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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:

Docket No.

ADVISORY COMMITTEE ON RIGHTS OF LICENSEE
EMPLOYEES UNDER INVESTIGATION

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ADVISORY COMMITTEE ON RIGHTS OF LICENSEE EMPLOYEES
UNDER INVESTIGATION

1717 H. Street, N.W.
Washington, D.C.
First Floor Conference Room

The Advisory Committee on Rights of Licensee
Employees Under Investigation convened at 10:30 a.m.,
pursuant to notice, E. Silbert, Chairman of the Committee,
presiding.

- PRESENT:
- E. SILBERT
 - J. FITZGERALD
 - J. SCOTT
 - R. SPRITZER
 - O. RUEBHAUSEN
 - R. LEVI

WITNESS TRUXELL

1 MR. SILBERT: We're going to call the meeting
2 to order.

3 This is the Advisory Committee for Review of
4 Investigation Policy on Rights of Licensee Employees
5 Under Investigation and all members of the committee are
6 present for our meeting here today, a meeting that is
7 being held pursuant to the Federal Advisory Committee Act
8 Notice of which was published in the Federal Register
9 pursuant to the requirements of that Act.

10 We have a scheduled list of witnesses who will
11 appear who have agreed and expressed an interest in
12 appearing before us to give their views with respect to
13 the questions that the Nuclear Regulatory Commission has
14 asked this Advisory Committee to address.

15 Before we turn to our first witness, our
16 liaison counsel Mr. Levi are there any introductory
17 matters that ought to be covered?

18
19 MR. LEVI: I don't believe so. The same rules
20 apply as we discussed at the first meeting that the
21 committee's meetings will be open unless particular
22 investigative practices and procedures require otherwise,
23 and that the transcript will be placed in the public
24 document room and all material that the committee
25 prepares or is provided to it will also be put in the

WITNESS TRUXELL

1 public document room and that everything should be
2 shared under the Freedom of Information Act.

3 MR. SILBERT: Very well our first scheduled
4 witness is Mr. Truxell.

5 If you'd have a seat at that small table, we
6 had delayed starting because we were concerned that not
7 having a table would put you too close.

8 WITNESS TRUXELL: I haven't met you. I am Bert
9 Truxell.

10 MR. SILBERT: Have you met the other members
11 of the committee?

12 (shaking hands.)

13 MR. SILBERT: We appreciate very much your
14 willingness to appear before this committee and give us
15 the benefit of your views.

16 Just for the record will you tell us what your
17 name is and your position?

18 WITNESS TRUXELL: My name is Bert Truxell.
19 I am the Deputy Director of The Naval Intelligence
20 Service. I have held that since 1981. I have been
21 with NI since 1959 in the investigative business since
22 1952.

23 MR. SILBERT: What are the general
24 responsibilities that you have and have had in your
25 agency?

WITNESS TRUXELL

1 WITNESS TRUXELL: We have to investigate for
2 felony-type crimes. Which includes within the Department
3 of the Navy which includes Marines and also counsel
4 responsibility for intelligence and counterintelligence
5 investigations.

6 MR. SILBERT: Are your investigations solely in
7 the criminal area or do they extend to areas other than
8 counterintelligence or intelligence or do they extend to
9 other areas?

10 WITNESS TRUXELL: They may extend to those
11 areas where prosecution is not required and then civil
12 debarment might occur in the civilian sector.

13 MR. SILBERT: Have you had an opportunity, Mr.
14 Truxell to review the list of questions that were sent
15 out by the nuclear regulator Commission that they have
16 requested this Advisory Committee to consider?

17 WITNESS TRUXELL: Yes, I have.

18 MR. SILBERT: Would you be willing to give this
19 committee any overall comments, the benefit of any
20 overall comments that you have on the questions that were
21 posed by the committee -- by the Commission I should
22 say-- to this committee and then after that there may be
23 some questions or follow up questions for members of the
24 committee.

25 WITNESS TRUXELL: Impressions can be dangerous.

WITNESS TRUXELL

1 Yeah, I did have an impression after
2 reading those questions. I guess that I was surprised
3 that in essence the majority -- the impact was
4 relationship with witnesses, vis-a-vis attorneys,
5 vis-a-vis others. I found that interesting, if not
6 unusual.

7 MR. RUEBHAUSEN: Why is that?

8 WITNESS TRUXELL: Probably because although we
9 do involve ourselves in civil cases or cases which
10 ultimately go to civil action, primarily we are involved
11 in prosecution. Even in those cases which go to civil
12 action and if you will permit me I am speaking as an
13 investigator, I recognize that you people are all
14 attorneys. Most people who are witnesses are not
15 suspected of anything. I have found in 30 years of
16 experience that if you would lay a warning on them, your
17 chances of getting what you need to conduct your
18 investigation in the best interest of the government is
19 going to be adversely effected. Now that's whether you
20 do that orally and certainly is true if you do that in
21 writing.

22 MR. SPRITZER: Well there are warnings and
23 warnings. In your practice let me ask, do you make it
24 clear to somebody who you plan to interview that the
25 appearance of that person will be voluntary?

WITNESS TRUXELL

1 WITNESS TRUXELL: That is either stated or
2 implied.

3 We're talking about a witness and not a
4 suspect?

5 MR. SPRITZER: Yes.

6 WITNESS TRUXELL: Yes that is either stated or
7 implied because of the nature of the situation.

8 MR. SPRITZER: Do you do something further
9 where the person you are interviewing is also a suspect?
10 Or maybe thought to be if you --

11 WITNESS TRUXELL: If someone is a suspect and
12 we're talking about an interrogation now there is a
13 decision to be made as to whether it is custodial or non-
14 custodian.

15 MR. SPRITZ: I am assuming non-custodial?

16 WITNESS TRUXELL: Non-custodial we are not at
17 this time although up to a year and a half ago we were
18 providing warnings to civilians in non-custodial
19 situations. We have changed that policy.

20 MR. SPRITZER: And that was limited to the
21 circumstance where the civilian was a suspect?

22 WITNESS TRUXELL: A suspect.

23 MR. SPRITZER: A target of the investigation?

24 WITNESS TRUXELL: That's correct. Now there
25 are situations when you go in and talk to a witness, in

WITNESS TRUXELL

1 the course of that interview it appears to the
2 investigator that there is reason to believe that it
3 might be a suspect. Either the investigator is going to
4 cease that interview and gather more facts or he's going
5 to have to give a warning.

6 MR. SPRITZER: When you said before that you
7 felt investigative techniques would be impaired if you
8 gave warning, does that apply to the situation where --
9 that I contemplated, that you are informing the person
10 that his appearance will be entirely voluntary?

11 WITNESS TRUXELL: No, I do not have that
12 feeling.

13 MR. SPRITZER: So what had you in mind was a
14 specific warning --

15 WITNESS TRUXELL: Criminal offenses.

16 MR. SPRITZER: Capitol offenses?

17 WITNESS TRUXELL: Yes, I think that can have a
18 detrimental impact that starts to raise questions in the
19 mind of the individual as to what you are really looking
20 for. Are you really bearing something towards that
21 individual or are you in fact looking for what you told
22 him initially, him or her, what the object and target of
23 your investigation were. That comes from experience and
24 that's a personal instrument.

25 MR. SILBERT: The requirement -- you said your

1 department operation had until a year and a half ago, was
2 that a written requirement?

3 WITNESS TRUXELL: That's correct that was a
4 written requirement.

5 MR. SILBERT: And that was contained in a
6 written procedure or regulation?

7 WITNESS TRUXELL: We're talking suspects now?

8 MR. SILBERT: That is civilian suspects in
9 non-custodial situations?

10 WITNESS TRUXELL: They would be provided a
11 Miranda warning.

12 MR. SILBERT: And what were the circumstances,
13 if you know, that led to the repeal of that regulation or
14 withdrawal of that rule?

15 WITNESS TRUXELL: The largest single factor was
16 continuing disagreement with that policy by the Assistant
17 US Attorneys.

18 MR. SILBERT: The Assistant US Attorney?

19 WITNESS TRUXELL: Yes, in the various
20 districts.

21 MR. SILBERT: Besides the policy or
22 disagreement from the Assistant US Attorneys, was there
23 any experience that either you or the people working for
24 you had had with respect to the impact of a warning under
25 those circumstances? And I realize we're talking only

WITNESS TRUXELL

1 about a suspect, civilian, non-custodial situation.

2 WITNESS TRUXELL: The impact on a suspect
3 generally tends to diminish your chances of course of
4 that individual talking to you. We don't have
5 percentages. We have percentages on the military side.
6 We have not developed percentages on the military side
7 vis-a-vis those who will talk to you after the warning
8 and those who will not. Military side they run about 50
9 percent.

10 MR. SILBERT: When you talk a percentage and
11 say 50 percent what do you mean by that?

12 WITNESS TRUXELL: Once given a warning the
13 person will elect not to talk to you or will cease the
14 interrogation to get counsel.

15 MR. SILBERT: That warning to which we're now
16 addressing is that a warning to which you indicated to
17 the person prior to the warning not only what his
18 rights were but also that the person was a suspect?

19 WITNESS TRUXELL: That's correct.

20 MR. RUEBHAUSEN: When you're dealing with a
21 witness who is not a suspect, at least at the outset, do
22 you identify who you are, where you're from and --

23 WITNESS TRUXELL: And why we are there.

24 MR. RUEBHAUSEN: And why you are there?

25 WITNESS TRUXELL: Right.

WITNESS TRUXELL

1 MR. SILBERT: You mentioned that your
2 experience had been 30 years in the business, that if
3 warnings were given other than advising that their
4 appearance was voluntary that that might have an
5 inhibiting factor on the willingness of the witness to
6 cooperate, to respond to your inquiry.

7 What is the basis for that? Is that your
8 own individual experience or --

9 WITNESS TRUXELL: I think so. My own
10 individual experience, conversations with others in the
11 business and mostly individual experience where it is
12 across the table as we are now, eyeball to eyeball when
13 that occurs.

14 First of all what I had seen and if I may go
15 back to the days when I saw that. The confusion that
16 occurs on the part of that individual, I say I am Special
17 Agent Truxell and here's why I am here. Now the person
18 understands that and now you say give him a warning as to
19 a critical natural offense and you can see the thought
20 processes. He's thinking: "Gee, you just said you were
21 here for another company or another individual and now
22 you're doing this. I don't think you're being straight
23 with me." That is the kind of thought process that I
24 ascertain in the course of talking to people and others
25 have done the same.

WITNESS TRUXELL

1 MR. SILBERT: Do you have any sense of what the
2 reaction would be if there were no reference to a
3 criminal offense but rather references to simply carrying
4 out an investigative or civil or administrative
5 function?

6 WITNESS TRUXELL: Well, I really would have to
7 know what you're talking about in terms of the warnings.
8 What are you telling the person after you identify
9 yourself and you express first of all their appearance is
10 voluntary. What are you going to tell them as to what
11 impact the words would have? I can't answer that without
12 knowing precisely what you are talking.

13 MR. SILBERT: Well, what about if advice were
14 given describing the function of the agent which is we
15 are agents of the Office of Investigations of the Nuclear
16 Regulatory Commission?

17 WITNESS TRUXELL: I would consider that a
18 normal part of identification.

19 MR. SILBERT: And our function is to conduct
20 investigations in behalf of the Nuclear Regulatory
21 Commission and I must advise you before....And then
22 before you proceed further you have a right to have
23 counsel at this meeting.

24 WITNESS TRUXELL: If an investigator comes to
25 me and says that I will speak for myself, I have a

WITNESS TRUXELL

1 problem. Why are you telling me I have a right to
2 counsel? You must suspect something about me or you
3 wouldn't tell me that. That's how I feel. I am telling
4 you my immediate reaction to that.

5 MR. SILBERT: Let me ask you this. What if the
6 warning were also coupled with a further statement by the
7 investigator that you should understand that this advice
8 of your rights with respect to counsel and the fact that
9 this is a voluntary meeting is something that we as
10 investigators give to all persons that we wish to talk
11 to?

12 WITNESS TRUXELL: I might or might not believe
13 it. I am suspicious.

14 MR. SCOTT: Is there some verbal formulation
15 that you've considered that would achieve the goal of
16 conveying the right to counsel without having the
17 deterrence that you're speaking of?

18 WITNESS TRUXELL: I guess if I may speak both
19 personally and for organizational policy. I am not
20 certain that I agree that there is a right to counsel
21 when the individual is not suspect at the time of an
22 offense. I am not a lawyer, but I have worked with the
23 lawyers all my entire career. I am not aware --

24 MR. SILBERT: Let's assume for purposes of Mr.
25 Scott's question we're not talking about a constitutional

WITNESS TRUXELL

1 right to counsel but for one reason or another the agency
2 has determined that that -- there there will be a non-
3 constitutional and non-statutory right to counsel
4 granted. So let's just assume that for purposes of
5 responding to the question as it might impact on any
6 deterrent effect.

7 WITNESS TRUXELL: I would expect a negative
8 impact because I think you have to go beyond that as
9 you get into individual psychology and I will just speak
10 for myself. You come in and say I have a right to
11 counsel. Who's going to pay for it? Are you saying the
12 agency is going to pay for it? If the agency is not
13 going to pay for it, you know I am certainly not going to
14 pay for counsel to voluntarily tell you what you want to
15 know.

16 MR. SILBERT: Has it been your experience that
17 people are either willing to ask those questions that you
18 just raised or that that just becomes part of silent
19 confusion?

20 WITNESS TRUXELL: Generally, part of the silent
21 confusion, generally. Not always. I guess I speak from
22 those who articulate.

23 MR. SCOTT: Basically, Mr. Truxell, are you
24 fairly pessimistic that a verbal formulation could be
25 developed that would permit the investigator to convey

WITNESS TRUXELL

1 their right to counsel without having some dilatorious
2 impact on the conduct of the investigation?

3 WITNESS TRUXELL: I seldom answer yes or no but
4 the answer to that is yes.

5 MR. SCOTT: I thought I'd discern that.

6 MR. SILBERT: Are the policies that you follow
7 in the Department of the Navy, are they consistent with
8 the policies followed by the Department of Defense and
9 the other branches of the Armed Services, do you know?

10 WITNESS TRUXELL: Yes, that's correct.

11 MR. SILBERT: There's a consistent policy?

12 WITNESS TRUXELL: That's correct. There are
13 minor difference, but nothing that I can recall right
14 now. There are some minor differences but nothing in
15 terms of warning witnesses for example. I have no
16 knowledge of any Department of the Navy requirement that
17 is warning the witnesses.

18 MR. SILBERT: And even that some might imput
19 that a --

20 WITNESS TRUXELL: I don't mean it that way.

21 MR. SILBERT: You just give advice, plain
22 neutral advice about basically the right to counsel to
23 be the principal issue here. That so far as now the
24 Department of Defense and the other branches of the Armed
25 Services for a non-suspect witness no warning is given?

WITNESS TRUXELL

1 WITNESS TRUXELL: I am not aware of any.

2 MR. SILBERT: And as far as you know, you're
3 not aware of even any advice being given for non-
4 custodial suspect? That is for suspects in a non-
5 custodial situation and not advised of their right to
6 counsel?

7 WITNESS TRUXELL: No, I cannot answer that
8 because I am not aware of what the other agencies in DOD
9 are doing for the non-custodial. As I say we changed
10 about a year and a half ago and I have not made inquiries
11 nor have I discussed that aspect with the others so I
12 have to withhold that.

13 MR. SILBERT: Are you familiar with from just
14 general exposure or experience in the Department of The
15 Navy and elsewhere with respect to investigations that
16 are not focused on criminal activity but really for
17 civil purposes or non-criminal purposes, not
18 intelligence or counterintelligence, are there any
19 situations of which you are aware of within the
20 Department of The Navy in which advice of counsel is
21 given by an investigator?

22 WITNESS TRUXELL: What we generally will do
23 even in circumstances where we are led to believe that
24 action is going to be debarment or something else, we
25 will still pursue that investigation for prosecution

WITNESS TRUXELL

1 purposes. Having learned from experience that people and
2 agencies change their minds so we continue to follow our
3 investigative practices and investigative requirements in
4 terms of warnings. We do.

5 MR. SILBERT: Well, but I take it that even
6 when you're in only -- when you are pursuing an
7 investigation that has become non-criminal and result in
8 only recruitment or debarment, I take it that no advice
9 pertaining to counsel is given either to the witness or
10 to a suspect in a non-custodial situation?

11 WITNESS TRUXELL: No, let me please correct
12 that. Certainly the witness is. We do not provide any
13 type of a warning to a witness other than the fact that
14 either for the investigator to say it is voluntary or to
15 imply that it is voluntary.

16 The suspect -- for a suspect, if it is non-
17 custodial we are not warning an individual as of a year
18 and a half ago. If it is custodial and you certainly
19 know the meaning of custodial, we'll provide a warning.
20 We certainly have not if we have not arrested the
21 individual if it is not going to be for prosecution. But
22 if that person has the impression that his freedom has
23 been barred then we will provide a regular Miranda
24 warning. That normally does not happen under most
25 circumstances but I want to be completely on the level

WITNESS TRUXELL

1 with you.

2 MR. RUEBHAUSEN: The record doesn't contain a
3 definition of custodial and non-custodial. I think it
4 would be useful if you give us.

5 WITNESS TRUXELL: Our definition of custodial
6 is when we have placed an individual under arrest or when
7 that individual has reason to believe that he or she has
8 been deprived of their freedom.

9 MR. SILBERT: Turning to another area. What is
10 the procedure, if there is any either written or oral of
11 your agency with respect to interviews of witnesses when
12 the witness is an agent or employee of an organization
13 and either one of two situations applies. The
14 organization's attorney appears at the scheduled time for
15 your interview with the employee or the employee requests
16 the presence of an attorney out here without any advice
17 and that attorney happens to be the organization's
18 attorney and you are focusing your investigation on that
19 organization? What procedures do you follow and are they
20 written or oral?

21 WITNESS TRUXELL: They are oral because they
22 are handled on a case by case basis. I am not sure that
23 you can have any definitive written guidance in an area
24 such as that. It is far too complex.

25 Generally speaking, we do not look forward to

WITNESS TRUXELL

1 counsel for a contract or being present when we are
2 talking to a witness and generally speaking our reasons
3 for that is that we feel his presence could be restricted
4 in terms of the investigation provided.

5 We would enter the interview if we felt that it
6 was advantageous to the investigation. If we did
7 not we probably would not. That is up to a field
8 supervisor to ascertain.

9 MR. SILBERT: When you say advantageous, is
10 that based primarily on need or urgency or are there
11 other facts?

12 WITNESS TRUXELL: There may be other factors
13 but is that witness so important to us and that is what
14 happens most frequently, that we have to undertake under
15 those circumstances and then really it is when the
16 witnesses insist on it. If the company is insisting on
17 us, we'll probably ignore that.

18 MR. SILBERT: I am sorry, when you say the
19 company--

20 WITNESS TRUXELL: If the company insists.

21 MR. SILBERT: On being present?

22 WITNESS TRUXELL: Yes, we'll ask the witness
23 for an interview and we will do that, ask the witness to
24 interview them off company property.

25 MR. SILBERT: Let me ask you. What has been

WITNESS TRUXELL

1 your experience -- I assume you have had experience where
2 the company counsel has at least purported to insist on
3 want to be present at the interview of it's employees.

4 WITNESS TRUXELL: When we resist, they
5 generally withdraw.

6 MR. SILBERT: Have you had experiences in which
7 employees have said to you in the presence of the company
8 counsel that they don't want the company counsel
9 present?

10 WITNESS TRUXELL: No. None that I am aware
11 of.

12 MR. SILBERT: What would be the circumstances
13 there where you would attempt to interview the employee
14 off company grounds or, now, business grounds? How would
15 that come about? And I am assuming where you have either
16 received some kind of advance notice from company counsel
17 for example that we are aware of the investigation and we
18 respectfully wish to be present.

19 WITNESS TRUXELL: If I may answer it this way.
20 Generally speaking that's what happens. Counsel becomes
21 aware, sometimes from us that we are going to interview a
22 certain individual and they may express an interest. We
23 then generally will go to that witness to ask what are
24 your preferences in this respect? If they resist,
25 certainly we are going to resist.

WITNESS TRUXELL

1 We generally don't view it favorably unless we
2 find some other particular reason for doing it and
3 certainly don't do it if we feel it is disadvantageous to
4 do it.

5 If we feel the counsel -- sometimes we know the
6 counsel, sometimes we do not, is going to interrupt an
7 interview in such a way that it's going to destroy the
8 reason for our being there. If he does interrupt it in
9 such a way that it does we will discontinue it.

10 MR. FITZGERALD: Do you ever run into or have
11 you ever run into a situation where a counsel who is
12 present, the company counsel then reports the fruits of
13 the interview or the intelligence gathered in the
14 interview back to his corporate master?

15 WITNESS TRUXELL: Yes, that's his job. That's
16 one of our concerns. That's why he's there, that's why
17 he wants to be there.

18 MR. RUEBHAUSEN: I will propose a case. It's
19 individual acts of an employee that is the target,
20 individual Y is your witness, the company is not the
21 target, the employer is not the target. Do you
22 distinguish in that case in the request of the company
23 that it's counsel be present?

24 WITNESS TRUXELL: The company has no position
25 in that particular case.

WITNESS TRUXELL

1 MR. RUEBHAUSEN: The employer in both cases?

2 WITNESS TRUXELL: What kind of crime are we
3 talking about, robbery or burglary?

4 MR. RUEBHAUSEN: Sabotage of a plant and the
5 information you have at the outset of your inquiry is
6 that it's employee X that is the target, that the company
7 is not the target and employee Y is your witness. He's
8 the body that works closely next to employee X.

9 WITNESS TRUXELL: As I say each case is
10 reviewed on a case-by-case basis. If we did not feel any
11 particular disadvantage to that or we felt there was an
12 advantage to it we might do it.

13 MR. RUEBHAUSEN: Might do what?

14 WITNESS TRUXELL: Might allow counsel to be
15 present. Might. But I think I, as a field supervisor,
16 would want more facts before I decided yeh or nae. I am
17 inclined negatively. Personally I am inclined negatively
18 in that situation.

19 MR. SPRITZER: Really what you are saying is
20 you don't want company lawyers present but in some cases
21 you might take it if you don't feel you can do any
22 better?

23 WITNESS TRUXELL: That's essentially what
24 happens. Yes, exactly what happens.

25 MR. RUEBHAUSEN: Have you ever considered to

WITNESS TRUXELL

1 pay for independent counsel for the witness?

2 WITNESS TRUXELL: No.

3 I can hear the budgeteers.

4 MR. RUEBHAUSEN: Public defenders are not
5 unknown.

6 WITNESS TRUXELL: Having spent some time with
7 the budgeteers, I would rest on that.

8 MR. SILBERT: What policies or procedures do
9 you have with respect to tape recordings of interviews
10 that are conducted by you?

11 WITNESS TRUXELL: Very little is done anymore.
12 As you're probably aware, maybe ten years ago most
13 investigative agencies taped everything. We tape very,
14 very little, a minimal number.

15 It is done in our behest and with the
16 concurrence of the individual. If the individual were to
17 ask to tape it we would then make a decision as to
18 whether or not we wanted to do that. We might or might
19 not. More often would than would not, I would think.
20 We'd have to find some particular disadvantage not to.
21 We would not allow the individual to tape it. If it's
22 going to be taped we are going to tape it.

23 MR. SILBERT: If the individual requested and
24 you decide to tape, would you make it clear at the outset
25 that the person would have access to a copy of the tape?

WITNESS TRUXELL

1 WITNESS TRUXELL: They of course can have a
2 copy -- under law they can have a copy of that tape at
3 the time that the investigation is concluded.

4 Generally speaking we will provide a copy of
5 the tape if they ask. We have not indicated that that is
6 available, but if they ask, yes, we will generally do
7 that.

8 MR. RUEBHAUSEN: But you would not allow them
9 to make their own tape?

10 WITNESS TRUXELL: No, they wanted tape and we
11 agree, we will tape it.

12 MR. RUEBHAUSEN: Suppose they wanted to take
13 their own tape as well?

14 WITNESS TRUXELL: Individual basis.

15 Generally--

16 MR. RUEBHAUSEN: Sometimes the tapes have 18
17 minute gaps.

18 WITNESS TRUXELL: None of ours have been found
19 to have 18 minute gaps.

20 MR. RUEBHAUSEN: Do you really preclude them
21 from taping on their own?

22 WITNESS TRUXELL: We do for a variety of
23 reasons. We think it is better. We don't want two tape
24 recording machines. That is a distraction in the room.
25 Just having a machine on is a distraction, I think as

WITNESS TRUXELL

1 some of you know, you put two machines in there because
2 if they're taping, we're taping. I can tell you that.

3 We have had no problem in that regard. It's a
4 non-problem so I don't think we have to address it.

5 MR. SCOTT: And you would routinely make a copy
6 of the tape available?

7 WITNESS TRUXELL: Not routinely. They would
8 have to ask for it.

9 MR. SCOTT: But in a situation where the
10 witness asks that it is recorded you would record it and
11 you would routinely give them a copy?

12 WITNESS TRUXELL: Yes.

13 MR. FITZGERALD: Why do you not like taping?
14 Why have you moved away from it?

15 WITNESS TRUXELL: In this panel of attorneys.
16 Generally because in court they provide more
17 smoke than substance. The substance is there but the
18 defense counsel is over at the smoke rather than at --
19 that's very candid.

20 We found it increasingly disadvantageous.

21 MR. SPRITZER: You often, I suppose then when
22 you don't make tape recordings do attempt to get a
23 written statement at the conclusion of the interview?

24 WITNESS TRUXELL: Yes, we still get written
25 statements.

WITNESS TRUXELL

1 MR. RUEBHAUSEN: Let me ask you there. If you
2 get a written statement, no counsel has been present --

3 WITNESS TRUXELL: We're talking from a
4 witness.

5 MR. RUEBHAUSEN: Yes, from a witness, not a
6 suspect but you consider the testimony so important you
7 want a written statement under oath?

8 WITNESS TRUXELL: Under oath.

9 MR. RUEBHAUSEN: That does not arise to the
10 level of gravity that you think the witness should be
11 told that the witness has a right to counsel?

12 WITNESS TRUXELL: No, I do not.

13 MR. SILBERT: Anybody else? Any other further
14 questions?

15 MR. RUEBHAUSEN: I have one that would be
16 helpful to me, it's probably kindergarten, but in doing
17 an investigation and again let us assume that there is a
18 suspect that we have in mind at the outset. That's not
19 always the case, but a suspect at the outset.

20 Is there any standard of practice as to whether
21 you interview the suspect first or whether you interview
22 the suspect last?

23 WITNESS TRUXELL: The general rule, I will
24 speak only for our agency. If you conduct the
25 investigation before you interrogate the suspect, you

WITNESS TRUXELL

1 have the basis for the suspicion and development for all
2 your facts then you interview your individual.

3 MR. RUEBHAUSEN: What is the reason for that
4 general rule?

5 WITNESS TRUXELL: I think you can much more
6 intelligently talk to the individual who's suspected of
7 the offense. You have the advantage of information and
8 intelligence and fact.

