

2008

Gary B. Ferguson v. Williams and Hunt, Inc., Elliott
J. Williams, George A. Hunt, and Kurt Frakenburg :
Brief of Appellant

Utah Court of Appeals

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Roy A. Jacobsen, Mel C. Orchard; The Spence Law Firm; Edwin S. Wall, Charles F. Peterson; attorneys for appellant.

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IN THE UTAH SUPREME COURT

No. 20080273

GARY B. FERGUSON,
Plaintiff/Appellant,

vs.

WILLIAMS & HUNT, INC., ELLIOTT J. WILLIAMS, GEORGE A. HUNT, and
KURT FRANKENBURG,

Defendants/Appellees.

APPELLANT'S ADDENDUM VOLUME I

ROY A. JACOBSON, JR. Utah Bar No. 04780
MEL C. ORCHARD, III Utah Bar No. 10328
THE SPENCE LAW FIRM, LLC
15 South Jackson Street
P.O. Box 548
Jackson, Wyoming 83001
Fax: 307-733-5248

EDWIN S. WALL, Utah Bar No. 7446
WALL LAW OFFICE
406 Felt Building, 341 South Main, Suite 406
Salt Lake City, Utah 84111
Telephone: 801-523-3445
Fax: 801-746-5613

CHARLES F. PETERSON
PETERSON LAW OFFICES
913 West River Street, Suite 420
Boise, Idaho 83702
Telephone: 208-342-4633
Fax: 208-336-2059

Attorneys for Appellant

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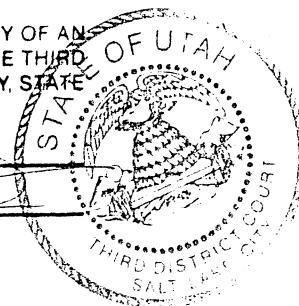
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I CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY, STATE
OF UTAH.

DATE:

May 30, 2008

DEPUTY COURT CLERK



CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Appellant's Addendum to be sent via federal express delivery, this 28th day of July 2008, to the following:

David Eckersley
PRINCE YEATES & GELDZAHLER
175 East 400 South, Ste. 900
Salt Lake City, UT 84111
Phone: 801-524-1000
Fax: 801-524-1098

Jeffrey J. Hunt
PARR WADDOUPS BROWN GEE & LOVELESS
185 South State St., Ste. 1300
Salt Lake City, UT 84111
Phone: 801-532-7750
Fax: 801-532-7750

Edwin S. Wall
Wall Law Offices 406 Felt Building
341 South Main, Ste. 406
Salt Lake City, UT 84111
Phone: 801-523-3445
Fax: 801-746-5613

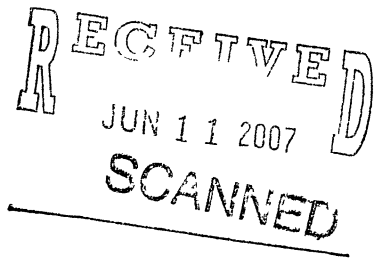
Chuck Peterson
Peterson Law Office
913 West River St., Ste. 420
Boise, ID 83701
Phone: 208-342-4633
Fax: 208-336-2059



The Spence Law Firm, LLC

Tab 1

ROY A JACOBSON, JR.
MEL ORCHARD III, Utah State Bar No. 10328
THE SPENCE LAW FIRM, LLC
15 South Jackson Street
P O Box 548
Jackson Wyoming, 83001
Telephone 307-733-7290
Facsimile 307-733-7290



EDWIN S WALL, Utah State Bar No. 7446
WALL LAW OFFICE
8 East Broadway, Ste 500
Salt Lake City, UT 84111
Telephone 801-523-3445

CHARLES F PETERSON
PETERSON LAW OFFICES
913 W. River Street, Ste 420
Boise, ID 83702
Telephone 208-342-4633
Facsimile: 208-336-2059

Attorneys for Plaintiff

IN AND FOR THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY STATE OF UTAH

GARY B. FERGUSON,)	
)	
Plaintiff,	)	PLAINTIFFS MEMORANDUM
	)	IN OPPOSITION TO
vs.	)	DEFENDANTS MOTION FOR
	)	SUMMARY JUDGMENT
WILLIAMS & HUNT, INC., ELLIOTT J.)	
WILLIAMS, GEORGE A. HUNT, BRUCE)	
H. JENSEN. and KURT FRANKENBURG.	)	Case No.050921677
)	
Defendant(s).	)	Judge Medley
)	

Plaintiff, Gary B. Ferguson, by and through his counsel of record, and pursuant to Rule 56 of the Utah Rules of Civil Procedure, hereby submits the following Memorandum in Opposition to Defendants Motion for Summary Judgment.

PLAINTIFFS RESPONSE TO DEFENDANTS LISTED “UNDISPUTED FACTS”

Plaintiff responds to and dispute as follows Defendants list of “undisputed facts”.

1. “Prior to May 5, 2005 Gary Ferguson was an at-will employee of the law firm of Williams & Hunt.”

Plaintiff admits this paragraph.

2. “Sometime in the spring of 2005, shareholders of the firm became concerned that Gary Ferguson was over-billing the Utah Medical Insurance Association, (UMIA) for work he was performing for their insureds.”

Plaintiff disputes this statement as follows:

Plaintiff, Gary Ferguson, did not over-bill UMIA. Deposition of Gary Ferguson at p 61-62, attached hereto as Exhibit [A]. Affidavit of Gary Ferguson at paragraphs 16,45,44. Deposition of Arthur Glenn at p. 9, 21-22, attached hereto as Exhibit [B]. Additionally, Defendants billed UMIA for Mr. Ferguson’s “over” billed hours for April 2005, the very same billable time they had said Mr. Ferguson had over-billed and the very same billable time Defendants used as a reason to terminate his employment.

3. “As a result, the firm used a computer program to keep track of when Gary Ferguson was logged on to his office computer to compare that record with his

billings.”

Plaintiff disputes this statement as follows:

Trial lawyers work outside of the law office attending depositions, meeting with witnesses, traveling to and from meetings with clients and expert witnesses, researching case law, doing medical research, and often work on lap top computers outside of the office. All of the time spent working on cases, whether actually being logged onto an office computer, is considered billable time. The inference that the Defendants could reasonably determine that Plaintiff was only working on UMIA cases when he was logged on to the law firm’s server is ludicrous, at best. See affidavit of Gary Ferguson at paragraphs 4 and 5, attached hereto as Exhibit [C]. Deposition of Gary Ferguson at p. 27-28, 65-66. Deposition of Art Glenn at p. 9, 21-22. Additionally, Defendants often remained logged onto their office computers while they were drinking in the firm bar, and not performing billable work on files. See deposition of Gary Ferguson at 25-26. Therefore, Defendants’ position that the attorneys at the law firm did billable work only while they were logged onto their office computers is false. See Request for Admissions No. 70-79.

The billing program used by the law firm frequently recorded two days worth of billable time on one day. See Gary Ferguson deposition at p. 78-80. Request for Admissions No. 78, attached hereto as Exhibit [D]. For this reason, no one could rely on a day’s entry of time as the actual amount of time worked for any specific day by that attorney. The defendants knew this and yet still relied on a clock on Plaintiffs office computer and a time entry from this notoriously inaccurate billing system.

4. “As a result of this comparison, the firm concluded that Mr. Ferguson was billing

for hours that he didn't work.”

Plaintiff disputes this statement as follows:

No person at the time, nor any time after, of Gary Ferguson's termination was able to point to any specific instance where he may have over-billed a client and it was clear at the time, and was known to Defendants, that the evidence was not sufficient to form a reasonable belief that Gary Ferguson had over-billed UMIA. Defendants' communication to UMIA was false, and was only intended harm Gary Ferguson and prevent him from getting any future cases from UMIA after they terminated him. Depo of Gary Ferguson at p.28, 29, and 71-72. Gary Ferguson did not over-bill UMIA or any other client. See deposition of Gary Ferguson at 61-62, 73-74. See also deposition of Arthur Glenn at p. 23. No reasonable lawyer would ever conclude based on the evidence before Defendants that Mr. Ferguson had over-billed UMIA. See Request for Admissions No. 70-79.

5. “As a result, Mr. Ferguson's employment with the firm was terminated.”

Plaintiff disputes this statement as follows:

The claim of over-billing was a creation by Elliott Williams and George Hunt, motivated by a desire only to harm Gary Ferguson and ensure that he was stripped of his ability to continue his financial relationship with UMIA. Deposition of Gary Ferguson at p. 37. See also deposition of George Hunt at p. 92, attached hereto as Exhibit [E]. Mr. Ferguson was terminated because he wanted to bring in a consultant to advise the firm on problems with sexual harassment of the staff by the attorneys and because he would no longer drink with Elliott Williams. See Affidavit of Gary Ferguson at paragraphs 16, 18, 19, and 43. Further, Gary Ferguson was terminated because Elliott Williams needed more money from the firm to pay college tuition. See Affidavit of Gary

Ferguson at page 30 and 31. See Request for Admissions No. 70-79.

6. “Elliott Williams informed the president of UMIA that Mr. Ferguson had been terminated owing to concerns about over-billing UMIA.”

Plaintiff disputes this statement, in part, as follows:

Elliott Williams told Marty Oslowski that Gary Ferguson’s bills could not be trusted and that Mr. Ferguson was over-billing UMIA. Gary Ferguson did not over-bill UMIA. See deposition of Gary Ferguson at p.28, 29, and 71-72. See the deposition of Arthur Glenn at p. 11. See the affidavit of Gary Ferguson at 16 and 43. See Request for Admissions 70-79

7. “At a later point, George Hunt and Dennis Ferguson went to lunch with two other representatives of UMIA and told them they had been concerned about Mr. Ferguson’s billing and felt compelled to act on it.”

Plaintiff disputes this statement as follows:

George Hunt, Bruce Jensen, and Dennis Ferguson told Arthur Glenn of UMIA that Gary Ferguson had over-billed UMIA. Mr. Ferguson did not over-bill UMIA or any other client. See deposition of Arthur Glenn at p. 9, 21-22. See deposition of Gary Ferguson at p.28, 29, and 71-72. Art Glenn told Defendant Hunt, Bruce Jensen, and Dennis Ferguson that he had a spread sheet prepared showing Gary Ferguson’s billed time for the period in question. Mr. Glenn testified he saw no evidence of over-billing. See deposition of Arthur Glenn at p. 9, 21-22. Further, that Art Glenn knew that on at least one occasion, Gary Ferguson had under-billed UMIA. See Arthur Glenn deposition at p. 18-19. See Request for Admissions No. 70-79. In addition, Mr. Glenn testified that he had known Gary Ferguson since approximately 1982 and knew him to be honest and trustworthy. See Arthur Glenn deposition at p.45.

PLAINTIFF'S STATEMENT OF MATERIAL FACTS

1. On May 5, 2005, Defendants wrongfully terminated Plaintiff from his employment with Williams & Hunt, inc. ("the law firm"), where he had been employed as an attorney since 1991. Admitted by Defendants in their Answer to Plaintiff's Complaint, paragraph 4, attached hereto as Exhibit [F]. He was also a shareholder in the law firm. Admitted by Defendants in their Answer to Plaintiff's Complaint, paragraph 9. Mr. Ferguson was a medical malpractice defense lawyer. He had built virtually his entire professional practice around one client- the Utah Medical Insurance Association ("UMIA") during his employment at the law firm. Admitted by Defendants, Answer, paragraph 6. UMIA was also the law firm's largest client. Defendant Elliott Williams served as its general counsel. Deposition of George Hunt, p. 13, 16.
2. Prior to his termination, Gary Ferguson had a solid working relationship with UMIA, including personal relationships with Art Glenn and Doug Smith of UMIA, and was sent direct referrals from UMIA for case work. Deposition of Arthur Glenn at p. 5.
3. There is no policy in place, nor is it common practice in the legal community, to limit the time an attorney bills a client to the time the attorney spends using the office computer. However, the 'proof' submitted by the law firm to UMIA for Gary Ferguson's "over-billing" came from Defendants authorizing the investigation of the times Mr. Ferguson logged in and out of the law firm's computer server, and determining that only time spent logged on to the firms server was considered time Mr. Ferguson was working. Deposition

of George Hunt, pp. 37-38.

4. As Mr. Osowski testified at his deposition, transcript attached hereto as Exhibit [G]:

“Well, he advised me that as his duty as general counsel for UMIA, that he had a duty to disclose that Gary’s billing practices had come under question. He indicated that they decided to keep track of when he was logging on and off his computer, and that within the first couple of days of doing that, that I think Gary had some kind of medical problem he had to take care of or had a medical appointment and came in about midday and left around five o’clock and billed UMIA for approximately 11 hours of work that day.” *Id.* at p. 9-10.

5. The log-in monitoring had never been used to track billable time for any other attorney at the law firm, *Id.* at p. 38, 40, 42. Medical Malpractice Attorneys spend a good deal of their billable time away from the office taking depositions, researching case law, doing medical research, meeting with clients, meeting with expert witnesses, etc. This was Gary Ferguson’s mode of legal practice, and was also the practice of the other trial lawyers at the law firm, including Defendant Williams.
6. Before Gary Ferguson was terminated, Defendant Williams contacted Martin Osowski of UMIA and told him that he had a ‘trust issue’ with Mr. Ferguson’s billings, and informed him the law firm planned to fire Mr. Ferguson. Deposition of Elliott Williams at p. 31, attached hereto as Exhibit [H]. Defendant Williams told Osowski that the law firm was terminating Gary Ferguson because he had over-billed UMIA. Deposition of Martin Osowski at p.20. Based on this communication, the firm sent a false and harmful message to UMIA and Martin Osowski that UMIA could not trust Gary Ferguson to tell

the truth about the time he had spent on UMIA cases, and that UMIA had been over-billed for Mr. Ferguson's work, according to Defendant Williams, and "that was the reason for termination." *Id.*, at p. 25.

7. Mr. Oslowski testified that he trusted the attorneys who handled medical malpractice defense work for UMIA to bill for the time they spent on his cases, actual time, not "time that was made up". *Id.* at p.11. He expected to pay for time they actually spent working, whether in the office or not (emphasis added) *Id.* He could not recall ever before having discussed with Defendant Williams any concerns about Plaintiff's representation of physician insureds for UMIA. *Id.* At p. 12. Neither had he ever had any complaints from his company's claims department with respect to either the amount of time that Mr. Ferguson was billing, or the way he was representing their clients. *Id.* At pp. 12-13.
8. Defendants knew Gary Ferguson had developed a substantial business relationship with UMIA and with its physician insureds while working as an employee and shareholder of the law firm. Admitted by Defendants Answer to Plaintiff's Complaint at para. 34-35.
9. Defendants knowingly defamed Gary Ferguson to representatives for UMIA by falsely informing them he had been over-billing for his time to avoid Mr. Ferguson being allowed by UMIA to take the medical malpractice files he was currently handling at the time of his termination to another firm and continue handling the medical malpractice defense on those cases. Defendants knew that if Mr. Ferguson was simply terminated, that he would take his to-date billing, current files, and future work away from the law firm and transfer them to his new employer. Had UMIA not been falsely told by Defendants that Gary Ferguson had over-billed for his time, Mr. Ferguson's client base

would likely have continued to include UMIA insured physicians and medical malpractice defense. Deposition of Martin Osowski, p. 15-16, 24-25. Deposition of Arthur Glenn, p. 11,33, 35-37. Deposition of George Hunt, p.111.

