

# 4 TOP TAKEAWAYS

## Use of Investigators

Kilpatrick Townsend senior counsel [Chris Bussert](#) recently presented in a workshop with Jeremy Liebman, franchise counsel at Krispy Kreme Doughnut Corporation, at the ABA Annual Forum on Franchising in Palm Springs, California. The title of the workshop was “Investigations Gone Wild - The Risks and Rewards in the Use of Investigators” and the speakers pointed out important, but frequently underdressed, issues involving the use of investigators including business, ethical and legal considerations.

**Mr. Bussert offers four key takeaways regarding this subject:**

1

Local ethics rules, disciplinary rulings and opinions and case law should be closely scrutinized before embarking on a pretext investigation, including in the states where the lawyer is admitted to practice, where the matter is pending or will be pursued, and where the investigation will take place. The judicial precedent interpreting the applicable ethical rules varies from locale to locale and should be carefully considered in developing a strategy for the use of pretext.

Consider the individuals who will be contacted in the course of the investigation. Courts have expressed fewer concerns with communications between investigators and sales clerks and other “public-facing” employees, as opposed to officers or others who have managerial responsibility with the target. Some courts, however, have held that statements made by even low level employees may be imputed to the target. The investigator should not try to simulate an attorney in a deposition in gathering information from individuals (such as asking a series of leading questions). Instead, the exchange should be low key and conversational, which will encourage the individual interviewed to volunteer information.

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Verifying and documenting normal business practices and transactions in the ordinary course of business with members of the general public is usually permitted. Conversely, having an investigator construct a complex ruse, such as where he or she poses as a professional to obtain information generally accessible only by highly trained professionals (such as a physician or health inspector) is not a good idea. Additionally, audiotaping or videotaping normal business practices and transactions is probably acceptable, although before doing so the law of the applicable jurisdiction should be reviewed to ascertain whether making the recordings of an individual without permission is allowed.

The investigator should be provided with specific written instructions including guidelines, goals, work product, and budget. The investigator should be reminded that he or she is an agent of the retaining client/firm and his or her actions can be imputed to the client/firm. Maintaining a written record of the instructions to the investigator regarding the scope and limitations of the investigation is prudent in the event the investigation is later subject to challenge. The investigator should be encouraged to maintain detailed and accurate notes regarding the conduct of the investigation as well.

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Christopher P. Bussert is in the Atlanta office of Kilpatrick Townsend & Stockton LLP. Over the past 30 years, Mr. Bussert has represented clients in trademark, copyright, false advertising, and franchise litigation, and in licensing and trademark clearance and prosecution matters. He is a past editor-in-chief of *The Franchise Law Journal* and a past member of the Governing Committee of the American Bar Association Forum on Franchising.

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