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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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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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I. INTRODUCTION

Can lawyers be disqualified from representation simply because they have had informal conversations with former employees with non-disclosure agreements? A few years ago,¹ lead counsel for plaintiffs in a major class-action suit faced just such a threat. A former

* 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.

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 partici-

employee of the defendant corporation contacted a journalist writing about the case with important new information about wrongful acts taken by the corporation. The former employee had not previously been identified during several years of discovery. The journalist passed the employee's name to the plaintiffs' 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 the defendant demanded the name of the former employee. Upon discovering that the former employee had signed a non-disclosure agreement, the 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 Rule 4.4 of the *Model Rule of Professional Conduct*,² which prohibits using a method of obtaining evidence that violates the rights of third parties,³ 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 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

pation in the case as a legal expert. The facts in the actual case have been simplified and modified for this Article.

2. MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (2009).

3. *Id.*

third parties unethical, the legitimacy of such conduct will depend on whether it violates 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*.⁴ Criminal law and the law of fraud are particularly important for setting the bounds of ethical conduct.⁵ Where certain non-criminal conduct associated with the practice of law may in fact be “prohibited by law,” the *Model Rules* both alert lawyers to this possibility and make such conduct unethical where illegal.⁶ Conversely, where statutory law expressly permits 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.”⁷ Lastly, the *Model Rules* also require lawyers to determine their

4. MODEL RULES OF PROF'L CONDUCT (2009). The *Model Rules of Professional Conduct*, which are published by the American Bar Association, will hereinafter be referred to as the “*Model Rules*.”
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 a criminal or fraudulent act. *See id.* R. 3.4(a) (prohibiting unlawful obstruction, alteration, destruction or concealment of evidence described in the comments to Rule 3.4 as an “offense”); *id.* R. 3.5(a) (prohibiting influencing judges, jurors and others “by means prohibited by law”); *id.* R. 8.4(b) (prohibiting lawyers from committing criminal acts that suggest a lack of honesty, trustworthiness or fitness as a lawyer); *id.* R. 1.2(d) (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 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 id.* R. 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); *id.* R. 1.6(b)(3) (allowing such disclosure to prevent, mitigate, or rectify financial/property injury arising from a crime or fraud).
6. *E.g.*, *id.* R. 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”); *id.* R. 1.7(b)(2) (“Notwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client if . . . the representation is not prohibited by law”); *id.* R. 3.4(b) (“A lawyer shall not . . . offer an inducement to a witness that is prohibited by law”); *id.* R. 3.5(c)(1) (prohibiting post-discharge communication with jurors if prohibited by law); *id.* R. 3.6(b)(1) (allowing extrajudicial lawyer statements of the identity of persons involved in litigation “except where prohibited by law”); *accord id.* R. 1.11(c) (prohibiting former government lawyer conflicts arising from knowledge of information that the government is legally prohibited from disclosing to the public or has a legal privilege to avoid disclosing).
7. *E.g.*, *id.* R. 1.11(a), (c), (d) (prohibiting former government lawyers from certain conflicted representation “[e]xcept as law may otherwise expressly permit”); *id.* R. 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”); *id.* R. 1.16(d) (“The lawyer may retain papers relating to the client

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,⁸ or allows a lawyer to reveal client information when the lawyer reasonably believes disclosure is necessary to comply with other law.⁹

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 law, particularly as it applies to our conduct in the practice of law itself.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 *Model Rules* themselves. Third, it is generally not unreasonable to expect lawyers to have the skill and

to the extent permitted by other law.”); *id.* R. 3.5(b) (prohibiting ex parte communications with judges, jurors or prospective jurors “unless authorized to do so by law”); *id.* R. 4.2 (prohibiting communications with represented persons unless “authorized to do so by law”); *id.* R. 5.5(b)(1) (prohibiting lawyers not admitted in a jurisdiction from systematic and continuous practice there unless “authorized by . . . other law”); *id.* R. 5.5(c)(2) (permitting temporary practice authorized by law).

8. *E.g.*, *id.* R. 1.16 (a)(1) (providing that “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law”); *see also id.* R. 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.”); *id.* R. 1.13(b) (addressing situations where “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”); *id.* R. 8.4(a) (prohibiting the use of “methods of obtaining evidence that violate the legal rights” of third parties); *id.* R. 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); *id.* R. 8.4(e) (barring claims that a lawyer can achieve results by means that violate the law); *id.* R. 8.4(f) (prohibiting assisting judges in conduct that violates the law).
9. *Id.* R. 1.6(b) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to comply with other law”); *see also id.* R. 8.1(b) (2009) (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).
10. *Accord* Irma S. Russell, *The Evolving Regulation of the Legal Profession: Costs of Indeterminacy and Certainty* 14 (Univ. of Tulsa Legal Studies Research Paper No. 2009-08), available at <http://ssrn.com/abstract=1357609> (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”).

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 necessarily 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,¹¹ expensive to defend,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, “In representing a client, a lawyer shall not . . . 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 recordings¹⁴ are forbidden to lawyers. Similarly, to the

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11. *EXDS, Inc. v. Devcon Constr., Inc.*, No. C05-0787 PVT., 2005 WL 2043020, at *3 (N.D. Cal. Aug. 24, 2005) (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 (2d Cir. 1975))).
 12. See *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1285 (1981) (“Lawyers have discovered that disqualifying opposing 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.”).
 13. MODEL RULES OF PROF’L CONDUCT R. 4.4(a) (2009).
 14. *E.g.*, *In re Lebensbaum*, No. BD-2005-083, 2005 WL 5177246 (Mass. Bar Disciplinary Decisions and Admonitions Nov. 15, 2005) (finding a violation of Model Rule 4.4(a) when a lawyer himself or through his client made an unauthorized entry into client’s husband’s home office and emailed business records from husband’s computer to lawyer); see also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 01-422, at 5–6 (2001), available at <http://www.abanet.org/cpr/>

extent the Rule prohibits methods of obtaining evidence which involve conduct prohibited by civil statutes or court rules, the reach of Rule 4.4 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 investigation to take advantage of the very useful information former employees often have about the wrongdoings of their former employers¹⁷ as long as they steer clear of attorney–client privileged and work product information¹⁸ and a few other avoidable

nosearch/01_422.pdf (noting that nonconsensual 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 Model Rule 4.4).

15. *E.g.*, *In re Michael L. Freeman*, No. 06-2029, 2008 WL 6550121 (Az. Disciplinary Comm'n Dec. 19, 2008) (finding a violation of Model Rule 4.4 by a lawyer who obtained counseling records of minor abuse victim by serving a subpoena duces tecum to the counselor without notice to the minor's counsel after the trial court denied the motion to compel production of such records); Conn. Informal Ethics Op. 96-4, at 2 (1996) (stating that a Connecticut lawyer had violated Model Rule 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, No. 2005-21, 2005 WL 5177277 (Mass. Bar Disciplinary Decisions and Admonitions Sept. 16, 2005) (finding a violation of Model Rule 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).
16. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2009) ("Consent of the organization's lawyer is not required for communication with a former constituent."); see also *Davis v. Washington Cnty. Open Door Home*, No. C-2-98-636, 2000 WL 1457004, at *5 n.8 (S.D. Ohio Sept. 21, 2000) ("Requiring 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.").
17. *E.g.*, *EXDS, Inc. v. Devcon Constr., Inc.*, No. C05-0787 PVT., 2005 WL 2043020, at *3 (N.D. Cal. Aug. 24, 2005) (noting that informal discovery of former employees provides relevant factual evidence in a cost-effective manner).
18. See MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 1 (2009) (stating that "the rights of third persons . . . include . . . unwarranted intrusions into privileged relationships"); see also *Davis*, 2000 WL 1457004, at *5 (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 employ-

ethical potholes.¹⁹ At the same time, the use of post-employment confidentiality or non-disclosure agreements (NDAs) has proliferated.²⁰ 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 agreements²¹ and therefore a violation of Model Rule 4.4 as well.

The operative words here are “could be.” Predicting the applicability of this tort turns out to be extremely difficult to do with any certainty. As the *Restatement (Second) 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.”²² This means that a crucial element of the tort, whether the interference was improper or not, 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

ees conditioned upon avoidance of attorney–client communications, among other things).

19. Other potential ethical violations that can arise from conversations with former employees on behalf of a client include violations to 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), and 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. REV. 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. REV. 721, 723 (2002) (“More 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.” MODEL RULES OF PROF'L CONDUCT R. 4.4 (2009).
22. RESTATEMENT (SECOND) OF TORTS § 767 cmt. b (1979).
23. *Id.* § 767 cmt. a (noting that resolving the issue of improper interference involves “the most frequent and difficult problems of the tort of interference with a contract”); see also William J. Woodward, Jr., *Contractarians, Community, and the Tort of Interference with Contract*, 80 MINN. L. REV. 1103, 1117–18 (1996) (noting that these “multiple, relatively vague factors make predicting the outcome of litigation very difficult”).

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.

To answer the ultimate question about the ethics of such conduct, it is also necessary to consider whether Model Rule 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 law-

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24. As will be discussed in more detail, 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 1997) (“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 in most jurisdictions to other torts, including interference with contract. *See, e.g., Silberg v. Anderson*, 786 P.2d 365, 368 (Cal. 1990) (noting that the California statute that codified the litigation privilege has been held to apply to “all torts except malicious prosecution”); *Echevarria, McCalla, Raymer, 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.”); *Fisher v. Lint*, 868 N.E.2d 161, 170 (Mass. App. Ct. 2007) (applying the privilege “broadly” to dismiss an intentional interference with advantageous relations claim); *Rainier’s Dairies v. Raritan Valley 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. 1998) (holding that the privilege extends to communications in the course of judicial proceedings that would otherwise create liability for tortious interference with a contract); *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) (stating that “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”). *But see Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 151 P.3d 732, 752 (Haw. 2007) (holding that the litigation privilege applies to tortious interference conduct only absent proof of malice); *Mantia v. Hanson*, 79 P.3d 404, 414 (Or. Ct. 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 and malicious prosecution); *Tulloch v. JPMorgan Chase & Co.*, No. Civ.A. H-05-3583, 2006 WL 197009, at *7 (S.D. Tex. Jan. 24, 2006) (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).
25. *See Briscoe v. LaHue*, 460 U.S. 325, 330–31 (1983) (describing the English common-law roots of the privilege and American acceptance of the privilege).

yers 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 Model Rule 4.4(a) by speaking with a former employee with an NDA during their investigation of the case.²⁶ This threat so immediately threatens the pocketbook of lawyers and clients²⁷ 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 cannot 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,²⁸ 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 Model Rule 4.4(a) includes intentional interference with contract as a prohibited method of obtaining evidence has required that this analysis be split into two parts, published as separate articles. In the first part 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 the second part²⁹ I will consider the contract issues involved in interpreting and enforcing such NDAs, as there can be no tort liability without a breach of an enforceable contract. I will also consider in the second part the extent to which Model Rule 4.4(a) can fairly be under-

26. See Becker, *supra* note 19, at 981 (noting the threat of ethical violation and trial sanction when former employees with confidentiality agreements are contacted *ex parte*).

27. See 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 matters ancillary to the merits)”).

28. See Chambers v. Capital Cities/ABC, 159 F.R.D. 441, 445 (S.D.N.Y. 1995) (stating that “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”).