10. As a result of the meeting between Defendant Williams and Martin Osowski, Mr. Osowski and UMIA made the decision not to assign new cases to Mr. Ferguson. Mr. Osowski testified as follows:

“Q: Do you know how many cases Gary was defending for UMIA at the time he was fired?

A: I was told about twenty.

Q: And how did you deal with those cases, if you know how they were dealt with, in terms of reassigning lawyers to represent your physicians?

A: During that meeting Elliott made it very clear that those cases were UMIA cases and that I had a decision to make regarding their disposition.

Q: And how did you go about making that decision?

A: You know, I attended a presentation made by a pretty prominent defense attorney in Chicago, and he stressed two points that have stuck with me for a long time. First is, you must and should pay your defense counsel an adequate hourly wage so that they can make a decent living, or you’ll lose them to the Plaintiff’s bar. And the second thing is, if you don’t trust your defense attorneys, fire them and find somebody who you do trust. I’ve lived by that for a long time. And this became an issue of trust. I trust Elliott’s judgment. There was some question as to how we were being billed, and on the basis of trust, I intrusted that those files would stay with Elliott’s law firm. *Id* at p. 13-14.”

11. As Mr. Osowski later stated in his deposition, the reasons the files stayed at the law firm, when Gary Ferguson left was simple: “It was an issue of trust.” *id.* at p.20-21. The law firm had told him Mr. Ferguson had “over-billed” his company. The issue of trust was not what he knew personally or what he had seen by way of evidence. rather. it was what he had been told by Defendant Williams. *Id* at p.20.
12. In his deposition, Arthur Glenn, Vice President for Claims of UMIA, testified that he was

responsible for assigning cases to counsel as needed to represent UMIA's physicians.

Deposition of Arthur Glenn at p. 4. When Gary Ferguson was terminated, he called Mr. Glenn and informed him he had been accused by the law firm of over-billing UMIA. Mr. Ferguson asked Mr. Glenn specifically if UMIA had ever had any complaint or problem with his billing. Mr. Glenn told Mr. Ferguson that he had not ever had any complaint or problem with his billing. Mr. Glenn had reviewed Mr. Ferguson's bills against other bills submitted by attorneys at the law firm as part of the spot review he conducted every month. *Id.* at p. 7-9.

13. Mr. Glenn reviewed the billing statements from the law firm for the first five months of 2005. He created a spreadsheet to review for evidence that Gary Ferguson had over-billed UMIA. See spreadsheet created by Mr. Glenn, attached hereto as Exhibit [1]. Mr. Glenn knew Mr. Ferguson was working on "several big cases" for UMIA. *Id.* at p. 12. . He also indicated he would expect that a lawyer working on big, complex, medical malpractice cases would have spent more time than another attorney working a simpler file. *Id.*
14. The spreadsheet showed implicitly that Gary Ferguson had not over-billed UMIA. A copy of the actual spreadsheet he created was marked as Exhibit 1 to Mr. Glenn's deposition. This spreadsheet shows, for example, that, on a trip to Virginia Beach to take depositions, Mr. Ferguson billed an hour less for the trip than did UMIA co-counsel representing another physician. It shows that Mr. Ferguson had actually under-billed UMIA for his time. *Id.* at p. 17-18. It also shows an entry for 22 hours of billable time that had been incorrectly logged as two days worth of time for one day entry. The time billed was

correct, but the billing date was incorrect, based on inaccuracies of the computer billing system in place at the law firm. *Id.* at p.18-19. When asked whether he had formed an opinion as to whether UMIA had been over-billed for Mr. Ferguson's time, Mr. Glenn testified implicitly that "Gary had not over-billed the insurance company."

15 Mr. Glenn met with the lawyers from the law firm and told them his findings, based on the spreadsheet. The lawyers at the meeting told Mr. Glenn that the basis for firing Gary Ferguson was not something Mr. Glenn would see on the bills, rather, it was something "that they had a computer program that they ran, and it was based on the findings of that program that he had billed time when he wasn't working, or something of that nature." *Id.* at p. 23. They told Mr. Glenn that Mr. Ferguson had billed more hours that quarter than either Elliott Williams or Bruce Jensen, and that he had over-billed UMIA for his work. *Id.* at p. 24. The lawyers did not show Mr. Glenn any proof, not a single paper, of evidence. *Id.* at p. 25. When Mr. Glenn asked the lawyers how much UMIA had been over-billed, and how they would even know the amount, they told him Elliott Williams "was working with Marty on that, Mr. Osowski." *Id.* at p. 28.

16. The statement made by the lawyers to Mr. Glenn was false. Mr. Osowski gave no indication in his deposition that he was ever 'working on the amount' with Defendant Williams, or that he had any involvement after his initial meeting with the lawyers at the Oyster Bar. When he was asked at his deposition how much money was reimbursed to UMIA, he said he thought it was "approximately a \$10,000 credit" against a future bill. See Martin Osowski deposition at p. 16. When asked whether he had discussions with any other member of the law firm about the matter, he testified that he had not, prior to

- Gary Ferguson's termination, and "may have afterwards just in passing." *Id* at p. 15-16.
17. Gary Ferguson had a long-standing working relationship with Mr. Glenn, and had done previous work for him in the early 1980's when he worked for Aetna. *Id* at p 5. Mr. Glenn testified that Mr. Ferguson asked him "if we would still be able to use him after he left the firm.... I told him that I had to talk to Marty and I told him that was going to be Marty's decision, not mine.... " *id.* at p.9. Mr. Glenn further testified that the following day after his conversation with Gary Ferguson, his boss, "Marty" Osowski called him and told him Gary Ferguson "had been terminated for- I think his words were "billing integrity". and to let my guys know that we weren't to use him on any other cases." *id* at p. 11.
18. The billing program used by the law firm frequently recorded two days worth of billable time on one day. See Gary Ferguson deposition at p. 78-80. Request for Admissions No.78. For this reason, no one could rely on a day's entry of time as the actual amount of time worked for any specific day by that attorney. The Defendants knew this and yet still relied on a clock on Gary Ferguson's office computer and a time entry from the law firm's notoriously inaccurate billing system.
19. Plaintiff served Defendant with Request for Admissions on 12-5-2006. Defendant did not respond within the 30 days allotted by the Utah Rules of Civil Procedure, therefore the requests for admissions are deemed admitted. A copy of these requests for admissions are attached hereto as Exhibit [D].
20. The inference of Defendants' Statement of Facts is that they acted reasonably and without malice. However, the facts of this case prove that they did, indeed, act unreasonably and

with malice. These facts and the reasonable inference to be drawn therefrom, establish a prima facie case of unreasonable actions done with malice by Defendants.

21. Defendant Williams does not deal well with any person at the law firm having an opinion that is in opposition of his own. Staff and attorneys are afraid to cross Defendant Williams, who can be offended over minor instances and who can hold a grudge if he feels slighted in any way. A good example of this is that Mr. Williams was upset and unwilling to believe Mr. Ferguson's explanation when the Plaintiff failed to attend an office Christmas party due to food poisoning. Depo of Gary Ferguson at p. 17.
22. Defendant Williams would punish attorneys at the law firm who did not consistently participate in his ritual of consuming alcoholic beverages at the firm bar after work. His normal form of punishment was to refrain from assigning any UMIA cases to the attorneys who did not participate in these social drinking gatherings. Depo of Gary Ferguson at p. 16-17.
23. The Defendants claimed that Mr. Ferguson had billed for meetings that he did not attend and for phone calls that he did not make, but no independent investigation to determine whether or not the activities actually occurred was made. Depo of George Hunt at p. 71.
24. Defendant Hunt and Defendant Williams were annoyed with what they perceived as unnecessary interference by Gary Ferguson in firm decisions that they felt Mr. Ferguson had no right to become involved with, despite the fact that he was a share-holder in the firm. Depo of Gary Ferguson at p. 33-35.
25. Gary Ferguson was terminated for his unwillingness to participate in the law firm drinking ritual. The claim of over-billing was merely a retaliatory act on the part of the

Defendants to what they perceived as a slight against them by Mr. Ferguson and was used as a tool to ensure that all of the partners would vote to remove Mr. Ferguson as a partner in the firm. The Defendants knew at the time that the computer log sheet was no a sufficient basis to claim that an attorney had over-billed. They merely used this claim out of ill-will and malice toward the Mr. Ferguson, which is evident in the firm meeting where the over-billing was discussed only as one of the several reasons for the “reasons we want him out”. Depo of George Hunt at p. 89-96. See George Hunt’s hand-written notes from 5-5-05 meeting, attached hereto as Exhibit [J].

26. Even at the time after the supposed investigation had taken place by the law firm, Defendant Williams, who had performed the ‘investigation’, was unable to point to any specific case where Gary Ferguson had over-billed. Depo of George Hunt at p.98-101 and Depo of Gary Ferguson at p. 72.

In addition to the above-listed 26 material facts in this case, Plaintiff submits the following list of admissible evidence from Mr. Ferguson’s affidavit showing malice.

- A. Defendants defamed Gary Ferguson and fired him the day before surgery to remove a suspected cancerous thyroid. The Defendants knew that Mr. Ferguson’s disability policy would terminate the day he was fired. The Defendants knew that one of the recognized complications of a thyroidectomy was loss of the ability to speak. The Defendants knew that Mr. Ferguson could end up unemployable as a trial lawyer as a result of the surgery, and if terminated, Mr. Ferguson would have no disability insurance. This action, as much as anything proves malice on the

part of the Defendants. See Affidavit of Gary B. Ferguson at para. 16, 20, and 24.

- B. Defendants terminated Mr. Ferguson because he refused to drink alcohol with them in the firm bar, to the point of intoxication and then drive home under the influence, whenever Defendant Williams was in the office. This ritual was a daily occurrence. See Affidavit of Gary B. Ferguson at para. 8-11, and 16.
- C. No trial lawyer limits his billing time to the time he is using a computer in the office. This is the basis of Defendants' assertion that Gary Ferguson over-billed UMIA. Trial lawyers often work outside of the law office attending depositions, meeting with witnesses and clients, including expert witnesses, researching case law, doing medical research, and working on lap top computers. This is the norm in the legal community, therefore. Defendants' assertion is not customary. See Affidavit of Gary B. Ferguson at para. 5.
- D. Gary Ferguson often took work with him outside of the office, and on a daily basis. See deposition of Gary Ferguson at p. 74.
- E. The computer billing system the Defendants are relying on frequently combines two days' billing into one. That is what happened in this case. Defendants knew this. See deposition of Gary Ferguson at p. 79-80.
- F. Defendants terminated Gary Ferguson even though they knew the claims manager at UMIA had researched the claim, created a spreadsheet, and stated there was no evidence that Mr. Ferguson had over-billed UMIA. See deposition of Arthur Glenn at p. 9, 21-22.
- G. Defendants terminated Gary Ferguson even though UMIA, nor any other client,

had ever complained that Mr. Ferguson had over-billed them. See Affidavit of Gary B. Ferguson at para. 16. Deposition of Arthur Glenn at p. 9, 21-22.

- H. Defendants charge of over-billing is a ruse. It did not exist. A jury is entitled to make this finding of fact. Defendants terminated and defamed Gary Ferguson out of malice. See affidavit of Gary Ferguson at para. 43-44.
- I. Plaintiff is entitled to an inference, given the lack of credible evidence of over-billing, that Mr. Ferguson did not over-bill.
- J. Defendants statement is defamatory, per se, because it is a crime. Criminal action is grounds for disbarment.
- K. Defendants terminated and defamed Mr. Ferguson even though he had an excellent reputation for honesty, integrity, and truthfulness with UMIA and with lawyers in the State of Utah. See Affidavit of Gary Ferguson at para. 43-44.
- L. Defendants terminated and defamed Gary Ferguson in such a manner that he did not receive a single offer of employment because of the method of communication with UMIA, and the defamatory statements made regarding Mr. Ferguson's practice. Other law firms in the Salt Lake City area assumed that Mr. Ferguson had committed a crime or done something awful, therefore, did not offer employment to Mr. Ferguson after his termination with the law firm. See Affidavit of Gary Ferguson at para. 32, 35, 36, 39.
- M. Defendants terminated and defamed Gary Ferguson because he attempted to have them obey the laws against sexual harassment with respect to male attorneys having sexual relationships with subordinates. See Affidavit of Gary Ferguson at

para. 18.

- N. Defendants terminated and defamed Gary Ferguson knowing he was taking a portion of the month of May 2005 off of work for family celebrations, his son graduating from medical school and his daughter doing her dissertation for her Ph.D. during the same time period. See affidavit of Gary Ferguson at para. 41, 42.
- O. Defendants Hunt and Williams knew Mr. Ferguson's brother, Christopher Ferguson, committed suicide after being terminated from his position as a nurse anesthetist. See affidavit of Gary Ferguson at para. 26.

ARGUMENT

Defendants have moved the Court to grant summary judgment on the basis of the privilege to communicate a matter to another that concerns the reasons for an employee's discharge. That privilege is not absolute, it is conditional or qualified, and the principal factual dispute in this case precludes summary judgment. Defendants knew that they had no evidence Gary Ferguson had over-billed UMIA. At best, they had evidence that he had billed for time while not logged into the law firm's server. The proof was so lacking, apparently the law firm and its lawyers didn't even believe it, because on May 9, 2005, Defendants billed UMIA for Mr. Ferguson's billable time from April 2005; the very same time they said Mr. Ferguson had over-billed, and the very same time they used as a reason to terminate him.

I. Factual disputes over malice preclude summary judgment on Plaintiff's

defamation claims.

Summary Judgment is appropriate only when (1) “there is no genuine issue as to any material fact” and (2) “the moving party is entitled to a judgment as a matter of law.” *Poteet v. White*, 2006 UT 63, 147 P.3d 439, 441 (Utah 2006).

A qualified privilege may protect an employer’s communications to employees and other interested parties concerning the reasons for an employee’s termination, if the communication has not exceeded the privilege and if the defendants have not acted with malice. *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991). Citing that rule, the Court in *Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25, 53, 116 P.3d 271, 288 (Utah 2005) explained that malice may include evidence of ill-will, excessive publication, or that the publisher did not reasonably believe his or her statements. *Id.* The lack of reasonable grounds for believing the statements deprives the speaker of the protection afforded by the conditional privilege. *Id.*, citing *Hales v. Commercial Bank*, 114 Utah 186, 197 p.2d 910, 913 (Utah 1948). Claims of defamation should only be dismissed if the Complaint contains general, conclusory allegations of defamation. *Zoumadakis v. Uintah Basin Medical Center, Inc.* 122 P.3d 891, 893 (Utah 2005).

Defendants’ communications are not privileged because they acted out of ill-will, spite, and hatred for Mr. Ferguson rather than out of a concern for UMIA. Defendant Williams told Marty Osowski that Mr. Ferguson had over-billed UMIA. Deposition of Martin Osowski at p. 20. Based on the nature of the “proof” compiled by Defendants, they could not have reasonably concluded that to be true. Accordingly, the defamation claims should not be dismissed on summary judgment.

