FRAUD, INVESTIGATIONS & RECOVERY

NOVEMBER 2026 | **VOLUME I** | **ISSUE 3**

Emergency Envelope

A practical alert series from Robins Kaplan's former DOJ attorneys and investigations team.



Responding to a Congressional Investigation: 10 Strategic Considerations for Companies and Executives

EXECUTIVE SUMMARY

Congressional investigations have always been one of the federal government's most consequential oversight tools. Once associated primarily with political scandals or executive-branch oversight, congressional investigations now routinely target private companies, nonprofit organizations, universities, financial institutions, healthcare providers, technology companies, and senior corporate executives. Congressional inquiries and investigations often are triggered by an event that generates public concern or outrage, such as a disaster, cybersecurity incident, product failure, workplace tragedy, data breach, fraud, consumer complaint, whistleblower allegation, or severe regulatory enforcement action.

Unlike civil litigation or federal agency inquiries, congressional investigations occupy a unique intersection of law, politics, public policy, media scrutiny — and theater. Congressional committees are not charged with determining civil or criminal liability; they convene public hearings to illuminate, to inform legislation, to conduct oversight, and to shape public policy, as well as to educate and persuade the public. Adopting a legal strategy alone is shortsighted, and fraught with peril. Organizations must simultaneously manage legal obligations, public relations, investor concerns, government relations, employee communications, and corporate governance, often while information produced for committee staff is being forwarded to DOJ, SEC, FTC, inspectors general or state attorneys general, as well as various advocacy groups.

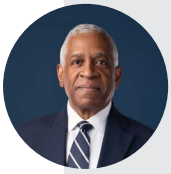
ROBINS KAPLAN LLP

IN THIS ISSUE

Responding to a Congressional Investigation: 10 Strategic Considerations for Companies and Executives 1

Artificial Intelligence in Civil Discovery: Prompts, Preservation, and Proof 5

Congressional oversight has changed dramatically over the past decade. So should your response strategy.



B. Todd Jones
PARTNER

The stakes are also inherently political, and they can shift quickly. Committee leadership, membership, subpoena power, and investigative priorities all change when control of a chamber changes hands — a dynamic explored in more detail below in light of the 2026 midterm elections.

The good news is that congressional investigations are not entirely unpredictable. Organizations that respond astutely and promptly, preserve credibility, coordinate communications, and engage counsel experienced in the unique rhythms of Capitol Hill are far better positioned to manage risk, protect their people, and emerge from an investigation with their brand and reputation relatively intact.

KEY DEVELOPMENTS SHAPING THE CURRENT LANDSCAPE

- Broader Targets - No longer just political scandal — companies, universities, and executives across every sector
- Public By Design - Hearings televised, transcripts published, exhibits released almost immediately
- Parallel Exposure - DOJ, SEC, FTC, FDA, inspectors general and state AGs often move alongside Congress
- Speed Sets the Tone - The first several days determine how much credibility a company retains

1. MOVE QUICKLY TO ASSESS SCOPE AND STAKES

The first hours after learning of a congressional inquiry — whether through a letter requesting documents, a request for a briefing, a subpoena, or a press report previewing a hearing — often determine how much credibility an organization retains throughout a process during which it will have little real control.

A careful initial assessment should address several threshold questions:

What committee or committees are involved, and what is the stated legal authority and legislative purpose behind the request? Is the inquiry directed specifically at the organization, or is it part of a broader industry-wide review? Is the request informal (a letter seeking voluntary cooperation) or formal (a document subpoena or a request to testify), and what deadlines apply? Does the request signal an oversight inquiry focused on policy, or a more adversarial investigation focused on specific conduct or individuals? What politics may be driving the inquiry? And to what end?

Because congressional practice differs meaningfully from civil litigation or white-collar defense, organizations should engage counsel experienced specifically in congressional investigations at the earliest possible stage, even if outside litigation, or regulatory counsel is already involved.

PRACTICE POINTER

Treat the first several days as a control window: identify the committee, authority, deadlines, likely witnesses, influencers, parallel exposure, and the internal decision-makers before positions harden; assess situational politics.

