



Inside Oversight: Levin Center at Wayne Law Tutorials

SERIES 5 OVERSIGHT GENERALLY

Tutorial: Handling a Difficult Lawyer

In this video, Levin Center experts offer tips and advice on how to handle a difficult attorney representing clients who are the subject of a Congressional investigation.

Instructors

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Transcript

Elise: Hi. I'm Elise Bean and this is Zack Schram, and we're here to share with you some tips we've learned over the years on how to handle a difficult lawyer representing the subject of a Congressional investigation. Both of us conducted oversight investigations for Senator Carl Levin on the Permanent Subcommittee on Investigations in the U.S. Senate.

Zack: During our time in the Senate, we ran into a number of difficult opposing counsel representing agencies, corporations, or individuals. Some fought us on producing documents, on scheduling or conducting interviews, on how our reports characterized the facts, or on how we planned to conduct a hearing. Sometimes they acted at the order of their client; sometimes the client had no idea what was going on. In this segment, we'd like to offer you some tips on how to handle a difficult lawyer, moving from the gentlest to the toughest alternatives.

Try honey first

Elise: Tip Number One: Try honey first. Most lawyers are not familiar with Congressional investigations, so sometimes all it takes to calm down a difficult opposing counsel is to provide more information about the rules and practices of the House or Senate. You can politely explain how Congressional investigations are different from civil and criminal litigation, in that they focus on policy issues and cannot impose a civil or criminal penalty on anyone. You can explain that the Supreme Court has upheld the right of Congress to conduct broad inquiries and how the Federal Rules of Procedure do not apply to Congressional proceedings. You can also explain that disputes are generally resolved by the Committee or Subcommittee itself, rather than by a court.

Use House General Counsel or Senate Legal Counsel

Zack: Tip Number Two: If polite explanations don't resolve the problem, try getting help from attorneys in the office of the House General Counsel or Senate Legal Counsel. Those offices can advise you on whether the opposing counsel is raising legitimate issues. They can also provide you with a letter or memorandum to help resolve legal disputes. More than that, they can provide you with an attorney who can engage directly with opposing counsel. For example, if opposing counsel is raising objections to document production, you can set up a meeting in which House or Senate counsel can appear on your behalf and directly address the legal issues. If opposing counsel is raising objections during interviews, you can ask House or Senate counsel to attend the interview and help deal with any inappropriate conduct. House or Senate counsel can even attend a hearing if you think opposing counsel might try to disrupt it.

Provide escalating warnings

Elise: Tip Number Three: If opposing counsel is still causing trouble, you can warn them about the potential impact on their client and even their own law firm. One approach is to tell the lawyer, first privately and later, if necessary, in front of the client, that the lawyer is not making any friends for their client by their conduct. A more serious step is to request a meeting with a more senior lawyer or representative, such as the head of the agency's Congressional liaison office, the agency's general counsel, a corporation's general counsel, a senior executive from the client, or the managing partner of the attorney's own law firm. At the meeting, you can explain the problem, ask for it to be resolved, and warn again that the counsel is not making any friends for the client or the law firm. Still another possible step is to send a letter to the agency or law firm describing the offending conduct and asking for substitute counsel.

Go public

Zack: Tip Number Four: If opposing counsel persists despite the escalating warnings, another tactic is to threaten to go public or actually go public with information about the attorney's conduct. A press release, floor statement, or press interview could be used to criticize actions taken by the attorney, his law firm, or the client. Since any public criticism of the attorney may also injure the reputation of the client, a key consideration should be whether the client has condoned the lawyer's troubling conduct.

Consider a hearing

Elise: Tip Number Five: If after all that, opposing counsel continues to disrupt or impede the investigation, you can choose to get really tough. One alternative is to hold a hearing focused solely on the client's failure to produce requested information or on the attorney's objectionable conduct. The offending counsel, his law firm, and the client could be called to answer questions about their actions and intentions. Since this step is labor and resource-intensive and requires the personal involvement of elected officials, it should be undertaken only after careful consideration of the costs and benefits.

Consider Congressional contempt proceedings

Zack: A more serious alternative is to issue a letter warning that the attorney, his firm, and the client are risking contempt of Congress or obstruction of a Congressional inquiry. That warning should be issued only after consulting with the House General Counsel or Senate Legal Counsel to ensure you are on solid legal ground. You should also consult with Congressional leaders to determine whether they are open to engaging in the complex and lengthy process involved with holding someone in contempt of Congress.

Make it bipartisan

Elise: One final tip is that, in all the actions we've described, it's best to act on a bipartisan basis. If you can show a united, bipartisan front, your warnings and actions will be taken more seriously by the legal counsel and client, and your opponents will face the daunting prospect of taking on both parties. The media is also more likely to treat your concerns as legitimate. To gain bipartisan support, it helps to consult regularly with your counterparts across the aisle and ask for their help in defending the right of Congress to investigate.

Handling a Difficult Lawyer

- 1. Try polite explanations first.**
- 2. Get help from the office of the House General Counsel or Senate Legal Counsel.**
- 3. Provide escalating warnings.**
- 4. Go public.**
- 5. Consider a hearing.**
- 6. Consider Congressional contempt proceedings.**
- 7. Act on a bipartisan basis.**

Zack: Opposing counsel can make a Congressional inquiry difficult to pursue, but House and Senate staff have a variety of ways to fight back. We hope these tips will help you think through your options.

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