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UNITED STATES OF AMERICA

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NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

**Title:** AHARON BEN-HAIM, Ph.D.  
Upper Montclair, New Jersey  
EVIDENTIARY HEARING

**Case No.:** IA 97-068

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**Work Order No.:** ASB-300-308

**LOCATION:** Newark, NJ

**DATE:** Friday, May 29, 1998

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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In the matter of: :  
AHARON BEN-HAIM, Ph.D. : Docket No. IA 97-068  
Upper Montclair, New Jersey :  
- - - - - X

Rodino Federal Building  
970 Broad Street, Room 204  
Newark, New Jersey

Friday, May 29, 1998

The above entitled matter came on for evidentiary  
hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

CHARLES BECHHOEFER, Chairman  
JERRY R. KLINE, Administrative Judge  
PETER S. LAM, Administrative Judge  
HARRY REIN, Technical Interrogator

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1 APPEARANCES:

2 On Behalf of Aharon Ben-Haim, Ph.D.:

3 AHARON BEN-HAIM, Ph.D., Pro Specifically

4 3 Cloverhill Place

5 Montclair, New Jersey 07042

6

7 On Behalf of the U.S. Nuclear Regulatory Commission:

8 CATHERINE MARCO, ESQ.

9 ANN HODGDON, ESQ.

10 Office of General Counsel

11 U.S. Nuclear Regulatory Commission

12 Washington, D.C. 20555

13

14 On Behalf of the Newark Medical Association:

15 RACHEL NOSOWSKY, ESQ.

16 Dechert, Price & Rhoads

17 4000 Bell Atlantic Tower

18 1717 Arch Street

19 Philadelphia, Pennsylvania 19103

20

21

22

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1	C O N T E N T S				
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## P R O C E E D I N G S

[9:00 a.m.]

1  
2  
3 CHAIRMAN BECHHOEFER: Good morning, ladies and  
4 gentlemen. This morning we, I believe, we'll complete the  
5 testimony of the NRC Staff and then we go on to Dr.  
6 Ben-Haim, his testimony and exhibits, et cetera.

7 Before we begin, are there any preliminary matters  
8 that anybody wishes to raise? Being none, Ms. Hodgdon?

9 MS. HODGDON: The Staff calls Joseph Del Medico.  
10 While Joseph Del Medico is taking the stand, I will say that  
11 the Board allowed his testimony to be prefiled.

12 On Wednesday, the Staff gave -- the Board gave the  
13 Staff permission to prefile his testimony and copies have  
14 been distributed to everyone, and I believe that the Board  
15 has its copies. Is that correct?

16 Just a reorienting us here because this is a  
17 little bit different from the way we did everything else in  
18 this proceeding. That was just to alert everybody that if  
19 they have a copy of Joseph Del Medico's prefiled testimony  
20 and they should take it out now because there won't be much  
21 direct testimony beyond what's provided here as his written  
22 testimony. Would the Board swear the witness, please?  
23 Whereupon,

24 R. JOSEPH DEL MEDICO,  
25 a witness, was called for examination and, having been first

1 duly sworn, was examined and testified as follows:

2 DIRECT EXAMINATION

3 BY MS. HODGDON:

4 Q Would you please state your full name for the  
5 record, please?

6 A Yes. My name is R. Joseph Del Medico.

7 Q Do you have a document in front of you there?

8 A Yes, I do.

9 Q Would you pick it up and look at it and describe  
10 it for us, please?

11 A Well, this is a copy of my testimony. It's  
12 entitled, "The Testimony of Joseph Del Medico," and then on  
13 the last page appended to that testimony is a statement of  
14 my professional qualifications.

15 Q I direct you to the Statement of Professional  
16 Qualifications, which is appended as the last page of the  
17 testimony.

18 Is this testimony, together with the Statement of  
19 Professional Qualifications, true and correct?

20 A There's a minor error on the Statement of  
21 Professional Qualifications under education in the second  
22 line. There's a date range for my Master's degree in  
23 radiopharmaceutical science at Northeastern University. It  
24 should read 1975 to 1978 instead of 1979.

25 I would also point out, in my testimony, there is

1 a quote of the Commission on page 4 and since it is a  
2 quotation, it should have been indented.

3 CHAIRMAN BECHHOEFER: Is that the single-spaced  
4 material on page 4?

5 THE WITNESS: Yes, Judge Bechhoefer. It follows  
6 the first two lines on page 4.

7 CHAIRMAN BECHHOEFER: Okay.

8 BY MS. HODGDON:

9 Q Those corrections having been made, is your  
10 testimony, together with your professional qualifications,  
11 now true and correct to the best of your knowledge and  
12 belief?

13 A Yes, it is.

14 Q I'll now go to completeness, just in the interest  
15 of giving the Board the opportunity to ask questions that  
16 may be relevant to Mr. Del Medico's experience.

17 I noticed that your experience stops at Health  
18 Physics Licensing Specialist, Materials Licensing Branch,  
19 U.S. Nuclear Regulatory Commission, 1978 to 1983.

20 Would you care to tell the Board about your  
21 experience before that time, because you have experience  
22 that might be relevant to some inquiries that they might  
23 have?

24 A All right, I'll do that. After I received my  
25 Bachelor of Science degree in biology from the University of

1 Akron, I entered a one-year certificate program in nuclear  
2 medicine technology at the Nuclear Medicine Institute in  
3 Cleveland, Ohio. That was both classroom work and actual  
4 work in a nuclear medicine department. That was the  
5 Hillcrest Hospital's Nuclear Medicine Department in  
6 Cleveland, Ohio.

7           When I had completed that program, I obtained  
8 employment at Aultman Hospital in Canton, Ohio. There, in  
9 addition to nuclear medicine technologist duties, I was the  
10 training supervisor for student nuclear medicine  
11 technologists.

12           From there I went to Green Cross General Hospital  
13 in Cuyahoga Falls, Ohio where I was the chief nuclear  
14 medicine technologist, and from there, I entered a program  
15 offering a Master of Science degree in radiopharmaceutical  
16 science at Northeastern University in Boston, Massachusetts.

17           Q     Thank you.

18           MS. HODGDON: I now offer Joseph Del Medico's  
19 testimony, a document consisting of 13 pages and the  
20 Statement of Professional Qualifications accompanying it as  
21 Joseph Del Medico's prefiled testimony, and I ask that the  
22 document be accepted as if read and that it be bound into  
23 the record of this proceeding.

24           CHAIRMAN BECHHOEFER: Any objections?

25           DR. BEN-HAIM: No objection.

1                   CHAIRMAN BECHHOEFER: The testimony of Joseph Del  
2 Medico or R. Joseph Del Medico will be bound into the record  
3 as if read at this point.

4                   [The qualifications of R. Joseph DelMedico  
5 follows:]

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Testimony of <sup>R</sup> Joseph DeIMedico

Q1. Please state your full name and current position with the NRC.

A. My name is R. Joseph DeIMedico. I am employed by the United States Nuclear Regulatory Commission as a Senior Enforcement Specialist in the Office of Enforcement. I have held this position since March 1989.

Q2. What are your duties in that position?

A. My duties include preparing guidance for carrying out the NRC's enforcement objectives and reviewing escalated enforcement actions prepared by the NRC regional offices to ensure technical accuracy and conformity with established policy.

Q3. Have you prepared a copy of your Professional Qualifications?

A. A statement of my professional qualifications is attached to this testimony as Attachment 1.

Q4. What is the purpose of your testimony?

A. The purpose of my testimony is to describe, from the standpoint of Commission policy, regulation, and applicable statute, the rationale for the August 27, 1997 Order that prohibits Aharon Ben-Haim's involvement in licensed activities.

Q5. What are the duties of the Office of Enforcement, the Regional Office, and the Office of Investigations in bringing an enforcement action that involves deliberate misconduct?

A. The Office of Enforcement (OE) is primarily responsible for implementation of the Enforcement Policy. The regional offices conduct compliance inspections and make an initial determination as to whether an enforcement action is appropriate for violations of NRC requirements and, if so, what type of action is appropriate. In cases of suspected wrongdoing, regional investigators from the NRC's Office of Investigations (OI) conduct investigations and report their findings regarding the suspected wrongdoing to the regional office and to the Office of Enforcement. Orders prohibiting involvement in licensed activities are considered to be escalated enforcement actions and are referred to OE by the regional offices for review of the associated violations, final preparation of Orders, and the issuance of such Orders.

Q6. Who can sign such an Order for the NRC?

A. These Orders are signed by the Deputy Executive Director for Regulatory Effectiveness or, in his absence, are delegated to be signed by the Director of the Office of Enforcement.

Q7. What NRC requirement prohibits deliberate misconduct and how was the requirement established?

A. In August 1991, the Commission promulgated a final rule to revise its procedures for issuing Orders (56 FR 40664). This rule is generally referred to as the Deliberate Misconduct rule. Among other things, this rulemaking:

- Included, as persons subject to Commission Orders, individuals not licensed by the Commission but who are otherwise subject to the Commission's jurisdiction; and
- Put unlicensed persons on notice that they may be subject to enforcement action for deliberate misconduct that causes a licensee to be in violation of any of the Commission's requirements.
- Established 10 CFR 30.10, "Deliberate misconduct."

This regulation prohibits deliberate misconduct that causes a licensee to be in violation of an NRC requirement.

Q8. Why did the Commission promulgate this rule?

A. Prior to this rulemaking, NRC could issue an Order to a licensee to remove an employee from licensed activities; however, the Commission had an overriding concern that there was nothing to prevent the individual who had engaged in deliberate misconduct from seeking employment with other licensees, without knowledge by the new employers of

the employee's prior conduct. For example, in the statements of consideration, the Commission wrote:

" Instances of willful misconduct on the part of unlicensed individuals have reduced the NRC's confidence that if these individuals were involved subsequently in licensed activities the activities could be conducted in a manner that adequately protects the public health and safety. . . . After becoming aware of such conduct by an employee, a licensee may dismiss the employee either by its own decision or because NRC formally orders removal of the employee from licensed activity. However, the wrongdoer may seek other employment in the same field at another NRC or Agreement State-licensed facility without knowledge by the new employer of the employee's prior conduct. 56 FR 40664 at 40665. "

Q9. What is the Commission's policy for exercising its authority to take action to enforce its regulatory requirements, and is this rulemaking reflected in that policy?

A. The General Statement of Policy and Procedures for NRC Enforcement Actions (Enforcement Policy), NUREG-1600, reflects this rulemaking and provides further guidance from the Commission to the NRC staff on enforcing its requirements. In general, the Enforcement Policy provides the Commission's guidance as to the proper policy to be followed in NRC enforcement actions. The version of the Enforcement Policy relevant to the issues in this case, which took place during 1996 and 1997, was noticed in the *Federal Register* on June 30, 1995 (60 FR 34381). It is referred to as the July 1995 version of the Enforcement Policy.

Q10. According to the Enforcement Policy, under what circumstances may enforcement actions be taken directly against individuals?

A. The Enforcement Policy, Section VIII, provides examples of situations for which enforcement action may be taken directly against an unlicensed individual. The situations include:

- Deliberately causing a licensee to be in violation of NRC requirements; and
- Recognizing a violation of procedural requirements and deliberately not taking corrective action.

Q11. Under the Enforcement Policy, what factors are considered in deciding whether to issue an enforcement action to an unlicensed individual?

A. The Enforcement Policy, Section VIII, states that, in deciding whether to issue an enforcement action to an unlicensed individual, the NRC will consider factors such as the following:

1. The level of the individual within the organization.
2. The individual's training and experience as well as the knowledge of the potential consequences of the wrongdoing.
3. The safety consequences of the misconduct.
4. The benefit to the wrongdoer, *e.g.*, personal or corporate gain.

5. The degree of supervision of the wrongdoer, *e.g.*, how closely the individual is monitored or audited, and the likelihood of detection.
6. The employer's response, *e.g.*, disciplinary action taken.
7. The attitude of the wrongdoer, *e.g.*, acceptance of responsibility.
8. The degree of management responsibility or culpability.
9. Who identified the misconduct.

Q12. Under the Enforcement Policy, can civil monetary penalties be issued to unlicensed individuals?

A. Not in most cases, including the case at hand. A footnote to Section VIII notes, with exceptions not applicable to this case, that NRC normally will not impose a civil penalty against an individual.

Q13. Under the Enforcement Policy, what enforcement sanctions are appropriate in cases that involve unlicensed individuals?

A. Under the Enforcement Policy, Section VIII, Notices of Violation and Orders are examples of enforcement actions that may be appropriate against individuals. Section

VIII specifically states that Orders to unlicensed individuals may include provisions that would:

- Prohibit involvement in NRC licensed activities for a specified period of time.
- Require the person to tell a prospective employer or customer engaged in licensed activities that the person has been subject to an NRC Order.

Q14. Why was the August 27, 1997 Order issued to Aharon Ben-Haim?

A. The August 27, 1997 Order was issued to Aharon Ben-Haim because the NRC staff concluded that he deliberately caused the licensee, Newark Medical Associates, to be in violation of NRC requirements. On the part of Aharon Ben-Haim, this is a violation of 10 CFR 30.10(a)(1). The NRC staff's conclusion was based on the observations of the NRC inspector during the January 29, 1997 inspection, and the OI investigation which resulted in the issuance of OI Report No. 1-97-004 on July 23, 1997.

Q15. Why is Aharon Ben-Haim considered to be an unlicensed individual?

A. Aharon Ben-Haim was a contractor to the licensee, Newark Medical Associates (NMA). Since the NMA license was not issued to him, he is an unlicensed individual for the purposes of any enforcement action taken against him in this case.

Q16. What enforcement sanctions were available against Aharon Ben-Haim and when are Orders to unlicensed persons used as an enforcement sanction?

A. As explained above, the enforcement sanctions available in this case under the Enforcement Policy are: (a) a Notice of Violation; or (b) an Order to the individual. Under the Enforcement Policy, Section VI.C.5, orders to unlicensed persons, including contractors, are used when the NRC has identified deliberate misconduct that may cause a licensee to be in violation of an NRC requirement, or where the NRC loses its reasonable assurance that the licensee will meet NRC requirements with that person involved in licensed activities.

Q17. How is the enforcement sanction against an unlicensed individual determined?

A. There is no algorithm or formula for determining the enforcement sanction to be taken against an individual involved in deliberate misconduct. The Enforcement Policy, Section VIII, states that the particular sanction to be used for enforcement actions involving individuals should be determined on a case-by-case basis.

Q18. What factors were considered in determining the enforcement sanction against Aharon Ben-Haim?

A. The following factors were considered in formulating the enforcement action against Aharon Ben-Haim:

- The Enforcement Policy, Section IV.C, states that willful violations are of particular concern to the Commission because its regulatory program is based on licensees and their contractors acting with integrity; and that willful violations cannot be tolerated by the Commission. This section goes on to state that the severity level of a violation may be increased if the circumstances surrounding the matter involve indications of willfulness. Reading this section together with Examples VI.C.2, 3, 4, and 10 of the Policy<sup>1</sup>, the violations that were caused by Aharon Ben-Haim's actions would be categorized at Severity Level II. By definition, Severity Level II violations are of very significant regulatory concern.
  
- Aharon Ben-Haim is a consultant who had contracted with the licensee to prepare for State and NRC inspections, assure continuous monitoring of the laboratory in compliance with NRC regulations, and assure that proper procedures were used in the handling of radioactive material. It was apparent to the NRC staff that Aharon Ben-Haim occupied a position of specialized knowledge, trust, and authority in the eyes of this licensee, as well as any other licensees for whom he might consult. This gave Aharon Ben-Haim the opportunity to have broad influence over the degree of NRC compliance at such facilities.

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<sup>1</sup>As explained in Section IV of the Enforcement Policy, these examples are provided to serve as guidance in determining the appropriate severity level; however, the examples are neither exhaustive nor controlling. The severity level of each violation requires consideration of the merits of the case.

- Aharon Ben-Haim had experience in NRC compliance matters. In fact, he himself prepared the NRC license application with commitments to follow a number of procedures that he later caused the licensee to violate.
- Since Aharon Ben-Haim was a consultant as opposed to an employee, his misconduct was unlikely to receive a significant response from the licensee, such as demotion, probation, or firing for cause. Presumably, if the licensee terminated Aharon Ben-Haim's consulting contract, he could still go on to consult at other facilities without the type of detailed check on previous employment that would occur for the hiring of an employee.
- There was tangible gain to Aharon Ben-Haim from his misconduct because the licensee's continued operation, even though it did not have a radiation safety officer or authorized user, would allow Aharon Ben-Haim to continue to earn consulting fees.
- The underlying licensee violations caused by Aharon Ben-Haim's misconduct continued in duration from October 19, 1996 through January 25, 1997.
- According to the OI Report of Interview, Aharon Ben Haim's attitude toward the non-compliances caused by his actions was that it was "impracticable to always abide by the small rules."

Q19. Has the Commission given its views on the significance of the attitude of the wrongdoer?

- A. Yes. On that last point, the Commission has specifically addressed the issue of the attitude of the wrongdoer as follows:

The Commission believes that in addressing the issue of future involvement of an individual in licensed activity, where safety is crucial, it is proper to consider the individual's attitude toward compliance with safety practices and regulations. Recognition and admission of past errors indicates a more positive attitude than continuing denial or hostility, and thus enhances the Commission's reasonable assurance that licensed activities will be conducted in a manner that protects public health and safety. However, attitude is only one factor and is not controlling in the overall determination of appropriate action. 58 FR 40664 at 40676.

- Q20. How did the staff assure that the enforcement sanction against Aharon Ben-Haim is consistent with other sanctions against persons who engage in deliberate misconduct?

- A. The August 27, 1997 Order that prohibits Aharon Ben-Haim from engaging in licensed activities for a period of five years is based on the NRC staff's consideration of all of the factors discussed above. Generally speaking, these same factors are considered and weighted in each case that involves deliberate misconduct as a means of maintaining consistency of the sanctions from one case to another.

- Q21. What is the end goal of the enforcement sanction taken against Aharon Ben-Haim?

- A. The Order concludes that the NRC cannot have confidence that licensed activities can be conducted safely and in compliance with NRC requirements if Dr. Ben-Haim were to

be permitted to be involved in licensed activities. Of course, an enforcement sanction can be said to have a punitive aspect. However, as with all sanctions applied in cases that involve deliberate misconduct, the sanction in this case was not established with a view to a punitive aspect, but rather has been established with a view to three specific goals: (1) protection of the public health and safety by prohibiting a person who has been known to engage in deliberate misconduct involving licensed activities; (2) deterring other individuals from engaging in deliberate misconduct that involves licensed activities; and (3) rehabilitation of the individual.

Q22. Has the Commission given its views concerning rehabilitation of an individual?

A. Yes. The Commission addressed this latter point in the statements of consideration for the Deliberate Misconduct rule:

*Comment:* Three commenters were concerned with the length of time that an order would be in effect and sought additional information on how an individual could redeem himself or herself to avoid being listed "for life."

*Response:* . . . Ordinarily the Commission would expect to provide a specific time limit for the provisions of the order, and a process for relaxation of the order. 56 FR 40664 at 40677.

Q23. How were the Commission's views effected in the sanction taken against Aharon Ben-Haim?

- A. The point here is that the duration of a sanction against an individual who has engaged in deliberate misconduct should be chosen with the intent that the sanction will restore the Commission's confidence in that individual's ability to conduct licensed activities with integrity and candor at the end of the sanction period. In the view of the NRC staff, a suspension from licensed activities for five years is a sufficient time such that, should Aharon Ben-Haim decide to become involved in licensed activities in the future, he will appreciate the importance of strict compliance with all Commission requirements.

## Statement of Professional Qualifications for R. Joseph DeMedico

### Current Title and Business Address

Senior Enforcement Specialist  
Office of Enforcement  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Experience: Senior Enforcement Specialist, Office of Enforcement, U.S. Nuclear Regulatory Commission, 1989 to present.

Congressional Affairs Officer, Office of Congressional Affairs, U.S. Nuclear Regulatory Commission, 1983 - 1989.

Health Physics Licensing Specialist, Materials Licensing Branch, U.S. Nuclear Regulatory Commission, 1978 - 1983.

Education: M.S., Radiopharmaceutical Science, Northeastern University, Boston, Massachusetts (1975 - 1978). Course work included: Radiation Health Physics, Medical Internal Radiation Dosimetry, Radiation Instrumentation, Biodistribution of Radiolabeled Chemicals. ✓

*Green Cross Hosp  
Altman Hosp*  
Nuclear Medicine Institute, Cleveland, Ohio, Nuclear Medicine Technology (1 year certificate program), 1972. *Hillcrest Hosp.*

B.S. Biology, University of Akron, Ohio (1967 - 1971).

Registration: Written examination/professional registration in Nuclear Medicine Technology by the following societies:

The American Registry of Radiologic Technologists  
The American Society of Clinical Pathologists  
Nuclear Medicine Technology Certification Board

Training: U.S. NRC, Teletherapy and Brachytherapy (40 Hr.), 1990

U.S. NRC, Safety Aspects of Industrial Radiography, (40 hr.), 1989

Health Physics Society, Health Physics Review Course (75 hr.), 1981

1 MS. HODGDON: Before the Staff offers Joseph Del  
2 Medico for cross-examination, I would like to address two  
3 documents on which, if you've read Mr. Del Medico's  
4 testimony, you will see that he relies. Those documents --  
5 he can tell us about them actually and then I will ask how  
6 the Board wants to treat them because I have marked S-13 and  
7 S-14 on them and I have given them to all parties, to the  
8 Board, and to the reporter.

9 Mr. Del Medico may describe them, if you will, and  
10 then I will ask the Board what they want to do with them.

11 BY MS. HODGDON:

12 Q Mr. Del Medico?

13 A Yes.

14 Q S-13 is -- do you have it with you?

15 A No, I don't. There are no numbered exhibits up  
16 here.

17 Q I'm sorry. You have a copy, but it's not -- it's  
18 NUREG-1600.

19 A Yes. NUREG-1600 is the general statement of  
20 policy and procedure for NRC enforcement actions. It's  
21 commonly referred to as the enforcement policy or the  
22 policy. For the convenience of the public, it is currently  
23 published in NUREG form in NUREG-1600.

24 Q What about your other document?

25 A Well, I believe you're referring to the statements

1 of consideration for the rule that the Commission  
2 promulgated that established 10 C.F.R. 30.10 back in 1991.  
3 I guess I could identify that as 56 F.R. 40664, published  
4 August 15th of 1991 and effective September 16th of 1991.

5 Q Thank you.

6 MS. HODGDON: Judge Bechhoefer, it's not usual to  
7 put public documents in as exhibits and I've provided these  
8 mostly for convenience. However, since they're already  
9 marked, there's no harm in putting them in as exhibits if  
10 the Board has no objection.

11 CHAIRMAN BECHHOEFER: I think these should be put  
12 in as exhibits, particularly since NUREG-1600 is not, as it  
13 used to be, a regulation of its own.

14 MS. HODGDON: The problem is that because it used  
15 to be in the regulations and now is not, it can't  
16 conveniently be found and therefore, that's why we provided  
17 it.

18 CHAIRMAN BECHHOEFER: That's correct.

19 MS. HODGDON: And so that being the case, it can  
20 be put in as an exhibit and it's there.

21 CHAIRMAN BECHHOEFER: We're saying that that's the  
22 way it should be done.

23 MS. HODGDON: Fine.

24 CHAIRMAN BECHHOEFER: I do have a question about  
25 NUREG-1600.

1 MS. HODGDON: For counsel or for Mr. Del Medico?

2 CHAIRMAN BECHHOEFER: Well, take your pick. I  
3 wondered whether this was the current version. Since 1995,  
4 I believe there have been several published changes and I  
5 wanted to know whether any of those changes -- I don't have  
6 them all in front of me, but I recall seeing them. In fact,  
7 I saw a statement about a new policy statement recently  
8 issued which wouldn't be applicable here.

9 MS. HODGDON: I believe there have been two  
10 changes, but I believe that Mr. Del Medico knows the answer  
11 to that question. But just for purposes of putting this in,  
12 you want a representation from him that as regards this  
13 case, this is the right version?

14 CHAIRMAN BECHHOEFER: Yes.

15 MS. HODGDON: Did he understand the question?

16 CHAIRMAN BECHHOEFER: Well, what I wanted to find  
17 out is, this is, I believe, the version of June '95,  
18 published July '95. Since that time, I have seen, although  
19 I have not studied, a number of changes to this document. I  
20 wanted to know whether this in this form it is the one  
21 currently applicable to the particular conduct in question  
22 that we're reviewing.

23 THE WITNESS: Okay. Judge Bechhoefer, I'll start  
24 with the most current version. Just probably last week,  
25 there was NUREG-1600, Version 2, published in NUREG form.

1 In between the publication of this July 1995 NUREG-1600 and  
2 that new one, there have been 11 minor changes to the  
3 enforcement policy. They have not been published in NUREG  
4 form, but they've been noticed in the Federal Register.

5 Of those, there is possibly one that has some  
6 tangential relevance to this case. It was published on  
7 December 10th of 1996, which, of course, was before the  
8 order was taken in this case, at 61 F.R. 65088, and I'll  
9 tell you about the change.

10 Up until that publication, enforcement sanctions  
11 against individuals that involved orders prohibiting  
12 activities -- prohibiting licensed activities needed -- the  
13 Commission needed to be consulted in advance. We did that  
14 in the form of a Commission paper. The change was to remove  
15 that requirement.

16 Specifically in the enforcement policy, it's under  
17 a section termed "Responsibilities." That's Section III and  
18 you'll see there, if you're following me there, I think  
19 there are ten -- at the very end of Section III before  
20 Section IV begins, there are ten numbered instances in which  
21 the Commission needs to be consulted.

22 Number 7 there, originally in 1995, said the  
23 Commission needed to be consulted for the issuance of a  
24 civil penalty or order to an unlicensed individual. The  
25 Federal Register notice that I'm talking about, that

1 particular change to the enforcement policy, removed that  
2 from the enforcement policy.

3 CHAIRMAN BECHHOEFER: I take it there were no  
4 changes in suggested penalties -- maybe that's the wrong  
5 word to use -- for various levels of violations or no  
6 changes in categorization of particular types of conduct as  
7 amounting to Level 1, Level 2, Level 3, et cetera.

8 THE WITNESS: I don't have the 11 changes in front  
9 of me, so I couldn't say that. I'm not aware of any that  
10 are relevant to this particular case.

11 CHAIRMAN BECHHOEFER: Well, that's really what I  
12 was driving at.

13 Have you formally offered this document?

14 MS. HODGDON: I believe I have, but I'll do it  
15 again. The Staff offers both S-13 and S-14. Do you want to  
16 do them one at a time?

17 CHAIRMAN BECHHOEFER: One at a time.

18 MS. HODGDON: Excuse me? One at a time, all  
19 right.

20 CHAIRMAN BECHHOEFER: One at a time.

21 MS. HODGDON: S-13, NUREG-1600, the enforcement  
22 policy, published July 1995 as an exhibit as already stated.  
23 That would be Staff-13.

24 CHAIRMAN BECHHOEFER: Dr. Ben-Haim, any  
25 objections?

1 DR. BEN-HAIM: No objection.

2 CHAIRMAN BECHHOEFER: This document will be  
3 entered into evidence as Staff Exhibit 13 and it is subject  
4 to that changes that Mr. Del Medico has described.

5 [Staff Exhibit 13 was received into  
6 evidence.]

7 CHAIRMAN BECHHOEFER: Ms. Hodgdon, do you want to  
8 do now 14?

9 MS. HODGDON: Yes.

10 BY MS. HODGDON:

11 Q S-14 -- did you describe that document?

12 A This is the Statements of Consideration --

13 Q Do you have a copy or would you like me to give it  
14 to you?

15 A I have a copy. I do not have a copy that's marked  
16 as a Staff exhibit.

17 Q If you put S-14 on there, that would do it, I  
18 believe, I hope. Just to be sure we all have the same  
19 thing, could you describe it for us?

20 A Yes. It's the Statements of Consideration for the  
21 rule change that the Commission promulgated to establish 10  
22 C.F.R. 30.10. I'm identifying it as 56 F.R. 40664,  
23 published August 15th, 1991, and effective September 16th,  
24 1991.

25 Q Just to be sure we have the whole thing, would you

1 tell me what this document is, what this document comes  
2 from, if you know?

3 A Yes. The rule change -- every rule change that's  
4 made to Title 10 of the Code of Federal Regulations has a  
5 Statements of Consideration attached to it wherein the  
6 Commission gives its rationale for the rule and answers any  
7 comments that the public may have made during the  
8 intervening period between publishing the rule in proposed  
9 form and publishing it in final form.

10 Q Thank you. That's really not what I meant. I  
11 meant to describe the document. My copy has, and I trust  
12 yours does, too, I hope yours does, too, has at the bottom  
13 September 29th, 1995, 2-SC-82. That's where it starts.

14 A Yes.

15 Q And it ends at 2-SC-102.

16 A Yes, that's correct.

17 Q In other words, do you know what that is, that  
18 annotation?

19 A Yes. This is the format for a tracking and  
20 keeping these rules and Statements of Consideration in  
21 numerical order. This one was published in Part 2; that  
22 accounts for the 2. This is a Statements of Consideration,  
23 which accounts for the SC. And the 82 is a page number.

24 Q Yes. My point is that this does not come directly  
25 from the Federal Register, but it's republished by the

1 Commission in its procedure books and this is the version  
2 that you have here. So that you can't find what Federal  
3 Register page you're on from this document, I just wanted to  
4 identify it that way to avoid confusion.

5 A Yes, that's correct.

6 CHAIRMAN BECHHOEFER: Except for the first page.

7 MS. HODGDON: Except for the first page, yes.

8 After that, you can't tell where you are in the Federal  
9 Register and you have to go get one from the Federal  
10 Register if you want to make a correct citation to that  
11 document. But this is just given for information. This is  
12 the version the Staff may use. The text is exactly the  
13 same, of course. It's just the pagination doesn't come out  
14 the same way.

15 So the Staff now moves that the document which  
16 Staff has labelled S-14, which would be Staff-14 as an  
17 exhibit, which is the Statement of Consideration as  
18 described, Statements of Consideration as described by Mr.  
19 Del Medico, be accepted as an exhibit.

20 CHAIRMAN BECHHOEFER: Any objection?

21 DR. BEN-HAIM: No objection.

22 CHAIRMAN BECHHOEFER: That document will be  
23 entered into evidence as an exhibit, as Staff Exhibit 14.

24 [Staff Exhibit 14 was received into  
25 evidence.]

1 MS. HODGDON: As previously stated, this document  
2 that Mr. Del Medico has stated is his testimony has been  
3 accepted by the Board has prefiled testimony and the Staff  
4 has no further direct for Mr. Del Medico. Staff now tenders  
5 Mr. Del Medico for cross-examination.

6 CHAIRMAN BECHHOEFER: Okay. Dr. Ben-Haim.

7 CROSS EXAMINATION

8 BY DR. BEN-HAIM:

9 Q Mr. Del Medico, prior to this hearing, did you  
10 have any personal, direct knowledge of the matters that are  
11 represented in this hearing?

12 A My knowledge comes primarily from the OI report,  
13 from reading the OI report, and the inspection report. I  
14 was not one of the OI investigators. I was not one of the  
15 inspectors. I did not personally participate in those  
16 aspects of the case, if I'm answering your question.

17 Q So you didn't have -- you didn't know my person or  
18 any other person involved in this? You didn't have any  
19 personal knowledge of either the people involved, the people  
20 that -- I mean, the people who are involved in this matter?

21 A Not other than through these written documents --

22 Q Thank you.

23 A -- and discussions with various NRC Staff.

24 Q Okay. I'll go to my second question. My second  
25 question is, after hearing Dr. Moskowitz's testimony, as

1 well as other evidence presented before us since the day  
2 before yesterday -- and I noticed you were present -- are  
3 you still absolutely convinced that I deliberately caused --  
4 that I deliberately misled the NRC and caused NMA to be in  
5 violation of NRC regulations?

6 A Well, Dr. Ben-Haim, firstly, the order does not  
7 allege that you deliberately misled the NRC, but it does  
8 allege that you violated 10 C.F.R. 30.10, which is entitled  
9 "Deliberate Misconduct," and it states that you did that  
10 through your knowing or deliberate actions that caused the  
11 licensee to be in violation of NRC requirements. Not the  
12 applicant, but the licensee.

13 Q Can you please -- you're confusing me with your  
14 answer.

15 A I'm sorry.

16 Q I understand the order as such, so it's my  
17 understanding. I do not -- can you please be more specific  
18 about those allegations?

19 A We have the order. You have your copy, I have  
20 mine. To find out what the order alleges or what the  
21 violation is that the order alleges, we should turn to III.

22 Q I don't have it.

23 A I'm sorry.

24 Q I just am not -- I'm not clear if I understood  
25 your answer. Can you please read your answer or repeat your

1 answer as to -- and my question is, what did the order say  
2 that I deliberately did? The emphasis in my question is on  
3 deliberate. And my question was, if you're still convinced  
4 that I deliberately did this.

5 A Okay.

6 Q Would you please out the point?

7 A Could we have the visual aids back up? Would that  
8 make sense to?

9 MS. HODGDON: Yes, that would be fine.

10 THE WITNESS: Okay. Again, to read this, it's  
11 long and involved. I think it would be better to summarize  
12 it, but what I am trying to summarize here, it begins in  
13 Section III of the order at the bottom of page 2 and, in  
14 essence, it's labelled (a)(1) and (2).

15 BY DR. BEN-HAIM:

16 Q Would you mind taking the time and read this to  
17 us?

18 MS. HODGDON: I'm not sure that Mr. Del Medico has  
19 the same version. He may have a printed order and not the  
20 -- do you have the Federal Register version?

21 THE WITNESS: No, I don't.

22 MS. HODGDON: Would it help if we all had the same  
23 thing, if I gave you the "Federal Register" version or do  
24 you want to use the one you have? It's S-9. I'll give you  
25 a copy.

1 THE WITNESS: All right. On the first -- shall I  
2 proceed?

3 MS. HODGDON: Has everybody found the place?

4 THE WITNESS: On the first page of S-9 at the very  
5 end of that page, the last sentence, I'll begin there.

6 "Based on the results of the OI investigation, the NRC has  
7 determined that Dr. Ben-Haim's actions constitute violations  
8 of 10 C.F.R. 30.10, 'Deliberate Misconduct,' as follows:

9 "(a) 10 C.F.R. 30.10, Sub (a)(1), Sub (c)(1), and  
10 Sub (c)(2) require, in part, that any contractor of a  
11 licensee not engaged in deliberate misconduct that causes or  
12 but for detection would have caused a licensee to be in  
13 violation of any rule, regulation, or order, or any term,  
14 condition, or a limitation of any license issued by the  
15 Commission, or any requirement, procedure, instruction,  
16 contract, purchase order, or policy of a licensee.

17 "(1). 10 C.F.R. 35.21 requires that a licensee  
18 appoint a Radiation safety officer responsible for  
19 implementing the radiation safety program and requires that  
20 the licensee, through the Radiation safety officer, ensure  
21 that radiation safety activities are being performed in  
22 accordance with approved procedures and regulatory  
23 requirements in the daily operation of the licensee's  
24 by-product material program.

25 "10 C.F.R. 35.13 requires that a licensee apply

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1 for and receive a license amendment before it changes  
2 Radiation safety officers." I'll paraphrase here. The NMA  
3 license, the license number is given. Condition 12, dated  
4 September 25th, 1996, states that the Radiation safety  
5 officer for this license is Gerard W. Moskowitz, M.D.

6 "During the period from November 1996 through  
7 February 6th, 1997, Dr. Ben-Haim caused Newark Medical  
8 Associates to be in violation of the requirements in Section  
9 III(a)(1) above by performing the functions of the Radiation  
10 safety officer even though he knew that the RSO named on the  
11 license application and subsequently on the license was  
12 Gerard Moskowitz, M.D.; and too, he, Dr. Ben-Haim, was not  
13 the RSO named on the license application or the license."

14 BY DR. BEN-HAIM:

15 Q Can I interrupt you for a second?

16 A Yes, sir.

17 Q After the deliberations of the last two days, can  
18 we still say this with absolute confidence, that I  
19 deliberately -- deliberately -- what does it say -- that I  
20 engaged in deliberate misconduct?

21 A Yes, sir.

22 Q You're absolutely convinced of this?

23 A Yes.

24 Q Because, you say, that -- but there was evidence  
25 that what I did was not an RSO activity, but -- okay, I'm

1 sorry because I'm testifying here. Sorry for this.

2 Okay. Continue, please.

3 A "(2) 10 C.F.R. 35.11 (a) and (b) permit an  
4 individual to use licensed material for medical use only in  
5 accordance with a specific license issued by the Commission  
6 or under the supervision of an authorized user, as provided  
7 in 10 C.F.R. 35.25."

8 Q May I interrupt you again, please?

9 A Yes, sir.

10 Q Are you sticking to your testimony just because it  
11 is written, or are you still convinced, absolutely convinced  
12 because it is imposed to you by something that you feel like  
13 an obligation, or are you -- just using common sense and  
14 knowledge from the last two days, are you prepared to revise  
15 the opinion that was created within you by the OI report?  
16 As you said yourself, you did not have any personal  
17 knowledge.

18 Having heard the deliberations of the last two  
19 days, did you, in no way, change that opinion that was only,  
20 as you said yourself, created by the OI report and the  
21 conclusions of the Staff and the order that was issued? Did  
22 you not find any new evidence within the last -- did you not  
23 see any new evidence in these last two days that would  
24 possibly contradict the basis for your affirmations?

25 A Okay. Dr. Ben-Haim, you've asked a large number

1 of questions. I believe the first question is, am I  
2 prepared to change my opinion. The answer is no, sir, I am  
3 not. I'm sorry that the questions are sort of escaping me.

4 Q Let me rephrase this. Let me rephrase this and  
5 let's take it point-by-point to make it easier for you, Mr.  
6 Del Medico.

7 A Yes, please.

8 Q You have some new knowledge and you know of some  
9 new people, you have seen new people that you had never seen  
10 before and one of them is myself. Another one was Dr.  
11 Moskowitz, and you had no personal -- you heard the personal  
12 testimonies of the investigators, and you also heard  
13 deliberations of this honorable panel and you heard the  
14 different sides.

