

# How to Handle High-Stakes Investigations

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## Speakers

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# Agenda

- Identifying a high-stakes investigation
- How high-stakes investigations differ from routine investigations
- Managing the investigation
- How to prepare in advance of a crisis or high-stakes matter



# Identifying a High-Stakes Investigation

# High-Stakes Investigations

## High-stakes investigations typically:

- are complex, urgent, and require a multi-disciplinary response
- contain systemic risk
- have significant legal, reputational, and/or monetary risk for the company
- may have a large scale impact or class action component



# How High-Stakes Investigations Differ from Routine Investigations

# Cost and Expenses

- Litigation costs (insurance coverage)
- Potential for adverse decision and award
- Potential for repeat claims or bad precedent
- Human capital drain
- Negative publicity
- Reputation
- Hiring and recruiting impacts
- Long term impact/business implications
- Quicker turn-around times often involved



# Human Capital Drain

- Manpower to collect information and documentation necessary for the investigation
- Senior leadership/management attention and diversion (including the GC)
- HR and marketing teams to address people and PR issues
- Witnesses (as well as depositions, preparation, trial time if litigation ensues)
- Employee distraction



# Potential for Publicity

- Reputation -- Negative vs. positive media
- “Juicy gossip”
- Public/important figures
- Stock implications
- Auditing and disclosure requirements
- Impact on case; potential to influence outcome (judge, jury, public opinion)
  - <https://academic.oup.com/aler/article-abstract/17/1/87/212635>





# Potential to Open the Legal Flood Gates

- Claimants coming out of the woodwork; “copycat” litigation
- #metoo
  - The Legal Implications of the metoo Movement, 103 MNLR 229, Elizabeth C. Tippet 2018
- Potential for class action
- Potential for shareholder actions/proposals
- Potential for government investigations
- Potential for organizing activity



# Ability to Address/Resolve and When

- Timing
  - Early engagement of leadership/management
- Implications of settlement
- Confidentiality
- Use of counsel & privilege
- Keeping matter sealed or under cover
  - Rule 5 Fed. Civ. Pro R. and unique local rules



# Managing the Investigation

# Best Practices

- In house counsel role in managing expectations
- Managing internal and external communications
- Litigation hold?
- Insurance notification?
- Individual representation
- Joint defense agreements/ Common interest rule
  - Seeking Common Sense for the Common Law Of Common Interest in the D.C. Circuit, 65 CATHULR 833 Jared S. Sunshine 2016
- Confidentiality
- How to establish and maintain applicable privilege
- Upjohn warning
  - Upjohn Company v. United States, 449 U.S. 383 (1981)
  - PSU Ethics Case Brings Conduct Rules' Clarity Into Question, Law360, Matt Fair, Feb. 21, 2020
  - The Consequences of the Failure of Corporate Counsel to Give Upjohn Warnings to Corporate Employees, J. Lewis, Pennsylvania Bar News, 2016
- Addressing unions and third parties
  - Social Media, at-will employment, and internal investigations: the ever-expanding reach of the national labor relations board to union and non-union workplaces, The Florida Defense Lawyers Association, M. Spellman, J. Slanker, 2013
- Establish good corporate citizenship reputation
- Use opportunity to provide positive outcomes for company – both from perspective of change as well as public perceptions



# When Your Investigation Involves Senior Management

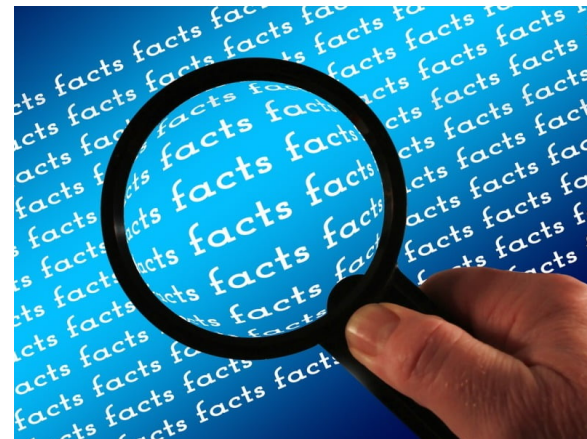
- Who is in charge?
- Involvement of the Board of Directors/Special Committee of the Board
- Appointment of outside or special counsel
- Unique disclosure concerns
- Individual representation
- Conflicts of interest
- Media implications