2. ASSEMBLE A CENTRALIZED, CROSS-FUNCTIONAL RESPONSE TEAM

Congressional investigations touch nearly every function of an organization, and an effective response requires a coordinated team that typically includes:

- executive leadership;
- internal legal and compliance personnel;
- outside counsel experienced in congressional investigations;
- information technology professionals;
- records management personnel;
- crisis management professionals
- communications and government affairs professionals; and
- board representatives where appropriate.

Initial priorities should include issuing litigation holds, suspending routine document destruction, preserving electronically stored information (ESI), identifying key custodians, reviewing insurance policies, assessing disclosure obligations, and beginning an attorney-client-privileged internal investigation.

Equally important is establishing a centralized structure for information-gathering, analysis, planning and decision-making. Conflicting actions and messages from different parts of the organization can quickly undermine credibility with congressional staff and create unnecessary legal, financial and reputational risk. Organizations that move deliberately during the first several days often maintain significantly greater credibility over the remainder of the investigation.

3. EVERY COMMUNICATION SHOULD BE WRITTEN WITH PUBLIC DISCLOSURE IN MIND

Congressional investigations increasingly unfold in full public view. Unlike many regulatory investigations, committee hearings are frequently televised, transcripts are published online and exhibits often become immediately available to influencers, advocacy groups and the public. Corporate executives should therefore assume that virtually every communication — including emails, text messages, instant messages, presentation slides, board materials, and internal memoranda—could eventually become public. Prioritize in-person and virtual meetings to assess information and consider potential actions and supporting messages.

This reality requires careful coordination between legal counsel, crisis management, government affairs

and communications professionals. Actions taken, as well as statements to employees, shareholders, customers, regulators, and the media should all be consistent with positions conveyed to Congress. Inconsistency is often more damaging than the underlying facts.

PUBLIC BY DESIGN

Assume that emails, texts, board materials, presentations, and testimony may become public. Action and message consistency across Congress, regulators, employees, investors, customers, and the media is a legal issue, not simply a communications concern.

4. UNDERSTAND THE COMMITTEE'S JURISDICTION, RULES, AND POLITICAL DYNAMICS

Congressional committees do not operate like courts, and organizations that approach them as though they do are often caught off guard. Committee jurisdiction, procedural rules, and the balance of power between majority and minority members all shape how an investigation will unfold, and those dynamics can shift with the political calendar, upcoming elections, Presidential pronouncements, Supreme Court decisions, social media response or a single high-profile news cycle.

It is important to understand which committee or committees have jurisdiction, whether multiple committees in the House and Senate are pursuing parallel or overlapping inquiries, and how each committee's rules govern document requests, depositions, transcribed interviews, and hearings. Majority and minority staff frequently have different priorities and, at times, different audiences they are trying to engage.

Building constructive, professional working relationships with committee staff — not just with members — is often the single most important factor in how smoothly an investigation proceeds. Staff typically drive the day-to-day pace of an inquiry, and an organization's credibility with staff can shape everything from production deadlines to the tone of a hearing.

5. COORDINATE WITH PARALLEL REGULATORY AND LAW ENFORCEMENT INVESTIGATIONS

Congressional investigations rarely occur in isolation. The same facts that prompted a committee inquiry may simultaneously attract the attention of the Department of Justice, the Securities and Exchange Commission, the Federal Trade Commission, the Department of Health and Human Services Office of Inspector General, state attorneys general, agency inspectors general, and other federal regulators. Information produced during one investigation may become relevant in another.

Consequently, organizations should evaluate every production decision, witness interview, privilege assertion, proposed action and public statement through the broader lens of all potential federal and state inquiries.

An integrated strategy helps ensure consistent positions that may later foster credibility with another government agency.

6. PRIVILEGE ISSUES REQUIRE STRATEGIC PLANNING

Attorney-client privilege remains one of the most important protections available to organizations.

Nevertheless, congressional committees have historically maintained that common-law privileges do not necessarily restrict their investigative authority in the same manner as judicial proceedings.

In practice, privilege disputes are often resolved through negotiation with committee leadership and staff rather than litigation.

Experienced counsel can frequently negotiate accommodations involving:

- testimony;
- privilege logs;
- confidential productions;
- limited waivers;
- rolling productions;
- in camera review;
- protective agreements; and
- alternative factual presentations.