15 Does this -- I'm not asking you to change your  
16 opinion as to the validity of regulations. I adhere with  
17 you totally with the validity and sense of the regulations.  
18 I'm just asking, in the matter of Aharon Ben-Haim, which is  
19 myself, did you gain any new insight into the matters that  
20 are in front of us?

21 A Dr. Ben-Haim, of course, I haven't heard your  
22 testimony because you haven't testified yet, and I assure  
23 you that when you do, I will pay close attention. Of  
24 course, I've paid close attention throughout this proceeding  
25 to the testimony of each individual who's testified.

1 I have not heard any testimony that would cause me  
2 to change the conclusion reached in this order.

3 Q Did you have any doubts with the testimony so far?  
4 Did you have any new light over these matters, new light  
5 shed on those matters?

6 A Well, certainly, you know, over the course of two  
7 days, some new light has been shed on the matters, some  
8 corners have been filled in. Some things that I wasn't as  
9 clear about I'm more clear about now.

10 Q My second question is, what procedures did I cause  
11 the licensee -- my third question. I'm sorry. What  
12 procedures did I cause the licensee to violate and when?

13 A Okay. We were going to answer this a while back.  
14 I think we were going to use the visual aids. I guess it  
15 doesn't matter where we start. We'll start with this visual  
16 aid, which states the NRC requirement 10 C.F.R. 35.53(c)(3).  
17 This is a requirement imposed on the licensee, of course.  
18 It's not a requirement imposed upon you.

19 It says that the licensee must maintain a record  
20 of the prescribed dosage, and the definitions below, which  
21 are in Part 35, the definitions below, which are in Part 35,  
22 clearly link the term "prescribed dosage" to an authorized  
23 user. The authorized user must give directions in order for  
24 a prescribed dosage. It's clear that the authorized user  
25 must be a physician, dentist, or podiatrist.

1           We know, of course, that the authorized user, the  
2 only authorized user named on this license was Dr.  
3 Moskowitz.

4           When you gave the -- it's my understanding that  
5 Dr. Elamir wanted to begin procedures and you gave to Ms.  
6 Smoligova written and verbal instructions on how to order  
7 and what to order as far as by-product material. I'm sure  
8 you realize what you needed to do at that time is get some  
9 direction from the authorized user concerning what to order,  
10 what radiopharmaceutical to order, what quantity to order.

11           At that juncture, had you done that, this  
12 violation would not have occurred because the violation  
13 requires that the licensee maintain a record of the  
14 prescribed dosage, and if the authorized user had been  
15 involved in determining the dosage, there would have been a  
16 prescribed dosage.

17           So that is how the licensee came to be in  
18 violation of NRC requirements through your actions. Now,  
19 you've indicated to the Office of Investigations, in Exhibit  
20 23, that you knew that an authorized user had to be involved  
21 in prescribing the dosage. If you had contacted Dr.  
22 Moskowitz at that time and said to him, "Hey, we're about to  
23 begin ordering, as a physicist, it seems to me that we could  
24 use Medronate Phosphate, MDP for bone scans, and perhaps we  
25 could use 25 millicuries, do you believe that that's

1 appropriate," and you got some delegation from Dr.  
2 Moskowitz, there would not have been a violation.

3 But I also want to point out, at that point, had  
4 you contacted Dr. Moskowitz, Dr. Moskowitz would have said  
5 to you, "I'm not the authorized user. I'm not the RSO. I  
6 don't know what you're talking about." And had you done  
7 that, you would have truncated the whole unfortunate chain  
8 of events that ensued thereafter.

9 Of course, now that's only one requirement that  
10 we've covered.

11 Q May I interrupt you here --

12 A Yes, of course.

13 Q -- and ask you, in respect to this, don't you  
14 think that it is actually Dr. Elamir's, the licensee's  
15 responsibility, when he gets his license, to contact his  
16 Radiation safety officer and authorized user, and don't you  
17 think it would have been reasonable not for me to --  
18 wouldn't you think that as a physicist, it was -- okay, the  
19 one question.

20 The first question was, and I repeat it. Isn't it  
21 the licensee's responsibility to contact the Radiation  
22 safety officer and the authorized user and not the  
23 physicist?

24 A Dr. Ben-Haim, you were more than the physicist in  
25 this case. You were a paid consultant. You contracted with

1 this licensee to perform certain services. The contract is  
2 in the OI report. It's Exhibit -- your proposal is in the  
3 OI report. It's Exhibit 7, page 1.

4 Your proposal includes that you will prepare for  
5 state and NRC inspections. You will ensure continuous  
6 monitoring of the laboratory in compliance with the  
7 regulations of the Nuclear Regulatory Commission. You will  
8 train the NMA Staff. You will perform all equipment tests.  
9 You will assure that proper procedures are used in the  
10 handling of radioactive material.

11 You knew, Dr. Ben-Haim, that Dr. Elamir is not  
12 familiar with NRC requirements. You knew that he did not  
13 have the training that he needed to have to be an authorized  
14 user on the NRC license. That training is set forth in 10  
15 C.F.R. 35.900.

16 This licensee was relying on you for this  
17 expertise. This licensee expected you to be the person who  
18 would not bring about the possession of radioactive  
19 by-product material before the NRC's requirements were met.

20 I might add, Dr. Ben-Haim, you prepared the  
21 license application for NMA and if we look at that license  
22 application, which is also a Staff exhibit --

23 MS. HODGDON: Exhibit 2. Do you have a copy?

24 THE WITNESS: I do have a copy of Exhibit 2.

25 You yourself stated in this application in Item

1 10.4 -- it appears to be about the ninth page of the  
2 exhibit, to help the Board. Item 10.4 entitled, "Safe Use  
3 of Radiopharmaceuticals. We will establish and implement  
4 the model safety procedures published in Appendix L to  
5 Regulatory Guide 10.8, Revision 2." You included a copy of  
6 Appendix L. That's also in the Staff exhibit about  
7 three-quarters of the way back, page I-1, Appendix I.

8 I'm sorry. I misspoke earlier. Appendix I, not  
9 Appendix L, Model Rules for Safe use of  
10 Radiopharmaceuticals. On the second page, Item No. 14 says,  
11 "Assay each patient dosage in the dose calibrator before  
12 administering it. Do not use the dosage if it is more than  
13 10 percent off from the prescribed dosage."

14 It isn't clear to me how there could be a  
15 prescribed dosage unless there were some involvement on the  
16 part of the authorized user.

17 BY DR. BEN-HAIM:

18 Q When was this application submitted?

19 A It appears to be around February 26th, 1996.

20 Q Was there --

21 MS. HODGDON: Excuse me, if I may ask a question.

22 Can you tell us where you're finding that date,  
23 because there may be other dates on there? Why don't you  
24 look at the cover letter. Do you have it?

25 DR. BEN-HAIM: The date is correct. It's in

1 February of '96.

2 MS. HODGDON: The 22nd.

3 DR. BEN-HAIM: It's irrelevant.

4 MS. HODGDON: Did you say the 22nd?

5 THE WITNESS: I believe I said February 22nd,  
6 1996. I did mean to say that, if I didn't.

7 MS. HODGDON: Thank you.

8 BY DR. BEN-HAIM:

9 Q Was there, in that application, which is a  
10 standard application and candidly prepared by me, wasn't  
11 there any Radiation safety officer and authorized user  
12 named?

13 A Yes, I'm certain there was. Item 7 states,  
14 "Authorized user and Radiation safety officer, Gerard W.  
15 Moskowitz, M.D."

16 Q Is there any reason -- I mean, hearing what you  
17 heard in the last two days, is there any reason for you to  
18 assume that I deliberately wrote this name without asking  
19 Dr. Moskowitz?

20 A This issue of whether you did or not is not a part  
21 of the order. It's not something that the Staff alleges.

22 Q In "Federal Register", I'm going back to Exhibit  
23 S-9. Excuse me. This is small print, so I have to use my  
24 glasses again.

25 A Yes, me, too.

1 Q I don't see anything now.

2 A I think we're all trying to hide our age, but it's  
3 not working.

4 Q I don't. I'm going to be 66 in a few days.

5 I'm referring to paragraph A.1.10, C.F.R. 35.21.  
6 That's on page 47225. 10 C.F.R. 35.21 requires that the  
7 licensee appoint a Radiation safety officer responsible for  
8 implementing the radiation safety program and requires that  
9 the licensee, through the Radiation safety officer, ensure  
10 that radiation safety activities are being performed in  
11 accordance -- did Dr. Elamir name a Radiation safety officer  
12 in his application?

13 A Yes. We've covered that. It's Item 7, I believe,  
14 Authorized user and Radiation safety officer, Gerard W.  
15 Moskowitz, M.D.

16 Q So didn't I have to presume that Dr. Moskowitz --  
17 that Dr. Elamir had a Radiation safety officer and  
18 authorized user being there even on the Saturdays that the  
19 -- where I was not even present -- being there and doing his  
20 job as a physician? That was my question. I repeat the  
21 question.

22 Couldn't I presume from what you've heard, since I  
23 knew that -- since I knew that there was an authorized user  
24 and Radiation safety officer on the license, was it not  
25 natural for me to presume that he was doing his work, his

1 job?

2 A Well, there are certain functions that he needed  
3 to perform and those functions intersect with your  
4 activities, your own activities, yours, Dr. Ben-Haim. When  
5 you brought about the possession of by-product material at  
6 NMA through your instructions to Ms. Smoligova, before you  
7 did that, you needed to have some delegation, some  
8 indication that the Radiation safety officer had approved  
9 the ordering of those materials.

10 You did not have that and you apparently knew that  
11 it was required because you yourself put it in the license  
12 application.

13 Q Didn't the hearings -- didn't the hearings so far  
14 at least raise the question whether this piece of paper,  
15 this wrinkled piece of paper that was found in -- that was  
16 the only piece of evidence found by the investigators,  
17 wasn't the question raised whether these were, in fact,  
18 instructions or prescriptions, whatever it has been  
19 characterized so far --

20 MS. HODGDON: Objection to the foundation in that  
21 Dr. Ben-Haim has represented that this was the only piece of  
22 evidence found by the investigators, obviously contradicted  
23 by the OI report which has many exhibits. So I would like  
24 the foundation restated. This is an improper question.

25 In addition, there's nothing in the record to

1 substantiate that the original of this piece of paper is, in  
2 fact, wrinkled, if that makes any difference.

3 CHAIRMAN BECHHOEFER: Why don't you rephrase the  
4 question? I do think, as asked, I think a little more  
5 foundation needs to be established and you may want to  
6 progress slowly.

7 DR. BEN-HAIM: Okay.

8 BY DR. BEN-HAIM:

9 Q I will put the question differently. I'm not  
10 going to repeat that question, but I'm going to put the  
11 question differently.

12 Would I have violated NRC regulations as a  
13 physicist putting down information on a piece of paper as a  
14 request of Dr. Elamir, who had designated Ms. Smoligova to  
15 be the ordering -- the secretary who does the ordering job?  
16 Would it be a violation? Just, that's all.

17 A Okay. As far as a violation, I'm assuming here  
18 that you're referring to 10 C.F.R. 30.10, Deliberate  
19 Misconduct." You've given a number of facts in this case.  
20 If you knew that the instructions that you were providing  
21 would bring about the possession of by-product material at  
22 NMA and you knew that before NMA could possess by-product  
23 material the approval of the RSO was needed, then yes, that  
24 would have been a violation of 10 C.F.R. 30.10.

25 I'm assuming here that we're speaking in the

1 hypothetical.

2 Q Do you recall that this piece of paper was given  
3 way before operations even started?

4 MS. HODGDON: Objection again. There was no  
5 testimony as to exactly when this piece of paper was given.  
6 Ms. Smoligova did not recall. If Dr. Ben-Haim recalls that  
7 or has some record of it, he hasn't testified to that yet.  
8 If there's a place in the record where it's established, Dr.  
9 Ben-Haim can point the witness to that.

10 BY DR. BEN-HAIM:

11 Q Would it have made a difference if you knew that  
12 this paper was given long before operations even started?

13 A This piece of paper is relevant in two ways. It  
14 goes to both the authorized user and the Radiation safety  
15 officer. It seems clear to me that this piece of paper was  
16 meant to bring about the purchase of a specific  
17 radiopharmaceutical, Medronate Phosphate, MDP, in a specific  
18 dosage, 25 millicuries.

19 I've pointed to Appendix I, which you submitted,  
20 wherein it's clear that that needs to be a prescribed  
21 dosage. It needs to have the involvement or approval of an  
22 authorized user. It doesn't matter much in my mind when it  
23 was submitted. If you knew that it would bring about this  
24 possession and that the authorized user would not be  
25 involved, then I don't see the relevance.

1 I would remind you, Dr. Ben-Haim. You were the  
2 knowledgeable person at this licensee. I think it's been  
3 well-established that Dr. Elamir was not. We've heard  
4 testimony from the two technologists, in particular Marina  
5 Geylikman was not. She apparently was adjusting these doses  
6 and thinking that she was entitled to do that because of  
7 some sort of "license" that she holds.

8 I don't understand what that license may be. It  
9 may be a state license, but it does not supersede NRC  
10 regulations. And as the individual who is knowledgeable,  
11 this was primarily your responsibility. Compliance with NRC  
12 regulations is something that you were being paid to assure.

13 Q Did I have the right as a physicist to just write  
14 down the information, not as an authorization or a  
15 prescription, but just the information. That, as a  
16 physicist, has some relevance since the image that the  
17 doctor wants to get has to be -- you have to have enough  
18 statistics.

19 So in a way, the physicist --

20 MS. HODGDON: Objection. Dr. Ben-Haim is making  
21 an argument. He should ask a question.

22 CHAIRMAN BECHHOEFER: He may establish a  
23 foundation for a question, however.

24 MS. HODGDON: It's my perception that he's  
25 arguing. It goes to the last point that was made by Mr. Del

1 Medico.

2 BY DR. BEN-HAIM:

3 Q Did you hear before in the last two days that this  
4 piece of paper could also be looked at as information and  
5 just information?

6 A I may have heard that. I ascribe to the testimony  
7 of Dr. Barry Siegel and I don't believe he said that.

8 Q Did he think it was radiation -- diagnostic  
9 procedures manual?

10 MS. HODGDON: Objection. If he wants to impeach  
11 -- he has the transcript, does he not? Could he not point  
12 to Dr. Siegel's testimony and ask this question more  
13 pointedly? Actually, I think the last reference was to a  
14 question made by a Board about couldn't it be just  
15 instruction and not to anybody's testimony. I think we're  
16 going to get a very bad record here if we don't clean up our  
17 act a little bit.

18 CHAIRMAN BECHHOEFER: We'll overrule that  
19 objection. While it might be desirable to point to a place  
20 in the transcript, I think to the extent Dr. Ben-Haim --

21 MS. HODGDON: The objection was that Dr. Ben-Haim  
22 asked the witness whether he recalled that there was  
23 testimony that this was an instruction. I myself don't  
24 recall any -- I haven't read the transcript either because I  
25 just got it. I myself don't recall any testimony that this

1 was an instruction.

2 So that is why I asked that he point to the record  
3 instead of asking -- maybe it's proper and the witness can  
4 just answer that he doesn't. I'm just saying that this is  
5 not really a proper question given that he's been given a  
6 transcript by the Board for his use and if he wants to use  
7 his assistant to find that place, that's fine.

8 But other than that, just a wide open question  
9 whether he recalls if there was testimony that this is just  
10 an instruction. . .

11 I've found the place in the transcript, if anybody  
12 is interested. On the transcript 387, Dr. Rein asked the  
13 question, "Did anyone tell you it's not instructions and  
14 it's only information?"

15 THE WITNESS: I'm sorry. Who was the question  
16 asked to?

17 MS. HODGDON: The question was a question of Dr.  
18 Rein.

19 THE WITNESS: To?

20 MS. HODGDON: To, I believe the witness was Dr.  
21 Siegel. No, it wasn't Dr. Siegel. Let me see who's on at  
22 387. One second.

23 CHAIRMAN BECHHOEFER: I think the witness has  
24 already answered the question, has he not?

25 MS. HODGDON: The answer is --

1 CHAIRMAN BECHHOEFER: Has not this witness --

2 JUDGE KLINE: This witness answered the question,  
3 that he relied on Dr. Siegel's testimony and Dr. Siegel  
4 didn't say anything about information, and that seems to be  
5 a complete answer.

6 MS. HODGDON: Thank you, if that's what you heard.  
7 What he got was the answer to a different question, but I  
8 want to ask to have it read back because I think it has  
9 little use, lacking in probative value.

10 THE WITNESS: I'm now getting concerned about  
11 having my answer restated. Perhaps for the record, I'll do  
12 this again. I ascribe to the testimony of Dr. Siegel. Dr.  
13 Siegel's complete testimony, in my opinion, makes it clear  
14 that this could not have been a mere miscellaneous  
15 instruction.

16 CHAIRMAN BECHHOEFER: That's what I heard.

17 BY DR. BEN-HAIM:

18 Q Let's go to another question. Could I reasonably  
19 expect such a misconduct, such a deliberate misconduct, to  
20 go undetected, having had experience with the way NRC  
21 inspections are conducted?

22 MS. HODGDON: Objection. The deliberate  
23 misconduct, it's not clear what that is, what that  
24 misconduct is, whose misconduct.

25 DR. BEN-HAIM: My misconduct.

1 MS. HODGDON: No foundation.

2 DR. BEN-HAIM: I am the one that is accused of  
3 deliberate misconduct, right?

4 BY DR. BEN-HAIM:

5 Q So could I expect -- could I reasonably expect  
6 this to go undetected?

7 CHAIRMAN BECHHOEFER: Dr. Ben-Haim. Could he  
8 reasonably expect.

9 MS. HODGDON: His own misconduct.

10 DR. BEN-HAIM: My own misconduct.

11 CHAIRMAN BECHHOEFER: His own, yes.

12 THE WITNESS: Thank you, Judge Bechhoefer.

13 CHAIRMAN BECHHOEFER: That's the way we understood  
14 it.

15 DR. BEN-HAIM: I am accused of deliberate  
16 misconduct.

17 THE WITNESS: Thank you. Yes, Dr. Ben-Haim. This  
18 goes to the very heart of the Commission's concern with  
19 deliberate misconduct. As you know, our inspections are  
20 conducted infrequently. For hospitals, I believe it's once  
21 a year. It couldn't possibly be any more frequent for a  
22 nuclear medicine clinic.

23 BY DR. BEN-HAIM:

24 Q Not the initial inspection.

25 A When an inspection is conducted at such a

1 facility, it lasts only a few hours. You were aware of that  
2 because of the inspection that Mr. Gibson conducted. In the  
3 meantime, for all the rest of that year, we are relying on  
4 the licensee and its contractors and its employees to  
5 conduct their operations with integrity and in complete  
6 compliance with NRC regulations, and it's a matter of trust.  
7 That's all the Commission has, is its trust in the licensee,  
8 its individuals, and its contractors.

9 Q As a follow-up question to the same question,  
10 would it not be reasonable for me to expect that on an  
11 initial inspection, especially an initial inspection when  
12 the concern of the NRC and my own concern that I share  
13 absolutely with the NRC that compliance with regulations is  
14 fully -- that the regulations are fully complied with, would  
15 it be reasonable to assume that I -- that it would certainly  
16 come out that there was no RSO and no authorized user if I  
17 knew that or if I knowingly had misled the NRC and Dr.  
18 Elamir?

19 MS. HODGDON: With regard to misled, that question  
20 has already been asked and answered. With regard to whether  
21 --

22 DR. BEN-HAIM: No, the question is different.

23 BY DR. BEN-HAIM:

24 Q The question is, on an initial inspection, would a  
25 reasonable person -- and I think that as -- would a

1 physicist -- would a thinking person not expect -- could he  
2 think that this would go undetected?

3 MS. HODGDON: The lack of an RSO and authorized  
4 user would go undetected --

5 DR. BEN-HAIM: Yes.

6 MS. HODGDON: -- or that his own misconduct?

7 DR. BEN-HAIM: Yes, both.

8 THE WITNESS: Well, I don't know. It might go  
9 undetected if certain answers were given to an NRC inspector  
10 to mislead the inspector in some way, and I believe we have  
11 some indication somewhere along the line that that happened  
12 in this case.

13 BY DR. BEN-HAIM:

14 Q Did the fact that the RSO and the authorized user  
15 were not -- was actually not performing his duties go  
16 undetected in this inspection?

17 A No, it did not.

18 Q Another question. Why should I use Moskowitz's  
19 name since I had other potential AUs and RSOs at my disposal  
20 if it was my -- if Dr. Elamir had asked me for it?

21 MS. HODGDON: Objection. Calls for speculation,  
22 which is nothing regarding this as in evidence. Why should  
23 he use when he has -- the foundation has not been laid here,  
24 when he has other RSOs at his disposal and so forth.

25 CHAIRMAN BECHHOEFER: I'm not sure this witness

1 could answer that.

2 BY DR. BEN-HAIM:

3 Q Why should anybody use -- why should anybody use a  
4 name like an RSO, an AU without any -- why should he do  
5 that? What would be the reason to use somebody's name  
6 without his approval?

7 MS. HODGDON: Same objection. Calls for  
8 speculation.

9 CHAIRMAN BECHHOEFER: I think we will sustain that  
10 objection. I don't think this witness could answer that  
11 type of question.

12 BY DR. BEN-HAIM:

13 Q What, according to your reasonable mind and  
14 thinking, would anybody -- what would be the reason for  
15 anybody to use somebody's name without -- I'll withdraw the  
16 question.

17 Don't you think that I would lose, rather than  
18 gain, if I engage in deliberate misconduct?

19 MS. HODGDON: Objection. Same question.

20 CHAIRMAN BECHHOEFER: Again, I don't think this  
21 witness --

22 DR. BEN-HAIM: But this witness talks exactly  
23 about this, that I had -- say that I had a gain.

24 BY DR. BEN-HAIM:

25 Q In your testimony, Mr. Del Medico, Q11, A4. "The

1 Enforcement Policy in Section VIII states that in deciding  
2 whether to issue an enforcement action to a non-licensed  
3 individual, the NRC will consider factors such as the  
4 following," and No. 4, "The benefit to the wrongdoer, e.g.,  
5 personal or corporate gain."

6 My question is, what is the gain Dr. Ben-Haim  
7 expected to receive from engaging in this particular,  
8 deliberate misconduct?

9 A Well, Dr. Ben-Haim, further on in the testimony,  
10 in answer to Q18, the NRC Staff does believe that there was  
11 tangible gain to you from this misconduct because of the  
12 licensee's continued operation, even though it did not have  
13 a Radiation safety officer or authorized user, allowed you  
14 to continue to earn consulting fees.

15 Of course, your agreement with NMA is in Exhibit 7  
16 of the OI report.

17 The agreement sets a fee of yearly \$16,000 payable  
18 quarterly at the beginning of each quarter and goes on to  
19 state, "As a physicist, I will supervise your Staff in all  
20 aspects related to the safe use of radioisotopes."

21 Q Can you quote specific cases where a similar  
22 sanction has been ordered?

23 A You said could I quote. Not sitting here. I  
24 don't have any of those documents in front of me, so I  
25 certainly could not quote them.

1 Q Do you recall any case?

2 A I've handled such cases, not all of them, but such  
3 cases since the rule was promulgated in 1991, and certainly  
4 many of those cases have involved a prohibition against an  
5 individual to keep that individual from engaging in licensed  
6 activities for a period of five years, if I'm answering your  
7 question.

8 Q Can you recall a case where the situation was  
9 similar? Can you describe, without giving a name, can you  
10 describe a similar situation?

11 A Well, I'm not sure what you mean by similar  
12 situation.

13 Q A situation where a physicist or a consultant was  
14 accused of deliberate misconduct and was given -- actually  
15 was forced to just destroy his business for five years?

16 A I'm sorry. I think it would be more correct to  
17 say was given an enforcement sanction that involved a  
18 prohibition against involvement in NRC-licensed activities  
19 for a period of five years.

20 Q Another question.

21 CHAIRMAN BECHHOEFER: Has that question been  
22 answered yet?

23 DR. BEN-HAIM: Yes. Well, I did not hear -- no,  
24 it was not answered actually.

25 THE WITNESS: I don't have the cases in front of

1 me. It strikes me that in the materials area, as opposed to  
2 the reactor area, which I'm not involved in, there are  
3 probably more cases that involve employees of licensees and  
4 few that involve consultants. However, the regulation is  
5 clear, 30.10 is clear.

6 When the Commission promulgated it, they had every  
7 expectation that it would apply equally to either an  
8 employee or a consultant. The Commission makes no  
9 difference in the rule itself or in the Statements of  
10 Consideration.

11 BY DR. BEN-HAIM:

12 Q So if I understand your answer correctly, do you  
13 recall -- can you -- do I understand your answer correctly  
14 that you do not recall any similar case? You do not have  
15 any -- do you have any personal experience being actively  
16 engaged in giving a sanction or in approving a sanction that  
17 your testimony in my case -- I'm sorry. I have to rephrase  
18 all this.

19 Do I understand you correctly that you don't have  
20 any personal recollection of a case like mine?

21 A We generally don't handle these things by  
22 recollection. We handle them through our files and through  
23 lists, chart-form lists that we keep within the Office of  
24 Enforcement. I've been involved in enforcement cases where  
25 the individual who was receiving a sanction requested those

1 in advance of the hearing and they were given and I prepared  
2 myself to answer questions about those.

3 But based on this particular case and the  
4 proceeding thus far, I did not do that in any great detail,  
5 and that's why I'm not prepared today to quote chapter and  
6 verse about any of those cases.

7 Q Do you have any experience with deliberate  
8 misconduct?

9 A Since this rule, 30.10, entitled "Deliberate  
10 Misconduct" was promulgated, I've handled a fair number of  
11 cases in which the Office of Investigations has, in a  
12 report, established a pattern of deliberate misconduct and  
13 an enforcement sanction has been required.

14 However, most of the enforcement cases that we  
15 handle on a day-to-day basis are against licensees and not  
16 against unlicensed individuals and there's a whole different  
17 ballgame there. They're primarily civil penalties. They're  
18 not primarily orders.

19 Q I have no more questions at this point.

20 CHAIRMAN BECHHOEFER: Before we start questions, I  
21 think we'll take a short break, about a ten-minute break.

22 [Recess.]

23 CHAIRMAN BECHHOEFER: Back on the record.

24 Mr. Del Medico, I would like to ask you first, did  
25 you play any part at all -- your testimony states that this

1 is a category -- or maybe the word isn't category -- Level  
2 II violation? Did you play a role in establishing that  
3 level for the facts that were presented to you through the  
4 reports, et cetera?

5 THE WITNESS: Judge Bechhoefer, the violations  
6 that we're speaking about would be violations on the part of  
7 the licensee, and the NRC Staff has not formally established  
8 them because there has not been any notice of -- there has  
9 not been any enforcement action taken against NMA for these  
10 violations.

11 What I did in preparing for my testimony is I  
12 looked through the relevant examples in the enforcement  
13 policy and also from my role in this case originally when  
14 the order was issued to get some general idea of what the  
15 severity level of these violations would be as a very first  
16 step in thinking about whether there should be a sanction  
17 and what that sanction should be.

18 DR. REIN: I didn't understand the answer. Did  
19 you play a role in establishing the level or was it given to  
20 you by Staff?

21 THE WITNESS: The level has not been formally  
22 established. There has not been any enforcement action  
23 taken against NMA. That is where the NRC Staff would  
24 establish the severity level of the violations.

25 DR. REIN: It states that this would be a Level

1 II, to be established. We've been talking about this. The  
2 question is, did you personally determine that it would be a  
3 Level II or did someone else make that determination for  
4 you?

5 THE WITNESS: Insofar as it's been established at  
6 all, no one else made that determination for me. However,  
7 the Director of the Office of Enforcement would generally  
8 concur, and it seems clear to me from the examples in the  
9 policy -- I mean, there isn't a whole lot of leeway in this.

10 DR. REIN: It's a real simple question. On page 9  
11 of your testimony, it says, "The violations that were caused  
12 by Aharon Ben-Haim's actions would be categorized at a  
13 severity Level II." That's your answer, isn't it?

14 THE WITNESS: This is my testimony.

15 DR. REIN: Now, the question that I have is, is  
16 that your answer that it would be a II, or does that answer  
17 come from someone else?

18 THE WITNESS: This is my answer and, in addition,  
19 it's concurred in by the Director of the Office of  
20 Enforcement, who is the individual who signed this order  
21 against Dr. Ben-Haim.

22 DR. REIN: Did he give it to you or did you give  
23 it to him and he concurred?

24 THE WITNESS: I wrote this testimony, gave it to  
25 him, and he concurred with it.

1 DR. REIN: So the Level II came out of your  
2 experience and your head and your background?

3 THE WITNESS: Yes, sir.

4 DR. REIN: Okay.

5 THE WITNESS: And out of the Commission's  
6 enforcement policy.

7 DR. REIN: As you interpret them.

8 THE WITNESS: Well, as they're written.

9 CHAIRMAN BECHHOEFER: My next question is,  
10 considering this a severity Level II -- well, considering  
11 the violations to be a severity Level II, what is the range  
12 of sanctions to an individual who might cause a licensee to  
13 commit a Level II violation? What range of sanctions for a  
14 particular individual could there be?

15 THE WITNESS: Well, there could be a range that  
16 runs from no action at all, possibly simply a letter to the  
17 individual saying that you are the subject of an OI report.  
18 The OI report is now completed, admonishing the individual  
19 about 30.10, reminding the individual for the future not to  
20 -- that the individual is subject to 30.10 and should not  
21 engage in deliberate misconduct.

22 Insofar as they presently exist, they range up to  
23 prohibiting the individual from involvement in licensed  
24 activities for a period of ten years. I believe that  
25 there's currently an individual who has an indefinite

1 prohibition, but there's some complication. He has left the  
2 country or something like that, and so some finite  
3 prohibition has not been established.

4 JUDGE LAM: So you're saying five years is not the  
5 maximum length of time?

6 THE WITNESS: When the Statements of Consideration  
7 were published, the Commission says in the Statements of  
8 Consideration, I believe they give -- they say would  
9 normally range up to a maximum of five years.

10 But after the Statements of Consideration were  
11 published, back when we needed to consult with the  
12 Commission before a sanction against an individual was  
13 taken, the Commission, in at least one case that I'm  
14 familiar with, and I think there may be one or two others,  
15 instructed the Staff in a Staff Requirements Memorandum,  
16 otherwise known as an SRM, to apply a sanction, a  
17 prohibition against involvement in licensed activities of  
18 ten years.

19 CHAIRMAN BECHHOEFER: Was any sort of amendment to  
20 NUREG-1600 published, made available to the public at that  
21 time?

22 THE WITNESS: I don't believe that NUREG-1600  
23 discusses a maximum length of such a sanction. I was  
24 referring earlier to the Statements of Consideration for the  
25 rule itself, 10 C.F.R. 30.10.

1 CHAIRMAN BECHHOEFER: I'm aware of that.

2 THE WITNESS: Oh, I'm sorry.

3 CHAIRMAN BECHHOEFER: Has the Commission ever  
4 published ranges of sanctions? I know they have for civil  
5 penalties of various levels and this doesn't apply,  
6 apparently, to individuals, but ranges of penalties are set  
7 forth for various levels. There's a range and it depends,  
8 in part, on the type of facility and the type of violation.

9 If you were doing a civil penalty, you could come  
10 up with some ranges that would be applicable to each  
11 particular action. I wanted to find out what the range  
12 would be for an individual such as this.

13 THE WITNESS: The only mention of the length of a  
14 sanction in a publication in the Federal Register that I'm  
15 aware of is this particular Statements of Consideration from  
16 1991. Of course, enforcement actions themselves are public  
17 documents, and in particular, orders against individuals are  
18 published in the Federal Register.

19 So to the extent -- in the case that I was  
20 referring to, to the extent that the individual received a  
21 sanction of ten years, that would have been published as an  
22 order in the Federal Register, an order against that  
23 individual.

24 CHAIRMAN BECHHOEFER: Well, in your view, based on  
25 what we've heard in the last couple of days, but we haven't

1 heard from Dr. Ben-Haim yet, but if the violation were  
2 deemed to be exhibiting the type of intent that's  
3 characterized as carelessness or failure to -- not knowingly  
4 intending to deceive, but careless disregard -- I believe  
5 those words are used in NUREG-1600 -- would there be any  
6 difference?

7           If we were to view these activities such as  
8 perhaps unintentional error, unintentional failure to take  
9 corrective action, that type of thing, would there be any  
10 difference in the type and length of the penalty that would  
11 be appropriate? Such as, well, should it be three years,  
12 four years, two years, time served, to quote a New England  
13 judge?

14           There are a range of actions that I believe we  
15 have authority to take. We couldn't go over five years  
16 under long-standing policy, but we have considerable  
17 discretion within that time frame, within the five-year time  
18 frame, the five-year, by the way, measured from July of 1987  
19 [sic], which is what's in the order.

20           THE WITNESS: To review the requirement that Dr.  
21 Ben-Haim violated, 10 C.F.R. 30.10, Deliberate Misconduct,  
22 that requires a finding of deliberate misconduct. Careless  
23 disregard is not a violation of 10 C.F.R. 30.10. There  
24 could be some confusion because when the Commission  
25 published the proposed rule, it was included. But it's very

1 clear from the words in 30.10 themselves and from the  
2 Statements of Consideration that between the proposed rule  
3 and the final rule, the Commission changed its mind.

4 So the question you're asking me, the answer to it  
5 is that if there were not deliberate misconduct in this  
6 case, there would be no violation on the part of Dr.  
7 Ben-Haim. There certainly may be violations on the part of  
8 the licensee, but there would be no violation on the part of  
9 Dr. Ben-Haim.

10 Under those circumstances, insofar as I could see,  
11 the Board would be vacating the entire sanction.

12 CHAIRMAN BECHHOEFER: I see. So you don't think  
13 that we would have authority, for instance, viewing the  
14 evidence, to say that three years should have been better  
15 than five or more appropriate than five or two years or four  
16 years?

17 THE WITNESS: No.

18 CHAIRMAN BECHHOEFER: In other words, anything  
19 less than five. You think that it either has to be zero or  
20 five?

21 THE WITNESS: First let me clarify my previous  
22 answer. I thought the question you were asking me is, what  
23 will happen if the Board finds that there was no deliberate  
24 misconduct in this case, and to the extent that there was  
25 any error on Dr. Ben-Haim's part, it extends no further than

1       careless disregard.

2               My answer in that case is that there would be no  
3 violation on the part of Dr. Ben-Haim and, of course, there  
4 would be no sanction if there were no violation. Am I  
5 making myself clear?

6               CHAIRMAN BECHHOEFER: Yes.

7               THE WITNESS: Thank you.

8               CHAIRMAN BECHHOEFER: Now, would we, in your mind,  
9 depending on our view of the testimony, have any authority  
10 to go to a less severe sanction, three years, four years,  
11 two years, whatever, anything less than five, again measured  
12 from the date of July 1987 [sic] as the current sanction is?

13              THE WITNESS: Judge Bechhoefer, I am really not  
14 trained in administrative law and it seems to me I'm  
15 probably not the person to ask.

16              JUDGE LAM: To put it another way then, do you  
17 have the discretion to impose a one-year, two-year,  
18 three-year, four-year sanctions instead of five?

19              THE WITNESS: Yes, certainly we do. I hope that a  
20 previous answer made that clear, and in addition, this order  
21 issued to Dr. Ben-Haim, as do all orders issued to  
22 individuals, has a clause that allows relaxation. So if  
23 there were a showing on the part of Dr. Ben-Haim at some  
24 later date that there was a reason to relax the order, relax  
25 some provision of the order, the NRC Staff would consider

1 what showing Dr. Ben-Haim was making, and if he succeeded in  
2 that showing, the order would be relaxed to the extent that  
3 the showing provided. Did I answer your question? I'm  
4 sorry.

5 JUDGE KLINE: Yes.

6 CHAIRMAN BECHHOEFER: You mentioned a later date,  
7 but does this hearing represent a later date? It's later  
8 than the order certainly. Would this hearing be an  
9 attempted showing that something less than five years should  
10 be imposed with all the facts collectively that have been  
11 developed in the last couple of days? Which we haven't  
12 ruled on yet, by the way.

13 THE WITNESS: Well, if you are asking me -- I just  
14 do not feel qualified to comment on what the Board might do  
15 here, but if you're asking me if the NRC Staff could use the  
16 proceedings of this hearing as some sort of showing, let me  
17 review the order.

18 I think the individual has to initiate -- excuse  
19 me just a moment.

20 CHAIRMAN BECHHOEFER: Well, the individual has  
21 initiated this hearing.

22 THE WITNESS: Well, actually, there may be a minor  
23 error in this order. In the order at the end of Section V,  
24 it says, "The Director, Office of Enforcement, may, in  
25 writing, relax or rescind any of the above conditions upon

1 demonstration by the licensee of good cause," and it should  
2 say there, you know, "upon demonstration by Dr. Ben-Haim of  
3 good cause." Did that answer your question?

4 CHAIRMAN BECHHOEFER: Well, to the extent that Dr.  
5 Ben-Haim initiated this hearing, could what has gone on  
6 before and what will go on this afternoon cause the Director  
7 of Enforcement to modify its views, modify its views on the  
8 sanction or relax the sanction?

9 THE WITNESS: The results of a hearing, per se, up  
10 until this point, insofar as I know, have not caused that to  
11 happen. I can assure you that the director of the Office of  
12 Enforcement will review the transcripts of this proceeding  
13 and -- there might be a minor legal matter of whether Dr.  
14 Ben-Haim needed to make some sort of a minor request, such  
15 as a two-line request, "Please consider the hearing as a  
16 showing of cause to relax the order," or possibly not.

17 I just don't know this. It seems to me that's a  
18 legal question. But the information that's here on the  
19 transcript could certainly be considered by the NRC Staff if  
20 the Staff found any of that information to make a showing.  
21 I see no impediment to that. It's not ever happened that  
22 I'm aware of.

23 Normally what happens is an individual who has --  
24 if it happens at all, an individual who has had a sanction  
25 imposed against him or her will specifically request, in

1 writing as it says here, from the director, Office of  
2 Enforcement, a relaxation of some portion of the order and  
3 will give the reasons.

4           Early on in the proceeding, there was a minor  
5 relaxation of the first order that was issued against Dr.  
6 Ben-Haim, for example, because of his request.

