AN ETHICAL RABBIT HOLE: MODEL RULE 4.4, INTENTIONAL INTERFERENCE WITH FORMER EMPLOYEE NON-DISCLOSURE AGREEMENTS AND THE THREAT OF DISQUALIFICATION

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AN ETHICAL RABBIT HOLE: MODEL RULE 4.4, INTENTIONAL INTERFERENCE WITH FORMER EMPLOYEE NON-DISCLOSURE AGREEMENTS AND THE THREAT OF DISQUALIFICATION, PART I

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ABSTRACT

The Model Rule 4.4 prohibition on the use of methods of obtaining evidence that violate the rights of third parties can be read to prohibit the informal questioning of a former employee with a non-disclosure agreement to advance a proposed or pending lawsuit, as this may constitute the tort of intentional interference with contract. The use of non-disclosure agreements is proliferating and, although actual tort liability in this context has hardly ever been litigated, it is easy to strategically use this tort to allege an ethical violation that can be the basis of a disqualification motion. The threat of such disqualification can severely chill such informal discovery as considerable attorney's fees may be at stake. However, it is far from clear that such conduct by lawyers would really either subject them to tort liability or produce a breach of an enforceable contract. This legal uncertainty creates an “ethical rabbit hole.” Part I of this Article shows that the tort of intentional interference with contract is still evolving and shows considerable variation across jurisdictions along such elements as the knowledge required for intentional conduct and the litigation privilege. Although there are excellent arguments to suggest that lawyers should not be liable for such conduct, the possibility of such liability cannot be conclusively ruled out in many jurisdictions. In Part II of this Article, the analysis turns to the underlying non-disclosure agreement. It is argued that, as employers seek to extend non-disclosure agreements beyond information usually viewed as proprietary under the law to limit informal discovery of employer wrong-doing, serious public policy questions about the legitimate scope and enforceability of such agreements are raised. Finally, the question of whether such conduct should be viewed as unethical

* Professor of Law, Drake University Law School. I am grateful to Dean David Walker and the Law School Endowment Trust for their generous support of this project, to Dean Allan Vestal and Professor Keith Miller for their careful readings and helpful comments, and to my family, as always, for everything.
is addressed. This Article argues criticizes the possible use of a rarely asserted and unpredictable tort to define ethical conduct as an improper and imprudent delegation of our professional power. Burdening informal discovery with a threat of disqualification will allow wrongdoing to be buried by employee confidentiality agreements.

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INTRODUCTION, PART I

Can a lawyer be disqualified from representation simply because they have had an informal conversation with a former employee with a non-disclosure agreement? A few years ago, lead counsel for plaintiffs in a major class-action suit faced just such a threat. A former employee of the defendant corporation, not previously identified during several years of discovery, contacted a journalist writing about the case with important new information about wrongful acts taken by the corporation. The journalist passed the name to counsel and when counsel spoke with the former employee, startling new information came to light. A subsequent request for documents related to the disclosure revealed to the defendant that there was an undisclosed employee source of information about the corporation and defendant demanded the name of the former employee. Upon discovering that the former employee had signed a non-disclosure agreement, defendant claimed that the information in question was confidential business information, that its disclosure outside of formal discovery violated the non-disclosure agreement, and that counsel’s conduct was unethical. In particular, counsel was alleged to have violated Model Rule of Professional Ethics 4.4, which prohibits using a method of obtaining evidence that violates the rights of third parties, by interfering with the non-disclosure contract. This claim of unethical conduct then formed the basis for a motion to disqualify counsel from representation in this major class-action suit, a case that had been pursued on a contingency basis for several years.

While vigorously opposing the disqualification on the merits at considerable expense, counsel offered not to use the evidence revealed by the former employee in order to avoid any suggestion of impropriety. There was no disqualification in the end, possibly because counsel had asked about the possibility of a non-disclosure agreement and that the former employee had forgotten that any such agreement had been signed, but it was quite a scare. What if counsel had not asked, or the employee had remembered? Would counsel have been disqualified? What if the

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1 The details of this skirmish are covered by a protective order and not publicly available, however, I am personally familiar with the facts through my participation in the case as a legal expert. This summary also reflects only part of the facts in the actual case.
2 American Bar Association Model Rule of Professional Ethics 4.4(a).
3 Id.
evidence given up had been central to the case?

With employer use of non-disclosure agreements proliferating, the threat of an ethics violation, loss of evidence, and disqualification could well be enough to discourage lawyers from engaging in informal discovery with any former employees, some because they may be known to have signed a non-disclosure agreement, others because they merely might have signed such an agreement. However, is there really any possibility that it is unethical to informally communicate with a former employee with a non-disclosure agreement, known or unknown, and could this possibly justify disqualification anyway? Since Model Rule 4.4 only makes conduct that violates the rights of third parties unethical, the legitimacy of your conduct will depend on whether your conduct violated the substantive law of contract and tort.

Substantive law often plays an important role in defining conduct that conforms to or violates the Model Rules of Professional Conduct. Criminal law and the law of fraud are particularly important for setting the bounds of ethical conduct. Where certain non-criminal conduct associated with the practice of law may in fact be “prohibited by law,” the Model Rules both alerts lawyers to this possibility and makes such conduct unethical where illegal. Conversely, where statutory law expressly permits

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4 American Bar Association Model Rules of Professional Conduct, (2006) ABA Model Rules of Professional Conduct will hereinafter be referred to as the “Model Rules” and individual rules will be preceded by the designation “MR.”

5 For example, it is an ethical violation to engage in or assist with certain criminal or fraudulent conduct, or fail to take action to avoid assisting a client with in a criminal or fraudulent act. See MR 3.4(a) (prohibiting unlawful obstruction, alteration, destruction or concealment of evidence described in Comment 2 as an “offense”); MR 3.5(a)( prohibiting influencing judges, jurors and others “by means prohibited by law”); MR 8.4(a) (prohibiting lawyers from committing criminal acts that suggest a lack of honesty, trustworthiness or fitness as a lawyer); MR 1.2 (prohibiting a lawyer from assisting a client in or counseling a client to engage in criminal or fraudulent conduct, where fraud or fraudulent is defined in MR Rule 1.0(d) as “conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction”).

At the same time, it is not an ethical violation to disclose client information to prevent or mitigate a crime or fraud. See MR 1.6(b)(2)(allowing a lawyer to reveal client information when the lawyer reasonably believes disclosure is necessary to prevent certain crimes or frauds) & (3)(allowing such disclosure to prevent, mitigate or rectify financial/property injury arising from a crime or fraud).

6 E.g., MR 1.5(c) (“A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by . . . other law”); MR 1.7(b)(2)(“Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if . . . (2) the representation is not prohibited by law”); MR 3.4(b) (“A lawyer shall not . . . (b) offer an inducement to a witness that is prohibited by law”); MR 3.5(c)(1) (prohibiting post-discharge communication with jurors if prohibited by law); MR 3.6(b)(1) allows extrajudicial lawyer statements of the identity of persons involved in litigation “except where prohibited by
conduct that otherwise falls within broad descriptions of unethical conduct, the Model Rules may make an exception to the ethical prohibition by referencing authorization by “other law.”

Lastly, the Model Rules also requires lawyers to determine their ethical obligations in the context of the law entire, both statutory and common, such as when it broadly forbids lawyers from representation of clients that would result in violation of other law, or allows a lawyer to reveal client information when the lawyer reasonably believes disclosure is necessary to comply with other law.

Although it may seem unnecessary to make unethical that which is already illegal, there are good reasons to “piggyback” ethical standards on at least some legal standards. First and foremost, our effectiveness as officers of the court, with a primary charge of furthering respect for and conformity to the law, requires that we ourselves respect and conform to the

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7 E.g., MR 1.11(a)(c) & (d) prohibit former government lawyers from certain conflicted representation “[e]xcept as law may otherwise expressly permit”; MR 1.15(d) (“Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive”); MR 1.16(d) (“The lawyer may retain papers relating to the client to the extent permitted by other law”); MR 3.5(b) (prohibiting ex parte communications with judges, jurors or prospective jurors “unless authorized to do so by law”); MR 4.2 prohibits communications with represented persons unless “authorized to do so by law”; MR 5.5(b)(1) prohibits lawyers not admitted in a jurisdiction from systematic and continuous practice there unless “authorized by . . . other law”; MR 5.5(c)(2)(permitting temporary practice authorized by law).

8 E.g., MR 1.16 (a)(1) (“a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law”);

See also, MR 1.4(a)(5)(“A lawyer shall . . . consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law”); MR 1.13(b) (“if a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law”); MR 4.4(a) (prohibiting the use of “methods of obtaining evidence that violate the legal rights” of third parties); MR 6.2(a) (prohibiting a lawyer from attempting to avoid court-appointed representation unless the representation is likely to result in violation of the law); MR 8.4(e) barring claims that a lawyer can achieve results by means that violate the law; and MR 8.4(f) (prohibiting assisting judges in conduct that violates the law).

9 MR 1.6(b)” (b)A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . (6) to comply with other law”). See also, MR 8.1(b) (requiring lawyers and applicants for admission to the bar to respond to lawful demands for information from the bar except where such disclosures are barred by Rule 1.6).
law, particularly as it applies to our conduct in the practice of law itself.\textsuperscript{10} Second, referencing standards that have been thoroughly worked out in the legal context, such as the criminal law and the law of fraud, allows the Model Rules to take advantage of this work without complicating the Rules themselves. Third, it is generally not unreasonable to expect lawyers to have the skill and knowledge required to determine the contours of applicable substantive law; after all, this is precisely what they are expected to do for clients. Finally, making such illegal conduct unethical ensures that the bar can discipline lawyers for conduct it wants to deter, even if such lawyers have managed to avoid judgment or liability due to lack of prosecution or suit.

Sometimes, however, determining the legality of “unethical-if-illegal” conduct will require a very complex analysis that may ultimately produce a conclusion that the legality of the conduct is unpredictable. In such situations, the purposes otherwise justifying legal referencing by the ethical rules are not served. When the law is unclear about what is and is not illegal, it may not be necessary for lawyers to avoid such conduct in order to maintain and promote respect for the law. Indeed, the reference to substantive law in such an ethical rule does not necessary reflect agreement that the conduct in question is ethically problematic. In addition, what is otherwise a useful shortcut for the bar fails to operate as such. Both lawyers and disciplinary entities will be forced to enter an “ethical rabbit hole,” a long and tangled detour into the law producing an uncertain answer. If the possible ethical violation can be the basis of a motion to disqualify, then clients and the courts will also suffer the effects of the ethical rabbit hole, as such motions are easily made, highly strategic,\textsuperscript{11} expensive to defend\textsuperscript{12} and ultimately require a judge to predict how a disciplinary panel would interpret this uncertain law.

Model Rule 4.4 contains just such an ethical rabbit hole. The relevant provision states, “[i]n representing clients, a lawyer shall not . . .

\textsuperscript{10} Accord, Irma S. Russell, The Evolving Regulation of the Legal Profession: Costs of Indeterminacy and Certainty, http://ssrn.com/abstract=1357609, at 14 (University of Tulsa Legal Studies Research Paper No. 2009-08)(arguing that the incorporation of the common law of misrepresentation into Model Rule 4.1, while injecting the uncertainty of the common law into the Rules, “ultimately serves the interest of lawyers by reminding them of the continuing application of positive law to lawyers”).

\textsuperscript{11} In re: EXDS, Inc., 2005 WL 204020, at 3 (N.D. Cal.)(noting that motions to disqualify not involving direct conflict of interest are “part of the tactics of an adversary proceeding ”)(quoting J.P Foley & Co., Inc. v. Vanderbilt, 523 F.2d 1357, 1360(2nd Cir. 1975).

\textsuperscript{12} See Developments in the Law: Conflict of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1285(1981)( “Lawyers have discovered that disqualifying counsel is a successful trial strategy, capable of creating delay, harassment, additional expense, and perhaps even resulting in the withdrawal of a dangerously competent counsel.”).
use methods of obtaining evidence that violate the legal rights of [a third person]."\(^{13}\) To the extent that the Rule forbids criminal methods of obtaining evidence, the prohibition is clear enough: methods of obtaining evidence such as burglary, extortion, physical compulsion and illegal phone recordings\(^{14}\) are forbidden to lawyers. Similarly, to the extent the Rule prohibits methods of obtaining evidence which involve conduct prohibited by civil statutes or court rules, the reach of the rule is not difficult to determine, as such statutes are likely to be quite narrow.\(^{15}\) However, the Rule also appears to extend its prohibition to methods of obtaining evidence that involve tortious conduct. While this may not be problematic for a good deal of tortious conduct, if a lawyer’s conduct falls within a tort whose contours are still evolving, it may be quite difficult to predict whether the conduct will be ethical.

The focus of this Article is on the possibility that a lawyer informally seeking evidence about an employer from a former employee will run afoul of the still-evolving tort of intentional interference with contract. Now that it is clear that the ethical rules allow attorneys to contact former employees without notice to, or the consent or presence of counsel for their former employer,\(^{16}\) lawyers can use informal methods of

\(^{13}\) MR 4.4(a)
\(^{14}\) E.g. In re: Henry Lebensbaum, 2005 WL 5177246 at –(Mass. Bar Disciplinary Decisions and Admonitions, Nov. 15, 2005)(finding a violation of MR 4.4(a) when a lawyer himself or through his client made an unauthorized entry into client’s husbands home office and emailed business records from husband’s computer to lawyer). See also, American Bar Association Formal Ethics Opinion 01-422, text at fn. 31-32 (2001)(noting that nonconsentual recording of conversations is a crime in a number of states and would violate the proscription against methods of obtaining evidence that violate the rights of third persons in MR 4.4).

\(^{15}\) E.g., Conn. Informal Ethics Opinion 96-4, at 2 (1996)( stating that a Connecticut lawyer had violated MR 4.4 simply by receiving a client’s ex-wife’s psychiatric records, when a state law forbade the disclosure or transmission of psychiatric records without the consent of the patient and the client had gotten the custodian to improperly release the records to the lawyer merely by signing his own name to a release request); Carol A. Gilbert, 2005 WL 5177277 (Mass. St. Bar Disp. Bd 2005)(finding a violation of MR 4.4 when a lawyer used her position as bar advocate in juvenile court to obtain criminal offender record information about the father of her minor child); In the Matter of a Member of the State Bar of Arizona, Michael L. Freeman, 2008 WL 6550121 (Az. Disp. Com. 2008)(finding a violation of MR 4.4 by lawyer who obtained counseling records of minor abuse victim by serving a subpoena duces tecum to counselor without notice to minor’s counsel after trial court denied motion to compel production of such records).

\(^{16}\) Model Rule 4.2, comment 7 (“Consent of the organization’s lawyer is not required for communication with a former constituent”). See also Davis v. Washington County Open Door Home, 2000 WL 1457004, at 5, n. 8(S.D. Ohio 2000)(“[r]quiring the approval and the presence of corporate counsel would have the inevitable effect of chilling the exchange of information, because former employees would most likely be hesitant about speaking freely in the presence of their former employer’s attorney”).
investigation to take advantage of the very useful information former employees often have about the wrongdoings of their former employees, as long as they steer clear of attorney-client privileged and work product information and a few other avoidable ethical potholes. At the same time, the use of post-employment confidentiality or non-disclosure agreements ("NDAs") has proliferated. If the former employee in question is subject to an NDA, informal pre- or post-filing investigative conversations with former employees could be viewed as tortious interference with these agreements, and therefore a violation of Model Rule 4.4 as well.

The operative word here is "could be." Predicting the applicability of this tort turns out to be extremely difficult to do with any certainty. As the Restatement of Torts itself notes, "[u]nlike other intentional torts . . . , this branch of tort law has not developed a crystallized set of definite rules as to the existence or non-existence of a privilege to act." This means that a crucial element of the tort, whether the interference was improper or not,

17 E.g., In re: EXDS, Inc., 2005 WL 204020, at 3 (noting that informal discovery of former employees provides relevant factual evidence in a cost-effective manner).
18 See Model Rule 4.4, comment 1 ("the rights of third persons . . . include . . . unwarranted intrusions into privileged relationships"); Davis v. Washington County Open Door Home, 2000 WL 1457004, at 5 (S.D. Ohio 2000) (noting that opinions by the Ohio federal courts and the Ohio Supreme Court’s Board of Commissioners on Grievances and Discipline had allowed ex parte contact with former employees conditioned upon avoidance of attorney-client communications, among other things).
19 Other potentially ethical violations that can arise from conversations with former employees on behalf of a client include Model Rule 4.3 ("Dealing with Unrepresented Person), Model Rule 4.2 ("Communication with Person Represented by Counsel), Model Rule 7.3 ("Direct Contact with Prospective Clients"), Model Rule 1.7 ("Conflict of Interest"), Model Rule 3.4 (Fairness to Opposing Party and Counsel")). See generally Susan Becker, Discovery of Information and Documents from a Litigant’s Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles, 81 Neb. L. R. 868, 889-913 (2003) (discussing all these potential violations).
20 Katherine Stone, Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace, 34 Conn. L.R. 721, 723 (2002) ("[m]ore and more, employers are requiring employees to sign covenants not to compete and covenants not to disclose confidential information at the outset of an employment relationship")
21 Communications with former employees with NDAs through the processes of formal discovery are not prohibited by Model Rule 4.4 for a number of reasons. Such communications would not meet many of the elements of the intentional interference tort, since the court rather than the lawyer would be inducing the disclosure, discovery disclosures are not a breach of the NDA contract, and the disclosures would likely fall within the litigation privilege. Also, as supervised by a court, such disclosures would be difficult to see as a method “of obtaining evidence that violate[s] the legal rights of . . . [a third] person,” M.R. 4.4.
22 Restatement (Second) of Torts, § 767, comment b.
must be resolved on a case-by-case basis by weighing a number of factors, of which the Restatement provides only a non-exhaustive list.\(^{23}\) Other elements of the tort are equally problematic. Even the application of the litigation privilege,\(^{24}\) a well-established common law privilege protecting otherwise tortious conduct relating to judicial proceedings by lawyers, judges, parties and witnesses,\(^{25}\) is unsettled in this context. Furthermore, such tort liability is premised on a valid NDA that actually covers the information in question, which raises additional complicated questions.

\(^{23}\) Id. at comments a & b (noting in comment a that resolving the issue of improper interference involve “the most frequent and difficult problems of the tort of interference with a contract”). See also William J. Woodward, Contractarians, Community, and the Tort of Interference, 80 Minn. L. Rev. 1103, 1117-18 (1996) (noting that these “multiple, relatively vague factors make predicting the outcome of litigation very difficult”).

\(^{24}\) As will be discussed in more detail below, this privilege was initially developed to immunize parties and lawyers from defamation suits arising from statements made in the course of litigation, which could otherwise deter legal action, Price v. Armour, 949 P.2d 1251, 1258 (Utah 1999)(“The whole purpose of the judicial privilege is to ensure free and open expression by all participants in judicial proceedings by alleviating any and all fear that participation will subject them to the risk of subsequent legal actions.”), but it has since been extended to most jurisdictions to other torts, including interference with contract. E.g., Echevarria, McCalla, Rayner, Barrett & Frappier v. Cole, 950 So. 2d 380, 384 (Fla. 2007) (“The litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute, or of some other origin.”); Price, 949 P.2d at 1258 (holding that the privilege applies to intentional interference with business relations claims as well as “all claims arising from the same allegedly defamatory statements”); Clark v. Druckman, 624 S.E.2d 864, 872 (W.Va. 2005) (“the litigation privilege generally operates to preclude actions for civil damages arising from an attorney’s conduct in the litigation process . . . [except for] claims of malicious prosecution and fraud”); Fisher v. Lint, 868 N.E. 2d 161, 170 (Ma. App. Ct. 2007) (applying the privilege “broadly” to dismiss an intentional interference with advantageous relations claim); Silberg v. Anderson, 50 Cal.3d 205, 212 (1990) (noting that the California statute that codified the litigation privilege has been held to apply to “all torts except malicious prosecution”); Rainier’s Dairies v. Raritan Val. Farms, 117 A.2d 889, (N.J. 1955) (holding the litigation privilege extended to intentional interference with business relations); Laub v. Pesikof, 979 S.W.2d 686, 691-92 (Tex.App.-Houston 1 Dist., 1998) (holding that the privilege extends to communications in the course of judicial proceedings that would otherwise created liability for tortious interference with a contract. But see Tulloch v. JPMorgan Chase & Co., 2006 WL 197009, at 7 (S.D.Tex.) (holding in a diversity case that Texas would not extend the litigation privilege to avoid contract damages for non-defamatory litigation communications in breach of a contract) ); Mantia v. Hanson, 79 P.3d 404, 414 (Or. App. 2003) (holding that the otherwise absolute litigation privilege immunizing attorneys from tortious interference claims was lost where the conduct satisfied the requirements for wrongful initiation of civil proceedings/malicious prosecution); Kahala Royal Corp. v. Goodsell Anderson Quinn & Stifel, 151 P.3d 732, 752 (Hawaii 2007) (holding that the litigation privilege applies to tortious interference conduct only absent proof of malice).

To answer the ultimate question about the ethics of such conduct, it is also necessary to consider whether MR 4.4 should be understood to make investigation by mere conversation, which is how the tort would arise, an unethical and prohibited method of obtaining evidence. If tort law actually does extend this far, at least in some jurisdictions, ought we to embrace the limits thereby imposed on lawyers and make them our own? If we do rubberstamp such tort law in the ethical rules, it provides opposing counsel with a very simple and potent threat; without ever actually litigating the tortiousness of the conduct or making an ethical complaint, the opposing party can move to disqualify the lawyer on the mere possibility that a lawyer may have violated MR 4.4(a) by speaking with a former employee with a NDA during their investigation of the case. This threat so immediately threatens the pocketbook of lawyers and clients that it may in fact create more deterrence than either the threat of tort liability, which is remote in time, expensive for the other side to pursue, and might be covered by malpractice insurance, or the threat of discipline, which is even more remote as opposing counsel can not get a strategic benefit from any possible discipline and likely suffers from the bar-wide reluctance to report possible ethical violations. Thus, without a deliberate decision as to whether we do indeed want to deter such conduct by litigation counsel, the Model Rules could be understood to have handed opposing counsel a weapon capable of producing a serious chill in litigation investigations, or, at the very least, greatly increasing the cost of litigation by shifting informal investigation to formal discovery.

The complexity of the legal and ethical rabbit hole created by the possibility that MR 4.4(a) includes intentional interference with contract as a prohibited method of obtaining evidence has required that the analysis be split into two parts, published as separate articles. In this Article, Part I, I will examine the applicability of the interference with contract tort to investigative questioning of former employees with NDAs by litigation attorneys without considering whether the non-disclosure agreement is both relevant and enforceable. In a second article, Part II, I will consider the contract issues involved in interpreting and enforcing such NDAs, as there

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26 See Becker, 81 Neb. L. R at 981 (noting the threat of ethical violation and trial sanction when former employees with confidentiality agreements are contacted ex parte).
27 Accord, Davidson Supply Co., Inc. v. P.P.E., Inc., 986 F.Supp. 956, 958(D. Md 1997)) (noting that motions to disqualify “cause tremendous disruption to the orderly handling of the case (not to mention the expenditure of time and money on attors ancillary to the merits)”).
28 See Chambers v. Capital Cities/ABC, 159 F.R.D. 441, 445 (S.D.N.Y. 1995) (“agreements calling or appearing to call for silence concerning matters relevant to alleged legal violations, whether or not such agreements are sought to be enforced, inherently chill communication relevant to the litigation”).
can be no tort liability without a breach of an enforceable contract. I will also consider in the second article the extent to which MR 4.4(a) can fairly be understood to extend to such conduct, even if it is tortious, and whether it ought to cover such conduct.

I. LIABILITY IN TORT

The still evolving tort of “Intentional Interference with Performance of Contract by Third Person” is defined by the Restatement (Second) of Torts as follows:

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.

The focus of the discussion in Part I will be on the application of these tort law requirements to the conduct of a litigation attorney who seeks verbal information on behalf of a client from the former employee of a defendant or potential defendant where such former employee has signed a non-disclosure or confidentiality agreement.

A. A CONTRACT

To begin with, this tort liability is premised both on the presence of a contract between “another and a third party” and the breach of this contract. For purposes of the tort discussion in Part I, we shall assume both an apparent contract of some possible relevance between the former employee and their former employer and a breach of the contract, although these raise their own issues which will be discussed in Part II. There are, however, two contract law issues that are expressly taken up as part of the tort law analysis of the interference tort. First, a contract that is void ab initio because it is illegal or in violation of public policy is not a contract at all, and cannot be tortiously interfered with. The necessity of considering whether and under what circumstances NDAs may be in

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29 Restatement 2nd of Torts, § 766 (2006)
30 Id.
31 Restatement (Second) of Torts, § 774, comment b (2006)
32 Id. See also, Chemtrust Industries v. Share Corp. et al., 1987 WL 13822, at 7 (S.D. Tex. 1987)(“a contract that is held void as against public policy” cannot “support a tortuous interference claim”).
violation of public policy must be resolved to determine the ethics of conduct under MR 4.4, however, this will be taken up in detail in Part II, published as a separate Article, as this is a matter of contract rather than tort law.

A second contract law issue -- contracts voidable under the statute of frauds, mutuality doctrines, and common law defenses like fraud and duress -- has become more generally relevant for the tort law concerning interference with contract. There is disagreement as to whether a contract that is voidable by the breaching party can be tortiously interfered with as “an existing contract” or whether it can only be interfered with as “a prospective contract.” The distinction between interference with an existing contract and a prospective contractual relation has significance because actors have more freedom to interfere with prospective contractual relations than with actual contracts, as long as they do not use methods that go beyond fair competition. In particular, competitive interference with a merely prospective contract must be independently wrongful or unlawful to be improper and create liability, while this is not the case for interference with an existing contract. The Restatement (Second) of Tort appears to support treating voidable contracts as existing contracts and has garnered a certain amount of support for this position. However, the California

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33 PMC, Inc. v. Saban Entertainment, Inc., 45 Cal.App.4th at 595
34 Restatement (Second) of Torts, § 768(1)(b) and comment e (wrongful means must be used for interference with prospective contractual relations to be improper). See also Central Sports Army Club v. Arena Associates, Inc., 952 F.Supp. 181, 190 (S.D.N.Y. 1997) (infancy defense requires showing of wrongful means); Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 953-54 (CA C.A. 2003)(voidable contract requires unlawful conduct).
35 Restatement (Second) of Torts, § 766 (requiring improper interference for interference with contract) and § 767, comment c (noting that interference can be improper even if innocent means are used).
36 The Restatement is not consistent or clear on this point. Compare Restatement (Second) of Torts, § 766, comment f (2006) (“The third person may have a defense against action on the contract that would permit him to avoid it and escape liability on it if he sees fit to do so. Until he does, the contract is a valid and subsisting relation, with which the actor is not permitted to interfere improperly.”) with Restatement (Second) of Torts, § 774, comment b (“The contract, however, may not be void and may be merely voidable by one party or the other or enforceable by one of them. To the extent that an agreement is not void but is a subsisting contract, the actor may properly cause its breach by means that are not wrongful and under the rule stated in this Section is still not liable.”). Accord, Guard-Life Corp. v. S. Parker Hardware Mfg., 406 N.E.2d 445, 449 (N.Y. 1980) (majority holding that the Restatement supports treating interference with voidable contracts as interference with prospective contractual relations, while the dissent interprets the Restatement as clearly requiring voidable contracts to be viewed as existing contracts).
37 Restatement (Second) of Torts, § 766, cases citing comment f. See also Woodward, Contractarians, 80 Minn. L.Rev. 1124, n. 75 (listing cases supporting treating invalid contracts as sufficient for the tort).
courts seem to have reversed course on what first appeared to be support for this Restatement position\textsuperscript{38} and the New York courts have clearly rejected treating voidable contracts as existing contracts for purposes of this tort.\textsuperscript{39}

Thus, if the contract is voidable and one is in a jurisdiction that allows liability for voidable contracts only as interference with prospective contractual relations, a good deal of the legal and ethical uncertainty about what is improper conduct under tort law and MR 4.4 is alleviated, as the understanding of wrongful or unlawful conduct is in most instances relatively straightforward; it would include conduct such as “physical violence, fraud, [bad faith] civil suits and criminal prosecution.”\textsuperscript{40} Of course, this does require the lawyer to determine that a particular NDA that may be interfered with is voidable by the employee under contract law. This in itself is a determination that will require considerable fact-finding and legal analysis by the lawyer and would certainly require talking to the very employee covered by the NDA. The result of all this analysis merely determines which tort law standard may apply to the lawyer’s conduct.\textsuperscript{41}

It is also not entirely clear that, even in such a favorable jurisdiction, a lawyer in this situation would enjoy the greater freedom to interfere with prospective contractual relations, as it is limited to the situation where the interfering actor has a competitive interest in the prospective relationship.\textsuperscript{42} In the absence of such a competitive motive, merely “improper” interference that creates tort liability is defined identically for interference with actual and prospective contracts.\textsuperscript{43} Thus, the voidable status of an NDA can only make a difference to a lawyer’s potential tort liability if a lawyer who induces a third party to breach a voidable NDA would be viewed as having a competitive business interest in the information protected by the agreement.

At first glance, a lawyer’s litigation interest in the third-party former employee as a witness or source of information seems to have nothing to do with business competition. The lawyer is not likely to be competing for the

\textsuperscript{38}PMC, Inc. v. Saban Entertainment, Inc., 45 Cal.App.4th 579, 595-601 (discussing the history and evolution of California court rulings on the two interference torts and holding that interference with contract requires an enforceable, non-voidable, contract) (Cal.App. 2 Dist. 1996).

\textsuperscript{39}Guard-Life Corp. v. S. Parker Hardware Mfg., 406 N.E.2d at 449 (holding that interference with voidable contracts should be evaluated as interference with prospective contractual relations, but claiming the Restatement supports this position).

\textsuperscript{40}Restatement (Second) of Torts, § 768, comment e.

\textsuperscript{41}A more detailed discussion of the contract law analysis that would be required to decide whether a non-disclosure/confidentiality agreement was voidable will be taken up in Part II.

\textsuperscript{42}Restatement (Second) of Torts, § 768

\textsuperscript{43}Restatement (Second) of Torts, § 767 (defining “improper” interference for both interference torts).
business of their potential witness's former employer. However, it could be argued that a lawyer paid to investigate a case for a client is engaged in business and, although the lawyer is not a buyer of the information arguably protected by the voidable agreement, they are competing for that information with the former employer.\footnote{44} As the Restatement does not require the interfering actor and the person harmed to be competing as seller or buyers\footnote{45} or limit the "plane on which they compete,"\footnote{46} it might be possible for a lawyer under these facts to gain the more advantageous legal position of merely interfering with a prospective contractual relation if the non-disclosure/confidentiality agreement is voidable. This advantage could make the difference between potentially unethical conduct under MR 4.4 and ethically permissible conduct under MR 4.4. However, there is no case law addressing the competitive status of lawyers in this context and the argument that lawyers should be considered competitors here is something of a reach.

So far we have seen that to reach a position of possible ethical safety involving a interference with an NDA, a lawyer would already have had to resolve three significant legal issues for their jurisdiction, possibly in the absence of relevant case law: the treatment of interference with voidable contracts, the voidability of the NDA in question, and the competitive status of a lawyer relative to the former employer. If the voidability of the NDA is unlikely, undeterminable or irrelevant, the potential for liability for interference with a valid NDA must be addressed. As demonstrated by the analysis which follows, resolving this question is sure to frustrate a lawyer trying to balance zealous gathering of favorable information for a client’s case with an avoidance of ethical violation, legal liability and disqualification.

\textbf{B. KNOWLEDGE OF THE CONTRACT}

For liability to attach, the Restatement requires that the interfering actor have knowledge both that a contract exists between plaintiff and another and that the actor’s conduct would interfere with the other’s performance of this contract.\footnote{47} It can sometimes be the case that the attorney will be informed of the existence of the NDA by counsel for the

\textsuperscript{44} But see Dolton v. Capitol Federal Savings and Loan Assn., 642 p.2d 21, 23 (Colo. App. 1981) (defendant lender and officer of bank, who may have provided information of plaintiff real estate developer’s offer to buy real estate to plaintiff’s competitor, were not themselves competitors of plaintiff with a privilege to interfere non-wrongfully).
\textsuperscript{45} R § 768 at comment c.
\textsuperscript{46} Id.
\textsuperscript{47} R § 766, comment i.
former employer before even talking to the former employee, either because the former employee has been identified as part of mandatory disclosure under the Rules of Civil Procedure as an “individual likely to have discoverable information”, 48 or the former employer is represented at an initial pretrial conference of parties under F.R.C.P. 26(f). 49 However, if the lawyer needs to talk to the former employee before the pretrial conference to know whether they have any discoverable and relevant information, or before filing suit to determine whether there is a non-frivolous basis for filing the complaint in the first place, the employer’s counsel will not have had the opportunity to provide this information. 50 Furthermore, the former employer will not always be a party to the ultimate litigation, in which case they will not learn of the lawyer’s interest in the former employee as part of the normal process of discovery.

The lawyer may also come to know of the existence of an NDA from the former employee. If the lawyer is told by the former employee that an NDA was signed, this would certainly satisfy the requirement that the lawyer know the contract exists. However, what if the former employee tells the lawyer that there is no NDA? Intentional interference with contract case law indicates that if the actor is told that there is no agreement between plaintiff and the other, or that any existing contract does not require the performance in question, and the actor has reason to believe these representations, there is no tort liability. 51 Thus, as applied to our scenario,

49 See Becker, 81 Neb. L. Rev. at 923 (noting that “[t]he 1993 requirements arguably mandated disclosure of the identity of and information held by a litigant’s former employees”).
50 See id. at 920 and 926 (noting that Rule 11 requirements of a reasonable inquiry before filing a complaint may require communication with former employees before an initial pretrial conference).
51 E.g., Ryan, Elliott and Company, Inc. v. Leggat, McCall & Werner, Inc., 396 N.E.2d 1009, 1011-13 (Mass. App. 1979) (real estate company had no knowledge of possible breach when potential employees represented that their attorneys had advised them they were free to leave their current employer and contracts for a specific term of years were extremely rare in real estate); Hunter Vending Co. v. D.C. Vending Co., Inc., 345 A.2d 142, 144 (D.C. 1975) (no knowledge of existing contract between restaurant and vending machine competitor when machines under that contract had been removed from restaurant and restaurant said there was no existing contract for vending machines); Tuxedo Contractors, Inc. v. Swindell-Dressler CO., 613 F.2d 1159, 1164 (D.C. Cir. 1979) (competitor entititied to rely on representation that any existing contract would not be interfered with); Collins Holding Corp. v. Defibaugh, 2005 WL 6068060, at 11 (S.C. Com. Pl.) (former employees of a game-machine rental company had insufficient knowledge of exclusive contract when they asked each customer whether they had such an agreement and each customer denied that there was); Telephone and Data Systems, Inc. v. Eastex Cellular L.P, 1993 WL 344770, at 18-19 (Del. Ch. 1993)(no reasonable implication of a contract where one party told defendant there was an unwritten deal and the other party denied the
if the lawyer has no independent knowledge of the NDA/confidentiality agreement between the former employee and employer, and the former employee incorrectly tells the lawyer that there is no NDA/confidentiality aspect to their employment or severance contract, the lawyer would not be viewed as have knowledge sufficient to create liability.\textsuperscript{52}

However, if the lawyer is not definitively told by either the former employer or the former employee that there is or is not an NDA between them, is it possible for the lawyer have knowledge of the contract sufficient for intentional interference liability to attach? Does the lawyer have to ask either the employer or the employee whether an NDA exists\textsuperscript{53} or can a lawyer avoid intentional interference liability by assuming there is no NDA in the absence of being told otherwise? Certainly, contacting employer’s counsel prior to talking to a former employee would complicate a lawyer’s efforts to investigate, as the employer’s counsel is likely to be as obstructive as possible. Furthermore, it is generally ethical to talk to a former employee without prior contact with employer’s counsel.\textsuperscript{54} In addition, as discussed above, the rules of discovery do not make such contacts per se impermissible post-filing, and do not even govern such contacts prior to the initiation of litigation. Thus, any requirement that the lawyer contact employer’s counsel about the possible existence of an NDA or discuss the matter with the former employee would have to come from the intentional interference tort itself. As we shall see below, however, resolving this question is complicated by the fact that what counts as “knowledge” varies considerably from jurisdiction to jurisdiction.

Finally, we also need to resolve how much about the NDA the lawyer needs to know in order to have the knowledge required for liability? Even a lawyer who is told by a former employee that there was an NDA the employee remembers signing may not get much, if any, detail about it. Generally, the law of intentional interference indicates that the actor must know enough about the contract to understand that their conduct will

\textsuperscript{52} But see also Eric P. Voigt, Driving Through the Dense Fog: Analysis of and Proposed Changes to Ohio Tortious Interference Law, 55 Clev. St. L.R. 339, 353-54 (2007) (arguing that an interfering party should not have reasonable grounds to rely on a denial of a conflicting agreement by the third party when the interferer has actual knowledge that such an agreement is “common in the industry”).

\textsuperscript{53} Some NDA’s include a non-disclosure provision that covers the NDA itself. Asking the employee if they are covered by such an NDA could induce a breach of the NDA, however, in the absence of independent knowledge of the NDA and the inclusion of this peculiar provision, such a breach could not be accomplished with knowledge of the agreement.

\textsuperscript{54} M.R. 4.2, comment 7(former employees do not require consent of employer counsel before contact).
produce interference.\(^\text{55}\) However, it will not always be necessary to know the exact terms of a contract to be viewed as knowing that certain conduct would interfere with the other’s performance of this contract.\(^\text{56}\) Thus, for example, a manufacturer that knows a potential purchaser of its products has already contracted with a competitor does not need to know the details of the prior sales contract when it is clear that inducing the purchaser to buy its product instead would lead to a loss of this sale for the competitor.\(^\text{57}\) In our scenario, what the lawyer would need to know about the NDA is whether the information sought by the lawyer would be covered. However, this issue is also complicated by variation and unpredictability of what counts as “knowledge” from jurisdiction to jurisdiction.

