The Ethics of Working with the I.P., P.I.

By Brian S. Faughnan

Long ago, Francis Bacon wrote "knowledge is power." Albert Einstein much more recently said that "information is not knowledge." Yet, transitive properties of equality and inequality notwithstanding, I find it difficult to imagine that either of those two great thinkers in history would argue my conclusion that, in today's world, information is power. Information can be a potent weapon for lawyers generally, litigators particularly, and lawyers handling intellectual property matters especially. Not surprisingly, some people will go to great lengths to try to shield information they do not want others to access, and other people will go to great lengths to try to acquire information others have shielded. Intellectual property lawyers (and often their clients as well) are often both kinds of people.

Such lawyers are often engaged in the art of investigation. The ability of lawyers to seek out and acquire information, or to shield and protect it for that matter, is not just constrained by what is illegal, but also by the rules of ethics that govern our profession. Given that those rules place such importance upon honesty, trustworthiness, and candor, there lurks an obvious, but highly important, question for *Landslide*® magazine readers: Do the ethics rules governing lawyers leave any room for lawyers to be involved in the use of deceptive investigative tactics, including certain types of pretexting activity?

Before plowing forward, it seems advisable to ensure that my reference to "pretexting" is clear. After all, it was but a few years ago that the high profile HP scandal introduced the term "pretexting" to many who may have never heard of it before. While "pretexting" is often carelessly used to mean only certain types of inquiries, like the pretexting for telephone records at the heart of the HP scandal (and that has been a federal crime since Congress passed the Telephone Records and Privacy Protection Act of 2006[1] in direct response to that scandal), the term actually encompasses a much broader array of activities.

"Pretexting" can correctly be used to describe any type of activity in which a person undertakes to gather information by putting forth an outward appearance as to his or her intentions or identity that is false. Some such activities are expressly made unlawful by statute based on the information targeted, like pretexting for phone records is now under federal law and like pretexting for financial records has been since the passage of Gramm-Leach-Bliley in 1999. Yet, there are an infinite number of other deceptive actions that might be employed as an investigative tactic that are not obviously illegal. For example, something as seemingly innocuous as a lawyer visiting her client's competitor's storefront to purchase a product for the purpose of confirming her client's suspicions about infringing activity before filing suit is fairly classified as pretexting activity if the lawyer does not let the competitor know who she is and why she is there.

Not surprisingly, there are examples of lawyers, or others at their behest, using deceptive tactics to further ends that many would agree justify such means. Otherwise legal conduct properly categorized as pretexting historically has been particularly effective at rooting out racial and other forms of insidious discrimination through the use of "testers"—people sent to pretend, for example, to be potential renters or consumers in order to determine whether a person or entity is engaged in discriminatory practices.[2] If these ends justify the means, a number of questions may flow more or less naturally, including shouldn't lawyer deception in the name of protecting intellectual property rights also be deemed acceptable conduct? Yet, at some point, every reader will begin to notice the slipperiness of the slope. After all, wouldn't being able to trick a wrongdoer into letting his guard down and revealing information he might otherwise try to shield be a useful thing for almost any lawyer, pursuing almost any type of case, to have in his arsenal? In the face of such questions, it is an ideal time to discuss the ethical restrictions that matter for lawyers wrestling with whether they can participate in an investigation involving deceptive tactics such as pretexting.

Using the ABA Model Rules as our guide (for the convenience of not getting bogged down in a discussion of state-based variations on the Rules, if for no other reason), six ethics rules are implicated, and potentially transgressed, when a lawyer either engages in deceptive conduct in connection with undertaking an investigation or oversees the investigative efforts of nonlawyers using deceptive conduct. For better compartmentalization, I have grouped those ethics rules into two buckets: (1) those relating to the "how" of the investigation, and (2) those relating to the "who" of the investigation.

There are three rules in our "how" bucket: Model Rules 4.1(a), 4.4(a), and 8.4(c). Rule 4.1(a) prohibits a lawyer "[i]n the course of representing a client" from "knowingly mak[ing] a false statement of material fact or law to a third person." Rule 8.4(c) goes even further by declaring it to be unethical for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Notably, this ethical prohibition is not limited to circumstances when a lawyer is representing a client, does not explicitly impose any requirement of knowledge on the lawyer's part, and does not limit its restriction to "material" statements. Rule 4.4(a) adds into the mix that a lawyer representing a client "shall not . . . use methods of obtaining evidence that violate the legal rights of [a third] person."

