Practical Guidance

Investigation in the C-Suite: Principles & Techniques

A Practical Guidance® Article by David C. Dziengowski and Alexis Caris, Morgan, Lewis & Bockius LLP

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The phone rings: the General Counsel (GC) is calling, and there is a major problem. Credible allegations of misconduct have surfaced against the CEO. Other allegations do not target the CEO, but suggest a corporate environment plagued by intolerable working conditions. The CEO, once publicly praised as a focused and driven entrepreneur, now privately faces an internal rebellion. Her broad base of support has emptied out, and the GC—who is a longstanding colleague and friend of the CEO—needs help. What do you do? How do you proceed?

This article identifies some of the problems that may arise during C-suite investigations. Routine and *typical* questions, such as who is the client, who has a need to know, how to protect privilege, and how best to close the investigation, among others, can quickly present *atypical* problems in this complicated space. Of course, no one article contains all the answers (and this article is no exception). We endeavor to provide some solutions in the form of tested principles and techniques.

Offering Reassurance During the Initial Call

Many GCs, like the one in our example, know their CEOs well. They have worked with them for years, sometimes at multiple companies. While the GC's client is the company, the CEO is the *face* of the company. What is more, the GC might report directly to the CEO, muddying the waters on duties of loyalty and candor. Clarity is not easily achieved in those companies where the corporate governance structure dictates a dual-reporting line into the Board of Directors (Board) or its Audit Committee.

On a human level, reassurance to the GC up front is important. Simple reminders that the company is the client, and the GC is a fiduciary, go a long way in providing clarity, reducing stress, and eliminating any sense of personal, internal conflict. So too does the reassurance that the GC is doing the right thing by seeking outside counsel for such a highly sensitive matter. Outside counsel can serve as a neutral fact finder and advisor, providing a necessary buffer between the CEO and GC, who must remain mindful of their accountability to the company and its stakeholders or investors. Outside counsel not only bring unique expertise; they also bring a fresh perspective insulated from internal politics and other tricky company dynamics. While a fresh perspective is important, outside counsel should take care to survey and assess the corporate landscape before delving head-first into interviews and fact finding more broadly. The GC can play an important role in helping outside counsel navigate through this landscape. When confronted with a significant risk proposition, it is helpful to remind the GC of this big picture.

Establishing the Attorney-Client Relationship

In many cases, the GC will work to retain outside counsel, who will report to the GC on a day-to-day basis throughout the investigation. Depending on the nature of the allegations at issue, thought should be given to have either the Board or its Audit Committee, or perhaps even the Chief Compliance Officer, formally retain outside counsel. Particularly in the wake of the #MeToo movement, wherein allegations of sexual harassment and related misconduct have been lodged against numerous executives and senior management, these corporate contacts appreciate the significant risk exposure and need for oversight on issues once previously addressed at lower levels of the corporate organization. A brief discussion follows. Note that, between FY 2018 and FY 2021, the Equal Employment Opportunity Commission (EEOC) received over 27,000 charges alleging sexual harassment. There was a notable increase in the number of sexual harassment charges received by the EEOC in the two years following the uptick in attention around the #MeToo movement in October 2017. EEOC Data Highlight (Apr. 2022).

It is universally accepted that outside counsel retained by a corporation owes its allegiance to the corporate entity and not to any officer, director, representative, or other person connected with the entity. Model Rules of Pro. Conduct r. 1.13 (2020). This axiom, while all well and good in theory, can be difficult in practice to execute, particularly in C-suite investigations. Directors and officers, of course, are fiduciaries of the organization. So too is the GC, who may be titled as a Chief Legal Officer. The GC may sit on the Board or have a dotted line into the Board. In still other organizations, the Chief Compliance Officer might report to the GC or be an organizational peer. Understanding that attorney-client relationships are built on a foundation of trust and confidence, outside counsel must be mindful of crisscrossing duties of candor, disclosure, and preservation that might warrant engagement directly by the Board. And in those cases where the GC formally retains outside counsel, it may be appropriate for outside counsel to provide periodic reports to the Board. After all, directors are stewards of the company and, as a result, have access to the corporation's books and records, which includes its privileged communications between the corporation and its counsel. M.G. McGuinn Jr., Right of Directors to Inspect Corporate Books and Records, 11 Vill. L. Rev. 578, 578 (1966) ("The right of a director to inspect the records springs from his duty to protect and preserve the corporation."); see also Restatement (Third) Law Governing Lawyers § 73, cmt. g ("The need-to-know limitation … permits disclosing privileged communications to other agents of the organization who reasonably need to know of the privileged communication in order to act for the organization in the matter.").

If the subject of the confidential investigation is the CEO or some other C-suite officer, it may be challenging to provide reports to the entire Board. Such an officer may sit on the Board, compromising, potentially, the confidentiality of the investigative process. Attention should be paid to the company's bylaws and governance procedures to determine whether special meetings of the Board are permissible to assemble quickly to address the investigation. The Board might consider creating a relevant committee that, if sanctioned by the bylaws, could meet to receive status reports, discuss next steps and, ultimately, report back to the Board or its designee.

