

When **Congress** knocks on your door

Lawyer and former investigator **MICHAEL BOPP** talks to Brunswick's **KEVIN BAILEY** about navigating the charged Capitol Hill landscape

AN AIR OF THEATER SURROUNDS US congressional committee hearings: from the Members' prepared lines and choreographed questioning to the dramatic soundbites and tense moments. But once the cameras are off and the performances ended, the legal and reputational damage for businesses and individuals involved may have only just begun.

Michael Bopp, a Partner in law firm Gibson, Dunn & Crutcher, knows the stage well. He has led major investigations in both the US Senate and House of Representatives and now helps clients navigate this complex legislative landscape.

In a recent conversation with Brunswick, Bopp stresses the importance of rigorously preparing a communications strategy from the outset, calling it "an investment that will pay huge dividends as a serious investigation unfolds."

This preparation needs to extend far beyond simply figuring out what to say or do: parties under investigation should "spend as much time planning *how* to deliver their messages as they do on developing the messages themselves," Bopp says. "Companies that don't plan ahead can leave that first part on the cutting-room floor because they run out of time."

What might people find surprising about congressional inquiries?

That they aren't all created equal. Receiving a letter from an individual member of Congress or a Senator is very different than receiving a letter from the Chair or Ranking Member of an investigative committee.

Different in what sense?

Committees hold all the investigative authority. They can compel you to testify or produce documents. Individual members hold none of that, even though you see letters with an air of authority behind them, saying things such as, "I expect you to comply..."



“
You’re not
always going
to be given
a chance
in the hearing
to tell your side
of the story
”

What’s the first thing companies should do when they receive a letter from Congress?

It sounds obvious, but they should look at the letterhead. Understand who the letter is from and whether they have the authority to issue a subpoena or force a hearing. The calculus of who should respond (or whether to respond at all) is very different when your compliance is voluntary, as opposed to when it’s mandatory.

What should happen next if a Committee investigation is involved?

Make sure you have the right team of advisers in place. Investigate internally and establish your potential exposure while you have the time to do so. Otherwise, the day before a subpoena response



is due you have someone tell you, “Oh my gosh. Look at these emails we didn’t know we had.”

What mistakes do companies that find themselves in this position commonly make?

One is not taking a letter or an inquiry seriously enough. They fail to appreciate who it’s from or they underestimate just how much is at stake.

Another is not developing or articulating an affirmative narrative. It’s easy to get caught up in the day-to-day of trying to respond to all of the Committee’s requests and demands. Then you find yourself faced with a surprise report, issued by the Committee to select media outlets the day before the hearing as a sort of “curtain raiser.”

If you haven’t already talked to those same reporters and positioned the story from your client’s point of view, you’re scrambling and on the defensive.

What’s the best way to avoid that?

Having your team of legal and communications advisers work together closely. When they’re in sync, it helps a company find the right things to say and the best way to say them.

You’re not always going to be given a chance in the hearing to tell your side of the story. Regardless of how cooperative you are or how patiently you explain your position, the Members still might not hear – or might not *want* to hear – what you’re saying. That makes having the right alternative channels for messaging all the more important.

Doesn’t speaking up carry its own set of risks?

It can definitely incentivize the Committee to go after you and create a little bit more of a circus atmosphere. And obviously the media tend to focus on contested, vitriolic hearings.

Of course, the ideal outcome is figuring out how to get your message out in a way that’s not going to antagonize them. But I have had clients achieve better results by pushing back a bit, speaking out.

Committee investigations have been perceived as little more than political theater. Is that fair?

There’s no question that there’s a political overlay to many investigations and hearings. But most are more bipartisan than people realize, and they often break important ground. It’s the ones where the subject matter or the people involved are polarizing that take on more theatrical aspects.

“
If your message is in an article and it’s cogent, it could be enough to make a reader stop and say, “Hey, there are two sides to this story”
”

MICHAEL BOPP

A Partner in the Washington, DC office of law firm Gibson, Dunn & Crutcher, Michael Bopp chairs both the firm’s Congressional Investigations Subgroup and its Public Policy Practice Group. Previously, he spent 12 years running investigations in Congress.

The law firm of Gibson, Dunn & Crutcher employs more than 1,200 lawyers in 19 offices throughout the US, Europe, the Middle East, Asia and South America.

Are there Committees or Members who are particularly adept investigators?

The Senate Special Committee on Aging has done probing investigations in recent years, largely because the Chair and Ranking Member collaborate. The Permanent Subcommittee on Investigations in the Senate and the Committee on Oversight and Government Reform in the House both have broad power and storied histories. You would not want either of them investigating you.

Senator Elizabeth Warren from Massachusetts is unique in that she employs her own investigative team, separate from any Committee.

What does success look like when you’re being investigated?

Aside from making sure the investigation runs its course as fairly as possible, it’s very circumstance-dependent. Success might be avoiding testimony or not appearing in the Committee’s report. Occasionally, that’s doable. If, for instance, the Committee casts a wide net and investigates 20 or 30 companies, you know each one won’t testify.

But in an investigation where the Committee focuses on, say, three companies, success might be remaining as uninteresting as possible.

While it can be hard to avoid criticism entirely, the right strategy can simply be taking steps to avoid being singled out in a report or at a hearing. The Committee looks at you and says, “Yeah, all right, they’re just like the rest of ’em.”

What about in situations you know are going to be hostile?

If you know an investigation is almost certainly going to produce a scathing report, success can be simply tempering that. At a hearing, you can look to make your points through your answers, or find ways for the report to take a more balanced view.

But you also can inject balance through your opening statement and your media relations efforts. Even though you know it’s not going to be a headline, if your message is in an article and it’s cogent, it could be enough to make a reader stop and say, “Hey, there are two sides to this story.”

KEVIN BAILEY, a Partner in Brunswick’s Washington, DC office, focuses on litigation and crisis communications. Prior to joining Brunswick, he served as BP’s head Washington lawyer.