29. Maura Strassberg, *An Ethical Rabbit Hole: Model Rule 4.4, Intentional Interference with Former Employee Non-Disclosure Agreements, and the Threat of Disqualification, Part II*, 90 NEB. L. REV. (forthcoming 2011).

stood to extend to such conduct, even if it is tortious, and whether it ought to cover such conduct.

II. LIABILITY IN TORT

The still evolving tort of “intentional interference with performance of contract by third person”³⁰ 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.³¹

The focus of the discussion in this part of the Article 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 person” and the breach of this contract. For purposes of the tort discussion in the first part of this Article, 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 the second part. 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 all³² and cannot be tortiously interfered with.³³ The necessity of considering whether and under what circumstances NDAs may be in violation of public policy must be resolved to determine the ethics of conduct under Model Rule 4.4. However, this will be taken up in detail in the second part of this Article—published separately—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 con-

30. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

31. *Id.*

32. *Id.* § 774 cmt. b.

33. *Id.*, see also *Chemtrust Indus. v. Share Corp.*, Civ. A. No. H-82-1224, 1987 WL 13822, at *7 (S.D. Tex. June 19, 1987) (providing that “a contract that is held void as against public policy” cannot “support a tortious interference claim”).

cerning 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.³⁴ In particular, competitive interference with a merely prospective contract must be independently wrongful or unlawful to be improper and create liability,³⁵ while this is not the case for interference with an existing contract.³⁶ The *Restatement (Second) of Torts* appears to support treating voidable contracts as existing contracts³⁷ and has garnered a certain amount of support for this position.³⁸ However, the California courts seem to have reversed course on what first appeared to be support for this *Restatement* position,³⁹ and the

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34. *PMC, Inc. v. Saban Entm't, Inc.*, 52 Cal. Rptr. 2d 877, 886 (Cal. Ct. App. 1996).
 35. RESTATEMENT (SECOND) OF TORTS § 768(1)(b) & cmt. e (1979) (wrongful means must be used for interference with prospective contractual relations to be improper); see also *Central Sports Army Club v. Arena Assocs., 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 (Cal. 2003) (voidable contract requires unlawful conduct).
 36. RESTATEMENT (SECOND) OF TORTS § 766 (1979) (requiring improper interference for interference with contract); *id.* § 767 cmt. c (noting that interference can be improper even if innocent means are used).
 37. The *Restatement* is not consistent or clear on this point. Compare RESTATEMENT (SECOND) OF TORTS § 766 cmt. f (1979) (“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 *id.* § 774 cmt. 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.”). See also *Guard-Life Corp. v. S. Parker Hardware Mfg.*, 406 N.E.2d 445, 449–50 (N.Y. 1980) (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).
 38. RESTATEMENT (SECOND) OF TORTS § 766 cmt. f (1979) (listing cases citing comment f); see also Woodward, *supra* note 23, at 1124 n.75 (listing cases supporting treating invalid contracts as sufficient for the tort).
 39. *PMC, Inc.*, 52 Cal. Rptr. at 886–90 (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).

New York courts have clearly rejected treating voidable contracts as existing contracts for purposes of this tort.⁴⁰

Thus, if the contract is voidable and 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 Model Rule 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 prosecutions.”⁴¹ 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.⁴²

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.⁴³ 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.⁴⁴ 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 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 em-

40. *Guard-Life Corp.*, 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).

41. RESTATEMENT (SECOND) OF TORTS § 768 cmt. e (1979).

42. A more detailed discussion of the contract law analysis that would be required to decide whether an NDA was voidable will be taken up in the second part of this Article.

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

44. *Id.* § 767 (defining “improper” interference for both interference torts).

ployer.⁴⁵ As the *Restatement* does not require the interfering actor and the person harmed to be competing as seller or buyer⁴⁶ or limit the “plane on which they compete,”⁴⁷ 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 agreement is voidable. This advantage could make the difference between potentially unethical conduct under Model Rule 4.4 and ethically permissible conduct under Model Rule 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 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: (1) the treatment of interference with voidable contracts, (2) the voidability of the NDA in question, and (3) 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 that 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.

B. Knowledge of the Contract

For liability to attach, the *Restatement* requires that the interfering actor have knowledge both that a contract exists between the plaintiff and another and that the actor’s conduct would interfere with the other’s performance of this contract.⁴⁸ It can sometimes be the case that the attorney will be informed of the existence of the NDA by counsel for the former employer before even talking to the former employee, either because the former employee has been identified as part of mandatory disclosure under the *Federal Rules of Civil Procedure* as an “individual likely to have discoverable information”⁴⁹ or the former

45. *But see* Dolton v. Capitol Fed. Sav. & Loan Assn., 642 P.2d 21, 23 (Colo. App. 1981) (finding the defendant lender and officer of the bank—who may have provided information to the plaintiff real estate developer’s competitor about the plaintiff’s offer to buy real estate—not to be a competitor of the plaintiff with a privilege to interfere non-wrongfully).

46. RESTATEMENT (SECOND) OF TORTS § 768 cmt. c (1979).

47. *Id.*

48. *Id.* § 766 cmt. i (1979).

49. FED. R. CIV. P. 26(a)(1)(A); Becker, *supra* note 19, at 925 (noting that “[t]he 1993 requirements arguably mandated disclosure of the identity of and information held by a litigant’s former employees”).

employer is represented at an initial pretrial conference of parties.⁵⁰ 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.⁵¹ 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.⁵² Thus, as applied to our scenario, if the lawyer has no independent knowledge of the NDA between the former employee and employer, and the former employee incorrectly tells the lawyer that there is no NDA aspect to their employment or severance contract, the lawyer

50. See FED. R. CIV. P. 26(f).

51. See Becker, *supra* note 19, at 920, 926 (noting that Rule 11 may require communication with former employees before an initial pretrial conference since it requires a reasonable inquiry before filing a complaint).

52. *E.g.*, Tuxedo Contractors, Inc. v. Swindell-Dressler Co., 613 F.2d 1159, 1164 (D.C. Cir. 1979) (holding competitor entitled to rely on representation that any existing contract would not be interfered with); Hunter Vending Co. v. D.C. Vending Co., Inc., 345 A.2d 142, 144 (D.C. 1975) (finding 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); Telephone & Data Sys., Inc. v. Eastex Cellular L.P., CIV. A. No. 12888, 1993 WL 344770, at *930-31 (Del. Ch. Aug. 27, 1993) (holding no reasonable implication of a contract where one party told defendant there was an unwritten deal and the other party denied the existence of any agreement); Ryan, Elliott & Co., Inc. v. Leggat, McCall & Werner, Inc., 396 N.E.2d 1009, 1011-13 (Mass. App. Ct. 1979) (holding that 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); Collins Holding Corp. v. Defibaugh, No. 02-CP-40-3941, 2005 WL 6068060, at *11 (S.C. Ct. C.P. Sept. 6, 2005) (finding that 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).

would not be viewed as having knowledge sufficient to create liability.⁵³

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 to 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,⁵⁴ or can a lawyer avoid intentional interference liability by assuming there is no NDA in the absence of being told otherwise? Certainly, contacting the 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.⁵⁵ 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, 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 produce interference.⁵⁶ However, it will not

53. *But see* Eric P. Voigt, *Driving Through the Dense Fog: Analysis of and Proposed Changes to Ohio Tortious Interference Law*, 55 CLEV. ST. L. REV. 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").

54. Some NDAs 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.

55. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2009) (providing that consent of the organization's lawyer is not required for communication with a former constituent).

56. *E.g.*, *DiGiorgio Corp. v. Mendez & Co., Inc.*, 230 F. Supp. 2d 552, 564 (D.N.J. 2002) ("General 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.*, support this proposition, as the issue addressed in

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.⁵⁷ 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.⁵⁸ 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.

1. *What Counts as Sufficient Knowledge*

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 evidentiary gold standard for the tort. It is also generally agreed that a merely negligent failure to find out about a con-

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 was more than detailed enough to make them aware of the interfering consequences of their conduct. *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 741, 775-76 (S.D.N.Y. 1990) (finding defendant had reviewed copies of the actual agreements and believed them unenforceable); *Guard-Life Corp. v. S. Parker Hardware Mfg.*, 406 N.E.2d 445, 450-51 (N.Y. 1980) (finding 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). *But see Americable Int'l, Inc. v. Cellularvision, U.S.A., Inc.*, No. 96 CV 942 (SJ), 1997 WL 597088, at *2 (E.D.N.Y. Sept. 19, 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.

57. *See, e.g., Marks v. Struble*, 347 F. Supp. 2d 136, 146-47 (D.N.J. 2004) (finding complaint alleging knowledge of an attorney-client relationship sufficiently alleged knowledge of the attorney-client retainer agreement between the parties); *CompuSpa, Inc. v. IBM Corp.*, No. DKC 2002-0507, 2004 U.S. Dist. LEXIS 11922, at *20-22 (D. Md. June 29, 2004) (finding that, on a motion for summary judgment, for a tortious interference claim to be asserted against it, IBM did not need to know the technicians it hired away from CompuSpa were required to give thirty days of notice before quitting as long as it had knowledge of the existence of the contract); *CompuSpa, Inc. v. IBM Corp.*, 228 F. Supp. 2d 613 (D. Md. 2002); *D 56, Inc. v. Berry's Inc.*, 955 F. Supp. 908, 915-16 (N.D. Ill. 1997) (finding that, 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).
58. *Hidden Brook Air, Inc. v. Thabet Aviation Int'l Inc.*, 241 F. Supp. 2d 246, 279-80 (S.D.N.Y. 2002) (finding that an airplane manufacturer knew defendant's purchase of plane from it would replace his purchase of plane from competitor).

tract is insufficient to give rise to intentional interference liability.⁵⁹ 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.”⁶⁰ 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.”⁶¹ 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 they willfully and deliberately choose not to take the steps required to confirm these additional facts.⁶²

59. RESTATEMENT (SECOND) OF TORTS § 766C cmt. a (1979) (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* Burnside v. Leimbach, 594 N.E.2d 60, 63 (Ohio Ct. App. 1991) (stating that “the tort of negligent interference with a business relation . . . is not recognized as yet in Ohio”); Hartridge v. State Farm Mut. Auto. Ins. Co., 271 N.W.2d 598, 601 (Wis. 1978) (stating that “under Wisconsin law intention is an essential element of a claim for damages sustained as a result of contractual interference”). *But see infra* note 63 and the cases cited therein.

60. Exxon Corp. v. Allsup, 808 S.W.2d 648, 656 (Tex. App. 1991).

61. Swaney v. Crawley, 191 N.W. 583, 584 (Minn. 1923); *see also* Tele-Port, Inc. v. Ameritech Mobile Commc’ns, Inc., 49 F. Supp. 2d 1089, 1092 (E.D. Wis. 1999) (quoting the Wisconsin form jury instruction for the proposition that “[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,” CIVIL JURY INSTRUCTIONS COMM., WIS. CIVIL JURY INSTRUCTIONS § 2780 (1996)).

62. *See* State v. McCallum, 583 A.2d 250, 253 (Md. 1991) (stating that “‘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”) (citation omitted).

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.⁶³

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.⁶⁴ Some jurisdictions have directly allowed a “should have known” gloss to describe knowledge sufficient for the tort.⁶⁵ 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.”⁶⁶ To the extent the “should have known” gloss is used for this tort, there is the possibility that mere negligent ignorance will be sufficient for intentional interference.

