Lawsuits against Litigators? Try Tortious Interference

T. Leigh Anenson

I.
Introduction

A new problem is assuming prominence in the changing landscape of litigation. Adversaries are interfering with litigation *by* litigation that seeks to exploit the attorney-client relationship. The interference occurs when parties or their counsel instigate a countersuit against opposing advocates to create a conflict of interest, thereby precipitating their removal from the case. To combat this strategic separation of client from counsel, attorneys should consider a claim for tortious interference with the attorney-client relationship.

Every litigator no doubt has experienced the traditional litigation "tricks of the trade" to some extent. Typical tactics include the shotgun complaint, discovery abuses, delay, and "dumb" shows, among others. New efforts to garner improper litigation leverage, however, are raising the bar. These abuses target the attorney-client relationship itself, seeking the removal of counsel by creating a conflict of interest in the current case.

II.
New Threat to Advocacy

Motions to disqualify opposing counsel or schemes that cause opposing counsel to become a witness in the case have been the subject of recent focus.[1] Another more serious threat to the advocacy process, however, is frivolous litigation against lawyers involved in the pending lawsuit. These countersuits inevitably sound in tort, based on allegations of litigation misconduct.

---

[1] *See* Alexander W. Jones, Note, *Defenses to Disqualification: Fact Situations That Allow an Attorney to Avoid Disqualification for a Conflict of Interest*, 27 J. Legal Prof. 195, 195 (2003) ("Attorney disqualification motions are increasingly becoming a litigation tool."); *see also* Douglas R. Richmond, *The Rude Question of Standing in Attorney Disqualification Disputes*, 25 Am. J. Trial Advoc. 17, 31-32 (2001) (discussing how attorneys use disqualification under the Model Code of Professional Responsibility to prevent a matter from reaching trial).

T. Leigh Anenson is of counsel at Reminger & Reminger, Co., L.P.A., a defense litigation firm with offices in Cleveland, Akron, Youngstown, Toledo, Sandusky, Columbus, and Cincinnati, Ohio, as well as Lexington and Florence, Kentucky. She teaches law at the University of Maryland, and can be reached at lanenson@reminger.com.

III.
Inadequacy of Remedies

Unlike conflict motions filed during an initial lawsuit, the subject litigation of this article involves a separate lawsuit that is instigated before a different judge in the same or even a different court. The litigation privilege (absolute immunity defense) often is resolved too late in the second case to prevent an attorney's withdrawal from the first.[2]

In terms of defending this extraneous litigation, the more traditional counterclaims for malicious prosecution and abuse of process are generally disfavored and present obstacles for litigation against litigating lawyers.[3] Many jurisdictions continue to require a seizure of property as a condition for malicious prosecution, which prevents the use of this claim as a viable defense remedy.[4] The malicious prosecution cause of action also requires favorable resolution of the maliciously filed lawsuit.[5] The practical effect of this element eliminates its

---

[2] *See* T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 Pepp. L. Rev. 915, 946-48 (2004).

[3] *See, e.g.*, Chittenden Trust Co. v. Marshall, 507 A.2d 965, 969 (Vt. 1986) (declaring an action for malicious prosecution disfavored in the law); *see also* John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 Hofstra L. Rev. 433, 454 (1986) (noting that there "are comparatively few cases in which [the tort of malicious prosecution] has been successfully maintained").

[4] The seizure requirement has been retained despite criticism. Wade, *supra* note 3, at 494 (describing the law as "quite rigid" and "not materially changed since the early days of the Republic," having retained the early misinterpretations even "after the error has been pointed out"); Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J. 1218, 1219 (1979) ("[T]he American system for dealing with groundless suits is sensitive neither to the history in which it has its roots nor to the needs of the modern judiciary.").

[5] Restatement (Second) of Torts §§ 674-681B (1979) (wrongful use of civil proceedings).

use while the principal case is still pending. Likewise, a counterclaim for abuse of process is concerned not with the institution of a lawsuit but with the improper use of an individual legal process.[6] As such, an abuse of process claim may not be applicable in the subsequent (attorney) lawsuit to redress the original (client) lawsuit. Moreover, neither abuse of process nor malicious prosecution would be available to clients who lack standing to pursue them.