9 MR. RUEBHAUSEN: Does it also bear on the
10 question of whether or not you want to alert the suspect
11 to what is going on?

12 WITNESS TRUXELL: There are times when that is
13 the case but that is not always the case because in many
14 criminal cases he or she knows that she is suspected or
15 he is suspected.

16 There are other instances when you are trying
17 to, for all kinds of reasons, destruction of evidence,
18 trying to prevent that individual from finding until the
19 last minute that they are a suspect of an offense but
20 generally speaking you conduct the investigation.

21 MR. RUEBHAUSEN: Let me ask another question.
22 Again, individual A is the suspect that has been
23 identified. Individual Y is the friend, neighbor,
24 brother, whatever. Individual Y says I want a lawyer and
25 he says my friend, individual X has a lawyer. And I'd

WITNESS TRUXELL

1 like his lawyer to be my lawyer. Would you allow that
2 lawyer to represent him?

3 WITNESS TRUXELL: We would not take a position
4 on who that individual selects as counsel.

5 MR. RUEBHAUSEN: You would not even though the
6 lawyer is counsel for the suspect?

7 WITNESS TRUXELL: I don't believe that,
8 depending on all the circumstances, that that lawyer, he
9 might find a conflict of interest, but at least I think
10 that witness has the right to go to the lawyer of his
11 choice and then be told I cannot take that case for any
12 particular reason.

13 MR. RUEBHAUSEN: But then if you follow that,
14 if the individual chose as the lawyer of his choice is
15 company counsel then you have --

16 WITNESS TRUXELL: Then have you a potential
17 conflict.

18 MR. RUEBHAUSEN: I just posed what I thought
19 was a conflict too.

20 WITNESS TRUXELL: That's a conflict of the
21 lawyer, not of the case.

22 MR. RUEBHAUSEN: I think it's a conflict of the
23 case. If you tell individual Y, not the suspect, the
24 witness, the questions that you're going to ask and the
25 lawyer for individual X, the suspect is present, that

WITNESS TRUXELL

1 could compromise the case.

2 WITNESS TRUXELL: But I am not going to take a
3 position on that. Now I may not further interview the
4 person because they will be gathering intelligence for
5 the defense counsel. I can't say you can't have that
6 lawyer, I have no right. I may not be very happy about
7 it but I don't think I have a right to say you can't
8 seek that person as counsel.

9 MR. SPRITZER: Essentially the only thing you
10 can do is decide whether you want to go on with the
11 interview?

12 WITNESS TRUXELL: That's exactly right. I
13 don't believe I have a right to say that.

14 MR. SILBERT: Any further questions?
15 We're very appreciative.

16 WITNESS TRUXELL: My pleasure.

17 (WITNESS EXCUSED.)

18 MR. SILBERT: We're going to resume now. Mr.
19 Bruh has arrived and just for the record you will
20 identify yourself by your name and position, sir?

21 WITNESS BRUH: Yes, my name is Bryant M. Bruh,
22 B-r-u-h, I am the Assistant Inspector General for
23 Investigations in the Department of Defense, and I am
24 also the Director of Defense Criminal Investigative
25 Agency, also in the Department of Defense.

WITNESS BRUH

1 MR. SILBERT: How long have you been in that
2 position, sir?

3 WITNESS BRUH: Since December of 1981.

4 MR. SILBERT: Can you briefly summarize what
5 your prior experience was?

6 WITNESS BRUH: Yes, I was the Assistant
7 Inspector General for Investigations and also the Acting
8 Inspector General for the General Services Administration
9 over a period of 18 months prior to that. And prior to
10 that I spent my career in law enforcement with the
11 Criminal Investigation Division of Internal Revenue
12 Service where my highest position was Chief, Criminal
13 Investigation Division, Boston.

14 MR. SILBERT: We certainly very much appreciate
15 your willingness to appear before this committee and give
16 us the benefit of your views.

17 Have you had an opportunity to review the
18 questions that have been posed by the nuclear regulator
19 Commission, questions posed to this Advisory Committee
20 for its views with respect to those questions?

21 WITNESS BRUH: There are about five main
22 questions, I believe.

23 MR. SILBERT: Yes that's correct. Those
24 questions of course relate primarily to advice of -- what
25 advice, if any should be given to witnesses being

WITNESS BRUH

1 questioned or interviewed by the agency, the presence of
2 company counsel, tape recording and confidentiality.

3 Do you have any overall views with respect to
4 those questions and what you would view to be the
5 appropriate responses to them?

6 WITNESS BRUH: Yes. With regard to the advice
7 of rights, I do not believe it appropriate to advise the
8 witness of his rights.

9 We follow essentially FBI or Department of
10 Justice guidelines on it.

11 We do advise people if they're in custody. We
12 advise them when they become the subject of an
13 investigation or at times when it seems to be that they
14 may be in custody, may have the appearance of it. But
15 typically in a fraud investigation for example where we
16 don't know for a fact that fraud has even been conducted,
17 we do not advise people of their rights.

18 MR. SILBERT: Turning to your responsibilities
19 as part of the Inspector General's Office whose overall
20 mandate is to investigate for fraud, waste and abuse and
21 that of course may be civil as well as potentially
22 criminal, is that correct?

23 WITNESS BRUH: That's correct.

24 MR. SILBERT: Now with respect to those
25 investigations there are certainly at least, in your mind

WITNESS BRUH

1 have not turned into any potentially criminal
2 investigation the procedure you follow with respect to
3 all witnesses is not to advise them of a right to
4 counsel?

5 WITNESS BRUH: That's correct.

6 MR. SILBERT: When you approach a witness to be
7 interviewed, what is your usual approach? What
8 information is conveyed to that witness?

9 WITNESS BRUH: There are -- I can think of a
10 couple of exceptions but generally we identify ourselves,
11 we show our credentials are, credential is our badge
12 which is on our credentials. We advise them of the
13 nature of the investigation, sometimes who we're
14 investigating. In fact most frequently who and what
15 issue we're investigating and why we came to that
16 individual.

17 There are times, however that we do not go into
18 that detail. In fact, we think that the investigation
19 would be compromised by doing that.

20 MR. SILBERT: By the detail, are you referring
21 specifically to the detail of who might be the subject of
22 the interview or why particularly you're approaching that
23 individual, approaching that individual to be questioned?

24 MR. SPRITZER: Do you advise or convey, if not
25 by express advice that the appearance by the witness will

WITNESS BRUH

1 be voluntary?

2 WITNESS BRUH: No, we do not say -- we do not
3 up front say to a person that it's voluntary on your
4 behalf to talk to us. We go there, we say it's an
5 official investigation, we'd like your cooperation and
6 we start the questioning.

7 MR. SILBERT: Is that same approach, that same
8 statement made to employees of your agency and non-
9 employees alike? Is the same approach utilized
10 regardless of whether or not the person you're going to
11 be interviewing is an employee of your agency??

12 WITNESS BRUH: Yes.

13 MR. SILBERT: From your experience do you have
14 any sense of what impact there would be in the
15 performance of your duties in the Inspector General's
16 Office or in your other responsibilities -- well, let's
17 talk about the Inspector General, non-criminal.

18 If there were to be conveyed -- stated to a
19 witness that they did have a right to counsel?

20 WITNESS BRUH: I think on many occasions you
21 would not be doing your job which is really to resolve
22 whatever the issue is you would put an unnecessary chill
23 over the conversation. You would indicate to an
24 individual something that you don't wish to indicate
25 which is that that person might be under investigation

WITNESS BRUH

1 when they're not.

2 It's a frightening enough experience effect to
3 use that the federal agent for any individual who for the
4 first time in their life might be approached and to say
5 when it's not a criminal investigation or clearly not in
6 your mind to say you have a right to a lawyer or any
7 other kind of such statement I think would chill the
8 atmosphere and unnecessarily worry them and not
9 accomplish what you're there for. I don't think it's in
10 the best interest of either the witness or the
11 government.

12 MR. SILBERT: When you say that it might have a
13 chilling effect, is there any way that you can think of
14 that that advice could be phrased so as to relieve the
15 witness of any anxiety such as advising the person that
16 this is advice--that is the advice to counsel--and
17 something that we give routinely to all persons and it is
18 in no way intended to convey to you any sense that you
19 have done anything wrong or that you are under
20 investigation. What would be your reaction as an
21 experienced investigator with the background that you
22 have had on how -- advice of that nature, not necessarily
23 in those precise words, but of that nature would be
24 received on the average by the particular witness you
25 would interview?

WITNESS BRUH

1 WITNESS BRUH: I think undoubtedly it would
2 ease the tension or chill. I still think it would have a
3 negative effect and I don't even understand why it's
4 necessary. I just don't understand why that position
5 should be taken. I think having a conversation with
6 somebody, you're trying to get information on a matter
7 which you said is not criminal and I just don't
8 understand the purpose of it.

9 MR. SILBERT: I assume that sometimes in your
10 investigation you probably come across people who may not
11 have understood or understand the full implications of
12 actions that they have undertaken themselves. For
13 example, in the criminal area even though you're not
14 necessarily investigating something criminal the concepts
15 of conspiracy and aiding and abetting stretch pretty far
16 and the person might have no sense of that and therefore
17 not have any concern, whereas, truth in fact they might
18 be well advised if they understood to talk to a lawyer
19 before they responded to your questions.

20 That may be at least part of the reasoning why
21 some people feel that people ought to know what their
22 rights are.

23 WITNESS BRUH: I stand pat.

24 MR. SPRITZER: What about the situation where
25 the person you're interviewing is not merely a witness

WITNESS BRUH

1 but somebody who is either an actual suspect of
2 wrongdoings or a potential suspect of wrongdoings? Do you
3 differ in your approach in that situation?

4 WITNESS BRUH: An actual suspect where we have
5 some evidence and we have narrowed the range of who
6 the likely targets are we would advise them of their
7 rights to include the right to an attorney.

8 MR. SPRITZER: Even though the setting is
9 non-custodial?

10 WITNESS BRUH: If in fact we have evidence that
11 indicates that we narrowed it down to one or two people
12 or maybe that one person and considerable evidence, I
13 would say, a fair amount of evidence, we would advise him
14 of his rights. If he's just one of several people or we
15 don't even know if a crime has been committed yet as is
16 the case frequently in fraud investigations because you
17 need to find out who advised them or what advice and what
18 are all the facts so we would not advise them.

19 MR. SPRITZER: So you make your determination I
20 would take it on the basis of how firm is our knowledge
21 of the person's criminal involvement?

22 WITNESS BRUH: As personally if it was in my
23 mind that I believe this person may have committed a
24 crime I would advise them.

25 MR. SPRITZER: Is this a matter of written or

WITNESS BRUH

1 established department policy or is it a matter that the
2 individual investigator decides according to his own
3 sense of the proprieties?

4 WITNESS BRUH: No, it's a departmental policy.
5 We're a new office, relatively new office, we're still
6 ironing out some of the statements but that essentially
7 is the policy.

8 MR. SPRITZER: As you put it the policy leaves
9 you a great deal of discretion?

10 WITNESS BRUH: Yes.

11 MR. SPRITZER: You decide for yourself how
12 likely you think it is this person is involved and if
13 he's one of three or four possible people involved you
14 suggested you might not advise them but if you narrowed
15 it to one or two you probably would. That suggests a
16 good deal of discretion?

17 WITNESS BRUH: I think it is a good deal of
18 discretion and I think if we narrow it to three or four
19 and if a crime has been actually committed or we believe
20 a crime has been committed. We might narrow it to three
21 or four and isolate in a fraud investigation right down
22 to the literal person we interview.

23 MR. SCOTT: Mr. Bruh do you have a policy of
24 addressing an issue of a witness who on his or her own
25 initiation asking for counsel to be present?

WITNESS BRUH

1 WITNESS BRUH: Yes.

2 MR. SCOTT: How do you handle that?

3 WITNESS BRUH: If somebody wants a counsel
4 present we have no objection to it. They can have
5 whoever they want present.

6 MR. SILBERT: Do you delay the investigation in
7 order for them to obtain counsel? I don't mean the
8 investigation. I mean the questioning of that witness?

9 WITNESS BRUH: The questioning of the witness?
10 I guess it depends on how the interview is
11 going at the time. If in response to our questions the
12 person was clearly indicating some kind of involvement in
13 this kind of issue we would stop immediately. We would
14 ask the person, do you mind, that kind of
15 conversation. If they said, no, we would stop. We would
16 not continue.

17 MR. SCOTT: Let me ask you this.

18 Do requests for counsel, do they generally come
19 at the outset of the investigation or the questioning or
20 in process at some point? I mean does the witness say
21 typically that we're going into areas I didn't anticipate
22 I think I ought to get a lawyer or when you get these
23 requests are they generally at the threshold of the
24 questioning?

25 WITNESS BRUH: I would say generally my

WITNESS BRUH

1 experience is that most people do not ask for lawyers,
2 most witnesses do not. Sometimes it could at the
3 beginning stage but I don't know if there is a typical
4 time.

5 MR. SCOTT: Your policy is to accommodate that
6 request when it's made?

7 WITNESS BRUH: That's correct.

8 MR. SILBERT: Is that policy reduced to writing
9 or any of other policies --

10 WITNESS BRUH: No.

11 MR. SILBERT: -- or any other policies about
12 which you have been talking, are they reduced to writing?

13 WITNESS BRUH: The policy with regard to if a
14 witness requests an attorney I don't believe is reduced
15 to writing.

16 MR. SCOTT: Would that policy of accommodation
17 extend to the request for any counsel?

18 WITNESS BRUH: No.

19 MR. SCOTT: The specific focus of our --

20 WITNESS BRUH: Let me just try to clarify one
21 thing.

22 If a witness says I would like a lawyer present
23 we would respond, I would think that most agents would
24 respond, why do you need an attorney? We would ask them
25 back a question virtually if in fact we're confused in

WITNESS BRUH

1 our own mind why he sees a need to have a lawyer when we
2 see no involvement in this part of what we're there for.
3 So we would try to keep the process moving along in the
4 interests of both the investigation and the person so he
5 doesn't incur expense or have a concern that is not
6 needed.

7 MR. SCOTT: If the person then in abundance of
8 caution said I just would rather have somebody with them
9 more often than not you would accommodate them?

10 WITNESS BRUH: Yes.

11 MR. SCOTT: One of the things we have been
12 looking at is the question of the use of organizational
13 counsel.

14 In other words, you may be talking to somebody,
15 a contractor of some sort, and the request for counsel
16 involves a request for company counsel, contractor's
17 counsel.

18 Would that have any impact on your general
19 policy of accommodation?

20 WITNESS BRUH: First of all, I don't think I
21 could stop somebody from who he selects as an attorney.
22 I can certainly say to the lawyer that you may be in a
23 possible conflict of interest situation.

24 I have gone as far as telling the witness
25 that. Where I have said that the witness may end up

WITNESS BRUH

1 Jeopardizing himself and I have generally talked to the
2 attorney first and even said it to the witness.

3 MR. SCOTT: When you say attorney, you have
4 reference to company counsel?

5 WITNESS BRUH: It could be company counsel, it
6 could be outside counsel who's representing, let's say,
7 the contractor who is under investigation and we try to
8 interview a witness and he shows up with either company
9 counsel or outside counsel, the same one.

10 MR. SCOTT: Would there ever be a situation
11 where you would refuse to go forward if there was an
12 insistence on company counsel?

13 WITNESS BRUH: I guess it depends on what we
14 have to ask the person.

15 If we're concerned -- when you ask a question,
16 you necessarily disclose information. If the timing
17 wasn't right and we did not expect the appearance of
18 truly independent, in our opinion, attorney we may cancel
19 the interview.

20 MR. SCOTT: Let me ask you this.

21 As I understand it, where you're dealing with
22 government employees that there is some obligation in
23 civil service regulations and rules for them to
24 participate in these sorts of inquiries, is there
25 routinely something in the contracts that the defense

WITNESS BRUH

1 department would have with non-governmental entities that
2 requires them to make employees available, anything like
3 that? Is there a similar compulsion?

4 WITNESS BRUH: Not that I am aware of. I will
5 tell you that when a contractor engages into a contract
6 with the Department of Defense or even solicits a
7 contract or vice versa there are certain agreements to
8 include access to his records.

9 And also inspecting what he produces.

10 MR. SILBERT: Within the Inspector General
11 Office, your subpoena power is limited to the records and
12 all witness interviews are voluntary?

13 WITNESS BRUH: That's correct.

14 MR. SILBERT: You don't have the opportunity of
15 going to the prosecutor of compelling a witness to appear
16 for your satisfaction?

17 WITNESS BRUH: That's true. Most of our
18 investigations, well over 90 percent of them are
19 criminal in nature and most of them, if it seems serious
20 we do go to grand jury and we have a lot of grand jury
21 investigations, so we do use the subpoena power of the
22 grand jury.

23 MR. SILBERT: I understand that but I am
24 talking now where the agency itself is conducting the
25 investigation. If you want to be able to talk to the

WITNESS BRUH

1 witness, it's always going to be on a voluntary basis
2 other than ultimately going to the US Attorney's Office
3 or somewhere else?

4 WITNESS BRUH: That's correct.

5 MR. FITZGERALD: If you could keep out company
6 institutional counsel from your interviews do you think
7 that that's a good idea? Would that be desirous from an
8 investigator standpoint?

9 WITNESS BRUH: I think it's desirous in
10 interest also from the individual that we're interviewing
11 standpoint.

12 MR. SCOTT: Can you explain that? You
13 indicated that earlier that there was a mutuality of
14 interest here.

15 WITNESS BRUH: Let's take a witness that is
16 minor in value in a matter we're investigating, criminal
17 in nature and could be prosecuted for their involvement.
18 Let's say helping a bookkeeper who is ordered by his
19 superior or her superior to falsify records which
20 ultimately get submitted to the government. We try to
21 interview the bookkeeper, we try to gain the cooperation
22 of the bookkeeper, clearly not in mind to prosecute the
23 individual. Then they come in with counsel who is really
24 being paid by the individual corporation who are under
25 investigation and gives them advice that it's not, I

WITNESS BRUH

1 think, in the best interest of that witness which is
2 cooperate with the government, don't lie to government
3 agents, don't hide documents. Say what instructions you
4 got and why you made these entries and if in fact the
5 counsel does not advise that person on many occasions
6 that person may end up being prosecuted.

7 MR. SILBERT: In the 10 percent of your cases
8 that don't have criminal -- let's say you are talking
9 about waste and certain areas of abuse, are there ever
10 any situations that you're aware of where advise of
11 counsel will be given? In other words where you don't
12 suspect criminal involvement but the person may be
13 involved head over heels in waste or potential abuse but
14 abuse does not appear to have criminal aspects to it,
15 what would be your response or approach then with respect
16 to witnesses or suspects?

17 WITNESS BRUH: I just can't think of a reason
18 why to advise someone to have an attorney.

19 MR. RUEBHAUSEN: Do you reduce witnesses'
20 testimony to written statements under oath, signed by the
21 witness?

22 WITNESS BRUH: Not every witness. Most people
23 we interview are not under oath and therefore what I
24 would call memorandum of interview or conference is
25 written which is a document prepared by a special agent

WITNESS BRUH

1 and contains essentially the basic conversation.

2 MR. RUEBHAUSEN: But there are situations where
3 you get the witness to sign a document under oath?

4 WITNESS BRUH: Yes, we do.

5 MR. RUEBHAUSEN: In that case, would you feel
6 differently about saying that the witness was entitled to
7 advice of counsel?

8 WITNESS BRUH: No, not a witness.

9 MR. SILBERT: Is your agency involved at all in
10 giving grants of confidentiality of witnesses to
11 encourage them to come forward with the idea--
12 understanding that their identity will not be disclosed?

13 WITNESS BRUH: I read what was sent to me in
14 advance and I guess I have a difficulty in understanding
15 what a grant of confidentiality is. In the Attorney's
16 General Office there was a division like this. We
17 routinely treat all witnesses who come forward with
18 confidentiality. To us that means that's a different
19 status and I will explain if you want to hear. That's an
20 informant kind of status but all witnesses are treated as
21 confidential until we ever have to use them and disclose
22 their identity such as at trial or some type of hearing.

23 MR. RUEBHAUSEN: The word confidential
24 appeared throughout here and it is a slippery word
25 because it means many different things. It could mean

WITNESS BRUH

1 that the fact that the witness ever testified will never
2 be revealed and "never" itself is a slippery word.

3 It could mean that you're assuring that even
4 though the testimony is revealed the witnesses giving
5 that testimony will not. Namely their will be anonymity
6 or it could mean that the witness is being given immunity
7 or there could be exceptions.

8 You have indicated exceptions just in your
9 testimony that when you come to trial all bets are off.
10 Exceptions are obvious. The first exception is that you
11 report to your superiors so it's not confidential in that
12 sense. You shall report to your superiors.

13 You may also report to other agencies whose
14 confidentiality I will know. Or you may respond to a
15 subpoena from another agency or a private subpoena for
16 information that you have and if you yield it up, it's
17 not confidential. And if you go to trial and you produce
18 the affidavit, the written memorandum, the summary,
19 whatever it is, it's not confidential. So I am very
20 confused in reading the testimony as for what is meant
21 when the word confidentiality is used and I'd like you to
22 elaborate on that a little bit more if you would.

23 WITNESS BRUH: As I indicated before we treat
24 every witness as confidential and to us the definition
25 of confidential means that we just don't hand it out to

WITNESS BRUH

1 anybody and everybody or are loose with the information.
2 We protect it and only disclose it to those individuals
3 that we're required to do under Freedom of Information
4 Act. At a trial, at some sort of official hearing or in
5 cooperation with a legitimate agency request, another
6 agency.

7 Where we have an informant situation even there
8 we're careful. An informant is an individual who is not
9 expected to testify. A witness is someone we expect to
10 testify if we have to use that person. So with an
11 informant we generally say to them that it will be kept
12 confidential. We don't believe that you will need to be
13 a witness in this case and generally advise the person.
14 Usually they're fairly sophisticated that in fact the
15 Court can order you differently although it's never
16 happened in my career.

17 MR. RUEBHAUSEN: Basically what is confidential
18 is the name of the witness. The information may not be
19 confidential.

20 WITNESS BRUH: The name of the witness would be
21 confidential, the information may not be confidential but
22 the name or any other information may or may not be
23 confidential. You just can't have all witnesses and no
24 defendants or all informants and no witnesses so I advise
25 people not to tell everybody that they won't have to

WITNESS BRUH

1 testify.

2 MR. SILBERT: This question may go back to some
3 of your days in the revenue service.

4 The primary responsibilities of the Office of
5 Investigation of the NRC are administrative and civil in
6 nature and it is always the potential as it is with any
7 revenue agent that their investigation may disclose or
8 turn up something which may appear to have criminal
9 overtones.

10 From your experience in the revenue service,
11 you were a special agent there, would a reference with
12 the revenue agents themselves while they were performing
13 their civil administrative responsibilities ever require
14 by policy or otherwise to give advice of rights with
15 respect to counsel, even to taxpayers?

16 WITNESS BRUH: The answer is no, and the answer
17 is even by policy written directives that no one other
18 than the special agent will advise someone of their
19 constitutional rights.

20 MR. SPRITZER: Special agents, however, are
21 under instructions to do so?

22 WITNESS BRUH: At certain times. An Internal
23 Revenue Agent would never advise nor are they trained to
24 advise them of their constitutional rights.

25 MR. SILBERT: What are your policies or

WITNESS BRUH

1 Procedures with respect to requests by witnesses to tape
2 record an interview?

3 WITNESS BRUH: Generally, I am against them.

4 If it was important to me -- an investigator's job is to
5 get the information. And if it was important to get that
6 information I would allow it only with the caveat that I
7 record it at the same time. I would not allow the
8 witness to record a conversation that I did not record at
9 the same time.

10 MR. SILBERT: So what you would have would be
11 two recorders?

12 WITNESS BRUH: Two recorders or recently I had
13 a situation involving myself on a very sensitive matter
14 where it was a surprise to me. I was conducting the
15 interview myself. The witness who had no criminal
16 involvement whatsoever and was really a friendly witness,
17 if I can use the term, brought his own recorder and I had
18 no capability of getting a machine. I said, if you don't
19 mind, sir, what I'd like to do is keep the tape, make a
20 copy of it and send it to you and he said fine.

21 MR. SILBERT: Are there any circumstances where
22 you would be inclined to refuse either the witness to
23 tape or the witness to keep it, to have a copy of the
24 tape?

25 WITNESS BRUH: Well, I would refuse for the

WITNESS BRUH

1 witness to tape it if I didn't have the capability of
2 taping it.

3 MR. SILBERT: And if the witness insisted that
4 means the interview would simply not proceed?

5 WITNESS BRUH: That's right.

6 I am sure there are circumstances that I would
7 not want that conversation to be taped. Where I thought,
8 for example, that the witness was very close to the
9 subject of the investigation it's possible that I would
10 not want it to be taped.

11 MR. SILBERT: You indicated that your initial
12 response was that you were not inclined to favor tape
13 recording. What is the reason for that?

14 WITNESS BRUH: The tape could be easily altered
15 by someone.

16 MR. SILBERT: That's taping in a situation
17 where you don't have the capacity to tape yourself?

18 WITNESS BRUH: Yes, and that's why we would
19 want an exact duplicate.

20 MR. SILBERT: Is there anything else about the
21 tape recording process, apart from the problem of
22 alteration, but what about it's relationship to the
23 success of an interview or not so far as taping is
24 concerned, does that have any impact from your
25 experience?

WITNESS BRUH

1 WITNESS BRUH: I guess I would not like it
2 taped where agents were relatively inexperienced.

3 From the point of view that -- not that there
4 is something to hide but until you train them on how to
5 conduct an interview, I would not like them to
6 immediately be part of a situation where an interview is
7 going to be taped and hopefully they wouldn't be involved
8 in a complicated interview in the beginning.

9 MR. SILBERT: That's looking at it from the
10 agency point of view more from the success of an
11 interview?

12 WITNESS BRUH: Yes. I don't personally find
13 that a taped interview is any better evidence than a
14 special agent writing a memorandum as to what the
15 conversation was about.

16 In fact I will even go as far to say that
17 affidavits are better except where you want to use it to
18 impeach somebody.

19 MR. SILBERT: Have you had experience, just
20 from your own because you have now had the opportunity to
21 work in three different agencies the capacity where the
22 presence of institutional or company counsel where
23 employees of the company were being interviewed had a
24 negative effect on the information received by you as an
25 investigator?

WITNESS BRUH

1 WITNESS BRUH: On many occasions.

2 MR. SILBERT: Can you just describe to us how
3 that is operated, how that has occurred?

4 WITNESS BRUH: Well, most of my experience I
5 spent as I said pretty close to 15 years in criminal
6 investigation with the Internal Revenue Service and I
7 worked on many investigations to which included very
8 large cases, what they call their large cases as well as
9 organized crime and narcotics cases and I can tell you
10 when corporate counsel came in it had an inhibiting
11 effect most of the time.

12 I saw corporate counsel come in and interview
13 ten different witnesses I was trying to interview. As
14 well as the subject of the investigation. I felt that at
15 times when people were not candid they testified -- where
16 they did speak, they spoke against their own interests.
17 They didn't realize it at times but similar to the
18 bookkeeper situation as mentioned before.