It should be expected that, when an investigation centers on a CEO or other C-suite officer, the GC will be "hands on" in terms of supervision. A conversation up front discussing the level of supervision, periodic reporting procedures, and unintended consequences of close supervision on the integrity of the investigation should take place. Further, the nature of the allegation, coupled with the level of risk exposure, might cause the company to look beyond its regular outside counsel to handle the investigation. In these circumstances, retention of a different law firm may reinforce the notion that an independent inquiry is taking place. Even in these circumstances, a company's regular outside counsel can play a helpful role advisory role during the investigative process.

Handling Privilege Issues – Know Your Jurisdiction

At the outset, a determination must be made as to whether the investigation will occur under the cloak of privilege. Many factors go into this important decision, and serious thought should be given to whether the investigation might be useful in any anticipated litigation. In such a circumstance, it may be helpful to have a non-privileged factual summary report while other materials are created under privilege. Of course, underlying facts are not privileged unless the disclosure of the underlying facts would reveal counsel's advice. See, e.g., Palmisano v. Paragon 28, No. 21-60447-CIV-DIMITROULEAS/S, 2021 U.S. Dist. LEXIS 83747 (S.D. Fla. Apr. 7, 2021); Samahon v. United States DOJ, No. 13-6462, 2015 U.S. Dist. LEXIS 23813 at *10 (E.D. Pa. Feb. 27, 2015).

So, a decision to run the investigation under a cloak of privilege should not forfeit the ability to deploy facts in an advantageous way down the road. In respect of privileged investigations, the common interest doctrine may apply

where the Board retains its own (and separate) outside counsel and communications are made between counsel. See, e.g., Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002) (holding the common interest privilege applies to communications made by the client or the client's lawyer to a lawyer representing another in a matter of common interest).

Once document review begins, it should come as no surprise that the GC may be copied on a multitude of emails or asked outright for their opinion on matters germane to the subject of the investigation. It may be difficult to assess the purpose of these communications, as C-suite officers view the GC as a trusted advisor (rightfully so) who is fit to opine on a host of topics and issues, many of which are not legal in nature. Determining whether these dual-purpose communications are privileged may depend on the jurisdiction; this issue was the subject of recent U.S. Supreme Court litigation. See In re Grand Jury, No. 21-1397 (Jan. 23, 2023) (dismissing writ of certiorari as improvidently granted).

For example, the D.C. Circuit asks whether obtaining or providing legal advice is "*one* of the significant purposes" of a dual-purpose communication. In re Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014). Some district courts have begun to adopt this significant-purpose test. See, e.g., Smith-Brown v. Ulta Beauty, Inc., No. 18 C 610, 2019 U.S. Dist. LEXIS 108021, at *2–3 (N.D. Ill. June 27, 2019) (adopting significant-purpose interpretation); In re Am. Realty Capital Props., Inc. Litig., No. 15-mc-40 (AKH), 2017 U.S. Dist. LEXIS 235460, at *3 (S.D.N.Y. Aug. 14, 2017) (same). The significant-purpose test is more protective of the privilege and reflects the frequent and multi-layered involvement of GCs within the corporate organization.

Other circuits, by contrast, hold that a dual-purpose communication can only have a single "primary" or "predominant" purpose. In re Grand Jury, 13 F.4th 710, 714 (9th Cir. 2021); Alomari v. Ohio Dept. of Pub. Safety, 626 F. App'x 558, 570–72 (6th Cir. 2015) (analyzing whether the primary purpose of a purported privileged communication was to obtain legal advice); In re County of Erie, 473 F.3d 413, 420 n.7 (2d Cir. 2007) ("[W]e think the predominant-purpose rule is the correct one."); United States v. Robinson, 121 F.3d 971, 974 (5th Cir. 1997) ("The assertor of the lawyer-client privilege must prove: (1) that he made a confidential communication; (2) to a lawyer or his subordinate; (3) for the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding."). The Seventh Circuit arguably applies a third standard, having held that dual-purpose communications used for both litigation and tax preparation are *never* privileged. See United States v. Frederick, 182 F.3d 496 (7th Cir. 1999). The third, eighth, tenth, and eleventh circuits have yet to confront this issue. State courts typically adopt one of the three approaches discussed above. Outside counsel must be aware of these distinctions and should use them to guide its investigations accordingly.

When conducting the investigation, a need may arise to interview witnesses outside the C-suite. In accordance with Upjohn Co. v. United States, 449 U.S. 383 (1981), these interviews may be conducted under cloak of privilege, provided that: (1) the information is necessary to supply the basis for legal advice to the company; (2) the information was unavailable from the "control group" or C-suite management; (3) the communications pertained to matters within the scope of the employee's duties; (4) the employees receive proper notification or warning that they were being questioned so that the company could secure legal advice; and (5) the communications were considered confidential at the time and were kept confidential. See Upjohn, 449 U.S. at 394–95.

