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Investigating the C-Suite: A Practical Guide for In-House Legal Departments Handling Allegations Against Senior Executives

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In this article, the authors provide practical guidance for in-house legal departments confronted with allegations against senior leadership.

STRUCTURING THE INVESTIGATION

The recent unsealing of the Epstein files has sent shockwaves through society with titans of the corporate world alleged to have connections with Jeffrey Epstein. Senior executives have scrambled to assess their exposure—and their companies have begun racing to understand the implications. But high-profile scandals like these are only the most visible examples of a universal reality: at some point, every company will likely face allegations of wrongdoing against its most senior executives, be it personal or professional misconduct. When the highest levels of leadership come under scrutiny, the stakes are immense—one allegation can threaten a company's integrity, reputation, and future. The question is not if your organization will confront such a moment, but when—and whether you are prepared.

Investigating C-Suite or board-level misconduct is more than just uncovering facts; it is about protecting the company's integrity, reputation, and future. Unfortunately, such investigations are fraught with

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potential pitfalls for in-house counsel, and special care must be taken in both their structuring and execution.

This article provides practical guidance for in-house legal departments confronted with allegations against senior leadership.

It first focuses on the foundational steps required to properly structure the investigation—establishing ownership, ensuring independence, managing disclosure, and protecting privilege.

Then, it addresses the execution of the investigation itself, including evidence collection, witness interviews, communicating findings to the Audit Committee, and navigating the practical challenges that inevitably arise when investigating the C-Suite.

Step 1: Who Is Going to “Own” the Investigation?

In a C-Suite investigation, the threshold decision is who “owns” the investigation—who will bear ultimate responsibility for making decisions, taking action resulting from the investigation, and ensuring the investigation is conducted in an objective and fact-based manner. Unlike a normal investigation typically handled by or at the direction of Legal, Compliance, or Human Resources (HR), C-Suite matters often involve the need for oversight outside the standard corporate reporting structure.

Fortunately, public companies today have mechanisms established for such circumstances, typically in the Board of Directors or Supervisory Board Audit Committees. Private companies should also be prepared with a playbook of how to approach these circumstances and, ideally, establish these procedures before the facts of any particular case complicate the process.

Although Legal can provide input or advise the Board on what will be required in the investigation, the ultimate decision on how to proceed will normally reside with the Board. In practice, it is normally appropriate for the Board to delegate ownership to its Audit Committee, particularly if such Audit Committee members are independent Board members.

Key Considerations

- Potential owners include: Board of Directors, Audit Committee, CEO or another C-Suite executive, General Counsel, or Chief Compliance Officer.
- Ownership means accountability for both the process and outcome—and willingness to face scrutiny from the Board, government, or auditors as to the integrity of the investigation.

Step 2: How “Independent” Does the Investigation Need to Be?

The question of whether and how to maintain independence in this context can be confusing. What is the role of in-house counsel in an independent investigation? Although it seems clear that a General Counsel or Compliance Officer investigating their CEO may be met with skepticism, how much “independence” is necessary? Should the “Owner” just hire an outside independent law firm, throw the investigation over the fence, and tell the firm to report back when done?

As a general principle, determinations of independence rely on an understanding that the decisionmaker—in many cases, a director—is impartial and objective, rather than driven by extraneous considerations or influences. Perceptions about the independence of an internal investigation begin with the Board’s independence. For example, in the context of a derivative suit brought by shareholders of a public company, investigations conducted by the accused parties themselves would not be considered independent. In comparison, if there is a scenario where there are no independent directors to oversee or lead the investigation, adding a new director who is independent can ensure the investigation’s independence.

Additionally, the retention of outside counsel can strengthen the independence of an internal investigation when necessary. It should be noted, however, that retention of this outside counsel should not result in hiring the same law firm that may have represented the alleged wrongdoer in a previous matter.