The issue of what kind of less-than-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 in-

63. Compare *Twitchell v. Nelson*, 155 N.W. 621, 624 (Minn. 1915) (stating that “[f]rom a knowledge of such facts the law imposes the duty to inquire, and the failure to do so, either willfully or negligently, constitutes bad faith and the legal inference of actual knowledge is conclusive”), with *Cont’l Research, Inc. v. Crutenden, Podesta & Miller*, 222 F. Supp. 190, 199 n.1 (D. Minn. 1963) (suggesting that subsequent case law indicated that Minnesota would not “impose tort liability upon one who was negligent in not finding out about a contract between two other parties”).

64. See *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 653, 654 n.23 (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 “wil[l]ful refusal to know”).

65. See, e.g., *Mid-Continent Tel. Corp. v. Home Tel. Corp.*, 319 F. Supp. 1176, 1200 (N.D. Miss. 1970) (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, 405–06 (Tex. Civ. App. 1977) (finding a jury instruction that stated “do you find that . . . Defendants knew, or in the exercise of ordinary care should have 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”).

66. See *infra* subsection I.B.1.d.

formation about the presence or absence of an NDA, 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. Thus, 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 these 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.⁶⁷ Similarly, in a New Jersey case, a beauty supply store that knew only that Matrix sold beauty products exclusively to salons and fashioned product packaging to discourage non-salon retail sales had insufficient knowledge of the existence or details of an anti-diversion agreement between a salon and Matrix.⁶⁸ Finally, in an Ohio case, Toyota's knowledge that a dealership sold a forklift competitor's products and that exclusive contracts were not unknown in the industry was insufficient to show actual knowledge of the dealer's exclusive contract with the forklift competitor when Toyota also knew that other locations of this dealer

67. *CBS, Inc. v. Cineamerica Distrib. Corp.*, No. 78 Civ. 2245, 1978 U.S. Dist. LEXIS 14919, at *8 (S.D.N.Y. Oct. 17, 1978); *see also* *Trionic Assocs., Inc. v. Harris Corp.*, 27 F. Supp. 2d 175, 185 (E.D.N.Y. 1998) (finding that a new employer's lack of actual knowledge of a non-competition agreement meant there was insufficient knowledge to support an intentional interference claim), *aff'd*, 198 F.3d 235 (2d Cir. 1999); *Roulette Records, Inc. v. Princess Prod. Corp.*, 224 N.Y.S.2d 204, 207 (N.Y. App. Div. 1962) (reversing an intentional interference judgment based on a "could or should have known" standard and finding no liability when no actual knowledge of exclusive recording contract), *aff'd*, 187 N.E.2d 132 (N.Y. 1962).

68. *Matrix Essentials, Inc. v. Cosmetic Gallery, Inc.*, 870 F. Supp. 1237, 1240-47 (D.N.J. 1994), *aff'd*, 85 F.3d 612 (3d Cir. 1996).

and other dealerships sold the products of this competitor alongside those of multiple competing manufacturers, and Toyota had been told by this dealer that they could and would like to sell Toyota products.⁶⁹ 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 NDAs 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 the defendant’s 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 fired both requires a prior employment contract and would interfere with the employment.⁷⁰ 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.⁷¹ Finally, the simple observation of a competitor’s bill-

69. *Crown Equip. Corp. v. Toyota Material Handling, U.S.A., Inc.*, 202 F. App’x 108, 113–14 (6th 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.

70. *Kelly v. Galveston Cnty.*, 520 S.W.2d 507, 513 (Tex. Civ. App. 1975) (applying Texas law).

71. *Nat’l Right to Life Political Action Comm. v. Friends of Bryan*, 741 F. Supp. 807, 813–14 (D. Nev. 1990) (applying Nevada law).

boards was found to make obvious the existence of a lease between the competitor and the landowners upon whose land the billboards were located.⁷²

The question then is whether the existence of an 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 was not found. In *Collins Holding Corp. v. Defibaugh*,⁷³ the court suggested that the defendant's knowledge that their new customers had a current contract with the defendant's former employer and that the former employer "trie[d] to get its customers to sign exclusive contracts"⁷⁴ but did not always succeed would not be sufficient to know that there was an exclusive contract.⁷⁵ 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 NDAs 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.*,⁷⁶ a real estate broker was told by a potential client that the client was being represented by another real estate broker, but he was not told there was an exclusive agency contract.⁷⁷ 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,"⁷⁸ 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

72. *Bocook Outdoor Media, Inc. v. Summey Outdoor Adver., Inc.*, 363 S.E.2d 390, 394 (S.C. Ct. App. 1987) (stating that the defendant "[knew] or [had] reason to know" of the agreements because they were "obvious" from the facts).

73. No. 02-CP-40-3941, 2005 WL 6068060, at *14 (S.C. Ct. C.P. Sept. 6, 2005) (applying a standard in which "[i]mplied knowledge of the contract can satisfy the element of the defendant's knowledge of the contract").

74. *Id.* at *15.

75. *Id.* The court also stated in dictum that "it is not enough for the plaintiff to show that . . . exclusive contracts are common in the industry." *Id.* at 14 (citing *CBS, Inc. v. Cineamerica Distrib. Corp.*, No. 78 Civ. 2245, 1978 U.S. Dist. LEXIS 14919 (S.D.N.Y. Oct. 17, 1978)).

76. No. 02A01-9711-CH-00287, 1998 WL 651623 (Tenn. Ct. App. Sept. 24, 1998) (applying Tennessee law).

77. *Id.* at 6.

78. *Id.*

believe in the existence of a contract.”⁷⁹ 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 entered into by persons in the former employer’s position with some regularity.⁸⁰

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 NDAs on their employees and former employees—to the more particular—this employer has required some employees and 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 Model Rule 4.4 violations expands considerably.

c. *Reasonable Inquiry*

Reasonable inquiry jurisdictions generally describe the standard of knowledge required as follows: “[I]t 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

79. *Id.* (finding the facts as sufficient to support an inference by defendant that there was exclusive representation even in the absence of actual knowledge).

80. *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 to the interfering employee 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).

rights of the parties.”⁸¹ The reasonable inquiry standard raises the question of whether a lawyer who knows a potential witness’s 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.⁸² 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.⁸³ 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.

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*,⁸⁴ the information known was so detailed that it may have been sufficient to show

81. *Swaney v. Crawley*, 191 N.W. 583, 584 (Minn. 1923); *see also* *Tele-Port, Inc. v. Ameritech Mobile Commc'ns, Inc.*, 49 F. Supp. 2d 1089, 1092 (E.D. Wis. 1999) (“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.” (internal citation omitted)).

82. *See infra* subsection I.B.1.c.ii.

83. *See infra* subsection I.B.1.c.i.

84. 191 N.W. 583 (Minn. 1923); 157 N.W. 910 (Minn. 1916).

that the defendant had actual knowledge of the contract in question,⁸⁵ but the court found that the evidence was sufficient on the lesser standard of a duty of inquire.⁸⁶ 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 the plaintiffs as potential purchasers of his principal's rights.⁸⁷ As a result of his efforts, the 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.⁸⁸ At that closing, a \$1000 down payment under the contract between the plaintiffs and the landowner was paid by the plaintiffs to the defendant as agent to discharge back taxes and overdue mortgage interest accrued under his principal's previous contract.⁸⁹ Subsequently, the defendant himself bought the same land directly from the owner by persuading the owner that the plaintiffs had been acting for the defendant in their purchase of the land and not on their own behalf.⁹⁰ 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 the plaintiffs and the land owner. Indeed, the defendant here was personally involved with the 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.*⁹¹ 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 business opportunities involving computer testing services."⁹² Subsequently ACT proposed a new agreement under which NASD would assign its testing centers to ACT.⁹³ NASD instead accepted a Sylvan Learning Systems offer to manage and then acquire the same testing centers.⁹⁴ The issue was whether Sylvan had facts

85. *Swaney*, 157 N.W. 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).

86. *Swaney*, 191 N.W. at 584.

87. *Swaney*, 157 N.W. at 910.

88. *Id.*

89. *Id.*

90. *Id.*

91. 296 F.3d 657 (8th Cir. 2002) (applying Iowa law to affirm summary judgment for defendant).

92. *Id.* at 660.

93. *Id.* at 661.

94. *Id.*

sufficient to put it “on notice that it should investigate whether ACT already had [a contract] that would be breached” with NASD.⁹⁵ 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.⁹⁶ 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 NASD were unusual business partners, made Sylvan’s lack of suspicion about a possible agreement between ACT and NASD quite reasonable.

The minimum actual knowledge a lawyer in our scenario could possess would be that a potential witness was a former employee of a particular employer and, perhaps additionally, the general knowledge that some employers impose NDAs 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. Yet, 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 either by direct contact with the plaintiff or by being the plaintiff’s close local competitor. In *Twitchell v. Nelson*,⁹⁷ the defendant company was not only a competitor of the plaintiff,⁹⁸ but its officers also knew that the spring water business the company purchased had been operating under an agreement with the plaintiff, that the plaintiff owned the land on which the spring supplying this business’s water was located, and that there was a controversy about the plain-

95. *Id.* at 663.

96. *Id.* at 662–63.

97. 155 N.W. 621 (Minn. 1915).

98. *Id.* at 624.

tiff's right to rent use of the spring.⁹⁹ The court concluded that the defendant actually knew there was some sort of contract with the plaintiff,¹⁰⁰ but he did not actually know that purchasing the assets would cause the plaintiff to breach a best-efforts obligation contained in the spring lease.¹⁰¹ However, in the face of their attorney's advice and their own understanding of this business, the defendant was found to have a duty to inquire further about the plaintiff's rights.¹⁰² Similarly, in *Kerkhoff v. Kerkhoff*,¹⁰³ new lessees 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 them to rely on the owner's permission to plow the stalks under without inquiring whether it would be acceptable to the prior sub-lessee.¹⁰⁴ Under the duty of reasonable inquiry, the new lessees were found to have knowledge of the prior sub-lease of land sufficient to make them liable for interference with the prior sub-lessee's rights to harvest corn stalks.¹⁰⁵

In the face of the detailed information known by the defendants in *Twitchell* and *Kerkhoff*,¹⁰⁶ it was possible to conclude that their failures 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 who 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 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.*,¹⁰⁷ involved Prudential's right of prior consent and first refusal on the sale of a

99. *Id.* In addition, the defendant was advised by its attorney that if it bought the business a lawsuit might result, and the defendant also had the records searched for the chattel mortgage securing the lease, which was properly filed and referenced but not actually found. *Id.* at 623–24.

100. *Id.* at 624.

101. *Id.* at 623.

102. *Id.* at 624.

103. No. C9-98-1134, 1999 WL 88962 (Minn. App. 1999).

104. *Id.* at *3.

105. *Id.*

106. *See also* *Tele-Port, Inc. v. Ameritech Mobile Commc'ns, Inc.*, 49 F. Supp. 2d 1089, 1092 (E.D. Wis. 1999) (finding that a contract to provide cell phone subscribers to service provider intentionally interfered with competitor's similar contract when defendant had actual knowledge of the existence of a similar contract but only knew the general form and substance of the contract).

107. No. 99-1357, 2000 U.S. App. LEXIS 3394 (4th Cir. Mar. 6, 2000) (reversing summary judgment for defendant).

Prudential real estate brokerage.¹⁰⁸ The defendant, Long & Foster, was the “country’s third-largest independent real estate brokerage company,”¹⁰⁹ and had previously bought franchise brokerages,¹¹⁰ 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.¹¹¹ Although there was no evidence showing that 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 generally or about Prudential in particular.¹¹² 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.¹¹³

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 and first refusal provision, it is not hard to compare these facts to our scenario, which involves employment or severance agreements that are widely used across the public and private sector, and the not atypical 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 generally not competitors of employers, or even the 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

108. *Id.* at *2.

