing his wife to breach her contractual relationship with her attorney whom she has retained for a pending suit is another ramification of this problem. Again the facts of the case determine the outcome. Courts have looked to see the degree, manner, and purpose of the husband's interference. Since most courts have recognized the necessity of balancing the husband's interest in family reconciliation with the attorney's interest in preserving the attorney-client relationship, the husband has argued that he has the right to induce the breach because the public interest in a cohesive, reconciled marriage far outweighs the attorney's monetary interest in the contract with the client-wife.[24] The attorney-plaintiff has argued that there are even stronger policy reasons for vigorously safeguarding the attorney-client relationship from any outside intermeddling. Furthermore, the attorney's case is strengthened if he shows that the husband furthered his own monetary interests by the interference.[25]

Financial advisers to an attorney's client also have been found liable for unjustifiably or unlawfully inducing a breach in the attorney-client relationship. In one case a widow retained the services of an attorney under an oral contract to close the estate of her deceased husband. The widow also consulted a certified public accountant to help her with tax problems of the estate. The tax consultant asked the widow if she had an attorney to close the estate, and she identified her attorney. The tax consultant indicated that the attorney was unsatisfactory and recommended another. The widow then dismissed the attorney who sued the tax consultant for inducing a breach in the attorney-client contract. The tax consultant argued that, as the client's financial adviser, he was privileged

23. *Id.* at 323.

24. *See* Abrams & Fox, Inc., v. Briney, 39 Cal. App. 3d 604, 609-610, 114 Cal. Rptr. 328, 332 (1974).

25. *Id.* at 606-07. (court found the husband liable because he was trying to promote his own monetary interests and he used threats of refusing reconciliation with his former wife if she did not discharge her attorney).

to recommend a better lawyer. However, this argument was summarily rejected in *Calbom v. Knudtzon.*[26]

Engaging in malicious prosecution or bringing unfounded disbarment proceedings which cause a client to lose confidence in the attorney and to breach a contract with the attorney are also actionable interferences with the attorney-client relationship. If the attorney is actually disbarred as a result of the suit, his clients really have no choice but to disregard their contractual relationship with him and to seek other counsel. Analytical problems have arisen under these facts as to whether there was a breach in the attorney-client contract and, if so, by whom. It would seem that the doctrine of impossibility would excuse both attorney and client from the contract. At least a few courts have been willing to look beyond the narrow concept of breach and to focus on the result effected by the interference.[27] The attorney has been just as wrongfully damaged as a result of the interference as if his client had actually breached the contract, and one court has recognized a cause of action against those who instigated the malicious prosecution.[28] If the disbarment proceedings are eventually unsuccessful but the accused attorney's contracted clients lose confidence in him and discharge him before the proceedings end, one problem confronted in the prior fact situation is not present. Clearly the client has breached the contract as a causal result of the actions of those bringing the suit. One court has allowed an attorney to recover damages on a showing that the disbarment suit was unfounded.[29]

In all the preceding fact situations a contractual relationship has existed between attorney and client. Often, however, no contractual arrangement is found. When the client has customarily employed the attorney for legal services whenever needed, for example, and an interfering third party has caused the client no longer to employ that attorney, one jurisdiction recognizes the tort of wrongful interference with a business relationship and prospective

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26. Calbom v. Knudtzon, 65 Wash. 2d 157, 396 P.2d 148, 153-54 (1964). *See* Frazee v. Citizens Fidelity Bank and Trust Co., 393 S.W. 2d 778, 784 (Ky. Ct. App. 1964) (dictum) (the court stated that trust institutions should not interfere with an attorney-client relationship).

27. French v. United States Fidelity & Guar. Co., 88 F. Supp. 714 (D.N.J. 1950); Stein v. Schmitz, 21 N.J. Misc. 218, 32 A.2d 844 (1943).

28. French v. United States Fidelity & Guar. Co., 88 F. Supp. 714 (D.N.J. 1950).

29. Stein v. Schmitz, 21 N.J. Misc. 218, 32 A.2d 844 (1943).

economic advantage.[30] The application of the tort theory allowing recovery for wrongful interference with a business relationship and prospective economic advantage to this situation has impliedly recognized the special relationship between the attorney and his customary client even though they are under no current contract for legal services.[31] Valuable for both the attorney and the client, the noncontractual relationship would seem to deserve protection. Furthermore, this tort theory might be available when for some reason the contract between the attorney and client is invalid. This concept is relatively new and untried, probably because of the difficulty of proving damages. But one court has stated that a plaintiff-attorney may recover in an action for wrongful interference with noncontractual business relationships,[32] but another has refused to extend protection to the attorney.[33]

