

4 KEY TAKEAWAYS

The Use of Investigators in Litigation Matters

Kilpatrick Townsend Partner **Rob Potter** and **William Belmont** of the Belmont Group recently presented an Ethics CLE on “[The Use of Investigators in Litigation Matters](#).”

Key takeaways from the presentation include:

1

Investigations or “test buys” made during or in anticipation of litigation should be undertaken very carefully, to avoid the risk of ethical violations. The American Bar Association’s Model Rules of Professional Conduct prohibit a lawyer from making false statements and from communicating with represented parties, among other things, and a lawyer is responsible for an investigator’s violations if the lawyer ordered, directed, or ratified the conduct.

2

Courts have nonetheless found pretextual investigations ethical where the investigator poses only as a member of the general public, makes no material misrepresentations, and generally does no more than observe or take part in the target’s standard business practices. This is particularly true in cases involving IP infringement and civil rights discrimination, where a defendant may otherwise be unlikely to reveal its unlawful conduct.

3

Investigations are unlikely to be found ethical if they involve communications with decision-makers at the company (who may know privileged information), if they are based on any misrepresentations, or if they are seeking damaging or embarrassing information about the party rather than working to expose unlawful conduct.

4

To be safe, attorneys initiating pretextual investigations should be sure to:

- Use only investigators licensed in that jurisdiction;
- Communicate only with lower-level, consumer-facing employees; and
- Try to develop objective facts rather than rely on employee statements wherever possible.