Statements imputing dishonesty in business relations are defamatory *per se*. *Allred v. Cook*, 590 P.2d 318,320 (Utah 1979). Defendant Hunt knew that to be the law, as he described it so in his deposition. Depo of George Hunt at p. 12. Defendants knew or reasonably should have known that the statements made to UMIA were false and that they impugned Mr. Ferguson's reputation as a lawyer. They fired Mr. Ferguson because they did not get along with him, not because he had over-billed UMIA. Whether Defendants acted with malice is an issue of fact, precluding summary judgment on the defamation claims.

In *Johnson v. Community Nursing Services*, 985 F. Supp. 1321 (Utah 1997), the district court of Utah considered whether summary judgment was appropriate in the employment termination setting. There, ~~Mr. Ferguson~~ ^{Ms. Johnson} quit her job and alleged a hostile work environment. Her employer made derogatory statements about her during an office meeting. The United States District Court stated:

"Under Utah law, there exists a qualified privilege protecting an employer's communication to employees and to other interested parties concerning the reason for the employee's discharge. *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991). This privilege protects statements made to advance a legitimate common interest between a publisher and the recipient of the publication. *Lind v. Lynch*, 665 P.2d 1276, 1278 (Utah 1983); *Restatement (Second) of Torts* § 596 (1977). If the privilege attaches to the statement, then the Plaintiff has the burden to prove that the privilege was abused through evidence of malice or excessive publication. *Brehany* 812 P.2d at 58-59. Whether a publication is conditionally privileged is a matter of law unless a genuine factual issue exists regarding whether the Defendant acted with malice, which is ordinarily a fact question *Lind*, 665 p.2d at 1278-79; *Brehany* 812 P.2d at 58-59. The "malice" required to overcome the conditional privilege consists of proof that the utterances were made from spite, ill-will, or hatred toward Plaintiff. *Combes v. Montgomery Ward & Co.*, 119 Utah 407, 415-17, 228 P.2d 272, 276-77 (Utah 1951). *Id* at 1328-29."

The Court found that the employer's statement was conditionally privileged because it

was a communication to interested parties about why the Plaintiff quit. *Id.* However, the Court refused to grant summary judgment on the defamation claim and said that summary judgment is precluded in a defamation claim when a factual issue exists as to whether the Defendant acted with malice. *Id.* The Court concluded that Plaintiff would have the burden at trial to show the existence of malice and abuse of the privilege. *Id.*

The same is true in this case. Gary Ferguson has denied that he over-billed UMIA in his deposition and by affidavit. Even if the statement is conditionally privileged, Defendants acted with reckless^{dis} regard for the truth. They communicated to UMIA that Mr. Ferguson had over-billed for his time, when they knew or should have known that they had no reasonable grounds to prove that the claim was true.

II. Defendants' defamatory statements to Osowski intentionally destroyed Plaintiff's business and economic relations with UMIA.

To establish intentional interference with economic relations, a Plaintiff must prove (1) that defendant intentionally interfered with the Plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means; and (3) damages. *Leigh Furniture v. Isom*, 657 p.2d 293. 304(Utah 1982). Courts look at the predominant purpose underlying the defendant's conduct. *Id.* at 307 (n.9). Improper purpose exists when actor's predominant purpose is spite or ill-will. *Id.* Improper means is satisfied where the means used to interfere are contrary to law. *Id.* Defamation is specifically listed as an improper means. *Id.*

Defendants well knew, as they have admitted, that Gary Ferguson had built a business

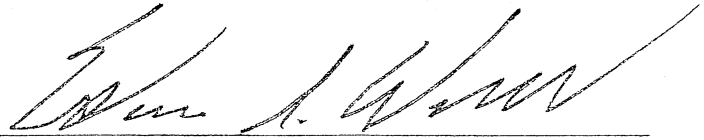
relationship with UMIA and its physician insureds. They knew that UMIA was his (and their) chief source of physician clients, and thereby, revenues. At best, there is a factual dispute over whether they acted knowingly to destroy Mr. Ferguson's reputation with UMIA for their own purposes. They told UMIA that Mr. Ferguson had over-billed for an improper purpose; their actions were motivated out of spite and ill-will towards the Plaintiff. They used an improper means- defaming Gary Ferguson's professional reputation- so that UMIA would keep its files with the law firm. Mr. Ferguson has suffered substantial and obvious damage and has been required to change his entire practice as a result of Defendants' tortuous conduct.

The most compelling proof of Defendants' ill-will comes from the deposition of George Hunt. Exhibit 9 to that deposition is a copy of Hunt's notes from the firing. Gary Ferguson's response- "EJW poisoned the well with UMIA.... " Indeed, he had, the day before, and neither Defendant Hunt nor Defendant Williams denies it. Defendant Williams met with Martin Osowski and the UMIA files that had been previously assigned to Mr. Ferguson remained at the law firm after Plaintiff's termination.

CONCLUSION

Summary Judgment dismissing Plaintiff's claims would be an error. Factual disputes preclude summary judgment, and the motion should be denied.

DATED this 7th day of June, 2007.

A handwritten signature in dark ink, appearing to read "Mel Orchard III", written over a horizontal line.

Mel Orchard III
Charles F. Peterson
Edward Wall
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing
PLAINTIFFS MEMORANDUM IN OPPOSITION TO DEFENDANTS to be mailed by
first-class mail, postage prepaid, this 7th day of June, 2007, to the following:

David Eckersley
PRINCE YEATES & GELDZAHLER
175 East 400 South, Ste 900
Salt Lake City, UT 84111

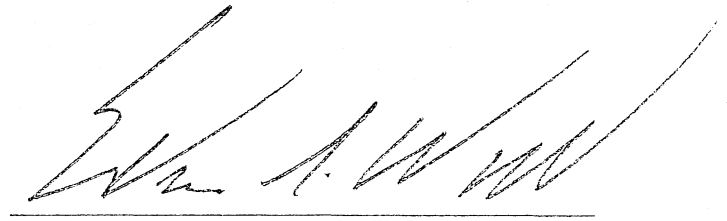
A handwritten signature in black ink, appearing to read "David Eckersley", is written over a horizontal line.

Exhibit A

COPY

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

GARY B. FERGUSON and JULIE A. :
FERGUSON, :
Plaintiffs, : Deposition of:
v. : GARY B. FERGUSON
WILLIAMS & HUNT, INC., FILLIOTT : Case No. 050921677
J. WILLIAMS, GEORGE A. HUNT, :
BRUCE H. JENSEN and KURT :
FRANKENBERG, :
Defendants. : Judge Tyrone E. Medley

BE IT REMEMBERED that on the 18th day of July,
2006, the deposition of GARY B. FERGUSON, produced as a
with-deposit herein at the instance of the Defendants herein, in
the above-captioned action now pending in the above-named
court, was taken before JAMIE R. BREY, a Certified Shorthand
Reporter and Notary Public in and for the State of Utah,
commencing at the hour of 9:00 a.m. of said day at the
offices of PRINCE, YEATES & GELDBAHLER, 175 East 400 South,
Suite 900, Salt Lake City, Utah.

That said deposition was taken pursuant to
Notice.

EXHIBITS

NUMBER	DESCRIPTION	PAGE
1	Copies of e-mails	12
2	Copies of e-mails	18
3	Complaint and jury demand	31
4	Log	58
5	Log	58
6	Timekeeper diary	64
7	Calendar page	75
8	Time entry batch audit list	69

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APPEARANCES

For the Plaintiffs: CHARLES F. PETERSON
Law Office of Charles Peterson
Attorney at Law
915 West River Street,
Suite 420
Windsor, Idaho 83702

For the Defendants: M. DAVID ECKERSLEY
PRINCE, YEATES & GELDBAHLER
Attorneys at Law
175 East 400 South, Suite 900
Salt Lake City, Utah 84111

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WITNESS PAGE

GARY B. FERGUSON

Examination by Mr. Eckersley 4

Salt Lake City, Utah
July 18, 2006

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9:00 a.m.

PROCEEDINGS

GARY B. FERGUSON,

6 called as a witness for and on behalf of the defendants,
7 being first duly sworn, was examined and testified as
8 follows:

EXAMINATION

12 BY MR. ECKERSLEY:

13 Q. Could you state your name.
14 A. Gary Ferguson.
15 Q. How are you employed?
16 A. I'm an attorney at Siegfried & Jensen.
17 Q. How long have you been there?
18 A. Since June 16th, 2005.
19 Q. What was your prior employment?
20 A. At Williams & Hunt.
21 Q. When did you start at Williams & Hunt?
22 A. In 1991. I think April 1st, 1991, right around
23 there.
24 Q. Was the firm in existence at that time? Now,
25 obviously, it was. But, I mean, how long had the firm been

n existence?

A. Months. I was practicing out of my '83 Chevy

n.

Q. What had been your prior employment?

A. Richards Brandt.

Q. Let's just get this in sequence. When did you graduate from law school?

A. No, you got to ask me about high school.

Q. I think we'll just go to law school.

A. '76 from Santa Clara.

Q. Did you start, then, at Richards Brandt?

A. No. I started at Moffat Welling in August, July or August of '76.

Q. And when did you go to Richards Brandt?

A. April 1st, 1980, I think. '80 or '81, right around then.

Q. Would it be fair to say that the nature of your practice both at Moffat Welling and at Richards Brandt was doing insurance defense work?

A. Correct.

Q. Was that primarily personal injury cases?

A. Yes.

Q. Motor vehicle accidents, products liability, that sort of thing?

A. Yes.

Q. How did you end up at Williams & Hunt? Did you learn that the firm -- that Elliott and George had broken off from Snow Christensen and set up their own firm and apply there? Or did they solicit you?

A. It was a mixed bag. I heard that they were setting up their own office, and called Sue Hellberg-Young.

Q. I'm sorry?

A. Sue Hellberg-Young. You know the court reporter, Sue Young?

Q. Oh, okay.

A. I called her to get more information on it, and I said I was interested, and she called somebody at -- Bruce probably. Bruce Jensen. Then I got a call from Bruce Jensen. Then they asked me to meet with them on a Saturday morning at Bruce Jensen's house. That's how I got involved.

Q. Were you familiar with the history of UMIA?

A. Yes.

Q. And were aware that at some point, essentially under the auspice of John Snow, that the doctors left Aetna and formed their own Beneficial Insurance Company?

A. Yes.

Q. When you first went to Williams & Hunt, were you involved in doing medical malpractice work?

A. I was but not for UMIA.

Q. For whom?

1 A. I believe I still had some Aetna med-mal cases.

2 but I could not be certain about that.

3 Q. Were you able to retain those?

4 A. Yeah, I kept all my Aetna work. Most of my
5 Allstate work. Some USF&G. So I had cases from various
6 carriers when I started at Williams & Hunt.

7 Q. There was some bad blood, was there not.

8 between Aetna and Elliott because of Elliott's role in

9 assisting John in setting up UMIA?

10 A. Yes.

11 Q. But that didn't limit your --

12 A. That didn't affect me.

13 Q. Okay.

14 When did you start doing UMIA work?

15 A. I could not give you the year. I can't tell

16 you when it was. Doug Smith and Art Glen at UMIA. I had been

17 doing work for them when they were at Aetna and Doug at

18 USF&G. So I had been doing work for them since, roughly,

19 1980. So eventually Doug started -- I believe it was Doug

20 who started sending me UMIA cases. But I can't tell you what

21 year.

22 Q. Did Gary Stott do any UMIA work when you were

23 at Richards Brandt?

24 A. I know he did Aetna. I know he did IHC. I

25 think he did UMIA.

1 Q. But you don't recall working with him on any
2 UMIA cases?

3 A. I may have covered depositions and things like
4 that for him on UMIA cases. But, boy, I sure don't recall.

5 Q. At what point did doing UMIA work become,
6 essentially, your primary occupation?

7 A. Well, I quit doing work for Aetna, USF&G. But
8 I can't tell you when that was either. But this is -- you
9 can find this in Williams & Hunt records. I can't tell you.

10 But I gradually transitioned in to doing nothing but UMIA
11 work with an occasional plaintiff's case.

12 Q. You just can't put a date on that?

13 A. Nope.

14 Q. You remember the Pullen case?

15 A. Yes.

16 Q. By the time you were involved in doing the
17 Pullen case, was that a time when you were doing primarily
18 UMIA work and that plaintiff's case being an unusual
19 exception?

20 A. Yes.

21 Q. That was a case that was, at least, resolved in
22 2003?

23 A. I don't remember when it was.

24 Q. Who was at the firm when you started?

25 A. George, Elliott, Bruce, Jody, Kurt Frankenberg

1 and then Dennis joined us a couple of months later.
 2 Q. So Dennis was a couple months after you?
 3 A. Yes.
 4 Q. Over the first 12 years that you were with the
 5 firm, how did things go?
 6 A. The first ten years were excellent.
 7 Q. When did you perceive that there was some
 8 difficulties developing in your relationship with other
 9 members of the firm?
 10 A. About the time Elliott had paid two
 11 private-college tuitions.
 12 Q. You're talking about his children, I take it?
 13 A. Yes.
 14 Q. And in what way did that strike you as being an
 15 impediment to an ongoing good relationship in the firm?
 16 A. Because he needed to take more money out of the
 17 firm.
 18 Q. And how did that need manifest itself in
 19 relationship to you?
 20 A. I think it did the entire firm. He wanted to
 21 take more money out to meet these private-tuition payments
 22 and it just -- he changed.
 23 Q. When you say he changed, tell me how you
 24 perceived the change to occur.
 25 A. He started drinking more. And he wanted people

1 A. That's true.
 2 Q. And as I understand it, you had an expert in
 3 that case who you were advancing funds?
 4 A. A lot of money to. It was probably the most
 5 expensive expert I have ever hired.
 6 Q. And at the outset of the case, there was a
 7 companion case and you had another counsel who was also
 8 involved?
 9 A. Yes.
 10 Q. That was a wrongful death case as I understand?
 11 A. Right.
 12 Q. And you were using -- you were sharing this
 13 expert?
 14 A. Yes.
 15 Q. But Williams & Hunt was advancing all of the
 16 costs?
 17 A. Well, the deal was that the other attorney, Jim
 18 Phillips, would pay half of this expert, but sometimes he got
 19 behind. So Williams & Hunt advanced the money.
 20 Q. And at some point in time during that, the
 21 prosecution of that case, the firm had to draw on its line of
 22 credit; correct?
 23 A. That may have happened. I saw that e-mail
 24 yesterday. That was -- according to that e-mail, that case
 25 was one of three factors. It was listed last.

1 in the office working the same times that he was working.
 2 And he didn't --
 3 Q. So --
 4 A. Pardon. Go on.
 5 Q. I'm sorry. So your perception was his need for
 6 additional cash prompted him to encourage or demand that
 7 people work longer hours and bill more time; is that fair?
 8 A. Yes.
 9 Q. And when do you recall that being?
 10 A. No. I can't -- he can give you the dates when
 11 he was paying that tuition.
 12 Q. Was there an episode during the prosecution of
 13 the Pullen case that caused you some problems?
 14 A. Yeah, he got upset in the Pullen case because
 15 we had to advance money. Now, you do plaintiff's work. You
 16 understand you have to advance money in a plaintiff's case.
 17 Elliott didn't do plaintiff's work, he did not really
 18 understand that. And there were probably \$75,000 that
 19 Williams & Hunt had advanced at the Pullen case, and he
 20 wanted that money because of his cash-flow needs. And that's
 21 what got him upset.
 22 Q. In the Pullen case as I understand it, there
 23 were times when not only Elliott but some of your other
 24 partners indicated to you that they didn't think that the
 25 case had the value that you were attributing to it?