Although this may sound like the safest approach in theory, the reality is that without important internal coordination between the “independent” law firm and the in-house legal or compliance team, properly executing a privileged and confidential investigation is exceptionally difficult. In-house counsel plays an integral role in numerous areas, including:

- Coordinating communications between the Audit Committee and the law firm;
- Identifying IT systems and access to such systems for gathering evidence;
- Identifying and coordinating law firm access to witnesses;
- Translating into business terms what the law firm may be reporting; and
- Importantly, managing the scope and scale of the actual investigation to prevent unnecessary churn.

A fair balance, in practical terms, is allowing the firm to drive the approach and execution of the investigation, while in-house counsel actively manages the scope, timing, and reporting on the matter. In this way, the firm gets meaningful access to the evidence it needs, while also leveraging the knowledge and experience of the in-house team to efficiently and confidentially drive the investigation.

In short, it is critical that you are positioned as the “honest broker.” You are not there to protect or indict your senior executive. Rather, you are the guardian of the process, ensuring it is being done objectively, thoughtfully, and thoroughly.

Key Considerations

- Assess whether an independent review is warranted.
- Weigh the benefits and drawbacks of internal versus external counsel.
- Define the role and relationship of the in-house team in assisting the firm in the investigation.
- Manage scope and tailor the approach based upon the allegation—avoid scope creep.
- Ensure legal privilege is maintained throughout.
- Factor in jurisdictional issues and logistics for witness interviews.

If there is a reasonable possibility of future waiver of privilege over the investigation, consider governance of investigation in relation to that issue.

Step 3: Do You Tell the Senior Executive About the Allegation or Investigation?

Specific circumstances will obviously dictate your course of action. That said, it is often necessary and, in fact, prudent to inform the target executive that they are the subject of a concern that must be investigated and the nature of the allegations. Often, the target executive is a key factual witness and can provide broader context and even avenues of evidence collection. That said, this assistance must be balanced with whether and to what extent the target executive is likely to unduly influence the investigation process.

Key Considerations

Before disclosing the existence of the investigation, some important considerations include:

- Is there any reason to believe the target executive(s) will try to improperly influence the investigation or destroy/manipulate evidence? Are there any reasons a third party would come to this conclusion (i.e., even if you do not think so, will others)?
- Will it be necessary to interview or collect evidence from the target executive's subordinates? If so, what is the likelihood the target executive will take steps to shape the narrative with the team or exert other influence ("circling the wagons" or getting everyone on the "same page")?
- Who should deliver the message to the target executive: the Audit Committee Chair, General Counsel, or Chief Compliance Officer?
- If you, as in-house counsel, are directed to inform the target executive, how is this likely to affect your relationship with that person?
- How much information will you share concerning the allegations or the investigation?
- Is this an investigation where allegations of harassment/sexual harassment or discrimination based on a protected status have been raised? If so, keep the information to the target executive to a minimum and ensure that the information does not include who made the allegations against them.

The real challenge then comes in maintaining confidentiality while moving forward with the investigation. Any in-house lawyer that has had to run an investigation of their own management is well aware of how quickly gossip can spread—internally and externally—particularly when it involves senior leadership. Confidentiality is critical from the outset. Even routine tasks such as issuing document retention notices or even having outside lawyers show up at your offices have the potential to trigger rumors and gossip. Additionally, everyone, including the target executive, should be provided a strong reminder of no retaliation against an individual who they believe may have made a report or otherwise participated in the investigation.

To address this concern, you must have a clear plan in place for managing information access and flow. It is recommended that you establish an Investigation Core Working Group (CWG).

Additionally, there is the issue of whether to place the target executive on "garden leave," pending investigation completion. This is an issue that

comes up with some frequency. There are two particular contexts where placing a person(s) alleged to have engaged in misconduct on leave during the pendency of the investigation must be strongly considered:

- (1) where the evidence adduced to date strongly suggests misconduct and particularly criminal misconduct;
- (2) where there are allegations of sexual harassment/harassment/discrimination based on a protected status or other similar improper behavior; and
- (3) where the person is or will continue to be obstructionist if allowed to stay active in their role.