7           JUDGE KLINE: Mr. Del Medico, I want to direct  
8 your attention this visual aid up here just for  
9 clarification purposes. Look at the top one, however,  
10 referring to maintaining in our records. I thought we heard  
11 yesterday from the OI panel that they had, in fact,  
12 inspected the records of the organization and found them to  
13 be in order.

14           So I take it then you're not asserting any  
15 violation with respect to the duty to maintain records? Is  
16 that correct?

17           MS. HODGDON: Objection -- objection, excuse me,  
18 Judge Kline. I believe that foundation is not correct.

19           JUDGE KLINE: Well, let him clarify it then.

20           MS. HODGDON: Fine. If you would look in the  
21 record of the transcript, I'm sure you would find that what  
22 OI said was different, but with that caveat, he can answer  
23 the question if he knows. The foundation is just not  
24 correct.

25           JUDGE KLINE: The OI as I recall it, and I don't

1 have the record in front of me, is that they matched records  
2 from NMA against delivery records from the radiopharmacy.

3 Is that correct?

4 MS. HODGDON: That's right, but the relationship  
5 between this and those two documents that they matched is  
6 something that Mr. Del Medico may or may not know about.  
7 But anyway, he knows about this one and maybe it would be  
8 better if he --

9 JUDGE KLINE: That's all I'm trying to do is  
10 clarify because I don't understand it either.

11 MS. HODGDON: Excuse me?

12 JUDGE KLINE: I don't understand the relationship  
13 between this statement and what the OI said, and all I'm  
14 asking him to do is clarify it. If he doesn't know, then it  
15 won't be clarified.

16 MS. HODGDON: Well, I think that if he can just  
17 clarify this one, what's required by this requirement, that  
18 the distinction between this and what OI said will be  
19 obvious.

20 JUDGE KLINE: It's all right with me.

21 MS. HODGDON: Do you need more than that? Do you  
22 want the full regulation?

23 THE WITNESS: No. Judge Kline, I do not believe  
24 that the Office of Investigations inspected or performed an  
25 inspection to determine the licensee's compliance with this

1 particular regulation. This is something that the  
2 Inspection Branch of Region I would do. Of course, you  
3 understand there are many types of records generated in a  
4 nuclear medicine activity, some of which are NRC  
5 requirements, some of which might be requirements on the  
6 part of the nuclear pharmacy if there is one involved.

7 I don't remember the specific reference in the  
8 transcript that you're talking about, but it seems fairly  
9 clear to me that OI would not be the part of the NRC Staff  
10 that would determine whether or not NMA had violated this  
11 particular requirement, 10 C.F.R. 35.53(c)(3). That would  
12 be Mr. Kinneman's responsibility and the inspector under  
13 him, in this case, Mr. Gibson.

14 JUDGE KLINE: Well, my memory is still reporting a  
15 glitch somewhere and it would take a long time to find it in  
16 the transcript. I specifically recalled Mr. Davis saying,  
17 "Yes, the inspectors should have done this records check and  
18 didn't, so I did it." I'm just wondering if it's the same  
19 records check and if there's any violation asserted.

20 JUDGE LAM: Well, in yesterday's testimony, Mr.  
21 Davis, part of the OI team, had stated for the record that  
22 he personally matches some computer listing with the  
23 Medi-Physics record. So that may or may not be what you are  
24 talking about, Mr. Del Medico.

25 JUDGE KLINE: I don't know if they're the same.

1 All I want to know is what you understand about that.

2 THE WITNESS: I do not see how they could be the  
3 same.

4 JUDGE KLINE: Okay.

5 THE WITNESS: And in addition, it's been  
6 well-established in this proceeding that there was no  
7 prescribed dosage by an authorized user. Therefore, it's  
8 very clear to me, you know, irregardless of what may have  
9 been said or not said or how it's been interpreted up until  
10 now, that there is a violation of this requirement on the  
11 part of the licensee.

12 JUDGE KLINE: That's what I'm trying to get at.  
13 The violation turns on the definition of the word  
14 "prescribed," not on any failing in an actual record.

15 THE WITNESS: Well, the violation turns on the NRC  
16 definition of the term "prescribed dosage," which is in 10  
17 C.F.R. 35.2.

18 CHAIRMAN BECHHOEFER: That just goes back to the  
19 authorized user question.

20 THE WITNESS: Yes, sir.

21 JUDGE KLINE: Not that there's some paper record  
22 somewhere that reports erroneous information.

23 THE WITNESS: Well, I'm not sure what we mean by  
24 the authorized user question. It's very clear to me, for  
25 the purposes of this proceeding. That there was no

1 authorized user.

2 JUDGE KLINE: I understand that.

3 THE WITNESS: Thank you.

4 JUDGE KLINE: I think I understand it.

5 CHAIRMAN BECHHOEFER: Let me get to another  
6 question. Your assertion of your authority to operate or to  
7 sanction an unlicensed consultant derives from 10 C.F.R.  
8 30.10; is that correct? That is, if there's a willful  
9 violation.

10 THE WITNESS: The Staff's authority to have an  
11 enforcement sanction on an unlicensed individual, including  
12 a consultant, yes, does derive from 10 C.F.R. 30.10,  
13 assuming that there's deliberate misconduct involved.

14 JUDGE KLINE: That section refers specifically to  
15 causing a licensee to be in violation, doesn't it?

16 THE WITNESS: Among other things, yes.

17 JUDGE KLINE: Okay. Now, my question is, where's  
18 the authority to extend the penalty to all other licensees  
19 where no violation of 30.10 has been alleged? That is to  
20 say, Dr. Ben-Haim is excluded from all licensed activity now  
21 and he apparently has other consulting jobs where no one has  
22 alleged that he violated 30.10. So where is your authority  
23 to impose a sanction at that point?

24 THE WITNESS: Well, it's the Commission's  
25 authority.

1 JUDGE KLINE: I want you just to point it to me.

2 THE WITNESS: Yes, sir. We should refer to the  
3 Statements of Consideration, which is Staff Exhibit 14.  
4 Actually, Judge Kline, the entire purpose of this rule  
5 change was to accomplish what you just said, was to  
6 establish a schema by which the Commission could impose a  
7 sanction that extended beyond an individual licensee and  
8 included any licensed activity at any NRC facility.

9 The Statements of Consideration make clear, at the  
10 bottom of 2-SC-83, middle paragraph, the last about 15  
11 lines, that up until this time, the Commission could issue  
12 an order to a single licensee to remove an individual from  
13 licensed activities. But the Commission had an overriding  
14 concern that that individual could move about within the  
15 field and get a job elsewhere.

16 The Commission wanted to change its rules so that  
17 -- to prevent that very thing. That is what the rule  
18 itself, 30.10, together with the Statements of Consideration  
19 that accompany it, accomplish.

20 I might add, this concern about individuals moving  
21 about appears many times throughout the Statements of  
22 Consideration. I'm just pointing to one of many places  
23 where the Commission mentions this.

24 JUDGE KLINE: All right. I understand it's in the  
25 Statements of Consideration, but they have not promulgated

1 -- do I understand correctly that they have not promulgated  
2 a rule on that matter?

3 THE WITNESS: No, that's incorrect. The rule is  
4 10 C.F.R. 30.10, which puts unlicensed individuals on notice  
5 that they are subject to Commission enforcement actions  
6 which, among other things, could prohibit them from  
7 involvement in NRC-licensed activities, not just at one  
8 facility, but prohibit them from involvement in any  
9 NRC-licensed activity.

10 JUDGE KLINE: When the director makes a conclusion  
11 that he has, in effect, lost confidence in the individual's  
12 likelihood of complying with NRC regulations, is that a  
13 generic finding that's not subject to rebuttal or could it  
14 be rebutted by evidence showing good behavior somewhere  
15 else?

16 THE WITNESS: Well, there are a number of ways  
17 that it could be rebutted. First of all, the order requires  
18 an answer to the order. So in the individual's answer to  
19 the order, presumably the individual could make a showing.  
20 The order provides an opportunity for a hearing on the  
21 immediate effectiveness. So presumably, the individual  
22 could make such a showing at that point.

23 Then lastly, the order has this provision that we  
24 were talking about a moment ago that allows for relaxation  
25 of the order. So if at some time in the future the

1 individual were able to make such a showing, the order could  
2 be changed, it could be relaxed.

3 JUDGE KLINE: Would it assist an individual to  
4 make a showing that there are no 30.10 violations anywhere  
5 else, just in the case at hand? That is to say, there's  
6 good behavior with respect to regulatory requirements in  
7 several other consultantships, but not --

8 MS. HODGDON: I don't really understand your  
9 question. Is it your contention or argument, foundation,  
10 that the absence of a notice of violation indicates good  
11 behavior as opposed to bad behavior?

12 JUDGE KLINE: You can transform it to absence of  
13 any violations known. The point I'm trying to get at is,  
14 there's a virtually generic statement that says that the NRC  
15 has lost confidence generally in this consultant and, in  
16 fact, we just don't know that there's any other behavior in  
17 violation other than the one in this case and it's no  
18 broader than this case.

19 The question is, could one make a demonstration of  
20 compliant behavior elsewhere in other consultantships to  
21 mitigate the loss of confidence that the director asserts or  
22 the Commission asserts? In other words, what can the guy do  
23 to mitigate a harsh penalty? What kind of evidence could he  
24 present or is this a non-rebuttable finding?

25 THE WITNESS: I'm hearing a number of questions

1 and I'll try to address them one at a time. I think the  
2 first question is, presuming an individual has engaged in  
3 deliberate misconduct at one facility, could the individual  
4 make a showing that he hadn't engaged in any other forms of  
5 deliberate misconduct as rebuttal.

6 Well, generally yes. You can use anything in  
7 rebuttal, but the point is, and I want to make this point  
8 clear because previously in this proceeding, there have been  
9 issues about was it a singular violation, was it plural, was  
10 it procedures of the RSO, was it a procedure of the RSO.  
11 This is a very serious matter to the Commission.

12 They have made that clear in what they have  
13 written and the Statements of Consideration make it very  
14 clear that it takes only one time that an individual engages  
15 in deliberate misconduct in order to make the Commission  
16 lose confidence in the ability of that individual to comply  
17 with Commission regulations and not engage in deliberate  
18 misconduct elsewhere.

19 This Statement of Consideration does not say you  
20 need to do this three times or ten times or 20 times. It  
21 uses the singular. I think you can understand the thinking  
22 on the part of the Commission. An individual who engages in  
23 deliberate misconduct one time, there is a very serious  
24 question raised about how, in the absence of being there  
25 daily, having an inspector there daily, some other form of

1 continuous audits, how could the Commission possibly have  
2 confidence that that individual would not do the same thing  
3 another time, either at the same facility or at another one.  
4 It really wouldn't matter.

5 JUDGE KLINE: Do I understand then that the  
6 Commission's loss of confidence is not subject to rebuttal  
7 by contrary evidence or by evidence of good behavior or  
8 compliant behavior elsewhere?

9 THE WITNESS: I expressed in my testimony that the  
10 Commission itself does --

11 JUDGE KLINE: It's all right if it is.

12 THE WITNESS: No, sir, no, sir. Please let me  
13 answer the question.

14 JUDGE KLINE: Okay.

15 THE WITNESS: I expressed in my testimony that the  
16 Commission does have a concept that at some point, an  
17 individual may become rehabilitated from this deliberate  
18 misconduct and may, at some point, again, some other time,  
19 be trusted to engage in licensed activities without some  
20 constant review, some inspector there permanently or what  
21 have you.

22 I quoted in my testimony two relevant factors in  
23 my opinion. First, in response to Q22, the Commission did  
24 express views concerning rehabilitation. There's a comment  
25 in the Statements of Consideration that commenters were

1 concerned with the length of time that an order would be in  
2 effect and sought additional information on how an  
3 individual could redeem himself or herself to avoid being  
4 listed for life.

5 The Commission's response was ordinarily, the  
6 Commission would expect to provide a specific time limit for  
7 the provisions of the order and a process for relaxation of  
8 the order. That was my first point.

9 Secondly, in my testimony, the Commission  
10 specifically addressed the attitude of the wrongdoer. This  
11 is in response to Q19. It seems important enough to me to  
12 read that short paragraph, if that's appropriate. I'm  
13 quoting now from the Statements of Consideration. "The  
14 Commission believes that in addressing the issue of future  
15 involvement of an individual in licensed activity where  
16 safety is crucial, it is proper to consider the individual's  
17 attitude toward compliance with safety practices and  
18 regulations.

19 "Recognition and admission of past errors  
20 indicates a more positive attitude than continuing denial or  
21 hostility and thus enhances the Commission's reasonable  
22 assurance that licensed activities will be conducted in a  
23 manner that protects the public health and safety."

24 It goes on to say, "However, attitude is only one  
25 factor and is not controlling in the overall determination."

1 JUDGE KLINE: First of all, I'm inquiring not on  
2 rehabilitation, but how one may mitigate the penalty in the  
3 first instance. In other words, in terms of weighing and  
4 balancing a penalty, what is it that would constitute  
5 evidence that would tend to mitigate a penalty? The  
6 paragraph you just read indicates that you would consider  
7 the individual's attitude towards compliance, and that goes  
8 to the heart of my question.

9 If the individual's attitude towards compliance is  
10 not faulted or, at least, in other instances of consulting,  
11 not the one before us, is that not evidence of willingness  
12 to comply?

13 THE WITNESS: I don't believe that the Commission  
14 found that. I believe the Commission found just once is  
15 enough, but I'd like to address some other points that  
16 you've raised. I'm not certain that it's appropriate to  
17 term this a penalty and the Staff does not set these  
18 sanctions with a view to a punitive aspect.

19 The sanction specifically is that the Commission  
20 has lost confidence in the individual and if the individual  
21 could show, at some point, that the Commission should have  
22 confidence for reasons set forth in the individual's  
23 showing, that would indeed be rebuttal and it could mitigate  
24 the length of the sanction.

25 JUDGE KLINE: But you're telling me that lack of

1 non-compliance in other aspects of the consultantship does  
2 not constitute such evidence.

3 THE WITNESS: Well, it seems to me that it  
4 certainly could be used in part in a showing, but I'm also  
5 giving due deference to what the Commission wrote in the  
6 Statements of Consideration, and it's clear to me, in the  
7 Statements of Consideration, that it only takes once.

8 JUDGE KLINE: It only takes once to find the  
9 violation. The issue is the level of --

10 THE WITNESS: It only takes once, one time of  
11 deliberate misconduct for the Commission to lose confidence  
12 in the ability of the individual to conduct licensed  
13 activities in compliance with Commission requirements. It  
14 is that loss of confidence that is the genesis for the order  
15 prohibiting involvement in licensed activities. It is not a  
16 punitive sanction.

17 JUDGE KLINE: Let me give you a hypothetical, that  
18 you have some consultant, not necessarily the one before us,  
19 who has several consultantships and he does have a genuine  
20 disregard for NRC regulations and he leaves a trail of  
21 violations at every consultantship he touches. Then you  
22 have another one, another consultant, who has several  
23 consultantships and engages in limited violations, and  
24 perhaps willful, but nevertheless, violations in one  
25 consultantships but none others.

1           Is there any regulatory way of distinguishing  
2 between those two individuals as to the sanction you would  
3 impose?

4           THE WITNESS: Yes. That does go to the sanction  
5 that would be imposed, and although the facts in this  
6 specific case wherein the Commission directed the Staff to  
7 impose a sanction of ten years, the facts that you presented  
8 in your hypothetical, the general concept of a trail of  
9 incidents of deliberate misconduct would, in that case,  
10 cause the Commission itself to lose confidence in that  
11 individual for a much longer period of time.

12           JUDGE KLINE: Okay. Going to the question of the  
13 period of time, I want to direct your attention to page 13  
14 of the testimony. Here it implies that the length of the  
15 sanction is what it takes to restore the Commission's  
16 confidence in the ability of the individuals to conduct  
17 licensed activities.

18           How do we get five years out of that? Why is it  
19 that one year wouldn't restore the Commission's confidence?

20           THE WITNESS: Well, I think your question goes to  
21 the heart of how this sanction of five years was chosen.

22           JUDGE KLINE: Let's go for it.

23           THE WITNESS: There are a number of factors that  
24 were considered and those factors are in my testimony at  
25 Q18, and generally speaking, these same factors are

1 considered in every deliberation involving an enforcement  
2 sanction or a possible enforcement sanction against an  
3 individual. That is how the Staff maintains consistency.

4 Now, recall originally when the Commission set  
5 this rule, which was in 1991, and up until December of 1996,  
6 the Commission required that the Staff consult with the  
7 Commission before the sanction was issued.

8 Over that period of time, through this process of  
9 consulting, by writing a Commission paper and seeing if the  
10 Commission had any further direction to the Staff, any  
11 change in the direction of the Staff, the concept of what  
12 sorts of deliberate misconduct might involve a one-year  
13 sanction, a three-year sanction, a five-year sanction, and a  
14 ten-year sanction, I might add, what was established and  
15 sort of firmed up and set into place.

16 In other words, at first the NRC Staff didn't have  
17 the Commission's full intent, but over those period of  
18 years, by this process of bringing each action to the  
19 Commission and listening to what the Commission had to say  
20 about it, the Commission -- both the Commission and the  
21 Staff believe that we had more or less jelled up, in general  
22 terms, a schema of what sort of factors might affect a  
23 decision concerning a sanction.

24 It was at that time that the Commission changed  
25 its policy and no longer required in advance that in

1 advance, the Staff come to the Commission with its full  
2 proposed action and wait for the Commission to approve or  
3 disapprove that action.

4 JUDGE KLINE: Earlier in your testimony, at Q11,  
5 you mentioned some general factors that influence in you  
6 deciding whether to issue an enforcement action, and among  
7 these are the safety consequences of the misconduct. I  
8 think we asked the Staff yesterday if there were any safety  
9 consequences, I mean, concrete safety consequences of the  
10 actions and they didn't point to any.

11 Was your deliberation influenced by the fact that  
12 there were no safety consequences, and does that tend to  
13 mitigate the penalty in any way?

14 THE WITNESS: Well, of course, there are actual  
15 and potential safety concerns.

16 JUDGE KLINE: I understand. I mean actual in this  
17 case.

18 THE WITNESS: As I recall, the Staff was more  
19 concerned with the potential safety consequences of an  
20 individual who could influence a wide number of licensees,  
21 not just one, but through his work, the consulting work that  
22 he did, a wide number of licensees. So the Staff was more  
23 concerned with potential safety consequences than actual  
24 safety consequences.

25 JUDGE KLINE: I understood that from his answer as

1 well. But as a matter of fact, nobody got overdosed in this  
2 case, did they? We have no record of it. We certainly  
3 don't know of any.

4 THE WITNESS: There's no record of an overdose in  
5 this case.

6 JUDGE KLINE: Thank you.

7 THE WITNESS: Although I might admit -- I might  
8 say, we heard from Dr. Siegel yesterday that the FDA-  
9 approved package insert for Medronate Phosphate indicates a  
10 dosage range that ends at 20 millicuries. It appears in  
11 this case that the dosage that was given was 25 millicuries  
12 and that's an overdose of 5 millicuries, one could say. I'm  
13 not sure exactly what you mean by an overdose.

14 There were no mis-administrations under the  
15 Commission's current definition of mis-administration in  
16 this case. There certainly -- if the intended dose that Dr.  
17 Moskowitz would have given was 20 millicuries, there  
18 certainly was additional radiation exposure needlessly given  
19 to these patients.

20 DR. REIN: We also heard that he was not critical  
21 at all of 25 millicuries in this case.

22 THE WITNESS: I'm sorry. Who was not?

23 DR. REIN: We also heard that he was not critical  
24 whatsoever of 25 millicuries, didn't we?

25 THE WITNESS: Who are we talking about?

1 DR. REIN: Dr. Siegel.

2 THE WITNESS: Dr. Siegel thought that the  
3 physician should set the dose according to his equipment --

4 DR. REIN: That wasn't my question.

5 THE WITNESS: Yes, it is. I believe it is.

6 DR. REIN: Let me rephrase my question --

7 THE WITNESS: Let me answer it, please.

8 DR. REIN: -- the way I want to. Did we not hear  
9 from Dr. Siegel that he had no criticism whatsoever of the  
10 fact that 25 millicuries was prescribed, regardless of  
11 whether it was prescribed by an AU or not, of the dosage?  
12 Or did you not hear that?

13 THE WITNESS: I heard Dr. Siegel say that the  
14 amount of radioactive material should be sufficient for the  
15 equipment at the facility, but should not be more than needs  
16 to be given to achieve a good, readable diagnostic image in  
17 the case at hand.

18 DR. REIN: I heard that same answer. Did you hear  
19 the question that I asked you? Let's try it again. Did you  
20 hear Dr. Siegel say that he had no criticism whatsoever of  
21 the 25-millicurie dose that was given in this case?

22 THE WITNESS: No, I don't recall that, but if  
23 you'd like to show me in the transcript where it is, it's  
24 possible that he did say it.

25 DR. REIN: I don't have that responsibility. As

1 long as -- if you don't remember it, that's fine.

2 THE WITNESS: Thank you.

3 CHAIRMAN BECHHOEFER: I want to follow up on --  
4 well, perhaps one of your answers to me earlier and also to  
5 Judge Kline. You were talking about relaxation. Now, for  
6 the next five years from last July, Dr. Ben-Haim is  
7 prohibited from engaging in NRC-licensed activities. How  
8 could he gain relaxation?

9 What would he say? "By the way, I've been out of  
10 a job for five years now or three years now and I haven't  
11 done anything wrong because I haven't involved in licensed  
12 activities." What is he supposed to say to get relaxation,  
13 that he's been abiding by the Staff order, assuming we don't  
14 modify it? How could he ever get relaxation?

15 THE WITNESS: Judge Bechhoefer, I have a great  
16 deal of difficulty answering that question because of a  
17 general tenet that the Commissioners hold. I learned this  
18 at Chairman Zeck's knee actually and that's that NRC  
19 employees cannot act as consultants to individuals or to  
20 licensees. If they do, in the end, we are, in essence,  
21 approving what we first proposed.

22 And so, with due respect, I think I'd prefer to  
23 stay out of that area.

24 CHAIRMAN BECHHOEFER: Well, you pointed out that  
25 there's a provision concerning relaxation. What you're

1 saying is that nothing Dr. Ben-Haim could do or not do would  
2 lead the Director of Enforcement to change his mind, because  
3 all he could say is that I've done nothing in the last two  
4 years, three years, four years, and please relax.

5 THE WITNESS: No, I certainly did not say that.  
6 And in point of --

7 CHAIRMAN BECHHOEFER: Doesn't that amount to what  
8 you did say?

9 THE WITNESS: No, Judge Bechhoefer. In point of  
10 fact, there have been cases -- there's at least one case  
11 that I have a very minor familiarity with in which a medical  
12 physicist did make a showing that an enforcement sanction  
13 issued against him should be relaxed and it was.

14 CHAIRMAN BECHHOEFER: Well, how would a person  
15 demonstrate that? Because he's now barred from any licensed  
16 activities, so you presume he's -- I'm presuming that the  
17 order were put into effect as written.

18 THE WITNESS: I'm very fearful that that would  
19 require my serving primarily as a consultant to Dr.  
20 Ben-Haim. I really find it improper that I should answer  
21 that question.

22 CHAIRMAN BECHHOEFER: Well, should we find --

23 THE WITNESS: Although I will say --

24 CHAIRMAN BECHHOEFER: -- that it's a meaningless  
25 provision because there's no way that we know of that Dr.

1 Ben-Haim could gain relaxation?

2 THE WITNESS: These relaxations are a matter of  
3 public record. They're not done in secret. They are not  
4 secret agency law. And so, it's out there, that one. I  
5 don't know if it's relevant to Dr. Ben-Haim's case. Dr.  
6 Ben-Haim, based on this proceeding, may need to make an  
7 entirely different showing. I have no idea.

8 CHAIRMAN BECHHOEFER: Well, my question is --

9 THE WITNESS: I will answer your question in  
10 general terms. The individual involved made a showing that  
11 the Commission could, at that point, have confidence in his  
12 ability to conduct licensed activities safely and in full  
13 compliance with the Commission's regulatory requirements.

14 CHAIRMAN BECHHOEFER: But I'm wondering how that's  
15 possible when you're not engaged in any licensed activity.  
16 You're barred from participating. To me, it might be a  
17 provision that I would cause to be dropped from the order  
18 because I would find it not possible to be executed.

19 THE WITNESS: But, of course, we know that it has  
20 been. I've testified to that effect and it's a matter of  
21 public record.

22 CHAIRMAN BECHHOEFER: From somebody who has been  
23 barred from all activities?

24 THE WITNESS: Yes, sir, insofar as I recall.

25 CHAIRMAN BECHHOEFER: I see.

1 JUDGE LAM: So there have been instances of other  
2 individuals who were under sanctions by the agency to  
3 successfully regain the agency's confidence. Is that what  
4 you're saying?

5 THE WITNESS: Well, I have a minor familiarity  
6 with one instance, so clearly, it's possible. Sitting here  
7 today without the NRC files, I'm not sure I want to make  
8 that stretch to instances.

9 JUDGE LAM: At least one instance?

10 THE WITNESS: Yes, sir.

11 JUDGE LAM: Mr. Del Medico, would you please look  
12 at your written testimony on page 8 and then pages 9 and 10?  
13 In response to Question 18, you have provided seven factors  
14 in determining the sanction against Dr. Ben-Haim. Do you  
15 have a process, either formal or informal, in weighing and  
16 balancing these factors? If you do, would you please  
17 describe it?

18 THE WITNESS: Well, it seems to me that there's no  
19 real process, that there's certainly no algorithm or  
20 formula. These factors either weigh for an individual or  
21 against an individual, of course, and if they weigh in favor  
22 of the individual, consideration is given to reducing the  
23 sanction based on that factor.

24 I hope I said that right. If they weigh for an  
25 individual. On the other hand, if they weigh against an

1 individual, consideration is given to increasing the  
2 sanction for that individual.

3 JUDGE LAM: So the Staff has discretion in  
4 applying these factors?

5 THE WITNESS: Yes. And the discretion comes from  
6 the Commission. The Commission's enforcement policy makes  
7 it clear that these sanctions are to be established by the  
8 Staff on an individual case basis. That's in my testimony.  
9 Well, it develops from the enforcement policy itself, the  
10 Commission's enforcement policy. They've chosen not to set  
11 up some formula or specific schema.

12 JUDGE LAM: And these factors do not necessarily  
13 carry equal weight?

14 THE WITNESS: No, and -- no.

15 JUDGE LAM: And in your view, which are the more  
16 -- well, let me ask this. Which is the most important  
17 factor here?

18 THE WITNESS: Well, it could vary from case to  
19 case, but -- I'm sorry?

20 JUDGE LAM: But for this particular case, for Dr.  
21 Ben-Haim's case, perhaps you can name two of the most  
22 important or the more important factors among the seven  
23 here.

24 THE WITNESS: Well, for the first and most  
25 important factor, I would defer to the Commission. The

1 Commission has written about the attitude of the wrongdoer,  
2 so that's pretty clear. That's on the record.

3 DR. REIN: Please, which of the seven is that one,  
4 attitude?

5 THE WITNESS: The very last one.

6 DR. REIN: Okay, thanks.

7 THE WITNESS: Of course, that was the Commission  
8 speaking. This is Joe Del Medico speaking. The second one,  
9 in my mind, would be the severity level of the underlying  
10 violations.

11 JUDGE LAM: Thank you.

12 THE WITNESS: Thank you, Judge Lam.

13 JUDGE KLINE: In weighing and balancing, did you  
14 consider any factors weighing in Dr. Ben-Haim's favor?

15 THE WITNESS: Well, of course, any of these  
16 factors could have weighed in Dr. Ben-Haim's favor. I say  
17 could have.

18 JUDGE KLINE: Did they?

19 THE WITNESS: Oh, I see, I see.

20 JUDGE KLINE: All of the factors on pages 9 and 10  
21 appear to be written in negative language.

22 THE WITNESS: Of course, that's not always true in  
23 every case.

24 JUDGE KLINE: Yes. I was wondering what, if any,  
25 factors you considered that weighed in his favor. Maybe

1 they're not written here.

2 THE WITNESS: Well, this sanction was not set at  
3 ten years, and, Judge Kline, you've pointed out that Dr.  
4 Ben-Haim, insofar as we know, has not engaged in deliberate  
5 misconduct at any other NRC-licensed facility. That  
6 certainly would have been a factor that would have further  
7 extended the sanction here.

8 In other cases, sometimes deliberate misconduct is  
9 self-reported to us and that certainly weighs in favor of  
10 the individual. Thank you.

11 JUDGE KLINE: Okay, thank you.

12 DR. REIN: Thank you for your clear testimony.  
13 It's been a pleasure listening to you. I hope I can be as  
14 clear with my questions.

15 Did you say that with the Level II sanction  
16 discretion that you had -- by you, I mean you and your staff  
17 generically -- that the range could have been from no action  
18 to ten years?

19 THE WITNESS: Well, yes.

20 DR. REIN: Not necessarily based on the facts of  
21 this case, but that would have been a Level II range that  
22 you could have, in your discretion, chosen depending on how  
23 you interpret the facts?

24 THE WITNESS: Keep in mind that the Commission  
25 didn't set up any particular schema that relates the

1 severity level of a violation to a specific sanction and  
2 that, in part, was the genesis for my testimony.

3 DR. REIN: I've really read a lot of this stuff,  
4 but I'm asking you about you. Could you have ranged from no  
5 action to ten years?

6 THE WITNESS: Well, the NRC Staff, in taking the  
7 sanction, could have ranged from no action to ten years.

8 DR. REIN: You're representing the Staff now, are  
9 you not, in describing the sanctions?

10 THE WITNESS: I'd just like to clarify for the  
11 record that I'm not the sole individual who made this  
12 decision or took this action and that the order is a product  
13 of the NRC Staff.

14 DR. REIN: Are you speaking for them on this  
15 issue?

16 THE WITNESS: Insofar as I can.

17 DR. REIN: Well, then I will understand that all  
18 your questions are NRC Staff answers relative to this issue.  
19 Let's just limit it to the narrow issues that I'd like to  
20 ask about.

21 In this case, from these facts in this record,  
22 from this testimony, what would change it from a Level II to  
23 a Level III in your opinion?

24 THE WITNESS: Well, any factor or combination of  
25 factors that had weighed in the favor of Dr. Ben-Haim

1 certainly could have. Had Dr. Ben-Haim been an employee  
2 rather than a consultant and had his employer already taken  
3 a significant action against him, it would seem from the  
4 point of view of the NRC Staff that, shall we say, a  
5 significant lesson was learned from that and that perhaps  
6 the Commission might have more confidence in the future that  
7 the individual would not engage in deliberate misconduct.

8 DR. REIN: So if he had had a smarter boss, his  
9 penalty would be less?

10 THE WITNESS: Well, unfortunately, Dr. Ben-Haim,  
11 of course, is not an employee. He's a consultant and in my  
12 testimony, I cover the fact that there's not the same  
13 relationship between employer and employee. There's really  
14 -- you know, consultants aren't fired to the extent that  
15 they have some record built in Human Responses against them  
16 that's available to future employers.

17 DR. REIN: Was my question difficult?

18 THE WITNESS: Well, I think you'll need to restate  
19 it.

20 DR. REIN: In this case, from this testimony, from  
21 these facts under these circumstances, from only what we  
22 know without speculating how many angels dance on the head  
23 of a pin, what would it take to have changed this from a  
24 Level II to a Level III in your opinion?

25 THE WITNESS: Dr. Rein --

1 MS. HODGDON: I'm sorry. I think the confusion  
2 is, as I understand the testimony, it says that the  
3 violation that would have been -- that were caused by  
4 Aharon's Ben-Haim's actions would be characterized at  
5 severity Level II.

6 DR. REIN: We all know that. What would it take  
7 to characterize --

8 MS. HODGDON: No. The fact is --

9 DR. REIN: That's the angels on the head of a pin  
10 I'm talking about.

11 MS. HODGDON: But Aharon Ben-Haim's behavior --

12 DR. REIN: Is that an objection you're making or  
13 do you want to argue with me?

14 MS. HODGDON: I just want to be sure that the  
15 witness understands the question.

16 DR. REIN: He's so smart that you brought him  
17 forth as your witness. He understood what I was talking  
18 about. What would it take to characterize it as a Level  
19 III?

20 THE WITNESS: Actually, Dr. Rein, that's been  
21 asked and answered. Any combination of these factors that  
22 would have weighed in Dr. Ben-Haim's favor might have  
23 lowered this sanction.

24 DR. REIN: Fine. No, might have characterized it  
25 as Level III. Is that what you mean?

1 MS. HODGDON: I think it's Dr. Rein who doesn't  
2 understand what the paragraph reads. Perhaps if he would  
3 read it again.

4 DR. REIN: Are you speculating on my state of  
5 mind? I think I understand it very well. Is that an  
6 objection you're making or do you want to argue with me?

7 MS. HODGDON: Either. It makes no difference.

8 DR. REIN: Judge, would you make a ruling on this,  
9 please?

10 CHAIRMAN BECHHOEFER: I believe his questions were  
11 clear.

12 MS. HODGDON: The way the sentence reads is  
13 reading the section together with and so forth, the  
14 violations that were caused by Aharon Ben-Haim's actions  
15 would be characterized at severity Level II.

16 CHAIRMAN BECHHOEFER: Well, the question was, what  
17 would it take to --

18 DR. REIN: Characterize it as a Level III.

19 CHAIRMAN BECHHOEFER: -- characterize these  
20 actions as -- the violations that would be caused would be  
21 severity Level III.

22 MS. HODGDON: Well, I don't know that that goes to  
23 what Aharon Ben-Haim did.

24 CHAIRMAN BECHHOEFER: Well, the allegation is that  
25 he caused -- that he took actions that caused the licensee

1 --

2 MS. HODGDON: That were caused would be  
3 characterized, right, and that's the licensee's violation,  
4 not the Aharon Ben-Haim violations. And so, the question  
5 is, can you change these violations here, which is what he  
6 caused the licensee to be in violation of, to severity Level  
7 III, and I'm saying that I don't know whether that has to do  
8 with Aharon Ben-Haim's behavior. I think that that goes  
9 beyond how many angels can dance on the head of a pin and,  
10 in fact, is virtually impossible to answer --

11 DR. REIN: Thank you. It's been overruled. Would  
12 you answer the question?

13 MS. HODGDON: -- and I don't think Mr. Del Medico  
14 can answer that question in any event.

15 CHAIRMAN BECHHOEFER: I overruled the objection.  
16 To the extent the witness can answer, please do so.

17 THE WITNESS: Mrs. Hodgdon is absolutely correct.  
18 I have been answering the wrong question. I misunderstood  
19 your question.

20 DR. REIN: Let me try it again.

21 THE WITNESS: I thought you were asking me, what  
22 would it take to lower the sanction.

23 DR. REIN: No.

24 THE WITNESS: You apparently were asking me, what  
25 would it take to lower the severity level of the violations

1 on the part of the licensee. I'll give some examples.

2 CHAIRMAN BECHHOEFER: As attributed, though, to  
3 Dr. Ben-Haim.

4 THE WITNESS: Well, these violations are not  
5 attributed to Dr. Ben-Haim. Dr. Ben-Haim --

6 CHAIRMAN BECHHOEFER: I don't think they're  
7 violations. Dr. Ben-Haim is allegedly causing the licensee  
8 to be in violation at Level II, and the question I  
9 understood was, which of these factors would be changed to  
10 make it Level III by the licensee.

11 THE WITNESS: Okay. I do want to be clear that  
12 these violations are not attributed to Dr. Ben-Haim. The  
13 only violation attributed to Dr. Ben-Haim is 10 C.F.R.  
14 30.10, "Deliberate Misconduct." But I do apologize for  
15 answering the wrong question and I will now try to answer  
16 the right question.

17 CHAIRMAN BECHHOEFER: And if I got it wrong, I can  
18 be corrected.

19 THE WITNESS: I'll give you some examples. Where  
20 it's talking there about the NRC requirement to maintain a  
21 record of the prescribed dosage, 10 C.F.R. 35.53(c)(3), and  
22 we see there that in the definition of prescribed dosage --

23 [Document handed to witness.]

24 MS. HODGDON: Excuse me. There's a shorthand  
25 version of that up here. I believe if he reads the

1 regulation, that it will also answer Judge Kline's question  
2 about the testimony of yesterday, and that's why I handed  
3 him the regulation. This chart abbreviates that section.

4 THE WITNESS: 10 C.F.R. 35.53 is entitled,  
5 "Measurement of Dosages of Unsealed By-Product Material for  
6 Medical Use." If I may paraphrase?

7 MS. HODGDON: Skip over whatever's not relevant.

8 THE WITNESS: It requires, among other things, in  
9 35.53(c)(3) that the licensee retain a record and the record  
10 must include the prescribed dosage and activity of the  
11 dosage at the time of measurement.

12 Now, the point that I was trying to make is, we  
13 can see from the NRC definition that the prescribed dosage  
14 needs to be documented in any appropriate record. Okay?  
15 Well, let us say that there was involvement of the  
16 authorized user in determining this prescribed dosage, but  
17 the authorized user had overlooked making this written  
18 record.

19 So, in fact, the authorized user was involved, had  
20 clearly chosen the radiopharmaceutical and the amount, but  
21 had merely -- the licensee itself had merely not documented  
22 that. The doctor hadn't and anyone else hadn't. It would  
23 seem to me, and this has certainly happened in similar  
24 cases, that the severity level of such a violation would be  
25 less.

1 DR. REIN: In that case, would the severity level  
2 possibly be a Level III, that level chosen at the discretion  
3 of the Enforcement Department, in the case you described?

4 THE WITNESS: The Commission's enforcement policy  
5 says that these examples are neither exhaustive nor  
6 controlling, so the Staff can change --

7 DR. REIN: So the level of severity is also a  
8 discretion based on the facts; is that true?

9 THE WITNESS: Yes, that's true.

10 DR. REIN: All right. Now, let's hypothetically,  
11 for the moment, consider every fact in this case exactly as  
12 it is except, hypothetically, consider this a Level III  
13 violation in severity just for the purposes of this one  
14 question.

15 The question is, what would be the range of  
16 sanctions for a Level III, everything else being equal?

17 THE WITNESS: The same range.

18 DR. REIN: You also said, I think, earlier at the  
19 very beginning that you have not yet heard Dr. Ben-Haim's  
20 testimony and you will pay close attention to it.