19 MR. RUEBHAUSEN: What do you do about that?
20 Because it seems to me we're balancing fairness and
21 decency and observance of the rights of the witnesses
22 on the one hand and the public's desire that
23 investigations of fraud be pursued and you meet a
24 situation where it's obvious to you and any reasonable
25 person that the conduct of the investigation is being

WITNESS BRUH

1 Jeopardized, chilled, obstructed. The choices that I
2 have heard is you stop the inquiry which doesn't seem to
3 be carrying out the public interest or going further in
4 the inquiry, getting the witness into a position where
5 the witness gets into more trouble or perjures themselves
6 and you don't get the information. Now are there no
7 other alternatives?

8 WITNESS BRUH: Yes, there are other
9 alternatives. I mentioned counsel before and we don't
10 want the witness to perjure themselves. We want the
11 information. We want to know what happened.

12 As I think I indicated before we advise the
13 lawyer that he may be in a conflict of interest situation
14 in that he may not be looking out for the best interest
15 of his witness.

16 There are different reactions to that kind of
17 meaning. There are also at times or I have personally
18 said to a witness that he may want to consider who his
19 attorney is because he's also representing the other
20 party and at times I have gone to the United States
21 Attorney's and asked him to intervene in contacting the
22 lawyer.

23 MR. RUEBHAUSEN: Have you ever thought of
24 writing a note to the grievance committee in the
25 jurisdiction testify lawyer?

WITNESS BRUH

1 WITNESS BRUH: No, I am afraid I haven't.

2 MR: RUEBHAUSEN: Or eventually starting a suit
3 in the Court to disqualify the lawyer?

4 WITNESS BRUH: That's why I go to the United
5 States Attorney's office.

6 MR. SILBERT: Any other questions for our
7 witness?

8 MR. FITZGERALD: I would like to.

9 Going back to confidentiality. You indicated
10 that generally everybody is treated confidentially. Do
11 the people that you are talking to appreciate that fact?
12 Are they told about it at the time you conduct the
13 interview?

14 WITNESS BRUH: We don't start off by saying
15 this is going to be confidential. As a general policy
16 we do not do that. What we do as I said before we
17 identify ourselves, we show our credentials. We usually
18 explain in reasonable detail as to why we're there and if
19 we see a reluctance on the witness is not candid we
20 generally say something like this information is going to
21 be kept confidential and we may explain to them what
22 that means.

23 MR. FITZGERALD: So you do use it as a device
24 to elicit information or discussion?

25 WITNESS BRUH: Yes.

WITNESS BRUH

1 MR. FITZGERALD: Are your reports made public
2 as a routine matter or are they kept confidential or
3 private --

4 WITNESS BRUH: Our reports are kept
5 confidential as a routine matter.

6 MR. FITZGERALD: How about in a criminal matter
7 under the DCIS?

8 WITNESS BRUH: I was referring to a criminal
9 matter when I was saying that our reports were kept
10 confidential.

11 MR. FITZGERALD: Do you distinguish or
12 differentiate between the confidentiality accorded in the
13 criminal investigation and the civil investigation?

14 WITNESS BRUH: I would just like to clarify one
15 thing.

16 MR. FITZGERALD: Sure.

17 WITNESS BRUH: We generally do not do "a
18 straight waste" if I can use that kind term of
19 investigation because the inspector general has other
20 arms available to do those investigations and he has
21 auditors for example and inspectors who do that. So we
22 do all the criminal investigations and we do abuse type
23 of investigations where they're serious abuse.
24 Therefore, I would say that with very few exceptions all
25 our reports are confidential.

WITNESS BRUH

1 MR. RUEBHAUSEN: I have one.

2 MR. SILBERT: Sure.

3 MR. RUEBHAUSEN: You may have said this before
4 and I apologize if I missed it. But I have the
5 impression that most of the interviewees that you have
6 testified voluntarily and you don't go the subpoena
7 route?

8 WITNESS BRUH: That's correct.

9 MR. RUEBHAUSEN: I can understand that if you
10 came to me with your personality I'd been willing to
11 testify voluntarily but some investigators wouldn't.

12 My question relates to if they have a lawyer
13 present is there any decline in the voluntary interest?
14 Is there a higher percentage that once a lawyer is
15 present that say we wish a subpoena?

16 WITNESS BRUH: Certainly if the lawyer is
17 representing someone or something other than the person
18 you're dealing with.

19 If the lawyer is representing just that which
20 have the necessary I think it largely depends on the
21 sophistication of the lawyer. If he's not sophisticated
22 he will object to virtually every question that the
23 investigator asks or over-protect or think he is
24 protecting his client. Again, it isn't protecting
25 anybody. If he's a fairly sophisticated lawyer and knows

WITNESS BRUH

1 what's going on he generally will let the witness go
2 ahead and testify.

3 MR. RUEBHAUSEN: He has generally understood
4 that his witness is not a suspect also?

5 WITNESS BRUH: Yes.

6 MR. SILBERT: If that's all the questions,
7 thank you very much, Mr. Bruh.

8 (WITNESS EXCUSED.)

9 MR. SILBERT: Appreciate your willingness to
10 come forward today and give us the benefits of your views
11 and those of your agency.

12 For the benefit of all of us would you just
13 identify who you are by name and your agency which you
14 hold a position?

15 WITNESS HELTERHOFF: My name is Hal
16 Helterhoff, H E L T E R H O F F, and I am chief of the
17 white collar crime section of the criminal investigative
18 division and Mr. Rivale who was scheduled is the
19 assistant chief and I am one of his chiefs in the
20 division.

21 MR. SILBERT: This is of the Federal Bureau of
22 Investigation?

23 WITNESS HELTERHOFF: Of the Federal Bureau of
24 Investigation, yes.

25 MR. SILBERT: How long have you had your

WITNESS HELTERHOFF

1 present position?

2 WITNESS HELTERHOFF: Just over two years.

3 MR. SILBERT: Could you describe your previous
4 experience?

5 WITNESS HELTERHOFF: Yes, I entered as a
6 special agent in 1965 and was assigned to the Boston
7 office and our Omaha office in Lincoln, Nebraska, for two
8 years and Cleveland, Ohio, for five and a half years. I
9 came back to our Washington headquarters and went to New
10 Orleans as the assistant special agent and I returned to
11 my present position in September of '81.

12 MR. SILBERT: Have you had an opportunity, Mr.
13 Helterhoff to review the questions that have been posed
14 to this advisory committee by the Nuclear Regulatory
15 Commission on questions that relate to the interviews of
16 witnesses that are conducted by its Office of
17 Investigation?

18 WITNESS HELTERHOFF: Yes, I have.

19 MR. SILBERT: Prior to any specific questions
20 that any members of the committee may have, do you have
21 any initial reaction, yourself, or overall comments that
22 you might wish to make with respect to the appropriate
23 responses to those inquiries?

24 WITNESS HELTERHOFF: No, certainly they're all
25 very appropriate questions. I could tell you that the

WITNESS HELTERHOFF

1 FBI for the most part, of course, works criminal
2 investigations, so the limited part that we have in civil
3 investigations of course we have certain rules and I'd be
4 happy to discuss them with you.

5 MR. SILBERT: Could you do that in so far as
6 the rules of the civil investigations are and what your
7 policies and practices are?

8 WITNESS HELTERHOFF: Yes, as the FBI we work
9 criminal violations from bank robberies to kidnapping to
10 white collar crime investigations. Those are all
11 criminal. We have a very limited number of civil
12 investigations. This civil type investigation would be
13 like background investigations, those appointed by the
14 president for positions in government with where we do a
15 background investigation on our own employees we do a
16 background investigation or for some other agencies.

17 We have some limited civil jurisdiction in some
18 areas such as like antitrust or some areas like that.

19 We also have, like the Civil Rights Act of 1964
20 where the government can bring a suit, for example it
21 would be a civil action.

22 Now generally, our rules there are that the
23 advice of rights, going back to the Miranda Decision are
24 not required in a civil investigation.

25 I can jump into this confidentiality issue or I

WITNESS HELTERHOFF

1 don't want to get ahead.

2 MR. SILBERT: Let's talk just for a moment on
3 the advice of rights and the civil matters that can have
4 people violate certain rights of others, I gather,
5 whether it be antitrust or civil rights under this act of
6 1964. Where you want to talk to a person who may be
7 suspected of violating those rights, not criminal,
8 purely civil, what would be the practice or procedure or
9 rule, if you will, of the FBI with respect to advising
10 such a person of his or her right to counsel?

11 WITNESS HELTERHOFF: First of all for openers,
12 there is no rule or requirement to advise them of their
13 rights.

14 Now you could have some borderline situations,
15 perhaps. Like the Civil Rights Act of 1964, not to
16 confuse the issue, but there are certain criminal
17 provisions, so if you're getting into that and although
18 you're still civil but it might be leading toward some
19 criminal violation there could be a need to -- for the
20 advice of rights. However, that would only be in a
21 situation where the person is in custody, the person has
22 been under arrest already or that we intend to arrest
23 them at the conclusion of the interview.

24 MR. SILBERT: Those three situations, custody,
25 arrest or intent to arrest after the interview?

WITNESS HELTERHOFF

1 WITNESS HELTERHOFF: That's right. Or you
2 might throw in another one.

3 Wherever the individual's freedom is
4 restricted.

5 MR. SILBERT: That might be custody?

6 WITNESS HELTERHOFF: Yes, custody.

7 MR. RUEBHAUSEN: Could I interrupt?

8 WITNESS HELTERHOFF: Sure.

9 MR. RUEBHAUSEN: Suppose you were asking the
10 witness at the end of the interview to put their
11 testimony under oath or the beginning of the interview,
12 would that change?

13 WITNESS HELTERHOFF: No, we have limited to put
14 an individual under oath, one is misconduct of our own
15 employees or and the other is fraud against the
16 government or allegations of fraud against the
17 government.

18 MR. SPRITZER: You do, I suppose, frequently
19 reduce information to writing and get the witness's
20 signature without administering oath?

21 WITNESS HELTERHOFF: Yes.

22 MR. SILBERT: But the fact that you do that
23 would not have an impact on whether or not you would
24 advise a person of the right to counsel or other rights?

25 WITNESS HELTERHOFF: That's correct, we would

WITNESS HELTERHOFF

1 not.

2 MR. SILBERT: Now you were going to turn to the
3 area of confidentiality?

4 MR. SPRITZER: May I ask a further question?

5 MR. SILBERT: Oh, sure.

6 MR. SPRITZER: I understood you to say that you
7 don't go beyond what is required by the Miranda case.
8 That is, you don't give warnings and right to counsel in
9 non-custodial situations as a matter of something that's
10 prescribed by the agency.

11 In situations where a person may be getting
12 himself or herself involved in possibly criminal
13 violations do agents as a matter of practice even on an
14 occasional basis give advice even though there would be
15 no legal requirement that that be done?

16 WITNESS HELTERHOFF: Generally, no, although we
17 do have a rule that an agent on the street that any time
• 18 he thinks a person is in a situation where Miranda
19 warnings might be required he can do that as his option.
20 You know it could be like this scenario you just
21 suggested where it looks like we might arrest this person
22 after this interview then you might be required to bring
23 out your Miranda warnings. But generally no because
24 that's the purpose of our interview generally to get the
25 incriminating information.

WITNESS HELTERHOFF

1 MR. SCOTT: In the limited civil investigations
2 that are undertaken, I guess I would have in mind not
3 full field investigations, the background, but the
4 antitrust or civil rights inquiries, does it ever develop
5 that a witness would ask to have counsel present?

6 WITNESS HELTERHOFF: Sure.

7 MR. SCOTT: What is the practice of the Bureau
8 in that circumstance?

9 WITNESS HELTERHOFF: Your talking about civil
10 investigations?

11 Number one, they don't have a right to counsel
12 but we do it on a case by case basis. If you have a co-
13 operative witness who only wants to give you information
14 and the witness says the only way I am going to do it is
15 if my attorney can come in we'd have to evaluate it and
16 in most cases we would probably say, okay, come on in and
17 we'd conduct the interview. However if we were not
18 getting anywhere --

19 MR. SCOTT: I suppose they could insist and you
20 wouldn't have any ability to go forward with the
21 investigation or the questioning without the counsel
22 there in cases.

23 WITNESS HELTERHOFF: Yes.

24 MR. SCOTT: Does it ever develop in these
25 situations that the individual thinking perhaps that

WITNESS HELTERHOFF

1 somebody like an employee of a school board or school
2 district or an employee of a corporation that's involved
3 in an antitrust matter, do they ever ask for
4 institutional counsel like you have the school board's
5 lawyer there or the corporation's lawyer there, is that
6 something that creates any special difficulties?

7 WITNESS HELTERHOFF: We would evaluate again on
8 the basis of the request in the individual matter.

9 First of all like you're suggesting we're not
10 going to have a corporate attorney demand to be present
11 if the person that we're going to interview doesn't want
12 an attorney present. So what we would do is, are you
13 sure you want to interview that person and I want to be
14 present and we would say hold it, we are going to ask
15 that person and we would say do you mind this counsel
16 being present and they say, no, we want this counsel
17 present. Then we would in all likelihood or discontinue
18 with the interview but if during the interview the
19 attorney said stop, stop, stop, we might terminate the
20 interview.

21 It depends on how many witnesses are there.
22 Now if you have numerous witnesses, now we're not talking
23 about the subject of the investigation. If you have all
24 different witnesses who can get information than if we
25 can get the information from other witnesses and that

WITNESS HELTERHOFF

1 person is not helpful we might not interview them.

2 MR. SCOTT: Have you ever confronted the
3 situation where you would have an institutional counsel
4 who wishes to represent a number of different witnesses?
5 Does that create any special problem?

6 WITNESS HELTERHOFF: It could. It depends on
7 the situation.

8 Sometimes it's of benefit. Because say we have
9 numerous individuals to interview about an allegation and
10 you want to do it without perhaps publicity because you
11 want to protect that component because they're not guilty
12 at this stage, there's only an allegation and if we go to
13 the corporation you might have a very, very cooperative
14 corporate counsel who says, look, we want to get to the
15 bottom of this. Not only will I arrange the interviews,
16 I will make sure you get all the information, anything
17 you want immediately.

18 So at that time it might be very beneficial to
19 proceed that way. However we would still ask the
20 individual who we want to interview, do you want the
21 corporate counsel present or is this your counsel not
22 just the corporate counsel. You could have the other
23 scenario where the corporate counsel is demanding
24 things, will not permit the witnesses to be interviewed
25 or answer the right questions and there we might have to

WITNESS HELTERHOFF

1 say time out and regroup and there's different avenues we
2 could take then. For instance, interview the witness
3 away from their employment. We're here under Title 15 to
4 investigate this matter and they might say, oh, I am glad
5 you came here because I don't want the corporate counsel
6 to be present and, you know, here it is. So there are
7 different ways.

8 MR. SCOTT: It might be a conflict between the
9 interests of the individual and company?

10 WITNESS HELTERHOFF: There very well could be.

11 Of course we could also go up to the United
12 States Attorney's Office, point that out to the United
13 States Attorney who -- you know, I'm kind of setting in
14 both areas, this is kind of civil and criminal we're
15 talking about here but say the individuals will not talk,
16 will not have corporate counsel. Of course the United
17 States Attorney has the authority to issue subpoenas and
18 then they're in a grand jury situation and when they're
19 in the grand jury they don't have the right to counsel.

20 Of course in the grand jury when subpoenas
21 are issued there is more potential for publicity. If the
22 person again, we're not worried about publicity but we
23 have to walk the line, so to speak to protect the
24 innocent until they actually are found guilty or are
25 found at least there's sufficient evidence for a charge.

WITNESS HELTERHOFF

1 So many times your corporations say, well, oh, my gosh,
2 we didn't mean that, we don't want to go that far. Many
3 times those negotiations go to the United States
4 Attorney. The United States attorney might call the
5 corporate counsel and say, okay, do you want to do it at
6 the interview or do you want to start coming to grand
7 jury and they negotiate it out.

8 MR. SILBERT: Do you have any sense in your
9 experience as a field investigator and supervisor, of
10 course, to whether or not advising a non-suspect would
11 have of a right to counsel, not the Miranda warnings,
12 that anything you say might be held against you, but
13 simply advising them that having a right to counsel
14 present in the interview would have an inhibiting effect
15 on your ability or the investigator's ability to obtain
16 information? Do you have any feeling on that?

17 WITNESS HELTERHOFF: I don't really have any
18 firsthand information or thoughts on that.

19 It would hit me though that if you're going to
20 advise the witness of that right, you know, that witness
21 might say, hey, wait a minute, I must have other rights
22 here too. You know, he's trying to tell me all the
23 rights so you might not be eliciting all the information
24 that you could get.

25 MR. SILBERT: Have you had any experience,

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1 yourself, in which -- and this may overlap some in your
2 response to the prior question. -- where the simple
3 presence of an institutional counsel, not a counsel who's
4 interfering, you know, on verifying, but the mere
5 presence of institution counsel, company counsel, might
6 inhibit the candor of an employee in responding to your --
7 that is the investigator's questions?

8 WITNESS HELTERHOFF: Certainly, that's
9 certainly a possibility. The mere presence. It gets
10 difficult because you want to do the interview and the
11 person being interviewed, if he they demand a counsel to
12 be present, it's that person who wants it and their mere
13 presence might but you have to resolve the results of
14 that interview with the other evidence you have.

15 Maybe you'll never know but in a lot of
16 instances it kicks out or maybe you know that person
17 wasn't as candid as he or she could have been and
18 generally going back to the other investigations of
19 course we have the grand jury benefit of having the
20 person come before the grand jury and say we'd like to go
21 over this statement a little bit more that you made. In
22 some instances as I am sure you know from your own
23 experience is their presence at the grand jury and being
24 put under oath, they might say, okay, here is the story.

25 MR. SILBERT: Does the FBI have any written

WITNESS HELTERHOFF

1 Procedures or policies that pertain to the situation when
2 an agent is conducting an investigation of an entity
3 whether it's a corporation or a union or a partnership or
4 something of that nature and seeks to talk to employees,
5 agents, and counsel for the entity appears at the time of
6 the scheduled interview as to what procedures, if any to
7 be followed? Has that ever to your knowledge made
8 available public material such as for example the IRS
9 has. Does the FBI have any such material?

10 WITNESS HELTERHOFF: Not to that particular
11 point. Just along the lines of when Miranda is necessary
12 or when warnings are necessary, but I am not aware of
13 anything that would get into that.

14 MR. SILBERT: Just counsel for third party, you
15 are talking to a witness and the counsel also represents
16 another party appears for the interview. The FBI doesn't
17 to your knowledge have any written guidelines in that
18 specific situation?

19 WITNESS HELTERHOFF: That's right.

20 MR. SILBERT: So what you are telling us is the
21 response of the agents is going to be largely case by
22 case depending on the attitude of the corporation, of
23 the counsel, their sense of how the witness is
24 responding, whether he seems to be candid or not. A
25 whole variety of circumstances?

WITNESS HELTERHOFF

1 WITNESS HELTERHOFF: That's correct.

2 MR. SILBERT: Is that response left to the
3 discretion of the individual special agents or is that
4 something that he, special agent, he or she, is likely to
5 review with a supervisor for example?

6 WITNESS HELTERHOFF: That's correct they would
7 certainly discuss it with a group supervisor. If
8 necessary, it would go to the special agent involved.
9 Many times right there would consult with the United
10 States Attorney and evaluate the case. In some instances
11 it would come back to our FBI headquarters and we would
12 discuss it with the Department of Justice.

13 MR. SILBERT: What's your policy on taping of
14 interviews?

15 WITNESS HELTERHOFF: We do not tape interviews
16 in any great degree. Our position is that if an
17 individual demands that they want their interview taped
18 we have several conditions upon which we'll do it.
19 Number one we'll have the recorder in plain view so
20 there's no question that the individual witness knows
21 that it's going to be taped.

22 We make sure of course that the nature of the
23 interview is such that it's not forced because you're
24 going to approach later here that actually here at the
25 interview it's clear quality. Afterwards, we want to

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1 make sure that we have a chain of custody, we seal the
2 tape and we keep it just like evidence so that, of
3 course, the tape can't be altered and we do this in very
4 rare instances.

5 MR. SILBERT: If the witness says I will only
6 be interviewed if a tape recording is made and a copy is
7 made available to me after the conclusion of the
8 interview, what is the response of the Bureau to that
9 kind of request?

10 WITNESS HELTERHOFF: Well, again, we would have
11 to see how important the interview is. Such as who is
12 this person, why are they demanding this? If we have
13 what we consider a very hostile witness who is making all
14 these demands we may or may not do it. We, again, have
15 to take it on a case by case basis. We might at this
16 point say in our evaluation and the discussion with the
17 United States Attorney, well, fine, we'll just get a
18 subpoena and have have you come before the grand jury to
19 give your statement. It could get very out of control if
20 you keep taping all these interviews and we want to make
21 sure that we're fair and we get the correct interview but
22 of course it could be staged by an individual if these
23 controls are not there.

24 MR. SILBERT: You have covered all the
25 questions on confidentiality, the circumstances under

WITNESS HELTERHOFF

1 which the Bureau is going to grant confidentiality if
2 it's not requested. What is your standard or usual
3 procedure in that area?

4 WITNESS HELTERHOFF: Our usual procedure is
5 we're not in the criminal area again, we're only in these
6 few several matters but say a background investigation on
7 somebody for employment, solely, totally civil. What we
8 would tell the individual, say an employer, a neighbor,
9 what the case may be, we would tell that individual,
10 look, we want to interview this person about a position
11 in government. You do have, if you desire, a privilege
12 of requesting confidentiality and if so we can grant this
13 confidentiality which means that the person who is
14 applying for this government job, if later this person
15 asks under the provisions of the Privacy Act to see the
16 investigation and generally this happens when they don't
17 get the job, but it could of course happen when they do
18 get the job is to see what the people have said. And if
19 the person says, yes, I want my name kept confidential
20 well, that background employee who applied for that
21 position is not going to get the name of that person or
22 any information that might tend to identify that person.

23 Now the question could come up, well, what if--
24 and let's go back to another area, not a background
25 investigation but say a criminal investigation where you

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1 would want to use it later and the person says I want to
2 tell you something and gives you a complete allegation of
3 criminal misconduct under the express purpose of
4 confidentiality. Well, that person would not be able to
5 get through the background to the civil investigation
6 access to that information but that material may still be
7 used because if it goes to the criminal. Generally what
8 we do is go back to the witness we expressed this clearly
9 under the Privacy Act in a civil matter but now it's
10 greater and now we're going to have to go forward to use
11 this information.

12 MR. SILBERT: Let's say something that would
13 come up in your unit, the white collar crime where it's
14 common knowledge you start investigating a matter you're
15 not sure that a crime has been committed it's not like a
16 street crime or a robbery, a rape or a murder.

17 WITNESS HELTERHOFF: Correct.

18 MR. SILBERT: So you're conducting an
19 investigation. What is your approach with the usual
20 witness? Do you usually initiate as a routine what
21 -- what are your procedures in that type of setting?

22 WITNESS HELTERHOFF: Well, we have quite strict
23 now Attorney General guidelines in all our criminal
24 investigations which in effect say that we cannot
25 initiate a criminal investigation unless we have a clear

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1 predication of some wrongdoing and when we have a clear
2 predication of some wrongdoing, there is at least the
3 alleged statute that might be violated. Say it's
4 kickbacks or might be federal bribery or something along
5 those lines. We know right away that that's a criminal
6 investigation so there's no requirement to give
7 confidentiality to the person interviewed.

8 MR. SILBERT: I take it that not only is
9 there no requirement but the practice or procedure is
10 that you don't volunteer it?

11 WITNESS HELTERHOFF: In the criminal matters,
12 correct, we do not.

13 MR. SILBERT: What if the witness says I'd like
14 to talk to you agent but I don't want my name used. What
15 happens then?

16 WITNESS HELTERHOFF: Well, we're in a criminal
17 area now with that, okay?

18 MR. SILBERT: Yes.

19 WITNESS HELTERHOFF: We would say, we will do
20 everything we can so your name will not surface but we
21 can't guarantee it. We will protect your name in our
22 reports, however, you have given us this criminal
23 allegation, we are duty bound to resolve it and you very
24 well could be called as a witness based on what the
25 United States Attorney says. We'll bring it to the

WITNESS HELTERHOFF

1 United States Attorney that you want to be kept
2 confidential, but we do not have it in our authority to
3 say, well, you've given me all this and now you can't in
4 any way, you know, be divulged.

5 MR. SILBERT: What if the witness says before I
6 talk to you about anything I want to be assured of
7 confidentiality?

8 WITNESS HELTERHOFF: We would tell the person
9 we can't guarantee it. We will make every effort where
10 it won't be divulged.

11 Now we have another area where we have our
12 informant program where in those instances -- but that's
13 a real long process where we go through suitability
14 inquiry on the informant and when they come up with the
15 information there generally speaking their names will not
16 be divulged but everyone there as you well know we could
17 get into a situation like an in cameron type of situation
18 where it would be to a limited degree his name would be
19 mentioned.

20 MR. SILBERT: Anybody else have any further
21 questions?

22 Well, we are most appreciative of your
23 appearance here today and your giving us the benefit of
24 your knowledge and views and experience on this matter.

25 Thank you very much.

WITNESS HELTERHOFF

1 WITNESS HELTERHOFF: Thank you.

2 MR. SILBERT: Any further business to be

3 brought before the committee before we recess for lunch?

4 (No response)

5 MR. SILBERT: Let's recess for lunch and we

6 will resume at 2 PM.

7 (Whereupon, at 12:30 P.M. this date,

8 this matter was adjourned, to be

9 reconvened at 2:00 o'clock P.M.,

10 this date.)

11 -oOo-

WITNESS SHOOP, McDONALD AND COUNTS

1 AFTERNOON SESSION

2 (Whereupon, at 2:00 o'clock P.M.,
3 this hearing was reconvened
4 pursuant to adjournment.)

5 MR. SILBERT: We're ready, if we can proceed
6 with this afternoon's part of the hearing today. We
7 should note that in the notice of meeting that was
8 published in the Federal Register, there was an
9 invitation extended to any person who wished to present
10 views at this hearing and to contact our liaison, Mr.
11 Levi. All persons who expressed any interest have been
12 accorded the opportunity to appear at this hearing and if
13 there are any persons present who have not made that
14 interest known even as of this time, who do wish an
15 opportunity to be heard, that invitation is extended as
16 of this moment.

17 In addition, the notice of the meeting also
18 made clear that we would be -- that is, this Advisory
19 Committee would be willing to, receptive to views that
20 were submitted in writing until one week after the close
21 of our business here today and wanted to reiterate that
22 again so that would be known. And that would extend to
23 not only persons who have an opportunity to appear here
24 and testify before the committee or would present their
25 views in writing or those who do not wish to present any

WITNESS SHOOP, McDONALD AND COUNTS

1 oral statement but wish to present views in writing, that
2 opportunity also exists.