1 Q. I'm not saying it was because of that case, I'm
 2 just saying it occurred -- it corresponded with it?
 3 A. Based on that e-mail, yes.
 4 Q. Do you have an independent recollection of it?
 5 A. No.
 6 Q. While we're talking about it, things that you
 7 might have looked at, what did you look at to prepare
 8 yourself for today's deposition?
 9 A. Nothing.
 10 Q. How did you see the e-mail? Was that just --
 11 A. Yesterday.
 12 Q. -- yesterday at the deposition?
 13 A. Yes.
 14 (Whereupon, Deposition Exhibit No. 1 was marked
 15 for identification.)
 16 BY MR. ECKERSLEY:
 17 Q. Let me show you Deposition Exhibit No. 1. I'll
 18 represent to you that this is the history of the e-mails
 19 concerning the tapping of the line of credit in June of 2003.
 20 Do you recognize that?
 21 A. Yes, it appears to be the e-mail -- series of
 22 e-mails.
 23 Q. Starting in reverse order?
 24 A. Right.
 25 Q. And I take it, from this, that you were

offended that there was some reference to Pullen as being one of the factors that had produced the -- or at least George had referenced in talking about why it was necessary to take down the line of credit?

A. Yes.

Q. Was it accurate when George said that following this exchange that you went into your office and closed the door for a period of time and didn't socialize anymore with the firm?

A. No.

Q. Tell me your perception of that.

A. My door would be closed because I'm right by the reception area. That's why my door would be closed, because it's so noisy out there. And I'm 4-F because of my hearing. So I don't need anything disturbing my hearing when I'm trying to listen to what's going on and when I'm trying to concentrate.

Q. We're all of the age in this room to know what 4-F means --

A. Except for the court reporter.

Q. -- except for the court reporter.

A. So I've got bad hearing. So that's -- I would keep my door closed on a regular basis.

Q. Are you telling me that you had historically? That it didn't --

A. Yes. Yes.

Q. Okay. What about with regards to the socializing after hours in the kitchen or in the lounge? Did, in fact, you start avoiding doing that after this time in June of 2003?

A. No.

Q. Describe what the history of that situation was at the firm. By that, I mean the origin of the lounge, the bar.

A. Well, it started in the kitchen. We -- when we first started out, we had offices over in Utah Medical Association. And we would walk over to Green Street at the end of day, have a drink or two and go home. Then when we finally got office space at 257 East, we continued that drinking in the kitchen, one or two drinks before we'd go home.

Then as the firm grew and the number of drinkers grew, the kitchen was too small. So eventually when this expansion was done, this bar was included in the expansion because the kitchen was too small.

Q. Do you recall when that expansion occurred?

A. No. I don't know when that happened.

What would happen is, so long as Elliott was in the office between 4:30 and 5:00, he would come by my office and say, Whiskey, whiskey, and then head back to the bar. So

1 if you wanted to stay on Elliott's good side, you went back
2 and drank with him.

3 Q. So we're clear, you didn't have any moral
4 opposition to that?

5 A. No. I didn't. No, no. I never have. I still
6 don't. No, no. But in order to do that, you had to go back
7 with Elliott. And I did that. And the funny thing is when
8 Elliott was out of town, not in the office, that didn't
9 happen. People would drift back towards the bar, generally
10 around 6:00 and -- and sometimes nobody would go back there.
11 But as long as Elliott was in the office, people were back
12 there drinking in that bar between -- starting somewhere
13 between 4:30 and 5:30 every night.

14 Q. Were there people in the firm who did not get
15 involved in that activity?

16 A. Yeah, yeah. Some of the -- Carolyn Jensen did
17 not, not on a regular basis. Kurt Frankenberg did not on a
18 regular basis. Rob Keller did not on a regular basis. Of
19 the attorneys, those are the only ones I can think who did
20 not do it on a regular basis.

21 Q. Can you think of any specific penalty that was
22 exercised against any of the people who didn't participate on
23 a regular basis?

24 A. Carolyn Jensen never got a single UMIA file.

25 Q. Prior to your departure?

1 A. Prior to my departure, she did not have a
2 single UMIA file given to her by Elliott to take to
3 conclusion and that -- that was the punishment. Here you've
4 got Elliott with 80 files. I would go in and talk to Elliott
5 and I said, Elliott, Carolyn needs work. Kurt needs work.
6 And he would not do anything to get them UMIA work. So
7 that's part of their punishment.

8 Eventually Kurt developed some rapport with
9 UMIA and was getting some cases on his own even though he
10 wasn't back there drinking on a regular basis.

11 Q. Where does Kurt live?

12 A. Park City.

13 Q. That was the reason why he didn't participate
14 in the drinking?

15 A. Well, early on, he did. He drank too much. I
16 think his wife said, You've got to stop doing this.

17 Q. It wasn't an issue about his having to drive?

18 A. That's part of it. But the other reason is
19 health reasons. He's -- he, like Rob Keller, are in good
20 shape and are road bikers. They didn't want the weight, they
21 didn't want the excess calories. So there were those
22 reasons.

23 Q. To your knowledge, nobody was fired as a result
24 of not participating in the socializing after hours?

25 A. Except me.

1 Q. Do you actually think that's the reason why --

2 A. Yeah. I think that's one of them. That's one
3 of them.

4 Q. When did you stop participating?

5 A. Well, those e-mails will show. The e-mails
6 regarding Merce versus Anderson. Elliott accused me of over
7 billing in Merce. I had not, explained to him why I had not.
8 And then I sent him that e-mail. I'm not socializing with you
9 back there until -- for now or whatever. And I did not.
10 That's roughly, what, six weeks or something like that, eight
11 weeks before I was fired.

12 Q. Assuming that it's March 16 of 2005?

13 A. Okay.

14 Q. Up to that time, had you still been
15 participating in the socializing, the drinking after hours?

16 A. Yeah, for the most part. Elliott was upset
17 that I did not attend the Christmas party. I got -- we
18 went -- there's some irony in this. We had our Christmas
19 luncheon with UMIA the day of our Christmas party. We went
20 to the New Yorker, and I ordered crab cakes and I got food
21 poisoning from the crab cakes. So I was sitting on the
22 toilet trying to clear everything out while the Williams &
23 Hunt Christmas party was going on. When I told George and
24 Elliott that Monday, they didn't believe me. Elliott just
25 thought I had dissed him.

1 Q. This is the Christmas party of 2004?

2 A. Right. Shortly thereafter Elliott said to me,
3 You know, you don't think I'd fire you or anything like that?
4 So I took that in hindsight to mean that that's another
5 reason why he hired me because I didn't go to the Christmas
6 party. But, no, I was back on good terms with Elliott
7 socializing with them on a regular basis in that bar up until
8 that Merce e-mail.

9 Q. And "them" would on most occasions include
10 George, Elliott, Dennis, Bruce and Jody?

11 A. Yes.

12 Q. Anybody --

13 A. And Mark Anderson.

14 Q. Mark Anderson being an associate?

15 A. Right.

16 Q. Do you remember when Mark started?

17 A. I bet he's been close to two years, I think. I
18 don't recall.

19 Q. Two years before you left?

20 A. No, no, maybe a year before I left.

21 (Whereupon, Deposition Exhibit No. 2 was marked
22 for identification.)

23 BY MR. ECKERSLEY:

24 Q. I'm showing you Deposition Exhibit No. 2. This
25 is the e-mail you were making reference to about questions

1 about billing in the Merce matter?

2 A. Right.

3 Q. Tell me your recollection of what occurred.

4 You went to Elliott initially with a question: is that
5 correct?

6 A. Right. I went to Elliott because of the amount
7 of this bill. It was for one month. And it's a case with
8 Corey Madsen and I can't remember the other attorney's name.
9 But they're psych-trained plaintiff's lawyers. So there's a
10 lot of time the defense has to put into cases where we have
11 psych-like lawyers. So this bill was rather large and I
12 asked -- went to Elliott and I said, Here's the amount of
13 this bill, what is UMIA's practice as far as billing it now
14 versus billing it on a quarterly? Well, that big you need to
15 bill it now. And he then said --

16 Q. "That big" being in excess of \$22,000?

17 A. Right. I said to him. You may want to know
18 about this, Elliott, because this is a big bill and it's all
19 one month and somebody at UMIA might ask you about it. And
20 he said, Well, that's the amount, you can bill that now.
21 And, yes. I would like to see it.

22 So I gave him a copy. And before I gave a copy
23 to Elliott, I gave it to Kurt Frankenberg because I wanted to
24 make sure there were no mistakes in that bill. And Kurt had
25 done quite a bit of work in that case. So I gave it to Kurt

1 first and he may have made one or two minor corrections,
2 typos, that kind of thing. Then I gave it to Elliott.

3 And then Elliott came in and accused me of over
4 billing on two different days in that case, and he was
5 downright, flat wrong. And he was angry. He was red in the
6 face, redder than usual. And you can tell when Elliott is
7 angry. I mean, he was angry at me. He did it on a Friday
8 afternoon, and so I tossed and turned that weekend thinking
9 about what I should do.

10 And so -- yeah. I sent an e-mail. It looks
11 like it's...

12 Q. Appears to say Wednesday?

13 A. Right. Well, that's the day it's sent. But
14 the first sentence is, "Last Friday you strongly and angrily
15 suggested I over billed." That's what he did. So I sent him
16 this e-mail. And essentially said I'm not going to socialize
17 with you anymore.

18 Q. The questions that he raised with you didn't
19 have to do with not performing hours, did they? They had to
20 do with perhaps taking too long to -- for the activities in
21 which you engaged?

22 A. No. He said I didn't do it. He said, with
23 respect to this one deposition that was in Provo, that I
24 spent too long driving to and from that deposition.

25 Q. Okay.

A. And that I spent too long in the deposition. It was my client being deposed by the plaintiff. I met with my client beforehand. I prepared him for the deposition. The deposition itself went seven hours, not including breaks. And then I -- you know, I had to drive back home. And he just told me I took too long to drive back from Provo.

Q. He also suggested that it was unnecessary for you to do as much preparation with your client as you did?

A. Yeah. See, you have to understand with Elliott, his standard -- and he says this repeatedly -- is benign neglect. That's his standard of practice. That is not my standard.

Q. I see that you make reference to that. So I assumed it was something you had heard quoted on a number of occasions?

A. Yes. From him. He treats his files with benign neglect. I don't. And I think that's one of the reasons why I had so many cases referred to me from UMIA, because I did a good job on the cases.

Q. Who at UMIA would you say you're particularly close with?

A. Doug Smith and Art Glen.

Q. Following this March 16 exchange and on Exhibit No. 2 that I've shown you, you see Elliott's response to other members of the firm, do you not, at the top?

A. Yeah. It's a false statement. He was angry.

Q. Did you see that e-mail in real time?

A. No. No. You see -- no.

Q. I notice it wasn't directed to you. I just wondered if anybody brought it up with you?

A. No.

Q. Did you, in the March 16th period of 2005, have any discussion with anybody else in the firm about this interchange you had with Elliott?

A. I may have discussed it with Kurt or Carolyn. But I don't -- I don't know.

Q. Who did you most frequently work with in the firm at that time? Would it be Kurt?

A. Kurt on this case. We generally handled our own cases there. So Kurt on the Merce case. I didn't have anything with Carolyn that I can recall.

Q. Okay.

When you stopped socializing after this exchange with Elliott, did people -- was there inquiry made of you why this was?

A. No. No. Because you see, I -- I CC my e-mail George Hunt. So I expected George to explain to the others what was going on. So no.

Q. As of 2005, tell me what the practice was with regard to billing. How, physically, did your time get

1 entered into bills?

2 A. Usually at the end of the day, if I had time, I
3 would log into our billing system and enter the time. And
4 sometimes that system pulls up the prior day, the prior time
5 you've entered the time. And if you don't recall to change
6 it, sometimes you bill on the wrong day. And it's not
7 something I could correct on the system. I had to go to my
8 secretary or a paralegal to make that day change.

9 Q. I don't understand what -- to make what day
10 change?

11 A. Let's say, you know, it's the end of the day,
12 you pull up the billing screen and you put in the client ID
13 number and you start putting in the description of what you
14 did. In the system, it automatically dates it but it dates
15 it for the last time you used the system.

16 So let's say the last time you used the system
17 was on the 12th, and you pull it up and you're billing on the
18 13th. If you don't change the 12 at the top when you pull it
19 up on the 13th, the date is going to show the 12th. Does
20 that make sense?

21 Q. I think so. How did you go about correcting it
22 to the right date?

23 A. If I remembered, I gave a note to the secretary
24 or to the paralegal and said, Okay, this entry needs to be
25 changed. And they could change it. I didn't know how to do

1 it. I think towards the end, I probably did not have access
2 to it. At one time I could easily change that mistake.

3 Q. How?

4 A. I could go back while I'm still logged on and
5 somehow change the date. But one upgrade or something to the
6 system, I could no longer do that. So that's -- that was one
7 problem with the system. If you didn't remember to change
8 the date, your time would show up on the wrong day.

9 Q. The entries you -- for all of bills, you're the
10 one who physically puts them into the computer?

11 A. Exactly.

12 Q. From your desktop computer?

13 A. Right. I had -- I had a three-ring binder. I
14 had my calendar. I would print off Outlook calendar days.
15 I'd write down what I did during the day as I did it. And at
16 the end of the day, I'd take that information, put it into
17 the computer. That's how I would do it. Sometimes I'd have
18 to do it the next day. But usually at the end of the day.

19 Q. So it wasn't invariable that you do it every
20 day, but at least you would do it within one day of the time
21 that you had actually performed the work?

22 A. Almost always.

23 Q. Exceptions being, perhaps, if you're out of
24 town or something of that nature?

25 A. Right. Or something just came up that I had to

1 run out of the office at the end of day. There were others
2 in the office that waited until the end of the week to bill.

3 Q. What was your habit with regard to logging on
4 and off your computer?

5 A. There was no custom, habit or whatever.

6 Frequently -- strike that. I'd have 30 med-mal cases so I
7 was extremely busy. I had adjustors calling. I had clients
8 calling. And I would get in the morning sometimes and start
9 returning those calls, working on other things and never even
10 turn on my computer. At the end of day, the same thing could
11 happen. I could turn off the computer and all of a sudden
12 I've got adjustors calling, doctors calling, things
13 happening. And my computer is not on and I'm still working.

14 Q. What would you say -- did you have a routine
15 with regard to what time you normally got to the office?

16 A. Between eight and nine.

17 Q. And a routine about when you would leave the
18 office?

19 A. Well, I'd -- when Elliott would go by and go
20 back to the bar, that was usually between 4:30 and 5:00. It
21 got closer to 4:30 as time went on. But usually -- let's say
22 five. We'd go back there, have a couple drinks and leave.
23 He would almost always leave at six. And I would leave with
24 him or right behind him.