Privilege should never be addressed reactively. Rather, organizations should develop a comprehensive privilege strategy before significant document production begins.

PRIVILEGE NOTE

Congressional committees have historically taken a different view of common-law privileges than courts. Build a privilege strategy before production begins and negotiate accommodations deliberately.

7. MANAGE DOCUMENT PRODUCTION STRATEGICALLY

Initial congressional document requests are often exceptionally broad, sometimes spanning years of records across multiple business units. Organizations should not assume that the request as written defines the scope of what must ultimately be produced. Experienced counsel can frequently negotiate narrower custodian lists, more targeted search terms, reasonable date ranges, and a rolling production schedule that gives the organization time to review documents for privilege, confidential business information, and personally identifiable information before they are produced.

Detailed production logs are essential, both to track what has been produced to which committee and to maintain consistency if the same or similar materials are later requested by a regulator or in litigation. Organizations should also anticipate that any document produced may later surface as a hearing exhibit and should review productions with that possibility in mind.

8. KEEP THE BOARD INFORMED AND ENGAGED

A congressional investigation automatically triggers the Board's fiduciary oversight responsibilities, and directors should be kept informed of developments throughout the process, not only at moments of crisis. Depending on the nature and severity of the allegations, the Board may wish to receive regular briefings from management and outside counsel, designate a special committee to oversee the response, or engage separate counsel to represent the Board's interests where those interests may diverge from management's. Counsel should ensure that directors receive timely, accurate, and privileged updates throughout the investigation.

9. COMMUNICATIONS STRATEGY IS LEGAL STRATEGY

An organization's communications response must squarely address the Congressional inquiry, while reinforcing brand and organizational values. Public perception often develops long before a Congressional report is published or legal conclusions are reached. Organizations therefore should coordinate legal counsel, crisis management consultants, communications professionals, investor relations personnel, government affairs specialists, and executive leadership from the earliest stages of the investigation.

Effective communications strategies should anticipate:

- social media activity;
- news media inquiries;
- employee communications;
- customer concerns;
- investor questions; and
- press conferences by committee members and advocacy groups.

An integrated communications approach optimizes consistent messaging while preserving legal defenses.

10. THE MOST IMPORTANT WORK HAPPENS BEFORE THE HEARING

Streamed hearings often represent only a small portion of a congressional investigation. Much of the most valuable legal work occurs beforehand. Experienced counsel adds value by:

- advancing constructive relationships with committee staff;
- narrowing overly broad requests;
- negotiating production schedules;
- conducting privileged factual investigations;
- coordinating with parallel regulators;
- preparing executives;
- protecting privileged communications; and
- co-developing a coordinated public narrative well before the first hearing is scheduled.

Successful testimony begins long before the hearing. Experienced counsel should prepare witnesses through multiple rounds of substantive and practical preparation. Key considerations include:

- mastering the factual record;
- reviewing all likely hearing exhibits;
- anticipating difficult questions from both majority and minority members;
- practicing concise and accurate responses;
- avoiding speculation;
- upholding brand and organizational values;
- acknowledging mistakes when appropriate;
- remaining composed during aggressive questioning; and
- understanding that every response may be quoted publicly.

WITNESS PREPARATION

Credibility - not advocacy - is the witness's most valuable asset with audiences who will judge the organization's performance. Preparation should include mastering the record, anticipating majority and minority questioning, rehearsing concise answers, and eliminating speculation.

KEY TAKEAWAY

Congressional investigations sit at the intersection of law, politics, public policy, and media scrutiny. Companies that move quickly, centralize situational analysis and decision-making, protect privilege deliberately, and coordinate legal and communications strategy are better positioned to preserve credibility with their key audiences — in a setting where the committee chair and majority and minority members are publicly wrestling for message control. Companies in sectors likely to draw Congressional inquiry and oversight should also treat potential changes in committee control as a near-term readiness issue.



Artificial Intelligence in Civil Discovery: Prompts, Preservation, and Proof

Artificial intelligence is changing discovery. The Federal Rules, so far, are not. That distinction may be the most important lesson for corporate counsel. Employees now use generative AI to analyze contracts, prepare reports, develop strategy, investigate problems, and communicate with customers. Experts use AI to locate and analyze evidence. Lawyers use it to organize facts and prepare litigation materials. Each interaction may create prompts, outputs, chat histories, logs, drafts, and metadata.