While parties may resort to the bar association, ethical proscriptions apply only to the opposing advocate who creates the conflict. Such professional punishment would likely be post hoc and would not prevent or remedy the damage caused to the attorney and client who are involved in the pending substantive litigation. Consequently, even assuming that a bar-related complaint results in a reprimand or sanctions against the attorney who initiated the interference, it would not provide monetary or any other relief to litigants who are victimized by a separate lawsuit against their chosen counsel. Furthermore, the court's inability to provide consequential damages in the frivolous lawsuit also severely impairs the utility of the rules of procedure. Rule 11 sanctions for vexatious litigation, for example, restrict recovery to attorney fees and costs.[7]

IV.
Interference Tort Antidote

Tortious interference appears to be the claim that holds the greatest promise for client and counsel. The cause of action usually is employed to remedy unfair competition in the commercial contract environment. Nevertheless, the tort now encompasses many types of contracts, including prospective and at-will economic relations. For the past fifty years or so, courts have brought the attorney-client relationship within the ambit of the tort's protection.[8]

---

[6] *See id.* § 682 (abuse of process).

[7] *See* Fed. R. Civ. P. 11 (providing that the court shall impose an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the document); *see also* Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions,* 21 Pepp. L. Rev. 1067, 1143 (1994) (proclaiming that "[l]everage suits represent litigation at its worst" and that sanctions schemes are an ineffective deterrent because the cost of the potential fee award does not begin to approach the benefit of such tactics).

[8] *See* Eugene Mullens, Note, *The Attorney as Plaintiff: Tortious Interference with Contract and the Attorney-Client Relationship*, 55 Ky. L.J. 682, 684 (1967) (explaining that it was not until the decade of the 1960's that a majority of courts began to recognize the interference tort as protecting attorney-client relations).

The Restatement (Second) of Torts rendition of the tort is the most popular. Section 767 provides that only "intentional" and "improper" interference are actionable. The latter involves a classic balancing test whose determination of impropriety requires a consideration of the surrounding circumstances. Conduct is deemed improper after an evaluation of the public and private interests advanced by the interference is balanced against those of the relationship.[9] The motive and method of interference also are key determinants.[10]

Significantly, there is universal recognition that spurious litigation is a powerful weapon and provides grounds for tortious interference. In *Snyder v. Sony Music Entertainment, Inc.*,[11] a New York appellate court pronounced that " '[w]rongful means' includes . . . civil suits [or] criminal prosecutions." The Texas Court of Appeals in *Hughes v. Houston Northwest Medical Center, Inc.,*[12] also reminded litigants that filing a lawsuit can constitute grounds for tortious interference: "Litigation is a powerful weapon, and when instituted in bad faith for the purpose of causing damage or loss, it is a wrongful method of interference."

Given the standard-like quality of the interference test, however, the tort is often criticized for its ambiguity and inconsistency of application.[13] Inevitably, an evaluation of liability entails the reconciliation of conflicting policies. The tort of intentional interference with contract is aimed at balancing the "interests in the sanctity of commercial contract against promoting competition in the context of the free enterprise system."[14] Its operation to thwart conflict creation through the prosecution of opposing counsel, by contrast, "juxtaposes the interest . . . of the special fiduciary relationship between advocate and litigant with the countervailing interest in open courts and the ideal of liberal advocacy."[15] Therefore, the resolution of a lawsuit that concerns the unethical pursuit of litigation leverage will involve a compromise along the same lines. Consideration of the interests at stake will best enable court and counsel to define and apply the interference tort when adversaries (or their attorneys) attempt to secure an unfair advantage in the underlying litigation.

---

[9] Restatement (Second) of Torts § 767 (1979); *see id.* § 767 cmt. j.

[10] *See id.* § 767 cmt. d (indicating that interference motivated by ill will may *ipso facto* constitute tortious interference); *id.* §767 cmt. c (citing the method of interference as "chief" among its non-exclusive list).

[11] 684 N.Y.S.2d 235, 239 (App. Div. 1999).

[12] 680 S.W.2d 838, 842 (Tex. App. 1984).

[13] *See* Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response*, 38 Ariz. L. Rev. 1175, 1218-20 (1996) (summarizing academic criticisms). *See generally* Amy Timmer, *Interference with Prospective Contractual Relations: A Tort Only a Mind Reader Could Plead in the Michigan Courts*, 45 Wayne L. Rev. 1443 (1999).

[14] T. Leigh Anenson, *Creating Conflicts of Interest: Litigation as Interference with the Attorney-Client Relationship*, 43 Am. Bus. L. J. 173, 174 (2006).

