

6 KEY TAKEAWAYS

Ethics: Investigations Gone Wild

Many companies routinely use private investigators or other covert techniques to review possible infringements, including to obtain evidence of infringement and unfair competition by competitors, and to gauge the scope and structure of a potential infringer's operation. Navigating the proper use of investigators and other undercover techniques can feel a bit like navigating the Wild West. The rules are not always well-defined and can vary by state. The timing of investigations can raise ethical issues as well. Even if the use of private investigators is permissible, there can be questions about the most effective way to use these procedures and how to convert what is yielded into usable evidence at a hearing or trial.

[Kilpatrick Townsend](#) attorneys [Nicki Chollet](#) and [Chris Bussert](#) along with [Cellaris Franchise, Inc.'s Jason Adler](#) recently spoke on the topic of "Ethics: Investigations Gone Wild" at the firm's annual Advanced Trademark Law Seminar.

Key takeaways from the presentation include:

1

Thoroughly vet the investigator as to experience, credentials, and license.

Local ethics rules, disciplinary rulings and opinions, and case law should be closely scrutinized before embarking on a pretext investigation.

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The investigator should be reminded that he is the agent of the retaining client/firm and that his actions can be imputed to the client/firm.

Maintain a written record of the instructions to the investigator.

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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.

Complex ruses are not advisable.

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