3 Is Mr. Shoop here?

4 WITNESS SHOOP: Yes.

5 I have two gentlemen with me.

6 MR. SILBERT: Do you wish to have them
7 accompany you while you present your views?

8 WITNESS SHOOP: Please.

9 MR. SILBERT: They're certainly welcome to do
10 so.

11 WITNESS SHOOP: I have a prepared statement and
12 if it would be easier for the committee, I will just
13 submit it rather than read it all.

14 MR. SILBERT: Fine, that would be helpful, we'd
15 appreciate that and to start off with, could you identify
16 yourself sir and your present position and also the
17 people who are here that are accompanying you?

18 WITNESS SHOOP: I am Paul Shoop, a
19 representative for the International Brotherhood of
20 Electrical Workers on the headquarters staff assigned to
21 the utility department and we're located here in
22 Washington DC.

23 To my left is my immediate supervisor, the
24 Director of The Utility Department, Robert McDonald.

25 MR. SILBERT: Welcome sir, pleased to have

WITNESS SHOOP, McDONALD AND COUNTS

1 you.

2 WITNESS SHOOP: To my right is John Counts that
3 is an attorney in our legal firm.

4 WITNESS COUNTS: C O U N T S.

5 MR. SILBERT: And you are most welcome.

6 WITNESS COUNTS: Thank you.

7 MR. SILBERT: You wish to proceed? Would you
8 want to summarize what you have put forth in your
9 statement or certainly feel free to add any matters
10 that are not in your statement as well.

11 WITNESS SHOOP: To try to briefly summarize,
12 the IBEW represent -- we're the labor organization with
13 the largest number of people. Roughly we have about
14 eight thousand members permanently assigned to the
15 various power reactors. In addition, we have tens of
16 thousands of other members from the building trades,
17 utility members from other locations in the utility that
18 rotate in and out of the power reactors and members that
19 are part of vendors specialty crews.

20 We have been at the power reactor since 1957
21 when the DOE facility shipping port came on the scene.
22 The subject under discussion, the investigation of
23 licensee employees will impact with the labor agreement
24 and it will impact adversely with the labor agreement.

25 Whenever a member would be interviewed, there

WITNESS SHOOP, MCDONALD AND COUNTS

1 is a possibility of disciplinary action taken by the
2 employer because of any action or inaction that the
3 employee did or didn't do. This is provided under the
4 terms of the labor agreement or the contract.

5 Many employers even though it's an inadvertent
6 serious mistake by the employee will take disciplinary
7 action up to and including discharge for the action, the
8 inadvertent action of the employee. So when a member is
9 interviewed by the NRC or anyone else it impacts with the
10 labor agreement.

11 We have had limited experience not with the NRC
12 but with DOE where it impacted with the labor agreement.

13 Essentially DOE's policies are much the same as
14 the NRC's. In this case, it was a security clearance was
15 required and the individual was interviewed because of
16 drug abuse.

17 At first our business manager was not allowed
18 to be present at the interview to represent the employee
19 because he was not legal counsel.

20 After discussion with DOE the business manager
21 was allowed to be present to represent his member.

22 In this case, the security clearance was denied
23 for just cause. He had been using drugs, however,
24 because our business manager was there the employer knew
25 about it, the individual was entered into a drug

WITNESS SHOOP, McDONALD AND COUNTS

1 rehabilitation program.

2 At this date I don't know whether the
3 individual was transferred to another station. So far as
4 I know he was never given a security clearance.

5 Under the labor laws, we're charged, we
6 organize the labor union or the local union is charged
7 with representing members and it doesn't matter whether
8 it's a union member or non-member. We're still charged
9 with representing the individual. This could be a very
10 costly mistake for the local union not to represent a
11 local member especially when it's challenged in court
12 when the individual says that the local union did not
13 represent him.

14 When we get into situations where our members
15 are interviewed, this is why we insist that we have our
16 local union business manager or his designated
17 representative there so he's apprised of all the
18 information that's presented.

19 We've cited a couple of cases that we would
20 like to use as an illustration in our discussion. The
21 Weingarten Case which says that the individual is allowed
22 to have a union representative present and at Pacific
23 Bell which is an extension and elaboration of the
24 Weingarten Case which says that the interviewee has to be
25 apprised of what the investigation as well as what the

WITNESS SHOOP, McDONALD AND COUNTS

1 subject matter is.

2 We think that an informal policy we believe
3 that the NRC has the discretionary power to have an
4 informal investigation. We will provide cooperation and
5 will enhance the investigation and will provide
6 information in a timely fashion.

7 Again, we, the IBEW here in Washington are
8 aware of some of the things that have gone on in the
9 regions, particularly with the license reactor operators
10 under Part 55. Again at Utility there was a drug abuse
11 charge against the operators at a certain facility. The
12 region people went in and we don't really know where it
13 happened. Hardnosed attitudes were taken, it could have
14 been our members, it could have been the utility, it
15 could have been the NRC personnel either singly or all
16 three.

17 In that case, our local union, it got real
18 sticky and our local union provided legal counsel for our
19 members who were the reactor operators at quite an
20 expense so they would have legal counsel during the
21 interview.

22 So far as I know, this type of interview
23 produced no results. All it got into was just a big
24 investigation where we had -- our local union will now
25 counsel with members and the NRC staff was present.

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1 These are the type of situations we would like
2 to avoid if we can have less than a legal formal
3 investigation policy. They will produce timely useful
4 results. If the licensee is in timely compliance we
5 would like to see the licensee get back into compliance.

6 Certainly we don't condone any willful act of
7 our member by most of the things that the NRC
8 investigates are non-compliance which are in the interest
9 of the public health and safety and more important our
10 members are at those stations, it's very important to
11 their health and safety, they're going to be the first
12 one effected. So we want to see the licensee back in
13 compliance and we believe that a less than informal
14 policy towards investigation will insure this.

15 Now to back up this statement we cite the
16 grievance arbitration procedure under the labor
17 agreement. Which is a formal agreement under the
18 contract but it's less than a strict legal procedure we
19 think this enhances the investigation. It is fair to the
20 interviewers, the interviewee, and of course the
21 licensee.

22 MR. SILBERT: Mr. Shoop, may I ask this
23 question: The Office of Investigation of the NRC
24 receives some information from whatever source, an
25 anonymous tip or some other source of information that a

WITNESS SHOOP, McDONALD AND COUNTS

1 licensee is not in compliance and they want want to
2 initiate an investigation part of which may be looking at
3 documents but also part of which may include interviewing
4 the various witnesses, and it's at a union place where
5 your union is organized or represented. What procedures
6 are you recommending the Office of Investigations should
7 pursue with respect to their wanting to come in and get
8 information and particularly if they want to get
9 information quickly?

10 WITNESS SHOOP: All right. The procedure that
11 we have represented in there is 10 CFR 19, which 19 is
12 the obstruction of workers. The section you're looking
13 at is -- let me find the page for you. That's on page
14 four.

15 MR. SILBERT: Right.

16 WITNESS SHOOP: This is the walk around, the
17 safety inspections very similar to OSHA. Under part 19
18 it recognized that a representative of the employees can
19 be there. However 19 says that the union representative,
20 if there's a union representative, he has to be an
21 employee of the licensee. In many cases our business
22 managers are fulltime representatives and are not
23 employees of the licensees.

24 In those cases where we have raised the
25 question on the part 19 walk around, we have been denied

WITNESS SHOOP, MCDONALD AND COUNTS

1 permission to have the union representative there who is
2 not a licensee employee.

3 In many cases the business manager is going to
4 be following the grievance from the first step on up
5 through arbitration. He is the one -- and especially if
6 he's not a licensee employee, he is not going to be
7 intimidated by a lot of the procedures. He is in a
8 better position to represent our local union member.
9 And, again, the bottom line for us is the lack of
10 representation charges that can be brought against our
11 local people.

12 Our local union business manager has to be
13 aware of what's going on. In an investigation everyone
14 at the NRC for non compliance where they interview our
15 member is going to impact the labor agreement. We know
16 this. We have a DOE case. We had some with suspected
17 sabotage and we had some with the part 55 reactor
18 operators.

19 MR. SPRITZER: Are you asking, Mr. Shoop then,
20 that prior to interviewing any union member that the
21 investigating officer notify an official of the union?

22 WITNESS SHOOP: We would like for the local
23 union business manager to be present during the
24 interview. Again, we're citing the Weingarten and
25 Pacific Bell which are only applicable to labor law.

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1 MR. SPRITZER: That means, I take it, that you
2 believe the business manager should be given advance
3 notification?

4 WITNESS SHOOP: Pacific Bell does give the
5 notification in the subject matter.

6 MR. SCOTT: Do I understand you, Mr. Shoop
7 that one of your principal concerns that after the fact
8 the union not be charged with a failure to represent?

9 WITNESS SHOOP: It would certainly be after the
10 fact, yes.

11 MR. SCOTT: Is that one of your principal
12 concerns that underlie the need for this advance notice?

13 WITNESS SHOOP: That's one of our principal
14 concerns, yes.

15 MR. SCOTT: Presumably we're dealing with a
16 range of situations, some of which the members is himself
17 or herself potential subject of some disciplinary
18 action.

19 The other in which the union member may simply
20 be a witness may have information and there may have been
21 no contemplation that that person will have visited on
22 present at this interview? Does it differ whether we're
23 dealing with someone who is a potential subject of
24 disciplinary action or a simple fact witness?

25

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1 WITNESS SHOOP: The fact witness could be a
2 subject of disciplinary action depending on what is
3 brought out by the facts. If you are familiar with a
4 power plant, whether it's fossil, nuclear or hydro or
5 whatever. Even though there are five hundred on the
6 staff it's a fairly small place. Everyone knows what's
7 going on. There probably would be no surprises of
8 what's going on in the investigation because people are
9 there and they have a good feel for what's going on.

10 Even though there's confidentiality between the
11 NRC people, there's enough information that has to be
12 made public that the employer is going to make some very
13 likely guesses and pinpoint the individual or individuals
14 involved. The witness could have inadvertently done
15 something that could have contributed to the non-
16 compliance also and it would be brought out under
17 investigation.

18 MR. SCOTT: So it's your concern that even
19 though somebody at the outset might not be a subject that
20 in the process of giving evidence that he or she may
21 inadvertently implicate themselves?

22 WITNESS SHOOP: Yes, because these so often go
23 off on fishing expeditions. Most of our people when you
24 talk to them, they're very unsophisticated, they say
25 things when they shouldn't say anything at all. Just

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1 inadvertently they place themselves in these positions
2 during interviews.

3 MR. SCOTT: Is the union's right to have a
4 representative present during a questioning session, is
5 that an independent right in your judgment or does it
6 depend upon the wishes of the effected employee? In
7 other words, are you contending that there should be a
8 right on the part of the union to be present irre-
9 spectative of the wishes of the employee?

10 WITNESS SHOOP: If the employee so choose not
11 to have our union representative there and he made it
12 known to us and everybody else then we certainly could
13 not bring charges that he was not represented. This
14 would put us in a much more favorable light. We have had
15 cases where our local union has provided counsel for the
16 part 55 operators. They did not want the union counsel,
17 they went out and got their own counsel and this was fine
18 with us. However we had the people there to represent
19 them and again, they can't bring the charge of non-
20 representation.

21 MR. SCOTT: Is it your experience now that -- I
22 am not sure I understood your earlier testimony. When
23 the employee is being questioned by the employer, is it
24 currently the case that representatives of the union are
25 routinely present under the Weingarten or whatever is

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1 that the case?

2 WITNESS SHOOP: Weingarten applies to the labor
3 laws and we're just using this as an example.

4 MR. SCOTT: And you want to extend that to NRC
5 inquiries?

6 WITNESS SHOOP: To keep the informal things so
7 it does a couple of things. It produces useful
8 information for the NRC, it protects our members and of
9 course we're interested in the same things that you are,
10 and the licensee is interested in the same thing, he
11 wants to get back in with compliance and we're all
12 interested in compliance, for the health and safety of
13 the public.

14 MR. SCOTT: Are you now routinely present at
15 NRC questioning of your members?

16 WITNESS SHOOP: In the case of the Part 55 the
17 operator, our counsel is there. Not our business
18 manager.

19 MR. SILBERT: That's the drug investigation to
20 which you earlier referred?

21 WITNESS SHOOP: That's the drug investigation.

22 In the case of the DOE which again was another
23 drug case, DOE said yes, after discussion, yes, the
24 business manager could be present.

25 MR. SCOTT: What about simply a routine NRC

WITNESS SHOOP, McDONALD AND COUNTS

1 inquiry? You know, a canvassing of all employees to try
2 to figure out what happened, why something went wrong
3 where there's not a focus on any individual misconduct?
4 Is it now the case that the union is routinely present
5 when each of those employees are questioned?

6 WITNESS SHOOP: From our experience, there are
7 no innocuous interviews but they can start out that
8 way. However, once the individual has said something,
9 now he's on the record with the interviewee and
10 everything else. You know, it's very difficult. So what
11 might start out as a very experienced interview can lead
12 him far astray --

13 MR. SCOTT: That's not the question. Whether
14 they're innocuous or not, is the union present?

15 WITNESS SHOOP: If there's possible
16 disciplinary an under Weingarten then, yes, he can
17 request his union representative there.

18 MR. SCOTT: Even when it's NRC doing the
19 questioning?

20 WITNESS SHOOP: Again, I am using Weingarten
21 which is labor law and using an extension. If NRC were
22 to do it and you were to adopt the same policies
23 essentially that's under Weingarten, if our member felt
24 there was possible disciplinary action possibly could
25 request a business manager.

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1 MR. SCOTT: But that doesn't happen with the
2 NRC?

3 WITNESS SHOOP: Not with the NRC.

4 MR. SPRITZER: In so far as your union
5 satisfying the requirement for union representation of
6 its members, wouldn't that be satisfied if the
7 interviewee were notified that he could appear with
8 counsel or with a representative?

9 WITNESS SHOOP: That would be satisfactory with
10 us.

11 MR. SPRITZER: You asked for something more if
12 I understood it. If the bargaining representative be
13 notified in advance and I am asking you why wouldn't that
14 -- your point be satisfied if the individual were
15 notified?

16 WITNESS SHOOP: Yes, because the individual
17 can--and it could be a member or a non-member that
18 could say, look, I don't want the union representative
19 there. However, we would -- if we were challenged on a
20 nonrepresentation case we had been on very firm case and
21 this is what we are seeking. We have no problem with
22 that. But the individual, he has the right or privilege
23 to have an union representative --

24 MR. SPRITZER: Or not?

25 WITNESS SHOOP: -- or not, depending on what he

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1 thinks.

2 MR. SILBERT: Have you had an opportunity to
3 read over the list of questions that the NRC posed to
4 this committee to respond to?

5 WITNESS SHOOP: Yes.

6 MR. SILBERT: By any chance, have you had a
7 chance to review some of the materials that have
8 previously been submitted? Specifically the letter from
9 Mr. Kharnoff and Mr. Hickey to the chairman as the
10 Chairman of the Regulator Commission expressing some
11 concerns about the investigative practices of the NRC?

12 WITNESS SHOOP: I have not read the Kharnoff
13 letter. I went through the transcripts and again this is
14 why we have our legal counsel with us because it got --
15 the legal procedures got pretty strict right off the bat
16 and this really raise had some flags, storm signals for
17 us. If you'd like to address it to John.

18 MR. SILBERT: I am not going to be asking a
19 legal question. I'm sure if you read through the
20 transcript you saw that there's at least an interest on
21 the part of the licensee counsel--that is the counsel
22 representing the licensee--to have an opportunity to be
23 present and particularly if each person to be interviewed
24 is advised of right to counsel and often times the only
25 available legal counsel at the site might be company

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1 counsel.

2 What is your view toward presence of company
3 counsel at the interview of one of your members?

4 WITNESS SHOOP: This is the concern that we
5 have that we want a union representative there.

6 Again, can you really insure confidentiality
7 when you have the other side, the other side of the
8 bargaining table from us is the employer and if the
9 employer is permitted at the interview and we're not,
10 again, a lot of facts are going to be brought out to the
11 employer where we're going to impact with the labor
12 agreement.

13 We have some problems with the other side's
14 counsel representing our members.

15 MR. SILBERT: Let me just pursue that a
16 moment.

17 You object to the company counsel being present
18 if your representatives, union representative, be it a
19 lawyer or business manager, is not given an equal
20 opportunity to be present?

21 WITNESS SHOOP: Yes.

22 MR. SILBERT: What is your view as to whether
23 or not -- or to rephrase it. Do you feel that only your
24 representative should be given the opportunity to be
25 present? By that again whether it be legal counsel or

WITNESS SHOOP, McDONALD AND COUNTS

1 business manager and company counsel should be excluded
2 or -- is that your position?

3 WITNESS SHOOP: No, we have not said that. We
4 did not address it and we have not said it. If we have
5 the right to be present we then would assume that the
6 other side also has a right to be present.

7 MR. SILBERT: In other words so that the NRC
8 would be conducting it's interview, at least at a place
9 where you are the bargaining representative, of both
10 members and non-members with both a representative of the
11 union present and if company counsel wishes to be
12 present, their being present as well?

13 WITNESS SHOOP: Yes.

14 MR. SILBERT: What do you think would be the
15 effect of that on the candor or willingness of the
16 employee to convey full and complete information to the
17 NRC investigators?

18 WITNESS SHOOP: We have only had three cases
19 that have come to our attention here and the first one
20 with the DOE, it obviously resulted in a lot of candor
21 because we had the business manager, the effected members
22 and of course DOE representatives and I don't know
23 whether management people were there but they certainly
24 knew what was going on.

25 MR. SILBERT: The interview room could get a

WITNESS SHOOP, McDONALD AND COUNTS

1 little crowded wouldn't it?

2 WITNESS SHOOP: Yes. In that case we thought
3 it worked out very satisfactorily. The security
4 clearance was not issued because of the seriousness of
5 charge, drug abuse. The employee was entered into a
6 rehabilitation program because this is what the contract
7 provided for. And, of course, again, in this case DOE,
8 the operator was back in the good graces of DOE. In the
9 other case with the part 55 operators on a similar drug
10 charge we think that that was just a donnybrook and
11 nothing useful came out of it.

12 MR. SILBERT: Are you able to attribute any
13 reason to that in the manner in which the interviewing
14 process was conducted, particularly with presence of
15 company counsel or your representative or--

16 WITNESS SHOOP: Before it got to the point
17 where they interviewed people I think some positions were
18 locked in concrete out in the field and it's very
19 difficult to know what's going on out in the field unless
20 you're out there. They only tend to tell you what they
21 think you ought to know.

22 MR. SCOTT: Mr. Shoop -- excuse me.

23 WITNESS SHOOP: Some hard positions were
24 taken. Our members who have reactor operator's license
25 under 55 were told, look, now your license is going to be

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1 yanked here if you don't do this and don't do that.

2 All right, right away these people are scared.

3 This is a livelihood. They're the best paying jobs in
4 the plants. They're good at what they're doing but
5 when you say you're going to take that license, they know
6 what it means, it means loss of employment. So positions
7 were taken, hardnose positions and I think it was
8 unfounded allegations, just here it is, so-and-so using
9 drugs.

10 In a third case there was another one where it
11 was probably criminal, another utility, probably involved
12 sabotage, the FBI did the investigation. Again, hard
13 positions were taken and the hard position said, all
14 right, we're finally done, we're going to use polygraph
15 and in a particular state a polygraph was not allowed
16 unless the particular individual volunteered. In this
17 case the individual did not volunteer to submit to the
18 polygraph so nothing came of that investigation. I think
19 if you have cooperation you could get a lot more useful
20 facts out of it.

21 MR. SCOTT: You contemplate a situation where
22 the questioning would take place in the presence of union
23 representatives and a company representative. In your
24 judgment, should the affected employee have the right to
25 exclude either or both of those representatives?

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1 WITNESS SHOOP: I never looked at, the other
2 issue from the attorneys--from the other side.

3 MR. SCOTT: What if the employee said, I don't
4 mind. In fact I'd like to have the company's counsel
5 here with me when NRC is asking me questions but I don't
6 want those union people here?

7 WITNESS SHOOP: If he requests again we'd
8 rather have the union people or union counsel but say he
9 opted for the company's counsel and you get into a whole
10 host of questions but let's say that he wanted non-
11 representation. He has been advised he could have his
12 local union or union counsel present. That's his
13 option. Okay he opted not to do that. In this case he
14 says he has his own counsel and it's management counsel
15 and in that case as far as representation we're off the
16 hook. I don't think it's a good practice for it to
17 occur.

18 MR. SILBERT: Is that likely to occur?

19 WITNESS SHOOP: Yes, I can conceive of this
20 happening because again we have not discussed this with
21 our local union business managers. We're in the field
22 and it's hard to know what's going on until after the
23 fact. In some cases depending on where it's at it could
24 well be that our member would opt for company counsel
25 rather than the local union.

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1 It could well happen this way.

2 WITNESS MCDONALD: If I may.

3 MR. SILBERT: Yes, feel free and also Mr.
4 Counts.

5 WITNESS MCDONALD: Mr. Shoop refers to a non-
6 member, it could be a right to work state or a
7 municipality where we represent the group but not the
8 member. It could be that particular situation where he
9 would rather have the employer's counsel or whatever for
10 his personal purposes.

11 MR. FITZGERALD: Someone represents someone
12 under I guess this Weingarten proceedings does he
13 represent the individual primarily and solely or does he
14 in any way represent the union management or the union as
15 an entity?

16 WITNESS SHOOP: He's there to represent the
17 union as an entity because under Weingarten it's
18 impacted under the labor agreement. There has been a
19 charge that would result in disciplinary action, so he's
20 there to represent the member because of the breach of
21 the labor agreement.

22 MR. FITZGERALD: But he's also there to
23 represent the union itself?

24 WITNESS SHOOP: He's there to represent the
25 union because a lack of representation would be a charge

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1 against the local union.

2 MR. SCOTT: Are we talking about two different
3 an observer to see what is going on because this will
4 effect both the union and the company. On the one hand
5 are we talking about that and on the other hand the
6 individual's right to have representation to have his or
7 her interest looked at?

8 Are these two separate things that you think
9 should be accommodated in this interview? In other
10 words, have you a right to see what's going on because
11 you're the union than and you have a right and the
12 individual has a right to be represented, is that what
13 we're talking about?

14 WITNESS SHOOP: Yes.

15 WITNESS MCDONALD: We're saying that we're here
16 to represent the individual to the best of our ability
17 and to do this we have to know the basic facts to
18 do it. I think in 99 percent of the cases it is right.
19 We're very concerned at what is brought out at the onset
20 of the interviews. It's the same thing that developed in
21 the Weingarten Decision that in many, many cases the
22 individual even though he requested was denied union
23 representation and so you start out at a very innocent
24 investigation developed into the most serious penalty in
25 employment and that's being discharged and this is why

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1 Weinsarten developed and the same thing as we're saying
2 in the NRC investigation is that some place along the
3 line it may go from a very simple witness-type of
4 questioning into something much more serious and this is
5 the whole basis of our --

6 MR. SCOTT: Since there's a potential for
7 gravity you have got to err in the side of more
8 protection is that what you're saying?

9 WITNESS MCDONALD: Yes, and it's up to the
10 individual to make the request. We're not saying that if
11 he so decides to not ask for union representation or not
12 to ask for an attorney, that's his decision.

13 MR. SILBERT: But is it your situation that
14 when the NRC investigator appears on the scene and wants
15 to question any member or members, that he should advise
16 the member at the outset of the interviews that he has a
17 right, he or she has a right to counsel or other
18 representative, including a representative from the union
19 or let me rephrase the question rather than yes or no.

20 What advice should be given at the outset of
21 the interview in your view to a member when an NRC
22 investigator appears on the scene?

23 WITNESS SHOOP: I think that should be very
24 easy which is part 19. All you have -- it's not that
25 easy to put anything into it, but just clarify it by

WITNESS SHOOP, McDONALD AND COUNTS

1 adding a paragraph to 19.

2 MR. RUEBHAUSEN: To what effect?

3 WITNESS SHOOP: To the effect that the
4 interviewee has the right to have his local union
5 representative and/or counsel.

6 MR. SILBERT: I am talking about initial advice
7 to the representative. That should be included in the
8 advice. When the NRC investigator appears on the scene
9 and wants to talk to a member, an employee?

10 WITNESS SHOOP: Yes, I would have to assume
11 that under part 19 on a walk around where he doesn't come
12 in and say, okay, union, if there's an employee here
13 who's a union representative you can be a party to this.
14 The request has to come from us only it's in 19. 19 says
15 that we have that right to have an union representative
16 present. It's very restricted. It's too restrictive for
17 us. We'd rather have a business manager than a site
18 person.

19 MR. SCOTT: But in addition to whatever is
20 promulgated and included in part 19 or any other
21 regulation, when the NRC investigator shows up on the
22 scene and is about to address the employee should the
23 investigator at that juncture give verbally to that
24 employee some advice about his or her right to have a
25 representative, including an union representative, and if

WITNESS SHOOP, MCDONALD AND COUNTS

1 so what would an appropriate verbal formulation of that
2 advice be?

3 WITNESS MCDONALD: I would say in response to
4 that, it would be most desirous to have the NRC
5 representative advise the individual of, you know, either
6 having union representation present or legal counsel
7 whichever he so desires. How it's done, I think the
8 best way is to have a signed statement that he was
9 notified but now we're getting back into formalities.
10 How it's accomplished I think would be --

11 WITNESS SHOOP: Part 19, a notice in part 19, I
12 think, would give us another mechanism we can do, we can
13 do this with our people and we can let our business
14 managers know this is what is expected of this. The most
15 desirable is, yes, if the interviewer would read it
16 however that might not be the best of the real world.

17 A notice in part 19 might be sufficient. If
18 it's in 19, we can inform all our members of what happens
19 in the case of an interview by the NRC interviewer.

20 MR. SCOTT: One of the things we've heard from
21 a number of representatives of various investigative
22 units is that the mere statement of a right to a repre-
23 sentative, especially a right to counsel has an adverse
24 impact on candor and forthcomingness.

25 Is that something that you can address in terms

WITNESS SHOOP, MCDONALD AND COUNTS

1 of your experience?

2 WITNESS SHOOP: Using or going back to our
3 experience just under the labor agreement, the contract,
4 we have all kind of investigations by the employer and
5 our member who is an employee and our business manager
6 and we get the facts from our members. Most of them are
7 quite candid, say cooperate with us. You get the
8 occasional person who is not going to give you anything,
9 but most of them cooperate with the type investigation
10 under the labor agreement. This is the type of thing we
11 like to see extended to the NRC interviewees.

12 There's no reason why it shouldn't because
13 we're after the same thing, you and us and the licensee.
14 We want return to compliance and we can only do this if
15 we have cooperation of our members who might be a
16 witness, who might have participated in something.

17 Let's say that I inadvertently did it and I
18 hear this happens all the time with the FAA. That they
19 inadvertently do it. They have turned themselves in,
20 they have some type of protection. I don't know whether
21 this is just in the real world or whether they're just
22 telling us this. But this is the type of candor that we
23 need or if the individual has or that the individual has
24 to have representation. There's going to be disciplinary
25 action depending on what the case is, we know that, and

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1 the individual has to have some representation so he's
2 protected and we think that these informal procedures are
3 going to get, yeah the individual, he might have a letter
4 in the file rather than a discharge. We would rather
5 have him see a letter in his file rather than a
6 discharge.

