

A Refresher On Witness Testimony In 3 Key Settings

By **Jack Sharman and Tyler Yarbrough** (February 21, 2024)

The recent controversy over congressional testimony by Claudine Gay, then-president of Harvard University; Liz Magill, then-president of the University of Pennsylvania; and Sally Kornbluth, president of the Massachusetts Institute of Technology, reminds us of what to emphasize, and what to avoid, when preparing witnesses for testimony in highly visible and contentious congressional hearings.

Congress is neither a court nor a classroom: It lacks the neutral rules of the former and the intellectual give-and-take of the latter. For the congressional witness, the Hippocratic mentality — first, do no harm — is a necessity.

In this article, we set out reminders for congressional witnesses and their counsel. These observations also apply to white collar practice outside the congressional hearing room, so we highlight practical similarities and important differences between and among congressional testimony, testimony before a grand jury and testimony at trial.

The Congressional Witness

Who are the stars?

In Congress, the member is the star. In the grand jury room, the prosecutor is the star. In the courtroom, the witness is the star.

What are the implications? This involves three different mindsets for the witnesses; therefore, neither preparation beforehand nor testimony in the moment can be recycled.

Is the testimony asymmetric?

Yes. Not all congressional testimony is worth the same. Much of the three college presidents' testimony was fine — or unexceptional, at least. The antisemitism and campus-policy discussion was an exchange of a few minutes in a lengthy hearing.

The asymmetric weight of congressional testimony reveals the danger of the forum. Like the college presidents, your witness may be educated and accomplished, a person of strong views and nuanced argument. Such a witness likely believes that everything they say is of equal, considerable and persuasive weight.

The witness must be sensitized to the reality that, at least in the context of congressional testimony, none of that is true. All moments are important; a few can be fatal.

Do the policies of the witness's organization pose a danger?

Frequently. An organization's policies, pledges and mission statements can create an expected standard of conduct higher than what otherwise might be the case. Much cross-examination material can be based on inchoate or contradictory standards.



Jack Sharman



Tyler Yarbrough

We saw this principle employed to a devastating effect against the three presidents when the examining member of Congress did a deep dive into the universities' policies about conduct and free speech, and then exploited inconsistencies and pretense.

As the lawyer, there is not much you can do about the organization's preexisting policies, but your witness needs to have a mastery of the policies and have been subjected to cross-examination on the inevitable vagueness, inconsistencies or foolishness of the policies.

At the hearing, does the witness have to be a Boy Scout?

Almost always. If you are a witness and you get a "Boy Scout" question, give a "Boy Scout" answer. Period.

What do we mean by Boy Scout questions and answers? The Scout oath requires that a Scout be "trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent."

This list goes to the fundamentals of character and morality. It is simple, powerful and readily understood. If asked whether these adjectives describe that which is good or that which is bad, overwhelming numbers of people will say the former. Trustworthiness, for example, is a good characteristic, while deceitfulness is a bad characteristic — even though deceit is often fundamental to important undertakings, such as law enforcement questioning.

When a witness equivocates about the value of these characteristics, the questioner — or judge and jury — will doubt the witness's credibility. In practice, we saw the committee's examining member sow grave doubts about the college presidents' credibility with simple questions about antisemitism and campus policies.

The history and politics of the Middle East are complex in the seminar room, but in the congressional forum, a simple and blunt response about the unacceptability of antisemitism under school policy was the only answer that was going to work.

What kind of environment is a congressional investigation?

A congressional investigation is an alien environment. Although there are Senate rules, House of Representatives rules, and committee rules and resolutions, there are no analogs to the Federal Rules of Evidence or Criminal or Civil Procedure.

The committee's investigation takes place in a political environment, and the actors have political goals.

Are all congressional investigations the same?

Congressional investigations are not monolithic. They are often highly personalized between members, between the majority and minority parties, between staffs, and between committees with potentially overlapping jurisdictions.

Counsel and witness are dealing with individuals rather than "Congress."

Do counsel and witnesses understand the context of the investigation?

Initially, probably not. As soon as you or your client is contacted, attempt to gain as much information as possible about the investigation, the upcoming hearing and your client's role.

Unlike grand jury investigations, a congressional investigation does not remain secret for long — if it's ever cloaked at all. In addition to national media, Washington, D.C.-centered platform specialists such as Axios, Punchbowl News and Semafor can provide useful background on personal and political dynamics.

How proactive should I be?

Very. Ask lots of questions. What is the subject of the investigation? How long has it been going on? How long might it last?

Are any other committees or subcommittees looking at the same issue? Is the executive branch — the U.S. Department of Justice or the regulatory agencies — looking at the same issue?

Is the committee headed toward hearings? Has a date been set? Is the investigation a bipartisan inquiry? Minority only? Majority and minority, but working separately?

What is the process?

Counsel must then attempt to determine the witness's role in the investigation — or, more precisely, the committee's perception of your client's role. What are the ground rules, if any? Is there a House or Senate resolution concerning the investigation?

Request copies. Resolutions and rules define authority and offer counsel opportunities to exploit. They will help you make strategic decisions — for example, whether you should participate voluntarily or only by subpoena, whether the staff deposition to which your client is being asked to submit is formally authorized, and whether or not the committee intends to grant witnesses immunity.

What is the hearing about?

Remember, the hearing is about the questioning member. The committee members' purported questions are rarely designed to elicit information from the witness. They are microspeeches to maximize camera time on the questioner or to score political points against the opposition.

The witness should expect frequent interruptions; indeed, it is somewhat rare when a witness is actually able to complete an answer. There is no judge present to whom the witness can appeal, nor should you expect the chair to step in.