Keep in mind that placing a person on garden leave is an extreme but often necessary measure. The decision should be handled in precisely the same manner as dealing with the obstructionist target executive, but may also apply to other persons identified in wrongdoing through the investigation. Force the decision on garden leave to be made at the Audit Committee-level in coordination with the independent counsel.

Step 4: Are There Strategies to Maintain Privilege and Confidentiality?

Developing a Core Working Group (CWG) with defined roles and a disciplined approach to information management is a critical step to ensuring privilege and confidentiality. In addition to counsel, this group may consist of HR professionals, compliance staff, internal audit personnel, forensic auditors, or administrative support. These persons should be informed that they are acting under the direction of counsel and within the scope of the legal engagement.

Critically, when assembling the CWG you must be explicit that each team member understands their personal obligation to maintain confidentiality and that severe consequences could follow their failure to do so, including disciplinary action being taken. Although this may sound severe, the stakes are extremely high, and the disclosure risk cannot be overstated.

In addition, be mindful of privilege and confidentiality laws within the applicable jurisdiction, including jurisdictions outside the United States. For instance, in some countries—such as South Korea, Germany, and Belgium—in-house counsel is not able to invoke privilege as they might in the United States. Invoking such privilege may be limited to matters done at the direction of outside counsel only or not attach at all. Understand the geographies likely to be implicated in the investigation and map out your privilege strategy accordingly.

Outside counsel tasked with directing the investigation should be expected to provide an overall strategy for the investigation, establish the communications plan, and assign tasks as necessary.

Key Considerations

- Outline team members and clearly define each person's role and responsibilities, including their obligations to protect privilege and confidentiality.
- Develop a communication and information distribution plan.
- Conduct an analysis at the outset whether the company may want to waive privilege in the future (e.g., to assert a defense or engage with the government), and structure the investigation accordingly.
- Have a standard template for the sharing of information—by necessity this should include an explicit confidentiality legend. For instance, whenever you are sending an email, the subject line should have bold text in all caps stating something such as:

DRAFT: ATTORNEY-CLIENT PRIVILEGED/ATTORNEY WORK PRODUCT

or

CONFIDENTIAL: SUBJECT TO ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT PROTECTION

- Ensure that the communication and information distribution plan is specific and clear both in terms of cadence, recipients of communications, and how information will be shared (Teams Meeting Room, email distribution list, scheduled team meetings, etc.).
- Set a cadence for sharing information with the investigation's owner. Typically, this is a weekly check-in meeting, though some Audit Committees insist on written reports.
- If you do circulate written reports, also ensure that they are clearly labeled as DRAFT and have proper legends to ensure privilege and confidentiality are maintained.

The real danger here is inadvertent disclosure. Constantly emphasize the very real danger attendant to any leaks, pointing out that such leaks

could very well jeopardize the investigation and even potentially lead to enhanced risk to the company.

Looking Ahead

With the proper structure in place—clear ownership, appropriate independence, thoughtful disclosure decisions, and robust privilege protections—the investigation can proceed on solid footing. This article now turns to the practical execution of the investigation: protecting evidence, structuring interviews, communicating findings to the Audit Committee, handling practical challenges such as obstructionist executives and witnesses retaining counsel, and preserving your own credibility throughout the process.

CONDUCTING THE INVESTIGATION

With the proper structure in place, it is now time to execute the investigation itself. It may seem simple enough—you just have the law firm tell you what is needed, and you help facilitate them getting access to the evidence, right?—but in reality, harvesting evidence while maintaining confidentiality or preventing rumormongering is difficult. This article now provides practical guidance on protecting evidence, structuring interviews, communicating findings, and navigating the challenges that inevitably arise.

