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Navigating Complaints Against C-Suite and Other Senior Executives: A Roadmap for In-House Counsel

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Hypothetical

- Recently hired SVP of Engineering replaced an individual who had been terminated following multiple substantiated complaints of inappropriate sexual misconduct from female employees after an online expose about the alleged toxic work culture for women at the Company;
- Executive assistant (EA) of recently hired SVP discovers a racy email between the new SVP and a junior sales employee;
- Email refers to a July 5 romantic dinner date followed by a concert;
- SVP previously had characterized the July 5 dinner date and concert as client entertainment; provided receipts to the EA; and instructed his EA to submit a request for reimbursement for the business expense;
- EA did so and SVP was reimbursed for same;
- EA reports her discovery of the email to HR.

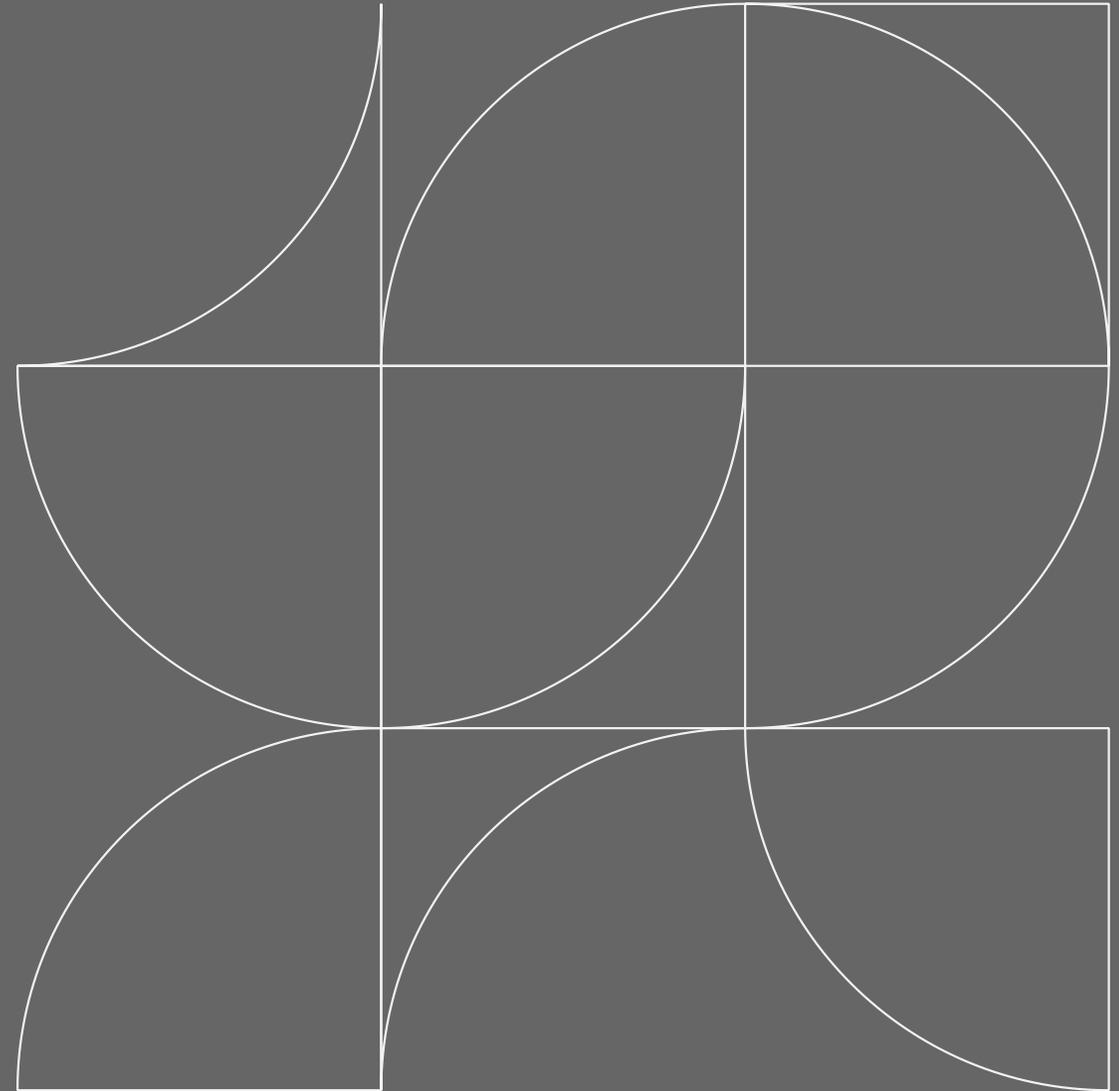


Strategic, Coordinated, and Multi-Faceted Response

- Legally compliant and defensible **Investigation Plan**
- Nimble **Crisis Management Plan** that is designed to minimize:
 - Disruption to the organization; and
 - Extent and scope of the damage

Privilege is an essential consideration for each of these action items.