Taken together, these three rules (if not Rule 8.4(c) alone) would appear to pose an insurmountable set of ethical obstacles to any attorney personally undertaking an investigation involving deception of any sort. Of course, lawyers are well trained to find ways around problems. So, we might say, since those rules only place shackles upon lawyers (and since we didn't want to do anything that would make us an important fact witness in our client's case anyway), we will simply hire a private detective—Magnum I.P., P.I.—to do the investigation, and let that detective proceed as deceptively as he decides he needs to be.

As we shift our focus to whether having a third party handle the investigative duties obviates the need to be concerned with the rules in our "how" bucket, a discussion of the first of the rules in our "who" bucket is in order.

Model Rule 5.3 addresses the ethical obligations of lawyers supervising, or having control over, the conduct of others who are not themselves lawyers, but who have been "employed or retained by or associated with" the lawyer. This language is broad enough to apply even to Mr. Magnum. Depending on the lawyer's own roles and responsibilities, Rule 5.3 imposes several levels of more or less stringent ethical requirements flowing from Mr. Magnum's activities. For partners in a law firm, or any other lawyer who "possesses comparable managerial authority," Rule 5.3(a) requires such lawyers to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that [Mr. Magnum's] conduct is compatible with the professional obligations of the lawyer." As to a lawyer "having direct supervisory authority over" Mr. Magnum, Rule 5.3(b) mandates the lawyer "shall make reasonable efforts to ensure that [Mr. Magnum's] conduct is compatible with the professional obligations of the lawyer." Finally, Rule 5.3(c) imposes direct responsibility for Mr. Magnum's conduct that would be an ethical violation "if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer [is someone who would fit under Rule 5.3(a) or (b)] and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." The aggregate effect of these requirements should be obvious: Our lawyer still must be concerned with the limitations imposed by Rules 4.1(a), 4.4(a), and 8.4(c), even when she is "merely" involved in the supervision or control of an investigation actually being performed by Mr. Magnum.

There are two other important ethics rules in the "who" bucket about which a lawyer contemplating a pretexting investigation should be aware, and they will likely get lonely if we do not at least make reference to them now. Model Rule 4.2 restricts a lawyer's ability to communicate about a matter with a person known by the lawyer to be represented by another lawyer. The rule requires that if a lawyer wishing to engage in communication with a person "about the subject of the representation" knows that the person is represented by another lawyer "in the matter," then the lawyer may do so only with "the consent of the other lawyer" or when "authorized to do so by law or a court order." Model Rule 4.3 is the yang to Model Rule 4.2's yin. If the person with whom the lawyer wishes to communicate is not represented by counsel, if the lawyer does not know of that representation, or if the communication would not be about the subject of that representation, then the lawyer must adhere to Rule 4.3. That rule prohibits the lawyer "dealing on behalf of a client" from "stat[ing] or imply[ing] that the lawyer is disinterested," and prohibits the lawyer from giving any legal advice ("other than the advice to secure counsel") to the unrepresented person if the lawyer "reasonably should know" that the interests of that person conflict with, "or have a reasonable possibility of" conflicting with, the client's interests. We will now set any further discussion of Rule 4.2 and Rule 4.3 aside for a bit until the subject arises more naturally in our discussion.

If all you knew about the law was the scope of the ethical prohibitions laid out above, then you likely would conclude that lawyers simply cannot condone the use of deceptive tactics in the pursuit of investigations. . . ever. But you know better. Indeed, as observed earlier, certain historical benefits have been achieved through the use of testers in circumstances where lawyers obviously were involved in and aware of the activities. So do those ethical provisions really present any obstacle at all to lawyer involvement in deception when it comes to investigations? The answer is that they certainly do present an obstacle, but how significant of an obstacle is both subject to debate and, as a consequence, far too subjective for intellectual property lawyers to readily draw firm ethical conclusions.

While there is only a smattering of reported cases addressing questions of deceptive behavior by lawyers in connection with intellectual property investigations (and, in fact, there is by no means a wealth of reported cases on the topic outside of the realm of intellectual property), among those courts that have wrestled with the issue, more often than not courts have blessed, or at least not thrown a flag regarding, lawyer involvement in the use of deceptive investigation tactics.