[15] *Id*.

V.
Litigious Interference Cases

Two recently reported cases involved claims of tortious interference stemming from a prior countersuit against counsel. In both cases, the courts recognized the tort to remedy adversarial interference in the original (client) lawsuit caused by the naming of the opposing advocate as a defendant in a subsequent (attorney) lawsuit.

In *McCall v. Tana Oil & Gas Corp*.,[16] an intermediate appellate court in Texas rejected the argument that the interference tort was not available as a cause of action when an adversary sues the opposing advocate during ongoing litigation. On further appeal, however, the Supreme Court of Texas in *Tana Oil & Gas Corp. v. McCall*[17] denied the attorneys' tort claim for lack of evidence regarding any interference with their representation. Despite the subsequent lawsuit against them, counsel acknowledged that they had fully performed their responsibilities to their client in the original lawsuit. Given the nature of its disposition, the court did not clarify or even discuss the elements of litigious interference with the attorney-client relationship.

In *Erlandson v. Pullen,*[18] the Court of Appeals of Oregon also addressed the interference tort in resolving a case of litigious interference between client and counsel. The appellate court found that the lower court properly denied a directed verdict because there was sufficient evidence to support the claim. It had inferred the existence of intentional and improper interference from the fact that the advocate was named as a defendant in a lawsuit as well as from the attorney-opponent's knowledge of the harm this would likely cause to the attorney-client relationship. As to damages, the court emphasized the following testimony:

> [Counsel] testified to the harm caused to his relationship with defendant because of this lawsuit. He stated that it injected an adversary relationship between them and created a built-in conflict of interest between himself and his client. He testified to additional legal fees that defendant incurred as a result of his being named a defendant and the necessity of obtaining another counsel in this case. He stated that their relationship was severed as to a number of pending cases.
>
> [The client] also testified to the higher legal fees he had to pay as a result of plaintiff filing suit against [his attorney]; the necessity and difficulty in securing new counsel; and the fact that he was forced to terminate his relationship with [his] attorney.[19]

---

[16] 82 S.W.3d 337 (Tex. App. 2001), *rev'd in part*, 104 S.W.2d 80 (Tex. 2003).

[17] 104 S.W.3d 80.

[18] 608 P.2d 1169 (Or. Ct. App. 1980).

[19] *Id.* at 1177.

Regardless of the evidence, however, the trial court failed to instruct the jury on the impropriety of the interference. Thus, the appellate court ultimately reversed the judgment in favor of the client for the loss of his counsel.[20]

Given the small number of cases on point, counsel may find some guidance in the judicial treatment accorded torts involving interference with business relations by litigation. In particular, an analogy can be drawn by matching cases concerning the same method of interference, albeit with a different relationship. In the business setting, precedent follows two tracks: cases that ignore ancillary tort causes of action such as malicious prosecution and abuse of process, and cases that fully converge them.

The first analytical track has been followed in many cases involving the interruption of business relations. Courts essentially have compartmentalized the analysis of the different tort theories. The decision in *Breslin v. Vornado, Inc.*,[21] provides an example of this approach. In *Breslin*, the District Court for the Eastern District of Pennsylvania dismissed a claim of malicious prosecution for the filing of a *lis pendens* relating to land upon which a proposed shopping center was to be built because it did not constitute a seizure of property under Pennsylvania law. Yet, premised on the same allegations, the court found the basis for an intentional interference claim. Similarly, in *Lyon v. May*,[22] a North Carolina Court of Appeals held an interference claim available to redress the attachment of insurance proceeds, but it denied an abuse of process claim, finding no basis to support an ulterior motive for the attachment proceeding.

By contrast, cases of interference in the second analytical track have merged the analysis of the interference tort into theories of frivolous litigation. Explicit efforts to unify tortious interference theory with the other relevant tort claims are evident in decisions by various courts in Connecticut, Massachusetts, and Oregon. In a case of first impression, the Supreme Court of Connecticut in *Blake v. Levy*[23] determined that the prosecution of unfounded litigation constitutes actionable "improper means" of interference by incorporating the claim of malicious civil prosecution. The court disregarded precedent that analyzed the torts separately. The Supreme Court of Massachusetts in *G.S. Enterprises., Inc. v. Falmouth Marine, Inc.*,[24] and the Court of Appeals of Oregon in *Mantia v. Hanson*,[25] also explicitly endorsed defining impropriety under interference law by reference to the determinants of frivolous litigation law.