Step 5: Are There Steps That Can Be Taken to Protect Evidence?

Once the structure of the investigation is established, you must take measures to ensure confidential evidence collection and minimize exposure risks. In our experience, of all the team members that take part in the Core Working Group, none may be more important than the person most overlooked—the administrative support team, or the CAR (Critical Administrative Resource).

Identifying the correct CAR is no easy task. This person (or persons) needs to work behind the scenes and often help gain access to evidence in a manner that will not raise any suspicions or gossip. For instance, this person can often be used for contacting employees or requesting documents that could be viewed as part of their ordinary administrative tasks. The key criteria for a CAR are:

1. Extensive knowledge of the company, including its IT infrastructure and personnel from an administrative/back-office perspective;
2. Strong personal relationships throughout the company; and

3. Reputation for integrity and ability to maintain confidentiality.

It may come as a surprise to learn that on a number of investigations, and particularly those where the concerns have been directed at either the CEO or a direct report, the CAR used has been the CEO's own administrative assistant, with the CEO's acknowledgment and support. There are few people better positioned to request information without receiving pushback than a CEO admin. That said, this is very company-specific, and one must evaluate carefully whether the loyalties (or perception of loyalties) of this person to the CEO may outweigh the loyalties to the company.

Key Considerations

- Identify the Critical Administrative Resource (CAR) and use a secure platform for document review.
- Develop clear explicit strategies for document collection and fact development.
- Limit access to sensitive materials to avoid alerting the organization or the target.
- In-house counsel is critical in identifying the CAR.

Step 6: How Do You Structure C-Suite Related Interviews?

Like any investigation, there are a number of decisions you need to make regarding your interview strategy, from scoping interviews and who you decide is most likely to have relevant information to the order of witnesses and timing (do you lock witnesses in early and then do document reviews, or wait until document review is complete, for instance). In this regard, C-Suite investigations are no different than other internal investigations. What is different, however, is the potential impact such interviews may have on the organization.

Witness Identification

The first step is contacting the witnesses that need to be interviewed. The person we normally rely upon to make initial contact is either the CAR or in-house counsel. Whomever you select, it is important that you develop a script that provides enough information to warrant the witness's time but does not raise any unnecessary alarms. Messaging such as:

We are conducting a confidential review of some issues for the company and understand you may have some helpful information that could be of assistance. We would appreciate meeting with you and request that you make this a priority on your schedule. Pursuant to company policies, please keep this outreach highly confidential. Should you have any immediate questions please contact X (normally the in-house counsel on the team), and we will be happy to provide further information when we meet.

Scheduling the Interview

The next step is scheduling the interview in terms of time and place. In the old days, this could be quite tricky—you did not want to have a small army of outside lawyers walking into the building immediately setting off alarm bells. Today, many witness interviews can be done virtually, but the CAR once again plays a critical role in scheduling the logistics around these interviews.

The Interview

Here is a practical reality—you can make all the admonitions in the world to the employee witness, but you can expect this person will tell other employees or maybe even the “boss” about it. Not only will this leak the existence of the investigation, but likely the substance as well. That said, it is critical that you take deliberate steps to minimize this hemorrhage as best you can. Some of this can be managed with careful scheduling—sequenced and even simultaneous interviews can minimize the impact of witness communication. In employment investigations, indicate that confidentiality will be kept to the extent possible, but do not promise absolute confidentiality.

Practice Point

We have found that possibly the most effective way to address leak potential is to explain to the witness their personal stake should they leak information about the interview. This should not be framed as a threat, but rather a caution and practical tip you are giving them to protect both themselves and the company. Remind them that this is simply a fact-gathering exercise, and they are offering critical assistance. Any unauthorized disclosure of such information could compromise the investigation. Additionally, always ensure that you give an Upjohn warning at the outset of the interview.