21 THE WITNESS: Yes, sir.

22 DR. REIN: Why?

23 THE WITNESS: I'm sorry?

24 DR. REIN: Why?

25 THE WITNESS: Dr. Ben-Haim was asking if there

1 might be anything in what I had heard today that would cause  
2 me to change my opinion about the sanction that was taken  
3 against him.

4 DR. REIN: Why would you pay close attention to  
5 his testimony?

6 THE WITNESS: Because I would like to hear, if  
7 there's anything that he has to say, that would change my  
8 opinion about the enforcement sanction taken against him.

9 DR. REIN: In other words, that still is an open  
10 set of facts that you have not yet heard? His testimony is  
11 still an open set of facts?

12 THE WITNESS: Yes, sir.

13 DR. REIN: I believe you also said that the  
14 penalty of five years in this case is not intended to be  
15 punitive.

16 THE WITNESS: What I hope I said is that the  
17 penalty is not chosen with a view to a punitive aspect.

18 DR. REIN: The punitive penalties are essentially  
19 a deterrence to the community, right? That's why they're  
20 punitive.

21 THE WITNESS: Among other things, I would imagine  
22 it would also say that they're deterrents to the individual.

23 DR. REIN: The Statements of Consideration,  
24 paragraph 1, page 2-SC-101, in fact, says that such  
25 penalties are intended to be a deterrent, doesn't it?

1 THE WITNESS: Yes. My testimony also says that.

2 DR. REIN: Which is the same as punitive, isn't  
3 it?

4 THE WITNESS: No, I made a distinction in my  
5 testimony, Dr. Rein.

6 DR. REIN: It also says the enforcement actions  
7 may include civil penalties. Am I reading that correctly?

8 THE WITNESS: I'm sorry. We're on page 101?

9 DR. REIN: First paragraph, about 20 lines down.

10 THE WITNESS: Well, there's an issue about civil  
11 penalties to unlicensed individuals and it's covered in a  
12 footnote in the Commission's enforcement policy.

13 DR. REIN: Just generally not done?

14 THE WITNESS: Yes.

15 DR. REIN: It doesn't say it can't be done. It  
16 just says it's generally not done?

17 THE WITNESS: Well, the Staff perceives that there  
18 may be a legal impediment in some cases to taking civil  
19 penalty actions against an individual. And, in fact, the  
20 statute is more clear, that in a Part 21 violation, which  
21 has to do with the reporting of a safety defect by the  
22 officer of a company, the statute is clear that civil  
23 penalties can be taken in that case.

24 But it seems -- and, you know, I'm not the legal  
25 expert -- less clear that the Staff can do that in a case

1 such as the case against Dr. Ben-Haim and therefore it has  
2 not been done.

3 DR. REIN: There's no precedent for it anyway, is  
4 there?

5 THE WITNESS: I don't feel that I have the  
6 expertise to answer that.

7 DR. REIN: Judge Kline asked you something and I  
8 want to follow up on it. If NMA does not have an RSO and an  
9 AU, it can't do business; is that correct?

10 THE WITNESS: It would be a violation to receive  
11 or possess or use by-product material under those  
12 circumstances.

13 DR. REIN: For practical purposes, it can't do  
14 bone scans, shouldn't do bone scans?

15 THE WITNESS: Yes, sir.

16 DR. REIN: And under those circumstances, being a  
17 physicist, he would probably be out of work, Dr. Ben-Haim,  
18 if there were no bone scans being done at NMA? That makes  
19 sense, doesn't it? He was hired to do the physics part of  
20 the radioactive stuff.

21 THE WITNESS: Not necessarily and in point of  
22 fact, there was a time when NMA was unable to do studies  
23 because NRC had issued a confirmatory action letter and Dr.  
24 Ben-Haim participated in that case in getting them back into  
25 operation within a day.

1 DR. REIN: But if they couldn't get back into  
2 operation, if they went out of the radioactive isotope  
3 scanning business, he would not be having any employment  
4 there. That's logical, isn't it?

5 THE WITNESS: Well, from viewing the contract in  
6 the OI exhibit, I would say yes.

7 DR. REIN: All right. Therefore, without an RSO  
8 and without an authorized user, he would tend to lose, not  
9 gain.

10 THE WITNESS: Unless he took the actions he took  
11 in this case, which is to re-establish one within a day.

12 DR. REIN: Is there such a thing by a consultant  
13 to carelessly cause a licensee to violate regulations?

14 THE WITNESS: I think your question is, could a  
15 consultant engage in some sort of activity that was less  
16 than deliberate, but more than mere negligence, and  
17 therefore was categorized as careless disregard, and it  
18 certainly seems possible to me as I'm sitting here.

19 DR. REIN: Could a consultant be negligent and  
20 cause a licensee to breach these regulations?

21 THE WITNESS: Yes. As a matter of fact, the  
22 Commission's enforcement policy contemplates that.

23 DR. REIN: Okay. Were there any negligent acts by  
24 Dr. Ben-Haim recognized?

25 THE WITNESS: Are we talking about in the order to

1 Dr. Ben-Haim? Where are we talking about? During this  
2 proceeding?

3 DR. REIN: In reviewing all the facts of this  
4 case, was he negligent in any way in his activities with  
5 NMA?

6 THE WITNESS: Insofar as I know, as a result of  
7 the Staff's deliberations, we did not come up with  
8 activities that would be classified as negligent. We came  
9 up with activities that would be classified as deliberate  
10 misconduct.

11 DR. REIN: I know what you came up with because I  
12 read very well and quickly. My question is, was he  
13 negligent in any way during his activities at NMA?

14 THE WITNESS: In the Staff's deliberations, the  
15 Staff did not come up with findings that certain of his  
16 activities involved negligence.

17 DR. REIN: What does it mean in your answer to  
18 Question 17 of your testimony, in plain English, what does  
19 it mean to you when you say there's no algorithm or formula  
20 for determining sanctions?

21 THE WITNESS: There's no schema that says if this,  
22 then this. If this happened, then this sanction.

23 DR. REIN: Is it conceivable that under the exact  
24 same set of circumstances, the same set of people would come  
25 up with a different set of sanctions depending on whether it

1 was Monday or Friday?

2 THE WITNESS: Well, you said the same set of  
3 people. This is a large set of people. It involves myself;  
4 it involves the Director of the Office of Enforcement; it  
5 involves the Director of the Office of Nuclear Material  
6 Safety and Safeguards and his staff; it involves the  
7 Administrator of Region 1 and his staff, including Mr.  
8 Kinneman; and it involves the staff of the Office of the  
9 General Counsel.

10 DR. REIN: Same set of people. That's all I  
11 meant. You don't have to recount. We're not taking  
12 attendance. Would the same set of people under the same set  
13 of circumstances, from time to time, come up with a  
14 different sanction depending on whether it was Monday or  
15 Friday, whether they were tired or not tired, by the mood  
16 they were in, whether they had a good relationship at home  
17 with their wife, whether they just had lunch or didn't have  
18 lunch, whether a guy was just getting over the flu or not  
19 getting over the flu? I mean, that happens all the time in  
20 real life.

21 THE WITNESS: I think you're asking if the  
22 enforcement sanctions taken in this area could be  
23 inconsistent. We strive to avoid that. We are constantly  
24 conscious of it. As a scientist, I guess it's possible.

25 DR. REIN: From a practical, everyday point of

1 view -- does it sound like I'm being critical of you? I'm  
2 just trying to elicit the way things happen. Is it possible  
3 and does it happen that under the same set of circumstances,  
4 two different sanctions come down from the same set of  
5 people who intend to do their job with great precision and  
6 accurately?

7 THE WITNESS: I've answered that. It's possible.

8 DR. REIN: Okay. Have you seen that happen over  
9 your years of experience?

10 THE WITNESS: No. The very position that the  
11 Director of the Office of Enforcement holds depends upon the  
12 consistency of these enforcement actions. It is constantly  
13 on his mind. It is one of his first and foremost duties.  
14 It is what he does. It is what he strives to avoid.

15 DR. REIN: Please don't take a message back that  
16 I'm critical of him. I'm just trying to find out how things  
17 work.

18 THE WITNESS: I will not do that, sir.

19 DR. REIN: Okay. In any of the interviews,  
20 evaluations, considerations of Dr. Ben-Haim, was he ever  
21 hostile, aggressive, uncooperative with Staff?

22 THE WITNESS: I did not do the interviews.

23 DR. REIN: Well, you needed to evaluate that in  
24 order to reach your conclusion, didn't you?

25 THE WITNESS: I couldn't evaluate it if I didn't

1 do them.

2 MS. HODGDON: Excuse me for a clarification. I  
3 presume that this means prior to the issuance of this order  
4 which Mr. Del Medico wrote.

5 DR. REIN: Don't presume anything if I don't ask  
6 it.

7 MS. HODGDON: Just to clarify the question.

8 DR. REIN: I'll clarify the question if you don't  
9 understand it for you.

10 MS. HODGDON: I don't know that the witness  
11 understands it.

12 DR. REIN: He didn't tell me he didn't understand  
13 it. Would you like to help him?

14 MS. HODGDON: I would like to ask --

15 DR. REIN: Why don't you sit with him and whisper  
16 the answers in his ear before he answers?

17 Did you understand my question?

18 THE WITNESS: Could you repeat the question,  
19 please?

20 DR. REIN: Sure. I'll help you and I'll help  
21 counsel. If you'd look at page 2-SC-98 of the Statements of  
22 Consideration. I really don't appreciate being interrupted  
23 or obstruction of the process.

24 MS. HODGDON: I don't appreciate what you've been  
25 doing here either, Judge Rein --

1 DR. REIN: On the right side --

2 MS. HODGDON: -- when I ask for clarification. I  
3 would ask for a ruling.

4 DR. REIN: On the side of the page, 2-SC-98,  
5 beginning with the sentence, "In deciding when to issue an  
6 order." Do you see that paragraph, sir?

7 THE WITNESS: Yes.

8 DR. REIN: There are nine items that must be  
9 considered in issuing an order; is that correct?

10 THE WITNESS: Yes. They're also in my testimony.

11 DR. REIN: Right. And No. 7 talks about the  
12 attitude of the wrongdoer.

13 THE WITNESS: Yes, it does.

14 DR. REIN: My question was, was he ever hostile,  
15 aggressive, or uncooperative in his demeanor at any time at  
16 all?

17 THE WITNESS: The Commission, in No. 7, did not  
18 consider those factors. The Commission says that -- the  
19 example the Commission gives is, did the individual admit  
20 the wrongdoing and did the individual accept responsibility.

21 DR. REIN: However, on page 11 where you quoted so  
22 carefully and read the small print, you used the word  
23 "hostility" and you say the Commission used the word  
24 hostility. Line 6.

25 THE WITNESS: Well, that may be, but they

1 certainly did not use it in Item 7 where you directed my  
2 attention.

3 DR. REIN: Was he ever hostile?

4 THE WITNESS: I have no knowledge of that. I've  
5 answered that question. I was not present during the  
6 investigation or the inspection.

7 DR. REIN: Okay. Did you ask anyone, "What was  
8 his attitude during the investigation or inspection"?

9 THE WITNESS: I did not ask anyone if he was  
10 openly hostile or any of the other words that you used, Dr.  
11 Rein.

12 DR. REIN: Look with me on the same page, please,  
13 on the left column, the third paragraph beginning with "A  
14 situation in which." Do you see that, sir?

15 THE WITNESS: I'm taking a moment to review it.

16 DR. REIN: I simply want to refer to the word  
17 that's been used so much here, to get a meaning for it,  
18 where it says, "Deliberately causes." Do you see that?

19 THE WITNESS: Yes.

20 DR. REIN: Do you understand it to be the same as  
21 or different from intentionally causes?

22 THE WITNESS: No. I would try to use the  
23 Commission's words in 30.10 wherever I could, which is  
24 deliberate misconduct or deliberately causes.

25 DR. REIN: And do you understand, in plain talk,

1 that deliberately is the same as intentional?

2 THE WITNESS: Yes.

3 DR. REIN: All right. In the middle paragraph --  
4 in the middle column of that same page, in the paragraph  
5 beginning with "Depending on the circumstances," can you  
6 explain to me what is meant by the phrase "It might be  
7 appropriate"?

8 THE WITNESS: Well, as I've already testified, the  
9 range of sanctions ranges from no sanction at all, just a  
10 letter, all the way up at least up until this point to ten  
11 years.

12 DR. REIN: That's what that means? That's what  
13 that refers to?

14 THE WITNESS: Of course, the Commission wrote  
15 this, I didn't, but that's my interpretation.

16 DR. REIN: Instances of willful misconduct are  
17 discussed on 2-SC-83, middle column entitled, "Deliberate  
18 Misconduct by an Unlicensed Person." Can we consider Dr.  
19 Ben-Haim an unlicensed person?

20 THE WITNESS: Yes, that's in my testimony.

21 DR. REIN: And can we consider that these  
22 sanctions are for deliberate misconduct?

23 THE WITNESS: Yes.

24 DR. REIN: In the paragraph beginning with  
25 "Instances," it shows a few examples, and I just want to ask

1 about some of those examples in this case. Did he  
2 deliberately falsify any records?

3 THE WITNESS: The order does not allege that.

4 DR. REIN: Well, let me go further. Not only in  
5 the order, but in any interviews and investigations or any  
6 testimony you've heard here that you're aware of, only what  
7 you're aware of, and I know the answer is no.

8 THE WITNESS: I don't know that the answer is no.

9 DR. REIN: Did he make any false statements to the  
10 NRC?

11 THE WITNESS: The order does not allege that.

12 DR. REIN: Did he interfere with NRC  
13 investigations?

14 THE WITNESS: The order does not allege that.

15 DR. REIN: And so, the other forms of wrongdoing  
16 is what we're talking about in this case; is that correct?

17 THE WITNESS: The forms of wrongdoing that we're  
18 talking about are in the order. The basis for the order is  
19 always stated in the order.

20 DR. REIN: Do you know if he ever said, testified,  
21 or whether anybody at NRC ever told you, do you know from  
22 any source whether he ever said, "I didn't know there was no  
23 RSO"?

24 THE WITNESS: Well, are we talking about today  
25 after all this testimony?

1 DR. REIN: No, sir. We're talking about since  
2 January of 1997. If you know.

3 THE WITNESS: I don't know. I may have known at  
4 one time, you know. Before the order was issued, I  
5 thoroughly reviewed every exhibit in the OI report, but  
6 sitting here, I don't know.

7 DR. REIN: Okay. Do you know if he ever said,  
8 since January '97, "I did not know there was no AU"?

9 THE WITNESS: Of course, Dr. Ben-Haim hasn't  
10 testified yet, but in the very days of this proceeding, it  
11 seems that that that concept is being put forward.

12 DR. REIN: It also seems that he should have  
13 known.

14 THE WITNESS: I won't comment on whether he should  
15 have known. This order is based on things he should have  
16 done.

17 DR. REIN: All right.

18 THE WITNESS: He should have contacted the RSO and  
19 the authorized user before bringing about the possession of  
20 licensed material at this facility. And I would repeat, had  
21 he done that at that juncture, Dr. Moskowitz would have  
22 spoken up and said, "I'm neither," and this unfortunate  
23 chain of events would have been truncated.

24 DR. REIN: I might very well agree with you, but  
25 let's get back to my question.

1 THE WITNESS: Is it answered? I'm sorry.

2 DR. REIN: Well, it was answered with an addendum.  
3 I didn't ask you about the addendum.

4 THE WITNESS: Can you please repeat the question?

5 DR. REIN: Would it have made any difference  
6 whatsoever to anyone in the Staff if he had ever said, or  
7 more than once, "I never knew that Moskowitz was not the  
8 RSO, I never knew that Moskowitz was not the AU"?

9 THE WITNESS: This order does not allege any  
10 violation of 10 C.F.R. 30.10 on Dr. Ben-Haim's part that  
11 pertains to what was said in the license application.

12 DR. REIN: I'm not talking about that. I'm  
13 talking about during the entire year from October '96  
14 through January/February '97. If at that time he said,  
15 during those four months, "I never knew," would it make any  
16 difference?

17 THE WITNESS: No. The violations that the order  
18 alleges don't go to whether Dr. Ben-Haim knew or did not  
19 know that there was an RSO. They go to actions that he  
20 should have taken. He should have contacted Dr. Moskowitz  
21 for delegation in two instances, one as the RSO and one as  
22 the authorized user.

23 DR. REIN: Would it make any difference if,  
24 hypothetically, Dr. Elamir said, hypothetically, "I knew  
25 Moskowitz was not the RSO, I knew Moskowitz was not the AU,

1 and I chose not to tell Ben-Haim"?

2 THE WITNESS: It may make a difference in Dr.  
3 Elamir's proceeding, but this order to Dr. Ben-Haim does not  
4 allege those facts, and so the answer is no, it would make  
5 no difference.

6 DR. REIN: Is there a Level IV?

7 THE WITNESS: Yes, there is a severity Level IV.

8 DR. REIN: If, hypothetically, you, the Staff, had  
9 found this was a Level IV type of violation that he had  
10 caused the licensee to act out on, would there be what, no  
11 penalty there?

12 THE WITNESS: Well, first of all, I've tried to  
13 establish that there's no penalty in this case. There's an  
14 enforcement sanction against Dr. Ben-Haim.

15 DR. REIN: Would there be no sanction in this  
16 case?

17 THE WITNESS: The range of sanctions could range  
18 from no penalty at all up to ten years.

19 DR. REIN: For a Level IV?

20 THE WITNESS: Well, the Staff has that range  
21 available. It's very difficult for me to predict. It does  
22 seem unlikely that there would be a penalty of ten years for  
23 a severity Level IV.

24 DR. REIN: Can I understand then that the penalty  
25 range is discretionary based on the facts of the case and

1 has really nothing to do with levels?

2 THE WITNESS: No. As an initial point of  
3 departure, the severity level of the violations against the  
4 licensee that were caused by the deliberate misconduct are  
5 one consideration of many.

6 CHAIRMAN BECHHOEFER: Well, if the violation would  
7 have been severity Level IV, I thought the Commission  
8 doesn't impose any sanctions for that other than a warning.

9 THE WITNESS: I'm sorry. Other than --

10 CHAIRMAN BECHHOEFER: Other than perhaps a  
11 warning.

12 THE WITNESS: A warning. I couldn't hear you.

13 CHAIRMAN BECHHOEFER: This is my general  
14 understanding. I might be wrong, but I thought various  
15 sanctions or penalties began with Level III or higher.

16 THE WITNESS: Well, first of all, remember that  
17 the severity level is generally increased for willfulness.  
18 That's in my testimony and it's in the Commission's  
19 enforcement policy. But let us say that the underlying --  
20 let's build a hypothetical.

21 The underlying violations that were caused by a  
22 certain individual were severity Level IV, but there was a  
23 large string of them, and then when he was confronted by  
24 them, he said to the NRC officials, "Yeah, I did them and  
25 I'd do them again and I fully intend to." There might be,

1 in this hypothetical, a sanction of ten years or any other  
2 number.

3 CHAIRMAN BECHHOEFER: Under those circumstances,  
4 would that not be raised, escalated, if you will, to a III  
5 or a II at least?

6 THE WITNESS: Remember, we're not talking about  
7 the severity level of the 30.10 violation against the  
8 individual. We're talking about the severity level of the  
9 underlying violations against the licensee.

10 CHAIRMAN BECHHOEFER: Right.

11 DR. REIN: A couple questions about your CV,  
12 please. When you worked as a nuclear technologist, did you  
13 ever get the name of a company of a supplier out of the  
14 phone book?

15 THE WITNESS: Not insofar as I can recall. Let's  
16 set the stage. This was approximately 1972 through 1975.

17 DR. REIN: Okay. Well, did you ever get it from  
18 someone who was not an RSO or an AU, the name of a supplier?

19 THE WITNESS: Yes, undoubtedly. I mean, I'm  
20 conjecturing here, but it certainly seems that I did.

21 DR. REIN: Did you ever get the phone number from  
22 somebody who was not an RSO or an AU?

23 THE WITNESS: Yes.

24 DR. REIN: Did you ever look up the dosage  
25 yourself in a textbook or in one of your reference books?

1 THE WITNESS: The dosage to be administered to a  
2 patient? No. I always contacted my authorized physician  
3 user to find that dosage.

4 DR. REIN: Did you know the dosage while you were  
5 in school before you had an authorized physician user?

6 THE WITNESS: I knew the dosage in school because  
7 I was trained by an authorized physician user.

8 DR. REIN: But was the information available to  
9 you in one of your reference books?

10 THE WITNESS: It may have been.

11 DR. REIN: And did you ever consider the  
12 information in one of your reference books as a procedures  
13 manual?

14 THE WITNESS: Well, first of all, the Commission's  
15 regulations were different at the time and there wasn't a  
16 definition of procedures manual. But if you're asking me  
17 did I ever consider the information in a textbook to be a  
18 prescription from an authorized physician user, the answer  
19 is unequivocally no.

20 DR. REIN: Information is simply information,  
21 right? It depends on how it's used.

22 THE WITNESS: Textbook information is simply  
23 information.

24 DR. REIN: The Yellow Pages in Bell South  
25 Mobility's phone book is simply information.

1 THE WITNESS: Yes, sir.

2 DR. REIN: It doesn't necessarily have to be a  
3 prescription or a manual.

4 THE WITNESS: Not information in a phone book or  
5 information in a textbook.

6 DR. REIN: How often did you see prescriptions and  
7 manuals that look like the top half of page S-8 in your  
8 career with the NRC?

9 THE WITNESS: In recalling now, I'm not an  
10 inspector, and so I don't generally visit the facilities.  
11 In my career with the NRC, this may be the first concrete  
12 example -- well, you know, I guess we had procedures manuals  
13 when I was in the field and we did more than one procedure.  
14 Okay? We did much more than just bone scans and therefore,  
15 we had a page for each procedure.

16 DR. REIN: If someone decided that top half page  
17 was really intended to be a procedure manual or  
18 instructions, would you call that pretty sloppy? If I were  
19 to create that as a procedure manual, would you say that was  
20 pretty sloppy, careless, negligent type of work?

21 THE WITNESS: Well, of course, as Dr. Siegel  
22 pointed out, under the Commission's current definition, it's  
23 missing information.

24 DR. REIN: I really don't care today what he said.  
25 I want to know if you would call it pretty sloppy.

1 THE WITNESS: You mean because it's written on?

2 DR. REIN: Because it looks sloppy to me. Does it  
3 look sloppy to you because it's a half a piece of paper of  
4 vital information?

5 THE WITNESS: No. If I got this from an  
6 authorized physician user, I would be perfectly comfortable  
7 with it. The information that it's missing, by the way, is  
8 the route of injection, and when you've already received the  
9 material from the radiopharmacy in the form of a syringe,  
10 there really can be little doubt about the route of  
11 injection. I certainly wouldn't ask a patient to swallow a  
12 syringe.

13 CHAIRMAN BECHHOEFER: We're about to break for  
14 lunch at this moment. Mr. Del Medico, I was wondering if  
15 you could attempt to get further information during the  
16 lunch hour about the one instant you've remembered but  
17 couldn't remember the details of about relaxation from a  
18 person who would not be -- if the person were not permitted  
19 to be engaged in nuclear activities.

20 Perhaps you could just telephone back to your  
21 office and find out, in some little more detail, of what  
22 happened and what kind of case it was and whether it's  
23 comparable at all. Whether that's a meaningful provision or  
24 not, you had said there was one instance and I was wondering  
25 whether you could just, after lunch, come back and add to

1 your testimony.

2 MS. HODGDON: Judge Bechhoefer, we've already  
3 spoken with the Office of Enforcement this morning and it's  
4 somewhat understaffed today, it being Friday, whatever.

5 CHAIRMAN BECHHOEFER: Can you ask for that one  
6 particular --

7 MS. HODGDON: No, it was on a different matter,  
8 but I'm just saying it may not be possible to do this during  
9 lunch.

10 CHAIRMAN BECHHOEFER: Well, I'm not saying --

11 MS. HODGDON: It may be possible to do it by the  
12 end of the day. They're very understaffed and I'm sure  
13 they're very busy. It's hard for us also, because we don't  
14 have a phone here, to get an answer back.

15 CHAIRMAN BECHHOEFER: Before we close.

16 MS. HODGDON: As long a window as you can give us,  
17 we certainly will try to do it.

18 CHAIRMAN BECHHOEFER: It would be until we close  
19 the record.

20 THE WITNESS: There really are further  
21 complications. The enforcement specialist who was assigned  
22 to the case is in Syria right now, and since I don't know  
23 the name of the case, I wouldn't know how to have another  
24 individual start to look for it or look it up. I certainly  
25 can make an attempt.

1           Another problem is that while we're at lunch, the  
2 Office of Enforcement will be at lunch.

3           CHAIRMAN BECHHOEFER: Well, I will extend it to  
4 the end of the day.

5           MS. HODGDON: We can try to do it.

6           CHAIRMAN BECHHOEFER: The timing doesn't worry me.  
7 If you can't get it immediately -- if you can't get it at  
8 all, that will be fine, too. But just make an attempt.

9           THE WITNESS: And what details am I supposed to  
10 get? Did you want it faxed here? I mean, I wouldn't  
11 exactly know how to do that, I guess.

12           CHAIRMAN BECHHOEFER: Well, you can describe it to  
13 us in somewhat more detail. You had mentioned that, I  
14 guess, at least one occasion when a person not employed and  
15 no longer employed in nuclear-related activities was able to  
16 get relaxation. It couldn't be because well, I've abided by  
17 the order. I've stayed unemployed. I mean, what kinds of  
18 information.

19           I don't mean for Dr. Ben-Haim, but what kinds of  
20 information could be used to convince the director to  
21 perhaps shorten the sanction or relax, given the fact the  
22 person would not be engaged in nuclear activity, and this is  
23 all an assumption.

24           THE WITNESS: Sitting here, I think I can tell you  
25 generally what that would be. For one thing, it would be a

1 change in attitude, and for another, it would be some sort  
2 of additional assurance that when the person re-engages in  
3 licensed activity, that the person will not violate  
4 Commission requirements.

5 For example, on the part of an individual employee  
6 at a licensee facility, it might be the fact that someone  
7 plans to check on that person and perform periodic written  
8 audits.

9 CHAIRMAN BECHHOEFER: But this person would not be  
10 working in a nuclear facility, presumably.

11 THE WITNESS: Well, he might be once the order was  
12 relaxed.

13 CHAIRMAN BECHHOEFER: No, no, no. I'm talking  
14 about relaxation. The relaxation provision applies prior to  
15 the exclusion -- prior to the end of the suspension period.

16 THE WITNESS: That's right. In theory, an  
17 individual might show -- might make a showing that, you  
18 know, this qualified person -- I've set up an arrangement  
19 whereby this qualified person will check on me and audit my  
20 actions and perhaps, in some cases, make a report to the  
21 Commission. That would be one way.

22 There are many ways. It's really up to the  
23 individual to propose the way. It's not up to the NRC Staff  
24 to act as a consultant and show the individual what it is  
25 that the individual needs to do.

1 I'm sure you understand. If the NRC said, "You  
2 have to do A, B, and C," you know. . .

3 CHAIRMAN BECHHOEFER: What I don't understand is  
4 how a person in Dr. Ben-Haim's position, not working, not  
5 being permitted to work in a nuclear facility could ever  
6 establish sufficient information to cause the director to  
7 possibly modify the length of the sanction.

8 THE WITNESS: Well, for example, you surely don't  
9 have to be employed in nuclear activities to make a showing  
10 that there's been a change in attitude.

11 CHAIRMAN BECHHOEFER: Well, what does he do? Just  
12 say so? Is that going to be a meaningful statement to the  
13 director? Could that be?

14 THE WITNESS: It seems to me it would require a  
15 further demonstration, not a one-sentence letter that says,  
16 "Changed," probably wouldn't do it.

17 CHAIRMAN BECHHOEFER: I didn't think so.

18 THE WITNESS: Right.

19 CHAIRMAN BECHHOEFER: That's why I was asking for  
20 the one example you mentioned where it had been done to the  
21 best that you could obtain more information about. You had  
22 said on at least one occasion that was similar, it had been  
23 done.

24 THE WITNESS: Well, I'm very concerned about  
25 obtaining the wrong information. This is a complicated

1 matter. There must have been some written information that  
2 the individual sent to NRC and then there must have been  
3 some written relaxation of the order because --

4 CHAIRMAN BECHHOEFER: I'm sure of that.

5 THE WITNESS: Right.

6 CHAIRMAN BECHHOEFER: That's why I was wondering.  
7 If there's a record, could you obtain it before the end of  
8 the day, for instance?

9 THE WITNESS: So it would have to be faxed here?

10 CHAIRMAN BECHHOEFER: Well, we'll take your word  
11 for it if you get it.

12 THE WITNESS: I would have to have a fairly  
13 detailed outline of what that individual had said in  
14 correspondence to the NRC?

15 CHAIRMAN BECHHOEFER: Yes, yes, but you could do  
16 it verbally.

17 THE WITNESS: Is there any way to simply obtain  
18 the record of this case and have it be part of the  
19 proceeding?

20 CHAIRMAN BECHHOEFER: Well, it could be supplied  
21 after the fact, but I thought it would be easier to do it  
22 while you were still here.

23 THE WITNESS: It sounds a lot more difficult and  
24 it sounds as though I might bring back the wrong  
25 information.

1           CHAIRMAN BECHHOEFER: Well, if it's the wrong  
2 information, you could say you couldn't get the proper  
3 information and you'll provide it later or something for the  
4 record. We don't want -- we just wanted to make sure that  
5 that is a meaningful provision in the order against Dr.  
6 Ben-Haim. That was what we had thought you could try to  
7 get.

8           MS. HODGDON: Judge Bechhoefer, there are various  
9 avenues from which this can be obtained. There are various  
10 ways this can be obtained. Some of them are probably not  
11 available to us because there are not very many people that  
12 are in today, but we will try to get it by the end of the  
13 day.

14           CHAIRMAN BECHHOEFER: Well, just tell us that.  
15 Just tell us that.

16           MS. HODGDON: We will try to get it by the end of  
17 the day.

18           CHAIRMAN BECHHOEFER: Right, right. And if you  
19 can't, so be it.

20           MS. HODGDON: If we can't, we can't and let's just  
21 worry about it at that time.

22           CHAIRMAN BECHHOEFER: And we might tell you --

23           MS. HODGDON: Whether we need it or not.

24           CHAIRMAN BECHHOEFER: Yes, right.

25           MS. HODGDON: And how important it is and whether

1 you leave the record open to receive it.

2 CHAIRMAN BECHHOEFER: Right, right. Let's adjourn  
3 until 1:30.

4 [Whereupon, at 12:30 p.m., the hearing was  
5 recessed, to reconvene at 1:30 p.m., this same day.]

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## A F T E R N O O N S E S S I O N

[1:35 p.m.]

CHAIRMAN BECHHOEFER: Back on the record.

The Board, at least now, has finished its questioning.

MS. HODGDON: Fine. So it's my turn for redirect, I believe.

CHAIRMAN BECHHOEFER: That's correct.

## REDIRECT EXAMINATION

BY MS. HODGDON:

Q Mr. Del Medico, you were asked by one of the Board members or by Judge Rein what procedures Aharon Ben-Haim caused the licensee to violate and when. Then you said authorized user. I can't find the place. In some place, they ask you about negligent violations.

Did you say that there were none? Perhaps I could ask you about this document.

A I'll take a moment to review it.

[Document handed to witness.]

MS. HODGDON: I just gave the witness a copy of S-9, which is the inspection report, which was issued to Newark Medical Associates on September the 5th. It was explained yesterday about why that was so long in coming.

THE WITNESS: Well, this document is S-10. It's the inspection report issued to Newark Medical Associates.

1 BY MS. HODGDON:

2 Q Were you familiar with that document before today?

3 A Undoubtedly I reviewed it at the time that the  
4 order was issued, which was back in August of '97. I had  
5 not refreshed my --

6 Q That would have been a draft then, because this  
7 wasn't issued until September the 5th; is that correct?

8 A I'm sorry. It was issued?

9 Q September 5th.

10 A September 5th of '97. It would have been a draft,  
11 that's correct.

12 Q The question is, were you generally aware of these  
13 violations?

14 A These violations, which are on page 2 under  
15 "Results," are violations that are attributed to the  
16 licensee, Newark Medical Associates. I think the question  
17 that was asked of me, were there any negligent violations  
18 that were attributed to Dr. Ben-Haim.

19 Q The question is whether these are attributable.  
20 They're very minor and I'm just trying to establish -- I'm  
21 not quite sure the breadth of the question. I really wanted  
22 to ask you about the status of that, if you know. I mean,  
23 has the licensee been cited with these?

24 A No, not to my knowledge.

25 Q And could these be attributed to Dr. Ben-Haim if

1 you read the list?

2 A First let me elaborate on why the licensee has not  
3 been cited. This licensee, Newark Medical Associates, was  
4 issued a demand for information and the demand for  
5 information, in essence, asked why the Commission should  
6 allow Newark Medical Associates to continue operation.

7 In response, Newark Medical Associates agreed that  
8 it would not operate for the duration until these issues are  
9 resolved. And so, there was no pressing need to resolve  
10 these violations.

11 Now, the second question, Mrs. Hodgdon?

12 Q The second question was, if you look through those  
13 violations which have not been cited and with regard to  
14 30.10, it doesn't make any difference whether they've been  
15 cited or not, does it? Caused or would have caused the  
16 licensee. The question that was asked, was what about  
17 negligent violations?

18 Were there any that were attributable to Aharon  
19 Ben-Haim, and I'm asking you, if you read through that list  
20 of open item violations, if you see any that would have been  
21 attributable to Aharon Ben-Haim where his negligence might  
22 have caused the violation that's not being cited that's  
23 listed there?

24 A It's possible that his negligence might have  
25 caused certain of these violations, but, of course, the only

1 thing that -- the only violation that's been cited against  
2 Dr. Ben-Haim is 30.10, and these -- any violation  
3 attributable to the licensee would have to involve more than  
4 negligence in order to make the citation 30.10 against Dr.  
5 Ben-Haim.

6 Q Is it then your answer that violations that are so  
7 trivial would not cause -- that violations that are these  
8 small violations wouldn't be the basis for a 30.10,  
9 deliberate misconduct citation to Dr. Ben-Haim?

10 The distinction was between deliberate misconduct  
11 and mere negligence, and so I think the question was, okay,  
12 so you think that Dr. Ben-Haim is guilty of deliberate  
13 misconduct. Is he also guilty of mere negligence? And so,  
14 your answer is that you don't care because it has nothing to  
15 do with 30.10 and that's somebody else's job?

16 DR. BEN-HAIM: I object. I object to the fact  
17 that counsel is leading the answers -- the witness.

18 CHAIRMAN BECHHOEFER: I think that's a valid  
19 objection. This is Ms. Hodgdon's witness.

20 MS. HODGDON: I withdraw the question then since  
21 the objection has been sustained.

22 BY MS. HODGDON:

23 Q Next question. I have a question here about how  
24 consistency is maintained, but I don't know that I need to  
25 go into that because I think it was re-addressed since I

1 wrote it.

2           There was a question asked about 35.53(c) -- is  
3 that (3)?

4           A     Yes.

5           Q     And with regard to the testimony yesterday of the  
6 OI witnesses, specifically Agent Wilson, regarding records,  
7 Medi-Physics records and patient requests, I can show you  
8 the transcript. I forgot the page, excuse me.

9           A     Page 542.

10           MS. HODGDON: I've just shown the witness  
11 transcript page 542.

12           BY MS. HODGDON:

13           Q     The question, I believe, was, how did that  
14 testimony affect this violation? It was Judge Kline's  
15 question and --

16           A     Excuse me. What question?

17           Q     The question was, how did --

18           DR. BEN-HAIM: What page?

19           MS. HODGDON: 542. It's Answer 2.

20           BY MS. HODGDON:

21           Q     The question was, how did what Agent Wilson did  
22 affect --

23           DR. BEN-HAIM: Excuse me. Is that the first day's  
24 542 or the second day?

25           MS. HODGDON: It's the second day.

1 DR. BEN-HAIM: On my 542, there's no "how."

2 MS. HODGDON: There's no what?

3 DR. BEN-HAIM: No "how." I mean, no question that  
4 starts with "how."

5 MS. HODGDON: No, no. The answer. I'm saying  
6 Judge Kline's question this morning was, how did this  
7 testimony on page 542 affect the violation of this  
8 regulation that's at the top of that chart, 35.53(c)(3).  
9 And I am asking the witness to read that transcript and see  
10 if he can figure out what, in fact, what records these  
11 people were talking about and whether they affected this  
12 regulation.

13 THE WITNESS: Okay. I'm looking here at the  
14 regulatory requirement, 10 C.F.R. 35.53. It's entitled,  
15 "Measurement of Dosages of Unsealed By-Product Material for  
16 Medical Use." This measurement is commonly made in a  
17 machine that's known as a dose calibrator.

18 Ms. Geylikman testified about this. She didn't  
19 use the word "dose calibrator." I believe she used the word  
20 "machine." You put it in a machine and it's a number. A  
21 number comes up. So we do know that doses were measured at  
22 Newark Medical Associates. But these are dose calibrator  
23 records. They're records of the measurement of the dosage  
24 reading on the dose calibrator.

25 The records that the agent is referring to here,

1 there are two records. One are records from Medi-Physics.  
2 Of course, those could not be the records mentioned here in  
3 35.53 because it's not Medi-Physics, but rather, Newark  
4 Medical Associates who would have to prepare those records.

5 And then the second set, the agent terms the  
6 "individual patient records." It's less clear to me  
7 precisely what that term means. It could mean a lot of  
8 things. It could mean the appointment book. It could mean  
9 other forms of patient records.

10 But it seems to me if the agent really was  
11 referring to 35.53, he would have termed those the dose  
12 calibrator records or the measurement records or something  
13 along those lines. So it seems doubtful to me that the  
14 agent here was referring to the records required in 35.53.

15 Of course, I've already testified that  
16 irregardless, it's clear in this proceeding that there was  
17 no prescribed dosage, and so the licensee most certainly was  
18 in violation of this requirement.

19 BY MS. HODGDON:

20 Q Do you recall or is it in that transcript why  
21 Agent Davis was doing this, why he was, as he said -- I  
22 remember his word was marrying, because I just read the  
23 transcript. It said merged. Why he was marrying these  
24 records which were, in fact, invoices or a computer  
25 print-out of invoices from Medi-Physics with either an

1 appointment book or with -- I think maybe patient or doctor  
2 requests, why he was doing this?