When litigation arrives, the central question will not be whether those materials are "AI." Instead, it will ring very familiar:

Are they relevant, within a party's possession, custody, or control, nonprivileged, proportional—and, if so, were they preserved?

The emerging cases suggest that courts will answer those questions principally through existing discovery and evidentiary rules.

PROMPTS MAY BE EVIDENCE

Consider an executive investigating an internal compliance concern. She uploads emails to an enterprise AI system and asks: "Identify anything suggesting we knew these invoices were inaccurate." The system identifies several communications. She then asks: "Give me the strongest arguments that these invoices nevertheless comply with the contract." Months later, the company is sued for fraud. Opposing counsel requests the executive's prompts, outputs, and AI history. Are they discoverable? Potentially.

"Are they relevant, within a party's possession, custody, or control, nonprivileged, proportional—and, if so, were they preserved?"

ROBINS KAPLAN LLP



Carla J. Baumel
COUNSEL



Allen A. Slaughter Jr.
COUNSEL

Rule 26(b)(1) permits discovery of nonprivileged matter relevant to a claim or defense and proportional to the needs of the case. The Rule does not distinguish between email, text messages, collaboration platforms, or AI-generated information. Fed. R. Civ. P. 26(b)(1). Rule 26(f), moreover, expressly requires parties to discuss preservation and discovery of electronically stored information. And recent cases are beginning to apply those principles directly to AI.

In *In re OpenAI, Inc. Copyright Infringement Litigation*, the Southern District of New York required production of a sample of approximately 20 million de-identified ChatGPT output logs after concluding that the requested material was relevant and proportional; the court later denied reconsideration. *In re OpenAI, Inc. Copyright Infringement Litig.*, No. 25-MD-3143 (SHS) (OTW), 2025 WL 3468036 (S.D.N.Y. Dec. 2, 2025), aff'd, 2026 WL 21676 (S.D.N.Y. Jan. 5, 2026).

Another early dispute arose in *Tremblay v. OpenAI, Inc.*, where authors alleging copyright infringement relied on ChatGPT-generated summaries of their works as evidence supporting their claims. OpenAI sought discovery of the plaintiffs' pre-suit testing, including the prompts and outputs that produced both favorable and unfavorable results. A magistrate judge initially compelled production, reasoning that the account information, negative test results, and testing process were necessary to evaluate the results plaintiffs had placed at issue. On review, however, the district court drew an important distinction: although certain *factual information* concerning the testing was discoverable, the prompts crafted by counsel reflected counsel's mental impressions about how to interrogate ChatGPT and therefore constituted opinion work product entitled to heightened protection. *Tremblay v. OpenAI, Inc.*, No. 23-cv-03223-AMO, 2024 WL 3748003, at *1–3 (N.D. Cal. Aug. 8, 2024).

A bit more on privilege below. But the lesson is not that every prompt is discoverable. It is that AI data receives no categorical exemption from Rule 26 and that the discoverability of a prompt or generative AI output logs may depend substantially on who created it, why it was created, what it reveals, and whether the party has relied on the resulting AI analysis to support its claims or defenses.

RULE 34: A PROMPT MAY STILL BE ESI

Rule 34 permits requests for documents and electronically stored information within a party's possession, custody, or control. Fed. R. Civ. P. 34(a). The rule is technologically neutral. If responsive prompts, outputs, logs, or AI-generated drafts exist and are within a party's control, the fact that they reside inside an AI platform instead of an email server, a database, or a file cabinet, may not, by itself, remove them from Rule 34 consideration. Relatedly, a particularly noteworthy development involves experts. In *Conservation Law Foundation, Inc. v. Shell Oil Co.*, a magistrate judge ordered revised Rule 34 responses concerning AI prompts or queries used by an expert and her team to reduce a large document production to the materials used in her analysis. The court regarded that process as part of the expert's methodology and therefore potentially discoverable. *Conservation Law Found., Inc. v. Shell Oil Co.*, No. 3:21-cv-00933 (VDO), ECF No. 970 (D. Conn. May 18, 2026). The order was subsequently stayed pending district-court review, so it should be treated as an important developing decision rather than settled law; but illuminating nonetheless.