In 1999, the Southern District of New York saw no ethical problem in a lawyer's involvement where an investigator pretended to be a consumer interested in purchasing products and spoke with sales clerks.[3] In *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, during a lull following years of contentious litigation, Gidatex believed that Campaniello was engaged in a "palming off" scheme in which customers were lured into the store using Gidatex's Saporiti Italia trademark and then sold goods that were deceptively represented to be Saporiti Italia. Gidatex's lawyers tasked investigators with persons pretending to be consumers, interacting with Campaniello sales clerks, and secretly recording the communications.

In justifying what would on its face certainly seem to qualify as "deceptive" conduct, the court explained that the enforcement of trademark laws was an important public policy objective and that pretexting can be effective at uncovering anticompetitive activity that might otherwise go undetected. The court also stressed that such conduct was not unethical because the investigators did not "trick [the sales clerks] into making statements they otherwise would not have made."[4] Rather, the court concluded that all that was captured on tape was Campaniello's normal business practices.

In a much more famous intellectual property dispute, the U.S. District Court for the District of New Jersey similarly concluded that there was nothing wrong with a lawyer's involvement in an investigation that used deception to uncover infringing sales activity in violation of a consent order.[5] In *Apple Corps Ltd. v. International Collectors Society*, the plaintiff previously had obtained a consent order prohibiting the defendant from selling certain stamps bearing the image of John Lennon. Suspecting that the defendant was violating that order, at least one attorney, along with private investigators and others working for the plaintiff's counsel, posed as ordinary consumers and telephoned the defendant's sales representatives to see if the sales representatives would

sell the stamps in question. They did. Thereafter, in response to the defendant's motion for sanctions in light of "deceitful" conduct by the plaintiff's attorneys, the court concluded that Rule 8.4(c) "does not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes."[6] The court went further in justifying its conclusions: "The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations."[7]

More recently, another New York federal court expressly relied upon both *Apple Corps* and *Gidatex* as persuasive authority in concluding that an undercover investigation involving deception was an accepted practice.[8] In *Cartier v. Symbolix, Inc.*, the famous jeweler suspected that an independent jeweler was adding diamonds to the bezels of less expensive Cartier watches and selling them as if they were more expensive Cartier models. Cartier's counsel hired an investigator to purchase one of the "faked" watches. With that proof in hand, Cartier then sought injunctive relief to stop the sales. The independent jeweler, Symbolix, sought to defend against Cartier's request for an injunction on the basis of Cartier's "unclean hands" in the undercover investigation, but the court echoed the sentiment expressed in *Gidatex* and *Apple Corps* that the "prevailing understanding in the legal profession" is that using an "undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violation by other means."[9]

In addition to cases like *Gidatex*, *Apple Corps*, and *Cartier* where courts expressly addressed such questions, a number of others reflect quite clearly that lawyers were involved with, or aware of, investigators who were acting under pretext in furtherance of obtaining evidence to prove intellectual property violations, but the courts simply said nothing about the issue at all.[10]

There is, however, at least one court that has not looked as favorably on lawyer involvement in pretextual investigations.[11] In *Midwest Motor Sports v. Arctic Cat Sales, Inc.*,[12] the only federal appellate court decision directly addressing this subject, the Eighth Circuit indicated clearly that it was bothered by the role of attorneys in a deceptive investigation which, in many respects, was quite similar to Gidatex's. One of Arctic Cat's former franchise dealers sued on a theory that Arctic Cat had wrongfully terminated its franchise. Arctic Cat's lawyer retained a former FBI agent to visit the former dealer's place of business. The former FBI agent, Mohr, posed as an interested snowmobile buyer in order to gather evidence helpful to defending the lawsuit against Arctic Cat, focusing on things like what products were being promoted in the showroom and what brands were selling best, and secretly recording his conversations about those topics. The court concluded that Arctic Cat's attorneys should be sanctioned for their involvement in the secret recording and that the audiotapes of those conversations should be excluded from evidence.