3 A I'm reviewing more paragraphs of the transcript.

4 Q The passage I just directed Dr. Ben-Haim to, I  
5 maybe would ask you if you can interpret that. It says you,  
6 in your capacity as an expert nuclear medicine technologist,  
7 medical technologist, "The purpose of my interview that day  
8 was to compare the doses of Tech-99M that were sent to  
9 Newark Medical from Medi-Physics and marry them up with the  
10 individual patient records."

11 So my question is, with a person of Agent Davis'  
12 expertise, what do you think he was doing there? Why did he  
13 want to do that?

14 A Well, he certainly did have the wrong expertise to  
15 be looking into the records in 35.53. That would be Mr.  
16 Kinneman or Mr. Gibson. It appears that the agents were  
17 attempting to verify that the records from individual doses  
18 from Medi-Physics matched up with the number of patient  
19 studies that were performed or billed or something like  
20 that. That is very different from measurement of the dosage  
21 in a dose calibrator.

22 Q So you think that it just goes to the number?  
23 They were trying to determine that there were a certain  
24 number of patients and that there were, in fact, some  
25 patients that did receive -- right, that there were a

1 certain number of patients. Maybe they didn't get the right  
2 number, but they knew that there were a number of patients.  
3 Is that correct? That's the way you understand it?

4 A Yes.

5 Q Thank you. You were asked a question about your  
6 testimony on page 11, about --

7 A Page 11 of what?

8 Q Of your testimony, Mr. Del Medico's testimony.  
9 Page 11 of his prefiled testimony. He says, "The Commission  
10 has specifically addressed the issue of the attitude of the  
11 wrongdoer as follows," and he was asked a question about  
12 recognition and admission of past errors indicates a more  
13 positive attitude than continued denial or hostility." You  
14 were asked whether Dr. Ben-Haim had displayed hostility.

15 My question to you is, maybe you would prefer the  
16 alternative of denial. I mean, does it say denial or  
17 hostility or is that -- am I reading that wrong?

18 A No. It does say, "Continuing denial or  
19 hostility."

20 Q That's fine.

21 MS. HODGDON: I think that concludes my redirect.

22 CHAIRMAN BECHHOEFER: Dr. Ben-Haim.

23 DR. BEN-HAIM: Yes.

24 RE CROSS EXAMINATION

25 BY DR. BEN-HAIM:

1 Q Mr. Del Medico, did I understand you right that if  
2 there were no deliberate conduct on Ben-Haim's part, there  
3 would be no violations?

4 A Yes, I believe so. Let me rephrase. If there  
5 were no deliberate misconduct on Dr. Ben-Haim's part, Dr.  
6 Ben-Haim would not be in violation of 10 C.F.R. 30.10.

7 Q Thank you. As far as you know, wasn't the whole  
8 investigation based on Dr. Moskowitz's denial of being the  
9 RSO and AU on NMA's license?

10 A Do you mean is that what triggered the  
11 investigation or is that what the results are based on? I'm  
12 not sure what you're referring to.

13 Q I said based.

14 A So you're asking were the results of the OI  
15 investigation --

16 Q No.

17 A I'm sorry.

18 Q Based. I said based.

19 A Could you repeat the whole question?

20 Q If the basis of the investigation, the foundation  
21 of the investigation, the base on which you build a house is  
22 the foundation. If the foundation of this investigation is  
23 Dr. Moskowitz's denial of being the RSO and the AU on NMA's  
24 license.

25 A Are you talking about why was the investigation

1 begun, conducted, or why did OI reach the conclusion that it  
2 reached?

3 Q I think my question is pretty clear. Does anybody  
4 not hear it correctly?

5 A The foundation is not a word that's used in Office  
6 of Enforcement at Nuclear Regulatory Commission. I'm sorry.  
7 I find it confusing.

8 DR. REIN: If Dr. Moskowitz had said he was the  
9 RSO when he was first interviewed, would that have ended the  
10 charges against Dr. Ben-Haim?

11 THE WITNESS: Well, I can't say whether an  
12 investigation would have gone on or not from that point. It  
13 may very well not have, but had the investigation gone on  
14 and had it been determined that Dr. Ben-Haim failed at  
15 certain junctures to take the -- to obtain the delegations  
16 that he needed and had the OI investigation shown that those  
17 actions on Dr. Ben-Haim's part were deliberate, no, it would  
18 not have ended the matter at all.

19 BY DR. BEN-HAIM:

20 Q Can you specify again the last part of your  
21 answer? No what?

22 A Can we play it back?

23 MS. HODGDON: No, it wouldn't have ended the  
24 matter at all.

25 THE WITNESS: Oh, yes, that's right. I said, no,

1 it would not have ended the matter at all. Let me be more  
2 specific. Dr. Ben-Haim, at that point, you still would have  
3 been in violation of 10 C.F.R. 30.10 for a deliberate  
4 violation on your part, your failure to obtain the  
5 delegations that were needed.

6 That would still have caused the licensee to be in  
7 violation of certain requirements, and so, we'd still be  
8 where we are today.

9 BY DR. BEN-HAIM:

10 Q Would I have -- sorry, excuse me.

11 Would what you heard in Dr. Moskowitz's testimony  
12 and the testimony of other witnesses these past days  
13 influence you to change your opinion on concluding  
14 deliberate misconduct on my part?

15 A Not as alleged in the order, specifically Section  
16 III(a)(1) and (2).

17 Q Would you read that order to us?

18 A It's a very long order, Dr. Ben-Haim. I had  
19 actually begun reading this and gotten quite a ways through  
20 it one time at your request and then I was stopped.

21 Q When Judge Kline asked you to state what factors  
22 were the most important in determining the enforcement  
23 sanction against me, you stated first attitude of wrongdoing  
24 -- attitude of the wrongdoer. What did you mean by that?

25 A Well, you'll recall I commented that of the

1 various factors that we consider, the attitude of the  
2 wrongdoer is the factor that the Commissioners themselves  
3 have written the most about. They wrote in the Statements  
4 of Consideration. They had a whole paragraph that addressed  
5 that specific factor.

6 So from that, I take it that insofar as the  
7 Commission is concerned, that's a very important factor.

8 Q Had I admitted to the alleged wrongdoing and had I  
9 said I won't do it again, would that have made a difference  
10 in determining the five-year period, the five-year order?

11 A I can't speculate for certain on that. I can tell  
12 you that I and the rest of the NRC Staff certainly would  
13 have considered that factor, among many others. These are  
14 complicated decisions; they're made by many people. I  
15 mentioned all of the people involved before. So I can't  
16 predict the outcome. If I answered your question?

17 Q What does the Commission mean by continuing  
18 denial, page 11 of your testimony?

19 A Well, of course, it's the Commission who wrote  
20 this, not myself, but I'll give you my best interpretation.  
21 In some of these cases, when the inspector first appears, or  
22 perhaps even before an inspector appears, an individual has  
23 somehow contacted NRC and indicated that a certain violation  
24 has occurred.

25 The Commission, I can tell you, considers, as a

1 very important factor, self-auditing and self-assessment and  
2 self-reporting of violations. It's a factor that builds the  
3 Commission's confidence in a licensee or, for that matter,  
4 an individual.

5 Q Doesn't this sound like compulsive confession that  
6 you ask from an innocent person?

7 A These are the Commission's words, they're not  
8 mine. I doubt very much that our Commissioners meant to  
9 indicate that they were somehow intending to make  
10 individuals confess to things.

11 Q Isn't this a dangerous attitude to --

12 A Remember, a violation of NRC requirements is not,  
13 you know, the same as committing some sort of violation of a  
14 federal statute, or what have you, in most cases and in  
15 general, the most important thing that the Commission is  
16 looking for in the face of a violation is correction,  
17 corrective action.

18 Q If you had called this alleged wrongdoing  
19 carelessness and not knowingly trying to deceive, would that  
20 have made a difference in your decision?

21 A The order, I do not believe, uses those words or  
22 makes that allegation, that there was any knowing attempt to  
23 deceive, the order that's issued to you, Dr. Ben-Haim.

24 Q I thought you heard -- I thought of hearing those  
25 words in your testimony, knowingly trying to deceive, or is

1 -- that's what I thought I heard today. Or didn't you say  
2 that?

3 A I don't believe so, Dr. Ben-Haim. I certainly did  
4 not mean to and I don't believe that I did. I'm almost  
5 certain that I did not. If I did, I retract it.

6 Q Did you today refer to me writing an audit within  
7 24 hours, or in a very short time, and what did you mean by  
8 -- how did you characterize this?

9 A I don't believe that I discussed your audit, Dr.  
10 Ben-Haim.

11 Q Yes, you did, this morning and I'd like to -- I  
12 would like to rephrase it.

13 A Okay.

14 Q Didn't I show a particular eagerness to comply and  
15 to cooperate with the NRC actually during all these  
16 investigations, but when I immediately, when asked by Dr.  
17 Elamir, who had actually received the order from the NRC, to  
18 make an audit, I did not ask for any reward and I'm just  
19 asking, wasn't this a fair compliance and a showing of  
20 adherence to regulations and complete cooperation with the  
21 NRC?

22 A I may not be clear. It's my understanding that an  
23 audit needed to be performed and that Dr. Elamir either  
24 agreed or somehow, in the course of the issuance of the  
25 confirmatory action letter, said that an audit would be

1 done.

2 Dr. Elamir needed to get somebody to do that, is  
3 my best interpretation as I sit here. I don't have his  
4 documents in front of me. He apparently chose you and we do  
5 have the results of your audit. I don't have the dates.

6 Q May I interrupt you for a moment?

7 A Yes.

8 Q I remember very well. Can I remind you -- can I  
9 remind you that the NRC specifically asked for the  
10 consultant and named the consultant, Aharon Ben-Haim, to  
11 provide -- to assist Dr. Elamir and to provide this audit  
12 for the NRC?

13 A Okay. I'm so reminded, provided that's true.

14 Q Thank you. Isn't that a showing of a positive  
15 attitude towards the regulations, towards the NRC, towards  
16 proper operation? Wasn't this a showing of the right  
17 attitude at least?

18 A You mean the fact that it was completed quickly or  
19 that it was completed or its contents? What are we talking  
20 about here?

21 Q All of it.

22 A It's certainly not indicative of any sort of  
23 negative performance, and to the extent that it was  
24 completed in timely fashion, that certainly was appreciated  
25 by the NRC Staff, I'm sure.

1 DR. BEN-HAIM: Thank you, Mr. Del Medico.

2 THE WITNESS: Yes, sir.

3 CHAIRMAN BECHHOEFER: Ms. Hodgdon, do you have  
4 further questions of this witness?

5 MS. HODGDON: If I could just ask one question  
6 about the audit, although I don't think that Mr. Del Medico  
7 has -- I don't know what knowledge he has of the audit.

8 FURTHER REDIRECT EXAMINATION

9 BY MS. HODGDON:

10 Q If you recall, was there testimony yesterday that  
11 this was a confirmatory action letter issued on February  
12 6th, 1997, requiring that Dr. Ben-Haim do an audit by  
13 February 14th and that the performance of this was a  
14 condition of the resumption of operation of this facility?

15 A Yes, that sounds correct. I don't have it in  
16 front of me.

17 MS. HODGDON: Thank you.

18 CHAIRMAN BECHHOEFER: Have you, Ms. Hodgdon, or  
19 Mr. Del Medico, either one, been able to get --

20 MS. HODGDON: Or Mr. Del Medico, but choose  
21 whichever you like. It makes no difference.

22 CHAIRMAN BECHHOEFER: I don't care. I just  
23 wondered if you're yet ready, before we excuse the witness,  
24 whether you're yet ready.

25 MS. HODGDON: We don't have anything yet, but we

1 have people working on it. It's just that they had other  
2 obligations like they had to go to a Commission meeting or a  
3 meeting with the Commission or something. They'd be right  
4 back and get it done. We expect that we will have it by the  
5 end of the day, which is all we committed to do, and we may  
6 not be able to do that.

7 CHAIRMAN BECHHOEFER: Correct. If you can.

8 MS. HODGDON: We have people making an effort even  
9 as we sit here.

10 CHAIRMAN BECHHOEFER: Is Mr. Del Medico going to  
11 stay here until the end of the day in case he has to be  
12 recalled to testify?

13 MS. HODGDON: I believe he plans to stay until the  
14 end of the day, if that's how long it takes.

15 THE WITNESS: I'll stay, Judge Bechhoefer.

16 CHAIRMAN BECHHOEFER: Okay. Well, for now, you're  
17 excused.

18 THE WITNESS: Thank you.

19 [Witness excused.]

20 CHAIRMAN BECHHOEFER: Okay, Dr. Ben-Haim. You may  
21 assume the stand. You're next.

22 DR. BEN-HAIM: Judge Bechhoefer, may I read my  
23 testimony as we --

24 CHAIRMAN BECHHOEFER: You'll have to be sworn in  
25 first.

1 Whereupon,

2 AHARON BEN-HAIM, Ph.D.,

3 a witness, was called for examination and, having been first  
4 duly sworn, was examined and testified as follows:

5 THE WITNESS: Shall I provide the court reporter  
6 with the exhibits right now or can I --

7 CHAIRMAN BECHHOEFER: Well, you'll have to  
8 introduce the exhibits separately, but if you want your  
9 prepared testimony to be given to the court reporter, you  
10 may do that right now.

11 THE WITNESS: I would like to introduce --

12 DR. REIN: If you want it to be part of the  
13 record, is what he asked you.

14 CHAIRMAN BECHHOEFER: Yes, to be bound into the  
15 record and then that will be your direct testimony in the  
16 record. And you should make sure that any corrections you  
17 wish to make are in there. You may supplement that, but  
18 that will be basically your prepared testimony then. That  
19 will go in as your direct testimony.

20 THE WITNESS: Yes. I would like to include in the  
21 record my answers to the interrogatories.

22 DR. REIN: Wait a minute.

23 THE WITNESS: I'm sorry. There was a mistake.

24 CHAIRMAN BECHHOEFER: Those will be exhibits.

25 THE WITNESS: I would like to provide a written

1 form of my testimony entitled, "The Matter of Aharon  
2 Ben-Haim by Dr. Aharon Ben-Haim in the matter of Aharon  
3 Ben-Haim." That will be Exhibit --

4 CHAIRMAN BECHHOEFER: That wouldn't be an exhibit.  
5 That would be your testimony.

6 THE WITNESS: That's my testimony.

7 CHAIRMAN BECHHOEFER: I assume the Staff has no  
8 objection to that being bound within the transcript?

9 MS. HODGDON: No.

10 CHAIRMAN BECHHOEFER: You didn't have any  
11 corrections to that that you would to advise anybody? Are  
12 there typos? Is there anything like that in there that you  
13 wish to relate?

14 THE WITNESS: Not at this point.

15 CHAIRMAN BECHHOEFER: Okay.

16 [The qualifications of Aharon Ben-Haim follows:]

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## THE MATTER OF AHARON BEN-HAIM

by Dr. Aharon Ben-Haim

In the Matter of  
AHARON BEN-HAIM, Sc. D.

IA 97-068

OI's investigation, Case No. 1-97-004, states on page 7 that "OI considered BEN-HAIM to be an official of NMA, for purposes of this investigation." Were I an official of NMA, I might have been informed of NMA's relations with UMDNJ. As an outside consultant and not an official of NMA, I had no idea of Dr. Elamir's involvement or non-involvement with UMDNJ. I therefore object to OI's statement.

I now know that Dr. Elamir and UMDNJ were negotiating contracts in February of 1996. On February 16, I saw Dr. Moskowitz who gave me his papers in order to be included in NMA's license application as AU and RSO. It did not make any difference to me who would be the AU/RSO. Dr. Elamir wanted it to be Dr. Moskowitz, so be it. Had he chosen somebody else, it would have been the same as far as I am concerned, provided the candidate has the qualifications required by the NRC and the NJDEP. I phoned Dr. Moskowitz using the phone number 982-6022 given to me by Dr. Elamir. I spoke with him and we made an appointment for February 16, 10:30 AM in his office in the Nuclear Medicine laboratory H141, at UMDNJ. Dr. Elamir testifies to this through his lawyers. See IA 97-064 and IA 97-070, ANSWER OF DR. MAGDY ELAMIR.... Dr. Elamir also corroborates the fact that I received the papers from Dr. Moskowitz's hands at that meeting.

According to OI's above document, page 12, "Moskowitz allowed that there was less than a 1% chance that he may have met with Ben-Haim at UMDNJ". I hope I will be able to refresh his memory today. There was no other purpose to my visit than to receive from Dr. Moskowitz these papers, since I wanted to diligently prepare the application

The License Application was accurate and complete, and therefore granted.

I now know that since sometime around July of 1996, i.e. well after my February 16 meeting with Dr. Moskowitz, the relations between UMDNJ and NMA did not turn well and that neither Dr. Baker nor Dr. Moskowitz told Dr. Elamir, as is revealed in OI's investigation. Neither did Dr. Elamir communicate with Dr. Moskowitz after having his License application granted, in the fall of 1996, and Dr. Elamir did not inform me about not notifying Dr. Moskowitz.

Based on the granted License, NMA's Nuclear Medicine operations started, although only sporadically. My involvement was that of an outside consultant and physicist. At no time was I involved in the official business of the clinic. I had no idea of any contracts between NMA and UMDNJ or between NMA and any other organization. During this time, I mentioned to Dr. Elamir that the RSO, i.e. Dr. Moskowitz, must come, review the procedures and sign the records. During all

contact with Dr. Moskowitz.

January 29, 1997, maybe an hour before the inspection, Dr. Elamir asked me to be present at the inspection. It was part of my contract to help with inspections. I had been at other inspections without the RSO being present and I was willing to help the inspector with as much information as was available to me. When Mr. Gibson asked me who the RSO was, I told him without any hesitation it was Dr. Moskowitz.

At my second OI interview, with Davis, I was told that Dr. Moskowitz denied my meeting with him. I told Davis that this is ridiculous.

Dr. Moskowitz had a shaky position at UMDNJ and bad rapports with his superior, Dr. Baker, so I have learned since. His wife told me on the phone that UMDNJ fired Dr. Moskowitz as a result of this current matter. When I told her that I have to see her husband so he may recognize me and correct his testimony, she told me that her husband, Dr. Moskowitz, is the victim in this matter. When later the same day I called Dr. Moskowitz on the phone, he refused seeing me, calling the whole thing "a charade". He said I should have contacted him then, at the time of OI's investigation, when it could have helped him to save his position at UMDNJ, he said. (I could not have contacted him, since I was advised by OI not to contact anybody at UMDNJ). I tried to see Dr. Moskowitz through his Rabbi, but Dr. Moskowitz refused.

It is fully evident from several testimonies that nobody at UMDNJ notified Dr. Elamir on the change of their relations with NMA. OI's contention that there were no negotiations concerning Dr. Moskowitz are repeatedly contradicted. See page 13 of OI's document, lines 8-10, 29-30, page 15, lines 10-15, 24- .

OI claims, page 16, line 2, that Dr. Elamir received Dr. Moskowitz's CV directly from Dr. Baker. I want to challenge this claim.

- a) Dr. Elamir does not say that in his ANSWER
- b) From OI's statement, Dr Baker would have to give Dr. Elamir 40 CV's, one for each member of his staff.
- c) It is contrary to common practice.

Dr. Elamir says "Even if not signed, a contract existed". Dr. Moskowitz says the flip version of the same coin: "If it is not signed, it doesn't exist."

In February, the negotiations were very active. I received the papers from Dr. Moskowitz who represented to me that he wanted to be included in the application as the AU and RSO.

Had I received Dr. Moskowitz's papers directly from Dr. Elamir and had I prepared the application on the basis of pertinent and accurate information from Dr. Elamir only, the application would still have been accurate and complete.

Had the NRC contacted Dr. Moskowitz before the license became effective, Dr. Elamir could have found a different RSO/AU.

It is clear that UMDNJ misled Dr. Elamir who thought that Dr. Moskowitz was his RSO and

AU, page 17, line 1 of OI report

Wilson and Davis appeared at my home address in an "instant visit". Their aggressive irruption into my privacy was countered by me with polite collaboration. I was in my bath robe, having just taken a shower. They did not even excuse themselves.

When they asked me about my meeting with Dr. Moskowitz, I could not remember the date. Then they asked me whether I have an appointment book. I remembered that I had my 1996 pocket diary in the inside pocket of a suit that was hanging in a closet facing the couch on which the two investigators were sitting. I went straight to the closet, took out my diary and came back to the two inspectors. I turned the pages in front of them and we saw the entry on February 16 together. I object to the SA's implying that I "created" this entry post-factum.

The Special Agents' report is full of inaccuracies and confusions:

Page 19 of OI, line 1: licenses, not regulations. Line 11 says: "In handing this document to Smoligova, BEN-HAIM admitted giving her the authorization to order the Tc-99 (sic)."

1. This was not a document.
2. I did not admit giving Smoligova any authorization.

I did not tell Smoligova my "authority to delegate this duty came from Dr. Elamir". Dr. Elamir told Smoligova that she was designated to order the doses and he asked me to write the information on a piece of paper.

I did not admit to OI that Dr. Elamir had not given me this authority and had no knowledge of this "delegation".

I did not know that the AU on the license is the only individual who, with respect to NMA, can delegate this ordering duty. Common practice, as documented by John Carr's testimony, contradicts this.

I was not aware that my actions were a mistake and placed the licensee, Dr. Elamir, in jeopardy. I never said I owed Dr. Elamir an apology.

It is interesting to note that Davis admits the accuracy of my description of Dr. Moskowitz whom I have seen only once in my life for a maximum of 20 minutes, over one year before this interview.

The OI report is inaccurate in its relation of the simplest facts:

Page 17, Interview of BEN-HAIM: MRI was never a subject I was involved with. I did not say that a female participated in the meeting.

Page 20, Interview of GEYLIKMAN. Marina was never employed by Dr. Elamir for three years at different locations. Equipment problems were the only problems she called me for.

SMOLIGOVA received only one single piece of paper and not notes. She does not take direction from BEN-HAIM for ordering the Tc-99(sic).

I verified that H141 is the number for the whole Nuclear Medicine Department, lab and offices. The office of Dr. Moskowitz was comprised therein.

To Agent's Analysis:

There is no need for a signed written agreement for a Nuclear Medicine doctor to be the RSO/AU for several entities. If there are restrictions in this case, they were imposed on Dr. Moskowitz by his employer, and I was not aware of them. The agents only repeat Dr. Moskowitz's arguments.

Page 22: "Moskowitz doubts that a meeting took place". He implies he would not have seen me because of an ER assignment. That assignment was until 10:00. Our meeting was at 10:30.

The agents admit a meeting could have taken place. My entry in the calendar is evidence to the meeting and Dr. Moskowitz's ER report is evidence that the meeting could have taken place.

The fact that Dr. Moskowitz gave me his papers at this meeting indicated his clear intention of becoming the RSO/AU for NMA even without a written agreement. That was the sole purpose of our meeting.

I have prepared several other license applications and never was there any signature needed from the potential RSO/AU. There was no way for me to foresee that Dr. Moskowitz would eventually retract himself. The special agents are set to wilfully, arbitrarily discredit me, whether a meeting with Dr. Moskowitz took place or not. They admit that a meeting may have taken place.

I never admitted acting as de facto RSO for NMA. The agent asked: "Why are you not the RSO?" I said: "I cannot be the RSO because I am not board certified in this country. I had applied for another facility and was rejected. Therefore, I knew I could not be the RSO and did not apply". This is also what I told Dr. Elamir.

I resent being presented as having a "cavalier attitude" as to NRC regulations, after 36 years of work as a medical physicist. I take NRC regulations very seriously and I repeatedly declared to the Special Agents that I am a Radiation Safety conscious consultant physicist.

The day of the inspection, it was not my duty to call Dr. Moskowitz but Dr. Elamir's. Also, I was not aware that Gibson had specifically asked for the RSO to be present at the inspection. I had been the sole representative of a facility at other inspections, e.g. with Kinneman inspecting the West Orange facility. But when Gibson asked to see the RSO, I gave him Dr. Moskowitz's name without hesitation, since I was convinced that he was the RSO.

Exhibit 16: I did not claim meeting with Dr. Moskowitz to discuss business relationship with NMA.

Dr. Moskowitz admits in writing "It is possible for me to have met some one at 10:30 A.M.", and further: "I am very concerned about the seriousness of this matter". But OI's report says: "MOSKOWITZ is deemed to be more credible, simply because he has no vested interest in the outcome of the OI investigation.

Exhibit 21: OI says I was hired to set up the NMA facility for the MRI service. Who said that? This is totally inaccurate, again. And the same error is repeated in the Interview report of Dr. Aharon Ben-Haim, Exhibit 22, page 1: "Elamir was looking for somebody to set up NMA with magnetic resonance imaging (MRI)".

Why do they say that I created the paperwork. I prepared it would be appropriate.

Exhibit 22: I never said anything about HMO American Preferred. I did not know anything about it.

I am accused of deliberately including Dr. Moskowitz's name as an RSO/AU in the license application. What would be my motive to do so? Davis/Wilson say: "The purpose of the meeting was nothing more than to lend credence to the start up operation at NMA". Here they imply there was a meeting, but it was only for "making believe". Page 19 of OI's report could not be more confused. Could I include Dr. Moskowitz's name and hope this would not be discovered? And what is so special about Dr. Moskowitz's name? It would have been very easy for Dr. Elamir to find another qualified RSO/ AU, which he immediately did after Dr. Moskowitz's retraction.

The violation states that I deliberately prepared NMA's license using Dr. Moskowitz's name without his knowledge and consent. The agents are not sure that the meeting with Dr. Moskowitz did not take place. See page 22, line 36.

The only purpose of my meeting with Dr. Moskowitz was to receive Dr. Moskowitz's papers which is a proof of his consent to using his name as a candidate for the RSO/AU in NMA's license. The only logical conclusion is that the assertion that I deliberately misled the NRC in including Dr. Moskowitz's name in NMA's License Application is false.

As a consultant physicist, I am of course obliged to give all pertinent information to my customer. Dr. Elamir designated Smoligova, MD, who is employed by NMA as an MRI technician, as the person in charge of ordering the radiopharmaceuticals from the pharmacy. He asked me to write down for Lubica the pertinent information, which I did. I wrote one single note, which consists of part of the writing on the piece of paper labeled Exhibit BH-3, before routine operations started. The rough piece of paper on which Lubica also keeps other notes is being arbitrarily qualified as a "prescription" by the Special Agents and the NRC Staff. There is no signature, no date, no name of patient, it was not meant to be presented to a pharmacy or a doctor, it is not specific to one radiopharmaceutical. It is general information, as it may appear on any pamphlet and does not engage anybody. It is not an order or an authorization.

I never admitted authorizing the dose orders of Tc-99<sup>m</sup>. Since I did not have any authority, I could not authorize and did not authorize. The characterization of the above piece of paper as a "prescription" by the agents shows how eager they are to find anything at all against me. I did not prescribe any doses for patients as stated by Joseph Del Medico, page 2/6..

As a physicist, my concern is for a Nuclear Medicine test to be meaningful. The quantity of radiopharmaceutical is not irrelevant, nor is the time of the test, from the imaging point of view. My concern is the equipment and its use from the physicist point of view. Also, from a Health Physics concern, the amount should be As Low As Reasonably Achievable. This is evident, even to a layman.

It is important to me as a consultant physicist to transmit this information to my customer. But it is information only and not an order, a directive, or a prescription. It is up to the customer to use the information according to his license and his patients' needs. I never pretended trespassing my limits into the domain of the physician.

I am convinced that there is an important role for the medical physicist to play in the operation of Nuclear Medicine facilities. The American College of Medical Physics has a Code of Ethics that is dear to me. I certify that I have always endeavored to follow the Guidelines of that code.

1 THE WITNESS: I would like to introduce --

2 CHAIRMAN BECHHOEFER: These are your exhibits, are  
3 they not?

4 THE WITNESS: The exhibits. Would it be possible  
5 to introduce the exhibits as we go along?

6 CHAIRMAN BECHHOEFER: That's fine, that's fine.

7 THE WITNESS: So before I start my testimony, I  
8 would like to explain that the strong wording in my letter  
9 to Chairman Jackson was the result of my frustration about  
10 feeling unfairly treated. I would like to point out that I  
11 consider the NRC Staff a very professional body for which I  
12 have the utmost respect.

13 DIRECT TESTIMONY

14 THE WITNESS: OI's investigation, Case No.  
15 1-97-004, states on page 7 that "OI considered Ben-Haim to  
16 be an official of NMA, Newark Medical Associates, for  
17 purposes of this investigation." Had I been an official of  
18 NMA, I might have been informed of NMA's relations with  
19 UMDNJ. As an outside consultant and not an official of NMA,  
20 I had no idea whatsoever of Dr. Elamir's involvement or  
21 non-involvement with UMDNJ. I therefore object to this OI  
22 statement.

23 I now know that Dr. Elamir and UMDNJ were  
24 negotiating contracts in February of 1996. On February 16,  
25 I did see Dr. Moskowitz, who gave me his papers in order to

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1 be included in NMA's license application as the authorized  
2 user and the radiation safety officer.

3 It did not make any difference to me who would be  
4 the AU/RSO. Dr. Elamir wanted it to be Dr. Moskowitz, so be  
5 it. Had he chosen somebody else, it could have been the  
6 same for me, as far as I'm concerned, provided the candidate  
7 had the qualifications required by the NRC and the New  
8 Jersey Department of Environmental Protection.

9 I phoned Dr. Moskowitz in his office. The phone  
10 number was given to me by Dr. Elamir. He asked me to give  
11 Dr. Moskowitz a call and I did. I spoke with him and we  
12 made an appointment for February 16, 10:30 a.m., in his  
13 office in the nuclear medicine lab, H141, at UMDNJ. There's  
14 no discrepancy between office or lab as everybody can  
15 verify.

16 Dr. Elamir testifies to this through his lawyers.  
17 See IA 97-064 and IA 97-070. The documents are available to  
18 you, the answer of Dr. Magdy Elamir, et cetera, et cetera.  
19 Dr. Elamir also corroborates the fact that I received the  
20 papers from Dr. Moskowitz's hands at that meeting and not  
21 through another means like through Dr. Baker from him.

22 According to OI's above document, page 12,  
23 "Moskowitz allowed that there was less than a 1 percent  
24 chance that he may have met with Ben-Haim at UMDNJ." I did  
25 not refresh Dr. Moskowitz's mind very much, but a little bit

1 at his deposition.

2 There was no other purpose to that visit, quoted  
3 here, than to receive from Dr. Moskowitz these papers. I  
4 wanted to very diligently prepare the application, which I  
5 did.

6 I declare that the license application was  
7 accurate and complete, accurate as to as far as I knew, and  
8 therefore granted. I now know that since sometime around  
9 July of 1996, it is well after my February 16 meeting with  
10 Dr. Moskowitz that the relations between the University of  
11 Medicine and Dentistry of New Jersey and Newark Medical  
12 Associates did not turn well, and that neither Dr. Baker nor  
13 Dr. Moskowitz told Dr. Elamir, as is revealed in the  
14 investigation of the NRC.

15 Neither did Dr. Elamir communicate with Dr.  
16 Moskowitz after having his license application granted in  
17 the fall of 1996, and Dr. Elamir did not inform me about not  
18 notifying Dr. Moskowitz. I saw Dr. Elamir after receiving  
19 his order and asked him, "What is this all about? Why did  
20 you tell me that Dr. Moskowitz was your AU? How come now  
21 you didn't even meet Dr. Moskowitz?"

22 And he told me that he received Dr. Moskowitz's  
23 name from Dr. Baker and that Dr. Baker told him it was all  
24 right. This is the answer I received from Dr. Elamir. That  
25 was around -- after the 20th of August, about probably the

1 20th or maybe even the same day that I knew of the order,  
2 which was the 19th of August -- 18th of August of 1997.

3 Based on the granted license, NMA's nuclear  
4 medicine operations started, although only sporadically. My  
5 involvement was that of an outside consultant and physicist.  
6 At no time was I involved in the official business of the  
7 clinic. I had no idea of any contracts between NMA and  
8 UMDNJ or between NMA and any other organization.

9 I certainly told Dr. Elamir the few times that --  
10 I saw him very seldom. I remember very well asking him why  
11 isn't Dr. Moskowitz here. I told him once, or wasn't he  
12 here actually, because I wasn't there on Saturdays when the  
13 work was done and I didn't know whether Dr. Moskowitz was  
14 there or not.

15 But I hadn't seen any signed -- any signature of  
16 his in the log book, and I had asked him specifically. I  
17 told him actually, "This has to be signed. He has to review  
18 the procedures and I don't see anything." Dr. Elamir  
19 nodded. Our encounters were very brief. So he nodded and  
20 said, "Okay, okay."

21 During all this time until the interviews with  
22 OI's special agents, I was convinced that Dr. Elamir was in  
23 contact with Dr. Moskowitz and had no way of knowing that he  
24 was not.

25 January the 29th of 1997, maybe an hour before the

1 inspection, Dr. Elamir asked me on the phone to be present  
2 at the inspection. I had not heard of that announced  
3 inspection a week before, whatever, when Dr. Elamir was  
4 informed. It was part of my contract to help with  
5 inspections. I had also been at other inspections without  
6 an RSO being present and I was willing to help the inspector  
7 with as much information as was available to me.

8 So when Mr. Gibson, during the inspection, asked  
9 me who the RSO was, I told him without any hesitation it was  
10 Dr. Moskowitz. At my second OI interview with Mr. Davis, he  
11 told me that Dr. Moskowitz denied my meeting with him,  
12 talking about a year earlier. I told Davis that this is  
13 ridiculous.

14 I know now that Dr. Moskowitz had a shaky position  
15 at UMDNJ and had bad rapport with his superior, Dr. Baker.  
16 After this happened, I was trying to see Dr. Moskowitz to  
17 try to have him -- to remind him of my existence because he  
18 saw me only once and I saw him only once. His wife told me  
19 on the phone that UMDNJ had fired Dr. Moskowitz as a result  
20 of this current matter. That's what she told me on the  
21 phone.

22 When I told her that I have to see him so that he  
23 may recognize me and correct his testimony, she told me that  
24 Dr. Moskowitz is the victim -- her husband -- is the victim  
25 in this matter. I heard this expression a few times and I

1 saw it also in the OI report in the last few weeks since  
2 this report is available to me.

3 When later the same day I called Dr. Moskowitz on  
4 the phone, he refused seeing me and he called the whole  
5 thing a charade. He said I should have contacted him then  
6 at the time of OI's investigation when I could have helped  
7 him to save his position at UMDNJ, so he said.

8 There was no way for me to contact him because I  
9 was advised very strongly by OI not to contact anybody at  
10 UMDNJ. I was told in very clear terms that there was no way  
11 I should go and try to contact anybody at UMDNJ, and they  
12 told me that there was a fishy business going on there. I  
13 didn't know what it was and was not even interested.

14 I tried to see Dr. Moskowitz through his rabbi of  
15 Dr. Moskowitz, also told you the day before yesterday, but  
16 he refused. I never threatened his wife. That was not  
17 true. That is not true. I stalked on -- I think staked? I  
18 tried to see him, so I went to his house, seeing the two  
19 cars there, and waited until he comes out so we may meet,  
20 even though he didn't want to.

21 I was hoping that he would recognize me. I didn't  
22 want to attack him or anything. I just wanted to force him  
23 to see me again. I'm here, I exist. That's all.

24 It is fully evident from several testimonies --  
25 I'm not talking about the testimonies of this hearing, but

1 from before. I wrote this before we started this hearing, a  
2 couple of days before. It is fully evident, I'm saying  
3 again, that nobody at UMDNJ notified Dr. Elamir on the  
4 change of their relations with NMA. OI's contention that  
5 there were no negotiations concerning Dr. Moskowitz are  
6 repeatedly contradicted in their own report. You can see  
7 page 13 of OI's document. I refer to page 13 of OI's  
8 document, lines 8 through 10.

9 As part of the negotiations, Baker provided a list  
10 of UMDNJ doctors as part and their credentials to Elamir.  
11 This was done routinely. Included on that list would have  
12 been Moskowitz's name. Moskowitz was the only nuclear  
13 physician on staff that Baker could have used if the  
14 negotiations would have led him to areas outside of MRI  
15 services.

16 On the same page, I believe it's line 29 and 30  
17 when you count the lines -- I don't know if you include the  
18 spaces or not. It's in the fourth paragraph. Baker  
19 reiterated that the negotiations were strictly for MRI  
20 services with only a potential for future services such as  
21 the reading of bone scans.

22 Page 15, line 10, I would read a few more lines.  
23 "Werner stated that sometime after the visit to NMA, he had  
24 been in or around Baker's office when he," that's Werner,  
25 "overheard something to the effect that Elamir needed a

1 license and wanted Moskowitz to read scans. This was  
2 Werner's first indication that Elamir had an interest in  
3 nuclear medicine, as this was Moskowitz's specialty."

4 There was a phrase about other radiology images  
5 included in the draft, but Zackin was not clear as to what  
6 that meant. There were no names, but there was a draft  
7 agreement on other radiology services.

8 The OI report claims, on page 16, line 2, that Dr.  
9 Elamir said that Baker provided information on Dr. Moskowitz  
10 to his, Elamir's, request, and was even given a copy of  
11 Moskowitz's CV by Baker, so that Dr. Elamir received Dr.  
12 Moskowitz's CV directly from Dr. Baker.

13 I want to challenge this claim. Dr. Elamir does  
14 not say that in his answer to the order that he received.  
15 From OI's statement, Dr. Baker would have to give Dr. Elamir  
16 40 CVs, one for each member of the staff. With what  
17 suitcase did Dr. Elamir go to UMDNJ, or Dr. Baker to NMA, to  
18 have all these 40 CVs and other credentials carrying with  
19 him?

20 It is contrary to common practice for people to  
21 give other people's CVs. I have never in my life given my  
22 CV otherwise than myself. I mean, I've sent it somewhere,  
23 but I've not given it to somebody else to give it to  
24 somebody. I do not believe, I challenge this as  
25 unreasonable for people to just give around CVs liberally

1 around. It doesn't seem logical or reasonable.

2 Dr. Elamir says, "Even if not signed, a contract  
3 existed." I'm quoting OI's report. And Dr. Moskowitz says  
4 the flip version, also OI's report, "If it is not signed, it  
5 doesn't exist."