7 MR. SPRITZER: There's no reason why at the
8 present time, of course, is there, any reason at all that
9 you can't inform all of your members that if at any time
10 any of them is called by the NRC, by an NRC investigator,
11 be advised that they're not under any compulsion to
12 appear. We think you should cooperate but we recommended
13 to you that if you are called you consult with union
14 counsel or your union representative.

15 WITNESS SHOOP: This gets back where if we take
16 this position, if the IBEW takes this position and so
17 informs it's business managers, as a result you'll get
18 nothing out of any investigation and this is what we
19 don't want. Okay? If it's a reason of non-compliance,
20 we want to get the licensee back into compliance. We
21 want to cooperate.

22 MR. RUEBHAUSEN: Why would you get nothing out
23 of the investigation?

24 WITNESS SHOOP: Because if I have the right to
25 dummy up I will dummy up.

WITNESS SHOOP, McDONALD AND COUNTS

1 MR. SPRITZER: You do have the right.

2 WITNESS SHOOP: But the real world out there is
3 different than it is in Washington.

4 MR. RUEBHAUSEN: The suggestion wasn't that you
5 dummy up, the suggestion was that you tell your employees
6 or your union members that they merely advise the
7 business manager whenever there's an investigation then
8 you can discharge your concern which is real and inherent
9 that you have an obligation to represent them.

10 WITNESS SHOOP: The union business manager
11 can't discharge it because unless he's counsel, he can't
12 be at hearings. We know this because we just had the case
13 with the 55.

14 The local member did go hire counsel. Yes, he
15 can be present. If we have, look, have you the right to
16 remain silent, they're very sophisticated out there in
17 the fact that they're going to remain silent and again
18 you're not going to get anything out of this interview.
19 Which is what you don't want and we don't want. If there
20 is someone out there using drugs which is going to effect
21 us out there, he's going to hurt other people right on
22 shift before the general public.

23 MR. SPRITZER: You want your people advised
24 that they have a right to a lawyer but you don't want
25 them advised that they have a right to be silent?

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1 WITNESS SHOOP: No, what we want is where our
2 business manager can be present at the interview to
3 observe what's going on. We think that this is where the
4 person will cooperate, you'll get the useful information
5 that you need, we'll have the information to protect the
6 individual under the terms of the labor agreement.

7 MR. FITZGERALD: The union representative would
8 counsel the person who may have used drugs to tell the
9 NRC investigator this because of the concern for getting
10 this out on the table?

11 WITNESS SHOOP: The union representative is
12 going to be there as an observer. He's not going to be a
13 party to the proceedings.

14 MR. FITZGERALD: He's not going to be
15 representing the individual.

16 WITNESS SHOOP: He's there representing the
17 individual.

18 MR. FITZGERALD: Well, in representing the
19 individual, is he going to be providing advise to the
20 individual in the situation that you're describing that
21 the fellow should tell us about the drug usage?

22 WITNESS SHOOP: Let's look at that before the
23 drug user in the DOE case got into the conference, he
24 knew well what was going on. There was dialogue between
25 our local union business manager and the member as to,

WITNESS SHOOP, McDONALD AND COUNTS

1 okay, what should we do here? Because we knew that's
2 good for discharge. In this case the employer said we're
3 going to put him into a rehabilitation program. Other
4 people have interviewed for this and they made a
5 statement through arbitration.

6 MR. FITZGERALD: Are you talking about making a
7 case to a formal body as to what the outcome should be?
8 An investigation conducted in front of a decisionmaker
9 that's going to determine whether discharge or
10 disciplinary action --

11 WITNESS SHOOP: The discharge is not going to
12 come from the NRC. The only possible way you can effect
13 a discharge is what your findings are and what they are --
14 let's say it's an operator, part 55 and let's say the NRC
15 is going to revoke your license and there's pretty good
16 reason why it's going to be revoked and that could be the
17 NRC. Let's say it's not a license. You are not going to
18 be the one to discharge, it's going to be our employer.
19

20 As a result of your investigation, what has
21 been brought out during your investigation is going to
22 take the disciplinary action against our member under the
23 terms of the labor agreement. To represent the
24 individual under the labor agreement we have to know all
25 the facts that are in the case. Whether it's drug

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1 abuse. Now it can't go in where the interview -- it's a
2 star chamber and then we're faced with disciplinary
3 action and we don't know all that's going on out there.
4 We have to represent the member and an extension of the
5 Weingarten is the closest thing that we can come up with
6 so that we have fair representation.

7 We have one other problem with the licensee
8 employees.

9 As I mentioned in my brief summary our
10 membership crosses the whole spectrum. We have members
11 that are in the building trades that work for
12 subcontractors that are not licensee employees. We have
13 vendor specialty crews that are for a subcontractor and
14 are not licensee employees and we have some problems
15 where we treat IBEW members differently just because of
16 whether they're a licensee employee or a non-licensee
17 employee.

18 MR. SCOTT: The non-licensee employees are
19 treated more favorably in terms of NRC

20 WITNESS SHOOP: Let's say we have two witnesses
21 and they're both IBEW members at a site and we have
22 building trades and utility employees. The building
23 trades have more seniority than the plant people. Let's
24 say they witness an event that led to non-compliance,
25 let's say they're both cooperating or they're both

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1 willing to cooperate.

2 As I understand the Advisory Committee's
3 recommendation's to be based on licensee employees. That
4 would mean our member utility employee, he would be
5 interviewed, the non-utility employee or member from the
6 building trades would not be interviewed because he was
7 not a licensee employee. And we have some problems with
8 this.

9 MR. SILBERT: Well, I'm not so sure there's any
10 suggestion that if the NRC would conduct an investigation
11 that those people would be off limits.

12 MR. RUEBHAUSEN: To the contrary, it was
13 explained that the NRC might go to motels and local bar
14 tender and others.

15 WITNESS SHOOP: We have another problem with
16 the bars. When we made headlines we have had this type
17 of situation and we'd rather you did not do that.

18 MR. RUEBHAUSEN: Don't a "you" to me.

19 WITNESS SHOOP: NRC.

20 MR. RUEBHAUSEN: I plead to some confusion. As
21 I understand it would you like an opportunity for your
22 business manager to be present at any interview of one of
23 your members, is that right?

24 WITNESS SHOOP: Yes.

25 MR. RUEBHAUSEN: Then the next question is can

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1 that opportunity be provided by some method of notice to
2 the union? In short, if you got notice of an interview
3 or a series of interviews that were to be conducted
4 wouldn't that give you the adequate opportunity for your
5 business manager?

6 WITNESS SHOOP: If we had notice, yes. There's
7 all kind of mechanism. We were given the best in the --

8 MR. RUEBHAUSEN: In many ways that notice is
9 better because you know before the interview takes place
10 you can take all the protective measures you want and if
11 I heard you if the union member decides he doesn't want
12 the business manager you won't object because you're
13 relieved of your obligation to representation so that
14 would be one of the issues before us is what is the best
15 method of giving the appropriate notice to the people who
16 are entitled to such notice.

17 WITNESS MCDONALD: If I may I think Paul in his
18 last statement, he was saying that even though this
19 committee is charged with the employee of the licensee we
20 kind of extended our testimony to include the building
21 trades person, the itinerant worker.

22 MR. SILBERT: Contractor and subcontractor.

23 WITNESS MCDONALD: The same principal would
24 apply.

25 WITNESS SHOOP: The scope of the committee is

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1 very narrow, it's just a licensee employee.

2 We really have, if you're going to investigate
3 people whether they're witnesses or involved in these
4 incidents it doesn't really matter to get useful
5 information. I think you narrowed the scope that
6 raises some problems with us if they're just licensee
7 employees, because we have members who are not licensee
8 employees and we're having a second class citizen.

9 MR. SILBERT: You want equal treatment for
10 all?

11 WITNESS SHOOP: Equal treatment, yes.

12 MR. SILBERT: Mr. McDonald do you wish to
13 add anything?

14 WITNESS MCDONALD: No.

15 The only comment I would make is that as far as
16 notification goes, we would, if this, say, the NRC did
17 agree that local union representative should be present
18 would be that it would be our responsibility to designate
19 a person at the work site more than likely that would be
20 the representative of the union.

21 I am thinking of the problem that could arise
22 and the question that arises where we may have one
23 business manager with 15,000 members and maybe three or
24 four nuclear stations, and we certainly don't expect the
25 NRC ourselves to be tied up. We would say that Paul

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1 Shoop who is, for a better term, chief steward at a
2 particular nuclear station he would be the union
3 representative. There wouldn't be something that you
4 would have to wait days to get a representative there or
5 something like that. We don't expect, nor do we expect
6 it under the Weingarten, the same principal would apply.

7 MR. SILBERT: Mr. Count?

8 WITNESS COUNTS: I have nothing to add.

9 MR. SILBERT: Gentlemen, we certainly
10 appreciate your taking the time to come here today and
11 giving us the benefit of your insight and your views.
12 Thank you very much.

13 (WITNESSES EXCUSED.)

14 MR. SILBERT: Is Mr. Devine here?

15 I want to thank you for appearing here Mr.
16 Devine.

17 For the record, would you identify yourself and
18 your association that which brings you here in which you
19 have you interest here?

20 WITNESS DEVINE: Yes, I am pleased to be
21 invited today, my name is Thomas Devine. I am the Legal
22 Director of The Government Accountability Project of the
23 Institute for Policy Studies.

24 GAP is an organization which provides legal and
25 other support for whistleblowers. Employees either

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1 within the government or within private corporations
2 which they feel is illegal or a threat to public life,
3 right and safety. We both assist those employees in
4 disclosing abuses if we agree that the issues are
5 significant and reasonable and we also provide legal
6 representation to help those employees defend themselves
7 against retaliation.

8 Within the last few years we have increasingly
9 received requests for assistance from employees in the
10 nuclear industry.

11 MR. RUEBHAUSEN: Could you give me the name
12 again of the institute which you represent?

13 WITNESS DEVINE: Institute for Policy Studies,
14 sir.

15 MR. SILBERT: That's Washington based?

16 WITNESS DEVINE: Yes, it's a think tank, it's
17 staffed by professors and sabbaticals from universities
18 and former government analysts who choose to go into
19 private industry.

20 MR. SILBERT: Are you a lawyer yourself?

21 WITNESS DEVINE: Yes.

22 MR. SILBERT: And do you have any experience
23 with people who have sought your advice from nuclear
24 facilities?

25 WITNESS DEVINE: Yes, I'd say in the last two

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1 years we have represented approximately a dozen employees
2 at nuclear power plants, and I have probably worked with
3 about 75 employees as witnesses in cases that we're
4 investigating on behalf of those that we represented.

5 MR. SILBERT: Does your representation follow
6 after you have been contacted by an employee at a nuclear
7 facility?

8 WITNESS DEVINE: That's correct.

9 MR. SILBERT: And what are the kinds of
10 circumstances under which you might be contacted?

11 WITNESS DEVINE: Sir, I should have mentioned
12 in that last statement that during the last year we have
13 also undertaken to represent citizen organizations in
14 some cases. My testimony isn't really applying to that
15 context.

16 MR. SILBERT: What are the kind of
17 circumstances that an employee at a nuclear facility
18 might come in contact or initiate a contact with GAP?

19 WITNESS DEVINE: Generally, it's a case where
20 the employee has raised some issue within the licensee's
21 organization. I have even spoken with his or her
22 supervisor or taken it to the company to present various
23 degrees of effort. In either, they have been ineffective
24 in achieving any of the policy goals which they're
25 attempting to pursue or they have been subjected to what

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1 they perceive as retaliation. As a result they request
2 assistance from us.

3 MR. SPRITZER: There are no instances then
4 in which you have been contacted as a result of the
5 employee having been called in by an investigator and
6 having decided that he wants representation?

7 WITNESS DEVINE: I am not sure if there has
8 never been a case like that.

9 MR. SPRITZER: That's not typical?

10 WITNESS DEVINE: That's not typical. Generally
11 there are the employees choosing to make the disclosure
12 outside the corporate system to our organization rather
13 than to the Nuclear Regulatory Commission because of a
14 variety of reasons they may distrust the NRC to be the
15 first to receive that evidence.

16 MR. SILBERT: How do they hear about you? I
17 mean we have been told that these nuclear facilities you
18 are out in the hinterland and they might not even have an
19 ability to locate counsel in the local area and here they
20 are now contacting someone in the seat of all bureaucracy,
21 Washington.

22 WITNESS DEVINE: I am sure if we had an area
23 out there they we would represent a lot more. I am sure
24 it's through newspaper reports and things.

25 MR. SILBERT: Did you review the questions

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1 which were posed by the Nuclear Advisory Committee?

2 WITNESS DEVINE: Yes, sir, and I have organized
3 my presentation today around those four questions.

4 MR. SILBERT: Why don't you proceed?

5 WITNESS DEVINE: The first issue as I
6 understand it is whether the NRC should apprise
7 interviewees as a matter of policy of their right to an
8 attorney? And we would recommend that this not be the
9 case. There are basically six reasons that I would offer
10 in support of this.

11 The first reason is that the policy is
12 unnecessary. The company can educate it's employees of
13 their right to counsel the same way that it's currently
14 required by the law to redress them of their right to
15 protection against retaliation through the Department of
16 Labor. They can put up notices on the bulletin board
17 saying you have the right to counsel.

18 At Three Mile Island where we are currently
19 involved in litigation the company last sent out letters
20 to the employees who might be involved informing them of
21 their right to counsel. This change in policy,
22 structural change simply is unnecessary.

23 I believe a second reason why it's unnecessary
24 is even if there were -- the structure didn't permit
25 this type of notice we don't believe that it's

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1 pragmatically or legally relevant except in a few rare
2 instances where nuclear employees would even be subject
3 to criminal prosecution assuming, of course, that they
4 don't make false statements to government investigators.

5 Criminal liability only applies to a few
6 selected officials with very significant
7 responsibilities. In fact, I am certain there haven't
8 been any prosecutions in history against operating
9 employees of listed nuclear power plants. We're largely
10 talking about a hypothetical situation.

11 There have only been a handful of referrals to
12 the Department of Justice for possible prosecution and I
13 am really a bit mystified as to the extent of the problem
14 which led to the creation of this committee. To me, it
15 seems to be a nonexistent problem.

16 The third example I would make is really a
17 result of that and we feel very strongly that the
18 Kharnoff proposal that's being considered is the core of
19 your Commission, is really for the benefit of licensees
20 rather than of interviewees, the employees of nuclear
21 power plants. In that sense, I think it's a bit of a
22 misnomer. The ones who stand to gain by adoption of the
23 proposals that you're considering is primarily licensees,
24 not witnesses.

25 The fourth point that I would --

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1 MR. SILBERT: Excuse me, can you explain why
2 you believe that to be so? That is, why do you believe
3 that the proposal is really one for the benefit of the
4 licensees as opposed to the interviewees? Is it simply
5 because you don't think the threat of a criminal
6 prosecution of an interviewee and a low level employee is
7 a realistic one?

8 WITNESS DEVINE: That's correct with respect to
9 the employee. With respect to the licensee, of course,
10 there is very real possibility of civil enforcement
11 actions being taken and there's increasing possibility of
12 criminal enforcement action being taken.

13 There's a number of grand juries that have
14 been convened to look at potential criminal violations of
15 the Atomic Energy Act. I would in that respect point to
16 the current grand jury investigations at Three Mile
17 Island and at the Zimmer Nuclear Power Plant outside of
18 Cincinnati.

19 MR. SILBERT: So what you're suggesting is that
20 in terms of the threat of enforcement be it civil or
21 criminal, the exposure or the likelihood of exposure of a
22 non-high level employee is rather minimal. The real
23 threat is with respect to the licensee itself or perhaps
24 some of its quite high officials?

25 WITNESS DEVINE: That's correct.

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1 MR. SILBERT: And therefore the benefits will
2 be from hearing the questions asked to the interviewee
3 and the information that is gained from it, is that what
4 you are talking?

5 WITNESS DEVINE: Yes, I think this proposal is
6 a very effective attempt to make discovery easier for
7 licensees in anticipation of possible litigation. I
8 would really define the issue here.

9 MR. SILBERT: Discover and monitor it's
10 progress and it's course?

11 WITNESS DEVINE: Yes, and to find out what the
12 NRC is learning in fact, what they're asking, what
13 they're learning.

14 I would say the issue in reality here is
15 whether licensees have the right to have their own
16 counsel present if you look at the full implication of
17 this when witnesses are questioned in an investigation
18 for which the licensee is a potential target. I think
19 that's really the thrust of these proposals rather than
20 protection of the interviewees from potential liability.

21 MR. RUEBHAUSEN: Mr. Devine, I am sure I am
22 getting ahead of where you're going but the employee
23 needs protection not only against the theoretical
24 possibilities and repercussion down the line, but also
25 some protection from losing his job which may be a far

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1 more real threat. Are you going to come to that?

2 WITNESS DEVINE: Yes, I am, sir.

3 The fourth point that I would make is that to
4 my knowledge this type of proposal is unique within the
5 federal government, at least until a subpoena is issued.

6 I am not aware of any other agency that takes
7 the initiative to offer witnesses the equivalent of
8 Miranda Rights in the preliminary stages of a civil
9 investigation. Mr. Kharnoff in his initial letter on
10 this topic did mention that certain agencies in their
11 regulation note the right to counsel. That's a far
12 different matter than taking the initiative to routinely
13 inform employees in the day-to-day bread and butter work
14 of the agency to the right to counsel.

15 MR. SPRITZER: Do you distinguish at all to the
16 situation where you put it in the ordinary civil
17 investigation and the situation where the interviewee may
18 be suspected himself or herself of being engaged in wrong
19 doing?

20 WITNESS DEVINE: I didn't hear the first few
21 words of your question sir.

22 MR. SPRITZER: Well, do you distinguish the
23 situation where the witness is there simply as a witness
24 to what somebody else has done and is in no way
25 implicated himself and the situation in which the witness

1 who is called may be personally implicated in wrong
2 doing?

3 WITNESS DEVINE: Yes, I do think there's a
4 very real distinction there. I think that it's a formal
5 distinction where the witness is subject to criminal
6 liability for the wrongdoing, otherwise it would be only
7 for the witness to make false statements to the
8 investigator.

9 MR. SPRITZER: What I'm getting at is would you
10 think it appropriate to adopt for the -- for the NRC to
11 adopt a policy of giving some kind of warning to a
12 witness in circumstances where the witness was, himself,
13 a target of the investigation or a focus of the
14 investigation in terms of possible wrongdoing?

15 WITNESS DEVINE: I would answer in two
16 respects, sir.

17 The first is if the witness is subject to
18 criminal liability. I think that it's only fair that the
19 witness be informed that due to their position at the
20 plant that they are subject to prosecution for violations
21 of certain laws and due to the nature of the individuals
22 involved I doubt that would be a surprise but it would
23 only be fair to go through that stuff.

24 The second warning that I think would be
25 appropriate for any witness is that they're subject to

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1 prosecution for material false statements to any
2 government investigator under 18 USC 1001.

3 A further point I would make why we don't feel
4 that this is a wise policy is the impact on the Nuclear
5 Regulatory Commission through further exacerbating what
6 we feel is already intolerable delays in investigations
7 by the NRC.

8 Offset investigations already face delays that
9 we believe are just too long because of institutional
10 roadblocks such as the necessity to wait for the Office
11 of Inspections and Enforcement to complete their work
12 before OI gets invited into the procedure, into the
13 process which is very frequently the practice in order to
14 avoid conflicts with -- potential conflicts with safety
15 concerns.

16 This would further exacerbate those delays by
17 having to make OI first wait for IE and then wait for the
18 employee to decide what kind of representation they would
19 want and then schedule something with potential counsel.

20 I think we have a very real problem with the
21 NRC that issues are stalled, that witnesses have
22 forgotten, that evidence has been lost or destroyed
23 before OI even gets there and this would exacerbate
24 them.

25 Finally, I studied the testimony from the last

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1 hearing that you all had and feel that the point is well
2 taken that imperically, at least, it makes sense to
3 me, that imperically this is restricted now of
4 information. In one instance where the NRC did permit
5 the company to advise employees of their right to counsel
6 on a systematic basis. In fact I was so concerned about
7 it that I immediately contacted the NRC to make sure they
8 weren't following that policy in their current Three Mile
9 Island investigation. I was pleased that they were not
10 warning employees or informing them of their right to
11 counsel.

12 That's basically the comments that I would have
13 to make on the first issue.

14 MR. SPRITZER: One further question on that.

15 You've been talking about right to counsel.
16 Questions have also been raised in some of the discussion
17 by some of the witnesses as to whether an interviewee
18 should be advised that the investigator does not have
19 legal process at his command.

20 In other words, that it would be voluntary
21 for him to appear if -- that he has a choice. You object
22 to giving such information to the interviewee as well?

23 WITNESS DEVINE: I would object to giving such
24 a statement until there is some need for it that's
25 shown. I don't think that it's desirable --

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1 MR. SPRITZER: Arguably some sophisticated
2 person might feel he has no choice and arguably the
3 ignorant person should be treated with the same
4 consideration as one who is better informed.

5 WITNESS DEVINE: Of course we face situations
6 everyday in society where we have to decide for ourselves
7 whether we have a choice to participate voluntarily in an
8 activity which is voluntary.

9 The only time that I think it is desirable to
10 institutionalize that type of full disclosure of your
11 options is when you're facing potential criminal
12 liability and there I would agree with you that the
13 warning should be made where it's applicable.

14 The second issue as I understand it is should
15 there be limitations on the choice of counsel? That is,
16 should employees, interviewees be prohibited from
17 choosing counsel paid for by the company during the
18 investigation and I want --

19 MR. SILBERT: It's a little more narrow than
20 that. It means company counsel which can be different
21 than counsel paid for by the company.

22 WITNESS DEVINE: I understand.

23 MR. SILBERT: Let's talk first about
24 company counsel.

25 WITNESS DEVINE: That is fine and actually in

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1 distinction I don't think would be any difference would
2 be significant to some of the points I am making here.
3 It may be significant to some of the follow-up points I
4 may get into.

5 Initially I want to qualify my views on this by
6 saying that we have not briefed this issue, gone to the
7 law library and done a full range of research as to what
8 the options are so this analysis is more policy analysis
9 than legal analysis and may be restricted on that basis.

10 With that limitation in mind I would say that,
11 yes, there should be such a limit and basically there's
12 five reasons why we believe that.

13 Initially, I guess as an overview, I think that
14 it's necessary to keep in mind the conflict between the
15 mission that is involved in Mr. Kharnoff's proposal and
16 the NRC's mission in its proposal. The NRC mission as I
17 understand it is to enforce the law and a major part of
18 that is by obtaining information, facilitating the free
19 flow of information. One of the objects that police
20 officer sees may well be as Mr. Hickey stated at the last
21 hearing to keep an unsafe employee off the job.

22 The mission of the representatives who proposed
23 this policy is to defend their clients. Quite possibly
24 against charges that their clients permitted an employee
25 to do the job. I think these missions are fundamentally

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1 at odds with one another and while I think it's fine for
2 representatives to protect their client's rights and seek
3 whatever forum is possible, I don't think it's proper for
4 the Nuclear Regulatory Commission to do whatever it's
5 required to do to inhibit the Commission.

6 With that overview in mind, I'd first like to
7 turn to the position that was discussed at the last
8 hearing by one of the witnesses who testified, that by
9 informing employees of their right to -- by allowing
10 employees to have company counsel, that this would
11 decrease the chilling effect in NRC investigations
12 through decreasing uncertainty and increasing stability
13 for the potential witness.

14 In my opinion, gentlemen, that position bears
15 almost no relationship with reality, at least based on
16 the nuclear employees that we have spoken with.

17 I believe that it reflects either naivete or
18 cynicism about the NRC investigations.

19 Based on our experience with approximately 75
20 employees of nuclear power plants, the most common
21 reason why they will refuse to speak with the Nuclear
22 Regulatory Commission and come to GAP instead is because
23 they are afraid that utility management will find out
24 about what they said to the NRC.

25 This type of practice facilitates that loss of

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1 confidentiality, and I think it's a very real fear that
2 NRC investigators face in the field. And it's been a
3 problem with the Commission. One way to neutralize that
4 problem to a degree would be to avoid these types of
5 policies.

6 MR. SILBERT: May I ask you a question? You
7 said the employees come to you because they are concerned
8 that the information that they convey to the NRC
9 investigators will somehow be disclosed to the employer?

10 WITNESS DEVINE: That's correct.

11 MR. SILBERT: Is that because of the presence
12 of company counsel or because NRC itself in seeking to
13 advise the company of its non-compliance may indicate the
14 source of its information either wittingly or
15 unwittingly?

16 WITNESS DEVINE: It's generally the latter. I
17 feel that when you do have company counsel present during
18 the interview you institutionalize that problem.
19 Currently, I think it happens through some type of
20 oversight-something that they get around.

21 The one example that happened in recent
22 litigation under the Freedom of Information Act, NRC
23 counsel disclosed certain documents that went into the
24 Court record. In that disclosure employees who will come
25 to the NRC under conditions of confidentiality were

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1 identified and as soon as I got it I informed the NRC
2 counsel about this. Informed myself that it was probably
3 too late because the company lawyers would have been in
4 the public documents room as soon as it arrived to
5 collect for that type of thing and he was sorry.

6 So in a large organization there is going to be
7 the possibility that information leaks out. Employees
8 are generally more cynical in their explanation of why
9 their confidentiality will be violated. They believe
10 it's because the local resident inspector is colluding
11 with the inspector. I have no way to prove that. I just
12 know that if the company counsel is there, there's is no
13 reason to wonder how that information got back.
14 Automatically.

15 MR. SPRITZER: Of course if an employee is
16 concerned about the company's learning about the
17 disclosures that he is going to make I assume he would
18 not opt for having company counsel.

19 WITNESS DEVINE: Well, that really would get
20 into one of the next points that I want to make. Whether
21 the employee feels that he or she has a choice to reject
22 company counsel if it's offered and I would like to
23 address that very specifically, sir.

24 The third point I would like to make here is
25 that I believe that as a rule conflicts of interest are

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1 going to be unavoidable for attorneys who represent both
2 the licensee and the interviewee. Most commonly in our
3 experience this would happen when the whistleblower wants
4 to challenge a company policy or an honest witness simply
5 wants to cooperate fully with an NRC investigation into
6 alleged abuses by a licensee which is the target of the
7 investigation.

8 In this situation, there almost definitionally
9 would be a conflict of interest.

10 Now you could have conflict also occurring in
11 the converse when the employee may have engaged in wrong
12 doing and the licensee in good faith under the Atomic
13 Energy Act wants to discipline anyone who may have
14 violated the Atomic Energy Act.

15 To me, the only times that their interests
16 would coincide are when both the interviewee and the
17 licensee were engaged in some misconduct together as part
18 of a coordinated operation or when the employee and
19 the licensee both perceive their self-interests as full
20 compliance with the Atomic Energy Act.