\(^{55}\) E.g. DiGiorgio Corp. v. Mendez and Co., Inc., 230 F. Supp. 2d 552, 564 (D. N.J. 2002) (‘[g]eneral knowledge of a business relationship is not sufficient; the defendant must have specific knowledge of the contract right upon which his actions infringe’). Despite frequently being cited for the broad proposition that the defendant need not know the details of the contract, neither Guard-Life Corp. nor Don King Productions, Inc., undercut this proposition, as the issue addressed in both cases was the defendant’s lack of knowledge of details that would show the contract to be legally void or voidable, and in both cases, the defendant’s actual knowledge of the contract in these cases was more than detailed enough to make them aware of the interfering consequences of their conduct. Guard-Life, 406 N.E.2d at 450-51 (defendant was told both the date through which contractual obligations extended and the breaching party’s intent to breach the contract to show good faith to defendant); Don King Productions, Inc. v. James “Buster” Douglas, 740 F.Supp. 741, 775-76 (S.D.N.Y. 1990)(defendant had reviewed copies of the actual agreements and believed them unenforceable). But see Americable Intern., Inc. v. Cellularvision, U.S.A., Inc., 1997 WL 597088, at 1 (E.D.N.Y. 1997) (finding mere knowledge of cable contract was sufficient to show knowledge that it was exclusive). However, in neither of the cases the court cites in support of this proposition was the defendant’s lack of specific knowledge about a known contract at issue.

\(^{56}\) E.g., Marks v. Struble, 347 F.Supp. 2d 136, 146-47 (D. N.J. 2004) (complaint alleging knowledge of an attorney-client relationship sufficiently alleged knowledge of the attorney-client retainer agreement between the parties); CompuSpa, Inc. v. Int’l Bus. Machs. Corp., 228 F. Supp. 613 (D. Md 2002) (on a motion to dismiss) and 2004 U.S. Dist. LEXIS 11922, at 20-22 (D. Md. 2004) (on a motion for summary judgment) (IBM did not need to know the technicians it hired away from CompuSpa were required to give 30 days of notice before quitting as long as it knew enough about the contract to realize that it would be breached by the technicians’ resignation); D 56, Inc. v. Berry’s Inc., 955 F.Supp. 908, 915-16 (N.D. Ill. 1997) (despite never seeing a copy of the contract, defendant had sufficient knowledge that contract prohibited resale where plaintiff sent defendant a letter informing it of a no resale contract, and defendant had numerous additional sources of information about such contracts).

Communication with either the employer or employee can produce actual knowledge of exactly those facts that show the existence of the contract and the interference that will be caused and such actual knowledge is the gold standard for the tort. It is also generally agreed that a merely negligent failure to find out about a contract is insufficient to give rise to intentional interference liability.\footnote{Restatement (Second) of Torts, § 766C, comment a (articulating a rule of no liability absent physical harm and noting that “there has been no general recognition of any liability for a negligent interference,” especially in cases where the defendant has no knowledge of the contract). See also Hartridge v. State Farm Mut. Auto Ins. Co., 271 N.W.2d 598, 601 (Wis. 1978) (“under Wisconsin law intention is an essential element of a claim for damages sustained as a result of contractual interference”); Burnside v. Leimbach, 594 N.E. 2d 60, 63 (Ohio App. 1991)(“the tort of negligence interference with a business relation . . .is not recognized as yet in Ohio”). But see cases cited n. 63.} However, there is more than one way knowledge can fall short of actual knowledge yet still be considered sufficiently deliberate to ground intentional action. Indeed, as many as three different ‘less-than-actual knowledge’ standards have emerged in intentional interference case law.

The first standard allows knowledge to be established if the “interfering party had knowledge of such facts and circumstances that would lead a reasonable person to believe in the existence of the contract and the plaintiff’s interest in it.”\footnote{Exxon Corp. v. Allsup, 808 S.W.2d 648, 656 (Tex. App. 1991).} Under this willful and deliberate ignorance standard, a person possesses facts that reasonably imply other facts but fails to embrace the implications of what is known. This failure to ‘connect the dots’ can be viewed as knowledge sufficient to ground intentional action since it is at least arguable that a person must in some sense “know” that which they choose not to accept or confirm, and by choosing not to know they demonstrate the capacity to act intentionally in relation to what is “known.”

A second approach provides that, in the absence of actual knowledge of the contract, “it is enough to show that defendant had knowledge of facts which, if followed by reasonable inquiry, would have led to a complete disclosure of the contractual relations and the rights of the parties.”\footnote{D.L. Swaney v. J.S. Crawley, 191 N.W. 583, 584 (Minn. 1923). See also Tele-Port, Inc. v. Ameritech Mobile Communications, Inc., 49 F.Supp. 2d 1089, 1092 (E.D. Wis. 1999)(quoting the Wisconsin jury instruction: “It is not necessary that defendant had actual knowledge of this specific contract. It is sufficient that defendant had knowledge of facts which, if followed by inquiry ordinarily made by a reasonable and prudent person, would have led to a disclosure of the contractual relationship”).} Here, a person knows facts that make them strongly suspect the truth of additional facts that go beyond that which is implied by what they
know, but willfully and deliberately chose not to take the steps required to confirm these additional facts. There is an intentional aspect to this ignorance, but it is a little harder to say that there is already actual knowledge of facts merely suspected rather than avoided. Because it requires that the defendant acquire new facts that are not mere implications of what they already know, the “reasonable inquiry” standard is more removed from actual knowledge than the “connect the dots” standard. As a consequence, the issue of whether the standard has moved from deliberate ignorance to negligent ignorance is even more likely to arise under this standard than under the implied, connect-the-dots knowledge standard.

Finally, a person may fail to reach actual knowledge of the existence of a contract or its relevant substance not because there is a deliberate choice not to connect the dots or to follow up on what is strongly suspected, but rather because there is a reckless or careless failure to acquire this information. This latter failure of knowledge is the “should have known” of negligence. Some jurisdictions have directly allowed a “should-have-known” gloss to describe knowledge sufficient for the tort. Other jurisdictions have adopted a standard of “actual or constructive knowledge” as sufficient for intentional interference, and some of these have then adopted the “should-have-known” gloss to describe “constructive knowledge.” To the extent the “should-have-known” gloss is used for this

61 See State v. McCallum, 585 A.2d 250, 253 (Md. 1991) (‘‘deliberate ignorance’ or ‘willful blindness’ . . . exists where a person believes that it is probable that something is a fact, but deliberately shuts his or her eyes or avoids making a reasonable inquiry with a conscious purpose to avoid learning the truth’’).
62 Compare Twitchell v. Glenwood-Inglewood Co., 155 N.W. 621, 624 (Minn. 1915) (“from a knowledge of such facts the law imposes the duty to inquire, and the failure to do so, either wilfully or negligently, constitutes bad faith and the legal inference of actual knowledge is conclusive) with Continental Research, Inc. v. Cruttenden, Podesta & Miller, 222 F. Supp. 190, 198-199 (D. Minn. 1963) (suggesting that subsequent case law suggested that Minnesota would not ‘impose tort liability upon one who was negligent in not finding out about a contract between two other parties’).
63 See Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 654 (Md. 1992) (holding that knowledge sufficient to show the intentionality required for punitive damages did not include ‘constructive knowledge’ or ‘substantial knowledge’ or ‘should have known’ but did include a ‘willful refusal to know’).
64 Mid-Continent Tel. Corp. v. Home Tel. Corp., 319 F.Supp. 1176, 1200 (N.D. Miss. 1970)(apparently applying a negligence standard in finding a defendant liable when they “knew or had reason to know” of a contract); Armendariz v. Mora, 553 S.W.2d 400, 405-406 (Tex. Civ. App. 1977) (finding a jury instruction that stated “do you find that . . . Defendants knew, or in the exercise of ordinary care should known, of the existence of the ‘exclusive concession lease’ ” to be a proper restatement of Texas law requiring “knowledge of such facts and circumstances that would lead a reasonable man to believe in their existence”).
65 See Part I(B)(1)(d), infra.
tort, there is the possibility that mere negligent ignorance will be sufficient for intentional interference.

The issue of what kind of less-that-actual knowledge may be sufficient for intentional interference is particularly relevant to our scenario because when a lawyer wants to question a former employee about their employment and the former employee does not volunteer any information about the presence or absence of a NDA/confidentiality agreement, the lawyer will ordinarily have no independent knowledge of the existence of such an agreement involving this employee. If the lawyer does not ask the former employee whether such an agreement exists, we would want to know whether the lawyer could ever be viewed as deliberately choosing not to know about the agreement, and then whether this would be legally sufficient to amount to knowledge of the agreement. So, to address the possibility of intentional interference liability, we must wrestle with the possibility that some failures to investigate may be seen as intentional and willful while others may be seen as merely negligent, as well as with questions about the level of intentionality required for the tort as a matter of law.

a. Actual Knowledge

Jurisdictions that require actual knowledge of the existence of the contract and such facts about the contract as will make it clear that interference will result from the actor’s conduct view anything less as imposing intentional tort liability for mere negligence. To appreciate this demands of the actual knowledge standard, it is most useful to see what fails to count as actual knowledge. Thus, under New York law, knowledge that exclusive recording contracts are typical in the music industry combined with the fact that such an agreement between the rock group Chicago and CBS was publicized was insufficient to show that a third party’s distribution of a live Chicago album was done with knowledge of the CBS contract. Similarly, in a New Jersey case, a beauty supply store that knew only that Matrix beauty products sold exclusively to salons and fashioned product packaging to discourage non-salon retail sales had

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insufficient knowledge of the existence or details of an anti-diversion agreement between a salon and Matrix.\textsuperscript{67} Finally, in an Ohio case involving a dealership contract to sell Toyota forklifts, there were insufficient facts of Toyota’s actual knowledge of the dealer’s exclusive contract with a forklift competitor when Toyota knew that the dealership sold this competitor’s products and exclusive contracts were not unknown in the industry, but also knew that other locations of this dealer and other dealerships sold this competitor’s products alongside those of multiple competing manufacturers, and was told by this dealer that they could and would like to sell Toyota products.\textsuperscript{68} In all of these cases, the interfering party could have asked and learned the relevant details of the existing contract, but was not penalized for not doing so.

If we apply the actual knowledge standard to our scenario, a lawyer may only know that the person they would like to interview is a former employee of a particular employer, and they may or may not have any actual knowledge about the use of NDA/confidentiality agreements by this employer or in this industry. Under state law that requires actual knowledge and rejects a duty to inquire standard, the cases discussed above suggest that having one or both of these pieces of information would not be enough to satisfy the knowledge requirement for intentional interference liability. However, in states that have adopted an implied knowledge, reasonable inquiry or constructive knowledge standard, it is more difficult to predict how this scenario would be evaluated.

b. Implied Knowledge

Under the implied, connect-the-dots standard, actual knowledge of facts that clearly indicate the existence of a contract makes direct knowledge of the contract superfluous. A side issue in these cases is whether the defendant also “knows” enough about the specific details of the contract to realize that their conduct will interfere. Where the interference with the contract is as obvious as the existence of the contract, however, this will not be a problem. For example, evidence showing a defendant attempted to have an individual fired trumped its denial of knowledge of both the employment contract and its details, as it was obvious that being


\textsuperscript{68} Crown Equipment Corporation v. Toyota Material Handling, U.S.A, 2020 Fed. Appx 108, 113-14 (6\textsuperscript{th} Cir. 2006)(finding these facts insufficient to show actual knowledge of the contract). This court also rejected a “constructive knowledge” standard that imposed liability for what the defendant merely “should have known” on the ground that a negligence standard would be insufficient to show intentional interference. Id. at 112.
fired both requires a prior employment contract and would interfere with the employment.  

Similarly, a political campaign committee that knew from its own purchases that radio and television advertisements required some kind of contract was also viewed as knowing that asking every radio and television station in Nevada to refuse to continue to run attack ads against its candidate would interfere with contracts involving those ads. Finally, the simple observation of a competitor’s billboards was found to make obvious the existence of a lease between the competitor and the landowners upon whose land the billboards were located.

The question for us, then, is whether the existence of a NDA would be viewed as implied simply from knowledge of a former employment relationship. In at least one case, implied knowledge of a similar term in a contract has not been found. In Collins Holding Corp. v. Defibaugh, the court suggested that defendants’ knowledge that their new customers had a current contract with defendant’s former employer and that the former employer “tried to get customers to sign exclusive contracts” but did not always succeed, would not be sufficient to know that there was an exclusive contract. Exclusivity was a possible, but not necessary feature of the contract in that case. Since an NDA is also a possible but not necessary feature of an employment or severance contract, under this case, a lawyer who actually knew of a company’s not always successful attempts to try to get employees to sign NDA/confidentiality agreements would not have implied knowledge that a particular former employee had entered into such an agreement. If that is the case, a lawyer who had no particular knowledge of this former employer’s NDA practices would be even less likely to be viewed as having implied knowledge of an NDA.

However, at least one case suggests otherwise. In Crye-Leike Realtors, Inc. v. WDM, Inc., a real estate broker was told by a potential client that the client was being represented by another real estate broker, but

69 Kelly v. Galveston County, 520 S.W.2d 507, 513 (C.C.A. Tex. 1975) (applying Texas law)
71 Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc., 363 S.E.2d 390, 394 (S.C.App. 1987) (defendant “[knew] or [had] reason to know’ of the agreements because they were “obvious” from the facts).
72 2005 WL 6068060, at 11 (C.C.P. S.C. 2005)(applying a standard in which “[i]mplied knowledge of the contract can satisfy the element of the defendant’s knowledge of the contract”).
73 Id. at 11.
74 Id at 11 (stating in dictum that “it is not enough for the plaintiff to show that . . . exclusive contracts are common in the industry,” citing CBS v. Cineamerica, supra n. 65).
was not told there was an exclusive agency contract. The court found that knowledge of the other representation, together with knowledge that “brokers usually attempted to get their clients to sign agreements with them,” was sufficient to create a genuine issue of material fact for the jury “as to whether [the broker] . . . had knowledge of such facts and circumstances that would lead a reasonable person to believe in the existence of a contract.” However, this was not an “obvious” inference from the facts. The fact that brokers try to get their clients to sign exclusive agreements does not support an inference in any particular case that this has in fact occurred, unless the success of these attempts is so great as to make a non-exclusive contract highly unusual, and the opinion does not list this as a fact in the record.

While Crye-Leike could be criticized as moving too far away from a deliberate ignorance standard and allowing a more negligent ignorance standard to be used, it does suggest that we should be concerned that use of an implied knowledge standard might in some jurisdictions justify a finding of sufficient knowledge to support intentionality when a lawyer merely knows that employment contracts with NDAs are sometimes/often/frequently entered into by persons in the former employer’s position.

This means that, given the state of current case law applying the implied knowledge standard, which is fairly limited, it is currently impossible to predict whether only obvious inferences will be sufficient for implied knowledge or whether inferences about what is possible or likely may also be sufficient. Thus, we have no idea whether a lawyer whose knowledge might range from the most general -- some employers are imposing NDA/confidentiality agreements on their employees/former employees -- to the more particular -- this employer has required some employees/former employees to enter such agreements -- would be viewed under this standard as having sufficient facts to reasonably infer that this employee had such an agreement. Certainly, a broad application of this standard could result in most lawyers being viewed as having knowledge of many former employee NDAs. With this obstacle removed, the likelihood of tort liability and MR 4.4 violations expand considerably.

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76 Id. at 16.
77 Id.
78 Id. (finding the facts as sufficient to support an inference by defendant that there was exclusive representation even in the absence of actual knowledge).
79 See also Exxon Corp. v. Allsup, 808 S.W.2d 648, 656 (Tex. App. 1991)(finding either actual knowledge of lifetime contract due to another corporate employee’s knowledge, actual knowledge due the interfering employee’s being told of the contract by a third party, or implied knowledge from the third party report and circumstantial evidence showing unusual treatment of the ‘lifetime’ employee).
c. Reasonable Inquiry

Reasonable inquiry jurisdictions generally describe the standard of knowledge required as follows: “it is enough to show that defendant had knowledge of facts which, if followed by reasonable inquiry, would have led to a complete disclosure of the contractual relations and the rights of the parties.” The reasonable inquiry standard raises the question of whether a lawyer who knows a potential witness’ employment history has a duty to inquire further as to possible inclusion of an NDA arising out of that employment. However, most of the duty to inquire cases involve actual knowledge of the contract and instead find a duty to inquire about the relevant terms of the contract. In contrast, when the facts known only suggest the possibility that a contract exists, a duty to inquire about the existence of the contract may or may not be found. This suggests that it would be important to determine whether an NDA would be viewed as a term of a known prior employment agreement, which might trigger a duty to inquire about the terms, or whether it would be viewed as an independent contract, in which case there might or might not be a duty to inquire.

Unfortunately, NDAs are entered into in a variety of ways. Non-disclosure can be a term within a unified contract entered into before employment begins. A free-standing non-disclosure agreement can be signed as a separate form proffered at the beginning of the employment relationship during orientation or training, or even during the middle of an employment relationship. Finally, non-disclosure can be one term in a severance agreement. In all but the unified pre-employment contract cases, the NDA is a separate agreement from the employment agreement. Clearly, a lawyer without actual knowledge of the existence of an NDA cannot know which of these scenarios, if any, might apply to a former employee. This will make application of the reasonable inquiry standard immediately problematic. We can, however, consider whether the case law finding such a duty to inquire in either situation suggests that a lawyer with knowledge merely of a former employment relationship has a duty to inquire as to the existence of an NDA.

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80 D.L. Swaney v. J.S. Crawley, 191 N.W. 583, 584 (Minn. 1923). See also Tele-Port, Inc. v. Americ Tech Mobile Communications, Inc., 49 F.Supp. 2d 1089, 1092 (E.D. Wis. 1999)(“[i]t is sufficient that defendant had knowledge of facts which, if followed by inquiry ordinarily made by a reasonable and prudent person, would have led to a disclosure of the contractual relationship”).

81 See Part I(B)(1)(ii).

82 See Part I(B)(1)(i).
i. Duty to Inquire as to Existence of Contract

Although the case law is limited, it suggests that detailed and individualized information about the parties to the unknown contract is necessary to trigger a duty to inquire as to the existence of a contract. Indeed, in at least one of these cases, Swaney v. Crawley, the information known was so detailed that it may have been sufficient to show that defendant had actual knowledge of the contract in question, but the court found that the evidence was sufficient on the lesser standard of a duty of inquire. The facts showed that the defendant, acting as the agent for a person who sought to sell a contract right to purchase property, first sought out plaintiffs as potential purchasers of his principal’s rights. As a result of his efforts, plaintiffs first entered into a purchase agreement with the owner of the land, then separately bought the rights under the principal’s contract, with defendant representing his principal at the closing. At that closing, a $1000 down payment under the contract between the plaintiff and the landowner was paid by plaintiffs to defendant as agent to discharge back taxes and overdue mortgage interest accrued under his principal’s previous contract. Subsequently, defendant himself bought the same land directly from the owner by persuading the owner that plaintiffs had been acting for defendant in their purchase of the land and not on their own behalf. It is difficult to get much guidance for lawyer liability from a case like this, where the facts were both enough to support actual knowledge and sufficiently different from our scenario that direct analogy is impossible. However, we can see that the defendant here knew an extraordinary amount about the parties and their relationships whether or not he had actual knowledge of the existence of a contract between plaintiffs and the land owner. Indeed, defendant here was personally involved with plaintiffs in a way we would not expect our lawyer to be with the former employer.

In contrast, ACT, Inc. v. Sylvan Learning Systems, Inc., gives us a sense of the kind of weak record that will fail to trigger a duty of reasonable inquiry. ACT and the National Association of Securities Dealers (NASD) had entered into an interim agreement for the “mutual development of

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83 157 N.W. 910 (Minn. 1916) and 191 N.W. 583, 584 (Minn. 1923).
84 157 N.W. at 910 (finding that the jury had enough evidence to conclude that defendant actually knew of the contract, even if he denied he had such knowledge).
85 191 N.W. at 584.
86 157 N.W. at 910
87 Id.
88 Id.
89 Id.
90 296 F.3d 657 (8th Cir. 2002)(applying Iowa law to affirm summary judgment for defendant).
business opportunities involving computer testing services.” Subsequently ACT proposed a new agreement under which NASD would assign its testing centers to ACT. NASD instead accepted a Sylvan Learning Systems offer to manage and then acquire the same testing centers. The issue was whether Sylvan had facts sufficient to put it “on notice that it should investigate whether ACT already had a contract that would be breached” with NASD. Sylvan’s vague knowledge that ACT and NASD had been seen doing some co-marketing and sharing space at trade shows and subsequent knowledge during its own discussions with NASD that ACT was submitting a competing proposal to manage and own NASD’s computerized testing centers was found to be insufficient to suggest that an agreement of this kind between NASD and ACT might already exist and needed to be inquired about. We can see that the fact that ACT and Sylvan were not in the same business and had little to do with each other, as well as the fact that ACT and NSAD were unusual business partners, made Sylvan’s lack of suspicion about a possible agreement between ACT and NSAD quite reasonable.

The minimum actual knowledge a lawyer in our scenario could have would be that a potential witness was a former employee of a particular employer and, perhaps additionally, the general knowledge that some employers impose NDA/confidentiality agreements on some of their employees. Such a lawyer might reasonably be viewed as having more reason to be suspicious than Sylvan had because while ACT’s contractual arrangement with NASD was rather unique and unpredictable, our scenario involves a regularly recurring contractual provision that addresses a concern shared by many employers. But even if any lawyer with such minimal knowledge might reasonably be more suspicious about the possibility of an NDA whenever a former employee is involved than Sylvan could have been about an ACT/NASD joint venture, there is still a large gap between what Sylvan knew and what the defendant in Swaney knew, making it difficult to predict whether a lawyer would be viewed as having a reasonable duty to inquire as to the existence of an NDA as a separate contract.

ii. Duty to Inquire as to the Terms of a Known Contract

Two Minnesota intentional interference cases suggest that a duty to inquire about the terms of a known contract arises primarily when a considerable amount of detailed information has already been obtained.

91 Id. at 660.
92 Id. at 661.
93 Id. at 663.
94 Id. at 662-63.
either by direct contact with the plaintiff or by being plaintiff’s close local competitor. In Twitchell v. Glenwood-Inglewood Co., the defendant was not only a competitor of plaintiff, but also knew that the spring water business it purchased had been operating under an agreement with plaintiff, that plaintiff owned the land on which the spring supplying this business’s water was located, and that there was a controversy about plaintiff’s right to rent use of the spring. The court concluded that defendant actually knew there was some sort of contract with plaintiff, but did not actually know that purchasing the assets would cause plaintiffs to breach a best efforts obligation contained in the spring lease. However, in the face of their attorney’s advice and their own understanding of this business, defendant was found to have a duty to inquire further about plaintiff’s rights. Similarly, in Kerkhoff v. Kerkhoff, a new lessee of farmland knew that the prior sub-lessee was farming this land, used corn stalks to feed his cattle, and would be upset if they plowed the corn stalks under. This then made it unreasonable for him to rely on the owner’s permission to plow the stalks under without inquiring whether it would be acceptable to the prior sub-lessee. Under the duty of reasonable inquiry, the new lessee was found to have knowledge of the prior sub-lease of land sufficient to make it liable for interference with the prior sub-lessee’s rights to harvest corn stalks.

In the face of the detailed information known by the defendants in Twitchell and Kerkhoff, it was possible to conclude that their failure to inquire further about the contracts they knew existed was deliberate rather than negligent. However, these cases do not suggest that a lawyer who knows only that there was an employment contract with the former employee, but has no direct contact with the employer concerning this employment relation and does not operate a business that competes with employer, has sufficient knowledge to make a failure to inquire about a

95 Twitchell v. Glenwood-Inglewood Co., 155 N.W. 621 (Minn. 1915)
96 Id. at 624.
97 Id. In addition, defendant was advised by its attorney that if it bought the business a lawsuit might result, and also had the records searched for the chattel mortgage securing the lease, which was properly filed and referenced but not actually found. Id.
98 Id.
99 Id. at 623.
100 1999 WL 88962 (Minn. App. 1999)
101 Id. at 3.
102 Id. at 3.
103 See also Tele-Port, Inc. v. Ameritech Mobile Communications, Inc., 49 F.Supp. 2d 1089, at 1092 (E.D. Wis. 1999)(contract to provide cell phone subscribers to service provider intentionally interfered with competitors similar contract when it had actual knowledge of the existence of a similar contract, but only knew the general form and substance of the contract).
non-disclosure ‘term’ deliberate rather than negligent.

Cases that involve more standardized contracts with an unknown, but predictably typical feature, may be more helpful. Prudential Real Estate Affiliates, Inc. v. Long & Foster Real Estate, Inc.,\textsuperscript{104} involved Prudential’s right of prior consent and first refusal on the sale of a Prudential real estate brokerage.\textsuperscript{105} The defendant, Long & Foster, was the “country’s third-largest independent real estate brokerage company,”\textsuperscript{106} had previously bought franchise brokerages,\textsuperscript{107} and knew the brokerage it was purchasing had three more years under a franchise agreement with Prudential that would be breached by the sale, yet never asked for a copy of the agreement or inquired about the terms.\textsuperscript{108} Although there was no evidence showing the Long & Foster actually knew that many national real estate brokerage franchisors similarly restricted sales and transfers, their considerable experience in buying brokerages suggested they likely either knew this general or about Prudential in particular.\textsuperscript{109} Given all this, the court concluded that a jury was entitled to consider whether Long & Foster’s failure to learn about the right to consent and of first refusal was deliberate.\textsuperscript{110}

Because Prudential involved a contract that was widely used within an industry, i.e., a real estate brokerage franchise contract, and one typical version of this contract contained a prior consent/first refusal provision, it is not hard to compare these facts to our scenario, which involves employment or severance agreements, which are widely used across the public and private sector, and the not un-typical version of such contracts that contain an NDA. However, an important fact that distinguishes Prudential from our lawyer scenario is that in Prudential the defendant actually knew that the sale would cause the franchisee to breach its promise to operate a Prudential brokerage for the full term of the contract. While this is a different breach than the prior refusal breach, nonetheless, there was already knowledge of interference in this case. This would not be present in the lawyer scenario, as there would be no other known breach of the employment agreement by discussing the former employment with the lawyer. A second distinguishing feature is Long & Foster’s position as a competitor within the same industry as Prudential and its experience with precisely this sort of transaction. Lawyers are not the competitors of employers, or even the

\textsuperscript{104} 2000 U.S. App. LEXIS 3394 (4th Cir. Mar. 6, 2000)(reversing summary judgment for defendant)  
\textsuperscript{105} Id. at 2 & 15.  
\textsuperscript{106} Id. at 4.  
\textsuperscript{107} Id. at 13.  
\textsuperscript{108} Id. at 4 & 13.  
\textsuperscript{109} Id. at 13.  
\textsuperscript{110} Id. at 15.
ordinary target of NDA agreements, and would not ordinarily encounter these agreements unless either they were involved in drafting, enforcing or advising on such agreements for client employers or employees, or had often run into potential witnesses with such agreements. Thus Long & Foster’s level of possible deliberate ignorance does not necessarily translate into deliberate ignorance by lawyers in our scenario, although it is troubling.

In Salon 2000, Inc. v. Dauwalter, 111 we move closer to our scenario, as the issue was the duty to inquire as to the absence or presence of a non-compete clause in a prior employment contract. Defendant, the owner of a hair salon that hired plaintiff’s former employee, was himself a former employee of plaintiff and as such had been subject to a non-competition agreement. 112 In addition, defendant had previously rented space to other former employees of plaintiff subject to such non-compete agreements. 113 On a motion for summary judgment, the court found sufficient evidence to create a genuine issue of material fact as to whether the defendant actually knew of this non-compete agreement with yet another of plaintiff’s former employees or at least had facts sufficient to require a reasonable inquiry about its possible existence. 114 Comparing defendant’s position here to that of a lawyer in our scenario, his personal experience of plaintiff’s use of a non-competition agreement as a small employer with a single category of employees was so suggestive that it could have been sufficient to provide circumstantial evidence of actual knowledge by defendant, let alone a duty of inquiry. A lawyer would only have this level of information about an NDA if they had personal knowledge that this employer insists upon such agreements for all similar employees.

Revere Transducers, Inc. v. Deere & Co., 115 is even closer to our scenario, as it involves a confidentiality agreement as part of an employment contract, however, the facts were sufficient to show actual knowledge as well as a duty of reasonable inquiry. Deere employed former Revere employees to develop new equipment that was in fact covered by confidentiality agreements between the employees and Revere, but Deere testified that it did not know about these agreements. 116 Nonetheless, there was evidence to the contrary: the Revere employees testified that they told Deere about their employment contract, and the record included notes by Deere employees referencing legal concerns arising out of the

111 2007 WL 1599223 (Minn. App. 2007)
112 Id. at 5.
113 Id.
114 Id. at 5.
115 595 N.W.2d 751, 764 (Iowa 1999).
116 Id. at 764.
confidentiality agreements. Beyond this, Revere and Deere had previously contracted about the same equipment the former Revere employees later developed for Deere, the Deere employee negotiating the subsequent interfering contracts was the primary contact between Deere and Revere on the earlier contract; and the Deere negotiator had personally signed a similar confidentiality agreement in connection with his employment at Deere.

While Salon 2000 and Revere are similar to our lawyer scenario, in that they involve typical but optional clauses in employment agreements, they are quite different as well. Not only do both have records showing particularized knowledge well beyond that which we would expect a lawyer in our scenario to have, but both records are strong enough to possibly support findings of actual knowledge of the relevant aspect of the contract. As such, these cases fail to plumb the depths of the reasonably inquiry standard and provide little or no guidance as to the sufficiency of a much weaker record under this standard. However, they do leave open the possibility that there could be a duty of inquiry for a lawyer with knowledge merely of a prior employment contract and the general possibility of NDAs as potential aspects of such contracts. This standard of knowledge therefore further expands the situations in which there might be possible tort liability and violation of MR 4.4.

d. Constructive Knowledge

One difficulty with applying the constructive knowledge standard to our lawyer scenario is that courts use this language to mean many different standards of knowledge. For some courts, it really means actual knowledge, but proven circumstantially rather than by direct admission. For example, in Professional Investors Life Insurance Co. v. Roussel, the first case attributing a constructive knowledge standard to Kansas law, some defendants denied knowledge of the contract and there was no direct evidence showing they were informed of the contract. However, there was quite a bit of evidence showing that they had close ties and dealings in matters related to the contract and its interference with a defendant who did know about the contract. The court allowed the case to go forward because there was “sufficient evidence from which the defendants’ knowledge of

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117 Id.
118 Id.
120 Id. at 397-98(borrowing this language from the American Bar Association, Model Jury Instructions for Business Tort Litigation §1.03 (1980) rather than any Kansas state case law).
plaintiff’s contract . . . can be inferred, to allow a jury to determine the truth of the statements defendants made in their affidavits.”

Clearly, what this court meant by constructive knowledge was that the jury would be allowed to consider circumstantial evidence of actual knowledge to find that there was actual knowledge, even if denied by defendants.

However, in another Kansas case, we do find a definition of constructive knowledge that is clearly less than actual knowledge. Plaintiff had alleged that defendant “knew or should have known” of the contract and defendant moved to dismiss on the grounds that this language made a claim for mere negligent interference, an unrecognized cause of action. The court refused to dismiss, finding that “should have known” was an proper gloss on “constructive knowledge.” However, the defendant was correct. The use of constructive knowledge to mean merely “should have known” makes negligent ignorance sufficient for knowledge and, therefore, radically changes the character of the interference tort.

Nonetheless, if we apply a negligent “should have known” standard to a lawyer in our scenario with minimum knowledge, i.e. there was an employment contract and some employers impose NDAs on some employees, we can see that almost any lawyer could be found to be negligent in failing to inquire about a the presence of an NDA. The use of this standard as sufficient for intentional interference would certainly pose the greatest risk of liability.

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121 Id. at 398.
122 Accord, D 56 Inc. v. Berry’s Inc., 995 F.Supp. 908, 916 (N.D. Ill. 1997) (allowing the jury to use “defendants ‘constructive’ knowledge” to determine whether “defendants knew of an agreement” and describing other inferences the jury could make from this evidence); Crown Equipment Corporation, 2020 Fed. Appx at 112 (plaintiff need not show direct evidence of knowledge of exclusivity, but merely evidence sufficient for the jury to infer there was actual knowledge); Murnik v. Kabo Chemicals, Inc., 1997 WL 567801, at 2 (N.D. Ill. 1997) (“constructive knowledge” of a licensing agreement with a competitor in the face of defendant’s denial of knowledge could be found when defendant was a former director of sales and marketing for the competitor, had access to confidential files about the licensing agreement, and met with the licensor prior to resigning to start a competitive business with the licensor). See also Tele-Port, Inc. v. Ameritech Mobile Communications, Inc., 49 F.Supp. 2d at 1092 (using constructive knowledge to mean either actual general knowledge sufficient to inform defendant it was interfering even without detailed knowledge of the agreement or knowledge sufficient to make a reasonable person inquire about aspects of the agreement which could be interfered with).
124 Id.
125 Id. (“[t]herefore, the court believes that Indy Lube’s "knew or should have known" language is appropriate in this respect”).
e. Conclusion

In sum, a lawyer attempting to evaluate whether a failure to inquire would suffice for tort liability could be somewhat secure that this would not be the case in an actual knowledge jurisdiction. In jurisdictions adopting one of the other three approaches to the knowledge requirement for tort liability—implied knowledge, reasonable inquiry, and should have known—and in their application to the novel scenario of a lawyer interviewing a potential witness with an undisclosed, un-inquired-about and unknown NDA, we find another legal and therefore ethical rabbit hole. Of particular concern is the fact that even in those jurisdictions that seem to have addressed the issue of what kind of less-than-actual knowledge standard they will accept for intentional interference, few have clearly stated that their standard calls for more than negligent ignorance or shown through application of their standards when such less-than-actual knowledge is deliberate and when it is merely negligent. In addition, there are few if any cases in which potentially liable defendants are not deeply enmeshed in their plaintiffs’ contracts or business worlds, creating a limited ability to analogize to our scenario. While this can provide arguments for distinguishing cases finding knowledge from our scenario, it does not provide any guarantee that sufficient knowledge of the NDA would not be found in the presence of very minimal knowledge by the lawyer.

Of course, a prudential approach would suggest that all lawyers simply ask about NDAs prior to questioning former employees about their former employment. The problem with this, however, is that if it is not either legally or ethically required, why should lawyers do something that might then make their legal/ethical position worse than it would be otherwise? Furthermore, we shall see that even when a lawyer learns that there is an NDA, it will still be impossible to predict whether the NDA covers the information sought or is even enforceable.

C. INDUCING OR OTHERWISE CAUSING THE THIRD PARTY NOT TO PERFORM THE CONTRACT

The Restatement requires the interfering actor to either have induced or otherwise caused the breach.\textsuperscript{126} Inducement of a breach is present when the breacher chooses not to perform as a result of intimidation or persuasion. Causation of a breach is present when the tortfeasor prevents the breacher from performing, such as by imprisoning the breacher or by arranging for a necessary precondition to performance to be absent.\textsuperscript{127}

\textsuperscript{126} Restatement (Second) of Torts, § 766.
\textsuperscript{127} Id. at comment h.
When a lawyer informally questions a former employee with a NDA about matters covered by the agreement and the former employee then breaches the agreement by answering the questions, clearly there is no prevention causation, but is there even inducement? 128 This answer may depend on precisely how the questioning came about.

If the lawyer were to seek out a former employee who had previously given no thought to revealing this information and were to persuade them to reveal it by offering money, inducement would have occurred. 129 However, suppose the former employee had previously decided on their own to breach the agreement or had previously actually breached the agreement by telling someone else this information, all without any involvement by the lawyer. If under these circumstances, the lawyer, knowing of the agreement, approaches the former employee, or the former employee approaches the lawyer, and the lawyer asks questions that elicit information covered by the agreement, has the lawyer induced the breach? Central to the issue of causation of a breach here is the possibility that the breacher may choose their own breach for their own reasons. 130

If the lawyer is simply the opportunity for the breach to occur, the lawyer may not be viewed as causing the breach in the sense required for liability in tort. In Davis v. HydPro, Inc., 131 a competitor who had no contact with the breacher until after the breach had occurred was found not to be the proximate cause of the breach merely because it “reaped the advantages of a broken contract.” 132 In NCC Sunday Inserts, Inc. v. World Color Press, 133 when a publisher of newspaper inserts purchased the business of a competitor who had independently decided to get out of the business due to a lack of profitability and had negotiated with others for the sale, it could not be found to have induced the competitor’s breach of its printing contract. 134 Similarly, in Ryan, Elliott and Company, Inc. v.

128 A deponent’s responses during formal discovery cannot be said to be induced by the lawyer at all, but rather by the power of the court.
129 See Restatement (Second) of Torts, § 766, comment k (noting that inducement by offering a benefit will be sufficient).
130 See Sweeney v. Smith, 167 F. 385, 387 (E.D. Penn. 1909) (“The promisor may have excellent reasons for declining to be bound by the earlier contract, and these he need not disclose. If he chooses to take the risk of breaking the first agreement, that is his own affair, which may make him liable on that agreement, but imposes no obligation on the second promisee. It is enough for the second promisee that the agreement is now offered to him without his own procurement or persuasion.”), affirmed 171 F. 645 (3rd Cir. 1909), cert. denied 215 U.S. 600 (1909).
131 839 S.W. 2d 137 (Tex. App. 1992)
132 Id. at 140.
134 Id. at 1007 and 1013-4
Leggat, McCall & Werner, Inc., a real estate agency which hired its rival’s employees was not found to have induced their breach of contract when the employees had already decided to leave, had discussed going into business for themselves, and had themselves initiated contact with the defendant agency.

