

The Metropolitan Corporate Counsel

www.metrocorpcounsel.com

Volume 17, No. 4

© 2009 The Metropolitan Corporate Counsel, Inc.

April 2009

Financial and Economic Crisis – Law Firms

The Potency Of The Investigative Power Of Congress

The Editor interviews John F. Sopko, Partner in Akin Gump's Washington, DC, office, who has 20 years of experience in conducting congressional investigations in both the U.S. Senate and the House of Representatives.

Editor: Which of your key assignments as chief counsel for numerous congressional investigating committees has given you the greatest personal satisfaction? Would you enumerate some of those assignments?

Sopko: That is difficult to answer, as I've done hundreds of investigations and worked for three great bosses – Sam Nunn, John Dingell and Jim Turner – all of whom appreciated Congress's oversight role. What is most satisfying about doing oversight is it can lead to positive change in legislation, policy or procedure. One investigation that was particularly satisfying because it resulted in major programmatic improvements started after the famous redefection of KGB agent Vitaly Yurchenko from a Georgetown restaurant. As a result, Sen. Nunn had me look into the U.S. government's programs for handling defectors and émigrés from the former Soviet Union. It led to a number of positive internal changes in the CIA and Defense Department. Another investigation I conducted for Sen. Nunn looked at our nation's response to an attack with a weapon of mass destruction. The upshot of this investigation was better preparation and coordination between state and federal agencies, which in turn helped in the response to the September 11th attacks. However, I think my most satisfying work was for Chairman Dingell on the House Energy and Commerce Committee dealing with problems with the FDA on drug and food safety. These investigations not only identified serious shortcomings in the management and funding for that agency but also

laid the groundwork for the legislation that will no doubt pass in this Congress to strengthen those programs.

Editor: Please describe your role at Akin Gump.

Sopko: I joined Akin Gump in January as a partner in Washington, D.C., to focus on congressional and federal investigations as part of the firm's public law and policy practice. Akin Gump has developed a unique team and a singular approach to congressional investigations; I am co-leading the congressional investigations group with Steve Ross, a former general counsel to the House of Representatives who has focused on congressional investigations for nearly his entire career.

Editor: Do you expect the 111th Congress to be as actively engaged in conducting investigations as was the 110th Congress? What committees do you foresee will be the most active?

Sopko: From my vantage point, the question is not what will be the focus of congressional oversight, but what will not. Congress has already started with a flurry of oversight in the financial arena that will continue for the next two years. This has been joined by oversight activity related to health, food and drug safety, global warming, energy pricing and other key areas that, not surprisingly, are part of the broad legislative agenda of the administration and Democratically controlled Congress. The two are related. I predict a growth in oversight partly because Congress often uses the investigatory process as a precursor to legislative action.



John F. Sopko

As the legislative agenda is broad, so will be the prerequisite oversight agenda. My old committees – House Energy and Commerce and the Senate Permanent Subcommittee on Investigations – will be quite active, as will Rep. Edolphus Towns of the House Oversight and Government Reform Committee, particularly in the area of health care reform and financial abuses. In addition, we can expect a number of committees to study government procurement issues, including the Senate and House Armed Services Committees, the House Oversight and Government Reform Committee, and the Senate Homeland Security and Government Affairs Committee, which created a special subcommittee specifically to examine procurement issues. At the same time, I predict aggressive oversight from committees not normally associated with such activities, due to changes in their leadership. In particular, I suspect that the Senate Commerce and Foreign Relations Committees will embark upon healthy oversight agendas with their two new chairmen, who have hired well-respected oversight staffs.

Editor: How does navigating through a congressional inquiry differ in terms of treatment of witnesses from an investigation conducted by the Department of Justice or another part of the Executive branch?

Sopko: Having worked in all three capacities, I have a unique perspective on congressional oversight practice and procedures. I was a state prosecutor and a federal prosecutor with the Organized Crime section of the Department of Justice. I also led investigations with the Department of Commerce's export control section and have had years of experience dealing with inspector generals and other federal law enforcement agencies. Although similar, none of that was quite like

my more than 20 years of congressional oversight experience. To successfully navigate congressional oversight, one has to appreciate that it is a unique blend of white collar defense, lobbying, regulatory oversight and crisis management all within a very political and public environment. This environment influences one's approach to advising witnesses and clients. One must not only know the rules of procedure of both the House and the Senate as well as those of each committee and possibly subcommittees, such as the Permanent Subcommittee on Investigations, but also appreciate the personalities and motivations of each committee.

Editor: What role does e-discovery play in congressional investigations?