The Grand Jury Witness

Preparation is equally important for the grand jury witness. The federal grand jury is one of the most powerful, secret and peculiar institutions in American law and culture. It is certainly the most one-sided institution and the one that most witnesses find runs counter to their civics class understanding of American governance.

What purpose does the grand jury serve?

The witness must understand that, at least in modern practice, the grand jury has a different, prosecutor-specific role than a trial jury.

Under the Fifth Amendment to the U.S. Constitution, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

Historically, and in theory, even today, the grand jury is "a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor," as articulated by the U.S. Supreme Court in its 1973 U.S. v. Dionisio decision.[1]

In reality, the grand jury is a tool of the prosecution. Decades ago, Sol Wachtler, the former chief judge of the New York Court of Appeals, famously observed that a prosecutor could "get a grand jury to indict a ham sandwich." [2]

What can the witness do about grand jury secrecy?

For better or for worse, not much.

Federal Rule of Criminal Procedure 6 governs grand jury secrecy. Because secrecy is one of the most powerful and dangerous characteristics of the grand jury, the prudent lawyer should review Rule 6 diligently.

Can the witness benefit from a lawyer?

As with the witness during the congressional hearing, the role of the lawyer at the grand jury session is limited. A lawyer may not accompany their client into the grand jury room.

Counsel hangs out in the hall or a witness room and waits either for their client to take a break or to be excused when the prosecutors have asked all that they wish to ask.

How does the witness prepare for grand jury testimony?

In some respects, preparing a grand jury witness for their testimony is the same as preparing any witness for sworn testimony. Because of the peculiarities of the grand jury process, however, there are some aspects of preparation that would be odd in other contexts.

Tell the truth.

Remind the witness to always tell the truth. The witness who lies, misleads or obfuscates in the grand jury may face not only a perjury charge, but also a federal false statement or obstruction of justice charge.

Exercise discipline.

Because the witness in the grand jury room is without a lawyer, they must exercise unusual discipline. What do we mean by that?

Listen to the question.

The witness must listen to the question with even greater clarity and focus than would be required in a deposition, hearing, trial or any proceeding where their lawyer is available.

There is no counsel present to lodge an objection — speaking or otherwise — or to force the prosecutor to ask a clear question. In addition, unlike a deposition, the witness can be questioned by virtually anyone in the room: prosecutors, an agent and individual grand jurors.

Stand your ground.

A grand jury witness must also be prepared to stand their ground. Like a congressional hearing or an average day at trial, a grand jury room can be an odd combination of hostility and lethargy.

The confrontational or accusatory tone often found in grand jury examinations is foreign to most witnesses, most of whom have consumed a steady diet of television where prosecutors, agents and police officers are the good guys and the individuals they are pursuing are the bad guys.

Your witness needs to be reminded that the reason they have been subpoenaed to testify before the grand jury is because someone in law enforcement believes they have knowledge of a crime, or even a potential crime.

This is not a business deal.

If your client is a businessperson, they should be reminded that many prosecutors and agents lack extensive experience in the business world. Prosecutors and agents do not have customers, employees, vendors or patients. They do not have to undergo examination by stock analysts on conference calls or be called on the carpet before the CEO or the board because of a missed sales target or a clumsy merger.

Accordingly, any business activity, whether common or obscure, can seem potentially criminal to the prosecutorial eye. If, for example, the examining prosecutor professes to be shocked when the witness testifies that a check labeled "commission" was really a commission payment and not an unlawful kickback, the witness should be prepared to stick to their testimonial guns, if the witness in fact truthfully believes that it was a legitimate commission payment.

Do not be afraid to take a break.

Congressional witnesses are usually stuck with the committee's schedule, and trial witnesses depend upon the judge for a break. But grand jury witnesses can leave the grand jury room at any time to consult with counsel.

The Trial Witness

As previously discussed, at the congressional hearing, the member is the star. In the grand jury room, the prosecutor is the star. At trial, the witness is the star.

If the witness is the star, what are the implications that distinguish the witness's role?

The jury needs to like the witness. In congressional testimony, it does not hurt if the committee members like the witness, but it is not necessary for credibility or survival.

In the grand jury room, the prosecutor will mostly control the likability of the witness, aided by the fact that many grand jury witnesses ignore the rules we set out above.

In the trial courtroom, however, if the jury does not have a good feeling about the witness — that they are a likable, reliable, truthful person — then the witness's star will come crashing down.

How does the trial witness rehearse their star role?

The topic of witness preparation for trial could take up a book, and indeed, has taken up several very good books. The basics of witness preparation set above — tell the truth, listen to the question — remain valid and necessary for trial testimony.

Additionally, it is important that the jury perceive that the witness answers questions on direct and on cross in the same manner of demeanor, pace and civility.

Such even-handedness does not come into play as much in the congressional hearing context. In the grand jury context, there is no need to be even-handed because the procedure is, by definition and purpose, one-sided.

Conclusion

No amount of preparation, of course, can make a mean-spirited, unbelievable or lying witness suddenly generous, credible and truthful. Indeed, that ultimate roadblock is common to all three places — the congressional hearing room, grand jury room and trial courtroom.

A careful understanding of the differences between the three venues, however, will help witnesses succeed and hopefully move on with their lives.

Jack Sharman is a partner at Lightfoot Franklin & White LLC and chair of the firm's white collar criminal defense and corporate investigations practice group. He served as special counsel in the House Financial Services Committee for the Whitewater investigation of then-President Bill Clinton and then-First Lady Hillary Clinton, and currently serves as special counsel to the Office of the Georgia Secretary of State relating to inquiries into the 2020 presidential election.

Tyler Yarbrough is an associate at the firm.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] United States v. Dionisio, 410 U.S. 1, 17 (1973).

[2] Novelist Tom Wolfe quotes Judge Wachtler's "ham sandwich" observation in *The Bonfire of The Vanities* (1987).