The key facts in these cases are a decision on the part of the breacher to terminate the contract prior to any contact with the actor, strongly demonstrated in two of these cases by the planning of post-breach alternatives that did not require the involvement of the defendant actor at all. Thus, a lawyer who learns that a former employee may have relevant information from someone to whom the former employee has already impermissibly talked has not induced the breach of the NDA.

Even if the agreement has not yet been breached by the former employee, it is quite possible that the lawyer may not be found to have induced an initial breach that involves the lawyer. The Restatement states that “[o]ne does not induce another to commit a breach of contract with a third person under the rule stated in this Section when he merely enters into an agreement with the other with knowledge that the other cannot perform both it and his contract with the third person.” As an illustration of this, the Restatement offers the situation of B, who is under contract to sell goods to C, but offers to sell them to A instead, who accepts the offer with knowledge of B’s contract with C and receives the goods. The Restatement concludes that “A has not induced the breach and is not subject to liability.” The absence of “affirmative, unduly persuasive, initiating conduct” signals a lack of inducement. Thus, if contact with the lawyer

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135 Supra note 51.
136 396 N.E.2d at 1013 (no inducement or other purposeful causation of the breach).
137 Restatement (Second) of Contracts, § 766, comment n.
138 Id.
139 Id. Se also Corinthian Corp. v. White & Bollard, 442 P.2d 950, 957-8 (Wa. 1968) (purchaser who was approached by seller and merely accepted their offer, which produced seller’s breach, did not induce breach); Kendal/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235, 245 (Ia 1988)(finding that publisher who made regular offer to dissatisfied authors who approached him did not cause breach of contract with original publisher of these authors)
140 Middleton v. Wallichs Musci & Entertainment Co., Inc., 536 P.2d 1072, 1076 (Az. App. 1975) (competing tenant who was aggressively wooed by lessor over a period of three years and who subsequently knowingly entered into a lease which violated lessor’s restrictive covenant with another tenant did not induce the breach of the restrictive covenant). But see, Southern Union Co. v. Southwest Gas Corp., 180 F. Supp. 2d 1021, 1054-55 (D. Az 2002) (finding that a predisposition to breach the contract followed by letters and phone calls from defendant which may have influenced the decision to breach was sufficient causation under Arizona’s “‘but for’ causation standard” whether or not this was inducement).
is initiated by a former employee who volunteers the information protected by a known NDA/confidentiality agreement, the lawyer would not be understood to have induced the breach.\textsuperscript{141}

Even if the lawyer initiates the contact with the former employee, the lawyer will still not be said to induce the breach in the absence of “some overt act which influences the promisor to breach his contract.”\textsuperscript{142}

Therefore, liability is only likely to arise in situations where the lawyer seeks out the former employee and engages in some form of persuasion to get them to reveal the information. Case law involving other types of contracts suggests that telling a former employee that their NDA with their former employer is unenforceable or that their former employee is unlikely to sue them for breach, or providing them with an attorney or paying their attorney’s fees if sued, would be viewed as inducing the subsequent breach of such a contract.\textsuperscript{143}

But even in the absence of such financial persuasion, there may be inducement by “moral pressure.”\textsuperscript{144} What exactly is meant by moral

\textsuperscript{141} But see Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 804(D.C. Ohio 1965)(refusing to grant summary judgment for a malpractice insurer charged with inducing breach of a confidential physician-patient relationship, where the uncontroverted facts showed that the doctor initiated the contact with his insurer, however, the possibility of lack of inducement does not appear to have been argued to the court).

\textsuperscript{142} Wolf v. Perry, 339 P.2d 679, 682 (N.M. 1959) (ordinary solicitation of business is not equal to inducement when facts failed to show solicitation occurred after contract came into existence and facts also suggested that breacher has already made up his mind not to honor or acknowledge the validity of contract).

\textsuperscript{143} IDS Life Ins. Co. v. SunAmerica, Inc., 958 F.Supp. 1258, 1275 (N.D. III. 1997) (finding use of these tactics by a competitor to lure away agents under contract with a valid one-year non-compete provision constituted inducement), affirmed in [relevant] part, vacated in part 136 F.3d 537 (7th Cir. 1998) (affirming grant of preliminary injunction based on these facts as to the one defendant not subject to arbitration); Edward Vantine Studios, Inc. v. Fraternal Composite Service, Inc., 373. N.W. 2d 512, 515 (C. A. Iowa 1985)(suggesting or agreeing to insert indemnity clause in competing contract was an inducement to breach); Melo-tone Vending, Inc. v. Sherry, 656 N.E.2d 312, (C.A. Ma, 1995)(providing legal defense to breached contract was both inducement and improper means); Marc Development, Inc. v. Wolin, 1996 WL 327782, at 2 (N.D.Ill. 1996)(providing an analysis of the legality of a setoff scheme could be inducement to execute the scheme); Biddle v. Warren Gen. Hosp., 715 N.E.2d 518, 520 & 528 (1999)(law firm induced breach of confidentiality when it proposed that hospital hire it to screen patients with unpaid bills to determine Supplemental Security Income eligibility). Accord, Becker, 81 Neb. L. Rev. at 913 (suggesting that offering to serve as counsel for the former employee could be viewed as an improper inducement to testify favorably prohibited by Model Rule 3.4); Unarco Material Handling, Inc. v. Liberato, 2010 WL 744394, at 1(Tenn. Ct. App.) (describing an attorney’s negotiation of an indemnification agreement that would hold the former employee harmless for breach of a confidentiality agreement as inducing the breach).

\textsuperscript{144} Restatement (Second) of Torts, § 766, comment k.
pressure in this context? It would seem to involve references to what is right or wrong, good or bad, from a moral or religious perspective. Although the restatement’s “moral pressure” language is quoted in a number of cases, there is actually very little case law involving inducement by moral pressure. In Alberts v. Devine,\textsuperscript{145} the Massachusetts Supreme Judicial Court found that Methodist clerical authorities could be held liable for a breach of confidentiality by a minister’s psychiatrist if they induced this disclosure by “a simple request or persuasion exerting only moral pressure.”\textsuperscript{146} Unfortunately, there are no details reported about precisely what was said to induce the psychiatrist to make the disclosures or what the disclosures were. We can imagine, however, that the clerics may have suggested to the psychiatrist that his patient might not be fit to be a minister given his mental health issues, and that disclosure of this information was necessary to protect his parishioners or the church itself.

In Augustine v. Anti-Defamation League of B’nai B’rith,\textsuperscript{147} complaints to a radio station by the Anti-Defamation League (“ADL”) about plaintiff allowing members of the National Socialist White People’s Party to make objectionable anti-Semitic and racist remarks without limit or disclaimer during his talk show\textsuperscript{148} were viewed as exerting moral pressure on the station causing plaintiff to be fired.\textsuperscript{149} Finally, in Greenfield v. Central Labor Council of Portland,\textsuperscript{150} while the Oregon Supreme Court found the kind of persuasion exerted by unions peacefully picketing business with signs saying “unfair to organized labor” to be otherwise lawful\textsuperscript{151} because it consisted of “communications . . . for the purpose of presenting arguments and appeals to their free judgments,”\textsuperscript{152} it did make it clear that stating that a business is “unfair to organized labor” in a picket line is at least an inducement by moral pressure to employees not to work and customers not to shop.\textsuperscript{153}

Thus if the lawyer extols the virtues or victimization of the plaintiff, derides the evils of the defendant, or holds out the justice that may be achieved as a way of persuading the potential witness to be responsive, we may say that moral pressure has been applied and that inducement has

\textsuperscript{145} 479 N.E.2d 113 (Ma. 1985)(deciding reported questions of law and reversing grant of summary judgment in favor of defendants )
\textsuperscript{146} Id. at 121 (quoting Restatement § 766, comment k).
\textsuperscript{147} 249 N.W.2d 547 (Wis. 1977)
\textsuperscript{148} Id. at 549.
\textsuperscript{149} Id. at 553
\textsuperscript{150} 192 P. 783 (Or. 1920)(conspiracy to injure or destroy business claim).
\textsuperscript{151} Id at 789-90.
\textsuperscript{152} Id at 789 (quoting Iron Molders’ Union No. 125 of Milwaukee, Wis. v. Allis-Chalmers Co., 166 F. 45, 51 (7th Cir. 1908)
\textsuperscript{153} Idl at 788-89.
occurred sufficient to create the possibility of tort liability. Indeed, even if the lawyer does no more than simply explain who they are representing and what the case is about, thus allowing the former employee to make up their own mind based on the facts of the litigation as to whether they are morally or otherwise inclined to provide the information, the lawyer may be said to have induced the breach.

Under this case law, a lawyer questioning a former employee may or may not have induced them to breach an NDA. The former employee may have already breached the agreement, or decided independently to do so, but if not, then it will take very little on the part of the lawyer for the lawyer to be seen as inducing or causing the breach by financial inducement or moral pressure. Thus a lawyer attempting to avoid tort liability must take care to understand how they came to know of this former employee and determine whether the former employee has their own reasons for speaking to the lawyer. However, as we shall see below, even if financial inducement or moral persuasion was employed, there will be a possibility that the interference will be viewed as privileged, just as peaceful picketing was viewed as a legitimate activity by labor unions despite the interference that resulted.

**D. INTENTIONALLY INTERFERE**

As we are dealing with an intentional tort, it is crucial that the interference be intentional. Knowledge of existence of the contract is a critical foundation for intention, because inducing a breach without knowing breach is a possible consequence cannot be intentional. Persuasive inducement is also critical, as the absence of inducement provides no action for intent to attach to. However, if there is both

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154 Model Rule 4.3 has been widely understood to require a lawyer contacting a non-client former employee to inform them from the outset of “the nature of the case, the identity of the lawyer's client, and the fact that the person's former or current employer is an adverse party.” Becker, 81 Neb. L. R. at 902 (quoting Bown v. St. Joseph's County, 148 F.R.D. 246, 254 (N.D. Ill. 1993) and noting ABA approval in ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-359 (1991)).

155 Restatement §766, comment k (“it may be a statement unaccompanied by any specific request but having the same effect as if the request were specifically made”). See e.g., Panko v. Consolidated Mutual Insurance Co., 423 F.2d 21, (3rd Cir. 1970) (describing as evidence of inducement an insurer’s request that a physician fill out a report and discussion of patient with physician, but affirming grant of summary judgment for defendant insurer on other grounds).

156 See e.g., Davis Chemical Corp. v. Diasonics, Inc., 826 F.2d 678, 687 (7th Cir. 1987)(while doctors breaching a contract to staff a medical facility using special equipment were substantially certain that a breach of the equipment purchase contract would result from their breach, inducement was missing because there was no conduct preventing or persuading the facility to breach the equipment contract); Click Model Management v.
knowledge of the contract and persuasive inducement, does this always amount to intentional interference? Would a lawyer who persuades a former employee to talk about their former employment, knowing that they were subject to a NDA, be viewed as intending to cause the breach?

The Restatement first defines intent as “denot[ing] that the actor desires to cause consequences of his act.”\(^{\text{157}}\) However, it also says that while “all consequences which the actor desires to bring about are intended,”\(^{\text{158}}\) consequences need not be desired to be viewed as intended. Intended consequences also include those that the actor knows prior to acting are “certain, or substantially certain, to result from his act.”\(^{\text{159}}\) Thus “an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action”\(^{\text{160}}\) is a basis for liability. At the same time, “[a]s the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness.”\(^{\text{161}}\)

1. Incidental Intent

It is probably fair to say that a lawyer who wants to question a former employee with an NDA has no desire to produce a breach of that agreement, indeed, they would be perfectly happy if the agreement could be honored and their questions answered. Thus, if there is any intent present, it must be incidental and result from the lawyer’s certainty or substantial certainty that answering the questions will result in a breach of the NDA. In this regard, it is useful to look at cases in which inducement was present, but incidental intent was not. In Augustine v. Anti-Defamation League of B’nai B’rith,\(^{\text{162}}\) discussed above,\(^{\text{163}}\) the court determined that the complaints made by the ADL were not intended to result in the firing of the plaintiff in either of the senses required by the Restatement.\(^{\text{164}}\) Since the complaints made were simply about the program policy of the station and were not

\(^{\text{157}}\) Restatement § 8A.

\(^{\text{158}}\) Id. at comment b.

\(^{\text{159}}\) Id.

\(^{\text{160}}\) Restatement § 766, comment j.

\(^{\text{161}}\) Id.

\(^{\text{162}}\) Supra note 151.

\(^{\text{163}}\) Supra, text at notes 151-53.

\(^{\text{164}}\) 249 N.W.2d at 554-55.
directed at either the plaintiff or his employment, there was no evidence to show a desire to produce plaintiff’s termination. Nor was it possible to find that the termination of plaintiff’s employment was a certain or substantially certain result of these complaints since other responses could have occurred instead.165

This kind of disjunction between the conduct and the possible consequences would not seem to be present in our scenario. Although the level of persuasive inducement in Augustine might be similar to that used by a lawyer to minimally persuade a former employee to reveal information about the former employer, the conduct of answering the questions is specifically sought by the lawyer. Since this is precisely the conduct that could breach the NDA, there is no uncertainty of this kind about whether breach will occur. However, there is a very different source of uncertainty in our scenario that may prevent lawyer interference of this kind from being intentional.

2. Substantial Certainty With Actual and Less-than-Actual Knowledge

In order to have incidental intent, our lawyer must be certain or have a substantial certainty that getting the desired information from the former employee about their employer will result in a breach of the former employee’s NDA. If our lawyer were to be less than substantially certain of this result, we would understand their conduct as reckless rather than intentional, and liability would not attach. It is difficult to imagine how a lawyer who has no knowledge that an actual NDA binds the former employee could ever know or be substantially certain that interference will occur. This would seem to be a necessary predicate for intentional interference. At the same time, even knowledge that there is an NDA does not mean that the lawyer necessarily knows or is substantially certain that breach of the NDA will result from the lawyer’s conversation with the former employee. The lawyer must know enough about the NDA to know that providing the particular information sought certainly or substantially certainly will result in a breach of the contract.

a. Actual Knowledge of the NDA Combined with Legal or Factual Mistakes or Uncertainty

We begin by assuming that our lawyer has actual knowledge there the former employee signed an NDA with their employer. To help us think through incidental intent as applied to interference with such a known

165 Id.
NDA, let us assume that there are two paradigmatic types of NDAs: type A and type B. Our lawyer can make factual or legal mistakes about these two types of NDA, or be uncertain about other important facts related to these two types of NDAs. What effects will these possible states of mind have on incidental intent?

First, let us consider when a lawyer in our scenario might not have sufficient factual information to be certain or substantially certain that questioning the former employee would cause a breach. Suppose the type A NDA, as a settled matter of law, covers the kind of information the lawyer seeks, and the type B NDA, as a settled matter of law, does not cover this kind of information. Further, suppose that the lawyer is correctly aware that there are these two types of agreements and of their different legal effect. Finally, suppose that the former employee remembers that they signed something titled “non-disclosure agreement” in connection with a severance package, but the lawyer does not get to see a copy of the agreement, has no other facts suggesting that the agreement signed was type A or type B, and has no other information that makes the use of one type rather than the other more probable in this situation. Clearly, the lawyer could not be viewed as knowing the breach of this agreement was certain, given the facts available to them.

Could the lawyer instead be viewed as knowing that breach of this agreement was substantially certain? Without having some information that made it substantially certain that the agreement signed was Type A, all the lawyer would know was that it was possible this was a type A agreement and therefore that it was possible questioning would cause a breach. Mere possibility, however, is not substantial certainty. If we keep in mind that this is really all about whether the lawyer can be said to intend the breach, at least incidentally, you can not incidentally intend something by your conduct when the facts you know only indicate that the result is possible, but fail to indicate that the result is probable. Uncertainty about the facts cannot produce certainty about the implications of those facts. This conduct would seem to be more reckless than intentional, and therefore insufficient for intentional interference liability.

Similarly, mistakes of fact can prevent an actor from concluding that something is certain or substantially certain. For example, suppose in the previous example there was in fact a 90% actual probability that any given NDA was a type A. If the lawyer did not have any facts that revealed this 90% probability, or had facts that suggested to them there was only a 10% probability of a type A agreement, again it would seem impossible to say

\[166\] NDAs may or may not have consideration depending on when they are entered into, see II(A)(consideration), use varying language to define the scope of coverage, see II(B), and have different the public interest impacts, see II(B)(4)(a).
that the lawyer was substantially certain that their conduct would result in breach, even though objectively it might well be substantially certain that their conduct would result in breach. Similarly, if the lawyer was told by the client that the NDA agreement signed was type B, but it was really type A, the lawyer would not have facts which would allow them to know that a breach was certain or substantially certain. Thus, either uncertainty about the facts or mistakes of fact will undermine incidental intent.  

What effect do mistakes or uncertainty about the legal consequences of a particular agreement have on intent? Suppose the lawyer knows that a former employee has signed a type A NDA and the lawyer believes that a type A NDA is void or voidable in this situation. Can the lawyer be said to incidentally intend the breach of a contract they believe to be void? Both the Restatement and case law indicate that a mistaken belief that a known contract is void or voidable will not relieve the actor from knowledge that their actions will otherwise interfere. This means we must assume the validity of an NDA when evaluating intentionality.

A lawyer may also make a legal mistake about whether their conduct will cause a breach of the NDA. Thus, the lawyer may know that a former employee has signed a type A NDA, and believe, based on the particular information to be sought and the likely interpretation of the language of the NDA, that questioning the former employee will not cause a breach. Alternatively, for good reasons as we shall see, the lawyer may be uncertain as to how a court would interpret this language. However, mistake or uncertainty about interpretation of contract language will not undermine intent; “it is not necessary that the actor appreciate the legal significance of the facts giving rise to the contractual duty, . . . if he knows those facts, he is subject to liability even though he is mistaken as to their legal significance and believes that the agreement is not legally binding or has a different legal effect from what it is judicially held to have.”

So, at least in circumstances when the lawyer knows sufficient facts about the

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167 Accord, In ReL EXDS, Inc., EXDS, Inc. v. Devcon Contraction, Inc., 2005 WL 2043020, at 7 (N.D.Cal)(where defense counsel had insufficient facts to realize that disclosed information might be confidential under an NDA protecting confidential information, and facts known reasonably suggested information was not confidential, counsel should not be disqualified)

168 Don King Productions 740 F.Supp. at 775-76(noting that the law of intentional interference makes knowledge of the existence of the contract rather than knowledge of the validity of the contract sufficient). See also Ryan, 396 N.E.2d at 1012. See also Restatement (Second) of Torts, § 766, comment i (mistaken belief about legal effect of contract no excuse). This forces potential interferers to take the risk of being wrong about the legal effect of the contract if they choose to interfere and the contract turns out to be valid and binding.

169 Restatement (Second) of Torts, § 766, comment i.
NDA to be able to correctly predict the legal effect of the NDA, the substantial certainty of their interference will be judged as if they had correctly predicted the legal effect.

This means that, unless a lawyer is certain as a matter of law that a particular NDA known to bind the former employee will not cover the information in question, the lawyer must evaluate their potential tort liability, at least as to intent, on the assumption that the NDA does cover this information and will be interfered with by their conduct. This will create a specter of liability in some number of cases in which the contract would actually not cover the information sought, and this specter can only have the effect of chilling investigation of cases or terrorizing lawyers who have engaged in such investigation and are later threatened with disqualification.

b. Less than Actual Knowledge

We understand that in an actual knowledge jurisdiction, incidental intent to cause the breach of an NDA would seem to require actual specific knowledge of the contract terms sufficient to allow the lawyer to correctly predict that a court would find that the lawyer’s conduct would interfere with this contract. However, lawyers may not even have actual knowledge of the existence of the NDA. Thus we must consider the impact of being in a jurisdiction that allows for less-than-actual knowledge of the existence of the contract to be sufficient. Can implied knowledge of an NDA, knowledge of an NDA that should have been gained by reasonable inquiry, or knowledge of an NDA that just should have been known produce certainty or substantial certainty of interference with the NDA?

We already know that in an implied knowledge jurisdiction, a lawyer who knows both that every employee of a particular employer is required to sign a NDA and that the person they want to question is a former employee of that particular employer would be viewed as knowing that this employee signed an NDA, since it takes a deliberate act of will to refuse to acknowledge the obvious implications of these facts. Consequently, the lawyer impliedly knows that there is a NDA contract that exists that might be interfered with. But we need more. Can we have implied rather than actual knowledge of the specific details of the NDA? Perhaps if a lawyer correctly knows that this employer uses a particular NDA with employees of this kind, we might view them as deliberately refusing to acknowledge that fact, or at least the high probability, that the employee has signed this particular kind of NDA. Thus, we might we willing to find that they have substantial certainty that this particular kind of NDA is involved and this would be sufficient to have substantial certainty
that this NDA would be breached. Therefore, as long as there is sufficient
background knowledge to allow implied knowledge of the crucial specific
terms of the contract, it appears that incidental intent can arise out of
implied knowledge as well as actual knowledge. In the absence of this
background knowledge however, there would not be either actual or implied
knowledge of the terms of the NDA, and as we saw above, uncertainty
about these facts cannot produce substantial certainty of results that flow
from these facts. However, in some jurisdictions, less-than-impli ed
knowledge can be sufficient. What happens to intention in these
jurisdictions?

Incidental intent is less compatible with the reasonable inquiry
standard than it may be with implied knowledge. Consider a scenario in
which the existence of the NDA is actually known to the lawyer and forum
law triggers a duty to reasonably inquire as to the particulars of the NDA.
This is most likely to occur when the lawyer is simply told by the former
employee that some NDA was signed. There are a number of possible
inquiries that might follow from this situation. The lawyer could ask the
former employee if they have a copy of this agreement and require them to
provide it to the lawyer. If the employee does in fact have the NDA, but is
not asked to provide it, we can imagine that in a reasonable inquiry
jurisdiction, the lawyer would be found to “know” the details of the NDA
sufficient to determine that it did cover this information. However, are we
entirely comfortable saying that the lawyer is certain or substantially certain
that interference will occur, when in fact the lawyer is neither? They have
failed to act in a way that would bring them to certainty or substantial
certainty, and under these circumstances, we are likely to say that failing to
ask for a copy from the former employee is choosing deliberate ignorance.
But this deliberate ignorance is more profound than the deliberate ignorance
that exists when someone refuses to acknowledge the logical or practical
implications of what they do know. Choosing uncertainty here might be
reprehensible, but it doesn’t come close to being equivalent to certainty or
even substantial certainty. It is more than reasonable to argue that mere
reasonable inquiry knowledge cannot produce incidental intent; indeed, it
seems more accurate to say that in this situation there is only recklessness or
carelessness about the possibility that particular actions might interfere with
the contract.

Suppose, however, that the lawyer did ask the employee for a copy
and the employee cannot provide it, or perhaps the lawyer did not ask, but
the former employee would not have been able to provide it anyway, as
might also often be the case. If the lawyer were to say, “I can not talk to
you until you get a copy of the NDA from your employer,” we can imagine
that the former employee, who is probably just being accommodating in
considering answering the lawyer’s informal questions at this point, might be unwilling to put themselves out in this way. The lawyer could offer to help the former employee get a copy of the agreement by drafting a letter for them, or the lawyer could attempt to contact the former employer to get some information about this former employee’s NDA or their NDA agreements in general. Is all this encompassed in the duty of reasonable inquiry?

While we haven’t directly considered what is a reasonable inquiry and what goes beyond reasonableness, we have seen that in the cases in which some duty of reasonable inquiry was found, the defendant was either already in personal contact with the plaintiff (the former employer in our scenario) and could easily have asked the plaintiff about the agreement, or would have learned what they needed to know by asking the breaching party, with whom they were certainly in contact (the former employee in our scenario). Our lawyer, on the other hand, may well have a breaching party who has no idea what their obligations are, and a potential interfered-with party with whom they have no established relationship or contact. Furthermore, one can easily imagine the response our lawyer will get from the former employer; they may well refuse to provide an actual copy of the agreement and may just make the blanket claim that any questioning the lawyer would like to do will be prohibited by the contract, whether or not the agreement has actually been located and examined, and whether or not the former employer (or its lawyers) actually believes the agreement would be found to cover this information. Strategically, there is not much to lose on the part of the former employer in making this strong claim.

Could a lawyer argue lack of substantial certainty regarding the breach when their knowledge of the existence and terms of the contract to be interfered only comes from such claims by the employer and the agreement itself is never provided to the lawyer? Two cases say such an argument would not work, but they may be distinguishable. In first, the relevant contract term was simple, either it was an exclusive publishing contract or not, and defendant received a letter confirming that it was exclusive from both the plaintiff publisher and the writer. In the second case, the relevant term, a resale prohibition, was also fairly simple, the letter from the plaintiff describing the resale prohibition was quite specific, and its credibility was strongly supported by much additional evidence.

170 See supra, Part I(C)
171 Id.
172 See B. Lewis Productions, Inc. v. Maya Angelou, 2005, WL 1138474, at 12-13 (finding this was enough to create a jury question as to the sufficiency of defendant’s knowledge).
However, as will be demonstrated below, the legal scope of coverage by NDAs is complicated enough that they may often be vulnerable to a number of legal attacks. Thus, we can imagine that, under the right circumstances, a blanket claim of coverage by the former employer could reasonably be viewed as merely strategic rather than legally credible. If a lawyer is not given facts sufficient to make an accurate legal judgment as to breach herself, but is asked instead to rely upon the self-interested judgment of an adverse party, arguably the lawyer does not have substantial certainty that a breach will result. So, in addition to not being quite sure whether a duty of reasonable inquiry triggered by knowledge that some NDA was signed extends all the way to inquiry to the former employer, we cannot be sure whether a suspiciously strategic response from the employer lacking much in the way of details about the relevant terms would objectively provide the lawyer with certainty or substantial certainty that the agreement would in fact be breached.

The reasonable inquiry standard is even more incompatible with incidental intent when the lawyer never actually comes to know of the existence of an NDA between the former employer and employee, but rather is legally credited with this knowledge because a reasonable inquiry would have revealed the existence of such an agreement and the lawyer’s failure to make this inquiry would seem to have been deliberate. As we saw above, the case law does not provide much assistance in determining what kind of factual knowledge might trigger this duty to inquire as to existence of the contract, both because most reasonable inquiry cases are about the content rather than the existence of the contract and because our facts are not easily analogized to existing case law. For the sake of having an example, however, perhaps such a duty of inquiry would arise if the lawyer was told by a colleague that the colleague had encountered one other person, formerly employed by the same employer and in a similar job, with an NDA, but no further details about the NDA were able to be provided. If the duty to inquire were triggered here, but the lawyer didn’t inquire, legally they would be credited with knowing the former employee they wish to question is a party to an NDA. But this would not be enough in itself for incidental intent. The lawyer would need to be credited with knowledge that this NDA was certain or substantially certain to be breached by the questioning.

As will be argued below, not every NDA is breached by any question about the former employment. Thus, is there a second duty to inquire, in which the lawyer should have asked for a copy of the NDA they would have known about if they had asked about its existence, or the lawyer

knowledge was sufficient to create a jury question).
should have contacted the former employer about the NDA they might have
known about if they had asked the former employee about it? We might
ask whether incidental intent built out of two layers of credited reasonable
inquiry knowledge rather than actual or even implied knowledge is really
intent at all, or mere negligence.\footnote{Twitchell v. Nelson, 155 N.W. at 623 ("[t]here can be no express malice
where the contractual relation is unknown to the alleged wrongdoer, and it is a little
difficult to imply it as a matter of legal inference when known only constructively and from
the fact that it is a matter of record").} Even worse, if the credited knowledge
were based on a “should have known” standard that was itself equivalent to
mere negligence, we would certainly find it impossible to describe any
resulting interference as even incidentally intentional. Yet, in those
jurisdictions that have adopted a reasonable inquiry or “should have
known” less-than-actual knowledge standard as sufficient for this
intentional tort without confronting the disturbing implications of these
knowledge standards upon intent, the possibility exists that a lawyer with
some minimal information and no actual substantial certainty of
interference could be credited with substantial certainty and found to have
incidental intent.

Overall, in considering whether a lawyer in our scenario could be
said to have intent, we have seen that only incidental intent is likely to be
present, that actual substantial certainty will require the lawyer to have
some as yet to be determined specific information about the NDA, and that
less-than-actual knowledge standards, which may or may not be applied to
produce credited knowledge in our scenario, threaten to undermine the
intentional nature of the interference tort entirely, but may still be applied in
ways that could create tort liability for our lawyer. The legal rabbit hole of
less-than-actual-knowledge standards has returned to complicate the
analysis of what would even count as intentional interference. There is,
however, one final tort element to intentional interference, that the
interference be adjudged improper in some way, and this holds the most
promise for letting the lawyer in our scenario off the hook for liability.

E. IMPROPER

The requirement that even intentional interference be improper\footnote{R § 766.} before liability attaches reflects the law’s fundamental uneasiness with
holding a third party liable for the breach of contractual responsibilities
assumed by another. Since the law already provides the plaintiff with a
contract remedy against the breaching party, it concerns us to also provide
the plaintiff with a tort cause of action against a stranger to the contract for
the very same damage, with the additional and very real possibility of punitive damages not available in contract. There must be something tortiously wrongful about the stranger’s own conduct to justify an additional remedy for the plaintiff and this kind of liability for the defendant. In addition, as much as we may want to protect the plaintiff’s contract interests, the defendant’s conduct may reflect an exercise of freedom that is even more important to protect.

Valued conduct can be protected by tort law in one of two ways. It may fall under a well-developed privilege, in which case it will not be improper. However, “[u]nlike other intentional torts such as intentional injury to person or property, or defamation, this branch of tort law has not developed a crystallized set of definite rules as to the existence or non-existence of a privilege.” Thus, in many situations, the propriety of defendant’s conduct can only be determined after an individualized balancing of the harm to the plaintiff of the breach against any positive value we find the interfering conduct to promote. This means that, unless the conduct falls within a recognized privilege, there will be a great deal of uncertainty about the possible impropriety of the interfering conduct; “[t]he decision therefore depends upon a judgment and choice of values in each situation.”

1. Privileged Conduct

a. Honest Advice

Although lawyers who advise their clients to breach a contract will usually fall under the general privilege for those who have responsibility for the welfare of others, the lawyer in our scenario will not have the benefit of this privilege because the breaching party is not their client. However, a lawyer’s conduct in our scenario could possibly fall within a broader

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176 See generally R 767, comment b (describing R §§ 768-74 as a non-exhaustive list of some privileges that have been recognized for the interference tort).
177 Id.
178 R § 767 comment b.
179 R § 770 (as long as the interference is genuinely to protect the welfare of the other and improper means are not used). E.g., Reynolds v. Schrock 149 P.3d 1062, 1068 (Or. 2006) (“safeguarding the lawyer-client relationship protects more than just an individual or entity in any particular case or transaction; it is integral to the protection of the legal system itself”); Los Angeles Airways, Inc. v. Davis, 687 F.2d 321, 326 (9th Cir. 1982) (“[a]n attorney can claim the protection of the privilege to induce breach of contract, subject to its qualifications, when he provides his advice in the course of his representation of a client”).
privilege to interfere by giving honest advice.\footnote{R \S 772} While the former employee is not the lawyer’s client but merely a potential witness, we can imagine that the lawyer might in some cases provide some advice to the former employee as to whether it is legally safe for the former employee to talk to the lawyer, given the existence of the NDA. Three conditions must be met, however, to fall within this privilege: “(1) that advice be requested, (2) that the advice given be within the scope of the request and (3) that the advice be honest.”\footnote{R \S 772 at comment c.} Ordinarily, the honest advice privilege will be a more specific version of the lawyer’s privilege to cause a client to breach a contract for their own welfare, as advice is the most usual method of causation for a lawyer.\footnote{Id. at comment b (“the lawyer . . . need[s] this protection for the performance of their tasks”).} In our scenario, the advice will be requested if the former employee asks the lawyer about the NDA, but not if the lawyer volunteers such advice.\footnote{Id. at comment c.} However, the advice will probably be within the scope of the request if the former employee generally asks whether it is safe for them to talk to the lawyer without expressly asking about the NDA.\footnote{Id. at comment d (“[t]he initial request . . . may be broad enough to embrace the whole problem”).} Finally, only good faith is required for the advice to be honest, although reasonable grounds for the advice and reasonable diligence in ascertaining the facts are important for determining good faith.\footnote{Id. at comment e} In our scenario, any judgment about the lawyer’s advice to the former employee will take place after the court has already decided that the NDA is in fact enforceable and covers the information in question. If the advice given was that the agreement did not cover this information and/or was unenforceable, clearly it will have been bad advice and the lawyer may or may not have some liability to the former employee. However, the fact that the advice was ultimately wrong does not necessarily mean that it was not honest advice given in good faith.

However, a problem of a different kind may well arise from such advice because the lawyer has a conflict of interest. It will be in the client’s interest to advise the former employee that it is safe to provide information to the lawyer. However, an independent lawyer might well always advise a former employee that it is in their best interest to not test whether the NDA applies or not. Even if the NDA in question would ultimately be ruled not to cover the information or to be voidable, the aggravation and expense of being sued is certainly worth avoiding, particularly if there is no return to the former employee in taking this risk. This conflict may well not be
consentable under Model Rule 1.7, even assuming our advising lawyer actually advised the former employee of the conflict, fully informed them of the risks, and then asked for and received consent.\footnote{This conflict would come under Model Rule 1.7(a)(2) and might not be consentable under 1.7(b). Accord, Chambers v. Capital Cities / ABC, 159 F.R.D. 441, 445 (S.D. N.Y. 1995) (stating that plaintiff’s counsel should not discuss the validity of confidentiality agreements with former employees both because plaintiff might not appropriately protect genuine trade secrets and privileged information and because plaintiff’s counsel could be held liable to the former employee for incorrect advice).} In the face of such a conflict, Model Rule 4.3 prohibits a lawyer from giving any legal advice to an unrepresented former employee.\footnote{Model Rule 4.3 (“The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client”). See also Becker, 81 Neb. L. R. at 901-2 (noting that contact with an unrepresented former employee can lead to a violation of Model Rule 4.3).} Consequently, to come within this privilege, there is a serious risk that the lawyer would have to act unethically. It would not be unreasonable for a court to find that unethical advice could not be given in good faith.\footnote{Accord, Ramirez v. Selles, 784 P.2d 433, 436 (Or. 1989) (holding that a lawyer has no competitive privilege in a client when it would be conflict of interest to represent the client).} Thus, in a version of our scenario in which the lawyer’s advice to the former employee causes the employee to speak freely to the lawyer, it is highly questionable that the lawyer would be immunized from liability as a result of the advice.\footnote{Accord, Hamilton v. Greeleaf, 677 A.2d 525, 527-28 (ME.1996) (lawyer loses absolute litigation privilege for litigation communications if lawyer’s representation of client violates conflict of interest rules).} Furthermore, the unethical nature of the advice would allow the court to find that the lawyer engaged in wrongful means, which on its own almost certainly will result in a finding that the interference was improper.\footnote{\S 767 comment c (suggesting that only in special relationships, such as parental or custodial, could ordinarily wrongful means ever be proper).}

b. Truthful Information

We saw earlier that even if a lawyer simply informed the former employee who the client was and what the case was about, and the former employee decided that they wanted to provide the information because they thought the client should be helped, the lawyer may still be said to have induced the breach. However, the Restatement also indicates that

\[\text{[t]here is of course no liability for interference with a contract or with a prospective contractual relation on the part of one who merely gives truthful information to another . . . even though the}\]
facts are marshaled in such a way that they speak for themselves and the person to whom the information is given immediately recognizes them as a reason for breaking his contract . . . [,] whether or not the information is requested.\textsuperscript{191}

This privilege has been applied in cases where the inducement was a truthful statement that a lawsuit had been filed,\textsuperscript{192} as well as other truthful statements.\textsuperscript{193} A lawyer in our scenario might well do nothing to induce the former employee to break their NDA other than to truthfully identify their client, the matter on which they represent the client, and describe litigation that has been or may be filed. \textit{International City}\textsuperscript{194} makes it clear that the fact of a lawsuit is privileged, but it is less clear from the case law how additional facts about the lawsuit would be treated.\textsuperscript{195} Thus there is some uncertainty about how a description of the client’s claims in more detail would be treated.

Certainly, in the case of litigation that has already been initiated, so long as the lawyer accurately reproduced the content of the complaint and identified this content as the allegations of the complaint, it would merely be a truthful description of the complaint and the truthfulness of the allegations themselves would not be at issue. If litigation had not yet been

\textsuperscript{191} Id. at comment b.
\textsuperscript{192} Thompson v. Paul, 402 F.Supp. 1110, 1116-17(D. Az. 2005)( no liability for law firm whose truthful statement that a lawsuit had been filed against the terminated Chief Financial Officer (CFO) resulted in a loss of new clients by the former CFO); International City Management Association Retirement Corp. v. Watkins, 726 F.Supp. 1, 4 & 6-7 (D.D.C. 1989)( no liability for employer whose truthful statements that a lawsuit had been initiated against a discharged employee prevented him from obtaining new employment).
\textsuperscript{193} E.g. Allen v. Safeway Stores Inc., 699 P.2d 277, 279-80 (Wy.1985)(no liability for a state employee whose truthful account of statements made by grocery store employees resulted in the termination of their employment); Liebe v. City Finance Comp., 295 N.W.2d 16, 18-21 (C.A. Wis. 1980) (no liability when finance company employee who had secretly written book critical of finance industry and distributed flyers promoting book was terminated after another finance company forwarded flyer to his employer and Better Business Bureau forwarded information supplied by employee showing his connection to critical book); Worldwide Primates, Inc. v. McGreal, 26 F.3d 1089, 1092-3) (finding Rule 11 sanctions appropriate against plaintiff who filed intentional interference suit against animal rights activist who had truthfully described both a government report showing major deficiencies in the treatment of animals by a commercial wildlife trader and a letter revoking the trader’s primate import license to a client of the trader); Masoni v. Board of Trade of San Francisco, 260 P.2d 205, 208 (Cal.App. 1 Dist. 1953)(no liability for business association whose truthful statement to creditors of a bar/restaurant that one of the owners had ample means to pay debts in full prevented the bar/restaurant from obtaining settlements from creditors for less than full payment).
\textsuperscript{194} Supra note 196.
\textsuperscript{195} E.g., Thompson, supra, fails to indicate whether the communications went beyond the fact of the lawsuit to include allegations made in the lawsuit.
filed, however, the lawyer might have to describe any statements about the potential defendant’s conduct as claims the client has made to the lawyer to avoid putting the truthfulness of the client’s claims at issue. This could be problematic, however, as it could constitute a waiver of attorney-client privilege as to statements on this subject by the client.196

This privilege would also not cover any additional statements that might be viewed as inducing the breach, and it might well take more than the bare facts to get a former employee to cooperate. The lawyer may have to draw out both obvious and less obvious inferences for the former employee. For example, the lawyer might need to say, “Your testimony supporting these allegations could help my client win this case.” This is not a mere statement of fact that can be true or false. It is a prediction of what might occur in the future and it adds to the moral pressure of the facts alone197. The lawyer might also try to persuade the former employee to provide information by stating that the defendant/former employer has probably behaved illegally toward many other people, and that by helping the client the former employee could help stop the company from doing this to even more people in the future. Again, these statements go beyond simple truthful information and will not allow the privilege to be applied.