Creation of an Investigation Plan





Investigation Plan:

Who Oversees the Investigation?

- HR leadership
- In-house counsel
- Separate outside counsel, providing advice and counsel
- The Board
 - Allegations against CEO, CFO, the General Counsel, or other key executive officer
 - Allegations against Board members or investors
 - Certain whistleblowing allegations



Investigation Plan: Who Investigates?

- HR v. In-house counsel v. Outside counsel
- How serious is the alleged or suspected misconduct?
- How did the allegation come to the Company's attention?
- How likely is an external legal claim?
- Can HR or in-house counsel be neutral?
- Can HR or in-house counsel not give in to intimidation?
- Does in-house counsel have an advisory role?

Investigation Plan: The Issue of Privilege



- Determine whether investigation will be privileged
- Consider future waiver
 - California Federal v. State Court
 - Reliance Defenses
 - Written communication
- Separate outside counsel for investigation and advice, creating brighter privilege lines



Investigation Plan: Managing Outside Investigator

Move fast! A slow investigation is almost as bad as no investigation.

- In California, outside investigator must be licensed attorney or private investigator
- Manage expectations regarding documentation from the investigator:
 - prompt, thorough, neutral
 - communication style (email v. telephone)
 - privileged or discoverable
 - maintenance of records
 - consider whether to request signed written statements from witnesses
- Ensure all requested records are provided and witnesses cooperate
- **DON'T** demand interim reports on findings. Remember, conclusions and credibility determinations come at the end.
- Witnesses' availability



Investigation Plan: Board's Involvement

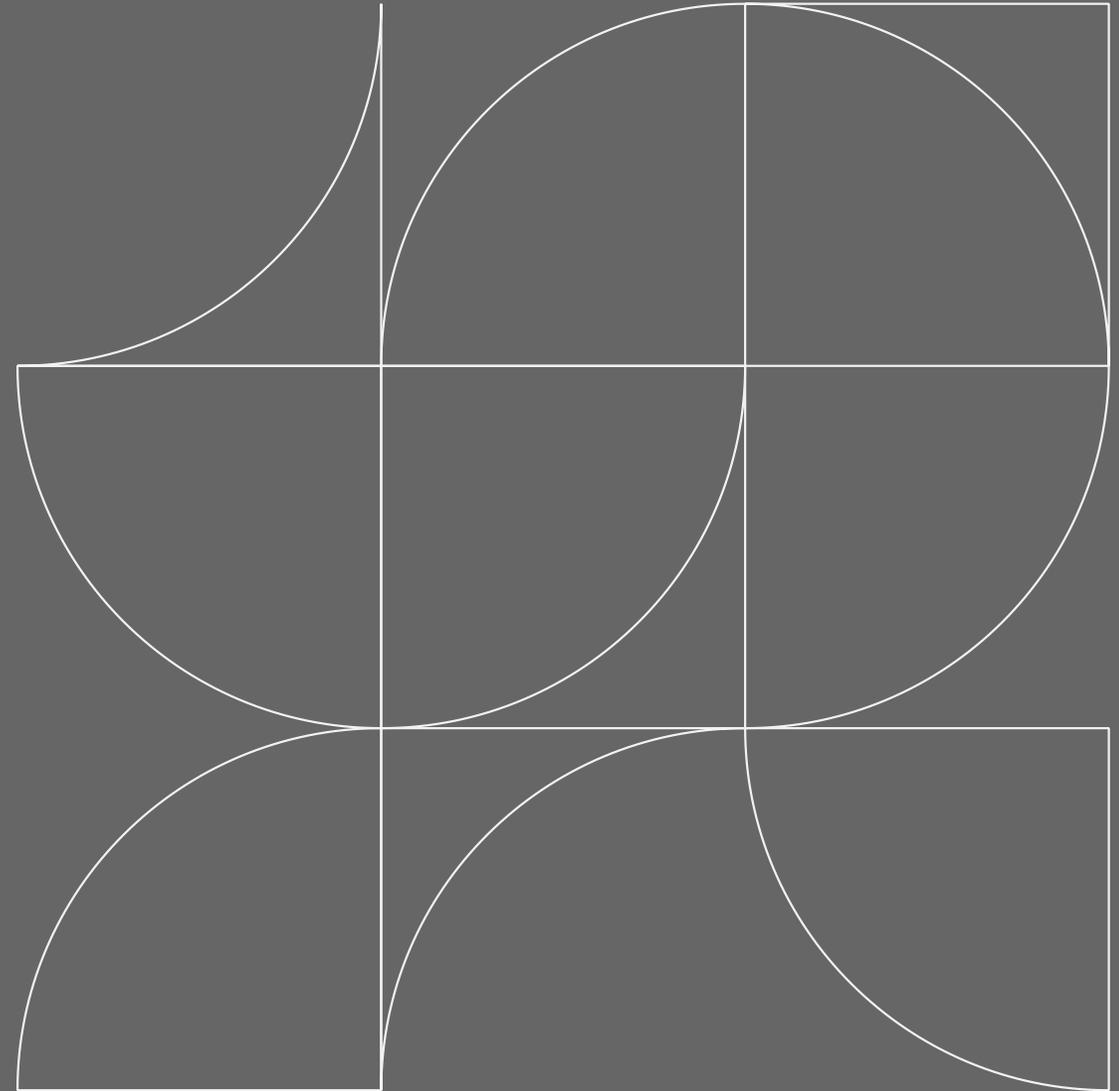
- Keeping the Board apprised before and during investigation
 - Advise of complaint
 - Inform of investigation strategy
 - Status reports appropriate, but no interim findings
- Remind Board of counsel's role
 - Counsel for Company
 - Privileged controlled by Company
 - Board (and individual board members) should consider securing own counsel
- How much does the Board need to know?
 - Sufficient information to
 - provide truthful information in SEC filings
 - effectively and meaningfully oversee the Company
 - maintain or protect the value of the Company, while complying with the law
 - Develop strategies to audit Company and the adequacy of its harassment policies and practices