109. *Id.* at *4.

110. *Id.* at *13.

111. *Id.* at *4, *13.

112. *Id.* at *13.

113. *Id.* at *15 n.7.

into deliberate ignorance by lawyers in our scenario, although it is troubling.

In *Salon 2000, Inc. v. Dauwalter*,¹¹⁴ we move closer to our scenario, as the issue in that case was the duty to inquire into the absence or presence of a non-compete clause in a prior employment contract. The defendant, the owner of a hair salon that hired the plaintiff's former employee, was himself a former employee of the plaintiff and as such had been subject to a non-compete agreement.¹¹⁵ In addition, the defendant had previously rented space to other former employees of the plaintiff subject to such non-compete agreements.¹¹⁶ 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 the plaintiff's former employees, or at least had facts sufficient to require a reasonable inquiry about its possible existence.¹¹⁷ Comparing the defendant's position here to that of a lawyer in our scenario, his personal experience of the plaintiff's use of a non-compete 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 the 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.*¹¹⁸ is even closer to our scenario, as it involves a confidentiality agreement as part of an employment contract. However, the facts were sufficient in this case to show actual knowledge as well as a duty of reasonable inquiry.¹¹⁹ 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.¹²⁰ 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 confidentiality agreements.¹²¹ 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

114. No. A06-1227, 2007 WL 1599223 (Minn. App. June 5, 2007).

115. *Id.* at *5.

116. *Id.*

117. *Id.*

118. 595 N.W.2d 751 (Iowa 1999).

119. *Id.* at 764.

120. *Id.*

121. *Id.*

on the earlier contract, and the Deere negotiator had personally signed a similar confidentiality agreement in connection with his employment at Deere.¹²²

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 reasonable 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 Model Rule 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*,¹²³ the first case attributing a constructive knowledge standard to Kansas law,¹²⁴ 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.¹²⁵ The court allowed the case to go forward because there was “sufficient evidence from which the defendants’ knowledge of plaintiff’s contract . . . [could] be inferred, to allow a jury to determine the truth of the statements defendants made in their affidavits.”¹²⁶ Clearly, what this court meant by constructive knowledge was that the jury would be

122. *Id.*

123. 528 F. Supp. 391 (D. Kan. 1981).

124. *Id.* at 397–98 (borrowing this language, including “constructive knowledge,” from the AM. BAR ASS’N, MODEL JURY INSTRUCTIONS FOR BUSINESS TORT LITIGATION § 1.03 (1980), rather than any Kansas state case law).

125. *Id.* at 398.

126. *Id.*

allowed to consider circumstantial evidence of actual knowledge to find that there was actual knowledge, even if denied by defendants.¹²⁷

However, in another Kansas case, we do find a definition of constructive knowledge that is clearly less than actual knowledge. The plaintiff alleged that the defendant “knew or should have known”¹²⁸ of the contract and the defendant moved to dismiss on the grounds that this language made a claim for mere negligent interference, an unrecognized cause of action.¹²⁹ The court refused to dismiss, finding that “should have known” was a proper gloss on “constructive knowledge.”¹³⁰ 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.

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 ju-

127. *Accord* Crown Equip. Corp. v. Toyota Material Handling, U.S.A., Inc., 202 Fed. App'x 109, 112 (6th Cir. 2006) (finding that plaintiff need not show direct evidence of knowledge of exclusivity but merely evidence sufficient for the jury to infer there was actual knowledge); *D 56, Inc. v. Berry's Inc.*, 955 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); *Murnik v. Kabo Chems., Inc.*, No. 97 C 1845, 1997 WL 567801, at *2 (N.D. Ill. Sept. 4, 1997) (stating that “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 Commc'ns, Inc.*, 49 F. Supp. 2d 1089, 1092 (E.D. Wis. 1999) (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).

128. *Indy Lube Invs., L.L.C. v. Wal-Mart Stores, Inc.*, 199 F. Supp. 2d 1114, 1124 (D. Kan. 2002) (applying Kansas law).

129. *Id.*

130. *Id.* (“Therefore, the court believes that Indy Lube’s ‘knew or should have known’ language is appropriate in this respect.”).

risdictions 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 or 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 (Second) of Torts* requires the interfering actor to either have induced or otherwise caused the breach.¹³¹ Inducement of a breach is present when the breaching party chooses not to perform as a result of intimidation or persuasion.¹³² Causation of a breach is present when the tortfeasor prevents the breaching party from performing, such as by imprisoning the breaching party or by arranging for a necessary precondition to performance to be absent.¹³³ When a lawyer informally questions a former employee with an NDA about matters covered by the agreement, and the former employee then breaches the agreement by answering the questions, clearly there is

131. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

132. *Id.* § 766 cmt. h.

133. *Id.*

no prevention causation, but is there even inducement?¹³⁴ 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 her to reveal it by offering money, inducement would have occurred.¹³⁵ However, suppose the former employee had previously decided on her 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 breaching party may choose to breach for their own reasons.¹³⁶

If the lawyer's conversation with the employee can be shown to arise from an independent decision by the employee to breach the NDA, the lawyer may not be viewed as causing the breach in the sense required for liability in tort. In *Davis v. HydPro, Inc.*,¹³⁷ a competitor who had no contact with the breaching party 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."¹³⁸ In *NCC Sunday Inserts, Inc. v. World Color Press*,¹³⁹ 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.¹⁴⁰ Similarly, in *Ryan, Elliott & Co. v. Leggat, McCall & Werner, Inc.*,¹⁴¹ a real estate agency which hired its rival's employees was not found to have induced their breach of contract when the employees

134. 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. See, e.g., FED. R. CIV. P. 37(a)(3)(B)(i) (motion for an order compelling a deponent to answer a question).

135. See RESTATEMENT (SECOND) OF TORTS § 766 cmt. k (1979) (noting that inducement by offering a benefit will be sufficient).

136. See *Sweeney v. Smith*, 167 F. 385, 387 (C.C.E.D. Pa. 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."), *aff'd*, 171 F. 645 (3d Cir. 1909).

137. 839 S.W.2d 137 (Tex. App. 1992).

138. *Id.* at 140.

139. 759 F. Supp. 1004 (S.D.N.Y. 1991).

140. *Id.* at 1007, 1013-14.

141. 396 N.E.2d 1009 (Mass. App. Ct. 1979).

had already decided to leave, had discussed going into business for themselves, and had themselves initiated contact with the defendant agency.¹⁴²

The key facts in these cases are a decision on the part of the breaching party 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. 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.”¹⁴³ 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.¹⁴⁴ The *Restatement* concludes that “A has not induced the breach and is not subject to liability.”¹⁴⁵ The absence of “affirmative, unduly persuasive, initiating conduct”¹⁴⁶ signals a lack of inducement. Thus, if contact with the lawyer is initiated by a former employee who volunteers the information protected by a known NDA, the lawyer would not be understood to have induced the breach.¹⁴⁷

142. *Id.* at 1013 (finding no inducement or other purposeful causation of the breach).

143. RESTATEMENT (SECOND) OF TORTS § 766 cmt. n (1979).

144. *Id.*

145. *Id.*; see also *Kendall/Hunt Publ’g Co. v. Rowe*, 424 N.W.2d 235, 245 (Iowa 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); *Corinthian Corp. v. White & Bollard, Inc.*, 442 P.2d 950, 957–58 (Wash. 1968) (finding that purchaser who was approached by seller and merely accepted their offer, which produced seller’s breach, did not induce breach).

146. *Middleton v. Wallich Music & Entm’t Co., Inc.*, 536 P.2d 1072, 1076 (Ariz. Ct. App. 1975) (finding that 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 S. Union Co. v. Sw. Gas Corp.*, 180 F. Supp. 2d 1021, 1054–55 (D. Ariz. 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).

147. *But see Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793, 804–05 (N.D. Ohio 1965) (refusing to grant summary judgment for a malpractice insurer charged with inducing breach of a confidential physician–patient relationship, where the

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.”¹⁴⁸ 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, advising that their former employer 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.¹⁴⁹

Yet, even in the absence of such financial persuasion there may be inducement by “moral pressure.”¹⁵⁰ What exactly is meant by moral 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 induce-

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).

148. *Wolf v. Perry*, 339 P.2d 679, 682 (N.M. 1959) (holding that 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 breaching party had already made up his mind not to honor or acknowledge the validity of contract).
149. *See, e.g., IDS Life Ins. Co. v. SunAmerica, Inc.*, 958 F. Supp. 1258, 1275 (N.D. Ill. 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), *aff’d in relevant part, vacated in part*, 136 F.3d 537, 542 (7th Cir. 1998) (affirming grant of preliminary injunction based on these facts as to the one defendant not subject to arbitration); *Marc Dev., Inc. v. Wolin*, No. 93 C 2037, 1996 WL 327782, at *2 (N.D. Ill. June 11, 1996) (providing an analysis of the legality of a setoff scheme could be inducement to execute the scheme); *Edward Vantine Studios, Inc. v. Fraternal Composite Serv., Inc.*, 373 N.W.2d 512, 515 (Iowa Ct. App. 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, 315 (Mass. App. Ct. 1995) (providing legal defense to breached contract was both inducement and improper means); *Biddle v. Warren Gen. Hosp.*, 715 N.E.2d 518, 528 (Ohio 1999) (finding that 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); *see also Unarco Material Handling, Inc. v. Liberato*, 317 S.W.3d 227, 228 (Tenn. Ct. App. 2010) (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); *Becker, supra* note 19, 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).
150. RESTATEMENT (SECOND) OF TORTS § 766 cmt. k (1979).

ment by moral pressure. In *Alberts v. Devine*,¹⁵¹ 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."¹⁵² 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 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*,¹⁵³ complaints to a radio station by the Anti-Defamation League (ADL) about the 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 show¹⁵⁴ were viewed as exerting moral pressure on the station, causing the plaintiff to be fired.¹⁵⁵ Moreover, in *Greenfield v. Central Labor Council of Portland*,¹⁵⁶ 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,¹⁵⁷ because it consisted of "communication[s] . . . for the purpose of presenting arguments and appeals to their free judgments,"¹⁵⁸ the court 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.¹⁵⁹

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 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,¹⁶⁰ thus al-

151. 479 N.E.2d 113, 124 (Mass. 1985) (deciding reported questions of law and reversing grant of summary judgment in favor of defendants).

152. *Id.* at 121 (quoting RESTATEMENT (SECOND) OF TORTS § 766 cmt. k (1979)).

153. 249 N.W.2d 547 (Wis. 1977).

154. *Id.* at 549.

155. *Id.* at 553.

156. 192 P. 783 (Or. 1920) (involving a conspiracy to injure or destroy business claim).

157. *Id.* at 789-90.

158. *Id.* at 789 (quoting *Iron Molders' Union No. 125 v. Allis-Chalmers Co.*, 166 F. 45, 51 (7th Cir. 1908)).

159. *Id.* at 788-89.

160. See *Becker*, *supra* note 19, at 902 (indicating that 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,

lowing 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.¹⁶¹

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 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 is 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 to which intent can attach.¹⁶² However, if there is both knowledge of the contract and persuasive inducement, does this always amount to intentional interference? Would a lawyer who per-

and the fact that the person's former or current employer is an adverse party" (quoting *Brown v. St. Joseph's Cnty.*, 148 F.R.D. 246, 254 (N.D. Ind. 1993)) (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-359 (1991)).