21 In the former case I don't think you need this
22 rule and I wouldn't object to the same attorney being
23 there for both. In the later case I doubt very seriously
24 that the Office of Investigations is going to be engaged
25 in interviews. The licensee would have already

1 cleaned up it's own house most likely.

2 The fourth point basically is to respond to an
3 explanation offered at the last hearing why you could
4 avoid and how can you avoid the conflicts of interest.

5 The suggestion was that attorneys for the
6 licensee would warrant the employees or advise the
7 employees, disclose to them, that there could be a
8 potential conflict and have the employees, the
9 interviewee disclose whether it applies in that case.

10 And if that were the interviewee's perception
11 then the licensee attorney would back out and wouldn't
12 participate.

13 I feel that this is an inherently unacceptable
14 approach for the Nuclear Regulatory Commission because it
15 would effectively obliterate confidentiality protections
16 which are in the NRC's regulations for an employee to
17 make such disclosure. Basically he's informing the
18 company directly that the employee is there to rebut the
19 licensee's position and it would really make the
20 regulations, at least on the general level, irrelevant
21 and the NRC estimate couldn't disclose the specifics of
22 the interview.

23 The final point I would like to make is to
24 rebut a position made at the last hearing, that if there
25 were retaliation, that's protected anyway under 423 USC

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1 5851 the Whistleblowers Protection Act administered by
2 the Department of Labor.

3 I believe the suggestion was a bit ironic since
4 the offer of the suggestion defends the licensees in
5 procedure under 423 USC 5851 and as a rule takes the
6 position that retaliation hasn't occurred. I just find
7 that a bit ironic that that would be the source for such
8 a suggestion.

9 At best, however, even if this administrative
10 remedy is successful it's going to take years to be
11 successful if the litigation is pursued and I believe
12 that as a matter of policy the goal should be to avoid
13 the necessity of litigation to protect an employee's
14 job. I'd hate to be in the -- having a policy which
15 required litigation to mitigate the natural effects of
16 that policy.

17 That's basically the comments that I have on
18 the second question.

19 MR. RUEBHAUSEN: As I heard you I don't think
20 you responded to the question. I think as Mr. Spritzer
21 said, the difference between company counsel and counsel
22 retained for the employee either paid for by the employee
23 which is unrealistic or paid for by the employer. I
24 didn't think your comments were responsive to that but I
25 may have missed what you had in mind.

1 WITNESS DEVINE: I guess I would be pleased to
2 respond to any questions that you would have on how to
3 apply that distinction.

4 I can state as a general rule why I don't think
5 the distinction is necessarily too significant.

6 At Three Mile Island in the current
7 investigation General Public Utilities has sent out
8 letters to the employees informing them that GPU would
9 pay for counsel to be present during their participation
10 in the investigations for whatever agency.

11 It it also informed them that it was required
12 to limit paying for counsel to their participation as it
13 were consistent with the company's best interest. In
14 that the company will be prohibited from paying for
15 counsel if the employee testified in a manner which was
16 going to be inconsistent with the companies interest.

17 As a result of this, the employees had to sign
18 a statement that they would agree to pay the company back
19 if it were determined that their activities for which
20 they were represented were inconsistent with the
21 company's interest because they wouldn't qualify for
22 counsel under those circumstances.

23 As a result, to me the major distinction was
24 whether the counsel they had there would be more or less
25 familiar with the licensee's position but basically the

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1 interests would be the same.

2 MR. RUEBHAUSEN: I understand what you have in
3 mind with that special circumstance but if indeed it was
4 truly an independent counsel and the company had no
5 connection with it other than receiving the bills from
6 time to time, do you have any comments with respect to
7 that situation?

8 WITNESS DEVINE: I would think that that is
9 largely hypothetical.

10 MR. RUEBHAUSEN: I can testify it's been done.

11 WITNESS DEVINE: That it has been done?

12 MR. RUEBHAUSEN: Yes.

13 WITNESS DEVINE: I would think that if
14 companies were required under NRC regulations to offer
15 payment of counsel without restrictions for any
16 interviewee whom they employ that my objections to this
17 proposal would diminish drastically.

18 MR. RUEBHAUSEN: Does your organization provide
19 counsel like public defender counsel?

20 WITNESS DEVINE: Yes, sir, we do.

21 MR. RUEBHAUSEN: Would you have any objection
22 to your organization representing the employee as your
23 public defender representing the employee.

24 WITNESS DEVINE: What I first thought was that
25 maybe some of these companies would hire us to represent

1 the employee and then I saw the details and we wouldn't
2 qualify.

3 MR. RUEBHAUSEN: If you had the normal freedom
4 that a lawyer has in representing his client you would
5 have no difficulty?

6 WITNESS DEVINE: That's assuming that there
7 were no restrictions on what the interviewee said.

8 MR. SCOTT: Mr. Devine, were you going to
9 address this question of the ability of the employee to
10 decline an offer of company counsel if it were made?

11 WITNESS DEVINE: Perhaps I was too cursory in
12 my analysis of that point.

13 Basically the reason that I feel that this
14 policy would defeat the confidentiality requirements of
15 the NRC is that an employee realistically doesn't feel
16 that he or she has the option to decline company
17 counsel.

18 In order to take advantage of that option, the
19 employee is basically disclosing that he or she has
20 something that the interviewee doesn't want the company
21 to be aware of and that's a warning significantly to the
22 licensee.

23 Of course, there are employees who have
24 declined the offer but there are a much smaller number of
25 employees who choose to challenge the company that way

1 than who feel that once the offer is made they're on the
2 spot and they pretty much have to. I'd say, well, of
3 course I'd like to have your lawyer here with me. So I
4 think as a practical matter that's going to also inhibit
5 the free flow of information.

6 MR. SILBERT: Are you basing that on an
7 experience you've had with talking with employees or what
8 is the basis?

9 WITNESS DEVINE: Absolutely, yes, yes.

10 MR. RUEBHAUSEN: Have you had experience -- I
11 got the impression you have experience mostly with either
12 the disaffected employee or may I call it the statesman
13 like employee who knows the job and sees a wrong and
14 wants the wrong corrected and wants to make sure that
15 it's corrected.

16 WITNESS DEVINE: That's correct sir.

17 MR. RUEBHAUSEN: There's another type, the 35
18 year employ whose approaching retirement and certainly
19 doesn't want to hurt the employer.

20 Have you had any experience of what the impact
21 of these questions in that type of situation would be?

22 WITNESS DEVINE: Sir, we have not represented
23 any employees who are requesting our help to assist in
24 defending the licensee. They basically don't need us.
25 There's other organizations that they can turn to.

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1 The third question was on whether interviewees
2 should be permitted to tape record interviews and our
3 suggestion on this is that they should be permitted to
4 upon request. However, I am sensitive to the potential
5 consequences of release of this information during the
6 pendency of an investigation and would suggest that if
7 such a policy were adopted it be with the proviso that
8 the interviewee is legally prohibited from release of
9 the tape or transcript of the tape until completion of
10 the investigation.

11 I guess the basic reason for that --

12 MR. SILBERT: How are you legally prohibited?
13 How would you ever accomplish that?

14 WITNESS DEVINE: I guess the same way we
15 enforce any law which says you can't disclose this
16 information.

17 MR. SILBERT: Well, I understand sometimes you
18 do that with classified information.

19 WITNESS DEVINE: Sure.

20 MR. SILBERT: But you would accord to this
21 kind, the substance of that interview, a similar type of
22 restriction with respect to dissemination by the
23 interviewee himself or herself as you would to classified
24 information?

25 WITNESS DEVINE: Well, it would apply basically

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1 to one aspect of the tape or the transcript and that's
2 the questions that the NRC is offering. I believe that
3 it's a legitimate restriction under the Freedom of
4 Information Act, for example, to try to avoid the
5 disclosure of the agency's investigative process during
6 the pendency of investigation and things change a little
7 bit after it's over.

8 MR. SILBERT: You may want to consider in light
9 of the rather strict rules that govern grand jury
10 proceedings the person who is not restricted in any
11 disclosure or they wishes to make is the witness.
12 They are always at liberty to disclose and that is an
13 area that is already clothed with strict secrecy
14 provisions. Your suggestion might be difficult.

15 WITNESS DEVINE: I think it would be difficult
16 to enforce and basically that proviso is a recognition of
17 the difficult job that the nuclear regulatory law faces
18 during an investigation. Of all the points that I have
19 made today that would be the first one I'd be willing to
20 back off on.

21 The fourth question as I understand it is
22 whether there should be expressed grants of
23 confidentiality to all interviewees and our response
24 to that would be, yes, but only upon request.

25 And just to follow up on that conclusion, I

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1 would make a couple of points that are relevant to it but
2 not directly supporting it.

3 The first one is that if this committee advised
4 that NRC investigators should be required to inform
5 employees of their right to counsel, I believe that the
6 requirement should extend to the right for a confidential
7 interview so that there is consistent handling of the
8 policies which are being proposed to protect employees.

9 The second comment that I would make is that I
10 believe that there is a need for much tighter enforcement
11 of confidentiality guarantees to interviewees and one
12 example was offered at the beginning of my testimony in
13 response to a question where it came out during
14 litigation.

15 MR. SILBERT: That was by accident, wasn't it?

16 WITNESS DEVINE: That was by accident. Other
17 examples are the type that have been complained of or
18 it's been alleged that confidentiality has been
19 breached.

20 MR. SILBERT: Is that a result of the kind of
21 collusive sense that you alluded to --

22 WITNESS DEVINE: Sometimes it's because the
23 employee received collusion, other times the employee
24 didn't, I just don't know why but it might have been some
25 oversight or the word had got out. Some employees may

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1 have different feelings or cynicism on this point.

2 This problem of erratic confidentiality is a
3 significant barrier that's hurting the free flow of
4 information to the Nuclear Regulatory Commission, and I
5 feel very strongly that an Advisory Committee would be
6 much more appropriate to develop a program to protect
7 confidentiality of witnesses than to inform them of their
8 rights to counsel. And I feel that that's something
9 that's been a problem for NRC investigators for some time
10 having to with an argument with every suspicious witness
11 that it won't happen to them the way that they believe
12 that it has happened to so many other people.

13 That's basically the responses to the questions
14 that have been offered.

15 About the existence of this Advisory Committee
16 and would very greatly appreciate while I very greatly
17 appreciate the invitation to testify I want to facilitate
18 full candor by offering my concerns.

19 MR. SPRITZER: Go ahead.

20 WITNESS DEVINE: The first concern is whether
21 the committee is representative concerning the issues
22 that are being considered and I am asking this question
23 without any knowledge of the answer. But since the
24 committee has been called to consider potential liability
25 for interviewees, the consequences of potential liability

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1 for interviewees, I wonder if any of you all have
2 represented whistleblowers at nuclear power plants? If
3 your practices have been concerned with the type of
4 people that are the target of the policy that this
5 Advisory Committee is considering?

6 Second, my own cursory reading of the Advisory
7 Committee Act which made the mistake is that an Advisory
8 Committee should be called or could be called unless
9 another agency has already dealt with this agency or the
10 agency that is creating the Advisory Committee already
11 has one, already has an Advisory Committee that could
12 deal with this. And in reviewing the justification for
13 this Advisory Committee, I noticed that it was phrased as
14 basically that the NRC does not have an Advisory
15 Committee that's relevant for this topic.

16 I do believe, gentlemen, though that there are
17 many other agencies that face this same type of issue.
18 In fact the Department of Labor has to do it routinely in
19 Department of Labor prohibited by USC 5451 inherently
20 cover the same topics that are subject to criminal
21 jurisdiction since the Post Three Mile Island amendments
22 that established criminal liability for harassment or
23 intimidation of quality assurance employees.

24 Now this is just based on a cursory reading,
25 but you've been very thorough on the examination of the

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1 issues before you and I would suggest or wonder if that
2 has been considered by the committee also.

3 MR. SPRITZER: What is?

4 WITNESS DEVINE: Whether or not you should be
5 existing under the Advisory Committee Act? I know the
6 courts do all the time and I wonder if that type of self
7 assessment extends to Advisory Committees.

8 MR. SILBERT: With respect to your first
9 inquiry about whether or not any members of this
10 committee have represented whistleblowers, I am not sure
11 that the experience in or out of the industry is
12 particularly relevant as the opportunity for those who
13 have been asked to serve on the committee have available
14 to it the views of people such as yourself to provide
15 that information which is most helpful in this case and
16 that is why you were contacted and that is why not only
17 were you contacted but you were asked to give the name of
18 any other people who might have information of a similar
19 nature or relevant nature to provide.

20 As to the other question I suggest that that
21 one is probably more appropriately addressed as to the
22 Nuclear Regulator Commission itself. But as to the
23 material you have furnished us with respect to those
24 answers, anyone have any questions?

25 MR. RUEBHAUSEN: I have one comment.

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1 Mr. Devine could not have practiced law
2 terribly long, certainly not as long as some of us have
3 without having considered in great depth the question of
4 whistleblowing as lawyers and also on behalf of clients
5 so it need not have been for whistleblowing Nuclear
6 Regulatory contacts to become familiar with the deep and
7 serious public and private issues that are involved.

8 MR. SPRITZER: I just wondered why you seemed
9 to regard this committee's function as related solely to
10 the situation presented by whistleblowers as witnesses.
11 I assume that when the whistle is blown the investigating
12 arm of the NRC may have occasion to call dozens and
13 dozens of people other than the whistleblower and sets
14 their interests of how much protection should be afforded
15 is just as much a matter of concern.

16 WITNESS DEVINE: Absolutely, sir, and I think
17 representative membership on the committee would extend
18 to those who have worked for licensees, as I believe you
19 have Mr. Silbert or would extend to those who represented
20 the employees in the middle. It would also extend to
21 those who have worked with the employees who are
22 challenging company policy, so I would say that certainly
23 there is much more than whistleblowers involved with the
24 topic that you're concerned with.

25 It's just that to have a representative

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1 membership I think there should be some perspective
2 that's developed an expertise with them.

3 MR. SPRITZER: You think we should have
4 proportionate representation from all elements involved
5 in this controversy?

6 WITNESS DEVINE: Or at least certainly an
7 effort.

8 MR. SILBERT: I want to thank you for your
9 views and the candor of your views and your obvious
10 thoughtfulness.

11 MR. RUEBHAUSEN: Very helpful, thank you very
12 much.

13 MR. SILBERT: Let's take a ten minute break.

14 (WITNESS EXCUSED)

15 (WHEREUPON, A SHORT RECESS WAS TAKEN.)

16 MR. SILBERT: Let's resume and back on the
17 record.

18 Our next scheduled witness for today was Ellen
19 Weiss to be representing the Union of Concerned
20 Scientists.

21 Yesterday, Ms. Weiss telephoned me to advise
22 that there is a concurrent contemporaneous hearing going
23 on today in the NRC in which she is a participant, a
24 representative of a party and she would be attending
25 that. She wasn't certain whether she would be able to
1 fulfill her responsibilities there and participate in our

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2 hearing today.

3 I told her that we would be flexible. That if
4 at any time she could come down we would -- during the
5 course of our hearing, we would change our schedule to
6 accommodate her but that if she didn't the record would
7 be open for her subsequently to submit whatever views she
8 wanted to in writing and I assume that she's not here now
9 so that we will proceed to hear from the next scheduled
10 witnesses who are representatives of the Atomic
11 Industrial Forum and before we proceed to hear from them,
12 Mr. Ruebhausen, do you have a statement?

13 MR. RUEBHAUSEN: May I make a statement?

14 Debevoise & Liberman has been counsel for the
15 Atomic Industrial Forum for more than three decades, and
16 that I personally have been involved over that period of
17 time in giving advice to the executives and the board and
18 executive committee of the Atomic Industrial Forum and
19 indeed I was involved in the initial organization of the
20 forum more than 30 years ago.

21 When Chairman Palladino talked with me early
22 last September about the possibility of my serving on
23 this Advisory Committee, I gave him those facts and he
24 said that he would want to consider whether that in any
25 way by an appearance or by substance interfered with the
1 objectives that he was seeking and whether it as such was

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2 not desirable for me to serve.

3 He said he would take that under consideration.

4 Later on when I received the invitation I
5 assumed that he had satisfied himself that there was no
6 reason why I should not serve and I then considered for
7 myself whether there was a reason and I decided that
8 there was not. That the committees of the forum are put
9 together by the forum and mostly drawn from the
10 membership of the forum which is a diverse membership.
11 The committee's function is to assemble information and
12 understanding and disseminate information and
13 understanding and that the views expressed by individual
14 members of committees need not be the views of the Forum
15 and not necessarily are the views of the Forum unless
16 formally adopted by the board of directors. I have never
17 been involved with this particular committee and I hope I
18 am not offending anybody. I don't think I've ever met
19 any of the four witnesses before us today so I feel under
20 no inhibitions in performing my function as a member of
21 the Advisory Committee on the complex and interesting
22 subject that is before us but I think the record should
23 show what I just stated.

24 MR. SILBERT: Thank you.

25 The record should also show that yesterday I
1 received in the mail from one of the representatives here

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2 today, Mr. Richard Littell, a letter addressed to me but
3 concerning the subcommittee which views were expressed
4 with respect to each of the questions before us. I have
5 disseminated a copy of that letter to each of the members
6 of the Advisory Committee and it will, of course, be made
7 a part of the record in this case in this hearing.

8 Would the members who are here of the Atomic
9 Industrial Forum initially identify themselves?

10 WITNESS HICKEY: Thank you, Mr. Chairman, if I
11 may begin.

12 I am Patrick Hickey, of the law firm of Shaw,
13 Pittman, Potts & Trowbridge of this city. We do as I
14 indicated represent licensees, utilities and other groups
15 involved in the nuclear regulatory area. To my immediate
16 right if I may introduce my colleagues is Mr. Littell, a
17 member of the firm of Debevoise & Liberman of this city.
18 His firm has been engaged in a nuclear practice for a
19 number of years but Mr. Littell himself is an
20 administrative lawyer who does not do nuclear work. He
21 also has previously served as general counsel to some
22 government agencies and he wrote the letter that you have
23 just referred to.

24 At the far right is Mr. Harry Voigt who is a
25 partner in the firm of LeBoeuf, Lamb, Leiby & MacRae,
1 here in Washington. He too has been engaged over the

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2 past 10 or 12 years in nuclear licensing enforcement
3 proceedings.

4 Perhaps also relevant to the committee's
5 considerations, he and his firm have represented in
6 the immediate past a number of employees of a nuclear
7 power plant slipping into Federal Power investigation.

8 And to my right is Edward Firestone who is
9 general counsel to the Nuclear Division of the General
10 Electric Company. His role is slightly different. His
11 client is a primary vendor and supplier of materials to
12 nuclear power plants rather than on behalf of operating
13 utilities.

14 I should also note the presence immediately
15 behind us of Miss Linda Hodges, a staff member of the
16 Atomic Industrial Forum. We are appearing on behalf of
17 the Atomic Industrial Forum. I am sure Mr. Ruebhausen is
18 very familiar with the Forum.

19 I should indicate to you in case you don't know
20 that it is the major group representing over five hundred
21 domestic members of the area. Including architects,
22 vendors and suppliers and others.

23 With that brief introduction if I may in
24 the interest of time, we thought it would be most useful
25 to the committee if I just briefly summarized the
1 responses that we have to the questions that were posed

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2 by Chairman Palladino in his letter to you.

3 Some of them were addressed in some detail last
4 time. If earth of the intervening testimony or further
5 reflection have prompted any questions in your mind we
6 would be happy to respond to those as your interest
7 dictates.

8 The basic question was whether the NRC should
9 advise of the right to counsel. The view we expressed
10 was that should be done. That there was not a basis that
11 we could see for differences between suspects and other
12 witnesses and we would recommend it be given
13 accordingly to all because of the difficulties of
14 determining the precise status of the witness and the
15 possibility that his status may change.

16 And lastly, that an appropriate method of
17 making information available was to all of the suggested
18 devices, namely the published rule an admonition and
19 signed acknowledgement to reflect that it has been given
20 and the content of what has been given.

21 Your second question about --

22 MR. SILBERT: Could we stop there for a moment?

23 WITNESS HICKEY: Sure.

24 MR. SILBERT: I read Mr. Littell's letter
25 and the speech that was given by you and Mr. Kharnoff to
1 the AIF and the letter to Chairman Palladino.

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2 My question is, what law would you cite to us
3 as opposed to just a question of policy if you can
4 separate one from the other that would require--or is
5 there any law that requires the giving of advice of
6 counsel in the kind of investigation undertaken by the
7 Office of Investigations to an employee of a licensee?
8 That's the question. Is there any law that requires it?

9 WITNESS HICKEY: I think the answer to that is
10 that there is not a specific requirement but that one can
11 be and should be applied or referred to some of the other
12 provisions. I think Mr. Littell would like to address
13 that.

14 WITNESS LITTELL: May I elaborate?

15 MR. SILBERT: Please.

16 WITNESS LITTELL: I think at the last session
17 of this Advisory Commission Mr. Fortuna of the Office of
18 Investigations stated the proper rule. He said that
19 as a common sense or reasonable approach there is a right
20 since if the witness refused to voluntarily testify the
21 witness would automatically get the right under the
22 Administrative Procedure Act.

23 That is, the Office of Investigations has
24 the right to compel testimony by use of a subpoena. If a
25 witness insists that the office use that right and that
1 his testimony be compelled under the subpoena then the

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2 Administrative Procedure Act clearly grants a right of
3 counsel to compel the testimony.

4 Now our position is that as a matter of policy
5 the NRC should not put a premium on requiring witnesses
6 to insist that their testimony be compelled and to insist
7 upon subpoenas. That would only slow down and formalize
8 what should be a speedy and informal process.

9 Moreover, it is, I think, wrong in principle
10 for the NRC to have a system where a co-operative witness
11 who doesn't insist on a subpoena gets less rights than an
12 unco-operative witness who does insist upon a subpoena to
13 give less to the willing witness than to the
14 recalcitrant one. So I think that although in an
15 informal setting a witness does not have an automatic
16 right simply because he's requested. All good sense
17 requires that he be given that right and not required to
18 insist upon it.

19 MR. SCOTT: I think, Mr. Littell we're
20 presuming, I guess, for present purposes a right to
21 counsel in this setting and I had understood Mr.
22 Silbert's question to be addressed to the issue of the
23 right to notice of the right to counsel and the question
24 is whether -- and I understood Mr. Hickey to be
25 suggesting that there was a -- it could be inferred from
1 various authorities that there was a right to notice of

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2 that right to counsel. Is that the position?

3 WITNESS HICKEY: I didn't understand Mr.
4 Silbert's question the way you did. I thought he was
5 asking about the right to counsel.

6 MR. SILBERT: No, I was asking about the right
7 to notice.

8 WITNESS HICKEY: I am not aware of the legal
9 compulsion to advise interviewees of that right.

10 MR. SCOTT: Is that your position as well?

11 WITNESS LITTELL: It's a good distinction that
12 you're making. There may be a distinction in the law but
13 it seems to me there should be no distinction in the
14 policy. It is perfectly clear from the Office of
15 Investigation witnesses that if a witness asks for the
16 right to counsel it will be accorded. It is also clear
17 in the practice of other administrative agencies that
18 witnesses who ask to be represented by counsel are
19 allowed to do so. The only result of not granting a
20 notice is to penalize the unsophisticated witness who
21 doesn't know enough to ask.

22 It seems to me that the objective of a fair
23 procedure is to protect precisely those witnesses who
24 need protection the most.

25 The witness who is, to use the Office of
1 Investigation's words at the last hearing, astute enough

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2 to ask for counsel when she or he needs counsel. It is
3 unfair to take advantage of the other witness by not
4 giving that employee the rights that are automatically
5 demanded or insisted upon by the more knowledgeable
6 employee.

7 MR. SPRITZER: Recognizing that that reasoning
8 has some appeal it is, I think you would also recognize,
9 suggesting this committee advise the NRC to adopt a
10 policy that apparently goes beyond what any other agency
11 does. That's correct, isn't it? I don't know myself of
12 any agency that in its investigations, at least we
13 haven't received information so far as I know indicating
14 otherwise, I don't know that any agency makes it a
15 regular practice to advise witnesses routinely called in
16 an investigation that they have a right to bring a lawyer
17 with them.

18 WITNESS LITTELL: The law on that is mostly
19 unwritten. Our survey of other agencies shows that all
20 or virtually all, including agencies with safety
21 responsibilities do allow the right to counsel, but this
22 is not generally placed into manuals although some
23 agencies do.

24 MR. SPRITZER: I don't know about allowing the
25 right but whether they give a specific instruction or
1 advice.

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2 WITNESS LITTELL: That is a matter which I
3 think has some variance from agency to agency, from
4 investigator to investigator because there is no uniform
5 regulation. I think, what we're insisting or suggesting
6 is that the agency ought not to allow the lack of
7 uniformity that applies elsewhere but ought to decide
8 upon the policy that makes the most sense from the
9 standpoint of protecting the rights of employees and then
10 that policy should be uniform by rule in the agency.

11 MR. SILBERT: May I ask this? Our record is
12 going to be open till June 3rd. I realize that's not
13 much time from now, but if you have or any members here
14 have any information that any agency follows a practice
15 or procedure of giving notice to witnesses being
16 interviewed of a right to counsel, this committee would
17 welcome having that information. And we're not confining
18 ourselves to a practice or procedure that's been codified
19 in a regulation, but even if it's just an oral policy or
20 procedure we would certainly appreciate being so
21 advised.

22 WITNESS LITTELL: Thank you.

23 WITNESS FIRESTONE: Let me add one more piece
24 of information just speaking as a representative of the
25 vendor world. What will happen if there isn't a uniform
1 policy is that I guess I believe that lawyers

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2 representing licensees and representing vendors will
3 inform down to the lowest machinist at every location
4 their right in an NRC investigation to counsel and will
5 provide that information to them.

6 What it means is probably the fourth tier
7 vendor, the person that makes the pumps down at the
8 bottom end of the line and involved in the investigation
9 who only ten percent of his business world is in business
10 in that world will be advised that he's not involved
11 or first line vendor whether it's a supplier or engineer
12 who will inform all of their employees to right to
13 counsel. That's why we're looking for regularization of
14 the process, for uniformity of the process to make sure
15 everyone has the same.

16 WITNESS LITTELL: Incidentally, Mr. Silbert,
17 although I will respond at greater length, I do want to
18 make it clear that there are agencies which volunteer the
19 right to counsel.

20 For example, the Federal Aviation
21 Administration which conducts investigations of aircraft
22 and also with great safety implications. There is a very
23 definite practice. If the violation is considered to be
24 no more than a technical infraction of the regulations
25 the practice is that the investigator does not give a
1 notification but the inspector or the legal office will

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2 notify the pilot and at that point the pilot is free to
3 ask for legal advice. On the other hand if the act is
4 serious and could involve criminal prosecution I am told
5 that the FAA as a matter of course advises the
6 interviewee of the right to counsel.

7 MR. SCOTT: Could any of you gentlemen speak to
8 this issue of the impact of the notice of right to
9 counsel on what's been termed here today as the free flow
10 of information. Whether it would enhance that or have an
11 adverse effect or whatever?