Sopko: Discovery of electronic documents is a major tool for congressional oversight committees. Most congressional investigations start off with a document request, usually massive in scope, that attempts to capture electronic documents and messages. A committee may issue multiple requests, so the recipient has to be particularly careful in messages sent after or in response to the first request. Numerous witnesses have learned to rue the innocent email commenting on their views of the committee and its members that is captured in a subsequent request.

Editor: Can trade secrets be protected? What about the attorney-client privilege?

Sopko: The courts have ruled that Congress does not have to recognize these privileges, but they can be protected, particularly if you know how to negotiate with the committee members and their staff. Most congressional members and staff with whom I've dealt recognize the importance of those privileges and do not want to harm a company by needlessly releasing trade secrets. However, as in most matters with congressional oversight, these things must be negotiated on a case-by-case basis.

Editor: To what extent does the trial bar feed off disclosures made in connection with congressional investigations? What strategies can be used to mitigate this risk?

Sopko: There is a bit of that actually going both ways. The plaintiff's bar feeds off disclosures made before committees resulting in litigation. Likewise, material disclosed in the course of litigation often ends up on the Hill and becomes the basis of investigations. Probably one of the best-known examples came out of the tobacco litigation.

Editor: Why should corporate counsel and corporate executives be alert to the fact that many representatives of corporations may be called to testify in this current environment?

Sopko: A request from Congress for an appearance or for documents should not be taken lightly. Let's say you're a major government contractor. I think it's just common sense that you should be aware of what's happening on the Hill with regard to the breadth of congressional investigations and how they could impact you and your company. The ramifications of a congressional investigation go far beyond the actual hearing itself and can threaten the reputation of a company, its CEO, and/or a product, and can cause serious harm to an individual's future employment as well as adversely impact investor confidence in a company. Everybody should be aware that Congress is going to be very active over the next two years and should act accordingly. When Congress comes calling, you'd better take it seriously.

Editor: Why is it important for a corporate witness to formulate a strategy in advance of appearing before a committee? Do you feel that those who may be vulnerable should review their activities to reduce their exposure before they are asked to appear? Why is a non-confrontational approach best?

Sopko: The best strategy is to avoid appearing before Congress. Many of our clients approach us early on when we can be most helpful in devising a strategy to respond to a nascent investigation. As a full-service law firm with a large public policy practice, Akin Gump understands the Hill and how it operates. Our approach to congressional investigations is to provide strategic advice to protect a client's legal, political and reputational standing. Steve Ross and I – as well as others at the firm – are experienced in understanding what motivates congressional investigations, so we can devise a strategy to protect a client's interests with respect to both the congressional proceedings and those in other forums. Going back to my earlier point, Congress is a unique beast and its investigations have far-ranging repercussions. Understanding the political motivation for, and objectives of, the investigation is key. In some cases confrontation and publicity are what a committee wants. In others it is obtaining consensus for legislation. Knowing the difference can significantly impact how we advise a client's response.

Editor: What role can a public relations expert play in preparing a witness?

Sopko: Just as you need an expert lawyer who understands the nuances of an investigation, many times you also need similar expertise on public relations. We regularly work with clients to coordinate their messaging with public relations experts who regularly work with the media.

Editor: How can the press and other media be used to advantage to help defang a hostile committee?

Sopko: That is one of the more difficult tasks facing a client. We regularly work with clients to coordinate their messaging as they participate in congressional investigations, so that the message delivered in a hearing room is consistent with the message conveyed to the public and both are what the client wants disseminated. To do this, you must understand the press stories and how they relate to your client's message. Knowing that, sometimes the best press policy is actually no press or as little press as possible.

Editor: Sometimes asking for immunity from prosecution and taking the Fifth Amendment are not the best responses to an inquiry. Why is this the case?

Sopko: Again it goes back to the public nature of congressional oversight. One always has to weigh the publicity of any advice you may give a client who is called to testify, whether this is invoking the Fifth Amendment or seeking a grant of immunity. It is one of the things considered when advising a client, and that is why such actions are viewed on a case-by-case basis. Many investigations are motivated by press interest, and it is usually newsworthy when a witness takes the Fifth.

Editor: Why should corporate witnesses responding to congressional subpoenas always engage an experienced counsel?

Sopko: For two reasons. First, a congressional subpoena or investigation is serious. It can be as damaging to a client as an indictment or any other lawsuit. Second, it is a unique area of the law and one where you need counsel with the requisite qualifications and experience. It is analogous to a visit to your doctor who tells you he has discovered a spot on your lung. To whom do you reach out? Do you contact your family physician or seek out a specialist in lung diseases? Getting a letter or subpoena from Congress calls for a specialist, someone who can navigate the congressional investigations process and avoid the legal and political pitfalls with which such proceedings are replete.