The practical implication is immediate: counsel retaining experts should determine before the first prompt whether AI will be used, what the system retains, and whether prompts and outputs can later be collected.

PRESERVATION: THE LITIGATION HOLD HAS A NEW DATA SOURCE

The duty to preserve does not begin because information is discoverable. It arises when litigation is reasonably anticipated and extends to relevant information that should reasonably be preserved. Rule 37(e) addresses the consequences when ESI that should have been preserved is lost because reasonable preservation steps were not taken and the information cannot be restored or replaced. Fed. R. Civ. P. 37(e). Prejudice permits appropriately tailored curative measures; the most severe sanctions require intent to deprive.

DR Distributors, LLC v. 21 Century Smoking, Inc., 513 F. Supp. 3d 839 (N.D. Ill. 2021), remains an especially useful published treatment of these obligations. The court emphasized identification, preservation, collection, review, and production as fundamental components of ESI discovery and analyzed whether reasonable preservation measures had been taken. Courts continue to rely on its Rule 37(e) analysis.

AI complicates that familiar obligation. Some platforms retain complete histories; others permit deletion; enterprise settings may differ from consumer versions; and relevant information may exist simultaneously in the user's account, vendor systems, exported documents, and downstream business records. The answer may not be to "preserve every prompt." It may be, rather, to identify potentially relevant AI systems when a hold arises and make defensible preservation decisions about AI data within the firm's possession, custody, or control.

RULE 37: AI DOES NOT OUTSOURCE COUNSEL'S JUDGMENT

AI also potentially affects discovery conduct itself. For example, in *White v. Walmart, Inc.*, a federal magistrate judge confronted counsel who uploaded an opponent's discovery responses into AI, asked the system to identify deficiencies, and copied the AI-generated criticisms into correspondence with opposing counsel and the court. The court held that lawyers must exercise independent judgment in discovery and could not rely exclusively on AI-generated objections. *White v. Walmart, Inc.*, No. 1:25-cv-01120-RLY-TAB, ECF No. 37 (S.D. Ind. Apr. 14, 2026).

Similarly, *Tijerino v. Spotify USA Inc.* addressed counsel's use of AI during the discovery meet-and-confer process and reinforced that Rule 37's good-faith conferral obligation cannot simply be outsourced to an AI system. *Tijerino v. Spotify USA Inc.*, No. 2:24-cv-02290, ECF No. 78 (E.D. La. July 7, 2025). AI can *assist* discovery. It does not replace counsel's Rule 26(g) certification or Rule 37 responsibilities.

PRIVILEGE AND WORK PRODUCT: WHO ASKED THE AI—AND WHY?

Not every responsive AI interaction may be discoverable. Rule 26(b)(3) protects qualifying materials prepared in anticipation of litigation. Courts are already confronting whether AI interactions fall within that protection. AI use may also implicate counsel's independent confidentiality obligations. Model Rule 1.6(c) requires lawyers to make reasonable efforts to prevent unauthorized disclosure of, or access to, client information, while the duty of technological competence requires counsel to understand the benefits and risks associated with relevant technology. Those obligations may require counsel to consider not only a platform's security and retention practices, but also whether particularly sensitive information should be redacted, anonymized, or otherwise protected before it is submitted to an AI system. What constitutes reasonable protection will necessarily depend on the sensitivity of the information, the capabilities and safeguards of the particular platform, and the circumstances of its use. In *Morgan v. V2X, Inc.*, the District of Colorado held that a pro se litigant's AI-assisted litigation work could receive Rule 26(b)(3) work-product protection, while concluding that the identity of the AI platform itself was not protected. The court also imposed AI-specific safeguards governing the use of confidential discovery material. *Morgan v. V2X, Inc.*, No. 25-CV-01991-SKC-MDB, 2026 WL 864223, at *3–7 (D. Colo. Mar. 30, 2026).

The emerging lesson is highly fact dependent: who created the prompt, why it was created, whether counsel directed the work, what information was disclosed, and how the platform handled it may matter much more than the label "AI."

PROOF: IS THE AI OUTPUT WHAT YOU SAY IT IS?

