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Using a Private Investigator Effectively in Business Litigation

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If you or your business are being harmed, or the well-being of your employees, shareholders or customers is at risk, litigation is an effective tool to mitigate that harm or risk. Pre-litigation investigation is an efficient and strategic way to develop your case, mitigate damages, and evaluate the merits of your claims. Legal counsel should consider working with a private investigator to assist with the pre-litigation investigation.

Why hire a private investigator?

Private investigators can help navigate the complexities that accompany business disputes. Pre-litigation investigation by counsel is always necessary. If it warrants retaining a private investigator, then this extra skillset can help develop your case, safeguard your business against further losses, and preserve its reputation in the face of deceitful practices.

Because it is legal and ethical to obtain unfiltered evidence before litigation commences, private investigators can be especially helpful in business fraud scenarios. Individuals who commit fraud often try to conceal their misconduct, making pre-suit investigation and development of evidence crucial. By the time a lawyer commences a lawsuit and begins discovery, the stolen money may be spent, the trade secrets or confidential information disclosed, or the incriminating evidence deleted. Having counsel engage a private investigator early improves your chances of preventing such harm.

How can a private investigator help?

Private investigators can help identify witnesses, targets, accomplices and allies. They can also be invaluable in helping to collect witness statements and evidence that pass muster in court, including computer forensic information. Further, private investigators can also conduct detailed background checks, reviews of social media profiles, and surveillance. A private investigator with certified fraud examiner credentials can assist attorneys in analyzing financial documents for proof of fraud. Partnering with an experienced private investigator can broaden an attorney's ability to obtain evidence they might not otherwise discover prior to commencing litigation.

Are private investigators held to any restrictions?

Although given much more latitude than law enforcement, investigators and the attorneys who supervise their work are still constrained by certain legal and ethical rules. For example, in some jurisdictions, investigators may not record a witness statement without consent.

Why not go straight to law enforcement?

If the harm to your business warrants criminal prosecution, just turning the matter over to law enforcement may be the right move. If something warrants calling 911, then do so. But for business disputes involving criminal activities of a financial nature, or misuse of intellectual property, the victim should consider that prosecutors do not represent the victim. Although prosecutors and law enforcement do great work, their first duty is to prosecute the criminal, not represent your interests. Your attorney represents your interests.

Further, private investigators and the supervising lawyer are not "state actors," governed by the stricter constitutional, legislative and political restraints imposed on law enforcement and prosecutors. Plus, if the evidence and witness statements are collected properly, they can always be provided to law enforcement later.

Why can't I just conduct my own investigation?

Well ... you probably don't do your own dental work or, for that matter, your own tax returns. Developing a case, investigating facts, and procuring evidence can get complicated, fast. If the investigation is not conducted properly, the evidence collected may not be usable in a later proceeding.

Can I keep the investigation confidential?

Often, business litigation involves sensitive topics. For this reason, private investigators should be engaged under the principles outlined in *United States v. Kovel* to protect the confidentiality of the work undertaken at counsel's direction. This will help you maintain the confidentiality of your investigation.



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liaison with law enforcement. Business litigations should often begin by evaluating whether to involve an experienced private investigator to work alongside counsel.

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Conclusion

A good investigator can work with counsel to locate and secure crucial evidence, mitigate harm, help a business protect its rights before the wrongdoer is tipped off, conduct surveillance, and function as an experienced and trustworthy

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