---

[20] *See id.*

[21] 559 F. Supp. 187 (E.D. Pa. 1983).

[22] 424 S.E.2d 655 (N.C. Ct. App. 1993).

[23] 464 A.2d 52 (Conn. 1983).

[24] 571 N.E.2d 1363 (Mass. 1991).

[25] 79 P.3d 404 (Or. Ct. App. 2003).

These two diverging lines of precedent illustrate the need to clearly articulate a theory of litigious interference with the attorney-client relationship. Inquiry into the relationship between litigious interference and claims of unfounded litigation offers a promising way to integrate the different claims within a rational framework. When interference occurs with legal representation during an ongoing lawsuit, however, total convergence of the related claims is unwarranted. As a result, counsel should urge the court *not* to adopt the simplistic approach of defining liability under the rigid principles of wrongful civil proceedings.

For reasons discussed at the outset, limiting litigious interference to the elements of malicious prosecution or abuse of process likely leaves a client and his or her counsel without a remedy. The unusual and severe nature of the harm in cases involving the advocate-client relationship, as well as the important public policies at stake, serve to distinguish attorney-client relationship cases from those cases where litigation is used to interrupt a business relationship. Indeed, forcing the withdrawal of opposing counsel through litigation involves depriving a satisfied client of his or her chosen counsel by compulsion. As a corollary to effective representation, the client's freedom to choose a lawyer is a critical component of the law of professional responsibility. Notwithstanding the ideal that justice can be achieved with any competent counsel, the reality is that the quality of a particular counsel (along with the resources available to his or her particular firm) is often outcome determinative. Accordingly, allowing judicial access to one party in a subsequent suit against opposing counsel has the direct effect of denying judicial access to the other party in the pending dispute.

Because the security of the relationship between client and counsel is central to the truth-seeking mission of the legal system, separate and independent tort protection is especially important when enterprising litigants and their lawyers attempt to disrupt that relationship by means of an ancillary lawsuit. In light of the foregoing, neither of the existing outcomes (pure compartmentalization or total convergence) in litigious tortiuous interference with business should define the tort of litigious interference with the attorney-client relationship.

VI.
Restatement Reformulation

The development of an appropriate standard of litigious interference in the attorney-client context is analyzed in "Creating Conflicts of Interest: Litigation as Interference with the Attorney-Client Relationship," published in a recent volume of the *American Business Law Journal*.[26] In sum, the article relies on the Restatement definition with some additional considerations to inform the analysis.

[26] *See generally* Anenson, *supra* note 14.

The proffered solution retains the element of intent, but departs from the relativism of the Restatement in defining improper interference and entrusting the issue to the jury. In particular, it posits that proof of interference by either the absence of a legally cognizable claim or the existence of a reprehensible purpose should suffice to frame the definitions of these objective and subjective determinants under the professional standards of ethics.

The "[v]iolation of recognized ethical codes for a particular area of business activity or of established customs or practices regarding disapproved actions or methods" has always been instructive on the issue of interference.[27] In fact, in assessing tortious interference with the attorney-client relationship by means other than litigation, courts have found that ethical violations fulfill the requirement of improper interference. Cases reaching this resolution come from California in *Frazier, Dame, Doherty, Parrish & Hanawalt v. Boccardo, Blum, Lull, Niland, Teerlink & Bell*,[28] and Pennsylvania in *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*.[29] The Supreme Court of Ohio in *Fred Siegal Co. v. Arter & Hadden*,[30] also indicated that ethical violations were relevant in a case alleging interference with the attorney-client relationship. Professional disciplinary rules are replete with ethical constraints on groundless litigation and should therefore illuminate the liability for litigious interference.

Furthermore, allowing proof in the disjunctive (the existence of malice or an absence of probable cause) closely parallels that recommended in the Restatement (Second) of Torts when litigation is used as the method of interference. In that regard, comment c of section 767 of the Restatement (Second) of Torts provides that the prosecution of civil suits is:

> [O]rdinarily wrongful if the actor has no belief in the merit of the litigation or if, though having some belief in its merit, he [or she] nevertheless institutes or threatens to institute the litigation in bad faith, intending only to harass the third parties and not to bring his [or her] claim to definitive adjudication.