161. RESTATEMENT (SECOND) OF TORTS § 766 cmt. k (1979) (stating that "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. Consol. Mut. Ins. Co.*, 423 F.2d 41, 43-44 (3d 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).
162. *See, e.g.*, *Davis Chem. Corp. v. Disonics, Inc.*, 826 F.2d 678, 687 (7th Cir. 1987) (finding that, 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 Mgmt., Inc. v. Williams*, 167 A.D.2d 279, 280 (N.Y. App. Div. 1990) (finding that, when model dissatisfied with her agency complained to a friend, who then connected her to the friend's agency, friend's actions were insufficient for liability, because although a substantially certain result would be breach of original agency contract, there was no persuasion by friend).

suades a former employee to talk about their former employment, knowing that they were subject to an 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.”¹⁶³ However, it also says that while “all consequences which the actor desires to bring about are intended,”¹⁶⁴ 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.”¹⁶⁵ 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”¹⁶⁶ 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.”¹⁶⁷

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*,¹⁶⁸ discussed above,¹⁶⁹ 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*.¹⁷⁰ Since the complaints made were simply about the program policy of the station and were not 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.¹⁷¹

163. RESTATEMENT (SECOND) OF TORTS § 8A (1979).

164. *Id.* § 8A cmt. b.

165. *Id.*

166. *Id.* § 766 cmt. j.

167. *Id.* § 8A cmt. b.

168. 249 N.W.2d 547 (Wis. 1977).

169. *Supra* text accompanying notes 153–55.

170. *Augustine*, 249 N.W.2d at 554–55.

171. *Id.*

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 that the former employee signed an NDA with their employer. To help us think through incidental intent as applied to interference with such a known NDA, let us assume that there are two paradigmatic types of NDAs: type A and type B.¹⁷² Our lawyer can make factual or legal mistakes about these two types of NDAs 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?

172. See Strassberg, *supra* note 29, section II.A (indicating that NDAs may or may not have consideration depending on when they are entered into), section II.B (stating that NDAs may use varying language to define the scope of coverage), subsection II.B.4.a (stating that NDAs may also have different public interest impacts).

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 that 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 cannot 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 ninety percent actual probability that any given NDA was a type A. If the lawyer did not have any facts that revealed this ninety percent probability, or had facts that suggested to them there was only a ten percent probability of a type A agreement, again it would seem impossible to say 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.¹⁷³

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.¹⁷⁴ 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 that will become clear, 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:

“[I]t 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.”¹⁷⁵

Thus, at least in circumstances when the lawyer knows sufficient facts about the NDA to be able to correctly predict the legal effect of the NDA, the substantial certainty of their interference will be judged as if the legal effect had been correctly predicted.

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

173. See *EXDS, Inc. v. Devcon Constr., Inc.*, No. C05-0787 PVT., 2005 WL 2043020, at *7 (N.D. Cal. Aug. 24, 2005) (finding that where defense counsel had insufficient facts to realize that disclosed information might be confidential under a NDA protecting confidential information, and facts known reasonably suggested information was not confidential, counsel should not be disqualified).

174. *Don King Prods., Inc., v. Douglas*, 742 F. Supp. 741, 775–76 (S.D.N.Y. 1990) (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, Elliot & Co. v. Leggat, McCall & Warner, Inc.*, 396 N.E.2d 1009, 1012 (Mass. App. Ct. 1979) (finding no contract interference where defendant reasonably did not know the terms of the agreement); *RESTATEMENT (SECOND) OF TORTS* § 766 cmt. i (1979) (indicating that a mistaken belief about legal effect of contract provides 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.

175. *RESTATEMENT (SECOND) OF TORTS* § 766 cmt. i (1979).

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 an 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 an 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 be 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-implied 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 could not 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 cannot 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,¹⁷⁶ 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).¹⁷⁷ 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 the first case, the relevant contract term was simple; either it was an exclusive publishing contract or not, and the defendant received a letter confirming that it was exclusive from both the plaintiff publisher and the writer.¹⁷⁸ 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.¹⁷⁹ 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, 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 be-

176. *See supra* section I.C.

177. *See supra* section I.C.

178. *B. Lewis Prods., Inc. v. Maya Angelou & Hallmark Cards, Inc.*, 01CIV.0530MBM, 2005 WL 1138474, at *12–13 (S.D.N.Y. May 12, 2005) (finding this was enough to create a jury question as to the sufficiency of defendant's knowledge).

179. *D 56, Inc. v. Berry's Inc.*, 955 F. Supp. 908, 916 (N.D. Ill. Jan. 14, 1997) (finding sufficient evidence of knowledge to create a jury question).

ing 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 was 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. However, 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 in the second part of this Article,¹⁸⁰ 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 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.¹⁸¹ Even worse, if the credited knowledge were based on a "should have known" standard that was itself

180. Strassberg, *supra* note 29.

181. See *Twitchell v. Nelson*, 155 N.W. 621, 623 (Minn. 1915) ("There 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.").

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 threaten to undermine the intentional nature of the interference tort entirely, may 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 improper¹⁸² 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.¹⁸³ However, “[u]nlike other intentional torts such as inten-

182. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

183. *Id.* § 767 cmt. b (describing sections 768 through 774 as a non-exhaustive list of some privileges that have been recognized for the interference tort).

tional 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.”¹⁸⁴ 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.¹⁸⁵ 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.”¹⁸⁶

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,¹⁸⁷ 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 privilege to interfere by giving honest advice.¹⁸⁸ 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.”¹⁸⁹ 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.¹⁹⁰ In our scenario, the advice will be re-

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* § 770 (providing that no liability attaches as long as the interference is genuinely to protect the welfare of the other and improper means are not used); see, e.g., *L.A. Airways, Inc. v. Davis*, 687 F.2d 321, 326 (9th Cir. 1982) (“An 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.”); *Reynolds v. Schrock* 142 P.3d 1062, 1068 (Or. 2006) (“[S]afeguarding 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.”).

188. RESTATEMENT (SECOND) OF TORTS § 772 (1979).

189. *Id.* § 772 cmt. c.

190. *Id.* §772 cmt. b (“[T]he lawyer . . . need[s] this protection for the performance of their tasks.”).

quested if the former employee asks the lawyer about the NDA, but not if the lawyer volunteers such advice.¹⁹¹ 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.¹⁹²

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.¹⁹³ 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, was unenforceable, or both, clearly it will have been bad advice, and the lawyer may 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. 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 typically 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.¹⁹⁴ In the face of such a conflict, Model Rule 4.3 prohibits a lawyer from giving any legal advice to an unrepresented former employee.¹⁹⁵ Consequently, to come within this privilege, there is a serious risk that the lawyer would have to act

191. *Id.* § 772 cmt. c.

192. *Id.* § 772 cmt. d (“The initial request . . . may be broad enough to embrace the whole problem . . .”).

193. *Id.* § 772 cmt. e.

194. This conflict would come under Model Rule 1.7(a)(2) and might not be consentable under Rule 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).

195. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2009) (“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 cli-

unethically. It would not be unreasonable for a court to find that unethical advice could not be given in good faith.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸

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

[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.¹⁹⁹

This privilege has been applied in cases where the inducement was a truthful statement that a lawsuit had been filed,²⁰⁰ as well as other truthful statements.²⁰¹ A lawyer in our scenario might well do noth-

ent.”); *see also* Becker, *supra* note 19, at 901–02 (noting that contact with an unrepresented former employee can lead to a violation of Model Rule 4.3).

196. *See 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).
197. *See Hamilton v. Greeleaf*, 677 A.2d 525, 527–28 (Me. 1996) (providing that the lawyer loses absolute litigation privilege for litigation communications if the lawyer's representation of the client violates conflict of interest rules).
198. RESTATEMENT (SECOND) OF TORTS § 767 cmt. c (1979) (suggesting that only in special relationships, such as parental or custodial, could ordinarily wrongful means ever be proper).
199. *Id.* § 767 cmt. b.
200. *Thompson v. Paul*, 657 F. Supp. 2d 1113, 1116–17 (D. Ariz. 2009) (finding 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); *Int'l City Mgmt. Ass'n Ret. Corp. v. Watkins*, 726 F. Supp. 1, 4, 6–7 (D.D.C. 1989) (finding no liability for employer whose truthful statements that a lawsuit had been initiated against a discharged employee prevented him from obtaining new employment).
201. *E.g.*, *Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089, 1092–93 (11th Cir. 1994) (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

ing 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. *International City*²⁰² 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.²⁰³ 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 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.²⁰⁴

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

animals by a commercial wildlife trader and a letter revoking the trader's primate import license to a client of the trader); *Masoni v. Bd. of Trade of S.F.*, 260 P.2d 205, 208 (Cal. Dist. Ct. App. 1953) (finding no liability for business association whose truthful statement to creditors of a restaurant that one of the owners had ample means to pay debts in full prevented the restaurant from obtaining settlements from creditors for less than full payment); *Liebe v. City Fin. Co.*, 295 N.W.2d 16, 18–21 (Wis. Ct. App. 1980) (finding 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); *Allen v. Safeway Stores Inc.*, 699 P.2d 277, 279–80 (Wyo. 1985) (finding no liability for a state employee whose truthful account of statements made by grocery store employees resulted in the termination of their employment).

202. See generally Maura Strassberg, *Privilege Can Be Abused: Exploring the Ethical Obligation to Avoid Frivolous Claims of Privilege*, 37 SETON HALL L. REV. 413, 490 (2007).

203. For example, *Thompson*, 657 F. Supp. 2d 1113, fails to indicate whether the communications went beyond the fact of the lawsuit to include allegations made in the lawsuit.

204. Strassberg, *supra* note 202, at 490.

moral pressure of the facts alone.²⁰⁵ The lawyer might also try to persuade the former employee to provide information by stating that the 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 tortious, 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.²⁰⁶

c. Litigation Privilege

Immunizing litigators²⁰⁷ 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 law-

205. While reviewing a draft of this Article, Dean Allan Vestal suggested a slightly different version of this proposition: "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.

206. 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 (SECOND) OF TORTS § 767 cmt. 1 (1979).