25 Q. When you headed back, did you log off your

1 Q. In your complaint there's -- there is a
2 reference to that activity.

3 A. Elliott told me that on May 5th.

4 Q. I guess that was my question. You did become
5 aware at some point, let's say, May 5th?

6 A. Okay.

7 Q. Is that fair?

8 A. Yes.

9 Q. Did anyone else ever discuss that fact with
10 you? I'm not asking specifically either Doug or Art.

11 A. Prior to May 5th?

12 Q. No. Any time, ever, between now and the
13 beginning of time?

14 A. Yeah. Art talked to me about that after his
15 meeting with George, Dennis and Bruce.

16 Q. Tell me what they told you.

17 A. He said that was one of the claims -- their
18 claimed evidence and basis for saying I was over billing.

19 Q. Any more particulars than that?

20 A. He said, from his point of view, it was not a
21 sufficient basis, that it was -- that he knows that med-mal
22 lawyers work outside of the office, work without their
23 attorneys -- or their computer on and that the information
24 that Williams & Hunt brought to that luncheon meeting was no
25 way sufficient to support the conclusion that I was over

1 computer as a habit?

2 A. Oh, I did. But the others didn't. Elliott
3 didn't, George didn't, Dennis did not.

4 Q. And how did you know that?

5 A. Because I saw the computers still on. I saw
6 when they would log off. I was one of the few attorneys
7 there who would log off before going to drink. Bruce never
8 did because he'd go back and do work and things like that.

9 Q. Was there -- were you encouraged to log on and
10 off every day?

11 A. Nobody said anything about it.

12 Q. I know that people get unhappy with me because
13 I basically never log off. I'm always on unless somebody
14 says that something has to be done on the system. I was just
15 wondering if somebody said, Hey, we do things at night that
16 require people to be off the system so log off every day?

17 A. That may have been said one time or another.
18 But it wasn't something that was -- I mean, everybody tried
19 to log off before they went home.

20 Q. And you did it in particular?

21 A. I did.

22 Q. Did you become aware at some point in time that
23 the firm had been tracking when you were on and off the
24 computer?

25 A. No.

1 billing.

2 Q. What I really want to know is what he told you
3 he had been told by George or Dennis or Bruce?

4 A. Yeah, that I'd been over billing on UMIA files.

5 And he asked specific, Which files, which files? He was
6 not -- they mentioned the Robb file. And they may have
7 mentioned the Merce file. And he said -- well, let me back
8 up.

9 What Art told me was that he called Elliott
10 prior to that meeting and said, Elliott, the board may ask me
11 how much Gary over billed and whether or not we've been
12 reimbursed. And I need to be in a position to answer that
13 question. And so I need to see your evidence of over
14 billing. And Elliott told him, Sure, I'll show you. We've
15 got it. We've got it.

16 And so they set that luncheon date. And Art
17 and Doug show up and, much to Art's surprise, Elliott is not
18 there.

19 Q. This is what Art told you?

20 A. Yes. And that it was George, Bruce and Dennis.

21 And that the three of them -- George, Bruce and Dennis --
22 said -- represented that I'd over billed UMIA on those files
23 and that's why I'd been terminated. And when Art asked to
24 see the evidence of it, he said all they had were some
25 log-on/log-off numbers and essentially that was it. And he

said it was almost meaningless what they had to support their claim, the assertion that I'd over billed.

Q. Did Art tell you that he actually saw a document?

A. Yes.

Q. Yesterday we had an exhibit that --

A. I don't know if that's the document. I've never seen the document before yesterday. Maybe in your disclosures but I didn't study it then.

Q. Did you review the disclosures that the firm made?

A. No.

Q. Prior to this lawsuit being filed, did you disseminate copies of the complaint in advance to other lawyers?

A. Pardon me, what was the last part?

Q. Before the complaint was filed, did you show copies of what was proposed to be the draft complaint to other lawyers?

A. Let me think about that.

No. Just my attorneys.

Q. Let me have you think about it some more. Did you give a copy to Jim McConkie?

A. Not a draft. I didn't show it, no.

Q. Did you give a copy to Jim McConkie before it

was filed?

A. No.

Q. Do you know how he happened to give me a copy of it before it was filed?

A. I don't.

Q. What about Shawn McGarry?

A. No.

Q. Bobby Wright?

A. No.

Q. Do you have any explanation of how they might have had it, if they did, copies of the complaint before it was filed?

A. Copies of the complaint were faxed to all of those individuals the day it was filed.

Q. Why?

A. To let them know what had happened -- to let them know what had happened to me. That's basically it. Because I had been very limited to who I could talk to, what I could say, and that complaint spoke for me. And it's a public document.

Q. And you wanted these allegations disseminated?

A. I wanted my friends to know what had happened me.

Q. Did you have input in drafting the complaint?

A. Yes.

1 Q. Did you, in fact, draft it yourself?

2 A. No.

3 Q. Who did?

4 A. Mr. Peterson.

5 Q. Mr. Peterson, to my understanding, wasn't
6 involved at that time, was he?

7 A. He was. Your dates are all screwed up.

8 Q. Do you know why he isn't on the original
9 complaint?

10 A. Because he was not admitted in Utah.

11 (Whereupon, Deposition Exhibit No. 3 was marked
12 for identification.)

13 BY MR. ECKERSLEY:

14 Q. Do you recognize Exhibit 3 --

15 A. Yes.

16 Q. -- as the complaint filed in your behalf in
17 this action?

18 A. Yes.

19 Q. Would you look at paragraph 19? This indicates
20 that, at some point in late 2004 or early 2005, you stopped
21 your involvement in the nightly drinking and voiced your
22 opposition to this ritual.

23 I think you told me earlier in this deposition
24 you didn't really have any opposition to this ritual?

25 A. I had unvoiced opposition. And that is -- you

1 have to understand. Mr. Eckersley, every night we were going
2 back there and drinking two to three doubles or triples and
3 then driving home. It's not a safe practice, it's not a
4 healthy practice. But in any case, if you wanted to stay on
5 Elliott's good side, that's what you did. And I stopped
6 doing it with that March e-mail.

7 Q. So it wasn't late 2004, early 2005, it was
8 March of 2005?

9 A. March. March.

10 Q. And you did not voice any opposition?

11 A. No. Not until March.

12 Q. What is the reference to the sexual harassment,
13 consultant?

14 A. Janet Walker was having an affair with Dennis
15 Ferguson while he was still married and Dennis was a
16 shareholder; she was a subordinate to Dennis. And initially
17 when George asked Dennis whether or not they were having an
18 affair, they both denied it. Both of them lied to George
19 because they were having an affair.

20 And when they finally admitted the affair, I
21 was at lunch one day with George Naegle and he'd been
22 involved in the -- I'm going to butcher this name. The guy
23 who owns the Franklin -- team of Franklin Covey Field. Buser
24 or something like that.

25 Q. Right. Buzas.

1 A. And there was a sexual harassment case filed in
2 federal court against him. And George defended the case.
3 And I was telling George what I knew of what was going on in
4 the office in this regards. He said, You have no insurance
5 coverage, you need to get advice from a specialist in this
6 area to see what needs to be done.

7 And so I took that recommendation back to
8 George and said, We really need to get somebody like Janet
9 Hugie Smith to look at this and advise us. He wouldn't do
10 it, he said, No, no, we don't have to worry about it. We
11 don't have to worry about it.

12 Q. You understand, do you not, that sexual
13 harassment doesn't involve consensual sexual relationships
14 between employees?

15 A. I mean, the issue here is you've got a
16 subordinate. You've got a superior having sexual relations
17 with a subordinate.

18 Q. And the significance of that is what? Assuming
19 that it's consensual.

20 A. Yes, that's a basis for sexual harassment
21 charges. That's why firms do everything they can to
22 discourage people who are superior having sexual relations
23 those who work in -- and they're subordinate.

24 Q. Do you think that whatever it was that you said
25 to George about investigating some -- having a policy

1 So George said he would do that. And this was
2 important to others in the firm, and he didn't get it done.
3 He had -- and finally months had passed and I started asking
4 around to see if I could find a consultant. And I had one
5 recommended to me by Bob Stevens at Richards Brandt.

6 I told George about it. I said, George, what
7 about this guy? You know, he comes highly recommended, this
8 is what he costs, this is what he does. I think George
9 didn't like the fact that I found somebody and he hadn't done
10 anything on it for months.

11 See, by that time George wasn't doing much by
12 way of management. He just couldn't get things done. I
13 think one of the reasons -- well, anyway, my personal opinion
14 is that -- and so that guy wasn't hired and I was fired
15 shortly thereafter.

16 Q. Do you remember my question, Gary?

17 A. What was the question?

18 Q. The question was, what financial issues were
19 you at odds with with Elliott?

20 A. My feeling was that the overhead was way too
21 high there. You've got -- when I was there, there were ten
22 lawyers, four or five paralegals and right around 20
23 non-billing staff. And that you had -- we had two attorneys
24 offices that were not being used by attorneys; that we could
25 possibly sublease those offices to attorneys and start

1 regarding sexual discrimination, played any role whatsoever
2 in your termination?

3 A. First what I said to him, I felt we ought to go
4 to Janet Hugie Smith and get an opinion from her, see what
5 she recommended. I didn't encourage one policy or another.
6 Nothing. I just said, Let's get an expert, look at the
7 problem and see what she says. Yes, it upset George because
8 he really likes Janet Walker. And he -- it bothered him that
9 I wanted to do this.

10 Q. My question really is, do you think raising
11 that played a role in your termination?

12 A. Yes.

13 Q. And so by your answer, I take it you're saying
14 you simply didn't include the allegations regarding the
15 existence of this affair as an embarrassment to the firm?

16 A. Hell no.

17 Q. What was your understanding of -- you say in
18 paragraph 22 that you were at odds with Williams over various
19 financial issues in the firm. What were those?

20 A. Okay. At one of our meetings, I think late in
21 2004, the board -- primarily George and Elliott -- agreed
22 that we would get a consultant. We would hire a consultant
23 to review the financial situation with the firm, compensation
24 and those type of things; that there are plenty of them out
25 there. The primary emphasis was compensation.

1 bringing in money.

2 My feeling was that Williams & Hunt was on a
3 downhill run financially just because their overhead was
4 going to kill them in the long run. We needed to bring in
5 more billers. Either rent that space out, hire more
6 attorneys or do something. But the problem is, is that
7 George wasn't going to move Janet Walker out of that
8 attorneys office once he put her in there.

9 Q. I take it these are -- the overhead issue you
10 just described to me is one that you voiced to Elliott and he
11 disagreed?

12 A. I can't even say that. Those were my opinions,
13 and that's why I wanted the consultant to come in and look at
14 it. I think I voiced, at some meeting, that we ought to look
15 into subletting those offices just so we can get some income
16 in there.

17 Q. What I'm wondering is why you alleged in the
18 complaint that you were at odds with financial issues with
19 Elliott, what they were?

20 A. Well, that's it.

21 Q. So if you were at odds, that means that you
22 expressed your opinion and he expressed a different opinion?

23 A. Not -- not necessarily. I would know his
24 opinion and would not necessarily express mine.

25 Q. Okay.

In paragraph 27, you talk about Williams being unhappy -- Elliott being unhappy that the firm had advanced money for costs in a plaintiff's case. Is this a different case than the Pullen case?

A. No. It was -- it was the Pullen case. I had one other -- see, the Pullen case was during that time that Elliott was paying for two private-college tuitions. The other plaintiff's case I had, Trujillo, was settled for roughly \$800,000.

Q. Do you remember when that was?

A. No.

Q. By the way --

A. There weren't huge costs advances in that one.

Q. In the Pullen case, do you remember sending an e-mail disagreeing with people's assessment the case wasn't worth just 800,000 but was worth a lot more?

A. Yes.

Q. And point of fact, it was settled for substantially less than that, was it not?

A. It was settled for \$300,000.

Q. It was actually 350, wasn't it?

A. Something like that.

Q. Did you get unhappy with some members of the firm because you felt like they didn't really know what they were talking about when they were giving you their

1 A. Those are the ones I can think of right now.

2 MR. PETERSON: Technically three.

3 BY MR. ECKERSLEY:

4 Q. As you sit here now, you're not aware of the
5 firm telling anybody else anything about the reasons that you
6 were terminated?

7 A. Well, George told Janet. He said he'd been
8 telling Janet that yesterday.

9 Q. I'm talking about people exterior to the firm.

10 A. Not that I know of at this time.

11 Q. So in your complaint when you allege that you
12 had been injured by defamation, the allegation as you
13 understand it is specifically related to your relationship
14 with UMIA?

15 A. Correct.

16 Q. Did anybody ever tell you that they tried to
17 find out and the firm wouldn't tell them?

18 A. No.

19 Q. After you left the firm, after you were fired,
20 did you apply to other law firms --

21 A. Yes.

22 Q. -- prior to Siegfried & Jensen?

23 A. Excuse me, I didn't mean to interrupt. I knew
24 that question. Yes.

25 Q. Where?

evaluations of the Pullen case?

A. Yes.

Q. In retrospect, it turns out they were right and you were wrong?

A. Right.

Q. I asked you about some particular attorneys. Could you tell me how many lawyers you faxed copies of the complaint to the day it was filed?

A. I can't tell you.

Q. Ballpark?

A. Ten or 12, maybe.

Q. Tell me who you think anybody at the law firm discussed the basis for your termination with.

A. Well, on May 5th at that meeting after I was told they were firing me for over billing and keeping my door shut, not socializing and those things, I asked Elliott. What have you told UMIA? He said, I told Marty your bills can not be trusted. And I then said to Elliott. Well, then you poisoned the well with UMIA, so...

Q. That's one?

A. That's one. And then at that luncheon meeting, George, Dennis and Bruce repeated that statement, in essence, ... Art and Doug that the reason I was fired is because I was over billing UMIA.

Q. That's two.

1 A. Snow Christensen. I talked to Terry Rooney,

2 and he called me back and said that -- something like I had
3 too much capacity so they didn't have an opening there. I

4 called Colin King. He said that they were looking for
5 somebody younger. I called Alan Sullivan. He said no. And
6 I called Charlie Thronson and, over a series of weeks, they

7 would -- I had an ongoing conversation with him. And it
8 finally came down that, if I would take the Nevada bar and
9 pass it, which is hard, that they might hire me for an office

10 in Las Vegas and I'd have to move to Las Vegas. So that was
11 a no-go.

12 And I talked to Strong & Hanni. Scott

13 Williams. And I talked to -- and they were afraid of hiring
14 me because they didn't want to upset Marty Osowski. I

15 talked to Shawn McGarry. And Shawn said, If you had your
16 files, yes, we'd hire you in a nanosecond. Otherwise, we
17 can't. They were worried about upsetting Marty Osowski. I

18 didn't call anybody at Richards Brandt; I wasn't going to go
19 back there. Those are all the ones I can think of right now.

20 Q. Did any of the people that you just mentioned
21 give you any indication that they weren't willing to hire you
22 because of something they had been told by people at
23 Williams & Hunt?

24 A. No. What the UMIA firms said was that they
25 were scared --

1 Q Let me interrupt you there Gary UMIA firms
2 being?

3 A Strong & Hanni and Kipp & Christian What they
4 said is they didn't want to upset Marty Oslowski and lose the
5 UMIA business by hiring me

6 Q My question was did anybody tell you that they
7 weren't going to hire you because of something they had
8 learned from Williams & Hunt?