Courts such as the Supreme Court of Arizona in *Safeway Ins. Co. v. Guerrero*,[31] have relied on comment c to define attorney liability for tortious interference. Moreover, as evidenced by the Utah decision in *Leigh Furniture & Carpet Co. v. Isom*,[32] proof of malice *or* an absence of probable cause is consonant with the overriding importance of motive and means in determining improper interference.

---

[27] *See* T. Leigh Anenson, *Litigation Between Competitors with Mirror Restrictive Covenants: A Formula for Prosecution,* 10 Stan. J.L. Bus. & Fin. 1, 16 (2005) (quoting Restatement (Second) of Torts § 767 cmt. c (1979)).

[28] 138 Cal. Rptr. 670 (Ct. App. 1977).

[29] 393 A.2d 1175 (Pa. 1978). *But see* Brown v. Larkin & Shea, P.A., 522 So. 2d 500 (Fla. Dist. Ct. App. 1988) (holding that violation of disciplinary standards did not constitute interference).

[30] 707 N.E.2d 853 (Ohio 1999).

[31] 106 P.3d 1020 (Ariz. 2005).

[32] 657 P.2d 293 (Utah 1982).

Still, this more liberal liability standard is not without consequence since it removes the protection for trial lawyers enunciated in section 674 of the Restatement (Second) of Torts addressing malicious prosecution. The Restatement rules entitle attorneys to file unfounded claims, assuming they have a proper purpose in aiding the client or, in the alternative, they have probable cause for their action (but an improper purpose).[33]

Another deviation from the Restatement rules is the role of the decision-maker. The intensely fact-based inquiry into motive should remain with the jury as it does in cases of malicious prosecution. Nonetheless, deciding whether there is an objectively reasonable basis for the lawsuit constitutes a legal matter that should be allocated to the court. Judicial cognizance of impropriety conflicts with the controversial rationale set forth in comment l to section 767 of the Restatement (Second) of Torts, which suggests a jury determination of the issue.[34] Despite its divergence from the Restatement, allowing a judge to determine whether there is probable cause accords with early interference doctrine as well as groundless litigation cases and legislative enactments that counter frivolous litigation.[35]

Policing litigious interference cases involving the attorney-client relationship also resonates with the judicial function in dealing with an array of other economic interests that are protected by torts such as defamation and disparagement.[36] Moreover, creating the contours of an interference tort that balances the countervailing policies regarding incentives or disincentives for litigation in light of professional ethics is an area that lies particularly within the competence of the court.

Along with the content of the tort, two other concerns may arise in prosecuting a claim for litigious interference with the attorney-client relationship. These issues include whether the interference tort may be pled as a counterclaim (or separate action), and the availability of attorney immunity defenses in response to tortious interference. Each is addressed below.

VII.
AVAILABLITY AS COUNTERCLAIM

The advocate facing a claim by a party opponent should be allowed to assert an interference cause of action by counterclaim. While the dangerous potentialities of using malicious prosecution as a defensive subterfuge underpin the rule that it must be pled separately only

---

[33] RESTATEMENT (SECOND) OF TORTS § 674 cmt. d (1979).

[34] *Id*. § 767 cmt. l.

[35] *See* Jerry C. Estes, *Expanding Horizons in Law of Torts—Tortious Interference*, 23 DRAKE L. REV. 341, 358 (1974) (discussing cases that withhold the determination of impropriety from the jury); Gergen, *supra* note 13, at 1226 (criticizing Restatement position).

[36] *See* RESTATEMENT (SECOND) OF TORTS § 614(1) (1979) (indicating that the judge determines whether a communication is capable of a defamatory meaning); *see also id*. § 652(1)(b), (e) (indicating that the judge determines whether the interest is afforded protection).

after a favorable termination of the improper lawsuit, the equally dangerous risk of filing a lawsuit against opposing counsel justifies settling the matter at one time. Because the litigation already has escalated from one lawsuit to two, it is advisable to settle the matter with a counterclaim rather than creating additional satellite litigation by means of a third lawsuit. In fact, a few states like Tennessee and Washington have eliminated the favorable termination element of malicious prosecution statutorily in order to avoid a multiplicity of lawsuits.[37]

The freedom of lawyers to encourage lawsuits likely to result in out-of-court settlements (and thereby obviate the favorable termination requirement) is what precipitated the medical malpractice crisis. Legal professionals who are subject to frivolous lawsuits face similar issues; the adverse impact on their reputations or the fact that an insurance carrier will satisfy claims may compel settlement and preclude a claim for tortious interference. In addition to shortening the time period of exposure and uncertainty to the advocate, resolution of the interference issue would largely coincide with the plaintiff's case so as to minimize duplication of proof. In any event, if case management becomes too difficult or would result in prejudice, the court has the ability to separate the issues for trial.