However, we do see, for the first time, a simple and definite guarantee for a lawyer in our scenario that their conduct will not be tortuous, unethical or the basis for disqualification. A lawyer may safely induce a former employee to discuss matters covered by a valid NDA so long as the inducement consists of nothing but truthful information. However, if statements exerting moral pressure are made that cannot be viewed as truthful information, or inducements such as indemnity or advice are offered, the lawyer will not be able to take advantage of this privilege. Once the safe harbor of truthful information has been left, we must either find another privilege to cover the lawyer’s conduct or take our chances that the jury will find the conduct not improper in this particular case.198


197 A slightly different version of this, suggested by Dean Allan Vestal, might be, “With statements like yours, the odds of our winning are enhanced.” Whether this would fit under the exception as truthful information about the probabilities or whether probabilities would not be viewed as the kind of information encompassed by the exception is an open question.

198 Where no privilege is present, “the determination of whether the interference was improper or not is ordinarily left to the jury,” in contrast to claims of privileged conduct where the usual process is that the “court determines the circumstances under which a privilege exists and the jury determines what the actual circumstances are.” Restatement § 767 comment l.
c. Litigation Privilege

Immunizing litigators\textsuperscript{199} from liability for defamation arising out of statements made in the course of litigation has long been recognized as necessary to enable the zealous representation of clients by lawyers\textsuperscript{200} and to avoid burdening the courts with secondary litigation.\textsuperscript{201} This “litigation privilege”\textsuperscript{202} has been defined as follows:

An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.\textsuperscript{203}

Almost all states provide such immunity\textsuperscript{204} from liability for defamation.\textsuperscript{205}

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\textsuperscript{199} The same privilege also covers other essential participants in judicial proceeding, such as judges, parties and witnesses. Fridovich v. Fridovich, 598 So.2d 65, 66 (Fla. 1992) (“this privilege extends to the protection of the judge, parties, counsel and witnesses”). See generally Briscoe v. LaHue, 103 S.Ct. 1108, 1113-16 (1983) (detailing the history of the recognition of the litigation privilege for judges, parties and witnesses in American law).

\textsuperscript{200} Butz v. Economou, 438 U.S. 478, 512 (1978) (“[a]bsolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation”).

\textsuperscript{201} Kittler v. Eckberg, Lammers, Briggs, Wolff & Vierling, 535 N.W.2d 653, 657 (Minn.App. 1995) (noting that a public interest preventing “additional rounds” of tort litigation from adding to the “large volume of litigation filed in the courts in recent years” provides further justification for the “judicial action privilege”). But see generally, Paul T. Hayden, Reconsidering the Litigator’s Absolute Privilege to Defame, 54 Ohio State Law Journal 985, 1042-43 (1993) (arguing that the widely accepted absolute litigation privilege should be replaced by a qualified litigation privilege because it “harms the cause of justice as much as it helps it”).


\textsuperscript{203} Restatement (Second) of Torts § 586. See also Restatement of Law Governing Lawyers § 57 (“a lawyer is absolutely privileged to publish matter concerning a nonclient if . . . the publication occurs in communications preliminary to a reasonably anticipated proceeding before a tribunal or in the institution or during the course and as a part of such a proceeding”).

\textsuperscript{204} Some states treat the privilege as providing immunity from suit, even more treat it as an affirmative defense. Anenson, Absolute Immunity, 31 Pepperdine Law Review at 947 (“the litigation privilege is used as a defense more often than it is used as a complete immunity from suit”). The difference is that true immunity allows an immediate appeal if the suit is not dismissed, while a court’s refusal to recognize an affirmative defense is interlocutory and cannot be immediately appealed. Douglas R. Richmond, The Lawyer’s Litigation Privilege, 31 Am. J. Trial Adv. 281, 286 (2007). However, as used here, the word immunity is not meant to convey more than legal recognition of the privilege, whether as a complete defense or as an immunity from suit.

\textsuperscript{205} But see, Anenson, 31 Peppedine Law Review at 917 (noting that Georgia limits the
Many states also extend this absolute privilege\textsuperscript{206} to the tort of intentional interference with contract,\textsuperscript{207} while other states extend only a qualified privilege\textsuperscript{208} for intentional interference with contract.\textsuperscript{209} Assuming that the absolute immunity to pleadings and Louisiana provides only qualified immunity to lawyers and witnesses.

\textsuperscript{206} Absolute privilege provides either an affirmative defense or immunity from liability arising out of litigation communications even if actual malice can be shown, however, it does not protect against an actual malicious prosecution or abuse of process claim. Restatement § 587, comment a; Collins v. Red Roof Inns, Inc., 566 S.E.2d 595, 598 (W.Va. 2002).


\textsuperscript{208} Qualified privilege here means either an affirmative defense or immunity from liability arising out of litigation communications unless actual malice or a lack of good faith can be shown.

\textsuperscript{209} E.g., Kahala Royal Corp. v. Goodwill Anderson Quinn & Stifel, 151 P.3d 732, 752 (Hi. 2007)(holding that Hawaii law provides attorneys qualified immunity for tortious interference with contractual relations provided that neither actual malice nor ulterior motive conduct is shown); Mantia v. Hanson, 79 P.3d 404, 414 (Or. App. 2003)(holding that the privilege will not immunize tortious interference claims when the interfering “conduct satisfies the elements of wrongful initiation” of civil proceedings/malice prosecution); Macke Laundry Serv. Ltd. P’shp v. Jetz Serv. Co., 931 S.W.2d 166, 182 (Mo.Ct. App. 1996).
lawyer in our scenario would be acting in good faith in questioning the former employee for a litigation purpose, the difference between an absolute privilege and a qualified privilege will not be significant. However, it will be significant if the lawyer is in one of the jurisdictions that do not extend the litigation privilege beyond liability for defamation or have not yet decided whether to extend the privilege for intentional interference with contract claims.

Even in those jurisdictions that have already extended either an absolute or qualified litigation privilege to claims of intentional interference from contract claims, there may remain some uncertainty about the application of the privilege to the kind of interference involved in our scenario. To the extent most of these states have extended coverage of the privilege to intentional interference, it has been because the intentional interference with contract in question was caused by the defamatory nature of the litigation communications and they recognized that a “privilege

1996)(holding that Missouri law would immunize tortious interference claims based on lawyer advice to client in the absence of improper means, self-interest or if not acting in good faith for interest of client); Silver v. Mendel, 894 F.2d 598, 603(3rd Cir. 1990) (holding that Pennsylvania law would not apply absolute privilege to intentional interference with prospective contractual relations claim arising out of wrongful use of civil proceedings).


E.g., Safeway Insurance Co., Inc. v. Guerrero, 106 P.3d 1020, 1029(Az. 2005)(refusing to decide whether litigation privilege protects attorneys from intentional interference claims arising out of misrepresentations in settlement negotiations when attorney’s conduct was not otherwise improper); Harris v. Rigganbach, 633 N.W. 2d 193, 195-96 (S.D. 2001)(finding only that absolute litigation privilege extends beyond defamation to negligence and intentional and negligent infliction of emotional distress claims); Kirschstein v. Haynes, 788 P.2d 941, 954 (Okl. 1990) (finding only that absolute litigation privilege extends beyond defamation to intentional infliction of emotional distress claims).

E.g., Agostini, 42 Cal. Rptr at 315-16 (youth worker employment terminated after testimony that he engaged in corporal punishment); (Buckhannon, 928 P.2d at 1333 (disability payments terminated after litigation investigator told disability insurer that insured was not disabled and had engaged in fraud); Clark, 624 S.E.2d at 866 (filing of medical negligence action had negative effect on physician’s relationship with malpractice insurer); Fisher, 868 N.E.2d at 164-65 (wages docked due to report of police misconduct); Laub, 979 S.W.2d at 688 (contracts to transfer wife’s assets to husband not enforced because affidavit alleged that wife’s agreement was caused by abuse). Accord, Harris, 633
which protected an individual from liability from defamation would be of little value if the individual were subject to liability under a different theory of tort.”

Thus, to the extent that the potential witness in our scenario is induced by the lawyer to breach their NDA with their former employee by making defamatory statements, there would be a strong possibility in these jurisdictions that the lawyer’s communications with the former employee would be viewed as absolutely privileged. Even factually true statements may be covered by such a purely defamation-based interference privilege, in addition to falling within the truthful information privilege discussed above.

However, it might be that the lawyer induced the former employee to talk by paying them money, by advising them that the NDA was unenforceable or unlikely to be pursued by the former employer, or by offering to indemnify or defend them from subsequent suit. This kind of conduct or communication causes the breach in a very different way than defamatory or negative-but-truthful statements, by providing incentives or removing disincentives to the breacher rather than impugning the reputation of the former employer. Another form of inducement might be by moral pressure generated not by either factually true statements or defamatory statements, but rather by other kinds of statements, such as “wouldn’t you

N.W. 2d at 196 (allowing immunity for negligence and intentional/negligent infliction of emotional distress when claims simply put “a new label” on defamation claim); Lone, 489 A.2d 1195-6 (immunity extended to tortious interference with contractual relation when complaint put “a different label” on slander of title claim); Mahoney & Hagberg v. Newgard, 729 N.W.2d 302, 310 (Minn. 2007)(holding that privilege extends to claim of breach of attorney-client privilege that “sound in defamation” and refusing to reach the question of whether the “privilege applies to claims not sounding in defamation”); Myers v. Pickering Firm, Inc., 959 S.W.2d 152, 162 (Tenn.App. 1997) (holding “the absolute privilege affords a publication of false and defamatory statements in the course of judicial proceedings applies to an action for procurement or inducement of breach of contract based on those false and defamatory statements”); Price v. Armour, 949 P.2d at 1258 (holding that defamatory statements that lead to intentional interference with business relations are privileged for “all claims arising from the same allegedly defamatory statements”); Smith v. Rothstein & Barnes, 2000 WL 965335, at 7 (Conn.Super.) (holding that absolutely privileged defamatory statements “cannot be the basis of a tortious interference claim”).


214 There a few more wrinkles to the privilege which must be resolved before a definitive conclusion as to privilege can be reached, such as when the communication took place relative to the commencement of the litigation. See infra.

like to be a hero here,” or “this is the Christian thing to do.” If a jurisdiction understands the litigation privilege as meant only to protect participants in the litigation process from concerns about the truthfulness of their litigation-related communications, then litigation communications that do not make truth claims and are effective in other ways would not be privileged in an intentional interference suit.

Only a few states have affirmatively found immunity from intentional interference claims when the injurious nature of the litigation communications or conduct has not arisen out of either the defamatory or the negative-but-true nature of the statements about the plaintiff.216 These jurisdictions have found that the need for “participants in litigation . . . to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct”217 is the same regardless whether the damage is caused by defamation or “other misconduct occurring during the course of a judicial proceeding.”218 Most of these jurisdictions have not had the opportunity to consider whether the precise kind of misconduct involved in non-

216 E.g., Clark, 624 S.E. 2d at 867 & 869-70 (lawyer’s failure to ever talk to people ‘disclosed’ as planned expert witnesses fell within the misconduct protected by the privilege); Kahala, 151 P.3d at 752 (lawyers’ conduct in resisting a document discovery demand that then caused claimed breach of business partner’s contractual obligation was protected by qualified litigation privilege); Jeckle v. Crotty, 85 P.3d at 937-38 (lawyer’s use of improperly leaked patient names to contact patients for possible inclusion in ongoing class action lawsuit was protected by absolute privilege) ; Levin, 639 So.2d at 607-08 (disqualification of attorney caused by bad faith certification that attorney would be called as witness was protected from liability for tortious interference with business relationship by litigation privilege); Lofton v. TLC Laser Eye Centers, Inc., 2001 WL 121809, at 7 (dismissing as privileged claims asserting interference with contract by defamation, threats to sue, and attempts to enforce a contract); Maynard v. Caballero, 752 S.W. 2d 719, 720-21 (Tex. App. 1998) (holding privileged from a claim of intentional interference with contract one codefendant’s attorney’s conduct convincing another codefendant’s attorney that limited cross-examination of prosecution witness would be strategically beneficial); Rosenthal v. Irell & Manella, 135 Cal. App.3d at 127-28 (holding that attorney conduct urging a settlement was privileged whether or not it contained statements that could be said to false and noting with approval prior cases holding privileged such similar conduct as filing a defective mechanic’s lien and making a settlement offer in a threatening way). Accord Mantia, 79 P.3d at 412-13 (describing with apparent approval a prior holding that a false imprisonment claim arising out of an arrest based on attorney conduct that led to a procedurally defective warrant was subject to the litigation privilege); Rusheen v. Cohen, 39 Cal. Rptr 516, (2006) (holding that “if the gravamen of the action is communicative, the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct”).

217 Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So.2d 380, 384 (Fla. 2007)(holding that litigation privilege applies to liability under all common-law torts and statutory violations) (quoting Levin, 639 So.2d at 608).

218 Id.
defamatory intentional interference with contract deserves immunity.

However, a recent Tennessee case, Unarco Material Handling, Inc. v. Liberato, addressed the issue of litigation privilege in precisely our scenario. A corporation’s former president was induced to breach a confidentiality agreement by the lawyer for a client who suspected that the corporation had fraudulently induced a settlement. Before speaking to the lawyer, the former president insisted upon an indemnity agreement for his potential breach. The court found that the lawyer’s conduct of negotiating the indemnity agreement and questioning the former president was absolutely privileged against a claim of tortious interference with contract. The test set out by the court for litigation privilege immunity from tortious interference with contract requires that the attorney be acting for a client or prospective client in good faith, the conduct be related to the subject matter of the proposed litigation and there be real nexus between the conduct and the proposed litigation, and the conduct not involve wrongful means such as “fraud, trespass, threats, violence or other criminal conduct.”

At least a few courts have found that the litigation privilege should not apply to misconduct in the form of a breach of contract. They have

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219 Unarco, 2010 WL 744393 (Tenn.Ct.App.)
220 Id. at 1.
221 Id.
222 Id. at 9. However, the court did suggest that this conduct violated Tennessee’s version of Model Rule 4.2, which states: “In communicating with a current or former agent or employee of an organization, a lawyer shall not solicit or assist in the breach of any duty of confidentiality owed by the agent to the organization.” Tenn. Sup.Ct. R. 8, RPC, 4.2, comment 4. In contrast, the Model Rules version of this comment states: “In communicating with a current or former constituent of an organization a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.” ABA MR. 4.2, comment 7. In altering MR 4.2 this way, Tennessee has chosen to find unethical conduct that its own courts immunize as essential to a lawyer’s representation. This result is inconsistent. See generally infra, Part III(B).
223 Id.
224 Tulloch v. JPMorgan Chase & Co., 2006 WL 197009, at 7 (S.D.Tex.) (holding no privilege when the attachment of a release to a complaint unnecessarily breached an obligation of confidentiality contained in the release); Wentland v. Wass, 25 Cal.Rptr. 3d 109, 116 (Cal. App. 2005) (holding no litigation privilege where cause of action was breach of contract of confidentiality by publicizing the confidential information in a subsequent lawsuit between the contract parties); E. & J. Gallo Winery v. Andina Licores S.A., 2006 WL 1817097, at 7 (E.D. Cal.) (holding no litigation privilege for filing suit in Ecuador when such filing was a breach of California forum selection and choice of law contract provisions); Spectrum Creations, L.P. v. Carolyn Kinder International, LLC, 2008 WL 416264, at 68-69 (W.D. Tex.) (holding that disclosure of designs in violation of the confidentiality clause of a contract was not privileged under Texas law because the cause of action was not defamation based and was not privileged under Florida law because the “disclosure of the cd of designs was not in furtherance of either defendant's defense of the
reasoned that the public policy behind protecting litigation participants from subsequent libel suits is not furthered by privileging conduct that causes injury through disregard of contractual obligations, and that the breaching party may also be said to have waived the protection of the litigation privilege in the confidentiality contract. 225 Certainly, one might think that if the breach of a confidentiality contract itself were not protected by the litigation privilege, neither would an inducement to breach such a contract. On the other hand, some of these courts have also stated that “[w]here the gravamen of the cause of action sounds in tort, not contract, the litigation privilege applies.” 226 Whether this would mean that intentional interference with contract, a tort cause of action involving a breach of a non-contractual duty on the part of the interferer, 227 would be privileged even though the underlying breach of contract would not be, remains an open question.

Thus, while there is certainly the possibility that in some jurisdictions, a lawyer in our scenario would be privileged to use almost any form of inducement to persuade a former employee to reveal information covered by a NDA without concern that their actions could subject them to tort liability, the lack of precedent addressing privilege for the non-defamatory injuries of contractual interference means that liability remains a threat.

Another concern arises out of the fact that this kind of interference might be likely to occur during informal pre-filing investigation. Most jurisdictions follow the Restatement in extending the privilege to actions that are necessary to but prior to the actual commencement of the action. 228

225 Wentland, 25 Cal. Rptr. 3d at 116.
226 Id. at 117.
227 California Jurisprudence 3d, § 18 (“[f]or purposes of determining whether a claim against a government entity is based on tort or contract, if the claim is based on breach of promise it is contractual, if based on breach of a noncontractual duty it is tortious, and if unclear, the action will be considered based on contract rather than tort”).
228 E.g., Asay v. Hallmark Cards, Inc., 594 F.2d 692, 697 (8th Cir. 1979)(holding that Iowa would follow the Restatement’s extension of the privilege to “communications preliminary to a proposed judicial proceeding”); Arundel Corp. v. Green, 540 A.2d 815, 816-19(Md. App. 1988)(attorney letter seeking warning and injury information from purchasers of crushed rock who might be witnesses in contemplated asbestos litigation was absolutely privileged); Buschel v. Metrocorp, 957 F.Supp. 595, 597-98 (E.D. Pa. 1996) (pre-litigation letter asserting contractual rights and threatening court action if necessary was protected by absolute privilege under Pennsylvania law); Club Valencia Homeowner’s Ass’n, Inc. v. Valencia Associates, 712 P.2d 1024,1027(Co. App. 1985)(stating that “communications preliminary to a proposed judicial proceeding” are covered by the absolute privilege); Collins v. Red Roof Insns, Inc., 566 S.E.2d at 603 (absolute privilege applied to defamatory statements about third parties in employer’s response to employee demand letter); Crowell v. Herring, 392 S.E.2d 464, 468 (S.C. App. 1992)(absolute privilege covers “pre-investigation affidavit by an eventual witness”); Chard v. Galton, 559
Some jurisdictions, however, limit the privilege to communications or conduct during the course of the litigation, on the ground that the

P.2d 1280, 1282-83 (Or. 1977) (attorney’s defamatory pre-litigation statements seeking settlement from insurer of potential defendant were absolutely privileged); Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc., 774 A.2d 332, 341-42 (D.C. C.A. 2001)(attorney’s defamatory statements to potential client in potential shareholder’s action were absolutely privileged); Fink v. Oshins, 49 P.3d 640, 644 (Nev. 2002) (absolute privilege applies to attorney statements defaming trustee made prior to proceeds to remove trustee were commenced); Harris v. NCNB National Bank of North Carolina, 355 S.E.2d 838, 842 (N.C. C.A. 1987)(attorney absolutely privileged to send proposed complaint containing defamatory statements to attorney representing adverse party in a dispute); Hawkins v. Harris, 661 A.2d 284, 289-90 (N.J. 1995)(absolute privilege protected attorney-hired investigators who defamed potential plaintiff in interviews with prospective witnesses prior to commencement of litigation); Kittler v. Eckberg, Lammers, Briggs, Wolff & Vierling, 535 N.W.2d 653, 655-56 (Minn.App. 1995) (defamatory attorney letter soliciting additional clients for potential shareholder suit was absolutely privileged); Krishnan v. Law Offices of Preston Henrichson, 83 S.W.2d 295, 302 (Tex. App. 2002) (pre-filing attorney notice of claim letter to potential defendant defaming another potential defendant was absolutely privileged); Krouse v. Brower, 20 P.3d 895, 898-99 (Ut. 2001)(attorney demand letter made prior to commencement of litigation was covered by absolute privilege); Provencher v. Buzzell-Plourde Associates, 711 A.2d 251, 256 (1998)("[w]e join those courts which have concluded that pertinent pre-litigation communications between a witness and a litigant or attorney are absolutely privileged from civil liability if litigation was contemplated in good faith and under serious consideration"); Rubin v. Green, 17 Cal.Rptr. 828, 832- (Ca. 1993) (defamatory attorney communications to potential clients about merits of proposed suit were absolutely privileged); Samson Investment Co. v. Chevaillier, 988 P.2d 327, 331 (Ok. 1999) (defamatory allegations made in an attorney letter to potential clients regarding possible litigation was absolutely privileged); Simpson Strong-Tie Company, Inc. v. Stewart, 232 S.W.3d. 18, 24(Tenn. 2007)(holding defamatory communications in advertisements soliciting prospective clients for contemplated class action absolutely privileged); Smith v. Idexx Laboratories, Inc., 2000 WL 3367570o, at 2 (Me.Super. 2000)(holding that absolute privilege should cover defamatory statements in potential defendant’s response to potential plaintiff’s demand letter); Sriberg v. Raymond, 345 N.E.2d 882, 884(Ma. 1976)(holding that absolute privilege covers relevant attorney communications preliminary to litigation); Smith v. Rosenstein & Barnes, 2000 WL 965335, at 3 (Conn.Super.) (holding that absolute privilege covers prelitigation communications); Trachsel v. Two Rivers Psychiatric Hospital, 883 F.Supp. 442,443-44 (W.D.Mo. 1995)(predicting that Missouri law would provide an absolute privilege to a letter defaming one potential codefendant sent by potential plaintiff to the other potential codefendant); Western Technologies, Inc. v. Sverdrup & Parcel, Inc., 739 P.2d 1318, 1321-2(Az. App. 1986) (defamatory report of expert witness hired to determine cause of construction defects for possible litigation is absolutely privileged).

E.g., Park Knoll Associates v. Schmidt, 451 N.E.2d 182, 184-85(1983)(“a witness is immune from suit for defamatory remarks pertinent to a judicial proceeding . . . but not for those made before the proceeding commences” (citations omitted)); Timmis v. Bennett, 89 N.W.2d 748, 752 (1958)(“[t]he mere fact that defendant contemplated starting an action for damages on behalf of Mrs. Roblyer involving the acts of plaintiff and other police officers of the city of Kalamazoo does not bring the situation within the generally recognized rule.”); Kurczaba v. Pollock, 742 N.E.2d 425, 438-39 (Ill. App. 2000)(since
privileged participants are only under the supervision of the court once proceedings have begun and it is this supervision that ensures that otherwise tortious behavior will be both deterred and penalized. In these jurisdictions, pre-litigation investigation involving conversations with former employees would potentially subject attorneys to liability, while the same conversations taking place after the commencement of litigation would have the possibility of immunity.

A further limitation on the privilege that could be relevant to our scenario is that the statements or conduct complained of must have "some relation to the proceeding." This means that both the end and means of the conduct must be appropriately related to the contemplated litigation. There is considerable agreement that fact investigation and witness interviews are essential litigation functions and many jurisdictions have recognized that an absolute privilege protects attorney conduct and communications relevant to these functions. The requirement that the litigation privilege limited to publication during the course of judicial proceeding, publication of amended complaint prior to grant of leave to file by court is not privileged).

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230 Id. at 441("[A]n absolute privilege is allowed only in 'situations in which authorities have the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct' ")(quoting Demopolis v. Peoples National Bank of Washington, 796 P.2d 426, 430(1990)).

231 Restatement (Second) of Torts § 58.

232 Anenson, Absolute Immunity, 31 Pepperdine Law Review at 935 ("[i]n determining what conduct is entitled to the protection of the litigation privilege, courts examine not only the purpose of the conduct, but also the method employed to achieve that goal").

233 E.g., id. ("[s]ome of the legitimate purposes acknowledged by the courts are statements or conduct designed to gather evidence"); Hawkins, 661 A.2d at 290 ("[p]retrial investigation is 'necessary to a thorough and searching investigation of the truth,' . . . and, therefore, essential to the achievement of the objects of litigation'")(quoting Van V. Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Colum.L.Rev. 463, 477 (1909)).

234 E.g., Ascherman v. Natanson, 100 Cal. Rptr. 656 .659 (Cal. App. 1972)("the absolute privilege in both judicial and quasi-judicial proceedings extends to preliminary conversations and interviews between a prospective witness and an attorney if they are some way related to or connected with a pending or contemplated action"); Hawkins v. Harris, 661 A.2d 284, 290 (N.J. 1995) (holding that absolute privilege should extend to the relevant statements of investigators made in the course of pretrial discovery," but also finding that an investigator's suggestion of infidelity may not have been relevant to the litigation); Hoover v. Van Stone, 540 F.Supp. 1118, 1123-24 (D. Del. 1982) (finding that attorney contacts with persons who reasonably were potential witnesses were absolutely privileged); Kirshstein v. Haynes, 788 P.2d 941, 953-54 (Okl. 1990) (holding that potential litigant who acted as a lawyer would in showing defamatory affidavit to persons who had reason to know the truth or falsity of its contents was entitled to absolute privilege); Moses v. McWilliams, 549 A.2d 950, 959 -60(Pa. Super. 1988)(holding that subsequent treating physician's provision of confidential information to lawyer for hospital in malpractice case during informal ex parte discovery would be absolutely privileged); Robinson v. Home Fire & Marine Insurance Co., 49 N.W.2d 521, 527( Ia. 1953)(absolute privilege "has equal application to a situation where an attorney is conferring with a prospective witness");
specific content of the defamatory communication also be relevant to the litigation ensures that extraneous allegations are not immunized. In Unarco, the only case to consider this issue in the context of our scenario, the court required that the lawyer’s breach inducing conduct be “related to the subject matter of the proposed litigation, and [that there be] a real nexus between the attorney’s conduct and litigation under consideration.” This requirement would not seem to pose a problem in our scenario as long as the lawyer did not push the disclosure beyond potentially relevant material.

Finally, some jurisdictions have provided only a qualified privilege for defamatory attorney statements made during informal discovery to people who are otherwise unconnected to the proceedings, such as witnesses. At least one jurisdiction appears to provide no immunity for


E.g., Hawkins, 661 A.2d at 292 (“[t]he litigation privilege is not, however, a license to defame”); Hoover, 540 F.Supp. at 1121 (noting that the absolute privilege is subject only to the limitation that “the privileged statements must be relevant or pertinent to the case”); Rosenfeld, Meyer & Susman v. Cohen, 194 Cal.Rptr. 180, 202 (Cal.App. 1983)(holding that departing law firm members persuasion of a litigation client to leave with them was unrelated to the litigation and therefore not privileged in an interference with contractual relations action brought against them by the law firm).

Unarco, 2010 WL 744394, at 9(finding both sufficient relation and nexus for lawyer’s conduct to grant summary dismissal of the intentional interference claim).

E.g., Schulman v. Anderson Russell Kill & Olick, P.C., 458 N.Y.S.2d 448, 453-54 (“the absolute privilege protecting statements in the course of judicial proceedings does not apply to lawyers’ informal communications designed to gather information or to identify potential witnesses . . . [,] however, . . . attorneys’ statements reasonably related to informal discovery do deserve the more limited protection of qualified privilege”); Burzynski v. Aetna Life Insurance Co., 967 F.2d 1063, 1068 (5th Cir. 1992) (finding under Texas law that a mass mailing to third parties whose “‘relationship to the litigation was hypothetical at best’” (citation omitted) and which contained more defamatory information than needed for investigatory purposes does not bear a sufficient relationship to the proceeding to justify absolute immunity). Accord, Twelker v. Shannon & Wilson, Inc., 564 P.2d 1131, 1134 (Wash. 1977) (holding that only qualified rather than absolute privilege was available to an expert’s report to an insurer concerned about an insured’s possible exposure to liability). See also, Kahala, 151 P.3d at 752 (finding that lawyers’
communications with potential or actual witnesses. As the former employees our lawyer would be talking with are likely to be no more than witnesses, there are some jurisdictions in which we can be sure that our lawyer will not be able to assert the litigation privilege.

Thus, we have one jurisdiction, Tennessee, in which the litigation privilege will definitely be available to prevent liability in our scenario. In a number of other jurisdictions, the litigation privilege will definitely not be available because the former employee is only a witness or if the inducement occurs pre-filing. In jurisdictions where these factors are not a problem, the application of the privilege is an open question, depending on how far the jurisdiction is willing to expand the privilege past defamation-based conduct.

2. Not Improper

If interfering conduct cannot fall within one of these privileges, it is necessary to examine the competing values present in the particular case. This requires the consideration of at least seven distinct factors:

(a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.

Each of these factors, and their possible application to our scenario, will be addressed below. However, it should already be apparent that the very complexity of this analysis, and the unpredictability of the weighing which follows, particularly in the novel context posed by our scenario, makes this step of the analysis its own little rabbit hole, which adds yet another layer of unpredictability to this tort analysis.

management of inspection and review of books fell within Hawaii's generally qualified litigation privilege for intentional interference with contractual relations claims).  

238 Kurczaba, 742 N.E.2d at 440-41 (noting that the litigation privilege for attorneys in Illinois has not been extended beyond communications with opposing counsel, co-counsel and clients).

239 R § 767 & comment b (“[t]his Section states the important factors to be weighed against each other and balanced in arriving at a judgment; but it does not exhaust the list of possible factor”).
a. Nature of the Actor’s Conduct

The significant of this factor is greatest when the actor’s interfering conduct falls within an independent tort, such as violence, fraud, or duress; however, all that can be said is that ordinarily the use of such means will make interference improper.\textsuperscript{240} In the right circumstances, even violence will not be viewed as improper, as for example when a parent uses corporal punishment to stop a child from engaging in activities that are deemed bad for the child.\textsuperscript{241} Although we would not expect the lawyer to engage in any such independently tortious conduct to induce the former employee to respond to some questions, we must also consider whether the lawyer’s conduct might be improper because it is unethical.\textsuperscript{242}

We know that a possible violation of Model Rule 4.4, which prohibits the “use of methods of obtaining evidence that violate the legal rights of such a person,”\textsuperscript{243} is at stake in this conduct. However, we cannot know if questioning a former employee with an NDA is unethical under Model Rule 4.4 until it has independently been determined that it violates the legal rights of the former employer, as provided by tort law. Since this conduct can only be unethical if it is first improper under the law of intentional interference, it cannot, therefore, be improper because it is unethical under MR 4.4. Ethical violations that are independent of the tort, however, would be relevant. Potential ethical violations in this context could include, as discussed above, legal advice to a former employee that would be ethically improper under Model Rules 1.7 and 4.3.\textsuperscript{244} Other ethical violations that could arise in this context might include solicitation of a prospective client in violation of Model Rule 7.3, conduct that induced favorable testimony from a witness in violation of Model Rule 3.4, or inquiries into attorney-client privileged material in violation of a different aspect of Model Rule 4.4.\textsuperscript{245}

Assuming these ethical violations were avoided, and there is no

\textsuperscript{240} Id. at comment c (“[t]hus physical violence, fraudulent misrepresentation and threats of illegal conduct are ordinarily wrongful means and subject their user to liability even though he is free to accomplish the same result by more suitable means”).

\textsuperscript{241} Id. at comment c (beating your own child to prevent them from gambling is not improper).

\textsuperscript{242} Id. (“violation of recognized ethical codes, . . . established customs or practices” are potentially relevant to the impropriety of the interference). See also Adler, Barish, Daniels, Levin & Cerskoff v. Epstein, 393 A.2d 1175,  1184 (Pa. 1978) (finding solicitation of clients in violation of Code of Professional Responsibility DR 2-103(A) improper because unethical means of inducement).

\textsuperscript{243} MR 4.4.

\textsuperscript{244} See supra text at n. 190-91.

\textsuperscript{245} See also Unarco, 2010 WL 744394, at 10(noting that inducing a breach of confidentiality agreement is unethical under Tennessee’s version of MR 4.2).
reason to think they are unavoidable in this situation, there is still the possibility that the conduct could be improper as a result of violating a practice, if there was a practice of not questioning employees with NDAs that was followed by lawyers in the particular locality or area of practice. However, there is no reason to believe that such a practice has actually been established within any community of lawyers.

Case law suggests that unfair conduct can also make interference improper. Thus, one particular kind of inducement, offering to indemnify the breaching party for the breach, may well be improper if it is viewed as unfair. While there is disagreement about whether this kind of inducement is improper in cases involving only prospective contractual relations, there is more consistent case law holding that this is an improper tactic when applied to existing contracts for the purpose of gaining commercial advantage. However, in Unarco, where the purpose of inducing the breach was to gain information for possible litigation, the court found negotiation of an indemnity agreement demanded by the former employee privileged because, among other things, it did not involve “wrongful means,” which it described as including, “inter alia, fraud, trespass, threats, violence, or other criminal conduct.”

Finally, in the absence of tortuous, unethical or unfair behavior, minor aspects of the actor’s conduct, such as whether they were acting alone or in concert, whether the inducement was presented personally or more remotely, and whether the contact between them was initiated by the actor or the breaching party, could become relevant to “tip the scales” in a close case. It is possible to imagine that the particular circumstances by which a lawyer comes into contact with a former employee could involve these possibilities. The lawyer could be working with lawyers representing other plaintiffs or not, could contact the former employee by telephone or

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247 Downey v. United Weatherproofing, 253 S.W.2d 976, 982 (Mo. 1953) (“attempting to induce plaintiffs’ customers to breach their existing contracts by offering to indemnify such customers against liability for the breach, states conduct which is wrongful”); Edward Vantine Studios, Inc. v. Fraternal Composite Service, Inc., 373 N.W.2d at 515 (“defendant’s interference was improper to the extent that it agreed to indemnify the houses for any legal costs or fees resulting from their breach of plaintiff’s contracts”); Melo-Tone Vending, Inc. v. Sherry, Inc., 656 N.E.2d at 315 (subsidizing legal defense made interference improper).

248 2010 WL 744394

249 Id. at 9.

250 Id.

251 R § 767 comment c.
mail, and could have initiated the contact or have been sought out by the former employee. Thus, all that can be said is factors able to tip the scales toward liability may or may not be present.

b. The Actor’s Motive

The actor’s motive in interfering could be to simply to bring about the interference, or there could be a distinctly different motive. The Restatement places the presence or absence of the specific desire to bring about the interference in the “actor’s motive” factor and places the presence or absence of any other possible motives in the fourth factor, “the interests sought to be advanced by the actor.” In the discussion of the intentional nature of a lawyer’s interference in this scenario, we previously concluded that a lawyer questioning a former employee would not be doing this for the purpose of interfering with the NDA and would not desire this result to occur. Rather, we concluded that at most the lawyer could have incidental intent, in that they might know that breach of this contract would certainly or substantially certainly result. The Restatement indicates that where intent to interfere is only incidental, “the factor of motive carries little weight toward producing a determination that the interference was improper.” Thus, on this factor, there will be nothing to suggest improper interference in our scenario.

c. The Interests of the Other with which the Actor’s Conduct Interferes

Not all contractual interests are created equal: “[s]ome contractual interests receive greater protection [from interference] than others.” Most importantly, this factor distinguishes the lesser harm of interference with prospective contractual relations from the greater harm of interference with existing contractual relations. Competition can trump an interest in prospective contractual relations as long as wrongful means are not used, while competitive interference with a existing contract will create liability even if less than wrongful means are used. As we have seen, some jurisdictions will treat voidable contracts as mere prospective contractual

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252 Id. at comment d.
253 R § 767(d). See also id at comment d.
254 Id.
255 Id. at comment e.
256 Id.
257 R § 768(b) (“One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor . . . does not interfere improperly with the other’s relation if . . . (b) the actor does not employ wrongful means”).
258 R § 767 comment e.
relations, while others view them as no different that fully enforceable contracts, at least until such time as the affected party seeks to void them.\footnote{See supra, part I. A.}

If an NDA were to be voidable in one of the former jurisdictions, and the lawyer’s interest in the information was seen as competitive with the former employer’s interest, then the absence of the use of any wrongful means, such as violence, fraud, criminal or civil prosecution,\footnote{R § 768 comment e.} would strongly suggest that no interference liability could arise. If the lawyer’s interest in the information was not seen as competitive, but rather as arising out of another motive or interest, then the court would have to judge whether that interest outweighs the interest in a prospective contractual relationship, as is discussed further in the next section.