While that story (other than the outcome) should sound very familiar, there is an important difference in the facts in *Midwest Motor Sports*. Unlike the investigators in *Gidatex*, Mohr spoke not just with low-level sales employees but also with certain management-level employees. Such conduct implicates the two ethics rules in our "who" bucket that we earlier looked at only briefly: Rules 4.2 and 4.3. The communications with management-level employees matters to any Rule 4.2 analysis because under both the Model Rules and many state variations of it, management-level employees often are treated as being represented by the lawyer representing the organization. The court believed that the lawyer's involvement was unethical because Mohr's communications with certain employees was the type that would have violated Rule 4.2 if Mohr had been a lawyer. However, the outcome in *Arctic Cat* cannot be distinguished solely on that basis, as the Eighth Circuit also concluded that the lawyer's conduct ran afoul of Rule 8.4(c) because the duty imposed by that rule "to refrain from conduct that involves deceit or misrepresentation should preclude any attorney from participating in the type of surreptitious conduct that occurred here" and that "[s]uch tactics fall squarely within Model Rule 8.4(c)'s prohibition."[13]

While the case law may indicate that intellectual property lawyers have a good chance of convincing a court that a deceptive investigation was appropriate, disciplinary authorities may also take an interest, and at first blush, reconciling the use of deception in investigations with the language of the ethics rules themselves seems difficult. Nevertheless, at least two ethics opinions, despite finding no support for such a position in the text of the rules, have treated some deceptive investigative activities as ethical.

In 2007, the Alabama State Bar Office of General Counsel opined that "[d]uring pre-litigation investigation of suspected infringers of intellectual property rights, a lawyer may employ private investigators to pose as customers under the pretext of seeking services of the suspected infringers on the same basis or in the same manner as a member of the general public."[14] The portions of the Alabama opinion that are not obviously result oriented amount to a model of poor analysis. The opinion's treatment of Rule 8.4(c) was straightforward in its result-oriented approach—declaring that Rule 8.4(c) is not intended to apply to misrepresentations as to identity and purpose when the misrepresentations are used "to detect ongoing violations of the law where it would be difficult to discover those violations by any other means."[15] Beyond that aspect, the opinion ignores altogether the applicability of Rule 4.1, and attempts to brush aside Rule 4.2 and Rule 4.3 concerns by concluding, respectively, that one cannot be a "party" until a lawsuit has actually been filed, and that a lawyer acting as an investigator is not "acting in his capacity as a lawyer—'dealing on behalf of a client.'"[16] Both of those conclusions are, in a word, bizarre.[17]

Another ethics opinion issued in 2007 by another entity—the New York County Lawyers Association Committee on Professional Ethics—suffers not from the type of analytical flaws that pervade the Alabama opinion, but merely from

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the kind of general unhelpfulness that comes from any set of overly-stipulated conduct guidelines.[18] The New York County opinion concluded that it was "generally unethical for a non-government lawyer to knowingly utilize and/or supervise an investigator who will employ dissemblance in an investigation," but provided a limited exception permitting such conduct "in a small number of exceptional circumstances where the dissemblance by investigators is limited to identity and purpose and involves otherwise lawful activity undertaken solely for the purpose of gathering evidence."[19] That opinion specifically delineated the exceptional circumstances as when (1) the dissemblance is expressly authorized by law or the subject matter of the investigation is a violation of intellectual property rights or civil rights that the lawyer believes in good faith is or imminently will be occurring, and (2) the evidence sought by the investigation is not reasonably available through lawful means. Unfortunately, the committee did not stop there, but went on to muddy the waters by adding that "the lawyer's conduct and the investigator's conduct [must] not otherwise violate the [New York attorney ethics rules] or applicable law" and that "the dissemblance [must] not unlawfully or unethically violate the rights of third parties."[20]

Other, more recent, ethics opinions focusing on a specific type of pretexting activity—the making of a "friend" request on a social media platform for the purpose of gathering information that the user would otherwise only share with certain persons—raise further questions for intellectual property lawyers regarding the ethical propriety of deceptive conduct.

In 2009, the Professional Guidance Committee of the Philadelphia Bar Association opined that it would be a violation of Rule 8.4(c) for a lawyer to have a third party send a MySpace friend request to a witness without affirmatively disclosing to the recipient that the purpose for the friend request was to obtain and share information with the lawyer that could be used to impeach the witness's prior deposition testimony.[21] Just one year later, in 2010, the New York City Bar Association's Committee on Professional and Judicial Ethics offered similar guidance nixing the idea that a lawyer could personally, or through an agent, create a pseudonymous profile on Facebook for the purpose of attempting to "friend" an unrepresented adversary and, thereby, gain access to information that would otherwise be shielded from view.[22] As with the Philadelphia Bar, the New York City Bar opinion cited Rule 8.4's prohibition on deceptive or misleading conduct, but also explicitly referenced Rules 4.1 and 5.3(b).

