

## Don't Fall On That Hill: Keys To Testifying Before Congress

By **Michael Atkinson, Jeff Severson and David Favre** (May 1, 2024, 5:14 PM EDT)

Congressional testimony has been front and center in the news lately, from ex-aides of former President Donald Trump facing questions to tech CEOs having to defend the morality of their companies' actions.

These stories demonstrate the many pitfalls and risks that accompany congressional testimony, and illustrate why preparation is the key to success.

This article will identify some of those concerns, and ways to avoid the pitfalls and mitigate the risks, in preparing for and providing congressional testimony.

### Preparing for Congressional Testimony

In depositions or other testimony, legal risk is paramount. In congressional testimony, there are additional risks layered on top, including political, reputational and financial risks. A multifaceted, thorough preparation is key to mitigating these risks, as is understanding the interplay between the risks.

### Legal Risks

The touchstone for congressional testimony is truthfulness, which is essential and non-negotiable. Witnesses can face prosecution for willful false statements to Congress: Perjury under Title 18 of the U.S. Code, Section 1621, applies to testimony under oath, while liability for false statements to Congress, in general, are subject to Title 18 of the U.S. Code, Section 1001, regardless of whether the witness was under oath.

For example, Michael Cohen admitted that he lied to the U.S. Senate Select Committee on Intelligence in 2017 about the work he did on a project to build a Trump Tower in Russia, and he pleaded guilty the following year to making false statements to Congress, in violation of Section 1001.[1]

Witnesses also have more limited privilege protections in congressional testimony. For example, common law privileges — such as the attorney-client privilege or work-product doctrine — are committee-dependent. Although congressional committees generally allow the invocation of common law privileges, they are subject to overruling by the appropriate committee member, as determined by the committee's rules.



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Witnesses retain executive privilege and constitutional privileges, such as declining to testify based on the Fifth Amendment right against self-incrimination. Understanding the exact privilege protections available to a witness is a vital part of preparation.

But the mere act of asserting privilege rights can create its own political, reputational and financial risks that need to be weighed as well.

Congressional testimony can have theatrical aspects to it, particularly for politically charged issues. While there can be advantages to responding theatrically, such as reaffirming the serious nature of an issue or demonstrating incredulity to a senseless question, witnesses still need to think carefully about the substance of their testimony.

Congressional testimony is on the record and can be used in subsequent legal actions — by government entities, particularly if it is voluntary and not compelled by subpoena, and by civil litigants. With that in mind, witnesses should carefully consider whether apologies may be admissions of liability or cause other downstream consequences.

At a Senate Judiciary Committee hearing earlier this year on online child safety, Meta CEO Zuckerberg **took the unconventional move** of turning to apologize to parents of children who died of causes they said were related to social media. It is worth watching to see if Zuckerberg's much publicized apology generates such downstream consequences. All of this is to say: Clients need to understand how the legal risks intersect with other risks.

### ***Political, Reputational and Financial Risks***

Because congressional testimony often comes with attendant political, reputational and financial risks, attorneys must recognize that they are only a piece of the preparation team. Others in public relations and government affairs will have a more prominent role in preparing for congressional testimony than in preparation for other forms of testimony, particularly when there is heavy media attention or if the hearing will be televised.

Attorneys should thus appreciate that good preparation requires blending legal advice with business advice. And the witness has to walk a fine line between the two approaches.

On the one hand, there is a danger of answers driven by public relations that play fast and loose with the truth. As noted above, there are multiple avenues for prosecution of false statements to Congress, not to mention the loss of credibility in the public's perception.

On the other hand, there is also an inherent danger in testifying publicly about politically charged topics, as exemplified by the fallout from the testimony about antisemitism and school policies by the presidents of three universities — Harvard University, the Massachusetts Institute of Technology, and the University of Pennsylvania — before the House Committee on Education and the Workforce in December 2023, in which careers were altered, and influential alumni expressed their intent to withhold financial contributions. These are some of the potential high-stakes consequences of congressional testimony.

Preparation should consider whether the hearing will be televised. For example, an attorney passing notes or whispering to the client may be viewed unfavorably, as could a witness responding to questions

in a rude or condescending manner. Clips of any negative actions can quickly make their way online, where they will remain indefinitely.

Preparation should also account for the differences between an interview, which is often less formal and conducted in a closed setting with committee members' staff, and a hearing, which is usually open to the public and media and where most members of the committee will be present.

In an interview, questioning will volley back and forth between the staff of majority committee members and the staff of minority committee members, but the questioning from each may span hours. In a hearing, majority and minority committee members take turns questioning the witness, but these questions are generally restricted to a shorter time limit of only a few minutes per member. In both situations, a witness must be prepared for various types of questions and various questioning styles.

Because the circumstances of congressional testimony can be so variable — heavily publicized or not, televised or not, interview or hearing, etc. — it is most important that the preparation be tailored to the situation.

### **Providing Congressional Testimony**

Testifying before Congress is unlike other legal proceedings. Congressional testimony does not have universal rules or requirements, and there are no federal rules of congressional testimony.

Each chamber has a set of governing rules, which may be further supplemented by an individual committee's own set of guiding documents. Additionally, motivations for the questions may lie more in political agenda or in generating soundbites for the media than in care about the elicited response.

The combination of politically motivated questioning and a lack of clear rules means that witnesses and their attorneys need to be nimble and prepared for questions that would likely be unacceptable in other forms of testimony. However, these same factors lead to increased freedom in possible responses, so long as those answers are honest.

In addition, attorneys must carefully consider how much to interject themselves into a witness's testimony.

For example, in a July 1987 televised hearing on the Iran-Contra scandal, Congress questioned Oliver North, a former National Security Council staff member, about his role in the sale of weapons to Iran to funnel money to Nicaragua's Contras.

North's attorney, Brendan Sullivan, broke from precedent by repeatedly objecting to lines of questioning. When Sen. Daniel Inouye reminded Sullivan that the hearing was not a court of law and that the federal rules of evidence did not apply, Sullivan famously responded, "Well, sir, I'm not a potted plant. I'm here as the lawyer. That's my job."<sup>[2]</sup>

While the line is iconic, and should remind counsel of their critical role in congressional investigations, such epic drama is not the goal of witnesses appearing before Congress or their attorneys. Instead, the goal tends to be much less dramatic, with well-prepared witnesses confidently and crisply answering questions in ways that make common sense, and attorneys ending up appearing to be a "potted plant."

Whether dramatic or not, effective congressional appearances require a clear understanding of the many ways things can go wrong and appropriate planning according to those possibilities.

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[1] <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=391451>.

[2] <https://www.c-span.org/video/?c4511116/user-clip-potted-plant>.