6 In February of '96, the negotiations were very  
7 active and I received the papers from Dr. Moskowitz who  
8 represented to me that he wanted to be included in the  
9 application as the authorized user and radiation safety  
10 officer.

11 CHAIRMAN BECHHOEFER: You say he specifically told  
12 that to you, Dr. Moskowitz did?

13 THE WITNESS: No, he did not say those words. He  
14 gave me those papers. I understood from that that this was  
15 his intent. Why otherwise would he have given me those  
16 papers? He didn't say, "I will be the RSO." As the OI  
17 report says, "No, I didn't say that." We were talking about  
18 scans and he said, "I'm going to read the bone scans."  
19 That's what my recollection is. That's also what I said all  
20 the time.

21 The sole purpose of my visit was to get those  
22 papers. I had called him, talked to him on the phone, told  
23 him why I was coming. He had prepared those papers and I  
24 received them from him. Did I answer your question, Judge  
25 Bechhoefer, or is there still a question here?

1           CHAIRMAN BECHHOEFER: No. My question was whether  
2 there was specific communication to you from Dr. Moskowitz  
3 that he either was the RSO or was giving you the papers to  
4 become the RSO or authorized user, for that matter.

5           THE WITNESS: We had --

6           CHAIRMAN BECHHOEFER: If there's any conversation  
7 at all because he certainly denies even meeting you, at  
8 least in this context.

9           THE WITNESS: I introduced myself. I told him  
10 when I came in. If my recollection is correct, I even gave  
11 him my business card. I said I was the physicist for NMA  
12 and he had expected me in the hall. I had called him before  
13 the meeting.

14           CHAIRMAN BECHHOEFER: That was in the particular  
15 room that's identified in your diary? Was that in the  
16 particular room that was identified in your diary and which  
17 --

18           THE WITNESS: That was the room that he told me to  
19 come to. He told me specifically, "Come to H141 at UMDNJ at  
20 10:30," and that is what I wrote and then that's where I  
21 went. When I met him, I didn't look at the number, I didn't  
22 know it was that number. I knew that I had to go to floor  
23 H, Nuclear Medicine Department, and when I verified -- I  
24 verified in August after receiving the order and so on, I  
25 also went to UMDNJ.

1 I went to that place and what I found out is that  
2 H141 is actually the number for the whole department.  
3 That's the number that you have at the main entrance at the  
4 Nuclear Medicine Laboratory. The office was comprised  
5 therein. If I didn't say it before, I'm repeating. If I  
6 didn't say it before, I'm saying it for the first time, but  
7 if I said it before, bear with me that I am redundant.

8 The only purpose of the visit was to receive from  
9 Dr. Moskowitz those papers in order to be included in the  
10 application as the RSO and the authorized user. That was  
11 the only purpose of the visit. That was the purpose that I  
12 came for.

13 But had I received Dr. Moskowitz's papers directly  
14 from Dr. Elamir and had I prepared the application on the  
15 basis of pertinent and accurate information from Dr. Elamir  
16 only, the application would still have been accurate and  
17 complete. This could have been the scenario, a valid  
18 scenario, but I didn't. I received it from him.

19 Had the NRC contacted Dr. Moskowitz before the  
20 license became effective -- see, I'm accused of not  
21 notifying -- not being in contact with Moskowitz. Why  
22 doesn't the NRC do that? Elamir did not contact him, which  
23 he should have certainly. I mean, not only contacted him,  
24 he should have made sure that he does his job. It was  
25 supposed to be his job.

1           But why doesn't the NRC contact -- if that is such  
2 a concern, I share the concern of the NRC. I think it is  
3 very important. I think those roles of RSO and AU, the  
4 distinction between the authorized user, who is responsible  
5 for the medical practice, the radiation safety officer, who  
6 is responsible for the use of by-product material, these  
7 functions are very important.

8           I share all the concerns of the NRC with that. I  
9 understand that the regulations are being reviewed and new  
10 versions and better versions. I always endeavored -- I  
11 participated in panels of the International Commission for  
12 Radiation Protection when I was working at the International  
13 Atomic Energy Agency years ago.

14           In 1966, I was at a congress in Rome where the  
15 term "ALARA" came up the first time, as low as reasonably  
16 achievable. I sat at a panel where this was discussed and I  
17 told the investigators that I was always -- and that's the  
18 way I thought of it. I was a radiation safety conscious  
19 physicist, and I told him that sometimes those -- that I  
20 share those concerns with the radiation safety officer. But  
21 I never said that I was the de facto RSO. I said that I was  
22 not the RSO.

23           Had the NRC contacted Dr. Moskowitz before the  
24 license became effective, we would not have had this  
25 problem. I certainly, if I may, humbly submit

1 recommendation is to maybe have for every future license,  
2 have the NRC contact the RSO that is listed in the license  
3 before granting the license.

4 It is clear to me that the University of Medicine  
5 and Dentistry of New Jersey misled Dr. Elamir, who thought,  
6 even though he saw that at least that officially or legally  
7 that he had an RSO and an AU.

8 The investigators, Wilson and Davis, appeared at  
9 my home address in an instant visit. That's how it was  
10 characterized. Their aggressive eruption into my privacy --

11 CHAIRMAN BECHHOEFER: What do you mean by instant  
12 visit? Just unannounced?

13 THE WITNESS: Unannounced, but not only -- the  
14 whole attitude was very -- if we talk about attitudes, it  
15 was a very intimidating attitude. My nature is that of an  
16 Israeli. I am not used to people to just be submissive if  
17 somebody comes aggressively against me. I am not afraid of  
18 saying my opinion, of telling anybody.

19 But I am polite and I countered with polite  
20 collaboration. They didn't even give me the time of maybe  
21 getting dressed or something. Fine, you want to go ahead  
22 right now like this, I was in my bathrobe. I invited them  
23 to sit down on the couch and we started and I was ready to  
24 give all the information they wanted.

25 They did not even excuse themselves. They saw me

1 in this attitude, the normal attitude, I think, between  
2 civilized people is when somebody's -- you come unannounced  
3 as a visitor and you find somebody in his bathrobe. At  
4 least you could say, "Excuse me." They did not and I was  
5 shocked.

6 But as far as information, everything they asked,  
7 fine. I don't have anything to reproach this person. I  
8 mean, Dr. Ben-Haim.

9 When they asked me about my meeting with Dr.  
10 Moskowitz, I could not remember the date. Then they asked  
11 me whether I have an appointment book, and I remembered that  
12 I had my 1996 pocket diary in the inside pocket of a suit  
13 that was hanging in the closet facing the couch on which the  
14 two investigators were sitting.

15 I went straight in front of them to the closet,  
16 opened the door, went straight to the suit, took my 1996  
17 notebook out and started with them in their presence. They  
18 were sitting in front of me. I was sitting here and we  
19 started turning the pages to find out where it was. This is  
20 why I'm so surprised that how can they doubt my sincerity?  
21 February 16, and how can they not doubt the sincerity of Dr.  
22 Moskowitz? That beats me.

23 February 16, there's an entry in my calendar and I  
24 would like to introduce Exhibit BH-1, which is a copy of  
25 this page of my diary, right here. This is Exhibit BH-1.

1 CHAIRMAN BECHHOEFER: Give him three copies.

2 THE WITNESS: We saw the --

3 CHAIRMAN BECHHOEFER: Any objection to that  
4 exhibit?

5 MS. MARCO: No objection, but I am a little  
6 curious. May I look at that? This is the first I've seen  
7 the original.

8 JUDGE KLINE: Ms. Marco, would you also pass it  
9 around the Board so that we can see it?

10 CHAIRMAN BECHHOEFER: We'd just like to see it to  
11 make sure that what is going in the record is correct.

12 [Ben-Haim Exhibit 2 was received  
13 into evidence.]

14 CHAIRMAN BECHHOEFER: I'd like to take a quick  
15 break just for ten minutes or less.

16 [Recess.]

17 CHAIRMAN BECHHOEFER: Back on the record.

18 Dr. Ben-Haim, you may proceed.

19 THE WITNESS: I object to the special agents  
20 implying that I created this entry post facto. The special  
21 agents' report is full of inaccuracies and confusions. In  
22 the OI report, page 19, "I would take care of all state and  
23 federal regulations." I can't take care of regulations, but  
24 of licenses.

25 Line 11 says, "In handing this document to

1 Smoligova, Ben-Haim admitted giving her the authorization to  
2 order the Technetium-99 (sic)." This was not a document. I  
3 did not admit giving Smoligova any authorization. I did not  
4 tell Smoligova my authority to delegate this duty came from  
5 Dr. Elamir.

6 Dr. Elamir told Smoligova that she was designated  
7 to order the doses and he asked me to write information on a  
8 piece of paper. I did not admit to OI that Dr. Elamir had  
9 not given me this authority and had no knowledge of this  
10 delegation. I had no knowledge of this delegation and I did  
11 not admit it.

12 I did not know that the authorized user on the  
13 license is the only individual who, with respect to NMA, can  
14 delegate this ordering duty. Common practice, as documented  
15 by John Carr's testimony, contradicts this. I was not aware  
16 that my actions were a mistake and placed the licensee, Dr.  
17 Elamir, in jeopardy. I never said I owe Dr. Elamir an  
18 apology.

19 It is interesting to note that Davis admits the  
20 accuracy of my description of Dr. Moskowitz, whom I had seen  
21 only once in my life -- now I've seen him again -- for a  
22 maximum of 20 minutes, as I recall, over one year before  
23 that interview.

24 The OI report is inaccurate in its relation of the  
25 simplest facts. Page 17, interview of Ben-Haim, MRI was

1 never a subject I was involved with. I did not say that a  
2 female participated in the meeting and there were other  
3 females working in that lab.

4 Page 20, interview of Geylikman, Marina was never  
5 employed by Dr. Elamir for three years at different  
6 locations, and equipment problems were the only problems she  
7 called me in for. Smoligova received only one single piece  
8 of paper and not notes, not several notes. She does not  
9 take direction from Ben-Haim for ordering the Technetium-99.

10 I verify that H141 is the number of the whole  
11 Nuclear Medicine Department. I will say that again. I said  
12 it already.

13 Now, to agents' analysis. There is no need for a  
14 signed, written agreement for a nuclear medicine doctor to  
15 be the RSO/AU for several entities. If there are  
16 restrictions in this case, they were imposed on Dr.  
17 Moskowitz by his employer and I was not aware of them. The  
18 agents only repeat Dr. Moskowitz's arguments and use them  
19 against me.

20 Page 22, Moskowitz doubts that a meeting took  
21 place. He implies that he would not have seen me because of  
22 an ER assignment. That assignment was until 10:00 o'clock;  
23 our meeting was at 10:30. The agents admit the meeting  
24 could have taken place. My entry in the appointment book is  
25 evidence to the meeting and Dr. Moskowitz's ER report is

1 evidence that the meeting could have taken place.

2           The fact that Dr. Moskowitz gave me his papers at  
3 this meeting indicated his clear intention of becoming the  
4 RSO/AU for NMA even without a written agreement. That was  
5 the sole purpose of our meeting. I have prepared several  
6 other license applications and never was there any signature  
7 needed from the potential RSO/AU. There was no way for me  
8 to foresee that Dr. Moskowitz would eventually retract  
9 himself.

10           The special agents are set to willfully,  
11 arbitrarily discredit me whether a meeting with Dr.  
12 Moskowitz took place or not. They admit that the meeting  
13 may have taken place. I never admitted acting as the de  
14 facto RSO for NMA. The agent asked, "Why are you not the  
15 RSO?" I said, "I cannot be the RSO because I'm not  
16 board-certified in this country. I had applied for another  
17 facility and was rejected. Therefore, I knew I could not be  
18 the RSO and did not apply." This is also what I told Dr.  
19 Elamir.

20           I resent being presented as having a cavalier  
21 attitude as to NRC regulations. After 36 years of work as a  
22 medical physicist, I take NRC regulations very seriously and  
23 repeatedly declared to the special agents that I'm a  
24 radiation safety conscious consultant physicist. These were  
25 my words.

1           The day of the inspection, it was not my duty to  
2 call Dr. Moskowitz, but Dr. Elamir's. He was asked by Mr.  
3 Gibson that the RSO had to be there and I didn't know about  
4 it. I was not aware that Gibson had specifically asked for  
5 the RSO to be present at the inspection.

6           I had been the sole representative of the facility  
7 at other inspections, for example, with Kinneman inspecting  
8 the West Orange facility. But when Gibson asked to see the  
9 RSO, I gave him Dr. Moskowitz's name without hesitation,  
10 since I was convinced that he was the RSO.

11           In Exhibit 16 of the OI report, it says that I  
12 came with Dr. Moskowitz to discuss a business relationship  
13 with NMA, but I didn't. That is incorrect. Dr. Moskowitz  
14 admits in writing it is possible for me to have met someone  
15 at 10:30 a.m., and further, I am very concerned about the  
16 seriousness of this matter.

17           But OI's report says Moskowitz is deemed to be  
18 more credible simply because he has no vested interest in  
19 the outcome of the OI investigation. They claim that only  
20 money matters are counting. I think that the vested  
21 interest can be more than just money, and I don't think that  
22 I had any vested -- in fact, I was not made aware that I was  
23 investigated.

24           It's only July 18 that I learned that I was not  
25 only investigated, not only charged, but also judged and

1 sentenced, all at the same time. That came just like a  
2 storm on me on a very bad day -- on a sunny day, actually,  
3 of August. It came on me like a very, very heavy storm that  
4 I had not foreseen at all.

5 CHAIRMAN BECHHOEFER: Do you believe that Dr.  
6 Moskowitz had a vested interest in this matter?

7 THE WITNESS: Absolutely. I was even -- I was  
8 even told that he lost his job because of this. That's what  
9 I was told afterwards. But I certainly believe that he has  
10 an interest -- I don't know if vested interest is the right  
11 characterization, but he was certainly -- he certainly had a  
12 reason or a thought.

13 I think that -- of course, that's my thinking --  
14 that he was afraid to do anything that was contrary to what  
15 his boss was telling him in February or March. He was  
16 afraid of losing his job, which he actually did. He lost  
17 his job. So he was in a very precarious situation in  
18 February of '97.

19 His contract was due for renewal, I understand,  
20 somewhere around May or June, I don't know exactly, and it  
21 was not renewed, and his wife, at least, thought that this  
22 was the reason for his position not to be renewed, for his  
23 contract not to be renewed.

24 Exhibit 21, OI says I was hired to set up the NMA  
25 facility for the MRI service. Who said that? This is

1 totally inaccurate again, and the same error is repeated in  
2 the interview report of Dr. Aharon Ben-Haim, Exhibit 22,  
3 page 1. "Elamir was looking for somebody to set up NMA with  
4 magnetic resonance imaging." I'm quoting the report.

5           Why did they say that I created the paperwork? I  
6 prepared it. It would be appropriate, as far as I'm  
7 concerned.

8           Exhibit 22. I never said anything about HMO  
9 American Preferred. I did not know anything about its  
10 existence. I would like to add something that is not  
11 written, not in my written testimony. Yesterday, Davis said  
12 that the second interview with me occurred by chance. This  
13 is untrue. It was a set appointment.

14           I'm accused of deliberately including Dr.  
15 Moskowitz's name as an RSO/AU in the last application. What  
16 would be my motive to do so? Davis/Winston say the purpose  
17 of the meeting was nothing more than to lend credence to the  
18 start-up operation of NMA. He had implied there was a  
19 meeting, but it was only for making believe, I understand.  
20 It took me some time to understand to lend credence. I had  
21 never heard that expression before.

22           Page 19 of OI's report could not be more confused.  
23 Could I include Dr. Moskowitz's name and hope this would not  
24 be discovered, and what is so special about Dr. Moskowitz's  
25 name? It would have been very easy for Dr. Elamir to find

1 another qualified RSO/AU, which he immediately did after Dr.  
2 Moskowitz's retraction.

3           The violation states that I deliberately prepared  
4 NMA's license using Dr. Moskowitz's name without his  
5 knowledge and consent. The agents are not sure that the  
6 meeting with Dr. Moskowitz did not take place. See page 22,  
7 line 36.

8           In the last lines of the third paragraph, it says,  
9 "Even if a meeting did take place, as depicted by Ben-Haim,  
10 there was never a signed agreement binding UMDNJ to provide  
11 Moskowitz as RSO/AU to NMA." The only logical conclusion is  
12 that the assertion that I deliberately misled the NRC in  
13 including Dr. Moskowitz's name in NMA's license application  
14 is false.

15           As a consultant physicist, I'm, of course,  
16 obliged, obligated to give all pertinent information to my  
17 customer. Dr. Elamir designated Smoligova, M.D., who was  
18 employed by NMA as an MRI technician, as the person in  
19 charge of ordering the radiopharmaceuticals from the  
20 pharmacy. He designated her and actually, I think it's  
21 Appendix K that says the RSO or a designee, and it doesn't  
22 specify that it's a designee of the RSO.

23           If you look at Appendix K of the regulatory guide,  
24 the NRC regulatory guide, which is appended to the license  
25 application, it says that the RSO or a designee can order.

1 It does not specify whose designee. So how am I, who is not  
2 a legal expert at all, to understand this? I do not know  
3 that only the RSO or a designee of the RSO. It doesn't say  
4 that. It says or a designee.

5 Dr. Elamir designated Smoligova, M.D., who was  
6 employed by NMA as an MRI technician -- I'm repeating -- as  
7 the person in charge of ordering the radiopharmaceuticals  
8 from the pharmacy. He asked me to write down for Lubica the  
9 pertinent information, which I did. I wrote one single note  
10 which consisted of part of the writing on the piece of paper  
11 labelled Exhibit BH-3.

12 Before routine operations started -- may I just go  
13 back a little bit and just refer to my Exhibit BH-2, which  
14 is actually the curriculum vitae of Dr. Moskowitz which I  
15 received from him? I think it is probably not necessary to  
16 redundantly resubmit the curriculum vitae and other  
17 credential papers of Dr. Moskowitz.

18 I would like for the record just to add that BH-2,  
19 the curriculum vitae, the CV of Dr. Moskowitz, that is in my  
20 hand differs a little bit from the Exhibit S-8 that is  
21 already --

22 MS. MARCO: S-2 has been bound into the record,  
23 that's right.

24 CHAIRMAN BECHHOEFER: That's in the record  
25 already.

1 THE WITNESS: S-2.

2 MS. MARCO: It's been offered as an exhibit and  
3 has been accepted through Dr. Moskowitz.

4 CHAIRMAN BECHHOEFER: That's been bound into the  
5 record, but if you think there should be changes made to it  
6 --

7 THE WITNESS: The only comment that I have is,  
8 because I don't want to be too redundant and it could mean a  
9 lot more copies and a lot more paper wasted. My copy,  
10 instead of having number seven-point and so on until 28, in  
11 the upper right corner of those pages, I have a 6-A/1 on the  
12 first page and no -- I have two copies of this -- 6-A/1 in  
13 the corner of the first page and no numbers at all in the  
14 additional pages.

15 This could be, may be, evidence of me receiving  
16 the original because what I did was, when I prepared the  
17 license application, in my word processor, I just did blank  
18 pages with the -- in the word processor memory, I just had  
19 the blank pages which I printed out in my printer using this  
20 document as the paper that was fed into the printer, so that  
21 only the page numbers would come out, and therefore, there  
22 is a little difference.

23 The 6-A/1 was the number required by the New  
24 Jersey application.

25 DR. REIN: Are you saying that the CV you

1 submitted with the application contains some items printed  
2 by you on your printer?

3 THE WITNESS: Yes.

4 DR. REIN: Thank you.

5 THE WITNESS: Now, going back to the one before t  
6 last paragraph of the page I'm on, the rough piece of paper  
7 in which Lubica keeps with other notes is being arbitrarily  
8 qualified as a prescription by the special agents and the  
9 NRC Staff. There is no signature, no date, no name of  
10 patient. It was not meant to be presented to a pharmacy or  
11 a doctor.

12 It is not specific to one radiopharmaceutical. It  
13 is general information that may appear on any pamphlet and  
14 does not engage anybody. It is not an order or an  
15 authorization. I never admitted authorizing the dose orders  
16 of Technetium-99-M. Since I did not have any authority to  
17 authorize, I could not authorize and did not authorize.

18 The characterization of the above piece of paper  
19 as a prescription by the agents shows only how eager they  
20 are to find anything at all against me. I did not prescribe  
21 any doses for patients, as stated by Mr. Joseph Del Medico  
22 on page 2/6 of his testimony.

23 As a physicist, my concern is for a nuclear  
24 medicine to be meaningful. The quantity of  
25 radiopharmaceutical is not irrelevant, nor is the time of

1 the test from the imaging point of view.

2 I have to add that none of the medical doctors  
3 whose authority I very much respect as far as their medical  
4 knowledge is concerned, none of them in the proceedings over  
5 the last three days has ever mentioned anything about a PK  
6 as far as I can recollect, and the importance of the time of  
7 injection as when we talk about the dose.

8 If you order 25 millicuries for a certain hour and  
9 it is Technetium-99-M, which has a six hours half-life, then  
10 the time of injection is very important. The amount,  
11 usually the technician, the NMT, receives three or four  
12 doses, each nominally 25 millicuries, but she injects the  
13 patients at different times, of course.

14 And she has to measure each dose separately. The  
15 25 millicuries is not what the patient receives. The 25  
16 millicuries is just to make sure that there is going to be  
17 enough. If the injection is being done, and usually it is,  
18 if it's the fourth patient that comes around, she has to --  
19 first of all, she has to measure that dose.

20 She measures that dose prior to injection, just  
21 prior to injection. She has to make sure that she has the  
22 right dose for each patient. If she orders 25 millicuries,  
23 that doesn't mean that she injects 25 millicuries. And if  
24 the last patient -- she has to make sure that there is  
25 enough for the imaging point of view to get a good image.

1 Otherwise, she could really have a mis-administration  
2 because the . . .

3 I'm clarifying not that the NMT orders. I said  
4 that she orders. That was ordered.

5 From the imaging point of view, the time of the  
6 test is of primary importance and I am -- I think that I  
7 made a point to actually make sure that the forms for the  
8 records would mention that, the time of measurement, the  
9 dose given to the patient, and I'm pretty sure I didn't hear  
10 that mentioned and I'm pretty sure that those records were  
11 there at NMA.

12 Those records were in the log book for sure with  
13 actually individualized -- individualized records for each  
14 patient with the amount of activity. The NMT did her job  
15 correctly, I'm sure.

16 My concern is, above all, the equipment and its  
17 use from a physicist's point of view. And also from a  
18 health physics concern, the amount should be as low as  
19 reasonably achievable. This is evident even to a layman.  
20 It is important to me as a consultant physicist to transmit  
21 this information to my customer, but it is information only  
22 and not an order, a directive, or a prescription.

23 It is up to the customer to use the information  
24 according to his license and his patients' needs. I never  
25 pretended trespassing my limits into the domain of the

1 physician.

2 I am convinced that there is an important role for  
3 the medical physicist to play in the operation of nuclear  
4 medicine facilities. The American College of Medical  
5 Physics has a code of ethics that is dear to me. I certify  
6 that I always -- I have always endeavored to follow the  
7 guidelines of that code.

8 Thank you for listening. I'm ready for any  
9 questions.

10 CHAIRMAN BECHHOEFER: Ms. Marco.

11 THE WITNESS: Excuse me. I'm sorry. I forgot.  
12 My absent mind. I have so many exhibits that I did not  
13 present and they are very important, absolutely important.

14 CHAIRMAN BECHHOEFER: Identify them.

15 THE WITNESS: Okay. I would like to present  
16 Exhibits 5 through -- one-by-one. Exhibit 4 --

17 CHAIRMAN BECHHOEFER: Do them one-by-one.

18 THE WITNESS: Exhibit BH-4 is a form that I  
19 prepared for NMA, among other forms. That form describes a  
20 measurement that I did before the start-up operation, which  
21 is a requirement of NRC regulations. The date is August 14,  
22 '96, which is before the license was granted, in preparation  
23 of part of the equipment of the lab, the hot lab at NMA.

24 That equipment is the dose calibrator. The dose  
25 calibrator has to be periodically checked for constancy and

1 for accuracy. It has to be checked for geometry correction.  
2 That means for volumetric independence once only at the  
3 beginning of the operation of the dose calibrator, once  
4 only.

5 I prepared -- I performed the measurements, the  
6 required measurements, prepared those graphs, signed it, and  
7 left the space open for the RSO to sign, which is unsigned,  
8 as you can see here, and I would like to submit this  
9 document as Exhibit BH-4.

10 CHAIRMAN BECHHOEFER: Any objection?

11 MS. MARCO: No objection.

12 CHAIRMAN BECHHOEFER: Exhibit BH-4 will be entered  
13 into the record.

14 [Ben-Haim Exhibit BH-4 was received  
15 into evidence.]

16 THE WITNESS: After being asked to testify as an  
17 expert witness, I produced a copy of my doctorate diploma,  
18 which is written in German, and this is a doctorate diploma  
19 from the University of Technology in Vienna, and the exhibit  
20 is labelled Exhibit BH-5. The translation thereof is  
21 Exhibit BH-6, the English translation.

22 CHAIRMAN BECHHOEFER: Why don't you put those  
23 together then since they're the same thing.

24 Does the Staff have any objection to Exhibits BH-5  
25 and 6?

1 MS. MARCO: No. I understand that this is  
2 provided as a result of the prehearing conference.

3 CHAIRMAN BECHHOEFER: That's correct.

4 MS. MARCO: That's fine. No objection.

5 CHAIRMAN BECHHOEFER: Exhibits BH-5 and 6 will be  
6 entered into evidence.

7 [Ben-Haim Exhibits BH-5 and BH-6  
8 were received into evidence.]

9 THE WITNESS: Since the diploma is a copy, I may  
10 also show the original maybe for curiosity. This is the  
11 original of the doctorate written in German. That's a copy  
12 of the original. It's a color copy on a Xerox color copier  
13 of the original diploma, which is all -- it's interesting --  
14 handwritten. That's the way it's done in Vienna.

15 Exhibit BH-7. I would like to present Exhibit  
16 BH-7, which is a list of publications from a time I was  
17 still working in research.

18 CHAIRMAN BECHHOEFER: Any objection to BH-7, which  
19 is a list of publications?

20 MS. MARCO: No objection.

21 CHAIRMAN BECHHOEFER: Have you given BH-7 to the  
22 reporter?

23 MS. PADBERG: No, not yet.

24 CHAIRMAN BECHHOEFER: Exhibit BH-7 will be  
25 admitted.

1 [Ben-Haim Exhibit BH-7 was received  
2 into evidence.]

3 THE WITNESS: Exhibit BH-8 is my curriculum vitae.

4 CHAIRMAN BECHHOEFER: Any objection to BH-8?

5 MS. MARCO: No, no objection.

6 CHAIRMAN BECHHOEFER: Okay. BH-8 will be  
7 admitted.

8 [Ben-Haim Exhibit BH-8 was received  
9 into evidence.]

10 THE WITNESS: I would like to submit together  
11 Exhibit BH-9, BH-10, and BH-11 as testimonies of customers  
12 of mine as to my professional integrity and performance.

13 CHAIRMAN BECHHOEFER: Any objection?

14 MS. MARCO: No, but could he identify them by date  
15 and by author?

16 CHAIRMAN BECHHOEFER: Okay.

17 THE WITNESS: BH-9 is a letter from Alan B. Clark,  
18 M.D. of 185 Central Avenue, East Orange, New Jersey,  
19 Director of CATEC II, Computerized Axial Topography  
20 Laboratory located in East Orange. That is written,  
21 generated January the 23rd of 1992.

22 Exhibit BH-10 is signed by Paul Sahni, Manager of  
23 Heart Disease Testing and Treatment Rehabilitation Center in  
24 Clark, New Jersey.

25 CHAIRMAN BECHHOEFER: Add the date.

1 THE WITNESS: That is from September 15, 1987.

2 Exhibit BH-11 is a letter from a customer of mine  
3 in Monterrey, Nueva Leon in Mexico, dated January 25th, 1992  
4 and that is actually unsigned here. This is a translation.  
5 The original is in Spanish and therefore, the signature is  
6 just reported in parentheses.

7 CHAIRMAN BECHHOEFER: And that's dated January 25,  
8 1992?

9 THE WITNESS: Yes.

10 CHAIRMAN BECHHOEFER: I just wanted the record to  
11 have the date as well.

12 THE WITNESS: Thank you, Your Honor.

13 CHAIRMAN BECHHOEFER: Any objection to BH-11?

14 MS. MARCO: No, I don't have any objection.

15 CHAIRMAN BECHHOEFER: Exhibit BH-11 will be  
16 admitted.

17 [Ben-Haim Exhibit BH-11 was  
18 received into evidence.]

19 CHAIRMAN BECHHOEFER: Did I rule on 9 and 10? Any  
20 objections to 9 and 10?

21 MS. MARCO: No, no, Your Honor.

22 CHAIRMAN BECHHOEFER: Other than the fact they  
23 should be separately identified. 9, 10, and 11 are  
24 admitted.

25 [Ben-Haim Exhibits BH-9 and BH-10

1 were received into evidence.]

2 THE WITNESS: I would like to submit BH-12, which  
3 is a letter I recently received on March 20, 1998 from the  
4 U.S. Department of Justice, which exonerated me as a target  
5 at this time, at least, based on information currently  
6 available to this office. "You are not a target in this  
7 investigation." That was written March 20, 1998 and signed  
8 by Bruce Levy.

9 I'm sure that the Board and the Staff are aware  
10 that we had a 120-day stay and that there was an  
11 investigation that was independently carried out by the  
12 Department of Justice. An inspector came and saw me and  
13 then I was even subpoenaed to a grand jury and I was the  
14 only one showing. I was in a room not too far from here and  
15 nobody else but Mrs. Padberg and myself showed up, and I was  
16 very surprised, but this was all of the grand jury.

17 CHAIRMAN BECHHOEFER: Did the U.S. Attorney show  
18 up?

19 THE WITNESS: Nobody. I was summoned, there was a  
20 date and a time, I was there on time, I took the time,  
21 nobody showed up. I would like to submit this as BH-12.

22 CHAIRMAN BECHHOEFER: Any objection?

23 MS. MARCO: No objection to the non-target letter.

24 CHAIRMAN BECHHOEFER: Okay. Exhibit BH-12 will be  
25 admitted.

1 [Ben-Haim Exhibit BH-12 was  
2 received into evidence.]

3 CHAIRMAN BECHHOEFER: I might comment that if we  
4 never showed up when we were supposed to, we'd hear about it  
5 from somebody, parties if not superiors.

6 Ms. Hodgdon or --

7 MS. MARCO: I'm going to do the cross-examination.

8 CHAIRMAN BECHHOEFER: Okay.

9 CROSS EXAMINATION

10 BY MS. MARCO:

11 Q I want to ask you some questions to start about  
12 the work that you did as a consultant.

13 Isn't it correct that you prepared the NRC license  
14 application for Newark Medical Associates?

15 A I think I said this in my testimony. I did, yes.

16 Q So yes, is that --

17 A Yes.

18 Q And you prepared five or so license applications  
19 before; is that true?

20 A Yes.

21 Q And you've been an independent consultant since  
22 1985?

23 A Yes.

24 Q And so you know what needs to go into an NRC  
25 license application; isn't that right?

1 A Yes.

2 Q And isn't it fair to say that you have experience  
3 in preparing NRC license applications?

4 A Yes.

5 Q And isn't it true that you wrote a proposal to Dr.  
6 Elamir for your services?

7 A Yes.

8 Q And I believe I set that in front of you as part  
9 of Staff Exhibit 8. Do you have that in front of you?

10 A Yes.

11 Q This is the one that's dated February 15th, 1996,  
12 correct?

13 A Yes.

14 Q And you gave it to him in person?

15 A Yes.

16 Q And is it true that in it, you said that, "We  
17 offer to obtain, on your behalf, in the shortest possible  
18 time, your state and federal materials licenses"?

19 A Yes.

20 Q And that "we" -- does that mean Aharon Ben-Haim?

21 A Yes.

22 Q And do you also say that, "At the same time, we  
23 will install your hot laboratory and establish the necessary  
24 radiation health procedures"?

25 A Yes.

1 Q And does it also say that, "We will prepare for  
2 state and NRC inspections"?

3 A Yes.

4 Q And does this document also state on it that, "We  
5 will assure continuous monitoring of the laboratory in  
6 compliance with the regulations of the Nuclear Regulatory  
7 Commission"?

8 A Yes.

9 Q And as the last sentence, doesn't it say that, "We  
10 will train your staff, assist you in staffing requirements,  
11 perform all equipment tests such as dose calibrator  
12 constancy, accuracy, and linearity, assure that proper  
13 procedures are used in the handling of radioactive  
14 material," et cetera?

15 A Yes.

16 Q And you signed it; isn't that right?

17 A Yes.

18 Q So is it true that you have experience with the  
19 NRC's regulations?

20 A Yes.

21 Q And you consider them in important in your  
22 consultant work?

23 A Yes.

24 Q And you consider them important to follow?

25 A Yes.

1 Q Make it a practice to know them?

2 A Beg your pardon?

3 Q Do you make it a practice to know the regulations?

4 A Yes.

5 Q And you knew a licensee must have a radiation  
6 safety officer, true?

7 A Yes.

8 Q And you knew a licensee needs an authorized user?

9 A Yes.

10 Q Now, in front of you -- in front of you, I have a  
11 set of Staff Exhibits S-8, and in it, I believe following  
12 the initial cover letter, is NRC Form 313, Application --

13 MS. PADBERG: Did you say S-8?

14 MS. MARCO: Oh, I'm sorry. S-2. I'm sorry.

15 THE WITNESS: Yes.

16 BY MS. MARCO:

17 Q And are you familiar with this Form 313,  
18 Application for Materials License?

19 A Yes, I am.

20 Q And it's a one-page form, right?

21 A Yes, it is.

22 Q And you filled out such a form for NMA, correct?

23 A Yes, I did.

24 Q All right. And isn't it true that as part of this  
25 form, there are supplemental pages to it?

1 A Yes.

2 Q And did you prepare these supplemental pages that  
3 go to this form?

4 A Yes.

5 Q Are you familiar with the information in  
6 supplemental item number 10, radiation safety program? I  
7 believe it's three pages after that one-page Form 313. Item  
8 10.

9 A Yes, I am.

10 Q All right. Would you please read to the Board  
11 what Item 10.6 in ordering and receiving says? I believe  
12 it's one sentence.

13 A "Ordering and receiving. We will establish and  
14 implement a model guidance for ordering and receiving  
15 radioactive material that was published in Appendix K to  
16 Regulatory Guide 10.8, Revision 2."

17 Q And did you attach Appendix K, Regulatory Guide  
18 10.8, Revision 2, to the application for NMA?

19 A I believe I did.

20 Q And I believe I've tabbed it in the documents that  
21 you have before you. Could you please turn to that?

22 A I've got it.

23 Q Appendix K. Did you read it?

24 A Yes.

25 Q And do you know what it says?

1 A Yes.

2 Q And is there a heading that says, "Model Guidance"  
3 in that document?

4 A Yes.

5 Q And do you see the first paragraph, No. 1, under  
6 the heading Model Guidance?

7 A Yes, I see it.

8 Q And what does it say the radiation safety officer  
9 or designee must do?

10 A He must authorize each order --

11 Q Did you say authorize each order? Yes.

12 A "The radiation safety officer, RSO, or a designee  
13 must authorize each order for radioactive materials and  
14 ensure that the requested materials and quantities are  
15 authorized by the license for use by the requesting  
16 authorized user and that possession limits are not  
17 exceeded."

18 Q Now, when I heard you a little earlier, you had a  
19 question about -- there was some issue about the word  
20 "designee" in Appendix K.

21 A Yes.

22 Q Did you think that designee meant any designee of  
23 the licensee, just the licensee in general?

24 A I was not sure by whom. Isn't that what I  
25 understood a designee could be? It is not clear to me what

1 designee means. RSO or a designee by whom, by the RSO or by  
2 somebody else.

3 Q Did you think that designee meant Dr. Elamir?

4 A I don't know.

5 Q Isn't it true that Dr. Elamir had little  
6 experience with NRC requirements?

7 A That's true.

8 Q The RSO and the authorized user in the license  
9 application is Dr. Moskowitz; isn't that correct?

10 A That is correct.

11 Q And only Dr. Moskowitz, right?

12 A That is correct.

13 Q And isn't it a fact that Dr. Moskowitz did not  
14 delegate this authority to you?

15 A To me?

16 Q To you.

17 A That is true.

18 Q I would like to ask you also a few questions about  
19 the meeting that you say that took place with Dr. Moskowitz.

20 You said you met with Dr. Moskowitz; is that  
21 correct?

22 A Yes, that is correct.

23 Q At UMDNJ?

24 A Yes, at UMDNJ.

25 Q In his office?

1 A In his office.

2 Q And you say you met for approximately 20 minutes;  
3 is that right?

4 A I'm not sure about the time. I didn't time it.

5 Q Was it approximately 15 minutes, would you say?

6 A It is two years ago, two-and-a-quarter years ago.  
7 I know it was short, but I couldn't tell if it's 5 minutes,  
8 10 minutes, 15 minutes, 20 minutes. It's difficult to  
9 evaluate time when it's just for one purpose that you come.  
10 We didn't talk much. I waited for him to give me those  
11 papers.

12 Q Dr. Ben-Haim, in your direct statement, may I show  
13 you that you said it was a maximum of 20 minutes?

14 A That is correct.

15 Q And so, is it your testimony that you met for a  
16 maximum of 20 minutes?

17 A Yes.

18 Q Could it have been more than five minutes?

19 A Yes.

20 Q And was it more than ten?

21 A I don't know.

22 Q Was it between five and ten?

23 A I don't know.

24 Q But it was more than five you say?

25 A You asked me if it could have been. It could have

1 been more than five, but I don't know for sure. It may have  
2 been as short as five.

3 Q And you say he gave you his curriculum vitae?

4 A Yes.

5 Q And was there anyone else present?

6 A I cannot say for sure. When I was asked by the  
7 investigators -- I don't remember which one, or maybe the  
8 two -- I thought there was a female sitting on the left  
9 somewhere.