9 A No

10 Q How did you -- tell me how your current
11 situation with Siegfried & Jensen came up

12 A Through - oh let me tell you one more I
13 called -- this is to complete an earlier answer I called
14 Steve Sullivan at DeBry's office The day of my
15 thyroidectomy See these guys fired me on May 5th I had a
16 thyroidectomy scheduled on May 6th They knew it They knew
17 that I may have cancer They knew that one of the
18 complications of a thyroidectomy is lose your voice

19 Here I am a trial lawyer going into surgery
20 may lose his voice I had no short term disability I had
21 no disability insurance whatsoever after May 5th So here
22 I am in the waiting area at the hospital waiting to go into
23 surgery and I'm calling trying to find jobs So I'm calling
24 Colin King And the area is draped off with a curtain
25 Everybody can hear me on the cell phone talking to these

1 June 16th 2005

2 Q Tell me about the conflict situation

3 Obviously Joe Steele well what's Joe Steele's
4 relationship with Siegfried & Jensen?

5 A I'm not sure He practices there He's I
6 don't have privy to that information But he does work on
7 cases with them

8 Q Historically hasn't it been your experience
9 that he's essentially the guy that does their medical
10 malpractice work, without regard to what the compensation
11 arrangement is with them? Or what nature of their
12 professional relationship -- he's the guy that does their
13 medical malpractice?

14 A Mike Richman was Mike Richman was the guy who
15 did their med-mal work Joe was working on some of the cases
16 with Mike, and Joe had his own firm at that time The
17 letterhead was something like Steele

18 Q Ruffinengo?

19 A Yes Thank you

20 Q He was a friend of mine

21 A He's a good guy He had his own firm and
22 Joe's name would show up on the pleadings under that firm
23 name and then from Siegfried & Jensen usually Mike Richman
24 or maybe even Jim Gilson would show up beneath it So Mike
25 Richman was their med-mal department When I started he was

1 plaintiffs lawyers And the doctors are probably going
2 nuts

3 And I'm calling DeBry's office And I talked
4 to Steve Sullivan He's the first one who called me back on
5 May 6th and said, Yes, we may have something here And it
6 turned out that it didn't work out Colin called me back
7 late that night and he said I'll talk to my partners, we'll
8 see So DeBry's office is somebody else I talked to I
9 interviewed with them and it just - they weren't building a
10 medical malpractice department

11 So Siegfried & Jensen - attorneys who knew Ned
12 and Mitch and knew me called both of them and recommended
13 that they hire me I knew the two from a case I'd handled
14 early at Williams & Hunt They thought that I treated them
15 fairly and resolved the case early and fairly And so
16 they - and they knew I had a plaintiffs practice on the
17 side

18 And so after being out of work staying at home
19 for roughly five four or five weeks I interviewed with
20 Mitch Jensen and Joe Steele and they're interested They
21 need Ned's approval and he's in Hawaii When Ned gets back,
22 Ned says Sure we can hire him so long as we can clear the
23 conflicts And that took a while That was not a pleasant
24 chapter clearing those conflicts because of Williams &
25 Hunt Eventually my hire date was Siegfried & Jensen was

1 retiring and they wanted to build it up

2 So what was your -- that's my knowledge about
3 Joe Steele at that time

4 Q But you recognized that any case that Joe
5 Steele had was, in essence, a Siegfried & Jensen case?

6 They're cases that he got from them?

7 A Right And then he had some of his own cases
8 with CJ

9 Q One of the cases that Joe Steele was doing was
10 a case where you had previously been representing the
11 defendant?

12 A Yes It was, in part yes The Fillerup case
13 And it was really Gilson's

14 Q But the Fillerup case was a clear conflict of
15 interest?

16 A That's right Everybody agrees to that
17 Everybody Me Joe everybody agreed to that

18 Q Then there was a collateral issue about whether
19 the Williams & Hunt firm would seek to disqualify Siegfried &
20 Jensen from cases on which you had not specifically worked
21 but which were cases that they had against - that
22 Siegfried & Jensen had against clients of Williams & Hunt?

23 A Correct There were files not only that I had
24 not done any work on but I knew nothing about Correct

25 Q But didn't you you'd agree with me wouldn't

you, that that raises a question about the potential conflict of interest having a lawyer go from one firm to another firm where the firms have cases against each other?

A. It raises the question that has to be answered in a timely manner. Williams & Hunt did not.

Q. By what point in time did -- do you remember what the date of your affidavit was?

A. No, I don't.

Q. You're aware now that Williams & Hunt got legal counsel and got an opinion as to what was necessary to satisfied the conflict-of-interest issue?

A. I saw the Sullivan letter yesterday. I didn't read it. I saw it yesterday.

Q. In your complaint, it says you hired a lawyer to deal with that issue?

A. Right.

Q. Who was that?

A. Charles Gruber.

Q. Did he give you essentially the same advice that Sullivan gave to --

A. I didn't read Sullivan's letter. But I'll tell you what happened. As soon as -- so Joe was going to clear the conflicts with Williams & Hunt. He talks to Kurt Frankenberg and Kurt just says, out of the blue, Listen, you can't hire Gary because of all these other cases that

Williams & Hunt and Siegfried & Jensen have in addition to Fillerup. Joe said, Show me the rule. That's not the law, show me the rule, Kurt. And Gary is still at home, he's not working. He's pacing up and down inside of his house. And show me the rule, Kurt, show me the case law.

Kurt didn't get back to him for days. And when he first said, Okay, we need to find out if there's a conflict here, I retained Charles Gruber. Who is --

Q. Former bar counsel?

A. Right. And he defends lawyers when they're sued for ethical violations. He's an expert in the area. Siegfried & Jensen paid his bill. I hired him. I met with him. And I also met with another lawyer who I -- who gave me the same advice that Gruber did. What Gruber said was, Listen, they cannot bar you from your niche practice. That's what Williams & Hunt was trying to do.

And they can't bar -- the only conflicts cases are those where you have personal information about those cases. And so, at Williams & Hunt, we handle our cases individually. On occasion I would be asked -- conferenced about a case or cover deposition but, if that happened, I would do for it. And Williams & Hunt didn't check, until Joe demanded that they do so, my billing records to see if I had done any work on any of the files they're saying I was a conflict on.

1 It wasn't until after Joe insisted that they
2 check and they did so and they found that I had done no work,
3 no conference, nothing, on those cases. So I had no personal
4 knowledge of those cases. And Williams & Hunt tried to hire
5 Gruber because he was the expert. I had already retained
6 him. Finally, what Joe told me is George and Kurt agreed to
7 accept Gruber's opinion on the issue, which was you can't
8 stop me -- there's no conflict on the cases I didn't work on
9 and have any personal knowledge.

10 But Joe also had clout. He could not get
11 Williams & Hunt to agree to waive the conflict until he told
12 George Hunt that. Listen, if you want to claim that Gary's
13 conflicted on these cases that he did no work on, we're going
14 to claim that Williams is conflicted on every defense case
15 they have that S & J had at the time Gilson was working
16 there.

17 Because Elliott Williams, by representing
18 Gilson, had personal knowledge of all of those S & J cases.
19 And as soon as George heard that, he said, Okay, we're
20 backing off, no conflict.

21 Q. I take it you haven't -- you've told me you
22 haven't read Sullivan's letter. Did Gruber tell you that
23 this issue was actually a relatively complex one and this
24 notion of only being disqualified in circumstances where you
25 have actual knowledge is a relatively new development in the

1 law?

2 A. Well, what he said is I was in a niche practice
3 and they could not prevent me from practicing in a niche
4 practice. And if I had no personal knowledge, then that just
5 seals it.

6 Q. They couldn't have prevented you from being
7 hired by Siegfried & Jensen. They had no authority to veto
8 their employment decisions, did they?

9 A. By threatening to conflict S & J and Joe Steele
10 out of some big cases, they effectively barred me from being
11 hired.

12 Q. But the threat is simply that you, as a lawyer
13 at the firm that had represented parties adverse to parties
14 represented by Siegfried & Jensen, created conflict; that's
15 simply stating the obvious, is it not?

16 THE WITNESS: Could you read that to me?
17 BY MR. ECKERSLEY:

18 Q. Let me try it again. Maybe I can state the
19 obvious in a little more obvious way.

20 A. You don't usually ask such long questions.

21 Q. I think you conceded to me earlier that you
22 understood that your potential association with Siegfried &
23 Jensen raised, at least, ethical concerns about the cases
24 that Siegfried & Jensen had with your prior firm?

25 A. Correct.

1 Q. And what Kurt Frankenberg was telling Joe
2 Steele was that he thought there were concerns about that,
3 that might require Siegfried & Jensen be disqualified in
4 those cases?

5 A. Yes.

6 Q. What's defamatory about that, Gary?

7 A. That's not defamatory. That, what he was
8 trying to do -- I mean, what he did was delay me from
9 practicing at Siegfried & Jensen. That's what he did. And
10 if Joe Steele hadn't have had the clout that he had over
11 Elliott through Gilson, I may never have had this job with
12 S & J.

13 Q. In your complaint, though, you said that the
14 assertion that you might have had a conflict of interest is
15 defamatory. Are you withdrawing that now?

16 A. What paragraph are you talking about?

17 MR. ECKERSLEY: Why don't we take a break.
18 We'll look at it.

19 (Recess taken from 10:08 a.m. to 10:18 a.m.)

20 BY MR. ECKERSLEY:

21 Q. Did you find the part in the complaint that I
22 was referring to where there is the assertion that the
23 conflict-of-interest claim was defamatory?

24 A. It looks like paragraph 77.

25 Q. Do you now disagree with that?

1 A. Yes.

2 Q. Thank you.

3 Tell me in what way you think you have been
4 damaged economically as a result of the facts alleged in your
5 complaint.

6 A. Well, I was earning on average right around
7 quarter of a million dollars a year at Williams & Hunt. I
8 was putting in roughly 15 percent of that into a defined
9 benefit plan. I had health insurance, had disability
10 insurance and life insurance. And all of that ended on May
11 5th. And to date, I have earned \$15,600.

12 Q. What is your compensation arrangement at
13 Siegfried & Jensen?

14 A. It's one-third of the attorneys fees in a case
15 when it's concluded.

16 Q. One-third of the cases upon which you work?

17 A. Right.

18 Q. And do you work there like you did at
19 Williams & Hunt, essentially independently of other lawyers?

20 A. No. No. We work there -- there's a medical
21 malpractice department -- Sharrieff Shah, myself and two
22 paralegals and a clerk -- and we have separate case loads.
23 But we have medical malpractice meetings once or twice a
24 month. And we discuss all of the cases in the committees.

25 Much, Joe, Sharrieff, me and the paralegals. And Sharrieff

1 and I have some cases that we're working on together with one
2 of us as lead. And then most of the cases are -- we're
3 individually responsible for.

4 Q. How do you determine who gets the one-third?

5 A. It's real easy if you're the only attorney
6 working on it. But if there are other attorneys working on
7 it, then you sit down and come up with an agreement.

8 Q. Between the two of you?

9 A. Right.

10 Q. And not with Siegfried & Jensen?

11 A. No. They try to stay out of it.

12 Q. Those damages you described to me resulted from
13 your termination; correct?

14 A. Right.

15 Q. When you were working at Williams & Hunt, you
16 understood that were an employee at will, did you not?

17 A. Yes.

18 Q. And you understood that that meant you could be
19 terminated by the firm at any time?

20 A. Yes.

21 Q. Assuming that that termination did not violate
22 the law, what damages have you suffered independent of the
23 termination? If any?

24 A. That money amount.

25 Q. I'm going to ask you to think about this, Gary.

1 What I'm saying is, assuming that it was lawful for the firm
2 to terminate you, all right? Then in what way have you been
3 damaged by the alleged defamation?

4 A. Had I not been defamed with UMIA, I would have
5 been able to take those cases -- and it was roughly 30 -- to
6 Kipp & Christian, Strong & Hanni, Richards Brandt, somebody.
7 some other med-mal firm; continued to get new UMIA cases from
8 Art Glen and Doug Smith, the way I had been getting them for
9 years, and maintain essentially the same level of
10 compensation.

11 Q. Don't you think it's fair to say that if
12 Elliott went to Marty and said nothing other than, I don't
13 want you to give work to Gary, without saying anything
14 defamatory about you, that Elliott's wish and that desire
15 would be honored -- wish in that regard would be honored?

16 MR. PETERSON: Object to the question. It
17 calls for speculation.

18 MR. ECKERSLEY: And I want to hear your
19 speculation.

20 THE WITNESS: Would you read back the question,
21 please?

22 (Record read)

23 THE WITNESS: Personally, I still think that
24 that interferes with a contract.

Y MR. ECKERSLEY:

Q. But the answer to my question is yes, isn't it?

A. No, that's my answer is that it's interference with contract, it's a tort, so you can't do it.

Q. My question isn't characterizing it legal. My question simply is, don't you think that Elliott has the kind of relationship with Marty that, if he didn't want you to get work, you wouldn't get work?

A. No, I don't think that's true. And the reason why is that Marty does not control the claims department, Art Glen does. Art Glen reports to the board. Marty doesn't control case assignments.

Q. Did Art tell you that Marty told him and Doug that they weren't to give any work to you?

A. Well, here's what happened: I called Art Glen and maybe Doug Smith on May 5th while I was still in the office after George and Elliott had left my office, and I told Art what I had been accused of and what Elliott had told Marty, that you can not trust Gary's bills. So what Art told me was, Well, we'll just wait and see what Marty does and he'll do it quickly.

So I told them that I had surgery in the morning, gave them my cell phone numbers and asked them to call as soon as they heard from Marty. And so while I'm in the hospital, Art calls and says, Marty called me and said to pull

all of Gary's files and reassign them and not give Gary any more files.

Q. Doesn't that suggest an inconsistent with what you told me before that Marty controls claims?

A. I have since learned that Art Glen -- you have to understand this was a shock to everybody. It was -- had every appearance of an ambush, pre-planned. The UMIA people didn't know how to deal with it. Had they not pulled -- had this not been done and I'd been allowed to move to one of the other med-mal defense firms, my relationship with Art Glen and Doug Smith was so strong that they would continue to give me work. And they report to the board, they don't report to Marty on the case selection.

Q. Without regard to who they report to, doesn't what you told me indicate to you that Marty controls who gets the cases?

A. No.

Q. It's true, is it not, that your relationship with Art Glen has not resulted in your continuing to do UMIA work?

A. No, he could not because of what happened that day.

Q. Because Marty told him not to?

A. Right.

Q. Gary, in the complaint you reference a

1 conversation that supposedly occurred between Stacy Ferguson
2 and -- or -- let me start over.

3 Reference is made to Stacy having heard at a
4 dinner party in 2003 that Elliott was going to force you out
5 of the firm. Do you remember that?

6 A. Right.

7 Q. Did you confront Elliott about that?

8 A. I didn't learn about that until after I was
9 fired.

10 Q. And from whom did you learn it?

11 A. My wife.

12 Q. And so Julie tells you in 2005 that Stacy told
13 her in 2003 that Elliott had said something about forcing you
14 out of the firm?

15 A. Right.

16 Q. Did Julie tell you why she didn't raise that
17 with you before?

18 A. Yeah. Because she thought that it would be too
19 concerning to me and she didn't think there would be anything
20 I could do about it anyway. And she was wondering whether or
21 not Stacy was telling the truth because Dennis and Stacy were
22 going through a divorce and Stacy was upset that Janet was
23 still working at Williams & Hunt, those kind of things. So
24 for those reasons, she didn't tell me. It was only after I
25 was terminated that she told me.