207. The same privilege also covers other essential participants in a 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." (quoting *Ange v. State*, 123 So. 916, 917 (Fla. 1929))). See generally *Briscoe v. LaHue*, 460 U.S. 325, 332-37 (1983) (detailing the history of the recognition of the litigation privilege for judges, parties, and witnesses in American law).

yers²⁰⁸ and to avoid burdening the courts with secondary litigation.²⁰⁹ This “litigation privilege”²¹⁰ 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.²¹¹

Almost all states provide such immunity²¹² from liability for defamation.²¹³ Many states also extend this absolute privilege²¹⁴ to the tort of intentional interference with contract,²¹⁵ while other states extend

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208. *Butz v. Economou*, 438 U.S. 478, 512 (1978) (“Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.”).
209. *Kittler v. Eckberg*, 535 N.W.2d 653, 657 (Minn. Ct. 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 privilege” (citing *Rubin v. Green*, 847 P.2d 1044, 1047–50 (Cal. 1993)). *But see generally*, Paul T. Hayden, *Reconsidering the Litigator’s Absolute Privilege to Defame*, 54 OHIO ST. L.J. 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”).
210. T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 916 (2004).
211. RESTATEMENT (SECOND) OF TORTS § 586 (1979); *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 57 (2000) (“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.”).
212. Some states treat the privilege as providing immunity from suit, and even more treat it as an affirmative defense. Anenson, *supra* note 210, at 947 (“[T]he 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 ADVOC. 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.
213. *But see* Anenson, *supra* note 210, at 917 n.6 (noting that Georgia limits the absolute immunity to pleadings and Louisiana provides only qualified immunity to lawyers and witnesses).
214. While absolute privilege provides either an affirmative defense or immunity from liability arising out of litigation communications even if actual malice can be shown, it does not protect against an actual malicious prosecution or abuse of process claim. *See Collins v. Red Roof Inns, Inc.*, 566 S.E.2d 595, 598 (W. Va. 2002); RESTATEMENT (SECOND) OF TORTS § 587 cmt. a (1979).
215. *E.g.*, *Pinto v. Int’l Set, Inc.*, 650 F. Supp. 306, 309 (D. Minn. 1986) (holding that under both California and Minnesota law, absolute privilege protected an attorney from intentional interference liability for letter threatening litigation); *Agostini v. Strycula*, 42 Cal. Rptr. 314, 317 (Cal. Dist. Ct. App. 1965) (finding that, under California law, the privilege covered liability of a witness for testimony that induced breach of contract); *Buckhannon v. U.S. W. Commc’ns, Inc.*, 928

only a qualified privilege²¹⁶ for intentional interference with contract.²¹⁷ Assuming that the 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 defamation²¹⁸ or have not yet decided whether to

P.2d 1331, 1335 (Colo. App. 1996) (finding that absolute privilege protected attorneys from intentional interference claims); *Levin v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 608 (Fla. 1994) (holding on certified question that absolute immunity extended to claims against counsel of tortious interference with a business relationship); *Fisher v. Lint*, 868 N.E.2d 161, 164, 170 (Mass. App. Ct. 2007) (holding that absolute immunity protected a witness from intentional interference with advantageous relations liability); *Lone v. Brown*, 489 A.2d 1192, 1197 (N.J. Super. Ct. App. Div. 1985) (holding that absolute litigation privilege applies to a claim of tortious interference with contractual relationship against a party filing a notice of lis pendens); *Pelagatti v. Cohen*, 536 A.2d 1337, 1343 (Pa. Super. Ct. 1987) (holding that absolute privilege protected attorneys from intentional interference with contractual relations liability). *But see* *Silver v. Mendel*, 894 F.2d 598, 603 (3d Cir. 1990) (suggesting qualified immunity); *Unarco Material Handling, Inc., v. Liberato*, 317 S.W.3d 227, 238 (Tenn. Ct. App. 2010) (holding absolute privilege from intentional interference liability for lawyer who induced a breach of confidentiality agreement by former employee); *Laub v. Pesikoff*, 979 S.W.2d 686, 691–92 (Tex. Ct. App. 1998) (holding witnesses immune from liability for tortious interference with contractual relationship); *Price v. Armour*, 949 P.2d 1251, 1258 (Utah 1997) (holding that absolute privilege protected a litigant whose defamatory statements interfered with a business relationship between an attorney and his client from liability for intentional interference); *Jeckle v. Crotty*, 85 P.3d 931, 937–38 (Wash. Ct. App. 2004) (holding attorney immune from liability for interference with business relations); *Clark v. Druckman*, 624 S.E.2d 864, 871 (W. Va. 2005) (holding that only malicious prosecution was an exception to the absolute privilege in a case involving claims of both intentional interference and malicious prosecution against an attorney).

216. 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.

217. *E.g.*, *Silver*, 894 F.2d at 603 (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); *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 151 P.3d 732, 752 (Haw. 2007) (holding that Hawaii law provides attorneys qualified immunity for tortious interference with contractual relations provided that neither actual malice nor ultra vires conduct is shown); *Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co.*, 931 S.W.2d 166, 182 (Mo. Ct. App. 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); *Mantia v. Hanson*, 79 P.3d 404, 414 (Or. Ct. 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 and malicious prosecution).

218. *E.g.*, *Zdeb v. Baxter Int'l, Inc.*, 697 N.E.2d 425, 430 (Ill. App. Ct. 1998) (finding that “Illinois courts have not extended the . . . [Restatement defamation litigation] privilege to claims for intentional interference with prospective economic advantage”); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 702 (Tenn.

extend the privilege for intentional interference with contract claims.²¹⁹

Even in those jurisdictions that have already extended either an absolute or qualified litigation privilege to claims of intentional interference with contract, 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,²²⁰ and they recognized that a “privilege which protected an individual from liability from def-

2002) (“Absent any claims for defamation, we decline to extend the privilege to claims for intentional interference with business relationships.”). *But see* Am. Cont’l v. Milberg, 884 F. Supp. 1388, 1396 (D. Ariz. 1995) (finding the litigation privilege under Illinois law to extend to “any tort” liability for attorney litigation statements, including tortious interference), *aff’d*, 103 F.3d 1524 (9th Cir. 1996), *rev’d on other grounds*, 523 U.S. 26 (1998).

219. *E.g.*, Safeway Ins. Co., Inc. v. Guerrero, 106 P.3d 1020, 1023 n.16 (Ariz. 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); Kirschstein v. Haynes, 788 P.2d 941, 954 (Okla. 1990) (finding only that absolute litigation privilege extends beyond defamation to intentional infliction of emotional distress claims); Harris v. Riggenbach, 633 N.W. 2d 193, 195–96 (S.D. 2001) (same).
220. *E.g.*, *Agostini*, 42 Cal. Rptr. at 315–16 (involving situation where youth worker employment terminated after testimony that he engaged in corporal punishment); *Buckhannon*, 928 P.2d at 1333 (addressing situation where disability payments terminated after litigation investigator told disability insurer that insured was not disabled and had engaged in fraud); *Smith v. Rosenstein*, No. CV 950326698S, 2000 WL 965335, at *7 (Conn. Super. Ct. May 4, 2000) (holding that absolutely privileged defamatory statements “cannot be the basis of a tortious interference claim”); *Fisher*, 868 N.E.2d at 164–65 (addressing situation where wages docked due to report of police misconduct); *Mahoney v. Newgard*, 729 N.W.2d 302, 310 (Minn. 2007) (holding that privilege extends to a claim of breach of attorney–client privilege that does “sound in defamation” and refusing to reach the question of whether the “privilege applies to claims not sounding in defamation”); *Lone*, 489 A.2d 1195–96 (finding that immunity extended to tortious interference with contractual relation when complaint put “a different label” on slander of title claim); *Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152, 162 (Tenn. Ct. App. 1997) (holding “the absolute privilege afforded 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”); *Laub*, 979 S.W.2d at 688 (finding that contracts to transfer wife’s assets to husband not enforceable because affidavit alleged that wife’s agreement was caused by abuse); *accord Harris*, 633 N.W.2d at 196 (allowing immunity for negligence and intentional or negligent infliction of emotional distress when claims simply put “a new label” on defamation claim); *Price*, 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”); *Clark*, 624 S.E.2d at 866 (finding that filing of medical negligence action had negative effect on physician’s relationship with malpractice insurer).

amation would be of little value if the individual were subject to liability under a different theory of tort.”²²¹ 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 possibility²²² 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,²²³ 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 breaching party rather than impugning the reputation of the former employer. Another form of inducement might be by moral pressure generated by neither factually true statements nor defamatory statements, but rather by other kinds of statements, such as “wouldn’t you 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.²²⁴ These jurisdictions have found that the need for “participants

221. *Fisher*, 868 N.E.2d at 170 (quoting *Correllas v. Viveiros*, 572 N.E.2d 7, 13 (Mass. 1991)); see also *Laub*, 979 S.W.2d at 690 (“[T]he privilege must extend beyond defamation actions in order to ‘avoid the circumvention [of the policy behind the privilege] by affording an almost equally unrestricted action under a different label.’” (quoting *Doe v. Blake*, 809 F. Supp. 1020, 1028 (D. Conn. 1992))).

222. There are 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* notes 236–38 and accompanying text.

223. *E.g.*, *Rosenthal v. Irell*, 135 Cal. Rptr. 121, 127–28 (Cal. Dist. Ct. App. 1982) (holding that the privilege extends to liability arising out of truthful statements).

224. *E.g.*, *Lofton v. TLC Laser Eye Ctrs., Inc.*, No. Civ. CCB-00-1667, 2001 WL 121809, at *7 (D. Md. Feb. 8, 2001) (dismissing as privileged claims asserting interference with contract by defamation, threats to sue, and attempts to enforce a contract); *Rusheen v. Cohen*, 128 P.3d 713, 724 (Cal. 2006) (holding that “if the

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”²²⁵ is the same regardless whether the damage is caused by defamation or “*other misconduct* occurring during the course of a judicial proceeding.”²²⁶ Most of these jurisdictions have not had the opportunity to consider whether the precise kind of misconduct involved in non-defamatory intentional interference with contract deserves immunity.

However, a recent Tennessee case, *Unarco Material Handling, Inc. v. Liberato*,²²⁷ 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.²²⁸ Before speaking to the lawyer, the former president insisted upon an indemnity agreement for his potential breach.²²⁹ The court found that the lawyer’s conduct of negotiating the indemnity agreement and ques-

gravamen of the action is communicative, the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct”); *Rosenthal*, 135 Cal. Rptr. at 127–28 (holding that attorney conduct urging a settlement was privileged whether or not it contained statements that could be said to be 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); *Clark v. Druckman*, 624 S.E.2d 864, 867, 869–70 (W. Va. 2005) (holding that a lawyer’s failure to ever talk to people ‘disclosed’ as planned expert witnesses fell within the misconduct protected by the privilege); *accord Levin v. U.S. Fire Ins. Co.*, 639 So. 2d 607–08 (Fla. 1994) (finding that 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); *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 151 P.3d 732, 752 (Haw. 2007) (finding that 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); *Mantia v. Hanson*, 79 P.3d 404, 412–13 (Or. Ct. App. 2003) (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 (citing *Hibner v. Creditors Collection Serv. of Lincoln Cnty., Inc.*, 961 P.2d 898, 899–900 (Or. Ct. App. 1998)); *Maynard v. Caballero*, 752 S.W.2d 719, 720–21 (Tex. Ct. 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); *Jeckle v. Crotty*, 85 P.3d 931, 937–38 (Wash. Ct. App. 2004) (finding that lawyer’s use of improperly leaked patient names to contact patients for possible inclusion in ongoing class action lawsuit was protected by absolute privilege).

225. *Echevarria 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).

226. *Id.* (emphasis added).

227. 317 S.W.3d 227 (Tenn. Ct. App. 2010).

228. *Id.* at 229.

229. *Id.*

tioning the former president was absolutely privileged against a claim of tortious interference with contract.²³⁰ The test set out by the court for litigation privilege immunity from tortious interference with contract requires that (1) the attorney be acting for a client or prospective client in good faith, (2) the conduct be related to the subject matter of the proposed litigation and there be a real nexus between the conduct and the proposed litigation, and (3) the conduct not involve wrongful means such as “fraud, trespass, threats, violence or other criminal conduct.”²³¹

At least a few courts have found that the litigation privilege should not apply to misconduct in the form of a breach of contract.²³² They have 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.²³³ 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

230. *Id.* at 238. 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. RULES OF PROF’L CONDUCT R. 4.2 cmt. 4 (2010), available at http://www.tba.org/ethics/2011_TRPC.pdf. 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.” MODEL RULES OF PROF’L CONDUCT. R. 4.2 cmt. 7 (2009). In altering Model Rule 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 *infra* section III.B.