10 Q Did she participate in the meeting?

11 A No.

12 Q And UMDNJ is a hospital, right?

13 A Correct.

14 Q And hospitals have patients, nurses, doctors; is  
15 this right?

16 A Yes.

17 Q And so, she could have been any one of those  
18 people, correct?

19 A Yes.

20 Q And you don't know her name, do you?

21 A I am not even sure there was a female. I said  
22 from the beginning, I'm not sure. I thought, but I wasn't  
23 sure.

24 Q All right, thank you. Did you say this was the  
25 only time you ever met Dr. Moskowitz besides when he came in

1 to testify?

2 A Correct.

3 Q And is it true that you talked to Dr. Moskowitz in  
4 the time that you were with him at UMDNJ?

5 A Very little conversation.

6 Q But you did talk to him, yes?

7 A Yes.

8 Q And he talked to you, right?

9 A Yes.

10 Q All right. And in that time, he gave you his CV?

11 A Yes.

12 Q And in that time, he said he would -- what did he  
13 say concerning NMA?

14 A He asked something about the scans.

15 Q Bone scans?

16 A No, reading scans.

17 Q Reading scans.

18 A Reading scans.

19 Q But in that --

20 A That's my recollection. It's over two years ago.

21 Q Reading scans, you say, is your recollection?

22 A He said something about reading scans, yes.

23 Q And in that time, it's true that he never said  
24 that he would be the radiation safety officer for NMA,  
25 correct?

1 A He did not say it, no.

2 Q All right. And you sent the NRC a copy of a page  
3 from your appointment book; is that right?

4 A Yes. I was asked to do it.

5 Q And you wrote Dr. Moskowitz's name down in the  
6 space for Friday, April 16, 1996; is that right?

7 A When?

8 Q Did you?

9 A When?

10 Q I'm asking you, did you?

11 A Yes. When?

12 Q I'm not asking when. Did anyone see you write  
13 this down? It's okay if you don't remember or you don't  
14 know.

15 A I don't know.

16 Q Have you ever missed an appointment?

17 A Oh, yeah.

18 Q And have you missed an appointment for a  
19 prehearing conference before this very Board?

20 A A prehearing conference? You mean the one --  
21 please be more specific. What is a prehearing conference?  
22 I don't know.

23 Q Do you recall meeting with the Board over the  
24 phone?

25 A A prehearing conference over the phone, yes.

1 Q Yes. And isn't it a fact that you missed another  
2 telephone appointment?

3 A Yes.

4 Q That's true?

5 A That is true.

6 Q All right. I'm also going to ask you a few  
7 questions about Newark --

8 A Because of another appointment.

9 Q -- about Newark Medical Associates. You prepared  
10 this application, correct?

11 A Yes.

12 Q We've agreed on that?

13 A Yes.

14 Q And you prepared NMA's forms for various records;  
15 is that true?

16 A Yes.

17 Q And you prepared forms to record accuracy and  
18 constancy; is that right?

19 A Yes.

20 Q And you created these forms, correct?

21 A I don't like the word "create." Creating is used  
22 in -- I prepared those forms.

23 Q Have you ever told anybody that you created those  
24 forms?

25 A I don't know.

1 Q You don't know or don't remember?

2 A I don't know if I used the word "created."

3 Q Dr. Ben-Haim, we were in a deposition, were we  
4 not? I took your deposition?

5 A Yes.

6 Q And that was on Friday, April 24th, 1998?

7 A Yes.

8 Q And that was in East Rutherford, New Jersey; is  
9 that correct?

10 A Yes.

11 Q [Document handed to witness.] I would like to show  
12 you this.

13 A Okay.

14 Q Please turn to the last part of this document. Is  
15 this your deposition transcript?

16 A Yes, it is.

17 Q And isn't it a fact that you signed it?

18 A Yes, I have.

19 Q And your attorney was present at that time, isn't  
20 that correct, Mr. Sal Greenman?

21 A Yes.

22 Q I'd like to turn your attention to page 33, lines  
23 19 and 20.

24 A Yes.

25 Q Does this refresh your recollection?

1 A Yes.

2 Q And did you say that you created these forms?

3 A You asked me if I filled or created the forms and  
4 the question was, "You filled out or created the forms."

5 Q And what was the response? What was your  
6 response?

7 A The answer was, "I created the forms."

8 Q Okay.

9 A That is clear.

10 Q All right, thank you. You prepared the dose  
11 calibrator geometry correction form; is that right?

12 A That is correct.

13 Q And this is your Exhibit No. 4, right?

14 A Yes.

15 Q And it's dated August 14th, 1996?

16 A Yes.

17 Q Approximately two months before NMA started  
18 operations?

19 A Yes.

20 Q And this form was for the Victoreen Dose  
21 Calibrator; is that right?

22 A Yes.

23 Q And geometry correction is only performed one  
24 time; isn't that so?

25 A That is correct.

1 Q And that form was kept in a lab?

2 A Yes, it is.

3 Q On a shelf?

4 A On a shelf.

5 Q In a binder?

6 A In a binder.

7 Q And you signed it as the one who performed the  
8 correction; isn't that true?

9 A That is correct.

10 Q And you left a space open --

11 A Not the correction.

12 Q The one who performed the -- that performed this  
13 correction.

14 A It is not a correction that I performed.

15 Q You signed as the one who performed the  
16 calibration; isn't that true?

17 A Correct.

18 Q And you left a place open for the RSO to sign?

19 A Yes.

20 Q And Dr. Moskowitz had to sign this form, correct?

21 A Yes.

22 Q And the form actually says the word "RSO" at the  
23 signature line; isn't this correct?

24 A Yes.

25 Q And you did not sign this as RSO, did you?

1 A I did not sign this as RSO.

2 Q And you were not the RSO on the license  
3 application, correct?

4 A That is correct.

5 Q And if you signed as RSO, that would be false,  
6 wouldn't it?

7 A That is correct.

8 Q Blatantly false?

9 A Yes.

10 Q I have some more questions about your involvement  
11 with NMA.

12 We can agree that you found a nuclear technician  
13 to work at NMA, right?

14 A Yes.

15 Q And that was Marina Geylikman?

16 A Yes.

17 Q And you introduced her to Dr. Elamir?

18 A Yes.

19 Q And she was to work on Saturdays?

20 A Yes.

21 Q And isn't it true that you gave information to  
22 Lubica Smoligova regarding where to get Technetium-99-M?

23 A Yes.

24 Q And she was the MRI technician, true?

25 A Yes.

1 Q And she worked on weekdays?

2 A Yes.

3 Q And didn't you make sure that the laboratory had a  
4 key?

5 A Yes.

6 Q And you made sure it was kept locked?

7 A Yes.

8 Q And you posted the NRC license?

9 A Yes.

10 Q And you went to --

11 A No, I did not.

12 Q You did not post the NRC license?

13 A No. I made sure it was posted, but I did not post  
14 it.

15 Q You went to Price Club, correct?

16 A Beg your pardon?

17 Q You went to the Price Club?

18 A Yes.

19 Q And you bought a billboard; is that true?

20 A Yes.

21 Q And that was for posting?

22 A Yes.

23 Q You hung it there personally; isn't that so?

24 A The board, yes, not the license.

25 Q You told NMA employees to get dose symmetry; isn't

1 that right?

2 A To get?

3 Q Dose symmetry.

4 A I think -- dose symmetry?

5 Q Symmetry.

6 A That's not the way it's professionally --

7 Q Personal monitoring badges.

8 A Yes.

9 Q NMA didn't have its own badges?

10 A I don't know.

11 Q Did you ever say NMA had its own badges?

12 A When? You're not specific enough for me to answer  
13 that question.

14 Q By December 1996, they did not have their own  
15 badges; is that true?

16 A That is correct.

17 Q And you told them to get it; isn't that right?

18 A That is correct.

19 Q And you had no communication with Dr. Moskowitz  
20 during this time, true?

21 A That is correct.

22 Q Do you recall meeting with William Davis on April  
23 22nd, 1997?

24 A Yes.

25 Q And didn't you tell him you were doing the actual

1 work of an RSO?

2 A No.

3 Q And --

4 A Some of it, yes. I said that there was  
5 overlapping between the RSO and the physicist's work. I  
6 don't remember the exact words.

7 Q Did you tell him that you were acting as a de  
8 facto RSO?

9 A No, I did not.

10 Q Did you tell him that de facto you were doing the  
11 things that the RSO could do?

12 A That, yes.

13 Q Isn't it a fact that you never saw Dr. Moskowitz  
14 there?

15 A That is correct.

16 Q And you knew he had not signed the form that you  
17 prepared in August; isn't that true?

18 A That is true.

19 Q And you knew Dr. Moskowitz had not been to NMA;  
20 isn't that right?

21 A I know it now. You should be more specific with  
22 times because time is important.

23 Q Around the December time frame.

24 A I don't know when I'm supposed to be sure that he  
25 was there or not.

1 Q I will clarify for you. I'm going to clarify for  
2 you.

3 A Okay.

4 Q Around the December time frame, you knew that Dr.  
5 Moskowitz had not been to NMA; isn't that true?

6 A Correct.

7 Q And you were concerned that Dr. Moskowitz had not  
8 been there; isn't that correct?

9 A That is correct.

10 Q Isn't it true that by the time the NRC inspection  
11 came around in January of 1997, you knew that NMA was  
12 operating without Dr. Moskowitz?

13 A Only after the inspection.

14 Q I'd like to ask you some questions about the NRC's  
15 chart.

16 Now, we can agree that you wrote the word  
17 "radiopharmacy" at the top; isn't that true?

18 A That is correct.

19 Q And Medi-Physics, right?

20 A Yes.

21 Q And Medi-Physics is a radiopharmacy, right?

22 A Yes.

23 Q And the next line is that 800 number, correct?

24 A Correct.

25 Q And you wrote that?

1 A Yes.

2 Q And that's the 800 number for the radiopharmacy?

3 A Yes.

4 Q And you also wrote "bone scan;" is that true?

5 A Yes.

6 Q Bone scan is a nuclear diagnostic procedure,  
7 right?

8 A Yes.

9 Q And you wrote MDP?

10 A Yes.

11 Q And that's the Technetium Medronate?

12 A I beg your pardon?

13 Q Technetium Medronate, MDP?

14 A I don't know in detail what pharmaceutical it is  
15 because they change sometimes. I don't know.

16 Q And MDP is for bone scans; is that right?

17 A Yes.

18 Q And you wrote 25 millicuries over there on that  
19 form?

20 A There's an "I" missing there that probably didn't  
21 go into the field of copying.

22 Q But you wrote 25 millicuries?

23 A Yes.

24 Q And not 24 millicuries, right?

25 A 25.

- 1 Q 25.
- 2 A Yes.
- 3 Q Exactly 25?
- 4 A That's what I wrote.
- 5 Q And you wrote "heart;" isn't that true?
- 6 A Heart?
- 7 Q Heart.
- 8 A I wrote heart.
- 9 Q And "Myoview"?
- 10 A Yes.
- 11 Q The Technetium Myoview for heart. There's a  
12 little arrow, right?
- 13 A Yes.
- 14 Q And you wrote "two single doses"?
- 15 A Technetium for heart? Why do you call it  
16 Technetium for heart?
- 17 Q Myoview you wrote? And you wrote "two single  
18 doses"?
- 19 A Yes.
- 20 Q And that's 8 millicuries and 25 millicuries?
- 21 A One time, yes. One time and one time.
- 22 Q But it's true that NMA did not perform heart  
23 scans; isn't that right?
- 24 A That is correct.
- 25 Q But they did perform bone scans, right?

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1 A Yes.

2 Q And isn't it true that you told the NRC in  
3 February of 1997 that there had been 14 deliveries of  
4 Technetium-99-M MDP?

5 A I don't remember that. If I verify that, I never  
6 would have known that unless at the audit probably.

7 Q And referring to your response to the confirmatory  
8 action letter?

9 A Whatever I audited, that's the audit --

10 Q And as part --

11 A -- that I was asked to do.

12 Q And as part of your audit, did you say that there  
13 were 14 deliveries so far since October 19th, 1996, the date  
14 of the first delivery?

15 A I don't know it if you ask me, but if that's what  
16 I wrote, I wrote it.

17 Q All right. Well, I'm going to show you --

18 A I probably counted it on the lab book.

19 Q I'm showing you a copy of S-5. Is this your  
20 response to the NRC's confirmatory action letter?

21 A Yes.

22 Q And so, doesn't it say that there have been 14  
23 deliveries of Technetium-99-M MDP as of that February 14th  
24 date?

25 A Yes.

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1 Q And isn't it a fact that the date of the first  
2 delivery was October 19th, 1996?

3 A I don't know.

4 Q Doesn't it say that in your response to the --

5 A Oh, yes.

6 Q And that was a Saturday, right?

7 A I don't know.

8 MS. MARCO: Your Honor, the Board can take  
9 judicial notice that that date was a Saturday.

10 CHAIRMAN BECHHOEFER: I can tell you in a minute.  
11 I've got a calculator.

12 THE WITNESS: I have my 1996 calendar with me.  
13 October 19 was a Saturday.

14 MS. MARCO: Okay, all right. Thank you.

15 BY MS. MARCO:

16 Q I want to ask you --

17 A I have an unlimited source of information.

18 Q I want to ask you some questions about Lubica  
19 Smoligova.

20 You know Lubica Smoligova; isn't that right?

21 A Yes.

22 Q And she's a technologist that works during the  
23 weekdays?

24 A If she is, I have no idea. She was certainly.

25 Q And at the time, she was, wasn't she?

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1 A Yes.

2 Q And she didn't work on the Saturdays, right?

3 A Not as a rule. I think she did sometimes, she  
4 said. I heard in her deposition that she sometimes did.

5 Q Isn't it true that you gave these instructions to  
6 Lubica Smoligova?

7 A I didn't give any instructions to anybody because  
8 it was not my duty to instruct, so no, it's not true.

9 Q Did you give this information to Lubica Smoligova?

10 A Yes.

11 Q And you talked to her, right, when you gave it to  
12 her?

13 A I don't remember talking to her.

14 Q Did you discuss with her the information you  
15 wrote?

16 A I don't recall that.

17 Q Isn't it a fact that you knew she would use this  
18 information to order the radiopharmaceuticals?

19 A Yes.

20 Q And you told her to order the  
21 radiopharmaceuticals?

22 A No, I did not.

23 Q Did you authorize Lubica Smoligova to order the  
24 radiopharmaceuticals?

25 A No, I did not.

1           Q     So you want the Board to believe that you did not  
2 authorize Lubica Smoligova to order the  
3 radiopharmaceuticals?

4           A     Oh, yes.

5           Q     Well, did you order the radiopharmaceuticals?

6           A     No, I did not.

7           MS. MARCO: Your Honor, I have marked this as  
8 Staff Exhibit S-15 for identification.

9                                 [Staff Exhibit S-15 was marked for  
10                                 identification.]

11           BY MS. MARCO:

12           Q     This is a letter, isn't it? Is it a letter?

13           THE WITNESS: I object to the introduction of a  
14 document that we haven't seen until now.

15           MS. MARCO: Your Honor, this is cross-examination.  
16 This is for impeachment.

17           CHAIRMAN BECHHOEFER: When documents are used to  
18 impeach testimony, theoretically, at least, they don't have  
19 to be pre-identified.

20           BY MS. MARCO:

21           Q     This is a letter, true?

22           THE WITNESS: I object to the introduction of this  
23 document.

24           CHAIRMAN BECHHOEFER: It's permissible, in my  
25 opinion, in the way it's being used for impeachment

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1 purposes.

2 THE WITNESS: What does impeachment mean?

3 DR. REIN: Impeachment means to challenge  
4 testimony you just gave. That's all it means.

5 BY MS. MARCO:

6 Q It's a letter, right?

7 A I don't want to answer this question.

8 CHAIRMAN BECHHOEFER: Is there a question  
9 outstanding?

10 MS. MARCO: I'm sorry?

11 CHAIRMAN BECHHOEFER: Is there a question  
12 outstanding?

13 MS. MARCO: Yes. My question is, is this a  
14 letter.

15 THE WITNESS: I don't want to answer this  
16 question.

17 MS. MARCO: Your Honor, would you please instruct  
18 the witness --

19 CHAIRMAN BECHHOEFER: You must answer the question  
20 to the best of your knowledge.

21 THE WITNESS: But to the best of my knowledge,  
22 this is a letter.

23 BY MS. MARCO:

24 Q And it's dated October 17th, 1996, correct?

25 A That is correct.

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1 Q And it's a short letter?

2 A I've never seen this before and I don't know what  
3 it is. It's signed by me. It's a letter. I want to be  
4 able to know why -- why is it introduced like this? I know  
5 this letter. Okay? I know this letter.

6 DR. REIN: Because she wants to and it's legal.

7 THE WITNESS: And it's legal to do it this way?

8 DR. REIN: Yes.

9 THE WITNESS: Okay.

10 JUDGE LAM: Because you swore an oath that you  
11 never instructed anybody; therefore, Staff counsel  
12 introduced this letter to impeach your testimony.

13 BY MS. MARCO:

14 Q And it's three paragraphs long, correct?

15 A It's a three-paragraph letter.

16 Q And it's your letter to Dr. Elamir?

17 A It is.

18 Q No other addressee?

19 A No other addressee.

20 Q And you signed it, right?

21 A Yes, I did.

22 Q And you sent it by fax?

23 A Yes.

24 Q At 9:26 a.m. on October 17th, 1996, correct?

25 A Yes.

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1 Q And October 17th, 1996 was a Thursday, wasn't it,  
2 two days before October 19th, right?

3 A Yes.

4 Q Two days before the first delivery of  
5 Technetium-99-M?

6 A Yes.

7 Q Please read to me what you wanted Dr. Elamir to  
8 let you know.

9 A "Please let me know whether we have patients on  
10 Saturday, how many, and what tests so I may notify the  
11 Commission and order the radiopharmaceuticals."

12 Q And please read paragraph three.

13 A "We will have to decide who will place the orders  
14 and coordinate the logistics in the future."

15 MS. MARCO: Your Honor, I now offer Staff Exhibit  
16 15 into evidence.

17 CHAIRMAN BECHHOEFER: Dr. Ben-Haim, you have a  
18 right to object, although this kind of document we almost  
19 have to accept.

20 THE WITNESS: I have the right to object?

21 CHAIRMAN BECHHOEFER: To putting it in evidence,  
22 but we almost have to accept it, in any event.

23 THE WITNESS: I knew of this letter. I knew of  
24 this letter and it was not -- it was not --

25 DR. REIN: You can do that later. You can explain

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1 it later.

2 THE WITNESS: Okay.

3 CHAIRMAN BECHHOEFER: The letter will --

4 THE WITNESS: That's okay. I do not object to the  
5 introduction of this letter.

6 CHAIRMAN BECHHOEFER: We'll put it into evidence  
7 as Staff Exhibit 15.

8 [Staff Exhibit S-15 was received in  
9 evidence.]

10 MS. MARCO: I don't have any further questions for  
11 the witness.

12 DR. REIN: You were going to explain this letter?

13 THE WITNESS: Yes.

14 DR. REIN: Now.

15 THE WITNESS: I will be candid, as I always am,  
16 and if it's against me, so be it. I knew of this letter and  
17 since it was not in the evidence before, I was not going to  
18 volunteer it, so I did not -- I thought they had just missed  
19 it and I knew it could be.

20 I had carefully seen all my correspondence with  
21 Dr. Elamir and whatever was related to this. There was no  
22 bad intention, as I explained before. I did not like what  
23 was written here. What I understand when I said "we," I  
24 meant NMA, working for NMA. When I said "we," it didn't  
25 mean that I would order it, but I said we.

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1 I knew of this letter. I thought they had missed  
2 it, so I was not going to volunteer it. I repeat that. But  
3 since it is here now, it is here. It's the truth.

4 DR. REIN: In paragraph number 2, was it your plan  
5 to see to it that the radiopharmaceuticals were to be  
6 ordered?

7 THE WITNESS: Yes.

8 DR. REIN: And in plan number 3, were you one of  
9 the people who was going to help decide the ordering  
10 process?

11 THE WITNESS: Right.

12 DR. REIN: Who were you going to help decide it  
13 with?

14 THE WITNESS: Elamir had to decide. He had to  
15 decide. When I say we will have to decide who will place  
16 the orders and coordinate the logistics in the future.

17 DR. REIN: How long did you know Dr. Elamir before  
18 you became his consultant for NMA?

19 THE WITNESS: About a week before.

20 DR. REIN: You'd not worked for him before?

21 THE WITNESS: I had not worked for him before. I  
22 had met him once for minutes just occasionally.

23 DR. REIN: I'm sure you were asked this, but you  
24 have far greater knowledge about nuclear materials than he  
25 has, right?

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1 THE WITNESS: Yes.

2 DR. REIN: Did he ever say to you before you went  
3 to Dr. Moskowitz, "Dr. Moskowitz will be the RSO"?

4 THE WITNESS: Yes. Not in these words.

5 DR. REIN: Well, I want the exact words.

6 THE WITNESS: I told him that he needs an RSO. I  
7 said, "Who is going to be the RSO?" He said, "Dr.  
8 Moskowitz."

9 DR. REIN: Did you tell him he will need an AU?

10 THE WITNESS: Yes, I told him.

11 DR. REIN: Specifically?

12 THE WITNESS: I didn't give -- no, no, I didn't  
13 give any specific name. I told him specifically that he  
14 needed an RSO and an AU.

15 DR. REIN: And did he name someone or did he imply  
16 that it would Moskowitz?

17 THE WITNESS: He named Dr. Moskowitz and gave me  
18 his phone number and said I should call him.

19 DR. REIN: Did he expect you to call him to  
20 negotiate with him or did he expect you to call him to talk  
21 to him or did he expect you just to get the CV?

22 THE WITNESS: He expected me to go to him to get  
23 the CV.

24 DR. REIN: Why wasn't it mailed?

25 THE WITNESS: It's just across the street almost

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1 from --

2 DR. REIN: But you're a high-paid guy. Why do you  
3 have to go to a building and climb up to the H floor to pick  
4 up a CV that can be stuck in the mail?

5 THE WITNESS: First, I am not -- I don't consider  
6 myself a high-paid guy. Secondly, I do not have -- I'm very  
7 simple in my habits and I like sports.

8 DR. REIN: Was there another purpose besides just  
9 picking up the CV and you going there?

10 THE WITNESS: No.

11 DR. REIN: Were you supposed to negotiate with  
12 him?

13 THE WITNESS: No.

14 DR. REIN: Were you supposed to give him  
15 information as to what his duties will be?

16 THE WITNESS: No.

17 DR. REIN: Did you tell him, "I'll be the  
18 physicist on the job and I'll do the physicist end and you  
19 do the medical end"?

20 THE WITNESS: I told him I am the physicist for  
21 Newark Medical Associates.

22 DR. REIN: Yeah, but did you tell him what you  
23 would do there while he was the RSO?

24 THE WITNESS: No.

25 DR. REIN: In Exhibit 7, about which you were

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1 asked, pages 1 and 2 out of S-8, which is your letter of --  
2 your proposal, sir.

3 THE WITNESS: Oh, yes.

4 DR. REIN: And the quotation agreement.

5 THE WITNESS: Exhibit S-8?

6 DR. REIN: Yes. Did you write what you meant?

7 THE WITNESS: Yes.

8 DR. REIN: Did you mean what you wrote?

9 THE WITNESS: Yes, as far as to the best of my  
10 knowledge, yes.

11 DR. REIN: In other words, you were going to  
12 assure them that they would meet the Nuclear Regulatory  
13 Commission requirements?

14 THE WITNESS: Yes.

15 DR. REIN: All of them that you knew about?

16 THE WITNESS: Yes.

17 DR. REIN: And you were going to supervise in all  
18 aspects, according to page 2?

19 THE WITNESS: Yes.

20 DR. REIN: And did that mean supervise all the  
21 activities required by NRC that you knew about?

22 THE WITNESS: To the best of my knowledge, yes.

23 DR. REIN: Did you know that you were not  
24 authorized to order nuclear materials?

25 THE WITNESS: I did not know.

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1 DR. REIN: Did you know that the licensee in this  
2 case was not authorized to order nuclear materials?

3 THE WITNESS: No, I did not know.

4 DR. REIN: Do you now know it?

5 THE WITNESS: Yes.

6 DR. REIN: Other than handing you the CV, did  
7 Moskowitz say or imply, by language or by body language or  
8 in any way whatsoever, that says "Yes, I will be the RSO"?

9 THE WITNESS: No.

10 DR. REIN: Other than handing you the CV, did he  
11 imply in any way, by words or body language, "Yes, I will be  
12 the authorized user"?

13 THE WITNESS: Yes.

14 DR. REIN: How?

15 THE WITNESS: He spoke about that he would read  
16 the scans. I don't remember the words, but I definitely  
17 remember him saying that he would read the scans.

18 DR. REIN: Do you equate the reader of scans with  
19 the authorized user?

20 THE WITNESS: Yes.

21 DR. REIN: In your experience, do radiologists  
22 read scans without being authorized users?

23 THE WITNESS: In my experience with this  
24 particular -- with NMA, I now know that somebody was reading  
25 scans without being the authorized user.

1 DR. REIN: Well, did you know about bone scans  
2 before NMA?

3 THE WITNESS: I knew about bone scans.

4 DR. REIN: From that previous experience, did you  
5 ever have the experience where a physician would read bone  
6 scans but he was not the AU?

7 THE WITNESS: No.

8 DR. REIN: Take a look at the top half of S-8A.  
9 Could a reasonable person assume those were instructions to  
10 a technician to get this material?

11 THE WITNESS: Instruction is a very wide term.

12 DR. REIN: I can say it in Hebrew if you want, but  
13 if you give somebody this and you know that's the person  
14 that's going to order it, doesn't it say, "That's the stuff  
15 we've got to order"?

16 THE WITNESS: Yes.

17 DR. REIN: Did you tell her, "I'm giving you  
18 information, but I'm not the authorized user so you'd better  
19 get help from somebody else"?

20 THE WITNESS: No.

21 DR. REIN: Did you tell Elamir, "Listen, I gave  
22 her the information you wanted me to give her, but you'd  
23 better get somebody else to order it"?

24 THE WITNESS: I did not.

25 DR. REIN: Did you think of picking up the phone

1 to call Moskowitz to say, "Listen, I'm doing my physics part  
2 of the job, I've laid it out for this girl and given her all  
3 the information, but you'd better call her and tell her to  
4 order it"?

5 THE WITNESS: I did not.

6 DR. REIN: Did you tell Ms. Geylikman ever, "Be  
7 sure to get instructions from somebody before you give the  
8 shot"?

9 THE WITNESS: No.

10 DR. REIN: Did you ever tell Elamir, "You'd better  
11 talk to Geylikman before she gives the shots"?

12 THE WITNESS: No.

13 DR. REIN: Did you ever write a memo anyplace that  
14 says, "Listen, we need to have somebody tell Geylikman  
15 something before she gives the shots"?

16 THE WITNESS: No.

17 DR. REIN: How often did you go to NMA before  
18 October '96, approximately?

19 THE WITNESS: Maybe 20 times.

20 DR. REIN: Before October. Okay.

21 THE WITNESS: Fifteen times, 16 times.

22 DR. REIN: How often do you estimate you went to  
23 NMA between October '96 and early February '97?

24 THE WITNESS: I went there four consecutive days  
25 from December 3rd to December 6th to do the linearity check

1 of the dose calibrator, and I had not been at NMA from  
2 December 6th up to the inspection day, which was January the  
3 29th. So I was not at NMA any time between December 6th to  
4 January 29th.

5 DR. REIN: Why not?

6 THE WITNESS: There was no need for me to be  
7 there.

8 DR. REIN: How many times did you go between  
9 October 16th and the time of the calibrations?

10 THE WITNESS: I did not go between --

11 DR. REIN: So essentially, are you saying after  
12 the license was issued, you were only there four days in a  
13 row and that's it?

14 THE WITNESS: Four days in a row and only for five  
15 minutes each time.

16 DR. REIN: But that's it?

17 THE WITNESS: That's it.

18 DR. REIN: All right. In that interim between  
19 October 15th or 16th and the time of the inspection, were  
20 you called by any technicians for problems of some kind?

21 THE WITNESS: I cannot remember exactly, but I was  
22 not called during the test. I was told that there was a  
23 problem with the image, with the multi-imager and I went and  
24 replaced the multi-imager. I replaced the multi-imager  
25 during a different day. It was not a day -- not a Saturday.

1 DR. REIN: Were you ever called about medical  
2 problems?

3 THE WITNESS: Never.

4 DR. REIN: Were you ever called by Elamir or talk  
5 to Elamir about imaging between the middle of October and  
6 the time of the inspection?

7 THE WITNESS: No.

8 DR. REIN: From the time of the licensing, the  
9 middle of October, until the time of inspection, did you  
10 know how much Technetium had been ordered?

11 THE WITNESS: No.

12 DR. REIN: Did you know how many doses had been  
13 ordered?

14 THE WITNESS: No.

15 DR. REIN: Were you ever called by the lab to  
16 verify the orders?

17 THE WITNESS: No.

18 DR. REIN: Were you ever called by Smoligova to  
19 verify the orders?

20 THE WITNESS: No.

21 DR. REIN: Were you ever called by Geylikman to  
22 verify those?

23 THE WITNESS: No.

24 DR. REIN: Can you give me some idea as to which  
25 duties you think the physicist and the RSO overlap, duties

1 that you performed that you had said earlier, there may be  
2 some overlap with an RSO?

3 THE WITNESS: Yes. Well, radiation safety, as far  
4 as anything that has to do with instrumentation, mainly the  
5 way wipe tests are conducted. I think that I actually have  
6 a criticism usually for the way wipe tests are performed by  
7 some labs, and people do not really understand very well how  
8 critical it is to have the right sensitivity and to actually  
9 -- and don't have the accounting statistics background, a  
10 good accounting statistics background in order to evaluate a  
11 wipe test correctly.

12 DR. REIN: What else overlaps between an RSO and  
13 the work you do besides what you've just mentioned?

14 THE WITNESS: To make sure that nobody has access  
15 to a lab and is not exposed unnecessarily, none of the  
16 public. If you go to a hospital or to a clinic, to a  
17 nuclear medicine clinic, there might be -- you don't want  
18 radiation -- you don't want any radiation to affect anybody  
19 who is not supposed to -- who is not supposed to be scanned.

20 So the system, as an RSO, the overlapping concern  
21 is that the monitoring of the facilities, of the workplace  
22 for the personnel.

23 DR. REIN: Okay. You've mentioned those. Did you  
24 become aware at some point that a license was indeed issued?

25 THE WITNESS: Was indeed issued?

1 DR. REIN: Yes, that NRC approved the license --

2 THE WITNESS: Yes.

3 DR. REIN: -- and it got mailed or some way?

4 THE WITNESS: Yes.

5 DR. REIN: The license is dated -- it's Exhibit 2.  
6 It's dated September 25, '96. Do you have any idea as to  
7 when you knew that it was received?

8 THE WITNESS: I think Dr. Elamir -- I don't recall  
9 exactly, but I must have known pretty soon after.

10 DR. REIN: Considering the offer of the proposal  
11 you made and what you were employed for, Exhibit 7, at that  
12 point, did you say to yourself or did you think, "I'd better  
13 make sure there's an RSO"?

14 THE WITNESS: I did not doubt a moment that Dr.  
15 Moskowitz was the RSO.

16 DR. REIN: I'm not suggesting you doubted it, but  
17 my question is, did at some point you say, "We've got a  
18 license, I was hired to assure continuous monitoring, to  
19 meet the regulations, I ought to check to be sure the RSO is  
20 still alive"? A lot of car accidents out there.

21 THE WITNESS: I did not.

22 DR. REIN: "But I ought to see that there's an AU  
23 that's going to show up"?

24 THE WITNESS: I was concerned about this.

25 DR. REIN: What did you do about your concern?

1 THE WITNESS: I told Dr. Elamir.

2 DR. REIN: When, after he got the license?

3 THE WITNESS: No, I think when was there on  
4 December 6th and I saw -- I didn't see any RSO and I had --

5 DR. REIN: You expected to see an RSO?

6 THE WITNESS: No. I expected to have the  
7 documents reviewed. I told Dr. Elamir, "You should make  
8 sure that those procedures are reviewed by an RSO."

9 DR. REIN: Did you expect to see some tangible  
10 evidence that an RSO was working?

11 THE WITNESS: Yes.

12 DR. REIN: Did you expect to see some tangible  
13 evidence that an authorized user may have shown up one time  
14 or another?

15 THE WITNESS: Yes.

16 DR. REIN: And did you see such tangible evidence?

17 THE WITNESS: I didn't and I expressed my concern  
18 to Mrs. Padberg.

19 DR. REIN: All right. So you expressed your  
20 concern to whom?

21 THE WITNESS: To Mrs. Padberg.

22 DR. REIN: Okay. Well, that doesn't do anybody  
23 any good here at this hearing. I express a lot of concern  
24 to my wife, but it doesn't help any of my clients. All  
25 right?

1           What did you do to help your client to assure that  
2 NRC regulations would be met, in view of the fact that you  
3 said to yourself --

4           THE WITNESS: I told him.

5           DR. REIN: You told --

6           THE WITNESS: I told Dr. Elamir.

7           DR. REIN: -- Elamir. What did you tell him?

8           THE WITNESS: I asked him, "Why isn't Dr.  
9 Moskowitz here"?

10          DR. REIN: And he said?

11          THE WITNESS: He said, "I have somebody else."

12          DR. REIN: He said what?

13          THE WITNESS: He said, "I have somebody else."

14          DR. REIN: And did you say, "Oh, we'd better  
15 change the license"?

16          THE WITNESS: Somehow it did not click.

17          DR. REIN: Let's look at this in retrospect now.  
18 Whether it's October or November or December, but you become  
19 aware that there's no RSO evidently functioning. That's  
20 correct?

21          THE WITNESS: Yes.

22          DR. REIN: And you become aware there's no AU  
23 evidently functioning?

24          THE WITNESS: Yes.

25          DR. REIN: As the senior nuclear mind in that

1 facility, didn't you just fail to follow up and see to it  
2 that it should have been done?

3 THE WITNESS: Now I can see that.

4 DR. REIN: You failed then.

5 THE WITNESS: I thought, "Well, it's just the  
6 beginning. Let's see how things develop. I don't want" --

7 DR. REIN: You don't want to make waves?

8 THE WITNESS: I don't want to make waves.

9 DR. REIN: Isn't that your job to make waves as a  
10 physicist, to protect the public?

11 THE WITNESS: I didn't have any say in the  
12 day-to-day operations. As a consultant, you know, I was  
13 making sure that -- I had a lot of other things on my mind,  
14 so I --

15 DR. REIN: You were making sure of nothing because  
16 it says on Exhibit 7, page 1, "We will assure." So you  
17 failed in that contract, didn't you?

18 THE WITNESS: I did.

19 DR. REIN: Exhibit 25, sir, page 1 of S-8.

20 THE WITNESS: S-8.

21 DR. REIN: I'm just trying to make sure this is  
22 correct. You faxed a copy of the license on 10/18/96 to Mr.  
23 Carr, did you not?

24 THE WITNESS: Yes, I did.

25 DR. REIN: And why did you do that?

1 I suppose it was to let him know that you're in  
2 business and Moskowitz is the RSO and the AU and you're  
3 going to start ordering.

4 THE WITNESS: Okay. Let's clarify this. We have  
5 a license, and my understanding at the time was, I did not  
6 know that -- I thought if the license is current, if there  
7 is a license. I did not mean to mislead anybody. I was not  
8 -- I did not know, as I said before, as I testified. I did  
9 not know specifically that only the RSO can order.

10 DR. REIN: Why did you fax him the license?

11 THE WITNESS: In order for NMA to be able to do  
12 scans.

13 DR. REIN: Wasn't it in order for NMA to be able  
14 to buy Technetium?

15 THE WITNESS: To buy radioactive material.

16 DR. REIN: All right. How was it that you faxed  
17 it from your home office? How did you have the license at  
18 home? How did that work?

19 THE WITNESS: I don't recall.

20 DR. REIN: Well, is it correct that you faxed it  
21 -- that he says that you faxed it from Dynamic Imaging  
22 Services?

23 THE WITNESS: Yes, that would be from my home.

24 DR. REIN: Okay. And is that correct?

25 THE WITNESS: That is correct.

1 DR. REIN: Now, was the license mailed to your  
2 home by NRC or was it mailed to NMA?

3 THE WITNESS: It was mailed to NMA.

4 DR. REIN: How did it get from NMA to your house?

5 THE WITNESS: I must have received a copy of it.  
6 I don't recall.

7 DR. REIN: Were you at NMA and picked it up and  
8 took it home to fax it?

9 THE WITNESS: Yes.

10 DR. REIN: So when were you at NMA? You told me  
11 you weren't there at all between the middle of October --

12 THE WITNESS: This was.

13 DR. REIN: Pardon?

14 THE WITNESS: That was on October 18th.

15 DR. REIN: Okay. So was that the last day you  
16 were at NMA until December sometime?

17 THE WITNESS: I don't remember. Probably.

18 DR. REIN: At that point, did you have the  
19 obligation to your employer, NMA, and to the NRC, because of  
20 your position, to be sure there was an AU?

21 THE WITNESS: There was no doubt in my mind there  
22 was an AU and RSO.

23 DR. REIN: I'm not challenging your intent now,  
24 maybe later. But right now, did you have the obligation to  
25 be sure there was an authorized user?

1 THE WITNESS: Yes.

2 DR. REIN: And did you have the obligation to be  
3 sure there was an RSO?

4 THE WITNESS: Yes.

5 DR. REIN: And are you now saying there was no  
6 doubt, so that's why you didn't follow up on it?

7 THE WITNESS: That is correct.

8 DR. REIN: And the no doubt simply came from  
9 Elamir saying, "Be happy, don't worry, we got Moskowitz,"  
10 and Moskowitz handing you the CV?

11 THE WITNESS: That was -- yes.

12 DR. REIN: Can we add anything to that equation?  
13 Dr. Elamir says, "We've got Moskowitz." You go to  
14 Moskowitz, he gives you the CV. Two things. Is there  
15 anything else that eliminated any doubt in your mind that he  
16 would be the RSO and the AU?

17 THE WITNESS: That was the license that was there.

18 DR. REIN: The license? The license simply says,  
19 "We believe you, here's your license," right? The license  
20 doesn't make him the RSO. The license simply says, "We  
21 believe you, the person who filled out the license  
22 application."