Whether you find those two conclusions to be a bit Pollyanna-ish and troubling, or you find it troubling that other bodies charged with issuing ethics opinions appear to simply ignore the plain text of the rules governing their analysis to permit deceptive investigative activity, all lawyers should agree that the existence of a rule as overreaching as Rule 8.4(c) plays a large role in creating such troubling outcomes. After all, what sense does it even make to have a rule that we know for certain cannot be extended to its full, literal extent?

For example, assume you see me in the elevator and ask, "How are you?" I know that you likely really only want me to respond consistently with social convention and say, "I'm fine," even if the only honest answer would be for me to say, "I've had a horrible morning and am generally feeling just awful." But no one should ever seriously contend that by responding with "I'm fine," I have committed an ethics violation even though the text of Model Rule 8.4(c) flatly prohibits dishonesty by lawyers and does not tie its prohibition to the representation of a client. Or, if my first example seems unnecessarily convoluted, then think of a lawyer who is also a successful professional poker player or, even closer to home, think of how you have answered questions in the past from children, whether yours or not, regarding the existence of certain holiday gift givers.

The usual answer to such criticism regarding Rule 8.4(c)'s breadth is that, according to the Scope section of the Model Rules, "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself."[23] Yet, wouldn't it be better to fix the problem more directly? Some states have officially embraced the reality that lawyers can and actually do have involvement with surreptitious investigations that involve deceptive conduct, and have offered a more direct fix by adopting variations in the black letter of their versions of Rule 8.4, or through adoption of comments to that rule, that specifically exempt involvement in legitimate investigative activities from the prohibition on "dishonesty, fraud, deceit or misrepresentation."[24]

Among those approaches, Virginia's is perhaps the most intriguing. Virginia adopted a version of Rule 8.4(c) that adds the modifying clause, "which reflects adversely on the lawyer's fitness to practice law," to limit what types of dishonesty, fraud, deceit, or misrepresentation constitute an ethics violation.[25] Such a rule would appear to have the benefit of allowing lawyers engaged in investigations of intellectual property matters that involve some deceptive conduct to rest a bit easier in terms of being able to justify their conduct and reduce their potential disciplinary exposure, at least as long as it is agreed that dishonesty, deceit, or misrepresentations in that context would not reflect adversely on the lawyer's fitness to practice law. Such a rule better reconciles the plain (and presently extremely expansive) language of such a rule with the reality that a wide variety of conduct, whether it be bluffing in poker, telling children that a magical being descends down the chimney to bring them presents ("Yes, Virginia. Your Rule 8.4(c) specifically lets lawyers say there is a Santa Claus!"), or misrepresenting how you are feeling in an elevator, is dishonest in a technical, definitional sense but ought never be the fodder for a disciplinary complaint.

Of course, any rules-based fix that would focus only on Rule 8.4(c) would not go far enough. Squaring the practical reality of surreptitious investigations with the ethics rules involves a larger fix in the nature of a rule that would say something like: "Notwithstanding Rules 4.1(a), 4.3, 4.4(a), and [8.4], it shall not be professional misconduct for a lawyer in the course of representing a client to advise the client or others about, or to supervise personally or through others, lawful covert activity in the investigation of illegal or unlawful activities, provided that the lawyer's conduct otherwise complies with these rules."[26] Adoption of such a specific rules-based exception allowing lawyer involvement in surreptitious investigation activities offers advantages to both lawyers and to the integrity of the

ethics rules themselves. For lawyers, such a rule would allow for much greater certainty in evaluating potential conduct. As to the integrity of the rules themselves, the rule would treat this issue in a much more straightforward and realistic manner rather than leaving it to courts and others to attempt to fashion public policy-based exceptions to justify certain approaches considered to be acceptable law practice, plain language of the ethics rules notwithstanding.