1 Q. When did the Dennis-Janet thing become public
2 knowledge?

3 A. Right about the time of that -- it was a law
4 day run. I think 2003. That's what I think. It may have
5 been 2004, but I think it was 2003.

6 Q. That's May?

7 A. Yeah.

8 Q. After that time -- did that obviously have some
9 consequences because Stacy was friends with a lot of the
10 lawyers and spouses; correct?

11 A. Yes.

12 Q. And, in fact, Elliott's wife is still really
13 mad at Dennis?

14 A. Yes.

15 Q. And some other people expressed their
16 displeasure with Dennis over this situation, did they not?

17 A. Yeah.

18 Q. But you weren't one of them, were you?

19 A. No. I protected Dennis in the beginning.

20 Q. I mean -- and said to him something to the
21 effect of, you know, Life is complicated and shit happens?

22 A. Right. Something like that. I wouldn't have
23 said that shit happens but I would have said, you know, this
24 is the kind of thing. Yeah. And that -- at the beginning.

25 those were my feelings. Problem was, as time went on, Janet

1 had a lot of control in that office and it just wasn't a good
 2 thing for the staff.
 3 Q. Do you think that was -- you mentioned earlier
 4 you thought George was too close to Janet?
 5 A. Right.
 6 Q. Do you think that Janet abused her relationship
 7 with Dennis in dealing with other staff members?
 8 A. They were afraid of her because she's sleeping
 9 with and living with one of the partners, yes. And that
 10 she's on the very good side of the managing partner, yeah.
 11 They were afraid of her.
 12 Q. But nothing about that situation played any
 13 role in your termination, did it?
 14 A. Oh, I think that -- I think it did.
 15 Q. How?
 16 A. Because George, Elliott and Dennis did not want
 17 somebody with an adverse opinion on that issue in the office.
 18 Q. On what issue? Janet's continued employment?
 19 A. On, number one, not getting an expert to review
 20 it and, number two, the effect that it was having on the
 21 staff.
 22 (Off-the-record discussion)
 23 BY MR. ECKERSLEY:
 24 Q. My question really was, though, Dennis was
 25 grateful to you for your initial support, was he not?

1 A. Exactly, he was.
 2 Q. He didn't have any axe to grind with you
 3 regarding his relationship with Janet, did he?
 4 A. No.
 5 Q. I'm going to now have a series of exhibits
 6 marked. So we'll take a minute here.
 7 (Whereupon, Deposition Exhibit Nos. 4 through 7
 8 were marked for identification.)
 9 BY MR. ECKERSLEY:
 10 Q. I have placed before you Exhibits 4 through 7.
 11 Let's start with 4. Do you recognize that?
 12 A. From yesterday's deposition, yes.
 13 Q. And is it your understanding that what that
 14 represents is somebody taking the log-on/log-off record and
 15 comparing it to your billing?
 16 A. The only thing I know about Exhibit 4 is what
 17 George Hunt said yesterday. That's all I know.
 18 Q. Isn't that what he said yesterday?
 19 A. Essentially, that's what he described it as, a
 20 log-on/log-off record.
 21 Q. And looking at Exhibit 5, is it your
 22 understanding that that is the log-on/log-off actual record?
 23 A. Again, from George Hunt's deposition yesterday,
 24 yes.
 25 Q. Do you have any reason to think it isn't

1 accurate?
 2 A. Oh, yes. I didn't have anything to do with it.
 3 I'm not familiar with it. There's no reason that I would
 4 think this is accurate.
 5 Q. I'm not asking you if you think it's accurate.
 6 I'm asking you if you have any reason to think it isn't?
 7 Reason being a fact.
 8 A. What?
 9 Q. I understand you might think it's not accurate?
 10 A. Right.
 11 Q. What I'm asking you is why?
 12 A. Because I had nothing to do with it. I had
 13 nothing to do with the preparation, I don't know the system.
 14 I know nothing about it.
 15 Q. There are a lot of things that you don't know
 16 anything about that are true, aren't there?
 17 A. Well, I know the sun comes up tomorrow. But I
 18 don't know anything about this. So I don't -- I have no way
 19 of knowing if this is accurate.
 20 Q. George said yesterday that this system had been
 21 employed in connection with monitoring the time of a
 22 paralegal on a prior occasion?
 23 A. Right.
 24 Q. Were you aware of it when it happened?
 25 A. Not when it happened. Afterwards, Janet told

1 me.
 2 Q. So you knew that there was a system by which
 3 you could monitor the log-on/log-off activity of people who
 4 had computers?
 5 A. Yes.
 6 Q. And you knew that it had been used to
 7 essentially make an employment decision with regard to an
 8 employee?
 9 A. It assisted in her case.
 10 Q. When you log on to your computer, is it your
 11 practice to stay on continuously until you're logging off for
 12 the day?
 13 A. Yes. It's my practice with the exception that
 14 sometimes I log off and I continue working.
 15 Q. But you don't, for instance, if you go to
 16 lunch, log off to go to lunch?
 17 A. Not routinely, no.
 18 Q. And, in fact, if you have a deposition in the
 19 office, you probably don't log off while you're conducting
 20 the deposition?
 21 A. That's correct.
 22 Q. And I notice -- have you looked at Exhibit 5 in
 23 any detail?
 24 A. No.
 25 Q. It appears to me there's only two occasions

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during this period of time that the monitoring was going on where you log on and off more than once in a day? Is that consistent with your recollection of what your activity would be?

A. Well, it all depended. If I came into the office, logged on and then I was going to be gone for some period of time out of office, not just lunch, then I could turn off -- I could log off and then come back into the office and log on again.

Q. But if you were intending to come back, you probably wouldn't log off; isn't that fair to say?

A. No, I can't say that. It all depended.

Q. What generally is your explanation for the disparity in the numbers of hours and the number of hours you billed that's reflected in Exhibit 4?

A. I haven't reviewed it to give an explanation one way or the other.

Q. Surely you thought about the fact that the firm thought this disparity indicated you were over billing, and you must have an explanation for that as you thought about it?

A. No. Because I haven't examined it in detail. What I can tell you is I was not over billing. And there were times when I would turn off the computer -- I would not turn it on and I'd be working. I would turn it off before I

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quit working in the office. And there were days that I was out of the office and I'd be billing with no computer turned on.

Q. Let's look at one of those days. On Exhibit No. 4, there's an entry for 3/26. See that? And there's no log-on, no log-off.

A. Okay.

Q. And there's 11.75 hours listed there. Okay?

A. Okay.

Q. The explanation for that is that you were in California interviewing some doctors; isn't that true?

A. Right.

Q. Do you recall yesterday on the exhibit that George was shown where, in addition to what you see on Exhibit No. 4, there was a column that showed the difference in the hours?

A. Right.

Q. And do you recall that those purported to be totalling 41 hours that the firm thought you over billed?

A. Right. That's what I understood from his deposition testimony.

Q. And you recall that there was zero listed as over billing for this particular day?

A. I can't tell you one way or the other about that.

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1 Q. Do you remember George saying that they went
2 through a four-part process of how they determined in their
3 minds of whether or not this disparity represented over
4 billing?

5 A. What I remember George saying was that he
6 wasn't involved in it. He referred it to Elliott and he was
7 relying on Elliott. George described the process that he
8 thought took place, but Elliott did all of it. Elliott and
9 Jack. But George really didn't know.

10 Q. So if there was a zero here, doesn't that
11 indicate --

12 A. What day?

13 Q. Out in this column where the disparity is on
14 March 26th, if the firm did not accuse you of over billing
15 that day, doesn't that suggest to you that somebody looked at
16 your bills and said, Well, Gary was in California so that's
17 why he didn't log on or off?

18 A. I don't know what they did. I don't know what
19 they're thinking.

20 Q. Let's go through some particular days. Let me
21 ask you to look at March 31. This is a day where the log-on
22 record shows that you logged on at 8:34, logged off at 1:45.
23 That's about 5.25 hours, and you billed on that day for ten
24 hours.

25 A. Do you have the calendar day for March 31?

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1 Q. I don't. But looking at this suggests to me
2 it's --

3 A. I need the calendar.

4 Q. -- Thursday.

5 A. I need the calendar.

6 Q. Why don't you look at the records, Exhibit
7 No. 6, your billing records for that day? It says it's
8 Thursday, March 31. Have you got that?

9 A. I do.

10 Q. Look at the entries there and tell me if you
11 agree that essentially everything you've billed for on that
12 day would have been work that you would have done in your
13 office.

14 A. I really need my calendar. I do. I mean,
15 you've got the calendar for the week of March 21st, 27th.
16 Show me the calendar for March 31.

17 Q. I think I can do that. Let me take a break and
18 go see.

19 MR. ECKERSLEY: I provided it to you, didn't I?
20 Have you got it with you?

21 MR. PETERSON: I don't have it. I have it on
22 my computer.

23 MR. ECKERSLEY: You might be able to get that
24 faster than I will do it going through the documents.

25

*

1 BY MR. ECKERSLEY:

2 Q. Are you now looking at your calendar?

3 A. Right.

4 Q. What does it show for that day?

5 A. It shows Smith versus Wallin and deadline for
6 fact discovery. Completion of fact discovery in Smith versus
7 Wallin. 11:30 lunch meeting with Tom Green, who is a UMIA
8 adjustor. And then a 4:30 to 5:30 haircut appointment with
9 Gwen Kelly. So that's why the calendar was off was because
10 it looks like, in part -- and assuming that the
11 log-on/log-off records are accurate. And I don't know that
12 they are.

13 Q. I would ask you to assume that for the purpose
14 of all the questions I'm going to ask you.

15 A. Right. That I would have logged off to go to
16 that luncheon meeting with Tom Green, which was billable
17 time, and then worked on cases not in the office prior to my
18 haircut.

19 Q. Looking at the work on March 31, what there do
20 you think that you would have done outside of the office?

21 A. I could have done --

22 Q. For the time that you billed?

23 A. I could have done any of it. See, in the day
24 and age of cell phones, you don't have to talk from the
25 office. You can take files with you. I can take -- I could

1 have done -- a conference with Nikki, I would have had to
2 have been in the office. With the exception of the
3 conference with Nikki Bowen, everything else I could have
4 done outside of the office with a cell phone and a Dictaphone
5 and just taken the records with me.

6 Q. Now, I take it --

7 A. The files.

8 Q. If the log-on/log-off records are accurate, you
9 didn't actually log off when you went to lunch, did you?

10 A. Well, the lunch may have been delayed. Tom
11 Green is not always one of the guys who you can go to lunch
12 with right when he says.

13 Q. However, if you billed for March 31 on March
14 31, you would have to have done that prior to logging off at
15 1:45, would you not?

16 A. No, I would not have.

17 Q. Tell me why.

18 A. Because the day wasn't done.

19 Q. Well, what I'm asking you is, if your computer
20 is off, you can't do your time?

21 A. That's -- you mean bill my time?

22 Q. Right.

23 A. You mean enter it? Is that what you mean?

24 Q. Yeah, enter the time.

25 A. You're right. I cannot enter the time when the

1 computer is off. The computer has got to be on to enter the
2 time.

3 Q. So you could not have entered your time after
4 1:45 if the log-on/log-off records are correct?

5 A. If those records are correct, right. So this
6 would be one of those days where I come in and do it the next
7 day or when I had time to do it.

8 Q. Bill it the next day?

9 A. Bill the next day or whenever.

10 Q. Is it your testimony that you think the time
11 that you have recorded for March 31 was time that you worked
12 on -- some of it was time that you worked on outside of the
13 office?

14 A. Yes.

15 Q. Let's look at April 13th.

16 A. Do you have the calendar day?

17 Q. I'm hopeful that your counsel can find it for
18 us.

19 A. April 13th says Bird versus Breeding, checked to
20 see if Jared Nelson has signed the proposal. April 13th.
21 right, that's what we're talking about?

22 Q. Now, if you'll go to the billing record and
23 look at the work that you billed for on that day. Tell me
24 what work there you think might have been done outside of the
25 office.

1 A. Well, anything that was not an in-office
2 conference could have been done out of the office.

3 Q. Do you recall -- I take it you don't recall
4 April 13th?

5 A. No.

6 Q. Do you recall doing any of that work outside of
7 the office?

8 A. I don't recall one way or the other, no.

9 Q. Do you recall doing any of that work after you
10 signed off, logged off on the computer?

11 A. I have no recollection one way or the other.

12 Q. The Exhibit No. 4 shows that the disparity on
13 that date between the time you were logged on the computer
14 and the amount you billed is 3.75 hours. Do you see that?

15 A. For April 13th -- is that what we're talking
16 about?

17 Q. Yes.

18 A. I see 6.25 logged in, billed ten. Okay. Yes,
19 3.75.

20 Q. What explanation do you give me for the
21 disparity between those two numbers?

22 A. First, I can't vouch for the accuracy at all
23 for the computer log-on/log-off times. And that I could have
24 done everything but the in-office conference out of the
25 office.

1 Q. Go to March 28th for me, if you would.
 2 A. Do we have the calendar for March 28th?
 3 Q. Hopefully, Mr. Peterson will find that for us.
 4 (Off-the-record discussion)
 5 THE WITNESS: Okay. March 28th says -- it
 6 looks like 9:00 to 9:30, call Marv Smith, case settled.
 7 That's to remind me to call Marv Smith.
 8 BY MR. ECKERSLEY:
 9 Q. Who is?
 10 A. Who is a structured-settlement guy that UMIA
 11 uses. Now, we're talking about March 28th; right?
 12 Q. Now you're going to the record of your time
 13 entries. Anything there that you can indicate to me that you
 14 think was work you did outside of the office?
 15 A. Again, anything that's not an office
 16 conference, I could do outside of the office.
 17 Q. Here there's a 5.5 hours on the computer, 9.5
 18 hours billed. Do you see that on Exhibit 4?
 19 A. Yes.
 20 Q. Do you know what a batch entry audit list is?
 21 A. No.
 22 (Whereupon, Deposition Exhibit No. 8 was marked
 23 for identification.)
 24 BY MR. ECKERSLEY:
 25 Q. I'm showing you Exhibit 8, it's entitled Batch

Entry Audit List. Have you ever seen that document before --
 that kind of document before?

A. Maybe.
 Q. Have you ever been told that when you go onto
 the system to record your time that a record of that is
 generated?
 A. Right.
 Q. And is it your understanding that time entry
 batch audit time is that record?
 A. I don't know the system that well to know one
 way or the other.
 Q. You see what this says -- purports to say --
 and it starts on the exhibit, the first day is March 23rd,
 2005, which corresponds with the first day of the
 log-on/log-off record; do you see that?
 A. Okay, yes.
 Q. And it indicates that these entries were made
 by GBF on March 23rd, 2005. Do you see that?
 A. Yes.
 Q. Now, let's go to March 28.

MR. PETERSON: Hold on just a second. I may
 have an objection. Are you -- you are averring that this
 record indicates these entries were all made on March 28th,
 2005?

MR. ECKERSLEY: I'm sorry?

