



National Border Patrol Council

Legal Division Advisory

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OBLIGATIONS OF NON-AGENCY EMPLOYEE WITNESSES TO PARTICIPATE IN AGENCY INVESTIGATIONS

This NBPC Legal Division Advisory is intended to clarify misunderstandings concerning the obligations of non-Agency employee witnesses (spouses, friends, family and associates not employed by the Agency) to participate in interviews sought by Agency investigators. It has been reported that all too often Agency investigators contact the non-Agency employee witnesses seeking information in connection with a criminal and/or administrative investigation. In these instances, many Agency investigators have failed to inform non-Agency employee witnesses that their participation in providing a statement to Agency investigators is completely voluntary. It has also been reported that Agency investigators do not identify themselves as internal affairs investigators conducting a criminal and/or administrative investigation into the alleged misconduct of the Agency employee friend or relative. These tactics by Agency investigators have caused non-Agency employee witnesses to be misled, bullied and coerced into providing statements.

As explained in the December 2014 NBPC Legal Division Advisory entitled "Compelled Statements/Critical Incidents," the Fifth Amendment to the Constitution makes clear that, when questioned by law enforcement, people do not have to give a statement and that they have the absolute right to remain silent. The only time an Agency employee can be compelled to waive their Fifth Amendment privilege is as part of an *administrative* investigation conducted by the Agency, not as part of any *criminal* investigation. The Agency can **ONLY** compel its **EMPLOYEES** to answer questions as a condition of their employment.

Agency investigators do **NOT** have the legal authority to compel non-Agency employee witnesses to provide a statement, absent a subpoena or summons issued by a criminal or civil court. Because non-Agency employee witnesses are not employed by the Agency, they do **NOT** have an obligation to participate in Agency investigations nor are they subject to the Agency's employment policies requiring such participation.

Your non-Agency employee spouse, friends, family and associates do not give up their rights just by virtue of *your* employment with the Agency. It is important for them to understand that their participation in an Agency investigation **IS** strictly voluntary. It is also important for them to understand that any information they provide to Agency investigators may be used against you for the purpose of administrative discipline and/or criminal prosecution.

Spouses should also be advised that federal and most state courts recognize both a marital communications privilege and a spousal testimonial privilege, which protect the confidential communications between spouses during a marriage. Such confidential communications between spouses can be destroyed if they are shared or overheard by someone outside the legal marriage. You should advise your non-Agency employee spouse, friends, family and associates of their rights in the event that they are contacted by Agency investigators. This will ensure that they can make an informed decision as to whether to voluntarily provide a statement to Agency investigators.

The choice to participate is theirs alone and should not be influenced by anyone else.

The NBPC Legal Division is staffed by seven (7) attorneys who specialize in protecting the rights and interests of Border Patrol Agents and support personnel employed by the U.S. Customs and Border Protection, U.S. Border Patrol.