We have also seen that no harm whatsoever is seen to arise from interference with void contracts, such as those that are illegal or violate public policy, at least as long as only “appropriate means” are used.\footnote{See Restatement § 774.} This last caveat is somewhat puzzling as it would seem that the lack of a protectable contract interest should make the means used irrelevant. Indeed, arguably we should not even be considering the propriety of the interference when there is no interference at all. If a threat of violence, an illegal means, was used to get someone not to perform a contract that was illegal to begin with, there might be liability for assault, but there should not be liability for interference. However, following the language of the Restatement, we can at least safely conclude that interference with a void NDA in our scenario should not be a concern as long as inappropriate means were not used. Although the Restatement fails to explain what ‘appropriate means’ are, it would seem that if the means of inducement likely to be used by a lawyer -- ranging from a promise to defend and/or indemnify any claim of breach of the NDA to moral persuasion that helping the plaintiff is the right thing to do – would not be sufficiently “wrongful” for interference with prospective contract relationships, such means should not be in-'appropriate' for interference with a void contract, as this is of even less value than a prospective contractual relationship.

d. The Interests Sought to be Advanced by the Actor

i. Improper Interests: Malicious and Economic

Identification of the interest the actor sought to promote through the interference can, in some cases, quickly reveal that interference is improper. Interference with a contract that is motivated out of animosity and a desire
to hurt the other has no value and will always therefore be improper.\footnote{262}{R § 767 comment f.} A desire to improve one’s own economic position is recognized as important and enough to justify interference with prospective contractual relations, but insufficient to justify interference with another’s existing contractual relationship.\footnote{263}{Id.} In our scenario, the lawyer is acting on behalf of a client who is either considering litigation or is in the early stages of initiated litigation. Assuming that our lawyer is otherwise ethical, and has not pursued litigation in violation of Federal Rule of Civil Procedure 11\footnote{264}{Federal Rule of Civil Procedure 11(b)(2)(2007)(requiring attorneys to sign pleadings and other filings, thereby representing that the claims therein are non-frivolous).} and Model Rule 3.1,\footnote{265}{ABA MRPC 3.1(“[a] lawyer shall not bring . . . a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous”).} it should not be possible to say that the interference was solely for the purpose of “gratifying . . . feeling[s] of ill-will.”\footnote{266}{R § 767 comment f.}

However, should a lawyer who pursues litigation on behalf of a paying client\footnote{267}{This would include payment by someone to represent the client or any situation in which the lawyer gained some personal economic benefit as an intended, albeit indirect consequence of representation.} because it advances the interests of the client be seen as acting simply to improve their own economic position? Normally in this tort, improving one’s own economic position occurs by the interfering actor diverting an economic opportunity from another for the actor’s direct economic benefit. There is no such direct economic benefit to the lawyer for this interference. Although, if the interference helps make the litigation successful and therefore more financially remunerative for the lawyer, then, particularly in litigation involving a contingency fee, we could match the lawyer’s desire to get a large verdict against the former employer’s desire to avoid the economic harm that release of information may cause. If such an economic motive were all we were willing to credit the lawyer with, then it is pretty clear that this motive would not help the lawyer avoid liability.\footnote{268}{R § 767 comment f (“[i]f the interest of the other has been already consolidated into the binding legal obligation of a contract, however, that interest will normally outweigh the actor’s own interest in taking that established right from him”).} However, courts are unwilling to “conclude that lawyers have an improper motive simply because they seek to increase their fees by maximizing an award for a client.”\footnote{269}{E.g., Safeway Insurance Co., Inc. v. Guerrero, 106 P.3d 1020, 1027 (Az. 2005)(finding no improper motive by lawyer merely because Morris agreement would increase his contingency fee).}
ii. Proper Interests: Public Interest and the Rule of Law

Most lawyers should be able to argue that the motivation for their interference was serving the public interest. Some litigation will have a specific public interest component because of the specific rights enforced. Even litigation that serves only to vindicate private rights with no immediate public ramifications can be seen as serve the public interest in maintaining the rule of law. How would we know whether contemplated or initiated litigation involves a specific public interest? Case law has found a public interest in interfering with contracts that threaten public safety, may involve illegal public spending, place patients in dangerous nursing homes, give privileges to doctors believed to be incompetent, or employ sexual harassers. It seems likely that many other types of lawsuits could be viewed as involving a public interest, but again this inserts another level of unpredictability.

Whether a specific public interest can be connected to our litigation or merely the general public interest in maintaining the rule of law, the Restatement suggests that a careful evaluation must take place to ensure the interference is not still improper:

relevant questions in determining whether his interference is improper are . . . whether the practices are actually being used by the other, whether the actor actually believes that the practices are prejudicial to the public interest, whether his belief is reasonable, whether he is acting in good faith for the protection of the public interest, whether the contractual relation involved is incident or foreign to the continuance of the practices and whether the actor

270 Accord, Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155, 159 (3rd Cir. 1988) (“[t]here can be no tortious action or impropriety when private citizens or public officials exercise their rights to notify the appropriate agencies or mobilize public opinion about a serious violation of the law”).


272 Bledsoe v. Watson, 106 Cal. Rptr. 197, 198-99 (Cal. App. 1973) (interference with contract illegally funded with taxpayer funds was in the public interest).

273 Brownsville Golden Age Nursing Homes, 839 F.2d at 157 & 159 (“[p]latently, the revocation of Brownsville's license directed by the state court is dispositive of the propriety of defendants' actions”).


employs wrongful means to accomplish the result.\textsuperscript{276}

We can consider the application of these questions to two versions of our scenario, one in which the litigation involves the general public interest in maintaining the rule of law and the other in which the litigation involves a specific public interest. As the public would not seem to be interested in a fence dispute between neighbors beyond a general interest in assuring that rights are enforced in a peacable manner, this will be the general public interest version of our scenario. The second version will be a discrimination lawsuit, as this has been recognized as involving a public interest.\textsuperscript{277} It is particularly easy to imagine that a lawyer investigating a possible discrimination suit might want to seek out former employees to learn about their experiences and also that such former employees might well be covered by what we will assume for the moment is a valid NDA that covers this information.

The first question asks whether the defendant in the litigation being pursued by the lawyer, the boundary-pushing neighbor or the discriminating employer, is actually engaging in illegal conduct. Of course, that is the question the litigation is designed to address and, at the time this disqualification issue is raised, has not yet been resolved. Indeed, this evaluation should be made as of the time the lawyer induced the breach of contract. At best, one could only ask whether it appears that the lawyer was pursuing the litigation at the time of the interference in good faith. The second, third and fourth question address whether the actor really has an interest in the public interest at all. Sham public interest must be unmasked to see what is really driving the interference. Does the actor personally view the practices in question as prejudicial to the public interest? If they do not, than they are not actually motivated by public interest. For example, a person may organize a boycott to stop investment in Sudan because they want a competitive advantage and this cause will produce an effective boycott, but personally have no problem with investment in Sudan.

In our scenario, given that the lawyer is acting in a representative and professional capacity, their personal beliefs as to what is in the public interest and what is not are irrelevant. The sexist lawyer who diligently represents a client in a sex discrimination suit has actually subsumed their private beliefs to their professional role and it is this professional role and the interests that it promotes that are the most authentic in this situation. It is hard to see how this would be a sham on the part of the lawyer as long as an apparently non-frivolous claim has been made by the lawyer. All in all, the

\textsuperscript{276} R § 767 comment f.
\textsuperscript{277} Id.
lawyer’s good faith in questioning the former employee would seem to be assured by adherence to the usual legal and ethical standards of good faith pursuit of litigation.\textsuperscript{278} In addition, the reasonableness of a lawyer’s belief that they are acting in a specific public interest in pursuing good faith litigation is assured when such litigation is based on statutory law or common law rules understood as protecting the public interest.\textsuperscript{279} Similarly, a lawyer who ethically engages in litigation to vindicate the purely private rights of clients must also be seen to embrace the value of the rule of law, regardless of how cynical the lawyer may actually be.

The fifth question focuses our attention on how the contract interfered with contributed to or furthers the continuance of the practices that are not in the public interest. It is hard to say precisely what this question aims to accomplish. It might be another way to uncover a sham, if the interfered-with contract has no effect on the objectionable practices. Alternatively, it might be that the closer the connection between the contract and the objectionable practices, the more public interest value there is in interference with the contract, and vice versa. Therefore, we must consider the relationship between an NDA and the practices that the litigation seeks to stop.

The most direct connection would be found in litigation about the NDA itself, but most of the time that will not be the case. The NDA itself will likely be quite unrelated to the practices that are discriminatory or otherwise unlawful, except for the fact that in this situation, the NDA will work to conceal information about this and other illegal practices the employer has engaged in. This concealment, if not broken by the breach of the agreement, allows the former employer to continue to engage in these unlawful practices and/or not be legally responsible for them. As discovery of concealed information relevant to the illegal practice has little other value than for litigation and is, in general, fundamental to the pursuit of any public or private interest through litigation, it can neither be a sham nor merely “incident or foreign to the continuance of the practices.”\textsuperscript{280}

The final consideration in evaluating the propriety of interference in the public interest is whether the means used were wrongful. It is meant to avoid justifying the use of tortious or otherwise wrongful means to bring about a public interest end, so that the use of violence to induce the breach of contract with a discriminatory employer would be improper. We have already considered the means that are likely to be used by a lawyer on a

\begin{footnotes}
\footnote{278}{E.g., FRCP 11 and Model Rule 4.4.}
\footnote{279}{E.g., Bledsoe v. Watson, 106 Cal. Rptr. 197, 198-99 (Cal. App. 1973)( a “public policy, made explicit by statute” encourages litigation to save taxpayer money from illegal disbursement by providing a private right of action).}
\footnote{280}{R § 767 comment f.}
\end{footnotes}
former employee with an NDA to induce a response to questions, and we have seen that absent a promise to indemnify and defend or conduct smacking of undue influence, there is not likely to be wrongful conduct.

Therefore, it seems quite likely that none of the above-discussed considerations suggesting improper interference will be present to undermine a genuine specific public interest in the contemplated litigation or general public interest in enforcing the rule of law. However, it is not clear that successful negotiation of these considerations requires a conclusion that such litigation interference is not improper. Three more factors remain: social interest in each party’s contract or conduct, proximity of conduct to interference, and relations between the parties.

e. The Social Interests in Protection the Freedom of Action of the Actor and the Contractual Interests of the Other

Whether or not a public interest is served by the interference, it is also appropriate to consider all social interests in both the interfering conduct and the contract and weigh them against each other.\(^{281}\) While the only social interest specifically discussed by the Restatement is the social interest in competition in general, and there only in relation to interference with prospective contractual relations, the general suggestion is that “a stalemate”\(^{282}\) between private interests may be “enlightened by a consideration of the social utility of these interests.”\(^{283}\) Thus, in Bledsoe v Watson,\(^{284}\) the social interest in the actions of county citizens who persuaded the city treasurer not to pay an attorney claimed to have been illegally hired by the city outweighed the attorney’s interest in this employment contract.\(^{285}\) In Zilg v. Prentice-Hall, Inc.,\(^{286}\) the social utility of “communication of good faith views about the merits of a literary work to publishers and book clubs”\(^{287}\) was described as outweighing the author’s interest in an existing publishing contract.\(^{288}\)

\(^{281}\) See Herron v. State Farm Mutual Insurance Co., 14 Cal. Rptr. 294, 297 (“’[w]hether the intentional interference by a third party is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with’”).

\(^{282}\) Id. at comment g.

\(^{283}\) Id.

\(^{284}\) Supra note 275.

\(^{285}\) 106 Cal. Rptr. at 198-99 (a “public policy, made explicit by statute” encouraging litigation to save taxpayer money from illegal disbursement provides a weightier social interest than a general interest in contracts).

\(^{286}\) 717 F.2d 671 (2nd Cir. 1983)

\(^{287}\) Id. at 678.

\(^{288}\) Id. (expressing the views of the author of the opinion), and id. at 682 (concurring judges found the good faith of the defendant acting in a non-coercive manner to protect its
Certainly, as a derivative of either the general public interest in maintaining the rule of law through litigation or a specific public interest furthered by this litigation, it can be argued that there is a social interest in a lawyer’s freedom to represent a client diligently, in the absence of otherwise illegal or unethical conduct. If, as discussed above, the litigation privilege would not apply to automatically make interference of this kind by a lawyer proper, then these general or specific litigation values can be weighed against the particular contract interest in this case. On the side of the employer, it would ordinarily be possible to argue that there is a social interest in the enforceability of NDAs, at least to the extent they protect proprietary information, trade secrets, and other business assets. It is less clear that there is social interest in allowing businesses to use a vehicle designed to protect proprietary information to conceal information about wrongdoing. Thus, even if a court would not find the NDA void for public policy reasons, as further explored below, these same public policy considerations can be used to argue that on the overall scale of social utility, the lawyer’s conduct is more useful than the company’s. Unfortunately, given the wide latitude given to the court to weigh all these factors, there is no guarantee that these arguments will work to convince a court that the interference was proper.

f. The Proximity or Remoteness of the Actor’s Conduct to the Interference

If the actor’s conduct is the direct and immediate cause of the breach, the interference is more likely to be improper than if the breach is only indirectly caused by the actor. When the actor persuades a seller to redirect goods already under contract to a third party, the actor directly causes the seller’s breach. However, when the third party therefore fails to perform their contract to sell the same goods to a fourth party, the actor only indirectly causes the third party’s breach. In our scenario, if the lawyer has in fact caused the breach at all, it will be directly rather than indirectly. When direct causation is present, “the other factors need not play as important a role in the determination that the actor’s interference was improper.” In particular, the Restatement notes that the lack of wrongful conduct is less significant, as is the presence of mere incidental intent.

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289 See Maynard v. Caballero, 752 S.W.2d 719, 721 (finding that the “interest of the public in loyal, faithful and aggressive representation by the legal profession” outweighed the plaintiff’s interest in his relationship with his own attorney).

290 I.e., other than intentional interference with a contract, which has yet to be determined.

291 R §767 at comment h.

292 Id.
What is left unsaid, however, is how this factor interacts with the presence of a genuine, legitimate, and socially valuable interest both motivating the interfering conduct and advanced by it. Consequently, this factor injects considerable uncertainty as to the outcome of the analysis of impropriety in our scenario.

g. The Relations Between the Parties

The final factor notes that either a competitive relationship between the actor and the party deprived of a prospective contractual relationship or an advisory relationship between the actor and the breaching party can make the actor’s conduct proper. The first relationship refers to the already discussed competitor’s privilege to interfere using non-wrongful means with a prospective contractual relationship. This will only apply to our scenario if the contract is voidable in a jurisdiction that treats voidable contracts as prospective contractual relations, and if the court buys the argument that the lawyer and former employer are competitors for the relevant information, which is not the usual competitive relationship. The second refers to the advisor’s privilege to give honest advice. Advice from the lawyer to the former employee is not a necessary element of our scenario, but if it is present, we have seen that it may well be unethical. This would then make the conduct improper, despite the advisor’s privilege. Alternatively, in a version of our scenario in which the lawyer avoids giving such unethical advice, we would not expect to find any special relation between the parties relevant to the propriety of the interference.

h. Summary

Where does our hypothetical lawyer stand at the end of this analysis of the propriety of their conduct? Absent advice to the former employee or an offer to indemnify them for breach of NDA contract damages, the nature of our lawyer’s conduct would seem to be proper, however, any little feature of that conduct could “tip the scales” toward a finding of improper interference, including the fact that the lawyer’s causation of the interference would most likely be direct rather than remote. As our lawyer’s specific motive would not be to interfere with the NDA, but to advance the

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293 Id. at comment i.
294 See R § 768 and Part I(A), supra.
295 That is unless the NDA is voidable in a jurisdiction that treats voidable contracts as no more than prospective contractual relations. See Part I(A), supra.
296 See supra, part I(A) text at notes 42 on.
litigation, the motive factor would most likely suggest that the interference is not improper. In particular, if our lawyer’s interest in the information is viewed as competitive, and the NDA in question is voidable in a jurisdiction that treats such as a merely prospective contract, the interference will certainly not be improper. Otherwise – valid NDA, voidable NDA treated as existing contract, or voidable NDA but no competitive motive – we must weigh the value of the breached contract against the value of the interfering conduct.

To the extent that a lawyer’s motive in pursuing non-frivolous litigation is seen not merely as economic but rather as involving the public interest, additional weight would be put on the not-improper side of the scale. Whether more weight would be granted to litigation that seeks to vindicate a special public interest than to purely private litigation is not something any court has addressed. It is also not clear how much weight at all would be given to the enforcement of the NDA, as this may depend on whether the court gives such agreements specific positive value as a protector of property interests in information, general positive value as a contract, or specific negative value as a method of concealing evidence of illegality. Therefore, we see that while good arguments may be available to a lawyer seeking to argue their conduct was not improper, the fact that we cannot be absolutely sure that the most ordinary and minimal persuasion might not be viewed as wrongful in some way, and that the employer’s contract and confidentiality interests might not outweigh the social and public interests in the litigation, guarantees an unpredictable result. Not only do we fall down the rabbit hole, with regard to this factor we cannot get out.

CONCLUSION, PART I

We have seen that there are some jurisdictions in which a lawyer with particularly good facts is not likely to be liable for intentional interference with contract for speaking with a former employee about information relevant to a proposed or pending lawsuit, largely because either actual knowledge of the NDA is required or the litigation privilege would make such conduct not improper. Even in these jurisdictions, the possibility of liability arises if the lawyer knows of the NDA or if the communication happens to fall outside of the parameters of a more narrowly defined litigation privilege. At the same time, there are also many jurisdictions in which the possibility of such liability is not foreclosed even with the best facts. In almost all jurisdictions, therefore, it is possible that such communications might be unethical under Model Rule 4.4, which can serve as the basis for a motion to disqualify.
However, in addition to the tort elements discussed above, the former employee must also be found to be in breach of the non-disclosure agreement in order for intentional interference with contract liability to attach. In the second part of this article, published separately, I consider the likelihood that an employee non-disclosure agreement would be interpreted to cover various kinds of information that would be relevant to litigation. While scope of coverage depends initially upon the language of the agreement, various public policy considerations may also limit the enforceability of non-disclosure agreements in this context. At the same time, it will be almost impossible to predict in advance when public policy will be invoked to make a particular non-disclosure agreement unenforceable. With the possibility of an enforceable and breached NDA contract, and the unpredictability of tort law as applied to this scenario, the question of whether such conduct is unethical moves from the arena of substantive law to ethics itself. In the final section of the second part of this Article, I consider the interpretation of Model Rule 4.4 itself, and conclude that there are good reasons for excluding conduct of this kind from the reach of the rule.

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AN ETHICAL RABBIT HOLE: MODEL RULE 4.4, INTENTIONAL INTERFERENCE WITH FORMER EMPLOYEE NON-DISCLOSURE AGREEMENTS AND THE THREAT OF DISQUALIFICATION, PART II

MAURA IRENE STRASSBERG

INTRODUCTION, PART II

Can a lawyer be disqualified from representation simply because they have had an informal conversation with a former employee with a non-disclosure agreement? A few years ago, lead counsel for plaintiffs in a major class-action suit faced just such a threat. A former employee of the defendant corporation, not previously identified during several years of discovery, contacted a journalist writing about the case with important new information about wrongful acts taken by the corporation. The journalist passed the name to counsel and when counsel spoke with the former employee, startling new information came to light. A subsequent request for documents related to the disclosure revealed to the defendant that there was an undisclosed employee source of information about the corporation and defendant demanded the name of the former employee. Upon discovering that the former employee had signed a non-disclosure agreement, defendant claimed that the information in question was confidential business information, that its disclosure outside of formal discovery violated the non-disclosure agreement, and that counsel’s conduct was unethical. In particular, counsel was alleged to have violated Model Rule of Professional Ethics 4.4, which prohibits using a method of obtaining evidence that violates the rights of third parties, by interfering with the non-disclosure contract. This claim of unethical conduct then formed the basis for a motion to disqualify counsel from representation in this major class-action suit, a case that had been pursued on a contingency basis for several years.

While vigorously opposing the disqualification on the merits at considerable expense, counsel offered not to use the evidence revealed by

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* Professor of Law, Drake University Law School. I am grateful to Dean David Walker and the Law School Endowment Trust for their generous support of this project, to Dean Allan Vestal and Professor Keith Miller for their careful readings and helpful comments, and to my family, as always, for everything.

297 The details of this skirmish are covered by a protective order and not publicly available, however, I am personally familiar with the facts through my participation in the case as a legal expert. This summary also reflects only part of the facts in the actual case.

298 American Bar Association Model Rule of Professional Ethics 4.4(a).

299 Id.
the former employee in order to avoid any suggestion of impropriety. There was no disqualification in the end, possibly because counsel had asked about the possibility of a non-disclosure agreement and that the former employee had forgotten that any such agreement had been signed, but it was quite a scare. What if counsel had not asked, or the employee had remembered? Would counsel have been disqualified? What if the evidence given up had been central to the case?

With employer use of non-disclosure agreements proliferating, the threat of an ethics violation, loss of evidence, and disqualification could well be enough to discourage lawyers from engaging in informal discovery with any former employees, some because they may be known to have signed a non-disclosure agreement, others because they merely might have signed such an agreement. However, is there really any possibility that it is unethical to informally communicate with a former employee with a non-disclosure agreement, known or unknown, and could this possibly justify disqualification anyway? Since Model Rule 4.4 only makes conduct that violates the rights of third parties unethical, the legitimacy of your conduct will depend on whether your conduct violated the substantive law of contract and tort. This “piggybacking” of ethical rules on substantive law is widespread in the Model Rules and ordinarily it is both efficient and effective to make ethical standards rest upon substantive law. However, when substantive law is itself both unsettled and controversial, this technique creates what I have called an “ethical rabbit hole, a long and tangled detour into the law producing an uncertain answer.” That is precisely the situation created by the scenario I have just described.

Whether or not a lawyer can be found to have acted unethically in violation of Model Rule 4 initially depends upon whether the lawyer would be liable for intentional interference with the non-disclosure agreement between the former employee and their employer. In part, this is a matter of tort law, and in part I of this Article, published separately at ******, I evaluated the possible application of this quite complex tort to a lawyer’s informal communication with such a former employee for the purpose of obtaining information relevant to proposed or pending litigation. What emerged from this evaluation was a sense that only in a few jurisdictions and with the best facts could we have confidence that a lawyer would not be liable for intentional interference with contract as a matter of tort law. However, since a breach of an enforceable contract is also required before any tort liability can attach, this ethical rabbit hole also includes a detour through contract law as well.

In this second part of the Article, I consider the likelihood that an

300 See my Article, Part 1.
301 See my Article, Part 1.
employee non-disclosure agreement would be interpreted to cover various kinds of information that might be relevant to litigation. While the scope of coverage depends initially upon the language of the agreement, there are good arguments to suggest that various public policy considerations could limit the enforceability of non-disclosure agreements in this context. However, courts have thus far had limited opportunities to evaluate the public policy implications of non-disclosure agreements used to block informal discovery, and what results there are have been quite mixed. As a result, it is almost impossible to predict in advance whether a particular non-disclosure agreement will be found to be unenforceable.

With the possibility that some NDA contracts might be found both to be enforceable and to have been breached in this scenario, the question of whether a lawyer’s connection to such a breach is unethical moves from the arena of substantive law to ethics itself. If tort law actually does extend this far, at least in some jurisdictions, ought we to embrace the limits thereby imposed on lawyers and make them our own? If we do rubberstamp such tort law in the ethical rules, it provides opposing counsel with a very simple and potent threat; without ever actually litigating either the tortiousness of the conduct and the enforceability of the contract, and without ever making an ethical complaint, the opposing party can move to disqualify the lawyer on the mere possibility that a lawyer may have violated MR 4.4(a).\(^302\) This threat so immediately threatens the pocketbook of lawyers and clients\(^303\) that it may in fact create more deterrence than either the threat of tort liability, which is remote in time, expensive for the other side to pursue, and might be covered by malpractice insurance, or the threat of discipline, which is even more remote as opposing counsel can not get a strategic benefit from any possible discipline and likely suffers from the bar-wide reluctance to report possible ethical violations. Thus, without a deliberate decision as to whether we do indeed want to deter such conduct by litigation counsel, the Model Rules could be understood to have handed opposing counsel a weapon capable of producing a serious chill in litigation investigations,\(^304\) or, at the very least, greatly increasing the cost of

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303 Accord, Davidson Supply Co., Inc. v. P.P.E., Inc., 986 F.Supp. 956, 958(D. Md 1997)(noting that motions to disqualify “cause tremendous disruption to the orderly handling of the case (not to mention the expenditure of time and money on attors ancillary to the merits”).

304 See Chambers v. Capital Cities/ABC, 159 F.R.D. 441, 445 (S.D.N.Y. 1995) (“agreements calling or appearing to call for silence concerning matters relevant to alleged
litigation by shifting informal investigation to formal discovery. In the final section of this Article, I consider the history, purpose and interpretation of Model Rule 4.4, and conclude that there are good reasons for excluding conduct of this kind from the reach of the rule.

I. BREACH OF THE NON-DISCLOSURE AGREEMENT

Judicial determination that a breach of contract occurred is a prerequisite for a finding of tortious interference with such a contract. As a practical matter, however, interference with the contract will occur before any judicial determination that the interference caused a breach of contract. Since tort liability does not require our potentially interfering lawyer to have subjectively realized that a breach would occur, our lawyer may well bear the risk of an inaccurate prediction about breach. This will be enough to discourage some lawyers from engaging in informal discovery of former employees and persuade those already threatened with disqualification to agree not to use such information without putting the claimed breach of the NDA to a rigorous test. The goal of this next section is to provide the rigorous test that lawyers often feel they cannot afford to do by assessing the possible strength of the underlying breach of contract claims. To the extent that the assumed strength of these claims turns out to be exaggerated, we may question the desirability of allowing Model Rule 4.4 to perpetuate this chilling effect.

A. LACK OF CONSIDERATION

The presence of consideration for an NDA will depend entirely upon the particular circumstances under which the NDAs has been signed by the employee. The NDA may be signed at the beginning of employment, and when this is the case, it will be viewed as supported by the promise of future employment. Similarly, as NDAs signed at the end of employment

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305 See Goldner v. Sullivan, Gough, Skipworth, Summers and Smith, 105 A.D.2d 1149, 1150 (N.Y.A.D. 4 Dept. 1984)(dismissing as “premature” a tortious interference claim against insurance company attorneys who had advised non-payment of claims due to evidence of arson when issue of whether insurance companies breached by refusing to pay was not yet determined).

306 The lawyer need only know the facts that subsequently support the court’s legal conclusion of breach. Supra note 172.

307 E.g., Cubic Corporation v. Marty, 185 Cal.App.3d 438, 448(4th Dist. 1986)(future employment was consideration for NDA when signed at orientation for new employees); Access Organics, Inc.v. Hernandez, 175 P.3d 899, 903(Mont. 2008) (“[c]onsideration
are usually in exchange for severance pay and/or extended benefits, consideration would also normally be present under these circumstances of formation. However, in some cases, the NDA is signed in the middle of employment. Continued employment after such signing is sufficient consideration for the NDA in some jurisdictions, but in others consideration will only be found if the NDA was signed in exchange for a change in the employee’s conditions of employment, such as a raise, a promotion, or access to confidential information. If the NDA was requested merely as an afterthought or because of a change of policy, it will be found to lack consideration. There is some variance, however, in how

exists if the employee enters into the non-compete agreement at the time of hiring”). But see George W. Kistler, Inc. v. O’Brien, 347 A.2d 311, 316(Pa. 1975)(holding that when oral employment contract is entered into prior to beginning work and employee learns only when employment starts that they must sign a non-compete, it is without consideration); National Recruiters, Inc. v. Cashman, 323 N. W. 2d 736, 741 (Minn. 1982)(when employees not informed of non-compete at hiring, but required to sign one shortly after beginning work, there is no consideration).

E.g., Lake Land Emp. Group of Akron, LLC v. Columber, 804 N.E.2d 27, 32 (Ohio 2004 (holding that consideration is present when a post-employment non-compete is followed by continued employment of an at-will employee); Farm Bureau Service Co. of Maynard v Kohls, 203 N.W.2d 209, 212(Ia. 1972)((finding consideration in continued employment when non-compete signed two months after employment began); Matlock v. Data Processing Secur., Inc., 607 S.w.2d 946 (Tx. App. 1980)(post-employment non-compete supported by consideration of continued employment); Research & Trading Corp. v. Powell, 468 A.2d 1301, 1305 (Del. Ch. 1983)(holding that continued employment is consideration for post-employment NDA when employment is at will and employee must sign or be fired); Puritan Bennett Corp. v. Richter, 657 P.2d 589, 592(Ct.App. Ks. 1983)(“consideration found where employee was told both that “continued employment was conditioned upon execution of the hiring agreement” and “retained, promoted and entrusted with company secrets for a significant time after execution”).

E.g., Modern Controls, Inc. v. Andreadakis, 578 N.W.2d 1264, 1268(8th Cir. 1978)(applying Minnesota law, NDA signed nine weeks after employment commenced supported by return promise to pay two years of base pay if unemployable after termination); Wainwright’s Travel Service, Inc., v. Schmolke, 500 A.2d 746, 478 (Pa.Super. 1985)(non-compete providing ownership interest supported by consideration). See also, Access Organics, Inc. v. Hernandez, 175 P.3d at 903(noting in dictum that a “salary increase or promotion” or “[a]ccess to trade secrets or other confidential information may also suffice as a form of good consideration”); Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 541 (Wyo. 1993)(holding that additional consideration other than continued employment is necessary to provide consideration for a post-employment promise not to compete). See generally, 54A Am.Jur. 2d 2d Monopolies and Restraints of Trade § 895 (2009); Unikel, Bridging the “Trade Secret” Gap, 29 Loy. U. Chi. L.J. at n. 74(collecting cases finding both no need for additional consideration and requiring additional consideration) Annotation, Sufficiency of Consideration for Employee’s Covenant not to Compete, Entered Into after Inception of Employment, 51 A.L.R. 3d 825 (1972 and --- Supp.).

E.g., Access Organics, Inc. v. Hernandez, 175 P.3d at 903-04(where at-will employee signed agreement four months after accepting employment and one month after
tight courts require the relationship to be between the post-employment signing of the NDA and the job benefits. For some courts, if hindsight shows that the NDA in fact opened the door for subsequent promotions, etc., there will be consideration.\textsuperscript{311} For others, the raise, promotion or other new job benefit must be contemporaneous with the signing of the NDA.\textsuperscript{312} So there will be cases in which the NDA that serves as the foundation of the intentional interference claim does not even rise to the level of being a contract.

B. CONTRACT LANGUAGE: COVERAGE AND ENFORCEABILITY

There is a considerable variability in the language used in employee NDAs to describe the information prohibited from disclosure. If the language of a particular former employee’s NDA does not cover the kind of information sought by the lawyer, there is no possibility that a breach of this NDA will arise out of discussions between the lawyer and this former employee.\textsuperscript{313} A basic issue, therefore, is simply whether the language of the

\textsuperscript{311} E.g., Davies v. Davies Agcy., Inc., 298 N.W.2d 127, 131(Minn. 1980)(finding that ten years of employment and an opportunity to do sales was consideration for one brother’s non-compete agreements, when other brother who refused to sign remained at a clerical position); Puritan Bennett Corp. v. Richter, 657 P.2d at 592(relying both on subsequent promotions and access to secrets as well as continued employment to find consideration when employer threatened to fire employee unless agreement signed).

\textsuperscript{312} E.g., Access Organics, Inc.v. Hernandez, 175 P.3d at 903(promotion one month before NDA signed could not be consideration); James C. Greene Company, 134 S.E.2d 166, 169 (N.C. 1964) (“[w]hile the defendant from time to time received increases in salary, the evidence fails to relate any of them to the covenant not to compete”).

\textsuperscript{313} E.g., In Re Prudential Ins. Co. of America Sales Practices Litigation, 911. F.Supp. 148, 154(D.N.J.1995)(allowed ex parte discovery of current and former employees with
NDA appears to cover the information sought by the lawyer. There are six categories of discoverable information that a lawyer might seek from a former employee:

1. Trade Secrets
2. Knowledge Integral to Employee Skills and Abilities
3. Other Confidential Proprietary Commercial Information
4. Employer Conduct
5. General Background Information about the Employer
6. Trivial Information about the Employer

Using the kind of information sought as a focus, we can evaluate what language in an NDA might be found to cover these different kinds of information. To the extent NDAs will be understood to cover these kinds of information, there remains a question of whether the NDA will be enforceable in this context of pre-filing investigation and post-filing informal discovery due to the important public policies served by litigation.

1. Trade Secrets

   a. Contract Language

   The protection of trade secrets from unauthorized disclosure is well established in the law, even in the absence of an NDA. Originally handled by tort law under a cause of action variously named breach of a confidential or fiduciary relationship or disclosure/misappropriation of trade secrets, tortious disclosure of trade secrets in most states is now

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314 Attorney-client privileged information is not discoverable and therefore not included in this list. See Federal Rule of Civil Procedure 26(b)(1) ("FRCP") ("[p]arties may obtain discovery regarding any nonprivileged matter")

315 E.g. Union Pacific R.Co. v. Mower, 219 F.3d 1069, 1073 (9th Cir. 2000) (finding that every employee has an automatic legal duty to protect their employer’s trade secrets).


317 Restatement (1st) of Torts, §757 (“Liability For Disclosure Or Use Of Another's Trade Secret”)

exclusively covered by a statutory cause of action under the Uniform Trade Secret Act (“UTSA”). Coverage of trade secrets by an employee NDA may therefore seem superfluous, but it is important because it can serve to demonstrate that the business has taken reasonable steps to maintain the secrecy of the information, one of the required elements for finding a trade secret. Since trade secrets are an extremely valuable part of a business, it would be a rare employee NDA that did not seek to cover trade secrets, either by express use of the word “trade secrets,” or by other language that courts will interpret as referring to trade secrets. A lawyer who knows only that a former employee has signed an NDA, with no further details, might well be failing to ‘connect-the-dots’ if they assumed that the NDA did not cover trade secrets.

But how easy is it for a lawyer to determine that the information they seek would be understood as a trade secret? The category of trade secret has been described as “one of the most elusive and difficult concepts in the law to define.”

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A trade secret is defined under the UTSA as:

information, including a formula, pattern, compilation, program, device, method, technique, or process that

(i) derives independent economic value, actual or potential, from
not being generally known to, and not being readily ascertainable by

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319 Uniform Trade Secrets Act §7.
320 C. Geoffrey Weirich & Daniel P. Hart, Protecting Trade Secrets and Confidential Information in Georgia, 60 Mercer L. R. 533, 544 (2009) (“nondisclosure covenants . . . can provide additional evidence that an employer took reasonable measures to safeguard the secrecy of its proprietary information, as is required to establish trade secret status under the G[eorgia]TSA”). Accord, Union Pacific, 219 F.3d at 1076 (finding that confidentiality agreement that protected trade secrets for a limited time period waived the common-law duty once the time period had passed).
322 Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 760 & (Ia. 1999) (“Trade secrets would clearly fall within the definition of confidential information” in an agreement not to disclose “any confidential information”)
proper means by other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.\textsuperscript{324}

It is not always the first part of the definition that creates a problem; many pieces of information are easily categorized as a formula, pattern, etc. that has actual or potential economic value when secret.\textsuperscript{325} Rather, it is the resolution of factual issues demanded by the remainder of the definition that creates much of the uncertainty: is the information in fact not generally known to others,\textsuperscript{326} could the information be easily by obtained by others by means such as reverse engineering,\textsuperscript{327} and has the information been subject to reasonable efforts to maintain its secrecy beyond possible coverage by an NDA?\textsuperscript{328} Even experts can disagree about what is “generally known.”\textsuperscript{330}

\textsuperscript{324} Uniform Trade Secrets Act § 1(4) (2005)
\textsuperscript{325} See generally, Peterson, Trade Secret Law Update 2008, 947 Practising Law Institute at 877-79 (listing recent examples of information found to be a trade secret).
\textsuperscript{326} See Lear Siegler, Inc. v. Ark-Ell Springs, Inc., 569 F.2d 286, 288-89 (5th Cir. 1978) (noting that “[t]he term ‘trade secret’ is and “[t]he question of whether an item taken from an employer constitutes a ‘trade secret,’ is of the type normally resolved by a fact finder after full presentation of evidence from each side”).
\textsuperscript{327} E.g., AMP Inc. v. Fleishhacker, 823 F.2d 1199, 1203(7th Cir. 1987)(product information not a trade secret because it was “already known to virtually all of AMP’s competitors and easily available from widely circulated public sources”); Service Centers of Chicago, Inc. v. Minogue, 535 N.E.2d 1132, ,1136-7 (Ill. App. 1989)(finding no evidence to suggest customer survey and linear foot measurement were not both “generally known” and “obvious”)
\textsuperscript{328} Orly Lobel, Intellectual Property and Restrictive Covenants, Legal Studies Research Paper Series, No. 08-059(August 2008)(http ://ssrn.com/abstract=1226463) at 10. (“protection will not be granted to information that is public or discernable by proper means”). E.g., AMP Inc., 823 F.2d at 1203(“the electronic components produced were low technology commodity products which could be easily reproduced”)
\textsuperscript{329} E.g., Equifax Services, Inc. v. Examination Management Services, Inc., 453 S.E.2d 488, 493 (Ga. 1995)(finding NDAs insufficient “to ensure nondisclosure of the information,” and denying protection of the information as a trade secret)
\textsuperscript{330} U.S. v. Hsu, 40 F.Supp.2d 623, 628-30 (E.D. Pa. 1999)(avoiding resolution of the trade secret status of information in criminal prosecution for conspiracy to steal and attempted theft of trade secrets after expert evaluation produced disagreement, and suggesting that there were cases in which the term “generally known to” might be unconstitutionally vague). See also Victoria A. Cundiff, Recent Developments in Trade Secrets Law, 616 PLI/Pat 217, 224 (2000) (“[c]ourts and defendants alike have grappled with the apparent imprecision of the requirement that a trade secret must not be “generally known or reasonably ascertainable” since it does not impose an absolute standard for determining whether information is a trade secret”).
Without knowing the answers to these questions, it would not be possible for a lawyer to be sure that that information that could be a trade secret would in fact get trade secret protection.