Discovery is only half the problem. Eventually, someone may want to introduce AI-related material into evidence. Rule 901(a) on authentication requires sufficient evidence to support a finding that an item "is what the proponent claims it is." Fed. R. Evid. 901(a). Rule 901(b)(9) specifically contemplates evidence describing a process or system and showing that it produces an accurate result. Existing machine-generated-evidence cases provide a useful starting point. In *United States v. Lizarraga-Tirado*, the Ninth Circuit distinguished human-entered information from automatically generated Google Earth information and explained that machine-generated information could be authenticated by





evidence showing that the process or system produces an accurate result. 789 F.3d 1107, 1109–10 (9th Cir. 2015). That distinction may become increasingly important with AI.

Counsel confronting an AI-generated image, summary, analysis, or purported recording should ask: Who created it? What inputs produced it? Was it altered? Can the process be reproduced? What metadata exists? And where? Is the proponent offering a human assertion communicated through AI, or information generated by a machine process? Answers to each or any of these queries may impact what steps need to be taken for authentication.

AI also creates the opposite problem: authentic evidence may be attacked as synthetic. Rule 901's relatively modest threshold remains applicable, but deepfakes and generative editing will likely make provenance, metadata, witnesses with knowledge, and expert testimony increasingly important. And where AI-generated analysis is offered through an expert, Rules 702 and 703 remain additional gates. The fact that an expert used AI does not relieve the proponent of establishing that the expert's methodology is reliable and that the opinion rests on an adequate factual basis. Calling an analytical process "AI" does not establish reliability.

THE BIGGEST QUESTION: WHAT SHOULD COMPANIES PRESERVE NOW?

In most circumstances corporate counsel should not respond to these considerations by preserving every employee's AI history indefinitely. That would often be unnecessary, expensive, and inconsistent with the basic concepts of proportional discovery. The better approach is familiar from traditional ESI practice:

- identify approved AI platforms and understand their retention settings;
- determine which business functions use AI for legally significant decisions;
- add relevant AI sources to litigation-hold questionnaires;
- determine whether prompts, outputs, and logs can be exported or preserved;
- address AI use expressly with experts and litigation vendors;
- include AI in Rule 26(f), ESI-protocol, and protective-order discussions when relevant; and
- document reasonable preservation decisions.

The emerging cases suggest a simple rule. Do not necessarily ask simply whether AI is discoverable. Ask whether the information created through an AI tool would be discoverable if it had been created by email, text message, spreadsheet, or any other electronic system. From that standpoint, the Federal Rules already supply much of the answer.

BOTTOM LINE

AI is creating new sources of evidence, not a new law of discovery. Prompts may reveal intent. Outputs may document decision-making. Logs may establish a chronology. Expert prompts may reveal methodology. AI-assisted litigation work may implicate privilege or work product. And AI-generated evidence will test familiar rules concerning authentication, reliability, and proof.

For corporate counsel, the challenge is therefore not predicting a future set of AI discovery rules. It is ensuring that existing preservation, discovery, privilege, and evidentiary practices recognize that AI has become another place where legally significant information is created. The organizations best prepared for AI discovery will be those that make that adjustment before the litigation hold arrives.

ROBINS KAPLAN LLP

800 LASALLE AVENUE
SUITE 2800
MINNEAPOLIS MN 55402

BISMARCK
1207 West Divide Avenue
Suite 200
Bismarck, ND 58501
701 255 3000 TEL

BOSTON
800 Boylston Street
Suite 2500
Boston, MA 02199
617 267 2300 TEL

LOS ANGELES
2121 Avenue of the Stars
Suite 2800
Los Angeles, CA 90067
310 552 0130 TEL

MINNEAPOLIS
800 LaSalle Avenue
Suite 2800
Minneapolis, MN 55402
612 349 8500 TEL

NEW YORK
1325 Avenue of the Americas
Suite 2601
New York, NY 10019
212 980 7400 TEL

SILICON VALLEY
555 Twin Dolphin Drive
Suite 310
Redwood City, CA 94065
650 784 4040 TEL

SIOUX FALLS
150 E 4th Place
Suite 704
Sioux Falls, SD 57104
605 335 1300 TEL

800 553 9910
ROBINSKAPLAN.COM