12 WITNESS LITTELL: I would like to respond to
13 that. I did read the transcript of the last hearing and
14 I do remember one member of the Office of the
15 Investigations saying that in his view an inspector who
16 notified the employee of its right to counsel would find
17 that that had a "very intense chilling effect".

18 I find it very chilling to the bone to imagine
19 employees seated in interrogations with one, two or any
20 number of investigators whose technique before some
21 employees to be quite coercive and quite threatening and
22 yet that employee does he, or she, does not know that
23 they can address the person by having a counsel?

24 MR. RUEBHAUSEN: You mention coercive and
25 threatening. Do you know that there has been any
1 coercive and threatening interviews by the NRCOI?

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2 MR. VOIGT: Yes, sir.

3 MR. RUEBHAUSEN: So that's really a separate
4 issue, that's the issue of fairness or decency in which
5 the interviews are conducted?

6 WITNESS HICKEY: But not unrelated, of course.

7 MR. RUEBHAUSEN: Not unrelated but can be dealt
8 with separately.

9 WITNESS HICKEY: I can respond a little more
10 directly to Mr. Scott's question too.

11 I have the personal experience of having
12 informed a number of employees at various sites and under
13 various conditions about their rights with regard to NRC
14 investigative interview, including the right to go it
15 alone, the right in some instances to be accompanied by
16 company counsel and a number of variations on that.

17 How the employees respond is governed in my
18 experience by extreme distraction but in my experience
19 more often than not the employees have chosen to go in
20 without counsel. I think that at least raises a question
21 as to the contention that Mr. Devine made was that to
22 offer company counsel is to compel company counsel. Even
23 in the specific context he referred to where a particular
24 utility offered counsel by letter and I can't refrain
25 from saying that this characterization of a letter is not
1 an accurate one.

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2 The fact is, that many of the employees who
3 received those letters did not select counsel after being
4 offered the opportunity to talk to them and the company
5 would pay for it. The fact is they did not.

6 MR. SCOTT: One point of view that's been
7 expressed by several of our witnesses has been that the
8 mere invoking of counsel has a chilling effect on the
9 witness, the notion that, well, this must be a larger
10 matter than I had been given to understand, so I better
11 be disident or whatever and I guess the question is
12 whether you have any empirical experience with that.
13 What you're telling me is if people know they have it
14 they either go in without it or they go in with counsel
15 and it does not seem to have any adverse impact on the
16 disposition to provide information. That's your
17 experience?

18 WITNESS HICKEY: That's my experience. I think
19 the more significant factor is how the employees or the
20 prospective interviewees perceive what the NRC's mission
21 is there. In some instances what has prompted the
22 mission.

23 MR. SCOTT: We have talked somewhat about the
24 mechanics this morning and the possibilities regarding
25 the verbal formulation of it. Is there some preferred
1 verbal formulation of the notice in so far as you're

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2 concerned? Is there some way to state it that would
3 convey the right and be most neutral in terms of
4 effecting the -- or implicating these extraneous
5 concerns?

6 WITNESS HICKEY: I haven't tried to draft it
7 word by word and I usually don't read it from a script
8 but it seems to me that the elements are that a simple
9 straight forward statement that the employee being asked
10 to be interviewed, whatever he can be told about the
11 subject matter of the interview is, he is not compelled
12 at this time to be interviewed but that a subpoena is a
13 possibility if he refuses then he may choose not to go,
14 that he may choose to go alone or he may choose to go
15 with counsel if counsel is being offered by the company
16 or that he may obtain counsel on his own if he wishes to
17 do that.

18 MR. SCOTT: Would it be desirable to your
19 standpoint to leave that? That is a routine matter and
20 nothing should be read into it or is that not desirable
21 from your standpoint?

22 WITNESS HICKEY: I don't know that you could
23 say that and make it accurate.

24 I suspect that if it's determined or if the
25 Commission were to agree that it was appropriate to give
1 a warning, I would think that it would be extremely

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2 desirable to have a mandatory published phraseology of
3 that warning so that people could look at the questions
4 of possible slanting of the warning or proper or improper
5 inferences that might be drawn.

6 MR. SCOTT: Intonations?

7 WITNESS HICKEY: And then we say we won't
8 get into what investigator A said as to investigator B.
9 The instructions are that he will read this card and
10 everybody will read this card and that's what the warning
11 will be. Then at least you'd have uniformity.

12 MR. SILBERT: What is the reaction of the
13 members here to the testimony of the union
14 representatives who urged that this committee recommend
15 to the Commission that perspective interviewees be
16 advised of the right to have a union representative or
17 business representative present during the interview?

18 WITNESS HICKEY: I am not sure all of our
19 panelists were here when that testimony was given.

20 MR. SILBERT: I understand that.

21 WITNESS HICKEY: Have I not seen whatever
22 written submission the gentleman from the union has made
23 so I am not sure I know all of reasons in support of his
24 position.

25 My reaction is that he was asking for two
1 things. One was a right that he didn't claim was yet

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2 established but he thought might be extrapolated to have
3 an union representative present and then to incorporate
4 that into the warning that would be given to an
5 interviewee.

6 I think that the presence of another person, be
7 it a co-worker or a business manager or any other person
8 has some benefits in terms of avoiding the type of
9 coercing interview situations which might exist where
10 there's not another person present. I am not sure that
11 gives the employee the kind of advice he needs as to his
12 potential exposure.

13 MR. SILBERT: Are you suggesting then that it
14 might be advisable to have not only a co-worker or a
15 business manager from the union but in addition a counsel
16 person present as well to give him or her that kind of
17 advice?

18 WITNESS HICKEY: I think the case for
19 inhibiting the free flow of information gets stronger as
20 you increase the number of people that are present in the
21 interview and that it's not necessary to have several
22 people there if there is a counsel for the employee, if
23 that's what he wants.

24 If his choice is that he doesn't want counsel
25 but would like a disinterested observer or union
1 representative or a co-worker or his wife it seems to me

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2 that he should be allowed that.

3 MR. SPRITZER: So you think he should be
4 advised that he could have a personal representative or a
5 lawyer there?

6 MR. SILBERT: Or a union representative?

7 WITNESS HICKEY: Yes.

8 MR. RUEBHAUSEN: Mr. Hickey, your position with
9 respect to the presence of counsel in the context of what
10 is our jurisdiction, namely that the Regulatory
11 Commission and it's employees, would you extend that to
12 the interviewees who are not employees of the licensee
13 but who may be deemed to have relevant information? Such
14 as a neighbor or a motelkeeper?

15 WITNESS HICKEY: I really hadn't thought
16 carefully about outside independent witnesses.

17 I think that the basis for making the advice to
18 licensee employees is equally applicable to others at the
19 site such as contractors, vendors, architects, engineers,
20 employees.

21 If you get off the site to a neighbor who may
22 be asked whether they ever saw an employee using drugs
23 off site, it seems to me that the case is much less
24 strong.

25 MR. RUEBHAUSEN: Well, then could you then make
1 what the case is because I don't see the distinction that

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2 you're trying to draw between them.

3 WITNESS HICKEY: Part of the decision is that
4 given the history and pervasive influence of regulation
5 in the nuclear industry there is now a feeling, an
6 inaccurate one, but a feeling that an employee is
7 required to participate in these interviews. I am not
8 sure that that same position exists if you go to a
9 housewife who happens to live next door to a plant
10 operating.

11 MR. RUEBHAUSEN: So if there were promulgated a
12 rule or you had a card that said that no employee is
13 required to cooperate in these interviews that would get
14 at the heart of what is troubling you?

15 WITNESS HICKEY: I think you should tell him
16 what his rights are.

17 MR. RUEBHAUSEN: That's different.

18 WITNESS HICKEY: It's narrower --

19 MR. RUEBHAUSEN: It's clear that he does not
20 have to talk?

21 WITNESS HICKEY: I think that's clear.

22 MR. RUEBHAUSEN: That is the distinction that
23 you were drawing between the employee and the housewife
24 or the gardener?

25 WITNESS HICKEY: Well, neither have to talk
1 absent a subpoena. The pressure is on the one, the

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2 employee as compared to the housewife is much greater.

3 MR. RUEBHAUSEN: Well there's the pressure but
4 in the general rule that you discussed in the general
5 rule or the oral statement by the investigator you would
6 have dealt with what is troubling you.

7 WITNESS HICKEY: I am not sure I totally
8 understand what you are saying but I think if you advise
9 the employee of his rights that substantially deals with
10 my concern.

11 MR. RUEBHAUSEN: That broadens my question
12 because we assume under the right to counsel and assume
13 company counsel if you assume?

14 WITNESS HICKEY: If you tell me his right is
15 not to participate then assume that includes all the
16 degrees up to that, participating only with counsel,
17 either one of them. I believe that he has a right to
18 have counsel supplied to him.

19 MR. RUEBHAUSEN: I think I understand your
20 view.

21 MR. SILBERT: May I ask one question? Are you
22 suggesting in an advice of rights, a canned plea of
23 so-called Miranda Rights or are you talking about only
24 advising him as to his right to counsel?

25 WITNESS HICKEY: I think he should be told the
1 ground rules of investigation also. You should tell

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2 him about his counsel and that he has a right to
3 participate or not participate and he can condition his
4 participation in the various ways we suggested. It seems
5 to me that informs him well enough.

6 MR. SILBERT: So it's not the full Miranda
7 scope of warning, it's really twofold, right of
8 participation or not participation and right of counsel
9 or representative or co-worker or union representative?
10

11 WITNESS HICKEY: That's my feeling.

12 WITNESS LITTELL: Well, isn't the advice of the
13 right to counsel the more important one, the advice that
14 an employee has the right not to participate is more
15 academic than real for most employees who on whatever is
16 said will feel, I understand, a compulsion to cooperate
17 and to participate?

18 MR. SILBERT: Well, if they're going to feel
19 the compulsion, you say that even advising them that
20 they're not compelled to participate won't be very
21 effective -- or won't be effective?

22 WITNESS LITTELL: All that the Commission could
23 advise them is that they have a legal right not to
24 participate. This would not dissipate the pressures that
25 come from the need of an employee to participate in order
1 to show good faith, in order to do what is really part of

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2 the employee's job. I don't think there is any real way
3 to relieve the employee of the effective pressures to
4 cooperate with an investigation nor do I think that the
5 NRC in general would wish to encourage non-cooperation.

6 MR. RUEBHAUSEN: Is it the normal case, Mr.
7 Hickey, that when an investigation is started by the NRC
8 that he does not know the investigation is going
9 forward?

10 WITNESS HICKEY: I would say the normal case is
11 that the first notice you may receive that an investi-
12 gation is going forward frequently is the arrival at the
13 plant of NRC Office of Investigations employees who wish
14 to begin immediately investigating by looking at
15 documents or talking to witnesses.

16 In some instances you know after that's
17 happened the first time you know that an investigation is
18 ongoing and you then will have only to guess or to
19 attempt to learn when they will visit again, so, yes, it
20 is.

21 MR. RUEBHAUSEN: So you do get knowledge. You
22 may get it from whatever time it takes to get from the
23 gate to wherever they're going.

24 WITNESS HICKEY: That's right.

25 MR. RUEBHAUSEN: But you could then put in
1 effect a red alert and inform all of your employees that

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2 the agents are here and you have these rights, don't
3 talk or you can say don't talk unless you consult with
4 me, counsel?

5 WITNESS HICKEY: That can be done. I frankly
6 think that one of the policy reasons why there is a
7 better way to do it is that what happens when that begins
8 is that you initiate an atmosphere of friction in which
9 the Office of Investigations employs a very timely
10 question because I had some experience with it this
11 morning in which the Office of Investigations employees
12 are insisting that records of witnesses be made available
13 now and seeking to bring pressure to insure that that
14 happens and not in any tolerant manner saying, if
15 you'd like to take a couple of hours to talk to the
16 employees about this, be my guest and I would suspect
17 that things would get done more effectively if there were
18 a routine policy that avoided some of that pressure.

19 MR. RUEBHAUSEN: By the nature of things all
20 investigations whether the NRC or the FTC or the
21 Department of Justice or the FBI, there's an adversary
22 relationship and there is some natural friction.

23 WITNESS HICKEY: I think we should try to
24 minimize it and I must say that in the NRC area many
25 investigations and the tradition has been that if you
1 call them inspections they have been done in a relatively

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2 frictionless atmosphere. I think lately it's
3 unfortunately changing from that. Which is one of the
4 reasons why I hope this committee will address that.

5 MR. SILBERT: Next question?

6 WITNESS HICKEY: Next question is two,
7 which is about the choice of counsel.

8 I think our view has already been expressed as
9 to whether the Commission may limit an interviewee's
10 choice of counsel. That seems to us quite doubtful given
11 the case law that we have referred to. Whether they
12 should I think the rules are like in any other forum.
13 That is that if there is a conflict of interest a primary
14 determinant of that is the counsel himself and they
15 should not be allowed or are not allowed to participate,
16 otherwise they should be.

17 You did hear earlier this afternoon some
18 suggestion that the conflict was inevitable. I recall
19 addressing that briefly the last time the committee
20 gathered. I just reiterate that I disagree completely
21 with the proposition that the only time there is not a
22 conflict is when the employee and the company are in
23 cahoots to cover up the facts of a matter. There was
24 nothing that today that dissuaded me from that.

25 MR. SCOTT: Mr. Hickey, I recall from your
1 letter the assertion that where company counsel is

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2 present, there is reason to assume that company counsel
3 will share the fruits of the investigation or of the
4 interview with pertinent company officials. This is, I
5 think what Mr. Devine termed a means of discovery. I
6 take it you acknowledge that but think that that is not
7 necessarily something to be alarmed about and would have
8 some positive impact on the resolution of the problem.
9 Is that correct? I'd appreciate it if you could make
10 that out a little bit more?

11 WITNESS HICKEY: To elaborate just briefly do I
12 agree that in most instances it is appropriate and
13 expected for the company counsel who has been present at
14 an interview to discuss with company management the
15 substance but probably not the blow-by-blow of the
16 investigative effort of what they are looking at, what
17 the nature of the concern is. Is it very current or are
18 we talking about history? Is it widespread or isolated
19 and so on.

20 The interest of the company frequently is -- I
21 guess I would say commonly is--to have the matter solved
22 accurately and fairly and addressed so that it can be
23 basically put behind the company rather than have it on
24 going and drawn out and festering. If there is a problem
25 that supports the allegation that has been made on the
1 area that the Office of Investigations is pursuing, in

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2 most instances the company would like to have that out
3 and addressed and resolved because if it stays of unknown
4 dimensions it's really worse from the company's point of
5 view.

6 You must keep in mind that if at any stage the
7 Commission retains the problem that if they think there
8 is a safety problem to stop operations which is an
9 extreme threat to a company. You're talking shutting
10 down operation or stopping the construction at the plant
11 which is an extreme exposure to the company.

12 I think that the whole tradition of regulation
13 in the nuclear industry is based on the presumption that
14 the company has an interest, a strong interest that is
15 for the safety of the public health in the installation.
16 If that's not the case then we have been going at the
17 regulatory process quite the wrong way. Because there is
18 more increasing inspection and safety regulation than
19 ever.

20 Primary responsibility has always been felt to
21 rest with the licensee so if the Office of Investigations
22 view is that, oh, that doesn't extend to the kinds of
23 things we're talking about there, it ought to be the
24 opposite that the company will be interested in
25 concealing it. I think the case kind of errors to me
1 because I don't think that is going to change with the

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2 obvious business and economic aspect of the company's
3 interest.

4 MR. SPRITZER: Assuming you're right, but the
5 individual's interest and I think you're right in the
6 company's view, that is for exposing any misfeasance, the
7 individual's interest may not be to disclose if it might
8 subject him to discipline or something.

9 WITNESS HICKEY: I think you're right for that
10 employee.

11 MR. VOIGT: I think there are two points here
12 that have to be kept in focus.

13 It's common ground that the employee has a
14 right to counsel and to me part of that right is that he
15 has a right to pick his counsel. So in case A he may
16 feel that the lawyer who is best equipped to represent
17 him is a company attorney and he wants the company
18 attorney to represent him. The lawyer, obviously, has a
19 duty to ask himself and to tell his client if there's a
20 conflict, but assuming there isn't a conflict it seems to
21 me you're undercutting the fundamental right of the
22 employee if you establish some rule or presumption that
23 he can have any counsel in the world he wants except the
24 company lawyer, that's just wrong.

25 On the other hand, case B, the one you suggest
1 where he damn well doesn't want the company to know what

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2 he's about to tell the NRC, he's been advised under our
3 recommendation that he has a right to a lawyer of his own
4 selection or he has a right not to have a lawyer so he's
5 equally free to exclude the company attorney from the
6 interview. I think that's exactly the way it ought to
7 be. It's the individual's right that we're concerned
8 with, not the company's.

9 MR. RUEBHAUSEN: Would it be your suggestion
10 that the proposal that you put before this committee and
11 I know this is hypothetical, but is so proper that it
12 should be extended to the FTC, the food and drug, the FAA
13 and the office of mine safety or is it something that
14 again that's unique about the nuclear regulatory system
15 that underscores your concerns? Because whatever we do,
16 if we should accept your suggestion it would become a
17 precedent and we ought to know whether it should be
18 viewed as a precedent or confined only to the NRC.

19 WITNESS HICKEY: I don't feel qualified to
20 address it in the other context. I can say that there
21 are some aspects of the nuclear industry that seem to me
22 to make it particularly appropriate there. I have
23 already referred to the regulation, I guess that's not
24 unique to the nuclear industry.

25 I guess there is an increasing tendency not
1 only in the nuclear industry but in my area of

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2 occupational safety and health but there was something
3 that was fundamentally dealt with and I think as that was
4 developed and you see broad statutes and under the
5 Nuclear Regulatory Act which are criminal in nature that
6 the need for advice like this grows whether it is in the
7 food and drug area or the national health area.

8 MR. SPRITZER: But even in the area where we
9 have completely criminalized, where it is open and
10 shut a criminal investigation certainly it is clear that
11 the warning of the right to counsel must be given unless
12 there is a custodial setting.

13 WITNESS HICKEY: Perhaps the instinct for self-
14 preservation is a little more easily brought into play
15 there when a police officer or an FBI agent approaches a
16 citizen and says he would like to talk to him, I suspect
17 that the individual may react to him differently than
18 when a mining health and safety inspector goes to an
19 employee. I think he is more apt to be on his guard and
20 recognize if he's got a problem he better do something
21 about it because as you say the criminal element is
22 pervasive. That's what those investigators investigate
23 only.

24 MR. VOIGT: I subscribe to what Mr. Hickey has
25 just said but I think it's worth pointing out that the
1 nuclear industry is not unique perhaps but it's different

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2 in the sense that many of the individual employees, for
3 example those that I currently represent are listed and
4 they stand to lose their own lists, whereas in most
5 these other industries the employer may be subject to
6 sanction, but the individuals, short of personal criminal
7 liability don't have that personal stake in the
8 investigation.

9 MR. SILBERT: What kind of employees do you
10 represent in your practice?

11 MR. VOIGT: People who work in the nuclear
12 power plant and who work in the control room or are
13 supervisors in the control room, each one of those
14 individuals has to have his own license to manipulate the
15 controls of the power plant and that's his livelihood and
16 if he loses his license he may well lose his livelihood
17 quite apart from any civil or criminal penalty that may
18 be imposed.

19 WITNESS LITTELL: I agree with what is being
20 said and I'd like to add a point to respond to the
21 professor's point that there is a law that non-custodial
22 interrogation does not require a warning.

23 In those circumstances I think it's important
24 to recognize that the Supreme Court has drawn a
25 distinction between businesses which have little
1 expectation that they will be subject to inspection and

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2 those that do not have an expectation of regular
3 inspections.

4 For the former, it is customary that the
5 government does not need any particular process. The
6 government asks questions. There's no requirement for a
7 search warrant for example. That's the discovery for the
8 nuclear agency. In that the employees are subjected to a
9 regular barrage of government inspectors as well as
10 investigators and it is part of the ordinary routine part
11 of business to answer questions.

12 I think that's quite different than other
13 businesses where the approach of a police officer or an
14 inspector is a non-routine act and because it's non-
15 routine the employee is alerted to the need to have
16 special concern about what's going on. What I am
17 suggesting is that in businesses where interrogations
18 have become routine acts, in those situations there's all
19 the more reason to alert the employee than in certain
20 types of interrogations the right to counsel is
21 appropriate.

22 WITNESS FIRESTONE: Mr. Spritzer, I would like
23 to give a different view. I think it also should be
24 extended to this industry. As I understand the
25 committee's charter is to solely look at employees of
1 licensees and I would like to emphasize that I think

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2 employees of vendors and employees of architects and
3 engineers and so on down the line should be treated in
4 the same way. That is the policy that we're suggesting
5 should be applied to them also, not just cut off at the
6 licensee level.

7 MR. SILBERT: Okay.

8 WITNESS HICKEY: Your next question was about
9 tape recording, that's item three in the letter.

10 Our view is that tape recording enhances
11 the credibility of the process and if the witness desires
12 it should be -- he should be allowed to tape record the
13 interview. I would think that the NRC well might want to
14 do this itself but if they do not, it seems to me they
15 should allow the employee to. The employee, I should
16 think to be able always to keep the tape or a copy of the
17 tape. Mr. Silbert pointed out earlier that it is an area
18 shrouded in secrecy and as in the grand jury the witness
19 is allowed to indicate what he said in the grand jury.

20 MR. SILBERT: He doesn't have a copy of the
21 transcript.

22 WITNESS HICKEY: He may take notes.

23 MR. RUEBHAUSEN: Frequent recesses.

24 MR. SILBERT: In some jurisdictions.

25 WITNESS HICKEY: And as to whether the NRC
1 should have a copy of the tape, I think a copy of the

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2 tape should be made available to the NRC if they want it.
3 I would think that they would want it.

4 MR. SILBERT: Would you include that as part of
5 a warning or would you also, if you say they should
6 have a right to take tape record if they request just as
7 you acknowledge that they have a right to counsel if they
8 request, therefore they should be advised of there right
9 to counsel so they are all in an equal position that they
10 should all be advised of their right to tape record.

11 WITNESS HICKEY: I think they should.

12 MR. VOIGT: I would go beyond the scope of this
13 question, I think. I think the NRC should have a policy
14 of creating a record of every interview whether it be by
15 tape recording or stenographic reporter and if that
16 policy were adopted then this question would become moot
17 because there would always be a record and the individual
18 would always be entitled to a copy of it. It seems to me
19 a little unfair to put the burden on the witness to do
20 the recordings.

21 MR. SILBERT: How would you differentiate
22 that, again, between the criminal area? For example,
23 referred to by Professor Spritzer? Should the FBI
24 every time they approach a witness automatically and
25 routinely record? Should the IRS, should any agency do
1 that?

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2 The question is: Is there a reason to do it
3 here that would differentiate it from these other
4 agencies that at least purportedly have more of a
5 criminal mission than the Office of Investigations of
6 NRC?

7 MR. VOIGT: In a more perfect world I would say
8 that it should be done that way because we're constantly
9 encountering problems where the agent has a recollection
10 or the agent has made notes which bear very little
11 resemblance to the witness's recollection of what he told
12 the agent.

13 MR. SPRITZER: Are you really anticipating a
14 more perfect world?

15 MR. VOIGT: I guess I am not terribly
16 optimistic for a far more perfect world Professor
17 Spritzer, but I really believe you would get a better end
18 product, if you will, if the interviews were recorded so
19 you wouldn't get into an argument later on about what did
20 A really testify to?

21 WITNESS HICKEY: One obvious distinction that
22 occurs to me is that in the criminal area you will make
23 or break your case not on what was said in the interview
24 ordinarily but on what is tested in the Courtroom when
25 the full panacea of procedural rights. More often in the
1 NRC context the enforcement power is such that while

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2 there is a right to a hearing on down the line, the power
3 is exercised in a way that that right is infrequently
4 invoked and then not with the same protections that a
5 criminal development defendant would have. That seems to
6 me to council a greater attention to the accuracy of the
7 interview in the NRC interview than the criminal.

8 MR. RUEBHAUSEN: I want to be sure I understood
9 that. I followed the first part but the NRC will act on
10 the investigator's reports?

11 WITNESS HICKEY: The NRC can propose
12 enforcement action, yes, on the basis of the
13 investigator's report. There is a right to a hearing on
14 down the road. I think it's fair to say that the right
15 is not often invoked. The enforcement power is
16 substantial, the fines are increasing. Every next fine
17 is a new record fine, so I think that the impact on the
18 members of the industry of NRC charges based on
19 inaccurate investigator's records.

20 MR. RUEBHAUSEN: First you have to pay the
21 fine. Before you pay the fine you have an opportunity
22 for a hearing.

23 WITNESS HICKEY: That's right.

24 MR. SILBERT: What you're saying is that the
25 fines are so heavy and the proceedings so costly that
1 many of the licensees would prefer to comply.

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2 WITNESS HICKEY: And the burden, is not the
3 same as the government carries in a criminal case.

4 WITNESS HICKEY: Confidentiality, our view is
5 that there is no reason for blanket grants. That it
6 should be made available to the extent necessary to
7 protect an informer or individual who requests that kind
8 of protection, but not where, of course, that
9 individual's testimony is the basis for the enforcement
10 action. We don't see a basis for distinguishing a
11 response to subpart B between those and interviewees who
12 come forward on their own and those who are sought out,
13 but it should be the same policy for either.

14 We think it should be granted only on request
15 and that they should be informed of that, of the
16 availability of that information. They already are as I
17 mentioned previously informed through a notice that is
18 posted on all sides. A message that I think has gotten
19 across effectively so that most employees are aware of
20 their ability to contact the NRC through collect calls
21 from their home but I think to make clear some advice to
22 an employee should be given.

23 MR. SILBERT: So you would include that as, the
24 right to counsel, the right to have a representative, the
25 right not to participate, the right to tape record and
1 the rights to confidentiality?

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2 WITNESS HICKEY: Yes.

3 MR. SCOTT: What about the right, Mr. Hickey to
4 be free from retaliation. Is that dealt with now?

5 WITNESS HICKEY: That's also in the notice. I
6 think it would be a good thing to include in the advice.
7 It is by the way apparently now the way by policy but
8 frequently mentioned by NRC investigators in their
9 comments.

10 MR. SILBERT: Which one?

11 WITNESS HICKEY: The right to be free from
12 retaliatory action.

13 MR. SCOTT: Would it be unduly burdening you to
14 ask -- I don't know if my colleagues subscribe to this,
15 but in between now and June 3rd to perhaps provide us
16 with a model notice that would include these various
17 matters and language that you feel in your judgment would
18 be appropriate?

19 WITNESS HICKEY: I'd be glad to undertake that.

20 MR. SILBERT: Good, it would be appreciated.

21 WITNESS HICKEY: June 3rd?

22 MR. SILBERT: That's a week.

23 MR. RUEBHAUSEN: It's a long weekend.

24 WITNESS HICKEY: I am sure Mr. Hayes would want
25 to cooperate in that effort.

1 WITNESS HAYES: I'd been more than glad to

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2 cooperate in that effort, sir.