An additional problem arises with regard to information that falls on the boundary between trade secrets and knowledge integral to employee skills. On this boundary, there is a greater possibility that informal pursuit of this information from a former employee is legitimate because, as will be discussed below, knowledge integral to employee skills is not protected from former employee disclosure even when covered by the language of an NDA. At the same time, however, the pursuit of such information will be chilled by the possibility that the information might be found to be a trade secret or, as will be discussed below, the possibility that such information will be protected by a broad enough NDA even if it is not a trade secret.

b. Public Policy

Unlike attorney-client privileged information, which is entirely undiscoverable, information that has met the heavy burden of secrecy required to qualify as a trade secret will be discoverable as long as it is “relevant and necessary” to the litigation. “In most cases, the issue is not whether the information will be disclosed but under what conditions.”

Protective orders are used to limit the disclosure where the information is important to the case, but loss of secrecy will damage the value of the trade secret. The presence of an NDA protecting trade secrets provides no additional basis for avoiding disclosure of relevant information during formal discovery; indeed, an NDA that attempted this would be found to be void as against public policy.

Our concern, however, is the enforceability of a trade secret NDA

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331 Lobel, supra n. 324, at 10-11 (“defining the lines between industry know-how and firm-specific knowledge has been an ongoing adjudicatory struggle”).
332 See infra, Part II(B)(3).
333 Wright, Miller, Kane & Marcus, 8A Federal Practice and Procedure § 2043, text at note 2 (no absolute privilege for trade secrets). See also Becker, 81 Neb. L. R at 968, note 624 (noting that trade secrets are discoverable if relevant to case).
334 Id.
335 FRCP 26(c)(1)(G) (providing for protective orders for trade secrets).
336 Kenneth Hoffman v. Sbarra, Inc., 1997 WL 736703, at 1 (S.D.N.Y.) (“[t]o the extent that the [non-disclosure] agreement might be construed as requiring an employee to withhold evidence designed to enforce federal statutory rights, it is void”). See also at 1996 WL 520789, at 8, note 2 (6th Cir.) (describing approvingly an uncited Georgia proceeding in which the Georgia court found that a confidentiality agreement read to suppress witness testimony would violate public policy).
outside the context of formal discovery. If the agreement is void in the context of formal discovery, is there an argument that it is void as against public policy in the context of informal discovery, whether pre or post-filing? Determining whether a contract should not be enforced because it violates public policy requires weighing the interests in favor of enforcement against the interests against enforcement.338 Certainly, as previously argued with regard to the litigation privilege, the need pre-filing for relevant trade secret information to develop the theory of the case can be significant. However, if trade secret information is obtained in the discovery context, the judge can at the same time protect the owner’s property interest in the information339 by ensuring both that there is no entirely unnecessary disclosure and that any necessary disclosure is limited. This is not the case in informal discovery/investigation when there is neither judicial supervision nor often any notice to the owner that disclosure is threatened.340

Case law on enforceability of trade-secret protecting NDAs to limit informal investigation is mixed. In Uniroyal Goodrich Tire Co. v. Hudson,341 an NDA was enforced against a former employee with trade secret information who had been hired as a litigation consultant/expert by plaintiffs adverse to Uniroyal342 because disclosure in this context put the trade secret information in the “public realm,”343 which posed a significant threat to the confidentiality and therefore trade secret status of the information. The court found that enforcing the agreement by prohibiting the former employee from acting as a pre-trial consultant or expert witness at trial, but allowing him to testify as a fact witness, did not violate public policy.344 Similarly, in Saini v. International Game Technology,345 an NDA was enforced against a former employee who volunteered himself as an expert witness in pending litigation against his former employer because he needed a job.346 The harm to the employer of public disclosure of its trade

338 E.g., Restatement (Second) of Contracts § 178(1); Town of Newton v. Rumery, 480 U.S. 386, 392 (1987)( following and citing the Restatement (Second) of Contracts § 178(1)).
340 Accord, Saini, 434 F. Supp. at 921-22(noting that allowing former employees to disregard confidentiality obligations without court supervision allows the former employee and adverse counsel to decide what information is “legitimately confidential”).
342 Id.(barring the former employee from acting as an expert consultant or witness, but indicating that he would be allowed to testify as a fact witness).
343 Id. at 9(quoting the district court order)
344 Id. at 10.
346 Id. at 925.
secrets was seen as outweighing any public interest in exposing evidence of defective gambling devices where the exposure was motivated by private gain. While there is some suggestion in Saini that disclosures protecting health and safety might involve a public interest that would outweigh the interest in trade secret protection during informal investigation, Uniroyal was a tire failure case that did involve public safety yet the NDA was still enforced.

On the other hand, some courts have refused to enforce an NDA in cases where not only were no public safety or health interests at stake, but no litigation was in process or yet contemplated. Instead, it was these disclosures that eventually triggered litigation, and the litigation sought to protect property interests. In Re v. Horstmann, a non-disclosure agreement protecting trade secret information about a fuel-saving device was not enforced despite the disclosure of the trade secrets to law enforcement officials because it resulted in criminal charges being filed. Similarly, in Lachman v. Sperry-Sun Well Surveying Co., a breach of NDA action was dismissed when the disclosure informed a well owner’s neighbor that the well had deviated into the neighbor’s subsurface, and the disclosure then resulted in a successful suit by the neighbor against the well owner. The public interest in disclosing the deviation, which was either a tort or a crime depending on the well owner’s knowledge, was found to outweigh any general interest in enforcing the contract.

Thus, it appears that while a lawyer should assume that any former employee with access to trade secrets has a general duty, which could be contractual, statutory and/or common-law, not to disclosure trade secret information, it is not clear that this duty would be seen as prohibiting the disclosure of trade secret information to a lawyer in our scenario. As the

347 Id. at 919.
348 Id. at 921.
349 Id. at 922-23.
350 Id. at 923. See also Jodi L. Short, Killing the Messenger: The Use of Nondisclosure Agreements to Silence Whistleblowers, 60 U. Pitt. L. Rev. 1207,1211(1999)(arguing that nondisclosure agreements that work to prevent disclosures relevant to public safety and health should not be enforceable regardless of the context of the disclosure).
352 457 F.2d 850(10th Cir. 1972).
354 Id. at 854
355 Id. at 853. The status of this information as a trade secret or not is never discussed in the opinion, however, the disclosed information concerned the direction and location of the well and seems like the sort of information that could well be a trade secret.
356 E.g., IBP, Inc. v. Klumpe, 101 S.W.3d 461, 476-77(Tex. App. 2001)(finding disclosure of trade secrets relevant to litigation to lawyer was not a misappropriation of
two negative cases involve former employees hired as expert consultants/witnesses, it would seem that this is a particularly risky practice. Concern about the unnecessary loss of trade secret property that might result from informal disclosures could also justify broader enforceability of NDAs for any trade secret disclosure made outside of judicial supervision. At the same time, however, case law shows that countervailing public policy interests can outweigh these concerns. Thus, there is certainly a possibility that a former employee who informally disclosed litigation-relevant trade secret information to a lawyer without payment would not be found to have breached a contract enforceable in that context.

2. Knowledge Integral to Employee Skills and Abilities

As a result of employment training and the ordinary experiential learning associated with work, employees will develop skills and abilities. Ordinarily, a lawyer may reasonably assume that information integral to these skills and abilities will not be expressly covered by any NDA binding a former employee. This is because the public interest in ensuring employee mobility and promoting competition and innovation through the free flow of information and experience would likely make trade secret because it was not for a commercial use).

357 E.g., Smith Oil Corp. v. Viking Chemical Co., 468 N.E.2d 797, 801(Ill. App. 1984)(discussing “general blending or chemistry skills or sales skills”).

358 See AMP Inc. v. Fleishhacker, 823 F.2d 1199, 1202(7th Cir. 1987)(noting that the law will not “force a departing employee to perform a prefrontal lobotomy on himself or herself”); Great Lakes Carbon Corp. v. Koch Industries, Inc., 497 F.Supp. 462, 469-70(S.D.N.Y. 1980) (protecting a former employee’s “skill and judgment” in predicting and calculating estimates of market value); Pittsburgh Cut Wire Co. v. Sufrin, 38 A.2d 33, 35 (Pa. 1944) (“[a] man's aptitude, his skill, his dexterity, his manual and mental ability, and such other subjective knowledge as he obtains while in the course of his employment, are not the property of his employer”); Service Centers of Chicago, Inc. v. Minogue, 535 N.E.2d 1132, 1135 (Ill. App. 1989)(“ knowledge of estimating costs obtained by Minogue during the course of his employment with Deliverex came within the realm of general skills and knowledge which he was free to take and use in later pursuits”). See generally, Unikel, 20 Loy.U.Chi.L.J. at 849

359 E.g., Puritan-Bennett Corp. v. Richter, 679 P.2d at 211(refusing to enforce NDA to the extent that it “would virtually bar appellant from the practice of his profession” by covering information “far beyond trade secrets”); Lee v. Delmar, 66 So.2d 252, 255 (Fla.1953)( “[t]he right to work . . .[and] earn a living . . . is an inalienable right”); ILG Industries v. Scott, 273 N.E.2d 393, 396 (Ill. 1971)(noting that in a “society [that] is extremely mobile,” “the right of an individual to follow and pursue the particular occupation for which he is best trained is a most fundamental right”);

360 Lobel, supra note 324, at 11. See also, AMP Inc., 823 F.2d at 1202(finding a confidentiality agreement covering any business information with no time or geographical limitation to be unenforceable under Illinois law as an “unreasonable restraint[ ] on trade which unduly restrict[s] the free flow of information necessary for business competition”);
such an agreement void as against public policy. Indeed, it is likely that an NDA will expressly exclude this kind of information from coverage to avoid just this consequence.

However, this simple assumption about most NDAs is complicated by the fact that there is at best only a “fuzzy line delineating protectable trade secrets” from unprotectable employee expertise. When this fuzzy line is combined with an NDA that contains language broad enough to cover employee expertise, such as ‘any information about the business,’

Puritan-Bennett Corp. v. Richter, 679 P.2d at 211([h]iring agreements which restrict communication of ideas in general, rather than purely trade secrets, have been held unreasonable).

Garfield, 83 Cornell L.R. at 304-05([c]ourts often find . . . agreements . . . not to disclose any information learned on the job, unenforceable on public policy grounds . . . because they constitute an unlawful restraint of trade”). E.g., Prudential Insurance Co. of America v. Baum, 629 F.Supp. 466, 469 & 471(N.D. Ga. 1986)(applying Georgia law to find an “overbroad” NDA covering “all information which either identifies or concerns contractholders of the Company” unenforceable as “an unfair restraint on competition”); Carolina Chemical Equipment Co. v. Muckenfuss, 471 S.E.2d 721, 723-24(finding unenforceable an NDA covering “any knowledge or information concerning any aspect of the business of the Corporation” because “if enforced, would prevent Muckenfuss from using the general skills and knowledge he acquired at Carolina Chemical”); Service Centers of Chicago, Inc. v. Minogue, 535 N.E.2d at 1137(finding unenforceable an NDA covering “any information or material provided to him/her by the Company” because “Minogue is entitled to use the general skills he learned during his employment” and this NDA amounted to a covenant not to compete of unlimited duration); State Medical Oxygen and Supply, Inc. v. American Medical Oxygen Co., 782 P.2d 1272, 1274-75 (Mont. 1989)(finding unenforceable an NDA covering “any other information concerning the business . . ., its manner of operation, its plans, processes, or other data without regard to whether all of the foregoing matters will be deemed confidential, material, or important” as an unreasonable restriction on the exercise of a lawful profession, trade or business).

E.g., R.R. Donnelley & Sons Co. v. Fagan, 767 F.Supp. 1259, 1263(S.D.N.Y. 1991) (discussing a confidentiality agreement that expressly stated that the confidential information covered by the agreement “does not include ‘general skills, knowledge and experience’ as those terms are defined under Illinois law”)

Lobel, supra note 324, at 10 (quoting Pooley, 2006, 101). Some of the kinds of information courts have struggled with and disagreed about on this boundary include “such information as customer lists and data, contract expiration dates, product costs and pricing formulas, marketing plans, advertising methods and business strategies . . ., [and ] negative know-how,” the knowledge that allows an employee to avoid “past mistakes and failures”). Id at 10. E.g., Smith Oil Corp. v. Viking Chemical Co., 468 N.E.2d 797, 801(III. App. 1984)(customer information was not a trade secret and, in the absence of misappropriated documents, former employees were free to use what information they remembered)

E.g., Puritan-Bennett Corp. v. Richter, 679 P.2d 206, 211(Ks. 1984) (NDA covering “any information connected with any aspect of plaintiffs’ business” “would virtually bar appellant from the practice of his profession”); Thomas v. Best Mfg. Corp., 218 S.E.2d 68, 70 (Ga. 1975)(interpreting NDA covering “any . . . other information, pertaining to the business” as an attempt “[t]o restrict an employee from utilizing the experience gained”)
the public policies that justify protection of trade secrets, i.e., encouraging innovation, investment and employment, and discouraging unfair competition, as well as public policies supporting the enforcement of valid contractual agreements in general, may, if the court finds trade secrets at the center of employee expertise, result in a more expansive enforcement of an NDA than might otherwise be expected.

In particular, if a lawyer seeks the former employee’s expert judgments about the employer’s products, a mere conversation with a lawyer can engage this expertise and the information that is part of it. If such inquiries are combined with a broadly written NDA binding the former employee, there is potential for the court to find that the lawyer induced a breach of the NDA. As we have seen, at least two courts have found a significant threat to trade secrets when a former employee has volunteered his services as a paid expert and “used the knowledge and expertise gained from his employment . . . to testify against” his former employer. However, another court in a similar situation found the expert’s responses to questions about the former employer’s product not to involve trade secrets covered by an NDA at all.

Unikel, 29 Loy. U. Chi. L. J. 841, 846 (Summer 2008)

Uniroyal, 1996 WL 520789, at 7, 9-10 (prohibiting former employee from working or testifying against his former employer as an expert, but not prohibiting him from employment as an expert in similar cases not involving his employer).

E.g., Saini, 434 F.Supp. at 913, 916 (prohibiting former employee acting as paid expert in suit against employer from disclosing information found to be either a trade secret or confidential information because there is no public interest in encouraging mercenary whistleblowing in a private contract dispute with no allegations of illegal conduct or a threat to health or safety). See also, Patton v. Cox, 276 F.3d 493, 499 (9th Cir. 2002) (holding that, under Arizona law, “[t]he need to ensure complete and truthful testimony” does not require protection for witnesses who testify voluntarily).

Favala v. Cumberland Engineering Co., 17 F.3d 987, 991(7th Cir. 1994) (“Vice President of Product Integrity” started consulting business after being hired and was hired by law firm suing his former employer for negligent manufacture of machine). While the NDA in this case actually covered both “trade secrets and proprietary, confidential, private or non-published information relating to the business, operation or financial affairs of the Company,” id. at 989, both the parties and the court treated the issue as simply whether
Thus, even a lawyer who understands and attempts to respect the law’s protection of trade secrets, with or without an NDA, will run into “jurisprudential uncertainty about the law and policy of trade secrets” that makes it difficult to predict whether the information sought will be viewed as the trade secret property of the employer or the portable experience and expertise of the employee. This in turn means that when it comes to disclosures involving employee expertise, it may not help the lawyer to know the language of the NDA because it will be the judicial characterization of the disclosure that will determine whether the NDA might be seen as breached or not.

3. Other Confidential Commercial Information

a. Contract Language and Application

Many NDAs seek to prohibit disclosure of “confidential information” or “any information relating to the employer’s business. As we have seen, ‘confidential information’ will certainly be understood to mean trade secrets. It can also include information, understood as “data, technology, or know-how” that is valuable because some competitors do not trade secrets were being disclosed. See also, Short, Killing the Messenger, 60 U.Pitt.L.R. at 1228 (arguing that “the exception permitting the use of general knowledge and skills will in many cases allow former employees to serve as expert witnesses or in a consulting capacity, insofar as such activities involve the offering of the individual's informed opinion based on her accumulated general skill and expertise”).

370 Lobel, supra note 324, at 11.

371 E.g., Donnelley, 767 F.Supp at 1263 (“I will not . . . disclose, directly or indirectly, any Confidential Information”); Favala, 17 F.3d at 989 (agreement prohibited disclosure of “proprietary, confidential, private or non-published information relating to the business, operation or financial affairs of the Company”); Revere Transducers, Inc. v. John Deere & Co., 595 N.W.2d 751, 760 (Ia. 1999)(“I will not disclose to others at any time during my employment or thereafter any confidential information, knowledge or data belonging to the Company”)(italics in opinion); Zep Manufacturing Co. v. Harthcock, 824 S.W.2d 654, 662 (C.A. Tex. 1992)(“Employee will not . . . disclose to any other party any confidential information of Zep”).

372 E.g., In re: JDL Uniphase Corp. Securities Litigation, 238 F.Supp.2d 1127, 1130 (N.D.Ca. 2002)(agreement prohibited disclosure of “all information and any idea in whatever form, tangible or intangible, whether disclosed to or learned or developed by me, pertaining in any manner to the business of the Company”); Saini, 434 F.Supp.2d at 916 (agreement not to disclose “any information, manufacturing technique, process, formula, development or experimental work, work in process, business, trade secret, or any other secret or confidential matter relating to the products, sales, or business); Service Centers of Chicago, Inc. v. Minogue, 535 N.E.2d 1132. (Ill.App. 1989)(“The Employee hereby agrees not to disclose or disseminate any information or material provided to him/her by the Company”)

373 See Part II(B)(1).
know it.\textsuperscript{374} Since trade secrets must not be “generally known in the relevant trade or business,”\textsuperscript{375} one question will be whether this information is sufficiently secret to actually be considered a trade secret. It may be information that meets many of the elements of the USTA trade secret definition, included having value to the extent the existing level of secrecy is maintained, but it also may be known too far beyond the business to meet the stringent secrecy requirements of the UTSA definition.

If the information cannot be seen as a trade secret, it may be seen as entirely unprotectable because it occupies a “theoretical and practical gap between ‘trade secrets’ and ‘general skill and knowledge.’”\textsuperscript{376} This gap is not acknowledged to even exist under the two-tiered universe of information carved out for protection under the Restatements of Torts and the UTSA.\textsuperscript{377} In this two-tiered universe, information must either be a protected trade secret or unprotected “employee general skill and knowledge.”\textsuperscript{378} Determining whether information is one or the other requires a difficult decision about where “along the continuum between absolute secrecy and universal knowledge commercially valuable information loses its status as a “trade secret” and becomes unprotected “general skill and knowledge.””\textsuperscript{379} Some courts require that a majority of competitors not know the information, other courts require only that some competitor not know the information.\textsuperscript{380} This means that there is considerable unpredictability as to the protected status of some confidential commercial information under trade secret law.\textsuperscript{381}

Step away from trade secret law, however, and other legal doctrines

\textsuperscript{374} Robert Unikel, 29 Loy. U. Chi. L.J. 841, 844 (Summer 1998)(dividing confidential information into three categories: “Category 1” is known to substantially all persons in an industry, “Category 2” is known to a majority of persons in an industry, “Category 3” is known to a minority of persons in an industry)

\textsuperscript{375} Unikel, 29 Loy. U. Chi. L.J. at 869 (quote mark removed).

\textsuperscript{376} Unikel, 29 Loy. U. Chi. L.J. at 842-43. See also Short, Killing the Messenger, 60 U.Pitt L.R. at 1226 (“there are gaps in trade secret coverage that may leave a substantial portion of an employer’s valuable business information unprotected”); Rachel S. Arnow-Richman, Bargaining For Loyalty In The Information Age: A Reconsideration Of The Role Of Substantive Fairness In Enforcing Employee Noncompetes, 80 Or. L. Rev. 1163, 1184 (Winter 2001)(noting that the “absence of legal guidance has resulted in a free-for-all as to what confidential information actually is”).

\textsuperscript{377} Unikel, 29 Loy. U. Chi. L.J. at 867-68 (describing the First and Third Restatements of Torts and the UTSA as embracing a two-tier classification of information as either an always protected trade secret or an never protected general skill and knowledge).

\textsuperscript{378} Id.

\textsuperscript{379} Id. at 869.

\textsuperscript{380} Id.

\textsuperscript{381} Id. at 870-71(describing the “the predictability problems associated with current ‘trade secret’ definitions as encouraging commercial spying, discouraging investment in innovation, and increasing the costs of innovation).
can be used to justify protection for a third category of information, non-trade secret confidential commercial information. Thus, for example, as a matter of general contract law, two parties can carve out a new category of information not to be disclosed in an NDA. So, assuming NDA language broad enough to cover non-trade secret confidential commercial information, the question now is whether contractual protection of this information is supported by public policy.

b. Public Policy

The question of whether there are public policy concerns in protecting this third category of information in an NDA first returns us back to the unacknowledged theoretical gap between trade secrets and employee expertise. To the extent that the two-tier approach is embraced, and protection of less than trade secret information is viewed as producing constraints on the use of employee expertise, there will be a significant public policy obstacle to enforcing such agreements. Indeed, in a number of jurisdictions, NDAs that seek to prohibit disclosure of non-trade secret confidential commercial information are treated as the equivalent of a covenant not to compete that interferes with employee mobility, and will be found void in the absence of reasonable time and, in some jurisdictions, geographic limitations.

382 “Confidential information” in an NDA can also mean attorney-client privileged or work product information. These kinds of confidential information are not subject to the same problems as the commercially valuable non-trade secret information that is the subject of this section, as they are clearly defined and protected under evidentiary and procedural law. See infra, III (2)

383 Lear Siegler, Inc. v. Ark-Ell Springs, Inc., 569 F.2d 286, 289 (5th Cir. 1978) (holding that confidential commercial information that may or may not have been trade secrets could be protected by an NDA because, “[i]n the absence of overreaching, the employer and employee have the right to contract to prevent disclosure of information”).

384 E.g., Heyer-Jordan & Associates, Inc. v. Jordan, 801 S.W.2d 814, 821-22(Tenn.App. 1990)(construing words “confidential information” in agreement to mean trade secrets and finding that actual information involved, knowledge of customers, was not a trade secret and threatened to cross “‘a line . . . drawn between the general skills and knowledge of the trade and information that peculiar to the employer’s business’ ”); Dynamics Research Corp. v. Analytic Sciences Corp., 400 N.E.2d 1274, 1288(Mass.App. 1980)(“a non-disclosure agreement which seeks to restrict the employee’s right to use an alleged trade secret which is not such in fact or in law is unenforceable as against public policy”).

385 E.g., 1st American Systems, Inc. v. Rezatto, 311 N.W.2d 51, 59 (S.D. 1981) (remanding a non-disclosure agreement with a ten-year duration for a determination of reasonableness, despite finding that all the confidential information together constituted a trade secret, even though each item on its own did not); Milprint, Inc. v. Flynn, 2006 WL 2690249, at 2 (Wis.App. 2006) (stating that non-disclosure agreements, like covenants not
On the other hand, there are also a number of jurisdictions that recognize the existence of a protectable category of non-trade secret confidential information\(^{386}\) that is based upon a common law duty of confidentiality\(^{387}\) arising under agency\(^{388}\) or fiduciary law\(^{389}\) rather than to compete, must have a “reasonable time limit” and a reasonable territorial limit”); Henry Hope X-Ray Products, Inc. v. Marron Carrell, Inc., 674 F.2d 1336, 1342 (9th Cir. 1982) (“[u]nder Pennsylvania law, a confidentiality agreement ancillary to the taking of employment is valid if its restrictions are ’ ’reasonably limited as to duration of time and geographical extent.’ “’); Cincinnati Tool Steel Co. v. Breed, (482 N.E.2d 170, (Ill.App. 1985)(agreement not to disclose “confidential information” not enforceable because not limited in duration(not superceded as to non-trade secret confidential information by Illinois’s adoption of the UTSA); Electrical South, Inc. v. Lewis, 385 S.E.2d 352, 355 (N.C.App. 1989) (“[a]s a general rule, courts will enforce employer-drawn restrictions on an employee’s use of ‘customer contacts’ and ‘confidential information,’ ‘providing the covenant does not offend against the rule that as to time ... or as to territory it embraces it shall be no greater than is reasonably necessary to secure the protection....’ “’); Wright v. Power Indus. Consultants, Inc., 508 S.E.2d 191. 195(Ga. 1998)( an NDA without a time limitation is unenforceable to the extent it covers non-trade secret information), rev’d on other grounds by Advance Tech. Consultants, Inc. v. Roadtrac, LLC, 551 S.E.2d 735 (Ga.2001). See also Weirich & Hart, 60 Mercer L. R. at 552 (“a covenant not to disclose confidential information that is not a trade secret is void if it lacks a reasonable temporal limitation’ under Georgia law). New York law seems to be unsettled as to whether a time limit is required for a confidentiality agreement. Compare the majority and the dissenting opinions in Ashland Management Inc. v. Altair Investments NA, LLC, 869 N.Y.S.2d 465, 471(App.Div. 1st 2008) (“w)e find no legal support for the dissent’s core position that the absence of a durational limitation renders a confidentiality agreement void as a matter of law in cases where the employee does not provide ‘unique or extraordinary’ services”). See also Bast, At What Price Silence, 25 Wm. Mit. L.Rev . at 639-42(summarizing the law of a number of states regarding the enforceability of NDAs covering non-trade secret confidential information).

\(^{386}\) E.g., Den-Tal-Ez, Inc. v. Siemens Capital Corp., 566 A.2d 1214, 1224(Super. Pa. 1989)(noting that “[c]ertain information protected by agreement may be protected only by agreement, as it is considered by a business to be confidential, while not necessarily qualifying as “trade secrets”); Saini, 434 F.Supp. at 919(holding that “disclosure of non-trade secret confidential information” creates the same kind of injury as does disclosure of trade secrets); Spectrum, 2008 WL 416264, at 66 (W.D.Tex.)(stating that protecting valuable non-trade secret confidential information is a legitimate business interest that can support a restrictive covenant ”’); Jostens, Inc. v. National Computer Systems, Inc., 318 N.W.2d 691, 701(Minn. 1982)(“employees have a common-law duty not to wrongfully use confidential information or trade secrets obtained from an employer”).

\(^{387}\) E.g., Saliterman v. Finney, 361 N.W.2d 175, 178-79 (Minn. App. 1985)(finding a dentist “breached his common law duty not to disclose or use confidential information gained at the expense of his employer” when by using confidential patient lists to solicit patients for his competing dental practice); Shwayder Chemical Metallurgy Corp. v. Baum, 206 N.W.2d 484, 487-488 (Mich. App. 1973)(finding breach of duty arising out of confidential relationship for disclosure of customer and raw material source lists not found to be trade secrets); USM Corp. v. Marson Fasterner Corp., 393 N.E.2d 895, 903(Ma. 1979)(“plaintiff who may not claim trade secret protection . . ., because the information, while confidential, is only “business information,” may still be entitled to some relief
trade secret or contract law. In these jurisdictions, protection of non-trade secret confidential commercial information is not seen as limiting the use of employee expertise, and NDAs that seek to protect such confidential information will be enforceable even in the absence of time or geographical limits. However, even in these favorable jurisdictions, if the information is not even confidential information because it is obvious, generally available or has not been subject to appropriate efforts to maintain confidentiality, then it will fail to fall within the contract language at all.

against one who improperly procures such information”)(dictum). See generally, Carol M. Bast, At What Price Silence: Are Confidentiality Agreements Enforceable?, 25 Wil. Mitchell L.Rev. 627,636-7, at note 42 (1999)(collecting cases holding that non-trade secret confidential information is “is a protectable interest under common law principles”). But see, AMP Inc. v. Fleischhacker, 823 F.2d 1199, 1201(7th cir. 1986)(under Illinois law, an employer who relies on “common law restrictions against disclosure of confidential information” can only get protection for “trade secrets or near-permanent customer relationships”).


Unikel, 29 Loy.U.Chi.L.J. at 860-62(noting that many courts have found employees who disclosed confidential information to be in breach of their duty of loyalty as a fiduciary).

E.g., Coady, 719 N.W.2d at 250 (finding that the “confidentiality agreement does not restrict commerce and does not restrict plaintiff’s ability to work in any chosen career field, at any time”); Lear, 569 F.2d at 289 (“employer and employee have the right to contract to prevent disclosure of information”).

E.g., Bernier, v. Merrill Air Engineers, 770 A.2d 97, (Me. 2001)(holding that confidential non-trade secret information may be protected without impairing on the employee’s right to use general skill and knowledge and that neither geographic nor temporal limitations are necessary in non-disclosure agreements covering such information); Coady v. Harpo, Inc., 719 N.E.2d 244, 250 (Ill. App. 1999)(holding that “confidentiality agreement will not be deemed unenforceable for lack of durational or geographic limitations where trade secrets and confidential information are involved”); Revere , 595 N.W.2d 751, 761-62)(finding that non-disclosure agreement involving confidential information did not restrict employment opportunities and holding in general that NDAs do not require “geographic or durational limitations”).

E.g., Central Plastics Co. v. Godson, 537 P.2d 330, 334-35(Ok. 1975)(finding the
and no breach is possible.\textsuperscript{393}

If Model Rule 4.4 prohibits intentional interference with former employee NDAs, it expects lawyers to resolve the trade secret/confidential information/employee expertise question in order to determine whether it is ethical to informally seek information from the former employee. Determining which of these three categories of information is involved in any particular situation is a fact-intensive determination ordinarily made by a court upon the submission of significant quantity of evidence.\textsuperscript{394} It is not likely that a lawyer in this position will have the facts necessary to resolve the issue. Even with the facts, a definitive prediction as to whether the information would be found a trade secret, confidential information or non-confidential information could often not be made. Trying to resolve this issue prior to informal conversations would likely be quite expensive and not cost-effective. Thus, even though there are significant possibilities that the lawyer can ethically seek non-trade secret commercial information that might either not be covered by the language of the NDA, not be legally protectable in this jurisdiction without time/geographic limits, might not be sufficiently confidential, or might not be tortious interference, the risk of violating the ethical rule and facing a disqualification motion will be more than many lawyers are willing to take.

Other public policy concerns are also relevant to the enforcement of NDAs protecting non-trade secret commercial information. However, it is impossible to predict when any such will be unenforceable as against public policy\textsuperscript{395} given that the interests in favor of enforcement must be weighed against the interests against enforcement in this particular situation.\textsuperscript{396} In

\begin{itemize}
\item construction of a device obvious from inspection and the contents of customer lists “easily ascertainable or available generally to the public or trade”); Spectrum, 2008 WL 416264, at 72-73 (finding disclosure of information that was about or from discloser, was public knowledge, or was not shown to be valuable and confidential not a breach of NDA covering “valuable confidential . . . information”).
\item E.g., Disher v. Fulgoni, 5143 N.E.2d 767, 777-79(Ill. App. 1987)(finding agreement prohibiting disclosure of confidential information did not cover information either not shown to be subject to “adequate security measures to protect,” published by the employer, or known to other competitors independently); Eutectic Welding Alloys Corp. v. West, 160 N.W.2d 566, 570 (Minn. 1968))(finding no breach because “ordinary sales information” was not confidential)
\item Lear, 569 F.2d at 288-89(“The question of whether an item taken from an employer constitutes a “trade secret,” is of the type normally resolved by a fact finder after full presentation of evidence from each side”); Jostens, 318 N.W.2d at 697(describing the trial necessary to resolve whether information was a trade secret as “long and complex”).
\item See Garfield, 83 Cornell L.R. at 314 (“the Restatement test gives courts virtually no guidance, other than indicating that a court should begin with the presumption of enforcing contracts”).
\item E.g., Restatement (Second) of Contracts § 178(1); Town of Newton v. Rumery, 480 U.S. 386, 392 (1987) following and citing the Restatement (Second) of Contracts §
\end{itemize}
the context of an NDA protecting confidential commercial information, the public policies favoring enforcement will include the promotion of private contracts by enforcing justified expectations. In addition, although confidential commercial information may not quite receive the ‘property’ protection of trade secrets, the goals of encouraging innovation and investment and discouraging commercial spying can also be furthered by protection of this information. Thus, we might expect these interests will support enforcement of NDAs covering such information, but more weakly than they protect trade secrets.

On the other side of the balancing test, we can first find the various public policies against enforcement arising out of the litigation context of the disclosure. As has already been discussed, there is a general public policy in favor of ensuring that trial fact-finding is not interfered with. In addition, our lawyer will often be seeking information from the former employee that will reveal employer wrongdoing. As a result, the particular law claimed to be violated by the employer will provide its own distinctive public policy argument against enforcement of any NDA. This will be

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397 Alan E Garfield, Promises of Silence: Contract Law and Freedom of Speech, 83 Cornell L.R. 261, 298-99(describing “the public policies that underlie contracts law” as promoting private contracting by avoiding frustration of justified expectations and avoiding the unjust enrichment that may result from non-enforcement after performance by one party). See also Ryan M. Philp, Silence at Our Expense: Balancing Safety and Secrecy in Non-disclosure Agreements, 33 Set.Hall L.R. 845, 858(2003)(describing the Restatement balancing test as requiring that the “necessity of preserving the integrity of traditional contract law principles” be outweighed by public policies against enforcement).

398 See Melvin, F. Jager, Trade Secrets Law § 13:3, text at n.7(2007)(“ confidentiality agreements are an effective tool in the maintenance of commercial morality and in promoting invention and innovation”).

399 Uniroyal, 1996 WL 529789 at 10. See also, Smith v. Superior Court, 49 Calif. Rep. 2d 20, 26 (Ct. App. 1996) (“[a]greements to suppress evidence have long been held void as against public policy, both in California and in most common law jurisdictions”) (quoting Williamson v Superior Court, 582 P.2d 126, 131(Ca. 1978); Multiven, 2010 WL 583955, at 3, n. 4(saying in dictum regarding the enforcement of an NDA ultimately conceded not to cover requested interview topics that “there even may be situations where disclosure of trade secrets and truly confidential information is necessary in the interests of justice and full and fair disclosure”); John D. Iole and John D Goetz, Ethics or Procedure? A Discovery-Based Approach to Ex Parte Contacts with Former Employees of a Corporate Adversary, 68 Notre Dame L.R. 81, 124(1992) (“Except in cases of privilege or other legitimate protections from discovery, . . . withholding facts never will be a legitimate interest”)(footnote omitted).

