dentons.com

DENTONS

Insights and Commentary from Dentons

The combination of Dentons US and McKenna Long & Aldridge offers our clients access to 1,100 lawyers and professionals in 21 US locations. Clients inside the US benefit from unrivaled access to markets around the world, and international clients benefit from increased strength and reach across the US.

This document was authored by representatives of McKenna Long & Aldridge prior to our combination's launch and continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@portfoliomedia.com

Congressional Testimony: What To Do (And Not Do)

Law360, New York (April 21, 2010) -- Imagine the opening statements of any attorney representing a plaintiff in a personal injury or wrongful death case against Toyota:

"Ladies and gentlemen of the jury, the president of Toyota, the man whose name is on all of those cars, took full responsibility for the failures of Toyota to provide safe cars. He admitted, under oath, that Toyota pursued growth over the speed at which they were able to develop their people and organization and that this failure resulted in the safety issues and accidents that Toyota drivers have experienced."

While plaintiff and defense counsel may argue about whether Mr. Toyoda really said any such thing, any executive faced with testifying before Congress at the same time the company faces civil litigation is between the proverbial rock and hard place. The executive cannot refuse to testify; the testimony will be public; and every faction of the company may have a different view on what to say. An effort to maintain customer loyalty during bad publicity from a recall, for example, can create negative evidence for the inevitable lawsuits.

Moreover, an initial congressional request for testimony may not be the end of legislative inquiry. GlaxoSmithKline, for example, is battling against a U.S. Senate Finance Committee report alleging the company has concealed data suggesting that its drug, Avandia, increased the risk of heart attacks. According to the Senate report, GSK knew of possible heart attack risks tied to Avandia years before evidence of a link became public.

Tami Azorsky

Megan Kinsey-Smith

The report states that based on this knowledge, GSK had a duty to sufficiently warn patients and the FDA of the concerns in a timely manner, which it did not do. GSK has issued a response in the form of a white paper disputing the Senate report allegations, stating that the report failed to present an accurate, balanced and complete view, completely ignoring the final results of multiple studies demonstrating the safety of Avandia. Despite GSK's quick response, the damage that could be done in pending product liability personal injury litigation by the Senate report is obvious and is demonstrative of the unfortunate turns congressional investigations may take.

Various factors can influence the likelihood of congressional focus as a result of a product defect, failure or recall. A legislator may want to investigate a well-known or widely used product. A legislator may want to reform the agency that approved that product. A legislator may have a constituency that is critical of the product. A legislator may see an opportunity for political gain.

Regardless of the motive for the inquiry, facing a congressional inquiry is challenging for a company from the moment a legislator decides to request an inquiry until the final lawsuit arising out of the recall, defect or failure is resolved. The company is being tried in the court of public opinion.

In an attempt to satisfy the public when being questioned by Congress, the company should be careful not to cause exponential losses in civil litigation. Worse yet, many decisions must be made typically on a very short deadline.

Traveling this road, therefore, requires careful consideration. Paramount is the fact that anything you give to Congress or say to Congress, whether it be designated as confidential, trade secret, privileged, or otherwise protected, will be made public. And, it is highly unlikely that many individuals who have the information will have any interest in helping the company.

Based on these challenges, one might ask why Mr. Toyoda would testify at all given the potential consequences and the fact that Congress really had no power over him. The answer is pretty simple — business. His testimony likely was aimed at accomplishing three goals: (1) restore American confidence in his company; (2) respond to Congress's concerns and try to halt any further congressional interest; and (3) do all this with as little damage to the company's litigation position as possible.

In reality, congressional testimony may be required or it may be discretionary. Regardless, there are issues to be carefully considered when the specter of congressional testimony looms.

1. Balance ongoing business concerns with litigation concerns.

When faced with the prospect of congressional testimony, it is important to balance the company's ongoing business concerns with potential litigation issues. Management should involve both those adept at government affairs and the litigation team. Both perspectives are important to the decision to appear and the preparation.

Importantly, when testifying it is not necessary to disclose what went wrong, especially when investigations are not yet complete. Any preliminary assessment of what caused the issue may become accepted reality even if later investigation proves it inaccurate.

Moreover, it is not necessary to reveal preliminary considerations. The reality is that legislators are not interested in what went wrong; they want to know that the issues are being corrected and there is a clear path forward. Legislators are likely not experts in the technologies or systems that may have failed or in the appropriate corrective actions and they should not be treated as such. The focus should be on efforts to protect the public and the steps to improve quality, not on defending past actions.

A prepared statement or prepared written testimony should address main themes — much like an opening statement in a trial. This is a chance to get the story to the legislators and the public. The written statement is not a place to be defensive. Worst case, past conduct might have to be addressed in oral questions. Of course, in a perfect world, statements that could be misconstrued should be avoided in the first place. And that leads to the second recommendation:

2. Prepare

Although these types of situations usually occur on a very quick timeline, it is important to prepare witnesses thoroughly. Any witness that will be before Congress should be prepared to weave in the company's themes throughout their answers to the questions. They should also be prepared to be presented with questions to which they do not know the answers.

In this situation, a witness should never try to answer something he or she does not know or even respond to an inquiry about a fact on which he or she is not 100 percent sure. Unlike testimony before a court, committee hearings accept submissions of information after they conclude. It is always better to have additional time to craft accurate and properly worded answers than to have a witness answer on the spot without all the necessary information.

Additionally, testimony to Congress is typically under oath. The witness must tell the truth. If testimony is false, the company could face future investigations and indictments, including prosecution under 18 U.S.C. § 1001 for fraud and false statements, 18 U.S.C. § 1505 for obstruction of U.S. Senate proceeding, or other numerous charges.

Many times the individual witness could face the same charges as well. For example, in 2001 multiple executives of Purdue Pharma LP testified before Congress on the company's knowledge regarding adverse events related to MS-Contin Tablets, or OxyContin. In their statements, the executives represented that the company had no knowledge of unusual experience of abuse or diversion with the drug.

After further investigation by the company and the government, however, these statements proved to be false. Both the company and the individuals were threatened with criminal indictments because of these statements. Ultimately, in 2007, Purdue Pharma and the individual executives pled guilty to lesser charges than what the threatened indictments listed. Purdue, however, ended up paying a fine of $19 million, and the individuals faced other punishments — all for statements that when made by the executives were not known to be false, but perhaps were made without complete investigation.

3. Testimony May Begin Before the Appearance

In addition to witness preparation, it is advantageous to reach out to the staffers of the members that are on the committee before the hearing. Pre-work with the staff provides three significant benefits.

First, the company may learn about the topics of focus or concern and the view of the legislators preparing for the hearing. That knowledge could help in crafting of messages and witness preparation.

Second, pre-work with the staff might reveal a sympathetic legislator. The company may have the opportunity to provide factual information ahead of the hearing to bolster that support.

Third, pre-hearing communication with the staff may provide the company a chance to present the committee with the corrective efforts that the company is making before the hearing. It is an opportunity to prime the pump. And, in some exceptional cases, it may even make it possible to avoid the need for the testimony.

In sum, the challenge of testifying before Congress in the wake of revelations regarding significant product failures, defects, or recalls, are daunting. They can be managed, however, with careful cooperation among the potentially competing business and litigation interests and careful planning.

--By Tami L. Azorsky (pictured) and Megan Kinsey-Smith, McKenna Long & Aldridge LLP

Tami Azorsky is a partner with McKenna Long in the firm's Washington office and chairperson of the firm's litigation department. Megan Kinsey-Smith is an associate with the firm in the Washington office.

The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.