*Case study #1: Investigation reveals senior manager involved in wrong-doing and that other members of management team purportedly had knowledge.*

# Conducting the Investigation

- Who?
  - Use of counsel (in-house versus outside)
  - Private investigator/consultants
  - HR department's role
- Keeping confidentiality and privilege
  - EEOC v. Outback Steakhouse, 251 F.R.D. 603 (D. Colo. 2008)
- Identifying documents, e-discovery
- Determining scope of witnesses
- Interview notes and recordings
  - Koumoulis v. Independent Financial Marketing Group, 295 F.R.D. 28 (E.D.N.Y. 2013)
- Involvement of third parties – law enforcement, media, etc.



*Case study #2: Supervisor accused of sexually assaulting new employee during orientation and opposing counsel threatened to interview current and former employees.*

# When Your Investigation Results in Potential Wrongdoing

- What to put in writing
- Assessing and addressing liability
- Admissions
- Scope of privilege
- Remediation efforts
  - Damned if you do, damned if you don't? Employers' challenges in conducting sexual harassment investigations, Georgia State Univ. L. Rev., 17 GASTULR 575, K. Ruark, 2000
  - Resolving Workplace Sexual Harassment Complaints, EMP MA-CLE 16-1, 2021.



*Case study #3: Employee accused of wrong-doing by fellow employee appeared at interview high and acknowledged drug usage but denied other claims made against him.*

# Managing Internal Communications

- Maintaining the privilege, if applicable
- Maintaining morale and productivity during the investigative and dispute resolution process
- Controlling who should know what and when
  - Avoid large group written communications
  - Use of email, texts and chat
  - Prepping employees
  - Managing employee disclosures



*Case study #4:* Racial harassment claim made and in midst of investigating the company discovers that claimant made comments on Facebook about the environment at the company and about several of the employees. Other employees are starting to comment, some saying negative things and some defending the company.



# Managing External Communications

- When and how to engage journalists/press and first responders
  - <https://www.investmentnews.com/how-to-handle-a-scandal-58195>
  - Planning for Crisis Management The Seven Step Approach, Dan Prywes and Scott Sobel, Planning for Higher Education Journal, 2015
- Restrictions and implications on communications
  - Model Rule Of Professional Conduct 3.6 (what lawyers can say to media and its extension to management)
- Social media
- When to say no comment/when to substantively comment/what to say and to whom and when – or to simply ignore
- Appearances and making lemonade out of lemons

*Case study #5: You're presented with high stakes litigation threat involving pay equity that could easily adversely affect stock prices and business. During your investigation you become aware of various pay differences. Opposing counsel is threatening to go public.*





- Subpoenas
- Grand Jury
- EEOC, OSHA, etc.
- FOIA issues



*Case study #6: Underlying claim settled but EEOC continues to ask questions.*

## Ability to Address in a More Private Resolution Forum

- Early mediation
- Private arbitration
- Lawsuit under seal
- Tolling agreements



*Case study #7: Former employee filed lawsuit which included allegations of outrageous conduct and “named” names during critical business activity of defendant.*



# How to Prepare in Advance of a Crisis or High-Stakes Matter

- Have a crisis plan in place that includes:
  - likely business crisis scenarios
  - contract information of key management team (and process for updating when team members change)
  - VIP contacts including insurance agencies
- Update your crisis plan annually
- Practice a representative crisis scenario regularly with a media training professional and key management
  - Review past media relations and/or high-profile crisis cases that involved your business or industry and glean liabilities and best practices from those cases
- Coordinate possible crisis mitigation with your communications team and meet with key journalists, government and social media influencers and first responders before there is a crisis
- Know your insurance policies and update as needed
- Vet outside litigation and media relations counselors before you need them
- Have a protocol in place for document maintenance and preservation
- Make sure your managers know what privilege protects and doesn't, especially regarding emails and public statements
- Encourage your company to regularly practice positive public and media relations so important audiences see you as a good corporate citizen that deserves credibility under all circumstances



# Questions?

## THANK YOU!



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