400 Restatement (Second) of Contracts §178(3)(a) (indicating that public policy is “manifested by legislation or judicial decisions”). Any specific public policy would be enhanced by a general public policy in favor of disclosure of such wrongdoing, as disclosure discourages continued violation. See Chambers v. Capital Cities/ABC, 159 F.R.D. 441, 444 (S.D.N.Y. 1995) (“agreements obtained by employers requiring former
the same whether the information protected is trade secret and commercial confidential information or, as discussed below, non-commercial information. However, the weight given to different public interests can vary from court to court. Concealment of criminal activity will usually be found to violate a particularly strong public policy that would likely result in non-enforcement of the NDA.\footnote{Lachman v. Sperry-Sun Well Surveying Co., 457 F.2d 850, 853 (10th Cir. 1972)(“[t]he criminal nature of the offense . . . gives the state a clear and separate interest in voiding a contract which conceals the crime, and hampers the punishment of the offender”); McGrane v. Reader’s Digest Ass’n, Inc., 822 F. Supp. 1044, 1052 (S.D.N.Y. 1993)(“the courts can hardly be called upon to enforce an employer-employee exit agreement for the covering up of wrongdoing which might violate criminal laws”); Re v. Horstmann, 1987 WL 16710, at 2 (Del. Super.) (finding no breach of NDA when disclosure was to law enforcement officials regarding criminally fraudulent conduct).}

Beyond this, however, we return to a considerable level of uncertainty.\footnote{Garfield, 83 Cornell L.R. at 312 (noting that “the public policy analysis [of broad confidentiality agreements] is more challenging and more speculative” when non-criminal wrongdoing is involved because there is insufficient law or precedent to offer guidance to courts).}

We have seen that there are cases and scholarly commentary that have suggested that a public interest in public safety and health should be sufficient to overcome any interests in favor of enforcement,\footnote{Garfield, 83 Cornell L.R. at 315 (suggesting that “[c]ourts could easily find an overriding public interest in speech regarding tortious conduct or nontortious conduct that implicates public health and safety”); Short, Killing the Messenger, 60 U.Pitt.L.R. at 1234-35 (arguing that NDAs “should not be used to prevent a whistleblower from informing the public about wrongdoing . . ., especially . . . when that wrongdoing implicates public health and safety”); Carol M. Bast, At What Price Silence: Are Confidentiality Agreements Enforceable?, 25 Wm. Mitchell L.Rev. 627, 707 (1999)(“in the hierarchy of public policies, safety from physical harm and death ranks at or near the top”)(quoting Green v. Ralee Engineering Co., 61 Cal. Rptr. 2d 352, 356 (Ct. App. 1997))} but there is no definite acceptance of this argument by the courts.\footnote{See Part II(B)(1)(b), supra.}

Concealment of other civil violations, whether statutory\footnote{Some former employees have made a related argument, asserting whistleblower immunity for statutory violations. Whistleblower law can be a useful resource for public policy analysis. See Garfield, 80 Cornell L.R. at 316(using whistleblower statutes to argue that “the public interest in information about criminal conduct outweighs a person's privacy interest in

employees to remain silent about underlying events leading up to disputes, or concerning potentially illegal practices when approached by others can be harmful to the public's ability to rein in improper behavior, and in some contexts ability of the United States to police violations of its laws”). See also, Stefan Rutzel, Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing, 14 temp. Envt. L. & Tech. J. 1, 2 (“[v]iolation reporting by employees has, as examples from other areas show, the potential to dramatically increase compliance with, and enforcement of, environmental law”)(footnotes omitted).}
tort, in which public health and safety is not at stake, may or may not also be seen as involving sufficiently strong public policies to justify non-enforcement.\footnote{E.g., JDL Uniphase, 238 F.Supp.2d at 1130 &1137 (finding a broad “all information” NDA “in conflict with the public policy in favor of allowing current employees to assist in securities fraud investigations”); Lachman v. Sperry-Sun Well Surveying Co., 457 F.2d 850, (10th Cir. 1972)(refusing to enforce a confidentiality agreement when disclosure revealed misappropriation of natural gas that was a tort, and would have been criminal if done knowingly); Chambers v. Capital Cities/ABC, 159 F.R.D. at 444 (stating that “it is against public policy for parties to agree not to reveal . . . facts relating to alleged or potential violations of . . . [federal] law” in an age discrimination case); Equal Employment Opportunity Commission v. Astra USA, Inc., 94 F.3d 738, 744 (1st Cir. 1996) (finding the public policy against sexual harassment to outweigh the public policy in favor of “voluntary settlement of employment discrimination claims”); Equal Employment Opportunity Commission v. Morgan Stanley & Co., Inc., 2002 U.S. Dist. Lexis 17484, at 1(S.D.N.Y.)(ruling that non-assistance agreements interpreted to prohibit communication with EEOC about gender discrimination would violate important public policy interests); Equal Employment Opportunity Commission v. International Profit Associates, Inc., 2003 U.S. Dist. Lexis 6761, (N.D. Ill.)(holding an agreement prohibiting disclosure of “anything relating to his employment” was unenforceable because void as against public policy to the extent the agreement was used to chill communication with the EEOC regarding sexual harassment claims); Nestor v. Posner-Gerstenhaber, 857 So.2d 953, 955(Fla.App. 2003)(allowing informal discovery in a will contest of parties who had signed a confidentiality agreement covering information about the decedent’s testamentary capacity because “[c]ontractual confidentiality agreements . . . cannot be used to adversely interfere with the ability of nonparties to pursue discovery in support of their case”); Amari Co., Inc. v. Burgess, 546 F.Supp.2d 541, 582-3(N.D. Ill. 2008)(indicating that in theory in RICO case confidentiality agreements could not be used to conceal fraudulent racketeering activity, however, denying motion to enjoin enforcement of such agreements because employer was a non-party and no specific former employee witnesses were known to have been chilled by a threat to enforce). See also Garfield, 83 Cornell L.Rev. at 327 (arguing that agency and trade secret law suggest that “employers have no legitimate interest in suppressing information about their tortious conduct”).} On the other hand, concealment of a breach of contract may provide only a weak public policy against enforcement.\footnote{See Saini, 434 F.Supp. at 921 (enforcing broad “any information” agreement suppressing such information”); Bast, What Price Silence, 25 Wm. Mitchell L. Rev. at 705 (arguing that where disclosure would, under whistleblower law, fall under a public policy exception to employment at will, “the same whistleblowing should be sufficient to hold a confidentiality agreement unenforceable”). However, whistleblower law does not directly govern in cases involving former employees with NDAs, as former employees cannot be fired in retaliation, but merely sued for breach of contract. Saini, 434 F.Supp. at 922. See also, McGrane v. Reader’s Digest Ass’n, Inc., 822 F.Supp. 1044, 1051(S.D.N.Y. 1993)(noting that under New York’s whistleblower statute, only threats to public health and safety, and not financial improprieties, are sufficient to trigger protection).}
Finally, the weight of the public policy interest against enforcement is not necessarily determinative of the outcome.\textsuperscript{408} Also relevant to the analysis will be the factual context of the making of the contract and the disclosure.\textsuperscript{409} At least one case has suggested that other factors, such as whether “‘the former employee is not the initiating party’”\textsuperscript{410} and whether the NDA was intended from the beginning to conceal evidence of wrongdoing,\textsuperscript{411} should take on critical importance. Thus, since any determination that a NDA is void as against public policy “will turn on a fact-intensive inquiry,”\textsuperscript{412} even a strong public policy argument against enforcement faces an uncertain response.

breached by disclosure of\textsuperscript{409} trade secrets and confidential commercial information because public interest in “uncovering the sale of defective products . . . is not as high a priority as enforcement of sexual harassment law . . ., at least when . . . the defect at issue is not a threat to the safety or economic well-being of the public at large” and was counterbalanced by policies protecting trade secrets). Accord, Bast, What Price Silence, 25 Wm. Mitchell L. Rev. at 669 (noting that in most “[c]ases recognizing a whistleblowing public policy exception to the employment at will doctrine,” “the court requires that the information sought to be disclosed must affect public (not private) interests of health or safety, or must concern illegal conduct”).\textsuperscript{408} E.g., Uniroyal, 97 F.3d 1452, at 10 (unpublished opinion)(rejecting public policy arguments and enforcing an NDA to prohibit expert testimony in case involving tire failure, but also finding that former employee could testify as fact witness at trial). See also Garfield, 83 Cornell L.R. at 275 & 294(noting the enforcement via settlement agreement and injunction of a NDA involving Jefffrey Wigand, a tobacco executive who sought to testify about the health risks of tobacco known to the tobacco companies).\textsuperscript{409} Garfield, 83 Cornell L.R. at 318 (noting that “[r]elative contextual considerations include not only who made the promise of silence, but also the relationship of the parties to the contract, and how the party promising silence acquired the suppressed information”).\textsuperscript{410} Saini, 434 F.Supp. at 921(quoting Chambers v. Capital Cities/ABA, 159 F.R.D 441, 444)(S.D.N.Y. 1995)(enforcing the NDA where former employee contacted plaintiff in contract dispute with employer and offered his services as an expert ). But see Equal Employment Opportunity Commission v. Astra USA, Inc., 94 F.3d 738, 745 (1st Cir. 1996)(refusing to enforce a settlement agreement that would prohibit former employees from volunteering information to the EEOC about sexual harassment but would have allowed them to respond to EEOC subpoenas).\textsuperscript{411} Saini, 434 F.Supp. at 921(distinguishing between agreements settling employee harassment claims that were designed to prevent additional employer liability and an employment-related NDA designed to protect trade secrets and confidential information). See also Restatement (Second) of Contracts § 178(3)(c)(indicating that a more direct “connection between th[e] misconduct and the term” sought to be enforced will strengthen the cases against enforcement). But see Lachman, 457 F.2d at 852(holding that there is no difference between an agreement that intends to conceal wrongdoing and an agreement that did not so intend but which has that effect).\textsuperscript{412} Id.
4. Employer Conduct, General and Trivial Information, and Events

Trade secrets and non-trade secret confidential commercial information contribute to commercial profit both because they enjoy some level of secrecy and because they have commercial value. The remaining three categories of information are not commercial information and, as such, may not be entitled to any legal protection. As a result of their employment, former employees will have information about employer conduct, such as whether the employer bribed foreign officials or how the employer responded to charges of sexual harassment. Although this conduct might sometimes be the secret to a business’s success, it is so only indirectly at best. It is not what you sell or how you do it, but rather what you did in running your business operation. Thus, it could be argued it is not proprietary commercial information. Employees also gain general information about their employers, such as the layout of an office they work in, who reports to whom, or where materials are stored. They can also come to know trivial information as well, such as the boss’s taste in footwear, the brand of the coffee pot in the kitchen, or the kind of music played at the holiday party. Employees are also witnesses to events involving the employer, such as power failures, the level of floodwater in

413 There may be an additional protected category of non secret commercially valuable information which is viewed as property under New York law, involving either proprietary materials or valuable ideas. See e.g., Frederick Chusid & Co. v. Marshall Leeman & Co., 326 F.Supp. 1043, 1060 (S.D.N.Y. 1971)(finding that an NDA could protect materials developed for a career counseling business even if no trade secret or confidentiality could be shown); Cole v. Phillips H. Lord, Inc., 28 N.Y.S.2d 404, 409 (1st App. Div. 1941)(finding idea for radio show about a district attorney protected by contract). 414 Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1090-91 ((9th Cir. 1986) (finding Scientology materials not trade secrets when the harm alleged from disclosure was spiritual rather than commercial); Hoffman v. Sharro, Inc., 1997 WL 736703, at l(S.D.N.Y.)(suggesting that a payroll policy would not be covered by a non-disclosure agreement because it was not “competition-related information”). See generally, Short, Killing the Messenger, 60 U. Pitt. L.R. 1207, 1224 (“[c]ourts are in broad agreement that nondisclosure agreements, no matter how extensive their coverage, may only be used to restrict the disclosure of trade secret and confidential information”). 415 Accord, Restatement (First) of Torts § 757, comment b (a trade secret “is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like”); Mulei v. Jet Courier Service, Inc., 739 P.2d 889, 892 (“[o]nly confidential information acquired during the course of employment may be protected, not the general knowledge of a business operation”), reversed in part by 771 P.2d 486; Spectrum, 2008 WL 416264, at 72 (W.D. Tex.)(finding the fact that a showroom was opened and that a particular person visited it not “valuable confidential or professional information that would warrant protection under Florida law”).
the building, or a slip and fall on the stairs.  

a. Language

All of this information is arguably covered by an NDA that prohibits disclosure of “any information about the business”. Why do employers want to keep such information confidential when it is not typically commercially valuable? Certainly, they would prefer to avoid the potential negative consequences of any wrongdoing that might have occurred. However, even disclosure of information about lawful conduct, facts or events can prove embarrassing, trigger a criminal or regulatory investigation, or reveal liability. Consequently, as a rule, employers would prefer to control all the information that might be disclosed by current and former employees. It is for this reason that employers gravitate toward NDAs with the very broad “any information” language.

Whether or not a court will be willing to interpret “any information” as including non-commercial information is an open question. At least one court, in the face of a quickly-abandoned claim that an “any information” NDA barred testimony as to alleged criminal and fraudulent conduct by the employer, has suggested that it would have just refused to interpret the NDA so broadly. For some courts, “any information” NDAs are unenforceable because they produce a contract so vague that the former employee has no notice of what they must not reveal. One judge colorfully described this language as seeming to require the “departing employee to...

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416 E.g., Lott v. U.S., 2008 WL 2923437, at 1 (noting no unethical behavior by lawyer contact with former employee witness to an accident involving a fall from a gangway).

417 E.g., Great Lakes Carbon Corp. v. Koch Industries, Inc., 497 F. Supp. 462, 466 (S.D.N.Y. 1980) (finding unenforceable an NDA covering “information of any and every kind pertaining to the existing and/or contemplated business of, and belonging to Company”); State Medical Oxygen and Supply, Inc. v. American Medical Oxygen Co., 782 P.2d 1272, 1274 (Mont. 1989) (“the employee agrees not to divulge . . . any other information concerning the business of State Medical Supply, Inc., its manner of operation, its plans, processes, or other data without regard to whether all of the foregoing matters will be deemed confidential, material, or important”); Zanders, 898 F.2d at 1133 (“[y]ou also agree not to disclose to anyone any information obtained in the course of your employment and related to the functions of your position”).

418 Jodi L. Short, Killing the Messenger: The Use of Nondisclosure Agreements to Silence Whistleblowers, 60 U. Pitt. L. R. 1207, 1207 (1999) (noting that employers have increasingly used NDAs to “silence whistleblowers and deprive the public of important health and safety information”).

419 Multiven, Inc. v. Cisco Systems, Inc., 2010 WL 583955, at 3, n. 4 (N.D. Cal.) (rejecting employer’s attempt to preclude interviews or depositions of former employee because prohibited by an NDA covering “all other business . . . information (including, without limitation, the identity of and information relating to . . . employees”, after employer later conceded that NDA did not cover proposed interview topics).
perform a prefrontal lobotomy on himself or herself.\footnote{AMP, 823 F.2d at 1206 (finding unenforceable a confidentiality agreement covering “all information relating to the Company’s business”). See also Great Lakes, 497 F. Supp. at 471 (“[t]he definition of secrets so as to include information of every kind obtained by the employee is absurd”); Thomas & Betts Corp. v. Panduit Corp., 199 WL 261861 (N.D. Ill.)(finding “any other information” clause in NDA unenforceable as overbroad, but enforcing as to clause covering confidential information). Accord, Garfield, 83 Cornell L.Rev. at 283-84(noting that some NDAs may be attacked as lacking sufficient definiteness or as vague); Short, 60 U.Pitt. L.Rev. at 1227(“[c]ourts often strike down broad nondisclosure agreements which give no fair notice to the employee of what information cannot be disclosed”).}

Many courts, on the other hand, limit their evaluation of the NDA to the actual enforcement efforts before them, and are therefore unconcerned with a possible absurd application of the language.\footnote{E.g., Service Center, 535 N.E. 2d at 1135(considering the protectable status of particular information as trade secrets in the context of an “any information” NDA). Accord, U.S. v. Wallington, 889 F.2d 573, 576-77 (5th Cir. 1989)(describing as “absurd” and producing a “bizarre effect” a literal construction of a criminal statute prohibiting government employees from disclosing “any” employment information, and construing statute to cover only “confidential information”).}

b. Public Policy

“Any information” NDAs that are not unenforceable due to lack of consideration or vagueness and are not limited by interpretation may still be unenforceable as against public policy, but it will always be impossible to predict how a court will rule on this issue. What we can see is that the public interest in enforcement of NDAs that go beyond confidential commercial information may be seen as relatively weak because protecting this information is not necessary to encourage innovation and investment and discourage commercial spying.\footnote{Garfield, 83 Cornell L.R. at 304(“[c]ontracts that suppress other information no longer further the public policy of protecting trade secrets”). Accord, In re JDS Uniphase Corp. Securities Litigation, 238 F.Supp.2d 1127, 1136 (N.D. Ca. 2002)(noting that the employer was only able to assert “arguments about the validity of confidentiality agreements in general” to justify blocking informal discovery of former employees regarding non-trade secret and non-privileged information).}

Fair commercial competition does not require protecting commercial ventures from adverse economic consequences such as fines, recalls, and boycotts that may arise out of such disclosures.\footnote{See Garfield, 83 Cornell L. R. at 328(noting that although disclosure of information can cause economic harm by subjecting an employer to liability, this is not the same as the loss of competitive advantage sought to be avoided by protection of trade secrets and commercial confidential information). Accord, General Electric Co. v. United States Nuclear Regulatory Commission, 750 F.2d 1394, 1402 (7th Cir. 1984)(stating generally that the substantial competitive harm exemption to Freedom of Information Act (“FOIA”)
NDAs arises out of common-law notions of agency loyalty, which is discussed in more detail below. As we have already seen, a strong public policy against enforcement of such agreements will always arise out of the general litigation context of this breach and public policies of varying strength will additionally arise out of the specific legal context of the litigation.

In contrast to the categories of trade secrets and confidential commercial information, the public policy against restraining the employment opportunities of former employers also might or might not be seen as relevant in this situation. As we have already seen, when the enforcement effort is in the context of subsequent employment in which the former employee might use non-trade secret information, the “any information” NDA has usually been seen as impinging on the former employee’s use of general knowledge and skill in subsequent employment and has accordingly been found to be void in the absence of a time limit.\(^{424}\)

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\(^{424}\) See Part II(B)(3)(b), supra. See also, Great Lakes, 497 F. Supp. at 471(finding “any information” NDA without time restriction would be void as an unreasonable interference with the employee’s future employment); State Medical Oxygen and Supply, 782 P.2d at 1275(finding “any information” NDA void because it was not “limited in operation either as to time or place”); AMP Inc. v. Fleischhacker, 823 F.2d at 1202 (finding “all information” NDA without time or geographical limitation unenforceable as an “unreasonable restraints on trade which unduly restrict the free flow of information necessary for business competition”); American Shippers Supply Co. v. Campbell, 456 N.E.2d 1040, 1041-2 & 1044 (Ind. App. 1983)(affirming refusal to issue injunction based on “any information” NDA when the customer lists were neither trade secrets or confidential information and enforcement would have therefore impinged “ upon individual liberty of action as to one's trade or calling”)(quoting Club Aluminium Co. v. Young, 160 N.E.804, 806(Mass. 1928); Newino, Inc. v. Peregrim Development,Inc., 2003 WL 21493838 at 4(Conn.Super)(finding an NDA covering “virtually all the information that an employee may acquire about the plaintiff's business” unreasonable because of “the effect on the employee's ability to pursue his trade and the effect on the public interest”); Carolina Chemical Equipment Co. v. Muckenfuss, 471 S.E.2d 721, 723-4 (S.C. App. 1996)(finding “any knowledge” NDA unenforceable in the absence of a time limit under South Carolina law); Service Centers, 535 N.E. 2d at 1137 (finding unenforceable an “any information” NDA that was unlimited in time). See generally, Melvin, F. Jager, Trade Secrets Law § 13:3, text at n.12(“If the agreement is not limited to confidential information, but is broadly worded to limit the use of "any knowledge or
However, if a former employee is freely providing general, conduct, trivial or event information about the former employer to a lawyer, enforcement of an “any information” NDA to stop this kind of disclosure would not have any negative effect on the former employee’s current job prospects, since neither knowledge integral to skills and abilities nor actual employment is at stake. While the fact that such a broad NDA could impinge on future employment could be enough to void the NDA, a court could instead find that such a broad NDA is not void ‘as applied’ since a “refusal to enforce the term will [not necessarily] further th[e] policy” of protecting employee mobility in this situation. So we can see that it is unclear whether this policy would even be found to be at issue in our scenario.

c. Agency-based duty of confidentiality

As we have seen already seen, some jurisdictions have relied upon an agency-based duty of confidentiality to justify duties of non-disclosure extending beyond trade secrets. Case law in these jurisdictions tends to very broadly state an employee agent’s duty as ensuring the non-disclosure of “confidential information,” without defining what kind of confidential information counts. While the vast majority of such cases involve information of commercial value being used competitively by former employees, “confidential information” in an agency context can also

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information” learned during employment, courts are likely to view the agreement as tantamount to a restrictive covenant and declare it void if it is unreasonable in time or territory”). One possible exception to this is when the former employee’s subsequent employment was as a litigation expert against the former employer, in which case some courts found the restraint on employee mobility required non-enforcement and others found this restraint of insufficient consequence. See supra, text at n. 362-4.

425 Id. at §178(3)(b).

426 Carol M. Bast, At What Price Silence: Are Confidentiality Agreements Enforceable?, 25 Wm. Mit. L. Rev. 627, 636-7 & n. 42(1999)(collecting cases finding employees have a common-law duty of confidentiality for non-trade secret confidential information).

427 E.g., Eaton Corp. v. Giere, 971 F.2d 136,141 (8th Cir. 1992) (“employees have a common law duty not to use trade secrets or confidential information obtained from their employer” under Minnesota law); Structural Dynamics, 410 F. Supp. at 1114(under Michigan law, agency principles will protect “confidential information”); Roboserve, Ltd. v. Tom’s Foods, Inc., 940 F.2d 1441, 1456 (11th Cir. 1991)(“ an item may be considered confidential in the context of a business relationship without rising to the level of a trade secret,” under Georgia law); Kadant, Inc. v. Seeley Machine, Inc., 244 F.Supp.2d 19, 39(N.D.N.Y. 2003)(“ Plaintiff signed the confidentiality agreement, so if he disclosed to others or used to his own benefit ‘private information’ . . . he is in breach of both his contract and his fiduciary duty to plaintiff,” under New York law).

428 E.g., Eaton, supra n. 422 (transaxle technology); Structural Dynamics, supra n. 383 (isoparametric elements in a computer program); Roboserve, supra n. 422 (hot-beverage
mean any information the employer simply wants to keep secret and which would cause some kind of harm to the employer if revealed.\textsuperscript{429} This adds an additional public policy on the side of enforcing broad NDAs; the public’s interest ensuring a strong duty of loyalty for employees. However, if the NDA is construed to cover anything the employer wants to keep secret, that would also seem to include information about employer wrongdoing. Whether the harm that might be prevented by the disclosure of such wrongdoing would be a sufficient counterweight to both the contract promise and agency loyalty is unclear in the absence of clear case law.\textsuperscript{430}

However, it can be argued that the duty of loyalty sometimes invoked to justify enforcement of NDAs should not be understood to extent to evidence of wrongdoing by most employers. The fact that American law is willing to protect the privacy of individuals means that individuals have a right to limit the disclosure of both positive and negative information about themselves, either with or without imposing an NDA to bind those with access to this information.\textsuperscript{431} Thus, employees of individuals can have an independent duty of confidentiality covering “private,” non-commercial information. However, American law does not provide privacy rights to

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\item \textsuperscript{429} See Restatement (Second) of Agency §395 (“an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency . . . in competition with or to the injury of the principal”)
\item \textsuperscript{430} Restatement (Second) of Agency § 411, comment d (stating that an agent will not be liable for breach of contract if the failure to act is contrary to public policy). Arguably, since a failure to maintain confidentiality is a breach of the agency contract, see Restatement (Second) of Agency § 399(a), any countervailing public policy could prevent liability for the breach of duty of loyalty. Accord, Garfield, 83 Cornell L.R. at 336-38 (arguing that employee loyalty should not take priority over disclosure of truthful information that disparages an employer without releasing otherwise protected trade secrets or commercial confidential information).
\item \textsuperscript{431} See Restatement (Second) of Torts § 652D (1977) (“One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public”); Patton, 276 F.3d 498 (finding a breach of contract not to reveal the results of a psychological examination suggesting pedophilia when examining doctor voluntarily testified at medical license hearing). See also Garfield, 83 Cornell L.R. at 272-3 (“[i]ndividuals sometimes seek promises of silence to protect privacy and reputational interests, typically when a person either learns or will learn of information about an individual that the individual prefers to keep private”).
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fictional legal entities such as corporations. Thus we may ask what, if any, right corporations have to limit disclosure of negative information.

An interesting confluence of individual privacy and corporate confidentiality arose in Coady v. Harpo, Inc., in which a former employee of Oprah Winfrey’s company was enjoined from revealing any information about Oprah or her company under a broad “any information” NDA. Here the information at stake was simply gossip, tidbits of information about an individual who has made a commercially valuable empire around her personality and life. As such, it certainly fell within Oprah’s personal right of privacy. At the same time, it was Oprah’s corporate entity that was the party to the NDA and brought the suit on it. While the corporation had no privacy right in this gossip, the commercial asset of Oprah’s company is Oprah, and information about her not known to the public can be understood as confidential commercial information, the disclosure of which would deprive the company of its product.

Most corporate employers have rather different assets than Oprah Winfrey’s corporation has and, as a result, they cannot assert use individual-based privacy rights to create commercial property. Furthermore, since corporations are creatures of the law and only granted existence by the government, an argument can be made that they should expect their affairs to be open to scrutiny. It can be argued that there is a special need for the government or public to have access to possible information about corporate wrongdoing because corporations are capable of harnessing the power of many people and can therefore achieve greater wrongdoing than any single individual. Thus, I would argue, legal recognition of an unlimited duty of loyalty and confidentiality to corporate employers is both unsupported by privacy-based notions of loyalty and opposed by the public interest in ensuring corporate accountability.

Consequently, the agency-based duty of confidentiality that applies to corporate employees should be understood as limited to the commercial purposes of such entities. This is the case even if the disclosure of non-

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432 Garfield, 83 Cornell L.R. at 338-39 (“the law of privacy is unlikely to support the enforcement of contracts with business entities, because such entities are not considered to have a right of privacy”).

433 Accord, Victoria A. Cundiff, Recent Developments in Trade Secrets Law, 616 PLI/Pat at 228 (suggesting that “the facts of this case were unique and such a broad definition of confidential information might not be enforced as to more conventional businesses”).

434 Accord, Bast, What Price Silence, 25 Wm. Mitchell L. Rev. at 701 (arguing that “Public policy should allow disclosure if the employer has no overriding legitimate business justification, recognizing that the purpose of the confidentiality agreement is to avoid unfair competition”); Garfield, 83 Cornell L.Rev. at 322-24 (arguing that courts should look to limitations on the suppression of speech in defamation and other tort law to
commercial information that is evidence of wrongdoing might subject the corporation to negative financial consequences such as fines or damage awards.\textsuperscript{435} As a result, most broad former-employee NDAs should not be able to be supported on privacy grounds.\textsuperscript{436} This would allow courts to reject agency-based justifications for enforcing NDAs that seek to protect more than trade secrets or confidential commercial information. However, it is not clear that courts are yet fully prepared to acknowledge this distinction between the privacy of individuals and the property of corporations in the context of NDAs.

d. Court Control

Finally, some question also exists as to whether informal contacts with former employees will be permitted post-filing even when the NDA will not be enforced. In a few cases, courts have insisted on asserting some control over the informal investigation in order to ensure that trade secrets and privileged information were appropriately protected. In Chamber v. Capital Cities/ABC,\textsuperscript{437} plaintiff’s counsel in a pending case sought authorization from the court to inform former employees that they could safely ignore NDAs with defendant in speaking to plaintiff’s counsel.\textsuperscript{438} Although the court found the NDAs unenforceable because they would conceal possible evidence of age discrimination, it refused to “make

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\item find a First Amendment based public policy that is violated when NDA extend beyond trade secrets); In re: EXDS, Inc., EXDS, Inc. v. Devcon Construction, Inc., 2005 WL 2043020, at 6 (N.D.Calif.) (bankrupt company cannot claim disclosed information to be confidential under an NDA when bankruptcy removes any possibility of commercial benefit) But see restatement (Third) of Unfair Competition § 41, comment d (“in some circumstances an agreement not to use information that is in the public domain may be justified by a legitimate interest in protecting the reputation or good will of the promisee”).
\item See supra, n. 418 & 423 [FOIA cases]. See also, Short, Killing the Messenger, 60 U.Pitt. L.R. at 232-33(pointing out that under the FRCP, protective orders to avoid embarrassment means different things for individuals and corporations, with reputational harm for a business meaning harm to their competitive position). Accord, ITT Telecom Products Corp. v. Dooley, 262 Cal. Rptr. 773, 782-83(Ct. App. 1989)(“[t]he personal secrets of individuals are comparable to the trade secrets of businesses”); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787(3\textsuperscript{rd} Cir. 1994) (while protective order can be made to avoid serious embarrassment to an individual, “it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground).
\item Accord, JDL Uniphase, 238 F.Supp.2d at 1137 (distinguishing Patton v. Cox, supra n. 363, on the grounds that it involved “disclosure of private medical information, which is at the core of an individual's right to privacy,” while the case at hand involved disclosure of securities fraud by a corporate employer).
\item 149 F.R.D. 441 (S.D.N.Y. 1995)
\item Id. at 442.
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plaintiff's counsel the decisionmaker concerning what confidentiality requirements were related to genuine trade secrets or other legitimately privileged information, and which dealt with concealment of information relating to potential improprieties on the part of the employer. Instead, it held that defendant could either choose to notify former employees that they were free to talk to plaintiff’s counsel about specified subjects relevant to the age discrimination case or could take an adverse inference as to their testimony. However, plaintiff’s counsel was authorized to talk to the former employees only at either a deposition or at a pre-deposition interview to which defense counsel had to be invited to and be present as a silent observer. In JDL v. Uniphase, the court also refused to give plaintiff’s counsel free rein over former employees, but allowed ex parte interviews limited to previously submitted questions that clearly did not seek trade secret or privileged information.

These were both cases in which litigation was already pending and the lawyer seeking the information sought the assistance or approval of the court in the first place. These cases do not prove that the same court would have found unsupervised contacts made before complaint was filed or made after filing without court notice to be unethical and grounds for disqualification in the absence of any allegation that protected information was discussed. They do indicate that lawyers take a risk of being accused of triggering the disclosure of either trade secrets or privileged information if they engage in ex parte interviews. However, this risk exists even in the absence of an NDA; it is endemic to ex parte contacts with former employees. Therefore, if courts appear to broadly enforce “any information” NDAs to preclude ex parte contacts when such contacts seem to pose a threat to trade secrets or attorney-client privileged information, it is not clear that the NDA is really giving the court any power or justification it did not have without the NDA. Not all former employees

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439 Id. at 445.
440 Id. at 445.
441 Id. at 446.
442 238 F.Supp. 2d 1127 (N.D.Ca. 2002).
443 Id. at 1138
444 E.g., JDL, 238 F.Supp.2d at 1138 (ruling in response to motion to limit scope of NDAs ); Chambers, 149 F.R.D. at 442 (ruling in response to a motion to authorize plaintiff’s counsel to inform former employees that they could talk to plaintiff’s counsel without fear of breaching NDAs)
445 E.g. Multiven, 2010 WL 583955, at 2(after conceding that the NDA would not prohibit ex parte interviews of the former employee, the interviewing lawyer was accused of getting privileged information during the ex parte interviews).
446 E.g., Uniroyal, 1996 WL 529789 at 2 & 10 (affirming an NDA-based injunction against a former employee acting as an expert witness in a tire failure case prohibiting disclosure as an expert witness or consultant of not only “trade secrets and confidential and
have privileged or trade secret information, and even where a former employee may have trade secret information, it will not always be relevant to the litigation. Consequently, there will be situations in which there is no credible risk of improper disclosure of trade secrets or privileged information as a result of ex parte contacts. In these cases, the presence of a broad NDA need not trigger greater court supervision or control of informal investigation.

C. BREACH AND OTHER FACT SPECIFIC DEFENSES

Assuming the NDA is supported by consideration and the contract language both covers the information sought and is not against public policy, it may still not serve as the basis for a claim of intentional interference if, for example, the employer totally breached the employment agreement with the employee, as this could have the consequence of discharging the employee’s contractual duties of non-disclosure. The availability of this defense, however, requires particular facts that cannot be assumed to exist in any significant proportion of NDAs. Similarly, other particular facts could make available other defenses, such as fraud, which can make a contract voidable. As we have already seen, however, a defense that merely made a contract voidable rather than void might not undermine an intentional interference claim. Therefore, while the presence of such facts can act as a spoiler for the intentional interference claim, there is little to say about these defenses in a general evaluation of NDAs, other than that their applicability should always be considered when evaluating the risks of a conversation with a particular former employee.

D. PRIVILEGE

Previously, we considered the availability of litigation privilege to defeat the claim that the lawyer’s conduct of obtaining information from the

proprietary information” but also of “any information regarding . . . employees, company policies, practices, procedures, documents inspection and adjustment process and his knowledge about the . . . Plant”); Zanders, 898 F.2d at 1133-34 (finding no public policy violation and affirming an NDA-based injunction against former employee with attorney-client and privileged information relating to employment discrimination at employer that prohibited disclosure of “any information obtained in the course of her employment” other than “in a proceeding in which Amtrak has the opportunity to assert any applicable claim of privilege”).

447 E.g., Chemtrust Industries and Kem Manufacturing Corp. v. Share Corporation, et al., 1987 WL 13822, at 6 (S.D. Tex.) (“it is well settled law that an employer cannot enforce a negative covenant in a contract of employment where it has breached the contract”).

448 See Part I(A), supra.
former employee with the NDA was intentional interference with contract. We must also consider whether the litigation privilege could also be available to the former employee in a breach of contract action against them for disclosing the information to the lawyer, and what effect such immunity would have on a claim of intentional interference with the contract against the lawyer receiving the information.

One major complication in applying the litigation privilege in this context is that it functions only to protect against “actions for damages.”\footnote{Combustion Systems Services, Inc. v. Schuykill Energy Resources, Inc., 1993 WL 514456, at 4 (E.D. Pa) (finding that although privilege would block a claim of damages for breach of contract to recommend a settlement in court, it would not work to bar recission of the contract).} In the tort context, elimination of liability for damages removes the only remedy and thus essentially means that no wrongful conduct has occurred. In the context of a breach of contract, however, enforcement can take the shape of either an award of damages or injunctive relief providing specific performance. Most NDA enforcement actions will request injunctive relief prohibiting the disclosure rather than asking for damages.\footnote{But see Denise Rich Songs, Inc., et al. v. Hester, 2004 WL 2563702, at 1 (N.Y. Supr. Ct. 2004)( former employer sued former employee for monetary damages for disclosures made in employment discrimination complaint filed in Federal court in violation of NDA): ITT Telecom Products Corp. v. Dooley, 262 Cal. Rptr. 773, 774(Ct. App. 1989)(former employer sued former employee for damages for disclosures made as consultant to company suing former employer in violation of NDA).} Thus, a litigation privilege that protected a witness from monetary liability for disclosing information would not determine one way or another whether injunctive relief prohibiting the disclosure or prohibiting others from using the disclosed information was available.

The question that then arises is whether the availability of this injunctive relief on the contract satisfies the requirement of the intentional interference tort that a person be caused “not to perform the contract.”\footnote{Restatement (Second) of Torts, § 766.} Although injunctive relief is more forward looking than monetary damages, addressing the future performance of the contract rather than the past failure to perform, a precondition of injunctive relief is a showing that irreparable harm is likely in the absence of injunctive relief. In the case of a contract, the irreparable harm must stem from either a threatened or already occurring breach of the contract. Thus, even where an injunction is sought, there might already be a non-performance. This suggests that even were the litigation privilege to be available to shield a former employee from liability for contract damages for disclosures made outside of formal discovery, it would not automatically preclude the possibility of finding a breach of contract leading to equitable relief, which would be sufficient to ground tort
liability for the lawyer who had induced such disclosures.

In addition, we have already seen that jurisdictions differ as to the availability of the privilege for claims arising from pre-litigation conduct or informal post-filing discovery. In those jurisdictions that limit the privilege to formal discovery and beyond, the litigation privilege could not save a former employee who disclosed covered information informally from a breach of contract claim. Even in those jurisdictions in which the privilege does extend to pre-litigation conduct or informal post-filing discovery, a second obstacle remains: will the privilege protect against a breach of contract claim? In jurisdictions requiring a claim sounding in defamation, not only would the litigation privilege not be available to the lawyer to defend against a claim of intentional interference with contract, it would likely not be available to the former employee to defend against a claim for breach of contract.

Even a jurisdiction that will apply the privilege to the intentional interference tort will not necessarily apply it to a breach of contract action. Thus, in California, which broadly applies the privilege to almost all torts, a former employee who assisted a potential plaintiff against his former employer as a consultant despite having signed an NDA was privileged against a claim of misappropriation of trade secrets, which the court viewed as a sub-species of the breach of confidence tort, but not privileged against a claim of breach of contract. It should be noted, however, that the claim of disclosure of trade secrets in this case may have influenced this decision, as the court found that “society's interest in accurate judicial proceedings . . . [did not outweigh] ITT's property interest

452 See Part I(E)(1)(c), supra. See also, E.g., ITT Telecom Products Corp. v. Dooley, 262 Cal. Rptr. at 778 (finding former employee who consulted with company considering suit against former employer was not disqualified from claiming the privilege because he was merely “a consultant to . . . a potential litigant”).

453 Accord, Cummings v. Beaton & Associates, Inc., 618 N.E.2d 292, 312(Ill. App. 1992))(holding that lawyer’s repudiation of settlement to bankruptcy judge in violation of client’s contract to support settlement before bankruptcy judge was not protected by judicial privilege); Patton, 276 F.3d at 499(holding that psychologist’s voluntary testimony before state medical board in alleged breach of agreement not to reveal results of evaluation except as directed by court order was not protected by witness immunity); Tulloch v. JPMorgan Chase & Co., 2006 WL 197009, at 7(S.D. Tex.)(holding that, under Texas law, party to a release agreement with a confidentiality clause would not be protected by litigation privilege for breaching the agreement by attaching a copy of the release agreement to a complaint alleging breach of the release agreement and fraudulent inducement).

454 ITT Telecom Products Corp. v. Dooley, 262 Cal. Rptr. 773, 779(Ct. App. 1989)(listing the many torts the statutory (in California) litigation privilege has been found to apply to).

455 Id. at 781-83.

456 id. at 781.
in information yielding a competitive advantage and Dooley's written promise of nondisclosure.\textsuperscript{457} Indeed, the result in this opinion has been described as a trade secret exception to the litigation privilege.\textsuperscript{458} However, subsequent California cases have gone on to suggest that litigation disclosures of other kinds of information covered by confidentiality agreements are not privileged.\textsuperscript{459}

Nonetheless, there are jurisdictions where a broad litigation privilege has been found to protect a former employee from any remedy in a breach of contract action for disclosures relevant to the litigation. Thus, in New York, the applicability of the litigation privilege produced a quick dismissal of a breach of contract action\textsuperscript{460} seeking both monetary damages and injunctive relief\textsuperscript{461} against a former employee whose statements in an employment discrimination complaint were claimed to violate an NDA.\textsuperscript{462} In a Texas case involving the disclosure of trade secrets by a former employee to his attorney in response to a subpoena, the disclosure was found to be privileged in the context of a breach of contract claim arising out of an NDA.\textsuperscript{463}

\textsuperscript{457} Id. at 780.
\textsuperscript{458} Id. at 116(describing the result in ITT as having been codified by the legislature in a statutory exclusion of trade secret disclosure from the litigation privilege).
\textsuperscript{459} E.g., Wentland v. Wass, 25 Cal. Rptr. 3d 109, 116 (Ct. App. 2005)(holding that by statements claiming previous self-dealing made in breach of settlement agreement prohibiting disparaging comments filed in connection with action for accounting were not privileged); Sanchez v. County of San Bernadino, 98 Cal. Rptr. 3d 96, 105, n.3(Cal. App. 4th 2009)(stating in dictum that disclosure of a romantic relationship covered by a confidentiality agreement was not statutorily privileged in an action for breach of the contract).
\textsuperscript{460} Denise Rich Songs v. Hester, 798 N.Y.S.2d 708, 2004 WL 2563702, at 3 (“It has long been the law that statements made in the course of judicial proceedings are absolutely privileged, even if purportedly made in violation of a confidentiality agreement”).
\textsuperscript{461} Id. at 1.
\textsuperscript{462} Denise Rich, 2004 WL 2563702, at 5-6. In fact, given that the NDA covered only “certain proprietary and confidential information, . . . competitively sensitive data and information, . . . and Trade Secrets,” id. at 1 (quotation marks omitted), and the disclosures complained of concerned the status of the employee as employee rather than independent contractor, his compensation, and being forced to make a campaign contribution, id., it seems likely that the NDA might not actually have covered the disclosures in question anyway.
\textsuperscript{463} IBP, 101 S.W.3d at 479(granting summary judgment on claims that disclosure of trade secret information and documents to attorney breached NDA because disclosure was privileged, but denying summary judgment on breach of contract claim based on employee’s taking of documents to attorney because employee may have stolen the documents). See also, Kelly v. Golden, 352 F.3d 344, 350(8th Cir. 2003)(disparaging pleadings were privileged against a breach of contract suit when contract contained non-disparagement clause); Rain v. Rolls-Royce Corp., 2009 WL 2591547, at 2(finding that the Indiana Supreme Court would follow Texas and extend litigation privilege to litigation
E. SUMMARY

The enforceability of an NDA will depend upon the circumstances of its formation and performance, the information sought to be protected and disclosed, the legal and factual context of the litigation, and the availability of the litigation privilege. As to some of these legal variables, a lawyer will be able to make a reasonable prediction about the enforceability of a known NDA, at least in jurisdictions with relevant legal precedent. For example, we have seen that only NDAs formed in the midst of employment have the possibility of lacking consideration, and then only in some jurisdictions. A lawyer should be able to get the relevant details of time of signing, promotions, raises, etc. from the former employee to determine through legal research whether the NDA may be unenforceable due to a lack of consideration.