3 WITNESS HICKEY: I think we have addressed
4 the questions in the letter.

5 WITNESS LITTELL: There's one other question
6 that the chairman did not put before this committee but
7 which I think this committee might wish to address.

8 That is the question of when do the rights to
9 be reprimanded apply? The NRC conducts both
10 inspections and investigations. As I understand the
11 mandate of this committee the recommendations will
12 apply if adopted only through investigations.

13 At the last session of this committee Mr. Levi
14 pointed out quite correctly that it's very hard to
15 clarify what is an investigation and what is an
16 inspection. It's very hard to draw the line. Clearly
17 what is adopted here can be viciated if the warnings are
18 not applied when an investigation really begins. There's
19 a problem if what is denominated an inspection in fact
20 turns out to be an investigation. I would suggest a
21 pragmatic rule. At the very least, I think that the rule
22 that this committee formulates should apply whenever the
23 interview team includes a representative of the Office of
24 Investigations or an inspector who has been detailed
25 to the Office of Investigations.

1 MR. SILBERT: Can you explain why it is that

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2 you picked that particular formulation, the rule?

3 WITNESS LITTELL: It is my understanding, based
4 upon the record, that when there is concern about conduct
5 which may eventually result in charges that an Office of
6 Investigations' investigator is often added to the group
7 or is indeed the interviewer. That I think signals the
8 time when the protections of this committee should be
9 applied. I also understood from the last transcript that
10 there have been inspectors who have been detailed to the
11 Office of Investigations, and I presume that the same
12 rules should apply to their presence as applies to
13 investigators.

14 MR. SPRITZER: In the latter case you are
15 suggesting that they act as investigators?

16 WITNESS LITTELL: Yes. I think there is a
17 problem of, the old problem of when a rose is a rose is a
18 rose. I don't think the particular word used to
19 denominate the interview should. I think you should use
20 a pragmatic test and I think what I have suggested may be
21 a valid test.

22 MR. SILBERT: Any other comments that any
23 members of the representatives of the forum wish to make
24 on any of the subjects under consideration?

25 MR. VOIGT: I'd like to make one. I will try
1 to be brief because you gentlemen have been very

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2 indulgent. I was very troubled by Mr. Devine's
3 hostility toward the notion that the employer can pay for
4 a counsel and as a result somehow that counsel is not
5 independent or is really in cahoots with the company.

6 That's simply not true. The lawyer would be
7 very unethical if he let it be true. I think the
8 committee should be clear that the question you're
9 addressing when it says company counsel, it means a
10 company employee or a lawyer representing the company.
11 It does not embrace the third situation where the company
12 has agreed to reimburse the expense of private counsel
13 who does not represent the company.

14 MR. RUEBHAUSEN: I thought Mr. Devine was
15 confining his judgment to that one instance, an instance
16 which puzzled me as to why it was done that way because
17 based on that instance I think there would be much for
18 his point but that's not the normal way it's done.

19 MR. VOIGT: I will be happy to clarify that.
20 What the letter said is what the Pennsylvania Business
21 Corporation Law says. It wasn't an interpretation but my
22 memory serves me it was as close to being a quotation as
23 it could be without putting the quotation marks in. What
24 the Pennsylvania Business Corporation Law says. It's an
25 indemnification statute and the letter quite properly
1 indicates my view recited for the benefit of each

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2 recipient what the provisions of the statute were, no
3 more, no less.

4 MR. RUEBHAUSEN: So it was an indemnification
5 that included counsel fees?

6 MR. VOIGT: As indemnification usually does.

7 MR. RUEBHAUSEN: You mean under Pennsylvania
8 law the counsel could not have been held in -- here's a
9 group of counsel, pick your own and they will because
10 you'll call a counsel and said you're on your own and
11 anything you want to share with me that you consider
12 consistent with your obligation to your client we'd like
13 to know but it's your client, send us your bill and we
14 hope it will be reasonable.

15 MR. VOIGT: I am telling you that is basically
16 the case law.

17 MR. RUEBHAUSEN: Okay. I was puzzled by what I
18 heard him say.

19 WITNESS HICKEY: I was more than puzzled. The
20 suggestion was that the letter said that any employee who
21 wanted to cooperate with the investigation was not going
22 to be eligible for counsel. I think that we have to have
23 a representatively uncomplimentary view of the NRC and
24 the vision of it's enforcement activity to believe that
25 they would let a letter like that be sent out and that
1 they would allow a company to obstruct an investigation

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2 in that fashion. The answer of course is that that's not
3 what the letter said.

4 MR. SILBERT: Any other questions of our
5 representatives?

6 (No response.)

7 MR. SILBERT: Gentlemen, we are very
8 appreciative of the benefit of your views. I know you
9 are all busy and we welcome the time to have you come
10 here.

11 (WITNESSES EXCUSED.)

12 MR. SILBERT: Thank you for being with us here
13 today and for waiting patiently to appear?

14
15 For the record identify yourself?

16 WITNESS HAYES: I am Ben Hayes, Director,
17 Office of Investigations, United States Nuclear
18 Regulatory Agency. Roger Fortuna, Deputy Director
19 Office of Investigations, NRC. Bill Ward, I am the
20 Director of the Division of Field Operations, Office of
21 Investigations, NRC.

22 MR. SILBERT: Gentlemen, all but Mr.
23 Ruebenhausen were here at our first meeting when you
24 appeared in response to a number of the issues before
25 this committee and I know you've basically been here
1 throughout the proceedings today. Have any matters on

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2 the issues before this Advisory Committee that you feel
3 you have not had an adequate opportunity to address and
4 wish to supplement at this time for our consideration?

5 WITNESS HAYES: If I may, Mr. Chairman,
6 emphasize some areas that we covered last time and
7 somewhat summarize the essence of the testimony today
8 from representatives from other federal investigative
9 agencies.

10 I believe I stated last time we met that I am
11 unaware of any federal, state or local investigative
12 agency that routinely advises a witness that they
13 have a right to counsel or Miranda warnings or anything
14 of that nature and I am unaware as has been stated today
15 of any legal right or pronouncement that directs us to do
16 that.

17 If I could, let me once again go over basically
18 the two things that we do and only two things.

19 We look at documents and we talk to people and
20 that's it. We do not execute undercover programs, we do
21 not execute search warrants. We do not execute arrest
22 warrants, we do not use electronic surveillance devices.
23 We do not have funds available to purchase information as
24 many agencies do. We do not have a formal aggressive
25 program to develop informants as most agencies do. We do
1 not have two-way radio to conduct an investigation.

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2 And I have approximately 25 investigators throughout the
3 United States and as you know we are charged with the
4 overall mission of protecting the health and safety of
5 the people of this country. We look at documents and we
6 talk to people. That's it.

7 I feel that any recommendation that you would
8 present to the Commission should keep these two areas in
9 mind. That if we are further restricted and further
10 impaired from eliciting testimony, as you all know a
11 document is no good without the testimony to go with that
12 document then you further put us behind the eight ball if
13 you levied the Commissioners with the type of report that
14 we feel they need to fulfill their regulatory
15 responsibilities and I feel most sincere about that.

16 Mr. Hickey was kind enough to suggest that he
17 would like the investigations to move much more
18 expeditiously. I also would appreciate, you know, being
19 allowed to do so the way we feel we can best serve the
20 Commission. And if I am not mistaken Mr. Hickey also
21 suggested that if in fact he participates in a discussion
22 with staff and a witness that, of course, he would advise
23 the corporate officials of the essence of that and we
24 stated before that we feel that is totally inappropriate
25 because of the potential conflict of interest.

1 One clarification, I have forgotten who, but

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2 one of the gentlemen previously stated that the
3 assistance to OI, the people given to us to assist us but
4 we do have such a program and they are basically the
5 engineer with the technical expertise that help us to
6 look at various technical matters but they are not
7 investigators.

8 I do not feel it would be appropriate for this
9 committee to suggest to the Commission that a technical
10 non-investigator, if you decide to go with rights and
11 what have you that it would be appropriate for that
12 individual to have that laid upon him. I look at most --
13 or many agencies that have both a civil-criminal mission
14 mainly the Internal Revenue agent and revenue agents, a
15 civil auditor, under no circumstances gives a Miranda
16 warning.

17 MR. SPRITZER: Just for a point of information
18 when for instance, engineers are detailed to your office,
19 do they conduct interviews independently of the regularly
20 assigned investigators?

21 WITNESS HAYES: You mean by themselves
22 exclusively with --

23 MR. SPRITZER: Yes, would they go out and
24 question a witness?

25 WITNESS HAYES: They would be a part of the
1 questioning process but I am not sure --

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2 WITNESS WARD: I can give you an example. No,
3 they don't do complete interviews by themselves but what
4 we run into on a current investigation is they're at a
5 power plant and during the course of the investigation
6 they will pick up various technical documents. They will
7 then go to another part of the plant to either obtain
8 more or briefly talk to the person and find out where
9 else are workers located. Can you explicate this, can
10 you tell me what this means? And they have been greeted
11 with I have been advised I should not talk to you without
12 an attorney being present. So it's that more limited
13 type interview.

14 MR. SPRITZER: It's not a case of an engineer
15 acting on an inspector, it's a person acting defacto in
16 an investigation?

17 WITNESS WARD: That's correct.

18 MR. SCOTT: You take the position that where
19 that is happening that that person does have a right to
20 an attorney at that juncture?

21 WITNESS WARD: Yes, I think that to the extent
22 the individual chooses not to talk without an attorney we
23 have no choice but in this case the person returns back
24 to where the investigators are and they discuss the next
25 move to still obtain the information expeditiously.

1 Quite frequently when you have documents is you have

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2 people literally running back and forth to different
3 locations say short of the full interview process. It's
4 a delay and annoyance to us.

5 MR. SILBERT: Mr. Ward, an investigator
6 wouldn't say there is no right to counsel here, we can
7 easily get a subpoena to obtain those documents anyway?

8 WITNESS WARD: I think we may tend to negotiate
9 whether we need to have the lawyers present or have a
10 more compulsive process. I think that normally the right
11 to the documents is rather clear-cut by the regulatory
12 authority, an issue that we are occasionally confronted
13 with when they're not aware of our authority.

14 MR. SCOTT: It's not the action of asking for
15 the documents that triggers the response of the right to
16 counsel but when your detailee says can you explain this
17 to me?

18 WITNESS WARD: Correct. I might add that this
19 would be a very rare occurrence. The first time we have
20 run into it and the first time we have used those type of
21 people in an OI investigation would be on a current
22 investigation and it would be typically, is this all,
23 are these all the procedures and be faced with that sort
24 of response.

25 MR. SCOTT: Is that as a result of some posting
1 by the company or by the union that there is a right to

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2 counsel in this situation or some less formal but equally
3 pervasive message that was conveyed in response to your
4 presence there for that particular investigation?

5 WITNESS WARD: I believe that there was more
6 than one modality here. There was a general letter and
7 there also would have been extensive abbreviation by the
8 company attorneys in this particular investigation.

9 The issue of representation of counsel was a
10 very hot issue throughout the course of this
11 investigation. Certainly various stages of it. So I
12 think the awareness of the right to an attorney being
13 present was much more pervasive.

14 MR. FITZGERALD: Did the company send a letter
15 to all employees, is that what I implied from your
16 statement?

17 WITNESS FORTUNA: Citing New Jersey business.

18 MR. SILBERT: Do any of you have access to
19 letters that have been written by company counsel or
20 companies to employees advising of the right to counsel?
21 Do you have any samples in other words?

22 WITNESS HAYES: I am sure we could probably get
23 one, I am sure we could get the one Mr. Hickey was
24 referring to and Mr. Devine also.

25 MR. SILBERT: And maybe another one or two.
1 We're not asking for 25 but particularly that letter

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2 since it did come up if you could get that and submit it
3 to our liaison by June 3rd we would appreciate it just so
4 we could have that as part of our record.

5 WITNESS HAYES: If I may because of the time
6 situation, we'd appreciate the opportunity to reappear,
7 if you will, and we stand available at this point to
8 answer any additional questions that you might have from
9 our previous testimony or from testimony that occurred
10 today. I think we have made our positions known and with
11 respect to the various subjects that you're dealing with
12 and stand ready to answer anything that you might have at
13 this point.

14 MR. RUEBHAUSEN: I think that you ought to
15 respond to the answer I got that there were examples of
16 coercive intimidating questions, what's the basis for
17 that?

18 WITNESS HAYES: I have been the director for
19 almost four months now at the NRC and I believe we have
20 gotten two allegations that a member of my staff has
21 conducted himself inappropriately. Those allegations are
22 turned over to another function within NRC, an internal
23 affairs, a Mr. James Cummins who testified previously.
24 His responsibility is to look into affairs or wrongdoings,
25 if you will, of allegations concerning NRC people,
1 including my staff and he conducts a very thorough

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2 investigation and prepares the necessary report and draws
3 conclusions and what have you. As long as I have been
4 Director, Mr. Cummings has not documented, substantiated
5 or proven any allegations against members of my staff and
6 I can assure you as I've assured the Commission that
7 should a member of my staff conduct himself in an
8 improper manner that the appropriate disciplinary
9 measures will be taken.

10 MR. SCOTT: He hasn't made a case out to your
11 satisfaction or he hasn't --

12 WITNESS HAYES: No, he hasn't concluded. I get
13 it after he has conducted his inquiry and draws
14 conclusions. There's no consultation, if you will.

15 WITNESS WARD: Amplified from an informal
16 avenue I have received no complaints even informally to
17 suggest that my people have been overbearing or
18 insensitive to the rights of people under investigation.
19 I can recall historical anecdotal things one time the
20 investigator was accused because he wore a coat and tie
21 at an investigation.

22 MR. RUEBHAUSEN: How many investigators are
23 likely to appear at one of these?

24 WITNESS WARD: I wish we had two. That is my
25 norm. Many times we are conducting sole on interviews,
1 one investigator.

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2 MR. SILBERT: Mr. Kharnoff's report indicates
3 three or four.

4 WITNESS FORTUNA: That predates the Office of
5 Investigations. I am aware of his example. I am aware
6 of that issue being mentioned and I was not present but
7 historically that predates the conception of the Office
8 of Investigations.

9 MR. RUEBHAUSEN: It has happened?

10 WITNESS FORTUNA: I don't know. All I know is
11 whatever incident Mr. Kharnoff refers to happened on the
12 calendar predating July 19th, 1982. As to the truth,
13 six, three, four, two, one I have no knowledge.

14 MR. FITZGERALD: But would it have been done
15 under another investigatory regime or lack thereof?

16 WITNESS FORTUNA: Could of, but I have no
17 knowledge of it.

18 WITNESS HAYES: Let me say this, the general
19 rule since we have only got 20 investigators in the
20 United States approximately for me to send four
21 investigators on one interview is ludicrous. That's the
22 ultimate stupidity. I can barely get two together at
23 any one given time to conduct an interview and as Mr.
24 Ward has stated, two is better than one but usually we
25 only get one and it depends, if you will, on who we are
1 interviewing and that has a lot to do with it.

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2 MR. FITZGERALD: Would you agree that more than
3 two you set put to a kind of unfair or uneven over
4 powering situation?

5 WITNESS WARD: I would further state that with
6 more you put yourself at a disadvantage. We previously
7 testified and certainly by implication that the more
8 people in the interview room the worse off you are for
9 the free flow of information. We came there for a free
10 flow of information and would wish to modify the
11 environment to enhance that.

12 MR. SILBERT: You just reminded me.

13 What is your reaction to the suggestion that in
14 addition to counsel being present, possibly in addition,
15 that the union representative be present and I assume
16 that some of you were present during the testimony of
17 Mr. Shoop this afternoon.

18 WITNESS FORTUNA: If I understand the
19 Weingarten Rule intellectually and any knowledge I have
20 of that comes from my prior employment in the office of
21 inspector and -- the office that Mr. Hayes described is
22 the people that look at us when allegations are made
23 regarding our employees. We were involved in interview
24 situations where members of the NRC bargaining unit came
25 in and were spoken to. What did you do on your job
1 site? And depending on the answer they may have been

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2 subjected to some disciplinary action.

3 Weinsarten, to my understanding, and I am not
4 familiar with the specific extension as described by the
5 union representative, specifically regards that when and
6 if the employee member of the union bargaining unit
7 perceives in his or her mind that they are in jeopardy
8 from a job security prospective whether it be reprimand
9 or firing that they may request of their employer a union
10 representative and that request should be and must be
11 honored by the employer.

12 MR. SILBERT: How does that fit into this
13 situation?

14 WITNESS FORTUNA: Having described that
15 situation, I do not believe that it pertains because in
16 fact we're dealing with a licensee and concern that the
17 ultimate resolution or the ultimate use of our product
18 may be the imposition of some sort of fine or notice of
19 violation. I don't appreciate the carryover or the
20 impact.

21 MR. SILBERT: Assume the employee may be
22 concerned that what he or she discloses may constitute a
23 basis for reprimand or dismissal even if it's to an NRC
24 investigator and therefore may want to have a
25 representative of the union present?

1 WITNESS FORTUNA: But the product we would

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2 produce would be a product that we made available to the
3 NRC and to our enforcement organization as opposed to
4 making it available to a licensee or an employer for
5 their utilization in some sort of disciplinary action.

6 MR. SILBERT: I understand that but the
7 question might be that somehow the course of the NRC
8 procedure not because of disclosure or breach of
9 confidentiality but just in the course of disclosing
10 whatever sanction may be appropriate that information
11 might come up.

12 WITNESS HAYES: You mean the truth may get him
13 fired or her fired?

14 WITNESS WARD: That's when the Department of
15 Labor gets triggered. I could see them deducing or
16 otherwise finding out the identity of the person that
17 gave information out of confidence and there is yet
18 another step that should trigger the Department of
19 Labor's investigation. In other words, the employee
20 protection provision. I don't see how they could deduce
21 whether a particular individual interviewed was derelict
22 in their duty along the way and therefore separately
23 responsible.

24 MR. SCOTT: Do most of your investigative
25 interviews of licensees take place at the site, the
1 facility site?

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2 WITNESS HAYES: Certainly we are on the site
3 but in many instances we need to meet off site at their
4 request or we feel it's a better atmosphere or more
5 conducive atmosphere to the free flow of information. As
6 I said I think we testified previously that we
7 interviewed in bars and residents and motel rooms and
8 whatever. It would depend on the confidentiality or
9 nature of that particular witness who requested it so
10 maybe we wouldn't interview them onsite.

11 WITNESS WARD: Sure, the logistics dictate the
12 onsite interviews, surely the off site give a freer flow
13 of information and allows the investigator to do a lot of
14 screening interviews of entire classes of employees,
15 let's say the allegations of listed operators, there may
16 be 18 to 20 of them. Let me give a hypothetical
17 situation that cuts across many of these issues,
18 particularly with management counsel being present

19 Let us say that is as typically in this, that
20 an investigation is triggered by an allegation and that
21 allegation requests confidentiality among the population
22 of listed operators. Now to protect his identity when we
23 do those 20 screening interviews he better be there and
24 we certainly know the company counsel will be there in
25 the real world, consequently he has a dilemma, he either
1 tells us what he told us confidentially and compromises

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2 himself or he perjures himself. Neither one is very
3 helpful to the investigation.

4 MR. SPRITZER: But you can't keep counsel out.

5 WITNESS WARD: House counsel, when I say house
6 counsel, the appointee representing the company.

7 MR. SPRITZER: You would agree, I take it that
8 if a particular witness and I assume this witness
9 wouldn't choose to have company counsel present but if a
10 particular witness says I am going to talk to you only if
11 I have counsel of my choice present and counsel of my
12 choice is the company's associate general counsel Mr.
13 Jones, you have no control. You either have to say we
14 will interview you or you let Mr. Jones come, isn't that
15 right?

16 WITNESS WARD: Precisely as with the other 19
17 in my hypothetical example.

18 MR. SILBERT: It could be awkward, could it not
19 if the 19 chose to have company counsel and --

20 WITNESS HAYES: And one didn't.

21 WITNESS WARD: That's the whole point is that
22 he would be coerced, if you will, by the circumstances of
23 accepting company counsel present. Our view is that none
24 of them should have company counsel present.

25 MR. SPRITZER: To which I addressed the
1 question that you can't stop them from having company

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2 counsel if they want.

3 WITNESS WARD: We have three choices, one,
4 conduct the interview, we can conduct the investigation,
5 we can resort to the subpoena, raise the objection again
6 and litigate the case by showing, if you will, the
7 concrete harm standard.

8 MR. SPRITZER: And resorting to subpoena is
9 something you have never done?

10 WITNESS WARD: So far, in this context.

11 MR. SPRITZER: And you are going to have onto
12 accede to counsel's presence or not interview?

13 WITNESS HAYES: We'll go to the mat, possibly,
14 on a case-by-case basis. As long as I have been here we
15 have never issued a subpoena.

16 MR. SPRITZER: That's what I got from your
17 testimony last time.

18 WITNESS WARD: But if you took a hypothetical
19 case that would be the one with the possible harm and
20 that might be the one we need with which we could prove
21 our case on.

22 MR. SILBERT: Any other questions?

23 MR. RUEBHAUSEN: I have two, if I may.

24 Would you find it a problem to give notice to
25 the union when you know a union is involved at that
1 site?

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2 WITNESS WARD: You say involved?

3 WITNESS HAYES: Implicated?

4 MR. RUEBHAUSEN: The plant's unionized and it's
5 not too hard to find out who the union is. The company
6 has notice, sometimes on a short fuse, but the company
7 knows about the investigation or knows the scope of it
8 and the union does not and the union has it's exclusive
9 representation and is in a position where it's required
10 to have a union representative present. If they're
11 relieved of that responsibility they could be sued if
12 they fail to carry out that responsibility so some sort
13 of notice, defacto notice or other formal notice has a
14 certain amount of merit.

15 WITNESS HAYES: If I may, I believe the
16 representatives from labor union this morning appeared
17 to be more concerned with protecting the union than
18 protecting the individual's rights. They were extremely
19 concerned about being sued. The grounds for the suit, if
20 I heard him correctly, was that when an employee asks for
21 union representation the union refused on various levels.
22 They were sued and they lost.

23 That has no bearing at all on what we're
24 discussing here. If an employee absolutely refused to
25 meet with us and answer our questions without his mother
1 there or his sister or whomever then we're back to the

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2 decision of whether it's an attorney or union
3 representative or his brother.

4 MR. RUEBHAUSEN: That is I think a fair
5 description but there can be a situation where an
6 employee starts talking and then later on the union finds
7 out about it and later on the employee said, you weren't
8 there to represent me and then sues. In other words, a
9 different situation and it may not have been the fault of
10 the union, so I think their worry is a generic worry over
11 the whole system but the moment the employee says I don't
12 want you I got sense of relief from Mr. Shoop.

13 WITNESS HAYES: However, I think a court of
14 equity, I don't see how the employee could sue the union
15 when the employee did not notify the union that --

16 MR. RUEBHAUSEN: But they're worried about
17 that. My question is do you have a problem?

18 WITNESS HAYES: Certainly I have a problem with
19 notifying the union as to who we're going to address
20 because if we send them a listing of the particular
21 employees on their particular sight I have no guarantee
22 that in-house counsel may get it, that management may get
23 it, that it will be duplicated and sent to newspapers and
24 what have you and and it could expose, if you will, the
25 areas of our investigation prematurely.

1 MR. RUEBHAUSEN: You seek surprise?

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2 WITNESS HAYES: Absolutely. Surprise

3 MR. SPRITZER: Basically you want surprise?

4 WITNESS HAYES: What we want is an atmosphere
5 where we we can go in and conduct an investigation and
6 gather the facts and present them to the Commission so
7 they can make an informed decision and there are steps
8 for the licensee to take for remedy if the licensee feels
9 that our investigation is inappropriate or evidence is
10 not there to sustain the fine or what have you, they
11 certainly have redress, certainly have redress.

12 MR. SPRITZER: I am not being critical when I
13 say you want surprise, I take it you do want surprise as
14 an element to your investigations.

15 WITNESS HAYES: Certainly.

16 MR. RUEBHAUSEN: The second question, I think,
17 results to Mr. Hickey's if I understand him correctly
18 state that they would like all interviews tape recorded,
19 at least I had that impression, that that's their
20 proposal.

21 Some of our witnesses this morning were not
22 very anxious to have all the interviews tape recorded.

23 What is your view on this?

24 WITNESS HAYES: I do not feel it necessary to
25 tape record all interviews. I think it presents a
1 herrendous logistic problem in and of itself. I think

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2 the making of transcripts and sending them out, I think
3 it could be harmful in the investigative process to have
4 duplicate tapes floating around during the
5 investigation.

6 It comes down to a body taking the stand and
7 under oath testifying as to a particular event happening,
8 document, understanding or what have you.

9 The memorandum of interview that some of
10 the investigators spoke of today is strictly a device, an
11 information device for counsel or management to take a
12 particular action but in the final analysis, a warm body
13 has to take the stand as we all know and testify and at
14 that moment the licensee has redress on cross and what
15 have you. I don't feel it appropriate that we tape
16 record everything. It has a chilling effect because my
17 policy is the same as it was propounded today. They
18 tape record it where we tape record it. It's an
19 unworkable situation.

20 MR. SCOTT: At the same time I take that if
21 the requests were made you would in most cases honor it
22 or you would decide on a case by case basis?

23 WITNESS HAYES: I think it would have to be a
24 case by case basis. It comes down to if that was the
25 only way we would get that testimony then certainly we
1 will tape record and ask that the witness not foreclose

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2 his testimony.

3 MR. FITZGERALD: Would you try to talk the
4 person who requested the tape recording, would you try to
5 talk him out of it in your current practice?

6 WITNESS HAYES: I would. Absolutely. I would
7 suggest an affidavit which eventually they would get a
8 copy of. I just don't think a tape recording is needed
9 to protect their interests because they could always take
10 the stand and say I didn't say that. Then we're back to,
11 you know, a warm body on the stand testifying.

12 MR. FITZGERALD: Would your behavior as far as
13 trying to talk them out of it alter if we recognize that
14 as a right?

15 WITNESS HAYES: Certainly if I am mandated
16 to honor that in each and every instant then I would have
17 no choice.

18 WITNESS WARD: With respect previously it was
19 testified to the distraction level that it would present
20 and we feel still feel strongly on that Mr. Truxell in
21 his testimony alluded to a procedure that sounds like a
22 satisfactory compromise to me and we haven't had a chance
23 to talk it over in too much detail and one would be that
24 if they're insistent upon making a tape recording, all
25 right we do the tape recording, but we hold on to the
1 tape recording until the completion of the

16 -000-

CERTIFICATE OF PROCEEDINGS

This is to certify that the attached proceedings before the
NRC COMMISSION

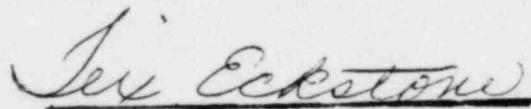
In the matter of: Advisory Committee on Rights of Licensee
Employees under Investigation
Date of Proceeding: May 26, 1983

Place of Proceeding: Washington, D.C.

were held as herein appears, and that this is the original
transcript for the file of the Commission.

TEX ECKSTONE

Official Reporter - Typed


Official Reporter - Signature