Investigation Plan: Board Driven Investigation

- No black and white rules for Board driven investigations. Board may exercise control over an investigation if allegations:
 - Relate to actions of the board members, in which case consideration needs to be given to whether comprising a board committee of disinterested directors is appropriate
 - Relate to actions of the CEO, the CFO, the general counsel, or other key executive officer
 - Involve conduct that could reasonably implicate one or more executive officers
 - Could otherwise call into question the objectivity of a management-directed investigation
- Role of in-house counsel
 - Support Board-engaged outside counsel

Creation of Crisis Management Plan





Crisis Management Plan: Goals

- Minimize legal exposure
 - Employment litigation
 - Shareholder litigation
- Protect Company and brand reputation
- Preemptive planning for various scenarios
- Minimize disruption
 - Productivity
 - Personnel changes



Crisis Management Plan: Need One?

- Prior History
 - Similar allegations
 - Similar players
 - Prior publicity
- How was the complaint received?
- What is the volume of the complaints?
- Who is the accused?
- What are the allegations?

Crisis Management Plan: Who is involved?

- Both inside and outside counsel
 - Protection of privilege
 - In-house counsel may be wearing both business and advice hats
- Strategic internal stakeholders
 - CEO and leadership
 - People/HR leadership
- Board
- PR Team
 - Monitor media
 - Create media plan and messaging
 - Creation of talking points



Crisis Management Plan:

Must be nimble, must be quick

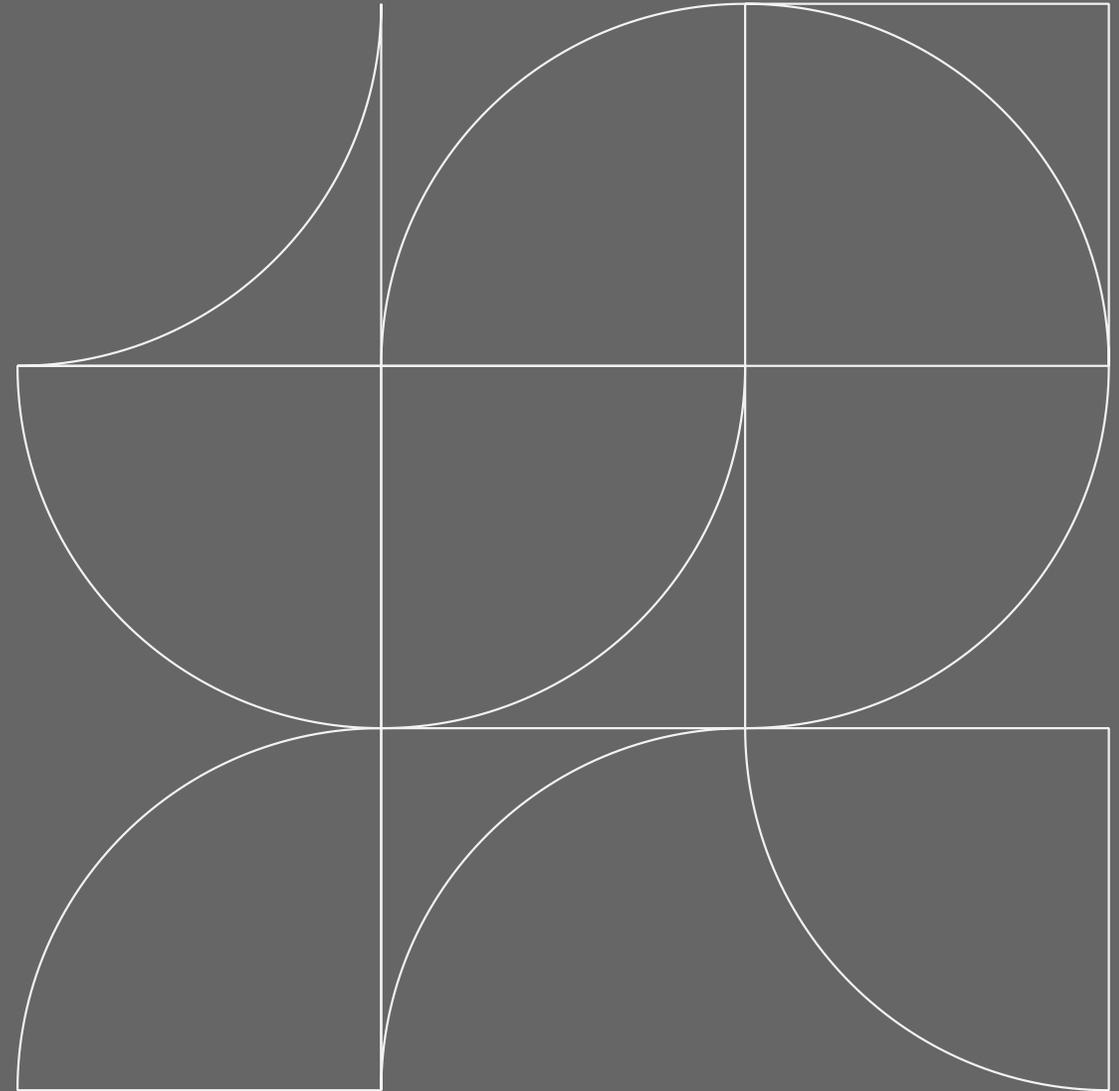
- Messaging evolves with the investigation
 - Initial considerations
 - Protection of employees
 - Hold on conclusions until investigation complete
 - Ability to pivot depending on internal and external pressures and developments
 - Internal chatter
 - Public posting or article
 - Employee action (i.e. walk out)
 - Resignations
 - Post-investigation
 - Messaging corrective action
 - Telling the complainant
 - Press release
 - Talking points
- Communication impacted by target audience
 - Employees
 - Customers
 - Shareholders/Investors



Addressing Reputational Risks

- How does it affect your brand? Your Customers?
 - Consider publicized different responses from companies and alleged harassers that you have seen
 - Monitor media
- Create an internal response and communication to try to head off the media blitz
- What if the accused is a key leader?
 - Dealing with shareholders or powerful internal stakeholders
 - Obligations to disclose to the Board, etc.
- Don't ignore the impact on other employees, morale, etc.

Shareholder Liability





D&O Claims

- Event driven shareholder litigation
- Bankruptcy
- Who is liable
 - Company
 - Individual Exposure
 - Outside Directors
 - Venture Capitalists
 - Private Equity
 - Special Committee Considerations

**thank
you**

Questions