Lawyers

When another attorney induces the breach of an attorney-client relationship, he is, of course, subject to the same causes of action as the non-attorney tortfeasor. When the attorney of a potential party defendant induces a settlement with a client of another attorney without consulting the attorney, he can be liable for damages for unjustified interference with the attorney-client contractual relationship.[34] Also, the lawyer who persistently tries to interfere with an attorney's client by inducing a settlement without the attorney's knowledge can be subject to an injunction restraining him from such action.[35]

Attorneys are also subject to very special rules of conduct because of their professional legal status. Very stringent safeguards exist to prohibit an attorney from inducing a breach in the attorney-client relationship of another lawyer.[36] Furthermore, attorneys are under a strong ethical obligation not to steal one another's clients

30. Hansen v. Barrett, 183 F. Supp. 831 (D. Minn. 1960).
31. *Id.* at 832.
32. *Id.* at 833.
33. Walsh v. O'Neill, 350 Mass. 586, 215 N.E.2d 915 (1966).
34. Skelly v. Richman, 10 Cal. App. 3d 844, 89 Cal. Rptr. 556 (1970).
35. Herman v. Prudence Mut. Cas. Co., 92 Ill. App. 2d, 235 N.E.2d 346 (1968).
36. *See* ABA CANONS OF PROFESSIONAL ETHICS, Canon 7. The third paragraph in part provides: "Efforts direct or indirect, in any way to encroach upon the professional employment of another lawyer, are unworthy of those who should be brethren at the Bar. . . ."

by inducing a breach between another attorney and his client with the purpose of obtaining the client for himself.[37]

In addition to being professionally bound not to steal another attorney's clients, an attorney is also under an ethical obligation not to deal directly with the clients of other lawyers.[38] One evident reason for the ethical mandate is that by dealing directly with another's client, an attorney might induce a breach in the attorney-client relationship. Consequently, Canon 9 of the American Bar Association *Canons of Professional Ethics, inter alia*, states that it is expressly unethical for an attorney to communicate upon the subject in controversy with a party represented by counsel or to negotiate or compromise the matter with the client without the other attorney's knowledge, consent, or presence.[39] The aim of the rule has been said to be to preserve the proper functioning of the legal profession as well as to shield the adverse party from improper approaches.[40]

Sanctions are available against the attorney who induces a breach of an attorney-client relationship in disregard of Canon 9. Violations of the ABA *Code of Professional Responsibility* may lead to permanent disbarment, suspension from practice, or a reprimand.[41] *Carpenter v. State Bar* is one example in which an attorney was suspended for negotiating directly with a client of another lawyer.[42] Yet even the attorney who escapes an official legal sanction suffers from his behavior, for he loses the "highest reward" of being an attorney—"the esteem of his professional brethren."[43]

Conclusion

It is a matter of debate whether the courts, in the language of *Jackson*, have shown a commitment to "vigorously protect"[44] the attorney-client relationship from third party inducement to breach it. Certainly courts have been willing to protect any valid contrac-

37. *See* H. DRINKER, LEGAL ETHICS 190 (1953) [hereinafter cited as DRINKER]. To support this proposition Drinker cites cases not exactly on point. Cases on this point are apparently scarce.

38. DRINKER, 190 (1953).

39. *See* ABA CANONS OF PROFESSIONAL ETHICS, Canon 9.

40. ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS, No. 108 (1934).

41. French v. United States Fidelity & Guar. Co., 88 F. Supp. 714, 726 (D.N.J. 1950).

42. 210 Cal. 520, 292 P. 450 (1930).

43. DRINKER, 190 (1953).

44. Jackson v. Traveler's Ins. Co., 403 F. Supp. 986, 998 (M.D. Tenn. 1975).

tual relationship from unlawful or unjustified interference under certain fact situations. The interfering party can be an insurance adjuster, employer, spouse, some financial consultant, or an attorney. The inducement of the breach may take the form of a settlement of a pending claim directly with the client (especially if the settlement is unfair), threats against the client if he does not discharge his attorney, malicious prosecution, or some other action showing unjustified or unlawful interference resulting in some benefit to the inducer. Expanding the cause of action to include tort liability for unjustified interference with some non-contractual relationship between attorney and client would seem to be a significant extension of protection to both attorney and his client. Personal and confidential in nature, the attorney-client relationship may be more easily disturbed than a less sensitive contractual relationship.[45] Vigorous protection by the courts is desirable.

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45. *In re* Dunn, 205 N.Y. 398, 399, 98 N.E. 914, 915 (1912).