23 THE WITNESS: Yeah, but he's listed on the  
24 license.

25 DR. REIN: You listed him.

1 THE WITNESS: Yeah, but he gave me the papers.

2 DR. REIN: I understand. Maybe you don't  
3 understand my question. I just want to be sure we know all  
4 the bases for you assuming he was the RSO. Elamir says,  
5 "He's the RSO." Moskowitz gives you his CV?

6 THE WITNESS: Yes.

7 DR. REIN: Anything else?

8 THE WITNESS: No.

9 CHAIRMAN BECHHOEFER: Let's take a quick  
10 ten-minute break or so.

11 [Recess.]

12 CHAIRMAN BECHHOEFER: Back on the record.

13 DR. REIN: We heard testimony, Dr. Ben-Haim, that  
14 in one of your interviews, the witness said that you said,  
15 "I may have made some mistakes." Did you say that?

16 THE WITNESS: I do not recall.

17 DR. REIN: Looking at this thing as we sit here  
18 today, based on all the facts in this case as we have heard  
19 them this week, did you make some mistakes?

20 THE WITNESS: Yes.

21 DR. REIN: Which ones do you think are critical  
22 mistakes?

23 THE WITNESS: I am not clear in that because I am  
24 not sure that the Appendix K of the regulations is clear  
25 itself. I don't think that it is specific enough and clear

1 enough. I think that radiopharmacies don't know.

2 DR. REIN: That what?

3 THE WITNESS: Radiopharmacies don't know. The  
4 nuclear medicine facilities don't know.

5 DR. REIN: You're talking about the statement  
6 about who --

7 THE WITNESS: Who would order. I don't think it  
8 is specific. I don't think that John Carr knows. I don't  
9 think that anybody knows specifically and I think it has to  
10 be more clarified.

11 DR. REIN: So what's -- that's an NRC mistake  
12 maybe and we can get to that another day, but I was asking  
13 what mistakes you think perhaps you made, the biggest one,  
14 not that NRC made.

15 THE WITNESS: Posteriori now, knowing what I know  
16 now?

17 DR. REIN: Sure.

18 THE WITNESS: I am not sure I know even now. I  
19 certainly did not intend -- I didn't do a deliberate  
20 mistake. If I did, it was not deliberate and I don't know  
21 to this point if it was a mistake because it is not clear.

22 DR. REIN: So on Exhibit S-15, the second line of  
23 number two where you wrote, "So I may notify the technician  
24 and order the radiopharmaceuticals," is that a mistake?

25 THE WITNESS: I am not sure because of the

1 non-specificity of Appendix K to regulatory guide.

2 DR. REIN: Were you similarly non-sure at that  
3 time?

4 THE WITNESS: I was much -- I had ordered myself  
5 radiopharmaceuticals from the same pharmacy as a consultant  
6 and partner in West Orange for the cardiology group. Of  
7 course, there was no question there about the AU and the RSO  
8 who was my partner, that he would authorize me. But  
9 according to the regulations as I know them today, I would  
10 have to get a written directive from him, which I didn't  
11 know.

12 DR. REIN: Well, reconstructing it, was it your  
13 intent to order the radiopharmaceuticals based on S-15? Was  
14 it either your intent to order the pharmaceuticals or to  
15 tell the technician to order the pharmaceuticals?

16 THE WITNESS: Yes.

17 DR. REIN: So if we reconstruct S-8A, which is the  
18 poster --

19 THE WITNESS: Yes.

20 DR. REIN: -- does it begin to more approach  
21 instructions just a little bit, in view of the fact that you  
22 had the intent to order the radiopharmaceuticals?

23 THE WITNESS: I didn't see any -- I thought if you  
24 have a license and that -- the intent was to have scans made  
25 and I was not -- it is not clear, I would say, until today.

1 It's not clear that the ordering has to be --

2 DR. REIN: Let me put it this way. Did you  
3 suspect that Ms. Smoligova would use this information with  
4 which to order the radiopharmaceuticals?

5 THE WITNESS: Yes.

6 DR. REIN: Was it your intent that she uses this  
7 information to order radiopharmaceuticals?

8 THE WITNESS: I was following here -- I suggested  
9 -- I asked Dr. Elamir, "Who is going to do the ordering?"  
10 And he decided it would be Smoligova. He asked me to write  
11 this down for her. I repeat the same thing.

12 DR. REIN: All right. It says, "We will have to  
13 decide who will place the orders."

14 THE WITNESS: Yes.

15 DR. REIN: By "we," it means you and Elamir?

16 THE WITNESS: No, not me. I meant NMA. I didn't  
17 mean a person.

18 DR. REIN: You and NMA. Just NMA?

19 THE WITNESS: Yes.

20 DR. REIN: Since NMA is a corporation and it can't  
21 talk, who would be the talker for the corporation?

22 THE WITNESS: Elamir would decide.

23 DR. REIN: How many times did you say to Elamir,  
24 "Get me an RSO and an AU," besides that one time that you  
25 told me about?

1 THE WITNESS: This is a little bit long ago, but  
2 at the beginning, I said immediately that part of -- since I  
3 wrote this application some time between the 16th of  
4 February and it was sent, the 22nd of February. So -- no,  
5 before the 16th of February. So I asked him before I saw  
6 Dr. Moskowitz. That means -- and I met Elamir just the week  
7 before. So within those few days, I'm sure that I met him  
8 only a maximum of twice.

9 DR. REIN: Before you went to Dr. Moskowitz?

10 THE WITNESS: Before I saw Dr. Moskowitz.

11 DR. REIN: I'm jumping ahead. How many times  
12 after that did you say to him, "You've got to have an RSO,  
13 you've got to have an AU"?

14 THE WITNESS: Did not say it anymore. He already  
15 had one.

16 DR. REIN: At the time of S-15, did you say it  
17 again?

18 THE WITNESS: No.

19 DR. REIN: In Exhibit 23 on page 2, which is a  
20 report of your interview by Mr. Davis, he says that you said  
21 -- you called yourself an initiative guy. Does that make  
22 sense to you?

23 THE WITNESS: I think I remember telling --  
24 initiative guy? I didn't say that.

25 DR. REIN: Pardon?

1 THE WITNESS: No.

2 DR. REIN: "Ben-Haim described himself as the  
3 initiative guy. When he saw a problem, he corrected it."  
4 Did you say that about yourself?

5 THE WITNESS: I told him I was equipment-minded  
6 and therefore -- and I'm usually dealing with equipment  
7 problems, actually equipment services is my main thing.

8 DR. REIN: He says that you said, "It was  
9 impracticable to always abide by small rules." Did you say  
10 that?

11 THE WITNESS: No. In what context?

12 DR. REIN: In any context. Did you say it in any  
13 context whatsoever?

14 THE WITNESS: I'm sorry, but it seems to me that  
15 Davis did not understand what I was saying.

16 DR. REIN: Okay.

17 THE WITNESS: I said, "What is it that you want,"  
18 because he asked all kinds of questions that were -- that  
19 seemed very uneducated to me. So I told him in French  
20 "chercher la p'tite bete," which means to look for the small  
21 animal. So he puts this down as a very important thing.

22 DR. REIN: Tell us now what you wanted him to  
23 think it meant.

24 THE WITNESS: I did not understand, "What do you  
25 want from me?" He never said to me -- "What do you want

1 from me?"

2 DR. REIN: In other words, did you feel like he  
3 was picking on little things?

4 THE WITNESS: Yes, with me. "What do you want  
5 from me?" That was actually my --

6 DR. REIN: Were you hired to do little things by  
7 NMA?

8 THE WITNESS: No, I was not hired to do little  
9 things by NMA.

10 DR. REIN: When did you first know there were 14  
11 deliveries for 27 patients?

12 THE WITNESS: After being asked by -- if I  
13 recollect, if my recollection is correct -- by Elamir that  
14 there was a confirmatory action letter.

15 DR. REIN: After the letter?

16 THE WITNESS: After the letter.

17 DR. REIN: At that point, did you know there was  
18 no RSO?

19 THE WITNESS: Yes.

20 DR. REIN: Did you scream at Elamir?

21 THE WITNESS: Yes. Not at him directly, I didn't  
22 scream at him.

23 DR. REIN: Did you grab him by the collar and  
24 throw him up against the wall and tell him what the hell is  
25 he doing not getting an RSO after you told him a dozen

1 times? Did you do anything like that?

2 THE WITNESS: I did not do anything like that.

3 DR. REIN: Did you tell him, "We'll get by, we'll  
4 get through this"?

5 THE WITNESS: Yes, approximately.

6 DR. REIN: How did you plan to get through it?

7 THE WITNESS: By finding another RSO, an AU. It  
8 was represented from the NRC at the time that was only --  
9 that NMA could continue its operations and they only have to  
10 find an RSO, an active RSO, an AU. So I thought that with  
11 this, the matter was closed.

12 DR. REIN: Do you understand today that the  
13 difference between an important rule and an unimportant rule  
14 by NRC is whether you keep it or break it?

15 THE WITNESS: What do you exactly mean by that?

16 DR. REIN: There are rules by the NRC, right?

17 THE WITNESS: Yes.

18 DR. REIN: If you keep it, you say, "That's an  
19 important rule." If you break it, you say, "That's a little  
20 rule, it's not an important rule." Is that the difference?

21 THE WITNESS: It wasn't that you keep it, of  
22 course. No, I understood that, too, except that I did not  
23 know the rules as much as I know them today. And even  
24 today, I have my doubts as to certain points of those rules.

25 When I -- see, when I prepared the application --

1 may I just say something? When I prepared the application,  
2 and all the applications that I had prepared until now, I  
3 had read also the specific rules, but reading and reading,  
4 you can read and read and it is very difficult sometimes to  
5 remember all the details.

6 So all the application preparation says, it gives  
7 you this convenient way of making it by just, you are going  
8 to follow according to this and that, to Exhibit J, K and so  
9 on. So I prepared it, putting in that very convenient, you  
10 know, to expedite things, that very convenient phrase.  
11 "We're going to operate by," without really reading  
12 correctly as a lawyer would.

13 DR. REIN: You know what a rocket scientist is,  
14 right?

15 THE WITNESS: I'm not a rocket scientist.

16 DR. REIN: But you know what that is?

17 THE WITNESS: Yes, I know what it is.

18 DR. REIN: In order to complete the application,  
19 you don't have to be a rocket scientist?

20 THE WITNESS: No.

21 DR. REIN: Elamir could have completed it the same  
22 way you did.

23 THE WITNESS: I'm not sure.

24 DR. REIN: Close? Don't answer that. Didn't he  
25 employ you to do more than just to fill out the forms?

1 THE WITNESS: Yes.

2 DR. REIN: At any time, did you intentionally try  
3 to get away without an RSO?

4 THE WITNESS: No.

5 DR. REIN: After you suspected there was no RSO,  
6 did you try to get by just a little longer?

7 THE WITNESS: No.

8 DR. REIN: After you knew there was no AU, did you  
9 think that one might appear suddenly from Oz or from some  
10 place?

11 THE WITNESS: No.

12 DR. REIN: The question about not understanding or  
13 agreeing totally with the rules has to do with who may have  
14 the authority to order, who can be delegated, right?

15 THE WITNESS: Yes.

16 DR. REIN: In this case, from your perspective,  
17 are there any other rules that you don't understand or don't  
18 agree with besides the one that has to do with who can be  
19 delegated to order?

20 THE WITNESS: I agree with every rule. I don't  
21 have a disagreement with the rules and I'm trying to comply  
22 to the best of my knowledge to all the rules. If new rules  
23 will come, I would try to learn them. What I'm saying is  
24 that some of them are not very clear.

25 DR. REIN: That's the one about ordering. That's

1 the one about who can order?

2 THE WITNESS: Who can order, yes.

3 DR. REIN: All right. Besides that one, aren't  
4 there other functions of an AU or an RSO besides ordering?

5 THE WITNESS: Oh, yes.

6 DR. REIN: And who was filling the other functions  
7 besides the ordering function during those four months?

8 THE WITNESS: The overlapping functions that the  
9 physicist has to do I was trying, to the best of my ability,  
10 to help with.

11 DR. REIN: As you look back in retrospect now that  
12 you know what's happened, you know Moskowitz never showed  
13 up, never did anything and claims he wasn't even the RSO at  
14 any time, were you the de facto RSO for four months?

15 THE WITNESS: I would like to characterize myself  
16 as such.

17 DR. REIN: Okay. You're the Board and you've  
18 agreed with yourself that you didn't fill your obligations  
19 to either NMA or to the Nuclear Regulatory Commission.  
20 Hypothetically, what would you do to you? You like  
21 yourself, you blew it, and you've got to do something to  
22 yourself. What would you do? What would be fair to the  
23 people of the United States, the Nuclear Regulatory  
24 Commission, and to Dr. Ben-Haim?

25 THE WITNESS: To retract the order, the

1 superseding order.

2 DR. REIN: Okay. What kind of lesson would you  
3 have learned and how could the Commissioners feel  
4 comfortable with you considering what you've just testified  
5 to in the past hour?

6 THE WITNESS: To believe that what I have said is  
7 honest, that there's no deliberate misconduct, and --

8 DR. REIN: It's a tough question.

9 THE WITNESS: I don't think that -- I think that  
10 the Office of Enforcement -- I feel innocent, absolutely  
11 innocent in this matter. In the future, I'm going to be  
12 much more careful about looking at every regulation and  
13 complying with them, and I'm going to ask the NRC every time  
14 I am not clear about certain regulations. I'm going to ask,  
15 make sure that I really fulfill every regulation.

16 I think that I was accused, investigated poorly,  
17 accused falsely, judged and sentenced all in one before even  
18 being told that I am a target.

19 DR. REIN: That's the system, the way it works,  
20 and Congress can change that, but that's the way it is right  
21 now. But because that's the way it is and because we have  
22 to do our job and they have to do their job, and because you  
23 essentially ordered nuclear materials without an RSO and  
24 because the regulation says you shouldn't do that, whether  
25 you agree with the regulation or not, because of that and

1 since Congress hasn't decided to change it this morning --  
2 they're busy with other things.

3 So in view of all that, what should be the  
4 sanction?

5 THE WITNESS: First of all, the sanction shouldn't  
6 be to me. The sanction should be to Dr. Moskowitz. There  
7 was no reason for the Office of Investigation to believe Dr.  
8 Moskowitz and his word, to take -- how do you say it --  
9 sworn affidavit from him, to let me believe that everything  
10 was okay with me, not to -- to distort all or most of my  
11 interrogations.

12 DR. REIN: Let me make it easier. Hypothetically,  
13 Dr. Moskowitz lied and Dr. Moskowitz did agree with Elamir  
14 that he would become the RSO sometime before the license is  
15 issued. Okay? Assume that.

16 THE WITNESS: Okay.

17 DR. REIN: Now, the license is issued the end of  
18 September. October business starts and you as a physicist  
19 show up and still don't see an RSO and still don't see an AU  
20 and still know there should be an RSO and still know there  
21 should be an AU. And all you say is, "Elamir, where is the  
22 RSO?" And Elamir says to you, "Be happy, don't worry," and  
23 you don't do anything else. Didn't you still fall down on  
24 your duty?

25 THE WITNESS: This is not what happened. Dr.

1 Elamir did not notify Moskowitz and Moskowitz did not notify  
2 Dr. Elamir.

3 DR. REIN: I know that, but I'm giving you that  
4 Moskowitz lies and he doesn't notify Elamir, so Elamir, in  
5 his mind, still thinks that Moskowitz, one day, will show  
6 up. He'll come on his magic carpet and will float in the  
7 window. But you as a physicist know that he hasn't shown up  
8 yet.

9 THE WITNESS: Yes.

10 DR. REIN: So you failed a little responsibility  
11 there, right, by assuring Elamir that you're going to take  
12 care of business.

13 THE WITNESS: Yes.

14 DR. REIN: For that failure alone, what should the  
15 sanction be?

16 THE WITNESS: The sanction should be, "That's not  
17 the way you do things," so a citation, Violation IV, III.  
18 "Don't do it this way. In the future, make sure that it's  
19 going to be right, don't do it this way." No sanction.  
20 There was no wrong intention and no wrongdoing. The people  
21 who were scanned needed that -- needed, from a medical point  
22 of view, I assume, needed to be scanned and maybe lives were  
23 saved.

24 DR. REIN: Thank you, Judge. Nothing else.

25 JUDGE LAM: I have a couple brief questions for

1 Dr. Ben-Haim. After three days of proceedings, Dr.  
2 Ben-Haim, do I understand you correctly, your position  
3 remains that you are totally innocent of all charges and all  
4 these charges by the Staff are false and arbitrary? Do I  
5 understand you correctly, as of right now?

6 THE WITNESS: Yes.

7 JUDGE LAM: The second question is, Dr. Ben-Haim,  
8 within these three days of proceedings, you were adamant and  
9 insistent that you have nothing, absolutely nothing to do  
10 with the ordering of any radiopharmaceuticals.

11 THE WITNESS: No.

12 JUDGE LAM: How would you explain and help the  
13 Board to resolve what your position has been in this  
14 proceeding and the Staff Exhibit S-15, in which you wrote,  
15 in paragraphs 1, 2, and 3 on that letter, specifically, as  
16 Dr. Rein had indicated in his question to you, paragraph 2,  
17 how would you explain and help us to reconcile this letter  
18 and your three days' activity in this proceeding?

19 THE WITNESS: This paragraph, I candidly wrote,  
20 thinking that if there are scans to be done, we have to  
21 notify the technician and order the radiopharmaceuticals. I  
22 candidly thought that I was allowed to do it, not as an  
23 authorized user, but as an order for NMA. It was not clear  
24 to me that the ordering has to be -- that each order has to  
25 be specifically authorized by the authorized user.

1           That was not clear to me, and as I said, it is not  
2 totally clear to me as of today, until today, because I  
3 think that Appendix K is not clear on that point. Even  
4 though I had not -- and I admit I do not read every little  
5 line, but I asked John Carr at Medi-Physics, in order to  
6 make -- I said, "How is the ordering done?" And John Carr,  
7 all he said was, "As long as there is a license, we  
8 deliver."

9           It was not my intention to work in automatic mode,  
10 as it was characterized before in these three days. That  
11 was not my intention and I understand fully the importance  
12 of an authorized user as a physician, and a radiation safety  
13 officer to make sure of compliance and I understand the  
14 importance of those functions in a nuclear medicine  
15 laboratory.

16           I did not know that each order has to be  
17 authorized by an authorized user or by the RSO. I think by  
18 the RSO, not by the authorized user. I did not know that,  
19 and until today, I don't think it is perfectly clear in the  
20 regulations and in the practice. In the nuclear medicine  
21 practice, I don't think that this is clear.

22           I was surprised about other questions that were  
23 raised here and were not clear to people, like NMTs not  
24 knowing what an authorized user is. I mean, this is -- it  
25 seems that there are a lot of things that have to be

1 clarified to all people, including Dr. Ben-Haim.

2 But I don't feel guilty of this. I feel there is  
3 also a part of responsibility on the NRC and we have to  
4 improve all of us.

5 JUDGE LAM: Dr. Ben-Haim, I was not asking you if  
6 you were guilty of this. My question is related with how is  
7 this Licensing Board going to reconcile all the testimony  
8 that we heard from you that you had nothing whatsoever to do  
9 with ordering radiopharmaceuticals, on the one hand, and  
10 this letter on the other hand, that you had everything to do  
11 with ordering radiopharmaceuticals? How am I, as a member  
12 of this Licensing Board to reconcile that?

13 THE WITNESS: I understand. I had -- during the  
14 investigation, those last few months, I had seen that letter  
15 and I said, "It is not good. I am not going to volunteer  
16 it, but that's not good." I understood that it's not good  
17 and I admit it right now. This isn't in contradiction.

18 I'm saying again, I'm repeating, I was involved in  
19 this -- it is obvious that I told the things as they  
20 happened, as they happened. Dr. Elamir asked me to write  
21 this down for Smoligova, I wrote it down. I didn't see it  
22 as -- I didn't see it as instructions coming from me. I  
23 thought there was an AU/RSO and that in the chain of command  
24 somehow somebody, the license authorizes the ordering.

25 I didn't see me as being the one who actually did

1 the ordering, wanted the ordering. I was not involved in  
2 the scans and I did not see as the -- I'm certainly not the  
3 one who authorized the order. I did not authorize the  
4 order.

5 DR. REIN: Is it correct that you implemented the  
6 order and you got caught?

7 THE WITNESS: No.

8 DR. REIN: Not right?

9 THE WITNESS: No. I did not implement the order.  
10 Even in this, I did not implement the order.

11 DR. REIN: But you called Carr and you said, "How  
12 do we order," and he says, "Anybody can order it once we got  
13 your license."

14 THE WITNESS: Well, he didn't say that. He said,  
15 "Fax me the license."

16 DR. REIN: And then order.

17 THE WITNESS: That's what I did.

18 DR. REIN: Then somebody can call up and order.

19 THE WITNESS: He didn't say that.

20 DR. REIN: Well, did he say, "You cannot call up  
21 and" --

22 THE WITNESS: Practically, that's what happened.

23 DR. REIN: Okay. But it's not the right way.

24 THE WITNESS: I would like to see that more  
25 specifically written in NRC regulations.

1 DR. REIN: Would you do it again the same way?

2 THE WITNESS: I would not, certainly not.

3 DR. REIN: Would you not do it the same way  
4 because we've had a hearing about this subject or would you  
5 not do it the same way because you now recognize it takes an  
6 AU?

7 THE WITNESS: I now recognize. I was  
8 well-educated in the -- not an AU, an RSO.

9 CHAIRMAN BECHHOEFER: Dr. Ben-Haim, in that Staff  
10 Exhibit 15, in paragraph numbered 1, what is the attached  
11 letter that was referenced?

12 THE WITNESS: That was the letter, I believe, that  
13 he asked to specify it's not going to Iodine 125, I think,  
14 that he's not going to use Iodine 125, is what my  
15 recollection of that is.

16 CHAIRMAN BECHHOEFER: I see. It doesn't have  
17 anything to do with the particular charges involved here, I  
18 take it?

19 THE WITNESS: I don't think so.

20 CHAIRMAN BECHHOEFER: Okay. Do you know how or  
21 whether you instructed Ms. Smoligova to tell Medi-Physics  
22 that you were the -- I don't remember whether she said RSO  
23 or AU, but I think she said she had to give a name and your  
24 name was given.

25 THE WITNESS: I don't think so. I never -- no, I

1 don't think so.

2 CHAIRMAN BECHHOEFER: So do you think she just  
3 volunteered that or did you place the first order and give  
4 your name?

5 THE WITNESS: No, I don't remember if I placed the  
6 first order. It's possible, possible, but I did not give my  
7 -- John Carr knew me from -- and I ordered from West Orange.  
8 He knew me and there was a license and I thought at that  
9 time that I could order and I may have ordered. I don't  
10 recollect.

11 DR. REIN: Let me ask something. Let me  
12 interrupt.

13 CHAIRMAN BECHHOEFER: Sure.

14 DR. REIN: If a person has been properly  
15 delegated, properly delegated to order radiopharmaceuticals  
16 from Company A, does he also have the authority to order the  
17 same substance for Company B when Companies A and B are  
18 unrelated? What do you think?

19 THE WITNESS: I don't think so. It doesn't make  
20 sense.

21 CHAIRMAN BECHHOEFER: So you are telling me, in  
22 any event, that you don't know if Medi-Physics had your name  
23 as the -- I don't remember whether it was the RSO or AU, but  
24 apparently they wanted one or the other before they would  
25 fill the order.

1 THE WITNESS: I'm absolutely sure that they did  
2 not have my name as the RSO or AU in the order. They had  
3 the licensee's name, they had the Newark Medical Associates'  
4 license with Dr. Moskowitz as the RSO and AU, not my name.  
5 And I'm pretty sure that Dr. Moskowitz's name appeared on  
6 the labels that come with the pharmaceuticals.

7 CHAIRMAN BECHHOEFER: I see, okay. Maybe I  
8 misunderstood. I thought your name was on one of the  
9 orders.

10 THE WITNESS: No, I don't think so.

11 CHAIRMAN BECHHOEFER: Okay.

12 JUDGE KLINE: I just have a couple of questions  
13 concerning a somewhat different subject. Did you recommend  
14 to Dr. Elamir to hire Geylikman as a technician?

15 THE WITNESS: Yes, I did.

16 JUDGE KLINE: And were you acquainted with  
17 Geylikman's work habits before she came to work for NMA?

18 THE WITNESS: Yes, I was.

19 JUDGE KLINE: Were you keenly familiar or only  
20 casually familiar with her work habits?

21 THE WITNESS: I was well-familiar with her.

22 JUDGE KLINE: Did you hear her testimony that she,  
23 on her own initiative, without instructions from anybody  
24 apparently, adjusted doses that she administered?

25 THE WITNESS: I did not know that.

1 JUDGE KLINE: You did not know that she did that?

2 THE WITNESS: No.

3 JUDGE KLINE: All right. If she did that, would  
4 that be consistent with the previous work habits that you  
5 knew her to have?

6 THE WITNESS: I have no view. I don't know.

7 JUDGE KLINE: Then I'll end at this point.

8 CHAIRMAN BECHHOEFER: Do you know what license she  
9 had? She testified that she was licensed.

10 THE WITNESS: Yes. She has a New Jersey license.  
11 She also has a New York license.

12 CHAIRMAN BECHHOEFER: I see.

13 JUDGE KLINE: Are you familiar enough with the  
14 operation of NMA to know whether or not Geylikman was  
15 present alone on Saturdays or did she have a supervisor  
16 present?

17 THE WITNESS: I think that she was alone.

18 JUDGE KLINE: She was alone. Then if she  
19 administered doses as she found them, is it possible that  
20 she administered them on her own authority without  
21 instructions from anybody, perhaps wrongly?

22 THE WITNESS: Most probably, yes.

23 JUDGE KLINE: Is it likely that she would do  
24 something like that?

25 THE WITNESS: I don't think that any doctor was

1 ever there. The doctors did the reading somewhere else, but

2 --

3 JUDGE KLINE: I'm talking about administration of  
4 the radionuclide, the intravenous administration.

5 THE WITNESS: I don't know. I don't even know if  
6 there was a nurse around.

7 JUDGE KLINE: Okay, that's all.

8 CHAIRMAN BECHHOEFER: I guess the Board is  
9 through. Ms. Marco?

10 MS. MARCO: I just have a question.

11 RE CROSS EXAMINATION

12 BY MS. MARCO:

13 Q You said, in response to a question from Judge  
14 Rein, that when you expressed your concerns over Dr.  
15 Moskowitz not being at NMA to Dr. Elamir, he told you that  
16 he had someone else; is that correct? Do I understand that  
17 correct?

18 A It's a very short conversation. I expressed my  
19 concern about Dr. Moskowitz not being there.

20 Q And didn't you tell Judge Rein just a little while  
21 ago that he told you he had somebody else to be the RSO?

22 A I don't know if it was the same conversation. I  
23 don't know if he said it about RSO. I don't think that he  
24 said RSO.

25 Q Well, I tend to recall something about that, but

1 in any event, will you please turn to page 45 of that  
2 deposition transcript on your table.

3 Directing you to lines 14 to 24, is it not true  
4 that I said to you or that you said, at line 14, "There was  
5 an RSO. To me it was Dr. Moskowitz, but I had never seen  
6 him and he hadn't signed," referring back to that exhibit of  
7 yours, Exhibit 4, "and he hadn't been there."

8 A Yes.

9 Q And I said, "So you were getting concerned,  
10 right?" And that's what I asked?

11 A Yes.

12 Q And you said, "Yes." And then I asked, "And you  
13 voiced this besides you, besides at home, you voiced this to  
14 Dr. Elamir?" Didn't I say that?

15 A Yes.

16 Q And you said, "Yes," right?

17 A Um-hmm.

18 Q And then I asked, "And his whole acknowledgement  
19 was just merely to nod about it," and you said?

20 A "Yes," but in the meantime, I remembered that he  
21 also said something like okay, something like that.

22 Q Meantime between the time of April 24th, 1998 and  
23 today?

24 A No, no, no. That same acknowledgement. I don't  
25 remember if -- at that deposition, the only thing that I

1 remembered was just merely to nod about it. Dr. Elamir, for  
2 whoever knows him, is a very laconic person, doesn't talk  
3 much.

4 Q Okay. So at the deposition, all you remembered  
5 was that his response was merely to nod about it; is that  
6 right?

7 A Yes.

8 Q And sometime between the time we had the  
9 deposition and today, you remembered more of the  
10 conversation that took place. Is that what I understand?

11 A No.

12 Q No. What is it that you were saying then?

13 A I remember Dr. Elamir telling me that he had  
14 somebody else, but I don't remember in connection -- if it  
15 is in connection with the same question.

16 Q Well, I asked you a question before then. Can you  
17 turn with me to page 43, and starting on line 18, didn't you  
18 say, "I didn't see him much." This "him," I believe, is  
19 referring to Dr. Elamir, true?

20 A Um-hmm.

21 Q "He was a very busy person."

22 A Yes.

23 Q I'm sorry. Let me direct your attention to the  
24 very top of the page. "I asked Dr. Elamir, 'Why doesn't the  
25 RSO come in and sign as to review those' -- I told him, 'Why

1 isn't Dr. Moskowitz here?'" Is it true that you said that?

2 A Yes.

3 Q And I asked, "When was this?" And you said, "No"  
4 -- you were clarifying something, must have gotten me  
5 distracted. And then you answered, "I would expect him to  
6 come." Do you see line 11? "I would expect him to come.  
7 When? It was not up to me, but I reminded Dr. Elamir that  
8 has to be done."

9 A Yes.

10 Q Isn't that what that says?

11 A Yes.

12 Q And I said, "Has to be done. And what did he say  
13 about the time?" And then you said, "I saw Dr. Elamir maybe  
14 in my whole life about four times and I said each time" --  
15 isn't that right?

16 A Um-hmm.

17 Q And you said, "I told him" -- this is down on 21  
18 -- "I told him and he nodded, but" -- and I cut you off,  
19 didn't I, and I asked you a question; isn't that true?

20 A Yes.

21 Q Line 22, I said, "That was the extent of his  
22 acknowledgement, question mark?"

23 A Yes.

24 Q And you said -- what did you say?

25 A I said yes, but we didn't. We had very few and

1 very laconic conversations.

2 MS. MARCO: I don't have any further questions.

3 DR. REIN: When you advised Elamir once or twice  
4 or three -- regardless of the number of times -- that he  
5 needs an RSO or an AU, did you expect that he would see to  
6 it or did you expect that you would have to do it?

7 THE WITNESS: When he -- I mentioned -- I told Dr.  
8 Elamir that he needs an RSO, an AU right at the beginning.

9 DR. REIN: So months later, and you said, nobody  
10 is signing these papers and I haven't seen one, you ought to  
11 get -- do something about it, did you expect him to do it?

12 THE WITNESS: I expected him to tell -- go to the  
13 phone and tell Dr. Moskowitz, come over, you have to review  
14 the procedures and sign the documents in the log book for  
15 NMA, you have to come over to NMA and see what's going on.  
16 That's what I expected.

17 CHAIRMAN BECHHOEFER: Is that all? He's got a  
18 chance for redirect.

19 The Board questioning is finished. Dr. Ben-Haim,  
20 you have a chance for redirect. Any further testimony  
21 concerning what developed in the direct testimony and cross  
22 examination, if you want to say anything further about that,  
23 you should do so at this time.

24 THE WITNESS: There is one more thing that I would  
25 like to address.

1 CHAIRMAN BECHHOEFER: Pardon?

2 THE WITNESS: If it's possible, I would like to  
3 address a few words to the Office of Enforcement.

4 CHAIRMAN BECHHOEFER: Pardon? I didn't -- oh.

5 DR. REIN: Well, it's got to be testimony.

6 THE WITNESS: Testimony.

7 DR. REIN: You have to address the board.

8 THE WITNESS: Okay. So I'll address the board.

9 CHAIRMAN BECHHOEFER: Yes.

10 REDIRECT TESTIMONY

11 THE WITNESS: I understand, if I -- I understand  
12 that the Office of Enforcement wants a person that is not  
13 any more allowed to work in his profession to admit at least  
14 that he did a mistake and confess to the mistake and promise  
15 that he would be a much better person in the future.

16 Now, this is not said ironically; I'm just saying  
17 it in simple words. I am not -- I did not have any  
18 deliberate misconduct. I don't -- and I think that the  
19 accusation to me is false, and if I did anything wrong, it  
20 was not intentionally, and the opposite. I am an honest  
21 person, honest physicist. I do the best work I can with the  
22 public well or the public good in mind.

23 I certainly would not admit deliberate misconduct  
24 because I did not do -- I did not deliberately conduct  
25 myself -- deliberately misconduct myself.

1 I think that the notion that one should be  
2 compelled to do some kind of public apology for something --  
3 for some confession of a deliberate misconduct, if one  
4 doesn't, and that should clean you is something that is  
5 totally strange to my character and to the way I see a  
6 democratic country.

7 That is something that has been compelled --  
8 people, I mean, trying to publicly -- I have seen trials  
9 where people accuse themselves publicly and say they will  
10 never do it again, and these were dictatorships, and I don't  
11 think that this is -- I think it's a very dangerous  
12 atmosphere if a country starts to create such rules and  
13 practices.

14 I believe in the system, the fairness of the  
15 system, of the American system. I still believe that the  
16 regulations are the best they could be at this point, and  
17 that people in panels sit and do professional work trying to  
18 do the best to the good of the public. I would like them to  
19 be even better. I'm sure they will be even better, and I  
20 would like to participate in that as much as I can using my  
21 experience.

22 Nothing more.

23 CHAIRMAN BECHHOEFER: Anything further? Ms.  
24 Marco, anything further?

25 MS. MARCO: No, nothing further.

1 CHAIRMAN BECHHOEFER: I guess you're excused as a  
2 witness at this time.

3 [Witness excused.]

4 CHAIRMAN BECHHOEFER: I have one or two statements  
5 to make about proposed findings which you may want to write  
6 down. That will involve you as your own representative.

7 Normally every party has a right to file proposed  
8 findings, and if we order you to, you must. I don't think  
9 we would order it, but I assume the staff -- do you have any  
10 particular date -- the rules say 30 days after the record is  
11 closed, which presumably will be approximately 30 days from  
12 today. I don't know what that comes to. Today is the 29th.  
13 June 29th is -- I don't know --

14 MS. HODGDON: Can we have a moment, please?

15 CHAIRMAN BECHHOEFER: Yes. Off the record for a  
16 minute.

17 [Discussion off the record.]

18 MS. HODGDON: What's the schedule after that?  
19 When are his --

20 CHAIRMAN BECHHOEFER: Well, normally he only gets  
21 another ten days, but I think if he's going to do rebuttal  
22 filings, he has to have a little time to look over yours.  
23 If he wants to say, I agree, I agree, I don't agree with  
24 this paragraph, it should be instead --

25 MS. HODGDON: We have no objection to any time

1 that you want to give him.

2 CHAIRMAN BECHHOEFER: If theirs are filed on the  
3 30th, you'll get it several days later, in July.

4 JUDGE KLINE: Dr. Ben-Haim, on these proposed  
5 findings where you would file something in rebuttal to the  
6 staff, the staff is going to file an order, file a proposed  
7 order, okay, and it will probably be adverse to you, okay?  
8 What you -- you would have the right to read their order,  
9 their proposed order, and state how you disagree with it and  
10 what facts we should find in the alternative, but cited to  
11 the record, not just come out of your head. Do you  
12 understand that?

13 DR. BEN-HAIM: It means --

14 JUDGE KLINE: In other words, you say, hey, they  
15 overlooked a fact and it's on page such-and-such in the  
16 record, and if we go there to that record, we'll see it. So  
17 if you want to disagree with them, you have to cite to the  
18 record.

19 DR. BEN-HAIM: I have to quote the record.

20 JUDGE KLINE: Yes. Or give a page number, yes.  
21 You must have a record.

22 DR. BEN-HAIM: I must have a record.

23 JUDGE KLINE: Yes.

24 DR. BEN-HAIM: Then I don't want to do it.

25 JUDGE KLINE: You could get --

1 DR. BEN-HAIM: I can't afford it. I can't afford  
2 it.

3 JUDGE KLINE: You don't have to buy it. You could  
4 go to the public document room --

5 CHAIRMAN BECHHOEFER: We mentioned two local  
6 public document rooms. They're not real close, but one is  
7 in Toms River and the other was -- where did we say? White  
8 Plains?

9 JUDGE KLINE: White Plains, I think.

10 CHAIRMAN BECHHOEFER: White Plains. In the public  
11 libraries in each of those places.

12 DR. BEN-HAIM: In the public library in Toms River  
13 and --

14 CHAIRMAN BECHHOEFER: And White Plains.

15 JUDGE KLINE: White Plains.

16 DR. BEN-HAIM: They will have those records?

17 JUDGE KLINE: They're in microfiche.

18 CHAIRMAN BECHHOEFER: They would be in microfiche.

19 JUDGE KLINE: They will be in microfiche form.

20 DR. BEN-HAIM: Can I get them on the Internet?

21 CHAIRMAN BECHHOEFER: No.

22 THE REPORTER: We're on the record. I can't hear.

23 MS. HODGDON: I'm sorry, I didn't know we were on  
24 the record. I thought we were off the record.

25 CHAIRMAN BECHHOEFER: Well, off the record for a

1 moment.

2 [Discussion off the record.]

3 CHAIRMAN BECHHOEFER: Back on the record.

4 The staff elected at our inquiry not to put on  
5 further rebuttal testimony. The parties discussed schedules  
6 for filing proposed findings and we agreed to have a  
7 telephone conference call this coming week in order to come  
8 up with some final schedules. So we are not setting those  
9 schedules at this time.

10 With that, unless somebody has further comment,  
11 the record is closed and we're adjourned.

12 [Whereupon, at 6:03 p.m., the evidentiary hearing  
13 was concluded.]

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REPORTER'S CERTIFICATE

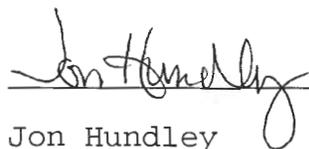
This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

NAME OF PROCEEDING: AHARON BEN-HAIM, Ph.D.  
Upper Montclair, New Jersey  
EVIDENTIARY HEARING

CASE NUMBER: IA 97-068

PLACE OF PROCEEDING: Newark, New Jersey

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

  
\_\_\_\_\_

Jon Hundley

Official Reporter

Ann Riley & Associates, Ltd.