231. *Unarco Material Handling, Inc., v. Liberato*, 317 S.W.3d 227, 238 (Tenn. Ct. App. 2010).

232. See *Spectrum Creations, L.P. v. Carolyn Kinder Int’l, LLC*, No. SA-05-CV-750-XR, 2008 WL 416264, at *68–69 (W.D. Tex. Feb. 13, 2008) (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 lawsuit”); *E. & J. Gallo Winery v. Andina Licores S.A.*, No. CV F 05-0101 AWI LJO, 2006 WL 1817097, at *7 (E.D. Cal. June 30, 2006) (finding no litigation privilege for filing suit in Ecuador when such filing was a breach of California forum selection and choice of law contract provisions); *Tulloch v. JPMorgan Chase & Co.*, No. Civ.A. H-05-3583, 2006 WL 197009, at *7 (S.D. Tex. Jan. 24, 2006) (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. Ct. App. 2005) (finding 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).

233. *Wentland*, 25 Cal. Rptr. 3d at 116.

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.”²³⁴ 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 interferer²³⁵—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 an 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.²³⁶ Some jurisdictions, however, limit the privilege to com-

234. *Id.* at 117.

235. 1A CAL. JUR. 3D *Actions* § 18 (2010) (“For 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.”) (citing *City of Dinuba v. Cnty. of Tulare*, 40 Cal. Rptr. 3d 899 (Cal. Ct. App. 2006)).

236. *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” (citing RESTATEMENT (SECOND) TORTS § 586 cmt. a (1979)); *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 341–42 (D.C. 2001) (finding an attorney’s defamatory statements to potential client in potential shareholder’s action were absolutely privileged); *Buschel v. Metrocorp*, 957 F. Supp. 595, 597–98 (E.D. Pa. 1996) (finding pre-litigation letter asserting contractual rights and threatening court action if necessary was protected by absolute privilege under Pennsylvania law); *Trachsel v. Two Rivers Psychiatric Hosp.*, 883 F. Supp. 442–44 (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); *W. Techs., Inc. v. Sverdrup & Parcel, Inc.*, 739 P.2d 1318, 1321–22 (Ariz. Ct. App. 1986) (finding that defamatory report of expert witness hired to determine cause of construction defects for possible litigation is absolutely privileged); *Rubin v. Green*, 17 Cal. Rptr. 2d 828, 832 (Cal. 1993) (finding defamatory attorney communications to potential clients about merits of proposed suit were absolutely privileged); *Club Valencia Homeowner’s Ass’n v. Valencia Assocs.*, 712 P.2d 1024, 1028 (Colo. App. 1985) (stating that “communications preliminary to a proposed judicial proceeding” are covered by the absolute privilege (citing RESTATEMENT (SECOND) OF TORTS § 586 (1979)); *Smith v. Rosenstein & Barnes*, No. CV 950326698S, 2000 WL 965335, at *3 (Conn. Super. Ct. May 4, 2000) (holding that absolute privilege covers prelitigation communications); *Smith v. Idexx Labs., Inc.*, No. CIV.A. CV-99-493, 2000 WL

munications or conduct during the course of the litigation²³⁷ on the ground that the privileged participants are only under the supervision of the court once proceedings have begun, and it is this supervision

33675700, at *2 (Super. Ct. Me. Jan. 11, 2000) (holding that absolute privilege should cover defamatory statements in potential defendant's response to potential plaintiff's demand letter); *Arundel Corp. v. Green*, 540 A.2d 815, 818–19 (Md. Ct. Spec. 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); *Sriberg v. Raymond*, 345 N.E.2d 882, 884 (Mass. 1976) (holding that absolute privilege covers relevant attorney communications preliminary to litigation); *Kittler v. Eckberg*, 535 N.W.2d 653, 657 (Minn. Ct. App. 1995) (finding that defamatory attorney letter soliciting additional clients for potential shareholder suit was absolutely privileged); *Fink v. Oshins*, 49 P.3d 640, 644 (Nev. 2002) (finding that absolute privilege applies to attorney statements defaming trustee made prior to proceedings to remove trustee were commenced); *Provencher v. Buzzell-Plourde Assocs.*, 711 A.2d 251, 256 (N.H. 1998) (“We 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.”); *Hawkins v. Harris*, 661 A.2d 284, 289–90 (N.J. 1995) (finding that absolute privilege protected attorney-hired investigators who defamed potential plaintiff in interviews with prospective witnesses prior to commencement of litigation); *Harris v. NCNB Nat'l Bank of N.C.*, 355 S.E.2d 838, 842 (N.C. Ct. App. 1987) (finding an attorney absolutely privileged to send proposed complaint containing defamatory statements to attorney representing adverse party in a dispute); *Samson Inv. Co. v. Chevaillier*, 988 P.2d 327, 331 (Okla. 1999) (finding defamatory allegations made in an attorney letter to potential clients regarding possible litigation were absolutely privileged); *Chard v. Galton*, 559 P.2d 1280, 1282–83 (Or. 1977) (finding attorney's defamatory pre-litigation statements seeking settlement from insurer of potential defendant were absolutely privileged); *Crowell v. Herring*, 392 S.E.2d 464, 468 (S.C. Ct. App. 1992) (finding that absolute privilege covers “pre-investigation affidavit by an eventual witness”); *Simpson Strong-Tie Co., Inc. v. Stewart, Estes, & Donnell*, 232 S.W.3d 18, 24 (Tenn. 2007) (holding defamatory communications in advertisements soliciting prospective clients for contemplated class action absolutely privileged); *Krishnan v. Law Offices of Preston Henrichson, P.C.*, 83 S.W.3d 295, 302 (Tex. App. 2002) (finding that 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 (Utah 2001) (finding attorney demand letter made prior to commencement of litigation was covered by absolute privilege); *Collins v. Red Roof Inns, Inc.*, 566 S.E.2d 595, 603 (W. Va. 2002) (holding that absolute privilege applied to defamatory statements about third parties in employer's response to employee demand letter).

237. *E.g.*, *Kurczaba v. Pollock*, 742 N.E.2d 425, 438–39 (Ill. App. Ct. 2000) (finding that, since 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); *Timmis v. Bennett*, 89 N.W.2d 748, 752 (Mich. 1958) (“The 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.”); *Park Knoll Assocs. v. Schmidt*, 451 N.E.2d 182, 184–85 (N.Y. 1983) (“A witness is immune from suit for defamatory remarks pertinent to a judicial proceeding . . . but not for those made before the proceeding commences.”).

that ensures that otherwise tortious behavior will be both deterred and penalized.²³⁸ 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.”²³⁹ This means that both the ends and means of the conduct must be appropriately related to the contemplated litigation.²⁴⁰ There is considerable agreement that fact investigation and witness interviews are essential litigation functions,²⁴¹ and many jurisdictions have recognized that an absolute privilege protects attorney conduct and communications relevant to these functions.²⁴² The requirement that the specific content of the

238. *Kurczaba*, 742 N.E.2d 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 Nat’l Bank of Wash.*, 796 P.2d 426, 430 (Wash. Ct. App. 1990))).

239. RESTATEMENT (SECOND) OF TORTS § 58 (1979).

240. *Anenson*, *supra* note 210, at 935 (“In 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.”).

241. *E.g.*, *Hawkins*, 661 A.2d at 290 (“Pretrial investigation is ‘necessary to a thorough and searching investigation of the truth,’ . . . and, therefore, essential to the achievement of the objects of litigation.” (citation omitted)); *Anenson*, *supra* note 210, at 935 (“Some of the legitimate purposes acknowledged by the courts are statements or conduct designed to gather evidence.”).

242. *E.g.*, *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); *Selby v. Burgess*, 712 S.W.2d 898, 900 (Ark. 1986) (extending absolute privilege to “communications made during investigation of a claim”); *Ascherman v. Natanson*, 100 Cal. Rptr. 656, 659 (Cal. Ct. 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.”); *Stucchio v. Tincher*, 726 So. 2d 372, 373 (Fla. Dist. Ct. App. 1999) (finding absolute privilege covers attorney interview with “potential witness in preparation for trial”); *Robinson v. Home Fire & Marine Ins. Co.*, 49 N.W.2d 521, 527 (Iowa 1953) (finding that absolute privilege “has equal application to a situation where an attorney is conferring with a prospective witness”); *Hawkins*, 661 A.2d at 290 (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); *Kirshstein v. Haynes*, 788 P.2d 941, 953–54 (Okla. 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. Ct. 1988) (holding that subsequent treating physician’s provision of confidential information to lawyer for hospital in malpractice case during informal ex parte dis-

defamatory communication also be relevant to the litigation ensures that extraneous allegations are not immunized.²⁴³ 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 proposed litigation [and that there be] a real nexus between the attorney's conduct and litigation under consideration."²⁴⁴ 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.²⁴⁵ At least one jurisdiction appears to provide no immu-

covery would be absolutely privileged); *Russell v. Clark*, 620 S.W.2d 865, 868 (Tex. Civ. App. 1981) (extending "absolute privilege to out-of-court communications made by attorneys preliminary to a judicial proceeding, or in connection therewith"); *accord* *W. Techs. Inc. v. Sverdrup & Parcel, Inc.*, 739 P.2d 1318, 1321–22 (Ariz. Ct. App. 1986) (finding that absolute privilege covered a potential witness's report to client considering litigation); *Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152, 161 (Tenn. Ct. App. 1997) (holding an expert report relevant to liability in pending litigation absolutely privileged). See generally *Tanguay v. Asen*, 722 A.2d 49, 50 (Me. 1998) (holding that there is at least a "qualified privilege of counsel to inquire and develop evidence relevant to the proceeding" and refusing to decide whether the privilege is qualified or absolute).

243. *E.g.*, *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. Ct. App. 1983) (holding that departing law firm member's 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); *Hawkins*, 661 A.2d at 292 ("The litigation privilege is not, however, a license to defame.").
244. *Unarco Material Handling, Inc. v. Liberto*, 317 S.W.3d 227, 238 (Tenn. Ct. App. 2010) (finding both sufficient relation and nexus for lawyer's conduct to grant summary dismissal of the intentional interference claim).
245. *E.g.*, *Burzynski v. Aetna Life Ins. 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" and which contained more defamatory information than needed for investigatory purposes does not bear a sufficient relationship to the proceeding to justify absolute immunity (citation omitted)); *Schulman v. Anderson Russell Kill & Olick, P.C.*, 458 N.Y.S.2d 448, 453–54 (N.Y. Sup. Ct. 1982) ("[T]he 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. . . . [H]owever . . . attorneys' statements reasonably related to informal discovery *do* deserve the more limited protection of qualified privilege."); *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 Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 151 P.3d 732, 752 (Haw. 2007) (finding that lawyers' management of inspection and review of books fell within Hawaii's gen-

nity for communications with potential or actual witnesses.²⁴⁶ 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.²⁴⁷

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.

a. *Nature of the Actor's Conduct*

The significance 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.²⁴⁸ In the right circum-

erally qualified litigation privilege for intentional interference with contractual relations claims).

246. See *Kurczaba v. Pollock*, 742 N.E.2d 425, 440–41 (Ill. App. Ct. 2000) (noting that the litigation privilege for attorneys in Illinois has not been extended beyond communications with opposing counsel, co-counsel, and clients).