Key Considerations for Interview Set-Up

- Schedule interviews discreetly—consider when, where, and how.
- Communicate confidentially with employees.
- Establish a clear interview order to avoid obstruction or leaks.
- Decide whether to interview the target first or last, depending on the need for information from subordinates.
- The CAR is essential to this process.
- Make sure to remind the witness during the interview that the company prohibits retaliation for making a complaint or participating in an investigation, and that any such retaliatory conduct should be reported immediately using the company's reporting procedures.

Key Considerations for Interview Execution

- Differentiate between respect and deference.
- Ensure interviewers are organized and documents are prepared.
- Set the right tone and maintain control.
- Limit the target's ability to forecast questions or outcomes.

Step 7: How Should Findings Be Communicated to the Audit Committee?

Audit Committee members are typically independent Board members. As such, they are not devoting the same amount of time to the investigation, or even the company, that “owners” in a normal internal investigation might devote. Having a clear plan for sharing findings, especially if they may be problematic, is imperative.

We recommend sharing findings on a regular cadence with the Audit Committee and without editorializing or commentary. Generally, it will be prudent to present the findings in person; any interim reports should be presented only in draft form and upon request by the Audit Committee. Ensure the reports are properly framed to include language such as “facts

adduced to date” and avoid conclusory language. You should anticipate that there will be significant scrutiny of the investigation findings, particularly in instances where the evidence supports the conclusion of wrongdoing.

Practice Tip

As the in-house lawyer, resist the urge to inject your views on the state of the evidence, particularly while the investigation is ongoing. It is not your job to opine on the facts adduced. Rather, it is to ensure objectivity in the process and ensure that the independent firm gets access to the information needed to complete the investigation. At the conclusion of fact gathering, the burden is on the firm to share their conclusions and recommendations.

Here, the biggest role for in-house counsel is to prevent surprises. It is recommended that the firm’s findings and conclusions be discussed with the Audit Committee directly before a report is generated. As a practical matter, it is often helpful to have independent counsel preview the evidence and conclusions with you, allowing you to pressure-test any recommendations. For instance, on more than one occasion, independent counsel has shared proposed recommendations that included the most severe disciplinary action be taken against C-Suite executives based only on the evidence in front of them. By previewing these recommendations, in-house counsel was able to contextualize certain findings to assist the firm in determining the severity of their recommendation.

Bear in mind that negative recommendations will be met with extreme scrutiny. By creating the proper track record, you can lean into the process that has been established and position yourself as a facilitator, not an actor in the independent investigation.

Additionally, ensure that there is a clear delineation between any discussion with the audit committee (or whomever is the client in the investigation) regarding the investigation/outcome of investigation and any employment-related decision to for privilege reasons.

Key Considerations

- Center the presentation on the company’s best interests and the objective, fact-based nature of the investigation.
- Anticipate and address assumptions about motives or responsibility.
- Defend recommendations with facts and thoroughness, not defensiveness.

Step 8: What Are Some Practical Challenges In-House Counsel May Confront?

Be prepared for obstacles and stakeholder demands during the investigation. You need to remain flexible and objective, as such obstacles can take many forms and, if left unchecked, can compromise the investigation.

The Overly Inquisitive Exec

A particular red flag you may see is the target executive who becomes aware of the investigation and attempts to be proactively involved. Keep in mind most senior executives did not get to where they are by being wallflowers. It is quite common that they will not be content just letting the process play out, but rather, will most likely badger you as in-house counsel for information. This is where maintaining a somewhat arms-length relationship with the independent counsel is critical. When confronted with such a situation, focus heavily on your role as simply a facilitator for evidence gathering and otherwise defer to independent counsel. You do not want to give the appearance that you are an integral and active part of the investigation while it is being conducted.

