

Going Undercover: Issues in Pretext Investigations

Can lawyers use deception to detect and stop wrongdoing? That was the primary question discussed during Friday's Midyear Meeting program, "Can Attorneys Go Undercover: Ethical Issues in Intellectual Property Pretext Investigations."

The Model Rules of Professional Conduct seem on the surface to oppose any conduct involving deceit, but several investigations have received judicial approval when related to possible civil rights violations and trademark infringement, said panelist Professor James Fischer, Southwestern Law School, Los Angeles.

However, lawyers should proceed carefully, advised Fischer. While the use of deception in an investigation does not per se subject a lawyer to discipline, neither is it an across-the-board allowance. Since the professional rules do not explicitly address the topic, the issue is not free from doubt.

Lawyers should consider:

- What is the purpose of the deceit? When courts have admitted evidence obtained through misrepresentation, it has deemed the deception as necessary to uncover the wrongful act or considered the deceit a lesser wrong than what it exposed.
- Is the deceit legal? The deception cannot violate the law, which can vary from state to state.
- Will the conduct subject the client to liability?
- Are there public relations consequences of the investigation?
- What forms of deception will be used? "As the type and nature of deception changes, the likelihood that it will attract judicial attention, concern and sanction increases," said Fischer.

Panelists also referenced certain professional conduct rules, Rule 4.1(a), Rule 8.4(c) and in particular, Rule 4.2(c) that are relevant to the discussion.

In addition to Fischer, panelists included Herbert P. Williams of Foley and Lardner LLP and Christopher McGeeham of Greer Burns and Crain, Ltd. The program was sponsored by the ABA Section of Intellectual Property Law, ABA Section of Science and Technology Law and the Center for Professional Responsibility.



Professor James Fischer of Southwestern Law School in Los Angeles discussed the professional rules relevant to pretext investigations.