



‘Taking the Fifth’ Before Congress: A New Ethics Twist

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It’s unethical for a prosecutor to put a witness on the stand in a criminal trial when he or she knows in advance that the witness is going to take the Fifth Amendment and refuse to testify at all.

Legal ethics authorities reason that the only effect of that kind of testimony is not to bring out relevant evidence but simply to prejudice the jury against the witness. After all, the jury would conclude, if the witness didn’t have something to hide, why did he or she take the Fifth? It’s a violation of the witness’s constitutional rights to permit that kind of inference to be made by a jury.

What about testimony before a congressional committee? Can a lawyer for a committee haul a witness before the panel, knowing that the witness will claim the Fifth Amendment?

In Washington, D.C., where congressional probes often go on at the same time as parallel criminal prosecutions, that can be a key question.

The Legal Ethics Committee of the D.C. Bar has issued an opinion that opens the door considerably wider than before for congressional staff lawyers to do this.

In an opinion issued in January, the committee wrote that an earlier opinion on the subject that it wrote in 1977 should be interpreted in a limited manner. At that time, it wrote that it is improper to call a witness to a congressional



hearing “when it is known in advance that no information will be obtained and the sole effect of the summons will be to pillory the witness.”

The new opinion makes it clear that “there may be legitimate reasons for a congressional committee to summon a witness who expresses an intention to assert her privilege against self-incrimination.” Thus, the bar committee found that the Rules of Professional Conduct are violated only if “there is no substantial purpose in calling a witness other than embarrassment, burden, or delay.”

There’s no blanket rule that this type of testimony is prohibited; it is unethical, the committee wrote, only when summoning the witness “will provide no information to the committee and (2) is intended merely to degrade a witness.”

Since a congressional committee lawyer can almost always think of some reason to call a witness other than embarrassment, burden, or delay, the new opinion makes it significantly more likely that congressional panels will try to take this step. We suggest that defense lawyers need to be aware of this tactic. If it won’t necessarily convict their client in court, it can go a long way towards convicting the client in the court of public opinion.

Crime in the Suites is authored by the [Ifrah Law Firm](#), a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

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