In the meantime, for lawyers looking for some practical guidance over and above the obvious need to be familiar with the rules, ethics opinions, and case law of note in the jurisdiction in which you are licensed and (if different) of the jurisdiction where a contemplated investigation will occur, the above authorities can be synthesized in a relatively straightforward fashion: If your investigators go beyond employing deception simply as to who they are and why they are asking, and employ deception to cause someone to do or say something they otherwise ordinarily would not have said, then a lawyer can expect that a court or disciplinary counsel will be significantly more likely to find the lawyer's involvement to be problematic. ■

Endnotes

1. 18 U.S.C. § 1039 (2006).

2. *See, e.g.*, Hill v. Shell Oil Co., 209 F. Supp. 2d 876 (N.D. Ill. 2002).

3. Gidatex, S.r.L. v. Campaniello Imps., Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999).

4. *Id.* at 126.

5. Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456 (D.N.J. 1998).

6. *Id.* at 475.

7. *Id.*

8. Cartier v. Symbolix, Inc., 386 F. Supp. 2d 354 (S.D.N.Y. 2005).

9. *Id.* at 362.

10. *See, e.g.*, Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966 (2d Cir. 1985); Phillip Morris USA Inc. v. Shalabi, 352 F. Supp. 2d 1067 (C.D. Cal. 2004); A.V. by Versace, Inc. v. Gianni Versace, S.p.A., Nos. 96 CIV. 9721PKLTHK, 98 CIV. 0123PKLTHK, 2002 WL 2012618 (S.D.N.Y. Sept. 3, 2002); Nikon, Inc. v. Ikon Corp., 803 F. Supp. 910 (S.D.N.Y. 1992), *aff'd* 987 F.2d 91 (2d Cir. 1993).

11. There are a number of cases outside of the intellectual property arena that should cause lawyers to be very cautious about assuming that they can safely be involved in deceptive conduct even if they believe the ends justify such means. *See, e.g.*, Allen v. Int'l Truck & Engine, No. 1:02-cv-0902-RLY-TAB, 2006 U.S. Dist. LEXIS 63720 (S.D. Ind. Sept. 6, 2006) ("[L]awyers (and investigators) cannot trick protected employees into doing things or saying things they otherwise would not say or do"); *In re* Pautler, 47 P.3d 1175 (Colo. 2002) (involving prosecutor who impersonated a public defender to secure a murder suspect's surrender); *In re* Ositis, 40 P.3d 500 (Or. 2002) (imposing reprimand on attorney who employed investigator to pose as journalist to glean information from adversary); *In re* Gatti, 8 P.3d 966 (Or. 2000) (rejecting exceptions to permit deception prohibited by the ethics rules even for governmental lawyers or civil rights investigators); *but see In re* Hurley, No. 2007AP478-D (Wis. Feb. 11, 2009) (declining to discipline lawyer involved in deceptive conduct aimed at obtaining exculpatory evidence for a defendant facing child pornography charges).

12. 347 F.3d 693 (8th Cir. 2003).

13. *Id.* at 699–700.

14. Ala. State Bar Office of Gen. Counsel, Formal Op. 2007-05, at 1.

15. *Id.* at 5.

16. *Id.* at 4.

17. Federal courts, for example, have had no difficulty concluding that Model Rule 4.2 applies to communications occurring before a lawsuit was filed. *See, e.g.*, Penda Corp. v. STK, LLC, Nos. Civ.A. 03-5578, Civ.A. 03-6240, 2004 WL 1628907 (E.D. Pa. July 16, 2004) (citing United States v. Grass, 239 F. Supp. 2d 535, 540–41 (M.D. Pa. 2003)).

18. N.Y. Cnty. Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 737 (2007).

19. *Id.* at 1.

20. *Id.*

21. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02.

22. N.Y. City Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 2010-2.

23. Model Rules of Professional Conduct Scope [14] (2010).

24. *See* Fla. Rules of Prof'l Conduct R. 8.4(c); Iowa Rules of Prof'l Conduct R. 8.4 cmt. [6]; Ohio Rules of Prof'l Conduct R. 8.4 cmt. [2A]; Or. Rules of Prof'l Conduct R. 8.4(b); Va. Rules of Prof'l Conduct R. 8.4(c).

25. Va. Rules of Prof'l Conduct R. 8.4(c).

26. Douglas R. Richmond, Brian S. Faughnan & Michael L. Matula, Professional Responsibility in Litigation 207 (2011).