To the extent that the kind of information sought has an effect on the enforceability of an NDA, we know that a duty of confidentiality for trade secrets can always be assumed, as it requires no contract at all. As to whether NDAs protecting trade secrets are enforceable in our scenario, there are public policy arguments that can be made on both sides. The few existing cases differ factually from our scenario in significant ways, and cannot provide clear answers about enforceability in even these jurisdictions.

Things are a bit more complicated for confidential commercial non-trade secret information because some jurisdictions allow such information to be protected through an NDA and others do not, but at least in jurisdictions where there is sufficiently developed legal precedent on this issue, a lawyer will be able to know what level of protection may be available. However, where enforceability depends on whether the information sought by the lawyer is actually either a trade secret or confidential commercial information, it will be nearly impossible for a lawyer merely attempting to determine the ethics of seeking information from a former employee to predict which of these two categories particular information will fall within. This determination turns either upon facts about secrecy that may in large part be unknown to the former employee and unavailable to the lawyer, or upon a difficult and unpredictable judgment as to whether the information falls within the general knowledge and expertise of the former employee.

Even if the jurisdiction both recognizes the existence of a category of protectable confidential non-trade secret commercial information and the information sought certainly falls within this category rather than general conduct alleged to be a breach of a non-disparagement contract and the damages suffered arose from the defamatory nature of the statements).
knowledge and expertise, the language of the contract can affect the enforceability of the NDA, so that, at least in some jurisdictions, a contract broadly drawn to cover “any information” might not be enforceable at all. If this is not a problem, other public policies can provide strong basis for refusing to enforce such an NDA.

Some of the strongest arguments against the enforceability of an NDA will be available when it seeks to protect other kinds of information, such as employer conduct, general information and events. First, it is a fairly open legal question whether such information should be protectable at all, and the answer will depend upon the jurisdiction, the nature of the employer, and the public interest in the particular information sought. Even in the best of jurisdictions and with the best facts, considerable uncertainty as to the enforceability of the NDA will remain because the result will depend upon a balancing of conflicting public policy interests.

Finally, litigation privilege is certainly unavailable in a number of jurisdictions for breach of contract claims. In all jurisdictions in which the litigation privilege has definitely been applied to a breach of contract claims, the factual context has not been a typical employer-employee NDA. Thus, even in these jurisdictions, there can be no certainty of the availability of the privilege to the former employee. In addition, due to the enforceability of contracts by injunction, it is not clear that the former employee’s immunity from damages for breach via the litigation privilege will necessarily undermine a claim for intentional interference against a lawyer arising out of disclosures clearly prohibited by the NDA.

In sum, there is some ability to predict that an NDA will be enforceable in some jurisdictions in some factual contexts. What is less possible is to predict that an NDA will not be enforceable, either because it involves an open legal question in some jurisdictions, because it depends upon facts the lawyer cannot have, or because it depends upon a balancing of interests a lawyer cannot predict. Thus, while there are some circumstances in which the lawyer’s tort liability for intentional interference will depend entirely upon the tort law issues explored in Part One because there will be a breach of an enforceable contract, there are many cases in which uncertainty about the enforceability and/or breach of the NDA will simply add an additional layer of uncertainty to the already complicated tort analysis.

_464_ In Unarco, which did involve breach of an NDA, privilege was found to apply to the tortious interference claim against the attorney, but was the grant of summary judgment on the breach of NDA claim against the employee was not appealed, it is not clear if privilege was ever asserted for the employee. 2010 WL 744394, at 2.
II. IS IT UNETHICAL?

So far we have seen that a lawyer who obtained information from a former employee with an NDA could be liable in tort for intentional interference, but we have also seen that such liability could just as easily not attach with the right facts in jurisdictions with favorable law. We have also seen that, in many cases, it would be difficult to predict in any particular jurisdiction whether such liability would or would not attach. In light of these findings, we can now consider whether any such intentional interference with contract falls within Model Rule 4.4’s prohibition against using “methods of obtaining evidence that violate the legal rights of . . . [a third] person.”

First, we shall consider how judges faced with disqualification motions based on claims that such conduct is unethical have responded. In the absence of any disciplinary opinions considering intentional interference with contract as a possible violation of MR 4.4, we shall then consider whether MR 4.4 should be interpreted to cover such lawyer conduct.

A. DISQUALIFICATION CASES

Most disqualification cases involving lawyer contact with former employees involve the possibility that attorney-client privileged, work product or trade secret information was received through an ex parte contact. There are only a few disqualification cases in which the ethical violation involved the receipt of other kinds of information whose protection came entirely from an NDA. None of them directly address

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465 MR 4.4(a).
466 E.g., Rentclub, Inc. v. Transamerican Rental Finance Corp., 811 F. Supp. 651, 654(M.D. Fla 1992)(disqualifying lawyer when information known to former employee included information relating to “strategies, theories and mental impressions in this and/or substantially related litigation”); MMR/Wallace Power & Indus., Inc. v. Thames Associates, 764 F.Supp. 712, 725 & 728(D. Conn. 1991)(disqualifying lawyer when former employee had worked for employer as “trial consultant/paralegal” on the same litigation); American Protection Insurance Co. v. MGM Grand Hotel, 1983 WL 25286, at (D. Nev. 1983)(disqualifying lawyer when former employee had been a vice president of the opposing party and then a paid consultant for the same litigation, and the court found both that “his advice, suggestions and counsel in this litigation was of great importance to MGM” and “[h]e also was fully privy to MGM’s confidence”).
467 See infra, case discussion immediately following. Cases in which the former employee clearly had attorney-client privileged or work product information in addition to a confidentiality agreement tend to ignore the impact of the confidentiality agreement entirely. E.g. In re Bell Helicopter Textron, Inc., 87 S.W.3d 139 (Tex. App. 2002)(finding disqualification appropriate when law firm hired helicopter manufacturer’s former Chief of Flight Safety as expert consultant on helicopter crash case because she had previously
intentional interference with contract as a violation of Model Rule 4.4.

One close case is Butler v. Biocore Medical Technologies Inc.,\(^{468}\) where the Tenth Circuit upheld a district court finding that a lawyer created an “appearance of impropriety”\(^{469}\) by hiring a former employee of the opposing party to assist with litigation against her former employer.\(^{470}\) The former employee had worked extensively with the employer’s commercial confidential information and had signed a confidentiality agreement presumably covering such information.\(^{471}\) The district court stated that, rather than hiring a former employee to gain information about an opposing party, “an attorney should use the discovery process.”\(^{472}\) However, since the former employee in this case had no access to privileged confidential information\(^{473}\) that would “have tainted the underlying trial,”\(^{474}\) the district

worked with manufacturer’s inhouse and outside counsel on legal strategy in other crash suits, no discussion of confidentiality agreement); Kitchen v. Aristech Chemical, 769 F. Supp. 254 (S.D. Ohio 1991)(finding only possible ethical violation for ex parte conversation with defendant’s former environmental engineer was if engineer’s access to work product and privileged communications of defendant made him a “party” not to be communicated with without consent of defendant’s counsel, finding no relevance to the issue of disqualification of engineer’s violation of the confidentiality agreement, and finding disqualification unnecessary due to lack of prejudice). See also, In re Data Gen. Corp. Antitrust Litig., 5 Fed. R. Serv.3d 510, 1986 U.S. Dist. Ct. Lexis 21923, at 7-9 (N.D.Cal.1986)(refusing to lift a protective order to allow employees with attorney-client privileged information and knowledge of trade secrets covered by NDAs to be hired as experts against their former employer and also noting that no one had challenged the validity of the NDAs in this case). But see Becker, 81 Neb. L.Rev. at 981-3 (suggesting that ethical protections for client confidences and attorney-client privilege, legal protections for “trade secret and proprietary information,” and civil procedure protections for privileged information “portend legitimacy for private confidentiality agreements between former employees and employer” and could provide a basis for litigation sanctions, and further suggesting that Kitchen, supra, supported this view).

\(^{468}\) 348 F.3d 1163 (10th Cir. 2000)

\(^{469}\) Kansas Code of Professional Responsibility, Canon 9 (“[a] lawyer should avoid even the appearance of impropriety”).

\(^{470}\) Butler, 348 F.3d at 1172.

\(^{471}\) Id. at 1170. The district court summarily concluded that the confidentiality agreement covered various kinds of information relevant to the litigation, and neither the 10th circuit or the district court appeared to consider the precise language of the agreement in relation to the litigation relevant information she had access to. Biocore Medical Technologies, Inc. v. Khosrowshahi, 181 F.R.D. 660, 673 (D.Kan. 1998).

\(^{472}\) 181 F.R.D. at 673.

\(^{473}\) Id. at 1172.

\(^{474}\) 181 F.R.D. at 674. See e.g., Camden v. State of Maryland, 910 F. Supp. 1115, 1123-24 (D.Md. 1996)(disqualifying attorneys because access to privileged and work-product information is prejudicial to the other side and undermines the privilege itself.); MMR/Wallace Power, 764 F.Supp. at 727 (“giving Thames unrestricted access to plaintiff’s trial strategies and tactics . . . [could] have a devastating effect on the outcome of the litigation”).
court refused to disqualify the lawyer. This led the reprimanded attorney to appeal, claiming that the absence of privileged information justifying disqualification meant that there was also no ethical violation.\footnote{348 F.3d at 1171.} The appellate court affirmed the district court’s finding of an ethical violation, citing at least one other case in which an ethical violation was found “based upon inducements to breach confidentiality agreements independent of any privileged information regarding litigation.”\footnote{Id.} Thus, although neither Model Rule 4.4 nor intentional interference with contract was discussed in the opinion,\footnote{This may have been because the evidence failed to show definitively that the former employee had actually disclosed any confidential information to the lawyer in breach of her contract. Id. at 673 (the former employee was ostensibly hired only to organize a chaotic document production).} Butler would seem to suggest that it is unethical for a lawyer to induce a breach of a confidentiality contract covering commercial information.

However, the persuasiveness of this holding is somewhat undermined by the fact that in the only case cited by the 10th circuit to support the importance of the confidentiality agreement, Rentclub, Inc. v. Transamerican Rental Finance Corp.,\footnote{Rentclub, supra note 461.} the facts both fail to show that any confidentiality agreement was signed by the former employee\footnote{Rentclub, 811 F. Supp. at 653-54, 655-56 (detailing the facts of the former employee’s position and the “confidential business information” he was exposed to, but failing to state that he was subject to an NDA of any kind).} and do show possible disclosure of work product information by the former employee.\footnote{Id. at 654.} The former employee, who had acted as the chief financial officer for the employer, was found to be privy to both work product information and business information that the Rentclub court described as “confidential and proprietary.”\footnote{Id. at 655.} While the inducement to disclose work product information in this case was clearly unethical and on its own provided grounds for the disqualification,\footnote{There was also another base for the finding of an ethical violation in Rentclub. There was also the distinct appearance that the former employee was paid for factual testimony rather than expert advice. Id.} the significance of the disclosure of confidential commercial information is more problematic. The Rentclub court relies primarily on MR 4.2 in finding the lawyer’s conduct with regard to obtaining this information to be unethical.\footnote{Id. at 654.} However, to reach this conclusion, the court relies on an interpretation of

\begin{enumerate}
\item[475] 348 F.3d at 1171.
\item[476] Id.
\item[477] Id.
\item[478] Rentclub, supra note 461.
\item[479] Rentclub, 811 F. Supp. at 653-54, 655-56 (detailing the facts of the former employee’s position and the “confidential business information” he was exposed to, but failing to state that he was subject to an NDA of any kind).
\item[480] Id. at 654.
\item[481] Id. at 655.
\item[482] There was also another base for the finding of an ethical violation in Rentclub. There was also the distinct appearance that the former employee was paid for factual testimony rather than expert advice. Id.
\item[483] Id. at 654.
\end{enumerate}
MR 4.2 that has largely been rejected at this point,\textsuperscript{484} that former employees with managerial positions are represented parties under MR 4.2 and cannot be contacted without the consent of employer’s counsel.\textsuperscript{485} Now that MR 4.2 is understood not to treat former employees as represented by counsel, it cannot justify a conclusion that inducing former employees to disclose non-trade secret confidential commercial information is unethical.

Had there been an NDA in this case, it might have been possible to ground the ethical violation on MR 4.4, but it would require a careful analysis to make sure that the NDA was breached and enforceable, and also that tort liability would attach. Alternatively, MR 4.4 might also have made this conduct unethical if this jurisdiction would have found this employee to have an independent agency-based duty of confidentiality that could, as described above, reasonably cover confidential commercial information. Even this would require a determination that the information in question was commercially valuable in a trade-secret kind of way, rather than valuable simply because it was evidence of wrongdoing that could create financial liability. No such analysis was made by the Rentclub court, if for no other reason that it had already found two other simple ethical violations that were more than sufficient for disqualification, inducing work product disclosures and paying a fact witness.

In Butler, of course, there was a confidentiality agreement that could have created a duty not to disclose. As this Article has shown, a determination that disclosure of business information in the context of an NDA is both a breach by the employee and tortiously induced by the lawyer requires considerable analysis, and the result is by no means certain. Because the Butler Court made no reference to intentional interference with contract as the basis of the ethical violation, it also failed to undertake the analysis necessary to determine whether the lawyer’s conduct was wrongful. Thus, for example, there was no consideration of the validity and scope of the confidentiality agreement in this case, nor was there evidence that the lawyer either knew that the former employee was subject to a confidentiality agreement or had any reason to suspect the possibility of such an agreement. As a result, the legal duty that serves as the foundation for the ethical violation was not established.

But there was one fact in Butler, shared with all the other cases cited by the court, including Rentclub, that could have helped show tortious inducement by the lawyer in this case if all other elements had also been met: the former employee was hired by the lawyer to assist in litigation against the former employer.\textsuperscript{486} The district court prominently included this

\textsuperscript{484} See infra, text at notes 506-11.
\textsuperscript{485} Id. at 658.
\textsuperscript{486} 181 F.R.D. at 665.
as one of the facts contributing to the violation of Canon 9.\textsuperscript{487} However, we have presumed for purposes of this Article that the former employee’s conversations with the lawyer will not involve monetary inducement or an employment relationship. Thus, to the extent the result in Butler depends primarily upon the fact that the lawyer hired the former employee, it fails to address whether otherwise inducing a breach of a confidentiality agreement would have been found to be unethical.

A closer case may be In re: EXDS, Inc.,\textsuperscript{488} in which the lawyer obtained, merely from conversation, “confidential” commercial (but no attorney-client privileged or trade secret information) from a former employee with a confidentiality agreement. After engaging in the kind of searching analysis this Article suggests is necessary to determine the wrongfulness of such conduct, the court concluded that there was no improper conduct by counsel that could be a basis for disqualification.\textsuperscript{489} It began by noting that “not all information a business may consider confidential qualifies as confidential with respect to those who are not signatories to a confidentiality agreement.”\textsuperscript{490} The court’s careful analysis of the claimed “confidentiality” of the information first revealed that there was a question as to whether EXDS, Inc. still possessed the right to enforce the confidentiality agreement after having sold virtually all of its assets in bankruptcy.\textsuperscript{491} Furthermore, the court looked carefully at the information in question to evaluate in what sense it could be viewed as confidential and therefore protected under the agreement. Since EXDS did not appear to actually treat the information as confidential,\textsuperscript{492} it was difficult for them to establish the required elements for possible legal protection discussed above, both actual secrecy and reasonable attempts to maintain such secrecy.\textsuperscript{493}

In addition, the EXDS court also took seriously the legal requirement that information should have commercial value derived from its secret or relatively secret status in order to gain legal protection as

\textsuperscript{487} 181 F.R.D. at 673 (“[a]n attorney violates Canon 9 when he hires a witness who has been exposed to substantial confidential information, to assist in litigation against a former employer”).

\textsuperscript{488} 2005 WL 2043020 (N.D. Cal.)(finding that the former employer had failed to show that the former employee had privileged information).

\textsuperscript{489} Id. at 10(“[b]ecause EXDS has not shown Defense counsel engaged in any improper conduct, nor that they obtained any confidential or privileged information from Fetzer, none of the ”remedial” relief requested by EXDS is warranted”).

\textsuperscript{490} Id. at 5, n. 11.

\textsuperscript{491} Id. at 5, n. 10.

\textsuperscript{492} Id. at 5 (noting that much of the information disclosed was then freely disclosed again by EXDS in court filings with no attempt to seal the record).

\textsuperscript{493} Part II(B)(1), supra.
“confidential.” The information at issue here failed in this respect, as the court could not see any commercial advantage EXDS could gain from such information given its unusual post-bankruptcy position of merely distributing the assets of the bankrupt estate and pursuing claims against third parties.\textsuperscript{494} Furthermore, the court noted that information that might be protected in a commercial context would not be protectable in the context of litigation in which such information was relevant.\textsuperscript{495} This echoes our earlier discussion of the potential unenforceability of confidentiality agreements that restrict access to relevant information in litigation. Finally, the court pointed out that, when only disclosure of “non-privileged, but commercially confidential, information”\textsuperscript{496} is at issue, it was not clear how there is any threat to the integrity of the judicial process that might justify disqualification.\textsuperscript{497}

This limited case law suggests that as long as the former employee is not hired by our lawyer, there is a greater likelihood that a court considering disqualification will focus on the breach of the NDA as a critical element in determining the presence of absence of unethical conduct. A careful analysis of the scope and enforceability of the NDA may in many cases be sufficient to reveal that no ethical wrongdoing is present. As a result, no case appears to have found it necessary to go on to consider the possible interference liability of a lawyer and whether this is covered by MR 4.4.

\section*{B. SHOULD INTENTIONAL CONTRACT INTERFERENCE BE UNDERSTOOD TO VIOLATE MODEL RULE 4.4?}

It is not surprising that there do not seem to be any ethics rulings considering intentional interference with contracts in general, or non-disclosure agreements in particular, as an unethical method of obtaining evidence. MR 4.4 as a basis for disqualification is useful to lawyers,

\begin{itemize}
  \item \textsuperscript{494} Id. at 1 & 6.
  \item \textsuperscript{495} Id. at 6 (“In the litigation context, absent a privilege, the law allows a company's opponent to obtain discovery of relevant information, regardless of whether it discloses the company's proprietary or trade secret information (though upon a showing of good cause courts will enter protective orders to preclude the company's competitors from obtaining and using the information for business purposes)”).
  \item \textsuperscript{496} Id. at 4, n. 8.
  \item \textsuperscript{497} Id. (stating that disqualification would only be appropriate “if the facts supported a finding that the integrity of the judicial process had been injured”). See also, Kitchen, 769 F.Supp. at 258-59(finding that former employee’s possible violation of a confidentiality agreement through contact with plaintiff’s attorney had no relevance to either “opposing party’s interest in a trial free from prejudice due to disclosures of confidential information . . . [or] the public’s interest in the scrupulous administration of justice”).
\end{itemize}
therefore it is invoked in this context. Disciplinary proceedings against opposing lawyers, on the other hand, make lawyers uncomfortable and have little or no strategic value. Thus, lawyers have had little incentive to bring this issue to disciplinary authorities. Furthermore, while the complexity of the issues involved here suggest that asserting such a violation of MR 4.4 would not necessarily be frivolous as a basis for a motion to disqualify, it also suggests that the underlying liability is too uncertain to provide the “knowledge” of a rule violation necessary to trigger mandatory misconduct reporting by another lawyer under Model Rule 8.3.\textsuperscript{498} Indeed, many lawyers might also wonder if this conduct, a mere conversation that happens to product a breach of contract, raises “a substantial question as to the lawyer’s honesty, to trustworthiness or fitness as a lawyer in other respects.”\textsuperscript{499}

If we have no information about how such disciplinary complaints have in fact been treated, we can ask how they should be treated. Should lawyers, in the exercise of our professional self-governance, choose to interpret MR 4.4 to include intentional interference liability as a “method of obtaining evidence that violates the legal rights of . . . [a third] person.”\textsuperscript{500} We can begin by considering the ‘legislative history’ of this clause of Model Rule 4.4. The prohibition on the “use of methods of obtaining evidence that violate the rights of . . . a [third] person” was part of the Kutak Commission’s recommendation for the original version of the Model Rules adopted to replace the Model Code of Professional Responsibility.\textsuperscript{501} Unlike the other section of proposed MR 4.4, which addressed use of “means that have no substantial purpose other than to embarrass, delay, or burden a third person,”\textsuperscript{502} the “methods of obtaining evidence” language was given no cited counterpart in the Model Code.\textsuperscript{503} At least in its specific reference to gathering evidence, this was, therefore, a novel prohibition.\textsuperscript{504}

\textsuperscript{498} American Bar Association Model Rule of Professional Conduct 8.3(a)(2007)(“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority”)
\textsuperscript{499} Id.
\textsuperscript{500} MR 4.4.
\textsuperscript{502} Id.
\textsuperscript{503} Id. at 555(citing corresponding Model Code provisions that refer only to harassing conduct).
\textsuperscript{504} However, use of methods of obtaining evidence that violate the rights of third parties would, for the most part, have already come within the general prohibition of Model Code DR 7-102(8), which prohibits a lawyer from “[k]nowingly engaging in other
The only explanation offered for “the specific reference to methods of obtaining evidence was its relation to the lawyer’s responsibility as an officer of the court.”\textsuperscript{505} As an integral part of court proceedings whose purpose is to enforce and maintain respect for the law, lawyers must ensure that their own conduct stays within legal bounds. Not only does due process require that only legal means be used in litigation, but public respect for courts and the law itself depends upon limiting lawyer conduct in this way.

While it is not hard to see how prohibiting criminal means of obtaining evidence, means that violate of civil statutes, or means involving torts like trespass or conversion would accomplish this purpose, we may well ask whether prohibiting intentional interference with contracts is necessary to achieve this purpose. Stealing evidence is a method that is wrong in itself, as is trespass or conversion. Violation of a civil statute in this context would probably involve obtaining statutorily protected information without the specified authorization. This would likely mean that the lawyer engaged in some deception or fraud to appear authorized under the statute.\textsuperscript{506} On the other hand, it is difficult to see how public respect for lawyers, the courts or the law would be negatively affected by allowing lawyers to do something which looks on its face exactly like what lawyers always do -- ask people questions -- with the only difference being the presence of an invisible contract. The conduct in question has no facial appearance of illegality or lack of respect for the law. Indeed, the ordinariness of the conduct involved, mere conversation, might itself suggest that that this was not what the Commission had in mind when it prohibited “methods of obtaining evidence that violate legal right[s].” In fact, we have seen that, in some states, such an informal conversation with a lawyer will be protected by litigation privilege from all tort liability, including intentional interference. It seems unlikely that conduct could simultaneously reasonably understood as privileged, yet found inconsistent with a lawyer’s role as officer of the court.

In addition, given the importance of informal fact investigation to effective client representation,\textsuperscript{507} it ought not be constrained by employer

\textsuperscript{505} Legislative History, supra note 496, at 554.

\textsuperscript{506} E.g., In the Matter of Disciplinary Proceedings Against Michael B. Sandy, 546 N.W.2d 876, 878(Wisc. 1996)(attorney obtained complaining minor’s confidential court file to defend his criminal client, alleged to have sexual assaulted the minor, by misrepresenting himself as minor’s attorney) and cases cited note 15.

\textsuperscript{507} E.g., International Business Machines Corp. v. Edelstein, 526 F.2d 37, 42(2nd Cir. 1975)(stating that restrictions on informal ex-parte interviewing of witnesses “not only impair the constitutional right to effective assistance of counsel but are time-honored and decision-honored principles, namely, that counsel for all parties have the right to interview
decisions to unilaterally impose non-disclosure agreements on employees at
the point of hiring or firing.

Indeed, the importance of informal investigation of former employees has already had an impact on our understanding of what is and is not ethical under the Model Rules. The Model Rule 4.2 prohibition of ex parte contact with represented persons was initially interpreted by some courts to forbid ex parte contacts with former as well as current employees of a represented employer. However, noting the “inhibit[ing effect of such an interpretation on] the acquisition of information about one’s case,” the ABA refused to interpret MR 4.2 so broadly. Through both its Formal Opinion process, and later in an addition to the comments to MR 4.2, the ABA has made clear that that ex parte contacts with former employees are not off-limits. Most jurisdictions adopting the Model Rules have also followed this ABA interpretation, recognizing the importance of the fact finding it makes possible. The only concern expressed by the ABA was that such ex parte contacts not be used to obtain attorney-client privileged information from former employees and it referenced MR 4.4 as prohibiting this. To the extent that protection of privileged information is an additional target of the “methods of obtaining evidence” section of MR 4.4, it is not furthered by making intentional interference with contract liability

an adverse party’s witnesses (the witness willing) in private, without the presence or consent of opposing counsel and without a transcript being made”); Bryant v. Yorktowne Cabinetry, Inc., 538 F.Supp. 2nd 948, 953 (W.D. Va 2008)(“requiring discovery of former employees only through formal means will needlessly raise the cost of litigating”); Cram v. Lamson and Sessions Co., Carlon Div., 148 F.R.D. 259, 261 (S.D. Iowa 1993)(“Requiring formal discovery methods rather than informal ex parte contacts as the only means of obtaining information would have a deleterious effect on the time and expense necessary to pursue litigation.”).

AMERICAN BAR ASSOCIATION MODEL RULE OF PROFESSIONAL RESPONSIBILITY 4.2 (2007).

See American Bar Association Formal Opinion, 91-359, Contact with Former Employee of Adverse Corporate Party (collecting cases holding that former employees were covered by MR 4.2)

Id.

Id.

MR 4.2, comment 7 (“Consent of the organization’s lawyer is not required for communication with a former constituent”)( added 2002).

See Selected Ethics and Professionalism Issues in Labor and Employment Law Cases, SM027 ALI-ABA 797, at 1018, n.140(collecting 36 cases finding ex parte contact with former employees permissible).

ABA Formal Op. 91-359 (“With respect to any unrepresented former employee, of course, the potentially-communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as a former employee with his or her former employer’s counsel are protected by the privilege (a privilege not belonging to or for the benefit of the former employee, by the former employer). Such an attempt could violate Rule 4.4.”).
an ethical violation.

The absence of any prejudice to employer litigants from the ex parte disclosure of non-privileged or non-work product information provides an additional basis for excluding intentional interference from MR 4.4. By analogy to privileged information, courts have read MR 4.4 to prohibit obtaining work product and trade secret information outside of formal discovery, where access can either be limited as required by law or protected as needed. At the same time, there can be no limit during formal discovery to access to non-privileged, non-work product and non-trade secret information, even when an NDA covers such information.\(^{515}\) If subsequent access to such information creates no prejudice, then there is also no possible prejudice arising out of earlier access to this information through informal investigation.\(^{516}\) This lack of any taint on the trial is precisely why no court has been willing to actually disqualify a lawyer for obtaining such information in advance of discovery.\(^{517}\)

Of course, disqualification and ethical violation are not co-extensive.\(^{518}\) Often this is because a court considering disqualification will factor in the hardship to the client of losing their lawyer in the litigation.\(^{519}\)

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\(^{515}\) Kenneth Hoffman v. Sbarra, Inc., 1997 WL 736703, at 1 (S.D.N.Y.) (“[t]o the extent that the [non-disclosure] agreement might be construed as requiring an employee to withhold evidence designed to enforce federal statutory rights, it is void”); Nestor v. Posner-Gerstenhaber, 857 So.2d 953, 955 (Fla. 3rd Dist. Ct. Ap. 2003) (holding that confidentiality agreements “cannot be used to adversely interfere with the ability of nonparties to pursue discovery in support of their case”). See also, Smith v. Superior Court, 41 Cal. App. 4th 1014, (5th Dist Ct. App. 1996) (noting that “‘[a]greements to suppress evidence have long been held void as against public policy, both in California and in most common law jurisdictions” in refusing to give effect to a Michigan injunction barring an former employee expert witness who had entered into a settlement agreement agreeing not to voluntarily disclose employer trade secrets or testify as any kind of witness) (quoting Williamson v. Superior Court, 21 Cal.3d 829, 836-7 (1978).

\(^{516}\) Accord, Nestor, supra n. 401 (confidentiality agreements cannot block “informal ex parte interviews with former employees”).

\(^{517}\) E.g., Barron Builders & Management Co. v. J & R Air Conditioning & Refrigeration, Inc., 1997 WL 6855352, at 4 (E.D. La. 1997) (finding “no impermissible ex parte communication” when attorneys obtained information that was neither “proprietary” nor attorney-client privileged from former employee); Davidson Supply, 986 F.Supp. at 959 (denying a motion to disqualify counsel for ex parte contact with a former employee who provided evidence of the employer’s conduct violating federal statutes that did not involve either trade secrets or attorney-client privileged information). See also discussion of Butler and EXDS, Part III(A), supra.

\(^{518}\) E.g., Butler, supra note 463 (finding an appearance of impropriety despite lack of taint necessary for disqualification).

\(^{519}\) Meat Price Investigators Association v. Spencer Foods, Inc., 572 F.2d 163, 165 (8th Cir. 1978) (in determining whether an attorney should be disqualified . . . three competing interests must be balanced: 1) the client’s interest in being represented by counsel of its choice; 2) the opposing party’s interest in a trial free from prejudice due to disclosures of
while any such hardship is ethically irrelevant.\textsuperscript{520} However, the reason there was no disqualification in Butler was not because of concerns about the hardship to the client. Rather, the focus was on the presence or absence of taint to the trial. Conduct that taints a trial is certainly an ethical concern as well, but the absence of such taint, our only ethical concern must be to avoid any inherent illegality in the obtaining of the evidence that displays disrespect for the law. Therefore, it is only the ‘officer of the court’ justification that can be relevant to the ethical legitimacy or illegitimacy of inducing a breach of an NDA to obtain information that will be freely discoverable in formal discovery.

However, intentional interference with such contracts fails to display blatant disrespect for the law. In part, this is the case because we have difficulty determining whether this conduct is even tortious. As this Article has shown, the inchoate nature of this tort, the uniqueness of lawyer interference relative to existing case law, the variability of standards of knowledge and litigation privilege across jurisdictions and the problematic enforceability of the contracts in question all combine to create a legal rabbit hole from which it is difficult to emerge with a clear sense of underlying tort liability. This in turn creates uncertainty about the ethics of such conduct. However, as one court has stated with regard to ethical prohibitions, “[l]awyers need to know where the electrified third rail lies.”\textsuperscript{521}

A similar uncertainty caused the ABA to change its position on the ethics of another “method of obtaining evidence,” the secret recording of telephone calls. Initially, in 1974, the ABA found this to be an unethical practice,\textsuperscript{522} because it was deceptive.\textsuperscript{523} At that time, the legal status of such recording was less clear, with state, federal and regulatory law in some conflict.\textsuperscript{524} The initial conclusion of the ABA was that, even if the conduct was legal, it could well be unethical.\textsuperscript{525} Twenty-seven years later, most

\textsuperscript{520} Thus, a conflict of interest which is clearly unethical will not necessarily result in disqualification, if the hardship to the client outweighs the prejudice.

\textsuperscript{521} Bryant, 938 F.Supp. 2d at 953(discussing lawyers’s need for “clear guidance” on ethical matters in general in light of a lack of consensus on whether former employees could be contacted ex parte).

\textsuperscript{522} ABA Formal Opinion 337 at 2 (August 10, 1974)(stating that recording of conversations without the knowledge of all parties is unethical, except perhaps as done by law enforcement officials).

\textsuperscript{523} Id.

\textsuperscript{524} Id. at 3, and note 1(detailing state laws, federal law enforcement law and FCC regulations applicable to secret recordings).

\textsuperscript{525} Id. at 3.
states had legalized the practice, and more people were engaging in it.\textsuperscript{526} It had also become clear that secret recordings were a “legitimate and necessary activity”\textsuperscript{527} in a number of civil and criminal law enforcement contexts. As a result, it began to seem less and less deceptive to engage in this conduct.\textsuperscript{528} In many states, ethics opinions concluded that such recording was not unethical, either in general or in specified situations.\textsuperscript{529} In lifting its blanket prohibition on such recording, the ABA stated

> [a] degree of uncertainty is common in the application of rules of ethics, but an ethical prohibition that is qualified by so many varying exceptions and such frequent disagreement as to the viability of the rule as a basis for professional discipline, is highly troubling.\textsuperscript{530}

So, in 2001, the ABA had to decide whether, now in the fact of clear legality, the practice of secret recording was still deceptive, and therefore, unethical. It was the disagreement about the deceptive ness of the conduct that was the problem. In the face of this uncertainty, and the evidentiary value of secret recordings, the ABA concluded that the practice, if legal, was not unethical.\textsuperscript{531}

In the case of intentional interference, as is still the case with secret recordings, it may be illegal in some jurisdictions and not in others. However, unlike secret recordings, there may be no reasonable way to determine which jurisdictions would definitely make it a tort. So the uncertainty lies in the issue of illegality. Aside from its possible status as a tort, there is no other way this conduct can be seen as wrongful under the Rules, as there need not be any deception or other wrongful conduct involved. In two important ways, therefore, the situation of intentional interference in all jurisdictions can be compared to the situation of secret recordings in 2001 in the jurisdictions in which it was legal. First, there is only one possible basis for finding the conduct unethical (tort liability) and that is subject to a very high degree of uncertainty and disagreement. This

\textsuperscript{526} ABA Formal Op. 01-422, Electronic Recordings by Lawyers Without the Knowledge of All Participants, at \textcopyright (2001)(deciding that the variable legality of non-consensual recordings across the states, disagreements about the deceptive ness of such recordings, and the importance of such recordings in many circumstances required the ABA to rescind its blanket prohibition on such calls except where it is a clear criminal offense or otherwise violates an ethical rule).

\textsuperscript{527} Id.

\textsuperscript{528} Id. (“it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party”).

\textsuperscript{529} Id.

\textsuperscript{530} Id.

\textsuperscript{531} Id.
is inconsistent with a significant purpose of the movement from the Canons of Professional Ethics and the Model Code of Professional Responsibility to the Model Rules, which was to produce more rather than less certainty, especially about ethical prohibitions. 532 Second, there is a great deal of law/rights enforcement value in being able to freely question former employees about non-privileged, non-work product, and non-trade secret information. Therefore, since the ABA concluded that legal secret recording was not unethical because of both the evidentiary value of the practice and uncertainty about its wrongfulness, it also makes sense to exclude intentional interference with contract from the “methods of obtaining evidence” intended to be included in MR 4.4.

If this were done, it would mean that even in a jurisdiction in which a lawyer would be liable for such intentional interference, it would not be unethical for them to engage in this conduct. Given our usual practice of ‘piggy-backing’ ethics on the law, this would be an unusual result, and we would lose the warning function of the ethical rules regarding potential legal liability. 533 However, ‘piggy-backing’ ethics on the law allows courts, juries and legislators rather than lawyers to define the ethical contours of legal practice. While this may not be a problem much of the time, it may be important for lawyers to be more active in defining their role in situations in which there is not clear agreement. If we believe informal fact investigation ought not to be constrained by employers trying to hide wrongdoing, if the litigation privilege ought to cover this tort, then we can take a position on this through our ethics rules. This may in turn have an effect on the legal analysis of such conduct, in particular, whether the interference in question is ‘improper.’ Thus, we can attempt to shape the law as it develops in this area, rather than simply wait for each jurisdiction to take up the question.

Finally, even if intentional interference with contract were not clearly excluded from MR 4.4, we could more directly deal with the chilling effect of disqualification or threats of disqualification for this conduct. If, as a matter of law, it were clear that disqualification is not available for intentional interference with contract that does not seek privileged, work product or irrelevant trade secret information due to the lack of prejudice,

532 Irma S. Russell, The Evolving Regulation of the Legal Profession: The Costs of Indeterminacy and Certainty, 2008 Journal of the Professional Lawyer 137, http://ssrn.com/abstract=1357609, at 1 (noting that the rules ‘emphasize[] clear notice and due process). 533 Contra, Russell, Evolving Regulation at 20 (arguing that when to achieve certainty, the Model Rules provide clear ethical permission in the face of uncertain common law legal liability, lawyers not only run the risk of liability, but also lose sight of the normative considerations that are developed in the common law). However, in this case, the increased certainty in the Model Rules would be the result of taking a normative stand, thus the latter concern of Professor Russell would not be present.
then the strategic use of non-disclosure agreements for motions to disqualify would be largely eliminated. Alternatively, if neither an ethical violation nor disqualification could to be found in the absence of clear intentional interference liability in the jurisdiction in question, this would remove much of the strategic value of disqualification motions in this context by making them considerably more expensive to pursue and less likely to succeed. However, this assumes that there will continue to be no legal clarification of the application of the intentional interference tort to lawyers who “induce” breach of NDAs during informal fact investigation, due primarily to a lack of interest in pursuing such claims against lawyers. Should this change, however, the only way to have an impact on such legal liability is to make it clear that the legal profession does not find such conduct inconsistent with our role as officers of the court.

534 E.g., EXDS, supra n. 483. Accord, Tradewinds Airlines, Inc. v. Soros, 2009 WL 1321695, at 5(S.D.N.Y.)(noting in a case seeking disqualification due to the attorney’s violation of a confidential settlement agreement, that “the Second Circuit requires a high standard of proof on the part of the party seeking to disqualify an opposing party’s counsel” (quoting Kubin v. Miller, 801 F. Supp. 1101, 1113 (S.D.N.Y. 1992)).