A brief note on confidentiality before moving on. To the extent the misconduct allegation pertains to a potential securities law violation, outside counsel should be mindful of Rule 21F-17. This rule prohibits any person from "imped[ing] an individual from communicating directly with the [SEC] about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement … ." 17 C.F.R. § 240.21F–17(a). In 2015, the SEC charged a global defense contractor with violating Rule 21F-17. The company's confidentiality agreement, signed in connection with investigations, contained a provision that prohibited employees from disclosing the facts underlying the company's investigations into illegal employee conduct to any third party without the consent of the company's legal department. The SEC determined that the language could be read to prohibit employees from communicating with the SEC, which would have "a potential chilling effect on whistleblowers' willingness to report illegal conduct to the SEC." See SEC, Companies Cannot Stifle Whistleblowers in Confidentiality Agreements. A company that takes this approach to conducting investigations may be penalized with hefty fines.

Closing the Investigation

Once the relevant documents have been reviewed, the appropriate witnesses have been interviewed, and all appropriate leads have been pursued, it becomes time to close out the investigation. At this juncture, remaining mindful of the key stakeholders' interests in the investigation and resultant effects on the company, it is important to secure a consensus that the diligence performed is sufficient. Given the risk exposure attendant to C-suite investigations, it is absolutely critical that the investigation is thorough and that all reasonable leads are pursued. Of course, outside counsel need not jump into every rabbit hole or pursue every detour presented to perform a diligent and thorough

investigation. If such opportunities present themselves along the way and are not pursued, the final report might explain why. Board members and, down the road, shareholders, might question what was done, so protecting the record in this space is especially important.

It may be the case that the client asks solely for factual findings. Or the client might also want advice and recommendations on resolution and remediation. If the latter, it is important to address any opportunities for the Company on a go-forward basis. For example, during the investigation, it may become clear that the Company should strengthen its internal controls, implement training or coaching, or clean up governance issues, among other possibilities. Where applicable, it is helpful for outside counsel to identify such opportunities as part of its holistic approach to advising the client.

As for the CEO in our example, if the investigation substantiates the allegation of misconduct, careful attention should be paid to the CEO's employment agreement before recommending any final action. Many C-suite executives, particularly CEOs, carefully negotiate Cause provisions in their employment agreements. In some cases, it may be tough to show and, ultimately defend (should litigation arise), a for-Cause termination. Additionally, once presented with an adverse outcome, the CEO may try to negotiate their exit by claiming "Good Reason" to resign. A Good Reason provision, which is protective of the executive and, like Cause provisions, negotiated up front, typically presents fact-intensive inquiries. When properly triggered, a Good Reason resignation can lead to a lucrative, soft-landing for the executive. Outside counsel must be mindful of these possibilities when closing the investigation so as to best advise the client in the resolution phase.

Finally, it may be tempting for outside counsel, who is close to the facts, to be actively involved in post-investigation remediation. Consider whether the investigation could appear compromised if investigation counsel takes on such a role.

Conclusion

Investigations in the C-suite raise the stakes and make typical issues such as retention, need to know, privilege, and resolution atypical. Given the risk exposure, Boards, Audit Committees, Chief Compliance Officers, and General Counsel may all have an interest in conducting an exacting review of the facts and producing a thorough assessment of the situation through a final report. Mindful of this landscape, outside counsel must not only operate at the tactical level (i.e., conducting interviews, reviewing documents, and pursing leads). It must also operate at the strategic level, understanding the client from an organizational and business perspective, so as to best serve the client when a C-suite investigation arises.

Morgan Lewis wishes to thank Sarah E. Bouchard for reviewing a draft of this article and providing helpful insights and suggestions.

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David C. Dziengowski litigates complex employment and executive compensation disputes in courts and arbitral forums throughout the country. David brings a diverse skill set to any case, having tried complex disputes, led internal investigations, and argued high-risk issues on appeal in federal courts. By developing practical and effective solutions, David regularly helps clients navigate through their most sensitive matters.

In addition to his litigation and investigation practice, David routinely advises clients on executive compensation and performance management matters. He has experience in structuring and drafting employment, arbitration, non-competition, non-solicitation, and separation agreements. Prior to joining Morgan Lewis, David litigated sensitive white collar criminal matters and diverse commercial disputes in the litigation department of a prominent national law firm.

David served on active duty in the US Navy Judge Advocate General's Corps from 2009 until 2014. He continues to serve, now as a Commander in the US Navy Reserve. His body of work includes representation of numerous Sailors and Marines at courts-martial and before administrative boards, four arguments before the US Court of Appeals for the Armed Forces, and one argument before the US Navy-Marine Corps Court of Criminal Appeals. In his role as Navy appellate defense counsel, David overturned two convictions and successfully defended an interlocutory appeal. David also taught law at the US Naval Academy and served as a Rule of Law Field Support Officer in the Arghandab River Valley of Kandahar, Afghanistan.

David's pro bono work includes representation of criminal defendants with the Innocence Project and veterans before the Board of Veterans' Appeals.

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While in law school, Alexis completed a legal externship for Judge Patty Shwartz of the US Court of Appeals for the Third Circuit. Alexis maintains an active pro bono practice and was awarded the Exemplary Pro Bono Service Award for completing over 400 hours of pro bono service while a student at Penn Law.