The Orchestrating or Obstructionist Exec

It may come to your attention that the target executive is actively pressuring the team or witnesses to either align stories or even misrepresent facts. Please note that this is a very common occurrence. How you are positioned in this situation is critical for your own long-term reputation in the company. Should this development come to your attention, it is not recommended that you confront the target executive directly. Rather, it is recommended that you take these concerns first to the independent counsel and then agree on a strategy for escalating the concern to the Audit Committee. Do not allow yourself to be placed in the position of being the decision-maker on how to proceed. Additionally, it should be reiterated that the company does not tolerate retaliation and that any retaliatory conduct should be reported immediately using the company's reporting procedures.

Witnesses "Lawyering Up"

It is quite common for the senior executives or even witnesses to come to you as in-house counsel and ask: "Should I get a lawyer?" Our response to this is always the same. It is perfectly acceptable to retain counsel. They just need to keep in mind that they have a responsibility as an employee of the company to cooperate in an internal investigation

and that the company is under no obligation to answer questions or explain findings to their counsel. Independent counsel should address any and all inquiries from any retained counsel.

Cultural Sensitivity in Global Investigations

A common mistake is assuming that all witnesses will behave alike. Particularly for in-house counsel working in a global corporation, understanding and being able to share with independent counsel what can be expected culturally from witnesses is critical. For instance, in some cultures, it is quite common to speak confidentially about their superiors, whereas in other cultures it is simply not done. We have handled cases where every single person interviewed in one country stated the misconduct occurred, and cases in another country where every single witness alleged no recollection whatsoever. In these cases, it is imperative that the supporting documents be carefully organized so that answers to specific factual questions—not ultimate conclusions—are adduced.

The Need for Real-Time Remediation

It seems that the typical sequence is to allow the independent investigation to be completed and recommendations made before turning to remediation. But what if you are confronted with a situation where the investigation has unearthed wrongdoing or even ongoing criminal misconduct such as bribes, harassment /discrimination based on a protected status, kickbacks, or self-enrichment? Do you simply let the wrongdoing continue or evaluate an immediate remediation plan? There are no uniform answers here, as this assessment is case-specific. Factors to consider include the impact of taking or not taking action, whether taking immediate action will compromise the investigation, and the risk implications. As in-house counsel, the important takeaway is to be looking at all stages of the investigation for remediation opportunities and to flag these issues to the Audit Committee and independent counsel as they arise.

FINAL THOUGHT: PRESERVING YOUR CREDIBILITY

As stated earlier, in C-Suite investigations, in-house counsel must serve as the honest broker. You are not there to protect or indict your senior executive. Rather, you are the guardian of the process, ensuring that it is being done objectively, thoughtfully, and thoroughly. The problem is that is often not the way you are perceived. It is not uncommon for target executives to hold grudges or resent you for the role you played, unless you are given credit for completely absolving them of wrongdoing. This is just an ugly fact of human nature.

Throughout the course of the investigation, it is imperative that you maintain and project objectivity and credibility. This posture applies to your dealings not only with the target executive, but also with each and every person with whom you interact on the matter. Wherever possible, reinforce that you have no agenda whatsoever in the matter. A line we often use: “This is not an inquisition.”

Tips to Maintain Your Reputation

- Refuse to discuss the matter casually with anyone.
- Avoid editorializing or speculation—rely on substantiated facts.
- Do not overstate your role in the investigation, suggesting you are the driver and decisionmaker.
- Make clear you are simply acting as the facilitator at the request of the Board.
- Convey empathy where appropriate.

Handling allegations against senior leadership is never easy, and there is no perfect playbook. What matters most is structure, adherence to process, and objectivity. Your role as in-house counsel is not to protect or prosecute—it is to safeguard the investigation process and scope and ensure that it is thorough, credible, and defensible. That means leaning into transparency with the right stakeholders, maintaining privilege at every turn, and resisting the urge to editorialize. If you do this well, you not only protect the integrity of the investigation, but also preserve your own credibility—something you will need long after the matter is closed.

In short, stay focused on process, not personalities. That is how you steer the company through its toughest moments without losing trust or control.

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