247. RESTATEMENT (SECOND) OF TORTS § 767 (1979). Further, the *Restatement* provides, “This 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 factors.” *Id.* § 767 cmt. b.

248. *Id.* § 767 cmt. c (“Thus physical violence, fraudulent misrepresentation and threats of illegal conduct are ordinarily wrongful means and subject their user to

stances, 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.²⁴⁹ 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.²⁵⁰

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,”²⁵¹ 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 been independently 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 Model Rule 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 4.3.²⁵² 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 4.4.²⁵³

Assuming these ethical violations were avoided, and there is no 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.

liability even though he is free to accomplish the same result by more suitable means.”).

249. *Id.* (noting that beating your own child to prevent them from gambling is not improper).

250. *Id.* (stating that “violation of recognized ethical code . . . or of 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 the Pennsylvania *Code of Professional Responsibility* improper because of unethical means of inducement).

251. MODEL RULES OF PROF'L RESPONSIBILITY R. 4.4 (2009).

252. See *supra* notes 194–95 and accompanying text.

253. See also *Unarco Material Handling, Inc. v. Liberto*, 317 S.W.3d 227, 239 (Tenn. Ct. App. 2010) (noting that inducing a breach of confidentiality agreement is unethical under Tennessee's version of Model Rule 4.2).

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,²⁵⁴ 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.²⁵⁵ 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,”²⁵⁶ which it described as including, “*inter alia*, fraud, trespass, threats, violence, or other criminal conduct.”²⁵⁷

Finally, in the absence of tortious, 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.²⁵⁸ 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, could contact the former employee by telephone or 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 simply to bring about the interference, or there could be a distinctly different motive. The *Re-*

254. *Compare* Leonard Duckworth, Inc. v. Michael L. Field & Co., 516 F.2d 952, 958 (5th Cir. 1975) (finding improper interference with real estate commission), *with* PMC, Inc. v. Saban Entm’t, Inc., 52 Cal. Rptr. 2d 877, 893 (Cal. Ct. App. 1996) (finding offer of indemnity agreement not improper).

255. Edward Vantine Studios, Inc. v. Fraternal Composite Serv., Inc., 373 N.W.2d 512, 515 (Iowa Ct. App. 1985) (“[D]efendant’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 312, 315 (Mass. App. Ct. 1995) (subsidizing legal defense made interference improper); Downey v. United Weatherproofing, Inc., 253 S.W.2d 976, 982 (Mo. 1953) (“[A]ttempting 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 . . .”).

256. *Unarco*, 317 S.W.3d at 238.

257. *Id.*

258. RESTATEMENT (SECOND) OF TORTS § 767 cmt. c (1979).

statement places the presence or absence of the specific desire to bring about the interference in the “actor’s motive” factor²⁵⁹ and places the presence or absence of any other possible motives in the fourth factor, “the interests sought to be advanced by the actor.”²⁶⁰ 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 decided 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.”²⁶¹ 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: “Some contractual interests receive greater protection [from interference] than others.”²⁶² Most importantly, this factor distinguishes the lesser harm of interference with prospective contractual relations from the greater harm of interference with existing contractual relations.²⁶³ Competition can trump an interest in prospective contractual relations as long as wrongful means are not used,²⁶⁴ while competitive interference with an existing contract will create liability even if less than wrongful means are used.²⁶⁵ As we have seen, some jurisdictions will treat voidable contracts as mere prospective contractual relations, while others view them as no different than fully enforceable contracts, at least until such time as the affected party seeks to void them.²⁶⁶ 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 prose-

259. *Id.* § 767 cmt. d.

260. *Id.* § 767(d); *see also id.* § 767 cmt. f (noting the importance of the interest the actor intends to promote).

261. *Id.* § 767 cmt. d.

262. *Id.* § 767 cmt. e.

263. *Id.*

264. *Id.* § 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 . . . the actor does not employ wrongful means.”).

265. *See id.* § 767 cmt. e.

266. *See supra* section I.A.

cution,²⁶⁷ 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 considered 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.²⁶⁸ 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, to indemnify, to do both with any claim of breach of the NDA, or 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 "inappropriate" 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.²⁶⁹ A desire to improve one's own economic position is recognized as important and enough to justify interference with prospective contractual relations, but it is insufficient to justify interference with another's existing contractual relationship.²⁷⁰ In our scenario, the lawyer is acting on behalf of a client who is either

267. See RESTATEMENT (SECOND) OF TORTS § 768 cmt. e (1979).

268. See *id.* § 774.

269. *Id.* § 767 cmt. f.

270. *Id.*

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 Rule 11 of the *Federal Rules of Civil Procedure*²⁷¹ and Rule 3.1 of the *Model Rules of Professional Conduct*,²⁷² it should not be possible to say that the interference was solely for the purpose of “gratifying . . . feeling[s] of ill will.”²⁷³

However, should a lawyer who pursues litigation on behalf of a paying client,²⁷⁴ 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. However, 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.²⁷⁵ 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.”²⁷⁶

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 to serve the public

271. FED. R. CIV. P. 11(b)(2) (requiring attorneys to sign pleadings and other filings, thereby representing that the claims therein are non-frivolous).

272. MODEL RULES OF PROF’L CONDUCT R. 3.1 (2009) (“A lawyer shall not bring . . . a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous.”).

273. RESTATEMENT (SECOND) OF TORTS § 767 cmt. f (1979).

274. 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.

275. RESTATEMENT (SECOND) OF TORTS § 767 cmt. f (1979) (“If 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.”).

276. *E.g.*, *Safeway Ins. Co. v. Guerrero*, 106 P.3d 1020, 1027 (Ariz. 2005) (finding no improper motive by lawyer merely because *Morris* agreement would increase his contingency fee).

interest in maintaining the rule of law.²⁷⁷ 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,²⁷⁸ may involve illegal public spending,²⁷⁹ place patients in dangerous nursing homes,²⁸⁰ give privileges to doctors believed to be incompetent,²⁸¹ or employ sexual harassers.²⁸² 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.

[R]elevant 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 employs wrongful means to accomplish the result.²⁸³

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 peaceable manner, this will be the general public interest version of our scenario. The second version will be a discrimination lawsuit, as this has

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277. *See* *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159 (3d Cir. 1988) (“There 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.”).
278. *Stratford Materials Corp. v. Jones*, 499 N.Y.S.2d 172, 173 (N.Y. App. Div. 1986) (finding that unapproved contracts to supply manholes for public works project properly interfered with to protect public safety and accountability).
279. *Bledsoe v. Watson*, 106 Cal. Rptr. 197, 198–99 (Cal. Ct. App. 1973) (holding that interference with contract illegally funded with taxpayer funds was in the public interest).
280. *Brownsville*, 839 F.2d at 159 (“Patently, the revocation of Brownsville’s license directed by the state court is dispositive of the propriety of defendants’ actions.”).
281. *Stitzell v. York Mem’l Osteopathic Hosp.*, 754 F. Supp. 1061, 1068 (M.D. Pa. 1991) (finding that legislation protecting peer review demonstrated value in critical evaluation by physician colleagues).
282. *Miller v. Servicemaster by Rees*, 851 P.2d 143, 146 (Ariz. Ct. App. 1992) (“[T]here is a strong public policy to protect a worker’s right to report alleged sexual harassment.”); *see also* *RESTATEMENT (SECOND) OF TORTS* § 767 cmt. f (1979) (noting that the disclosure of racial or sexual discrimination in employment may promote the actor’s interest as well as the public interest).
283. *RESTATEMENT (SECOND) OF TORTS* § 767 cmt. f (1979).

been recognized as involving a public interest.²⁸⁴ 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 questions address whether the actor really has a commitment to 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 not, then the actor is not actually motivated by public interest. For example, a person who has no problem with investment in Sudan may organize a boycott to stop investment in Sudan solely to gain a competitive advantage.

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 his or her private beliefs to the 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. All in all, the 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.²⁸⁵ 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.²⁸⁶ Similarly, a lawyer who ethically engages in litigation to vindicate the purely private

284. *Id.*

285. *E.g.*, FED. R. CIV. P. 11; MODEL RULES OF PROF'L CONDUCT R. 4.4 (2009).

286. *E.g.*, *Bledsoe v. Watson*, 106 Cal. Rptr. 197, 198–99 (Cal. Ct. App. 1973) (reasoning that a “public policy, made explicit by statute,” encourages litigation to save taxpayer money from illegal disbursement by providing a private right of action).

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 interfered-with contract contributed to or furthered 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 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.”²⁸⁷

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 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

287. RESTATEMENT (SECOND) OF TORTS § 767 cmt. f (1979).

conduct, proximity of conduct to interference, and relations between the parties.

e. The Social Interests in Protecting 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 to weigh them against each other.²⁸⁸ 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” between private interests may be “enlightened by a consideration of the social utility of these interests.”²⁸⁹ Thus, in *Bledsoe*,²⁹⁰ 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 an employment contract.²⁹¹ In *Zilg v. Prentice-Hall, Inc.*,²⁹² the social utility of “communication of good faith views about the merits of a literary work to publishers and book clubs”²⁹³ was described as outweighing the author’s interest in an existing publishing contract.²⁹⁴

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 diligently²⁹⁵—in the absence of otherwise illegal or unethical conduct.²⁹⁶ If, as discussed above, the litigation privilege would not apply to automatically make interference of this kind by a lawyer proper, then these general

288. See *Herron v. State Farm Mut. Ins. Co.*, 363 P.2d 310, 312 (Cal. 1961) (“Whether an 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.”).

289. RESTATEMENT (SECOND) OF TORTS § 767 cmt. g (1979).

290. 106 Cal. Rptr. at 199.

291. *Id.* at 198 (finding that 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).

292. 717 F.2d 671 (2d Cir. 1983).

293. *Id.* at 678.

294. *Id.* The concurring judges found the good faith of the defendant acting in a non-coercive manner to protect its reputation sufficient to make the interference socially desirable and not improper. See *id.* at 682 (Pierce, J., concurring).

295. See *Maynard v. Caballero*, 752 S.W.2d 719, 721 (Tex. App. 1988) (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).

296. Namely, illegal or unethical conduct other than intentional interference with a contract, which has yet to be determined.

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 in the second part of this Article, 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 permitted 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."²⁹⁷ In particular, the *Restatement* notes that the lack of wrongful conduct is less significant, as is the presence of mere incidental intent.²⁹⁸ 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. 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

297. RESTATEMENT (SECOND) OF TORTS §767 cmt. h (1979).

298. *Id.*

breaching party can make the actor's conduct proper.²⁹⁹ The first relationship refers to the already discussed competitor's privilege to interfere using non-wrongful means with a prospective contractual relationship.³⁰⁰ This will only apply to our scenario if the contract is voidable in a jurisdiction that treats voidable contracts as prospective contractual relations³⁰¹ 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.³⁰² 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 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—e.g., 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

299. *Id.* § 767 cmt. i.

300. *See id.* § 768; *see also supra* section I.A. (discussing the difference between void and voidable contracts).

301. That is, unless the NDA is voidable in a jurisdiction that treats voidable contracts as no more than prospective contractual relations. *See supra* section I.A.

302. *See supra* section I.A and notes 42–46.

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 will not be viewed as wrongful in some way, and that the employer's contract and confidentiality interests will 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.

III. CONCLUSION

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 a 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, 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 sub-

stantive 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.³⁰³

303. Strassberg, *supra* note 29.