VIII.
Denial of Absolute Immunity Defense

While advocates and their clients who file countersuits should continue to benefit from a qualified immunity, they should not escape liability on the basis of absolute immunity. Also known as the "litigation privilege," the doctrine of absolute immunity shields litigation lawyers and their clients from civil liability for their conduct during judicial proceedings.[38] The defense originated as a critical component of the advocacy system to bar claims that would disrupt the litigation process or deter persons engaged in that process from performing their respective functions.[39] Absolute immunity has precluded legal theories of interference with contractual or advantageous business relations and, in some cases, abuse of process and malicious prosecution as well.[40]

---

[37] Tenn. Code Ann. § 29-26-116(b) (2006); Wash. Rev. Code Ann. § 4.24.350(1) (LexisNexis 2006).

[38] *See* Anenson, *supra* note 2, at 917.

[39] *See* T. Leigh Anenson, *Immunity for Advocates? Absolutely*, 18 Prof. Liab. Underwtg. Soc'y J., Feb. 2005, at 9; Anenson, *supra* note 2, at 920-21.

[40] *See* Anenson, *supra* note 2, at 917.

The doctrine applies regardless of malice, bad faith, or ill will of any kind, so long as the suspect conduct has some relation to the litigation. The nexus requirement relegates protection under the privilege to actions in furtherance of legitimate litigation goals. The legal limitation of relevance accommodates the purposes of the doctrine in preserving the attorney-client relationship so long as there are internal sanctions available for relief from abusive trial tactics. This rationale underscores the Washington Court of Appeals determination in *Story v. Shelter Bay Co*.,[41] holding that the privilege does not extend to statements made in situations for which there are no safeguards against abuse. Accordingly, regardless of the theory of prosecution, courts have denied absolute immunity for actions that are designed to deprive parties of their chosen counsel. Such was the situation in *LanChile Airlines v. Connecticut General Life Insurance Co.*[42] Cases of retribution that escalate the existing dispute by filing claims in a new forum and interrupting or ending the attorney-client relationship compel a similar decision.

The foregoing reasoning was adopted by an Oregon appellate court in *Mantia v. Hanson,*[43] which considered the defense of absolute immunity for the first time in a case of litigious interference with employment relations. Refusing to shield an attorney from liability, the court declared that a "defense of absolute privilege cannot defeat a claim for tortious interference where the . . . defendant's conduct was such that the underlying purposes of the privilege would not be served by immunizing that conduct."[44] It then determined that interference via wrongful initiation of proceedings was such egregious conduct as to strip the attorney of any immunity defense.[45]

Applying Pennsylvania law, the Third Circuit Court of Appeals in *Silver v. Mendel*[46] reached the same conclusion. Relying on the protective rationale that supports absolute immunity when advancing legal claims, the court found that supportive rationale thwarted by the filing of a groundless involuntary petition in bankruptcy, which would not further the exploration of claims in litigation.[47] As such, the court refused to allow an attorney and his client to escape liability for interference with prospective contractual relations under the doctrine of absolute immunity.[48]

---

[41] 760 P.2d 368 (Wash. Ct. App. 1988).

[42] 731 F. Supp. 477 (S.D. Fla. 1990) (applying Florida law).

[43] 79 P.3d 404 (Or. Ct. App. 2003).

[44] *Id.* at 414.

[45] *Id.*

[46] 894 F.2d 598 (3rd Cir. 1990).

[47] *Id.*

[48] *Id.*

While attorneys are more susceptible to claims for wrongful use of civil proceedings, refusing the defense of absolute immunity under these narrow circumstances will not dampen the work of dedicated advocates. The advocacy system depends on participants who are committed to maintaining the legal framework; this necessitates a system with failsafe procedures to correct institutional failures.

IX.
CONCLUSION

The growing importance of conflict creation as a form of unfair advocacy requires new methods of protection. While tortious interference has antecedents in the Roman and English common law, its application to the attorney liability claims discussed above is an original response to what has become a formidable weapon in the litigation arsenal. Litigators who face lawsuits by opposing litigants should consider the claim of tortious interference to counter an ongoing crisis that has the potential to become pervasive.