1 MR. PETERSON: Did I understand you to be
 2 saying that this record indicates that all these entries were
 3 made on March 28, 2005?
 4 MR. ECKERSLEY: Yes.
 5 MR. PETERSON: On what do we divine that?
 6 Because I don't see anything in this record that --
 7 MR. ECKERSLEY: Look at the top number, batch
 8 number 15319, user ID JLW, that's Janet Walker. Batch 15319
 9 created by GBF, that's Gary, on 3/28/05.
 10 MR. PETERSON: But it says the user is JLW.
 11 MR. ECKERSLEY: That's the user who pulled this
 12 record up for me.
 13 THE WITNESS: It's the office manager.
 14 MR. PETERSON: On March 28th, 2005?
 15 MR. ECKERSLEY: No. On February 1, 2006, which
 16 you see up in this corner. Okay?
 17 MR. PETERSON: Okay.
 18 BY MR. ECKERSLEY:
 19 Q. If, in fact, you made this entry on March 28,
 20 2005, you had to have made it prior to 2:45 p.m., had you
 21 not? That's when your computer shows you went off?
 22 A. No. See, I don't know that either the log-on
 23 records are accurate nor do I know that this batch entry
 24 means that I did this on the 28th. So I don't know one way
 25 or the other. I don't know the systems well enough. Dave, to

1 say that either of them accurate or they represent that. All
 2 I can say is I don't know.
 3 Q. Let's assume that I'm Elliott Williams and I'm
 4 looking at the records that we have in front of us. And I'm
 5 told that the log-on/log-off program is accurate. And that
 6 by looking at the batch entry audit list, I can tell that you
 7 made this entry on this date -- that is, on March 28 -- and I
 8 know from comparing that with the log-on/log-off records that
 9 you had to have made it by 2:45 p.m. Therefore, I know that
 10 you have billed 9.5 hours when it couldn't have been worked.
 11 Don't you think it would be reasonable for me
 12 to conclude, given that information, that you were over
 13 billing?
 14 A. No.
 15 Q. Why not?
 16 A. Because once he had that information, he had to
 17 confront me with it and ask me at the time, not 13 or 14
 18 months later. He never did. And on that May 5th meeting, I
 19 asked him, What cases was I over billing? And he said he
 20 could not identify any specific case. So here you've got
 21 reasonable Elliott saying, This is -- I can rely on this and
 22 claim that Gary is over billing. No, you cannot. You know
 23 as a lawyer you cannot make that assumption. Not without
 24 asking a person who made the entries.
 25 Q. I'm asking you now.

1 A. No, I still think it's -- it's unreasonable for
2 him to reach that conclusion.

3 Q. I'm asking you now, what explanation would you
4 have given him for the scenario I just described to you,
5 namely, that you logged on, logged off after 5.5 hours and
6 you then billed 9.5 when you could not have -- 9.5 hours had
7 not lapsed by the time you logged off your computer? And
8 your computer had to be on to bill?

9 A. I would have known on March 28th or when
10 Elliott was looking at this, I would have known what
11 happened. Now I am 15 months later, I don't know what
12 happened. So that's the difference. That is. That is the
13 difference.

14 MR. ECKERSLEY: Here's what I want to do: I
15 want to take a little break. I want you to think about it
16 and provide me with any explanation you have for that
17 disparity. Take all the time you want; okay?

18 (Recess taken from 10:55 a.m. to 11:05 a.m.)

19 BY MR. ECKERSLEY:

20 Q. Do you remember my question?

21 A. I do. How could I forget?

22 Q. What's the answer?

23 A. I never over billed. So I did not over bill on
24 March 28th. I was not given this information at the time
25 when I had fresh memory and I could respond to it. And it's

1 15 months later, I don't remember March 28th from never.
2 I was -- I always took a briefcase home and
3 always had work in it to do. So what I could have -- if the
4 computer logs turn out to be correct, and I have no way to
5 verify that the computer logs are accurate or this batch
6 entry is accurate, I could have taken work home the night
7 before, worked at home or worked in the morning of the 28th
8 at home. And that way by the time I left, or whatever time
9 this computer log says I logged off, I could have had that
10 number of billable hours.

11 And with -- Bruce Jensen told me at the very
12 beginning when I started doing UMIA work that the minimum
13 time for a telephone call was .25 hours. So you know how
14 that goes. You can spend five minutes on the phone and still
15 end up with .25 hours in billables. And there are a lot of
16 .25s in this entry.

17 Batch entries normally show the time it was
18 entered. This one doesn't. So it makes me question whether
19 or not this batch entry is accurate because there was no time
20 on it.

21 Q. You would agree with me you can't bill from
22 home?

23 A. Right. Exactly. But I can work at home.

24 Q. I agree with that, Gary. I understand that.

25 But you agree with me that for this entry to be made on the

1 28th, if in fact it was made on the 28th, it had to be made
2 prior to 2:45 p.m. when the log-off record shows that you
3 went off your computer?

4 A. I have to assume that Exhibit 8 is accurate and
5 Exhibit 4 is accurate. I can't make that assumption.

6 Q. If they are accurate, the hypothetical I gave
7 you is correct, is it not?

8 A. I can't assume that those two documents are
9 accurate. Especially when the batch -- entry batch audit
10 list has no time.

11 Q. I want to do one more of these because I
12 think -- I'm hoping that this is an example of what you
13 actually have a memory. I want you to go to March 23rd of
14 2005. It's the first entry on the batch time list. It's the
15 first entry on the log-on/log-off record. And it's on the
16 first page, I believe, of the timekeeper diary.

17 A. Right.

18 Q. Have you got all those?

19 A. Yes.

20 Q. I've also given you Exhibit 7, which is your
21 calendar?

22 A. Right.

23 Q. Can you see that for March 23rd?

24 A. Yes. Thank you very much.

25 Q. Do you remember March 23rd?

1 A. No.

2 Q. Let me ask you to look at what you have on that
3 date on your calendar.

4 A. It says ultrasound, St. Mark's radiology.

5 Q. Do you recall having an ultrasound at
6 St. Mark's radiology?

7 A. I do, yes.

8 Q. Do you recall it being on the 23rd?

9 A. No.

10 Q. Tell me what you recall about having that
11 ultrasound. Where did you go, when did you go, how long did
12 it take?

13 A. I can't recall that except that the reason I
14 had it was because of the thyroid, the lump in my thyroid
15 that leads to the thyroidectomy. I can't recall how -- I
16 think I was in and out of there early and quickly. In fact,
17 I was one of first patients done that morning, and they did
18 me quickly and I was out. Out of the hospital.

19 Q. Did you have any conversation with anybody at
20 the hospital about the results of the ultrasound that day?

21 A. I think the tech told me that she thought there
22 was a lump.

23 Q. Do you recall going into the office after that?

24 A. No. That's all I recall about that ultrasound.

25 Q. You also have listed there, from 11:30 to

2:00, a lunch with GTN. Who's GTN?

A. George Naegle.

Q. Now I'm asking you if you recall -- where do you live, Gary? Where were you living at this time?

A. Roughly Vine Street and 1430 East. So 6200 South and 14th East.

Q. That's the Murray kind of area?

A. Right. My wife likes to call it Salt Lake City.

Q. Understood. Those of us grew up in that area used to like to call it Midvale or Murray or Cottonwood Heights. You just associate it with Salt Lake City.

At any rate, do you recall that you didn't come into the office until noon?

A. No. I have no recollection of this day.

Q. Okay. I was hoping, because of the procedure, that it might stand out in your mind?

A. No.

Q. You notice on the log-on/log-off record, they've listed 12:09. I submit to you that, as we discovered yesterday from a closer examination of Exhibit 5, 12:09 is actually a log-off time. It appears that -- my assumption is that you didn't log off the night before. Do you --

MR. PETERSON: Well, how can you assume that?

THE WITNESS: No. And, see, this is the first

1 hand her the calendar and ask her to bill it.

2 Q. How many hours did you bill on the 23rd?

3 A. Let's see. Let's go back to Exhibit 6.

4 According to Exhibit 6, 11.25.

5 Q. Assuming that you made that entry on the 23rd,

6 you had to have said that you had worked 11.25 hours by 7 5:10 p.m.?

8 A. See, part of the problem with this system is,

9 as I explained in the beginning, sometimes the first entry I 10 would make on a bill would be for work -- would be billed to 11 the wrong day. The way that computer system is set up -- 12 let's assume that it's March 24th and I'm entering time for 13 March 24th.

14 Let's make this assumption. And I'm in a 15 hurry. And I start entering the time. And what I do -- you 16 know, I put in the amount, I do the description, I do the 17 client number. And then I hit enter and then the next screen 18 pops up and then I say, Oh no, I've entered it on the wrong 19 day. Because the billing system would automatically put up 20 the day that you last billed.

21 So there are going to be entries, probably on 22 this sheet, that reflect time that was billed on the wrong 23 day. And I can't tell you which ones they are.

24 Q. I'll submit to you that, if you go through and 25 look at the batch entries, you'll find days where you enter

day that they put this clock on. Maybe that's when they first started it was at noon.

BY MR. ECKERSLEY:

Q. I don't know the answer to that. I'll find out. The log-on time that should show up that we first see on the 23rd is 12:12, is it not?

A. On Exhibit 5?

Q. Yes.

A. It says 12:09, right?

Q. That's the log-off time.

A. It says -- Exhibit 5 says, on the 23rd, 12:12 log on.

Q. And then log off at what time?

A. Three minutes earlier.

Q. Excuse me. The next down?

A. Excuse me. 5:10 p.m.

Q. And you'd agree that whatever bill you submitted that day, if it was, in fact, billed on the 23rd, had to be done prior to 5:10 p.m.? Correct?

A. No, I can't -- I can't say that.

Q. You can say this, can you not, it had to be done at some time when your computer was on?

A. Yes. The billing had to be done when my computer was on. With the exception that sometimes I gave my bills to my secretary to do. When I'm in a rush, I would

1 time for the two previous days, and they are distinguished by 2 day even though, for example, on April 1 you bill for both 3 April 1 and March 31. The batch sheet distinguishes between 4 those days.

5 A. And sometimes those are accurate, the dates are 6 accurate, and sometimes they're not. Because I can 7 accidentally bill on the wrong day.

8 Q. Who's the IT person for Williams & Hunt?

9 A. I don't remember her name. She's an 10 independent contractor part time.

11 Q. And I assume --

12 A. And Janet Walker.

13 Q. I would assume that you would concede that 14 they're both more familiar with how the computer system works 15 than you?

16 A. Yes.

17 Q. Had someone come to you on May 4th, May 5th and 18 asked the questions I've just asked you about these 19 discrepancies, what do you think you would have been able to 20 tell them now that you can't tell me today?

21 A. How I would know that? This is 15 months 22 later. If it would have been five weeks earlier -- when I 23 asked Elliott, which cases did I over bill? He said, No 24 specific case. No. Just a second. I've got to answer this 25 question.

1 He said. No specific case, it's because you
 2 billed more than Bruce. And Bruce had taken a month's -- or
 3 a week's vacation to go to Hawaii during that time. I
 4 apologize. I'm going to put my finger behind my back. I'll
 5 lower my voice.
 6 But Bruce had billed -- had taken that week
 7 off. I had worked on Martin Luther King's birthday. You saw
 8 that you worked on that Saturday. What I had been doing is I
 9 had been working as hard as I possibly could because I knew
 10 my kids' graduation -- one from medical school was in May and
 11 another was doing her Ph.D. dissertation in May -- so I know
 12 it's going to be taking a lot of time off. So I was working
 13 my butt off. I was working hard.
 14 So when I asked those guys to point out a case,
 15 they couldn't. So now you're asking me 13, 14, 15 months
 16 later what I would have said then. I don't -- I don't know
 17 in addition to what I've already told you.
 18 Q. Okay.
 19 A. When we're talking about the other dates. Let
 20 me just -- let me look at the March 23 entry. My biggest
 21 suspicion on March 23 is that their log-on wasn't turned on
 22 until noon. That's when they started monitoring me. And
 23 that I could do work while I'm waiting for an ultrasound to
 24 be done. You know you do that. Any attorney -- any trial
 25 lawyer can do that. You can be in a waiting room, you can be

1 believed you were over billing?
 2 A. Absolutely not.
 3 Q. Why not?
 4 A. Because they have to come to me. I'm the one
 5 who's make the entries. You know, Elliott is not following
 6 me around. He has to come to me and say, Okay, Gary, we've
 7 got this concern, what happened on that day? And my memory
 8 would have been fresh then and I could have told him.
 9 And, see, you have to understand, Dave, that
 10 after I was terminated and after Art Glen heard that I was
 11 accused of over billing, he instructed Doug Smith to do a
 12 flow chart on all my files starting January 1st through the
 13 time -- 2005 through the time I was billed and to look for
 14 any indication of over billing. And they found absolutely
 15 none.
 16 In fact, they found one entry in the Robb case
 17 where I under billed in his estimation. So this is -- there
 18 is no way that a reasonable person can conclude what Elliott
 19 did under the circumstances.
 20 MR. ECKERSLEY: I'll ask you to give me five.
 21 ten minutes and then I can be done.
 22 THE WITNESS: Sure. Take as long as you want.
 23 That's fine.
 24 (Recess taken from 11:19 a.m. to 11:23 a.m.)
 25 *

1 doing work. Let me -- I'm not done yet either.
 2 That's all I can think of right now.
 3 Q. You recognize, just because of the number of
 4 hours in a day, that to have accomplished the work that you
 5 billed on March 23rd by 5:10 p.m., you would have had to
 6 start work at six in the morning?
 7 A. Assuming the work was all done -- excuse me.
 8 Go ahead.
 9 MR. PETERSON: No. That's fine.
 10 THE WITNESS: Assuming the records are correct.
 11 But the thing is, is that does not take into account working
 12 the day before at home, working that morning early in the
 13 morning; I'm up between five and six in the morning. I'm one
 14 of the few guys in that office who took a briefcase every
 15 night with work in it. So, no, starting work at six in the
 16 morning is just one explanation. It's not the only
 17 explanation.
 18 BY MR. ECKERSLEY:
 19 Q. Wouldn't you agree with me that a reasonable
 20 person, analyzing the documentation I've shown you, could
 21 conclude in good faith that you were over billing?
 22 A. No. Absolutely not.
 23 Q. If such a person did come to that conclusion,
 24 you would agree with me, wouldn't you, that they would be

1 BY MR. ECKERSLEY:
 2 Q. I'm curious about why you sued Kurt?
 3 A. For his conversation with S & J when he
 4 didn't -- when he said that I was conflicted on those files,
 5 had personal knowledge on those files. I'm not talking about
 6 Fillerup. He made those statements; they were false and they
 7 delayed me in getting hired.
 8 Q. How long was that delay?
 9 A. I don't know. I'd have to go back and check.
 10 Q. Was it June 5th to June 16th?
 11 A. That would sound right.
 12 Q. June 16th was your hire date, right?
 13 A. Right. But, see, the problem is -- no, that
 14 could be wrong. The hire date was June 16th. Filled out all
 15 this stuff and I worked there one week. Because of Kurt's
 16 and George's communication with Joe Steele, I was sent home
 17 again and I was home for a week, maybe longer, I don't know.
 18 When you're at home not working after you've worked all your
 19 life, it's absolutely miserable.
 20 Q. I understand.
 21 Why Bruce?
 22 A. Why Bruce? For the...
 23 Q. Meeting with Art and Doug?
 24 A. Art and George -- yeah, that meeting. Bruce is
 25 no longer a party, though, right?

Q. Right.

MR. PETERSON: Right.

BY MR. ECKERSLEY:

Q. Who in addition to anybody you've told me so far, which is Marty, Doug and Art, do you think the firm communicated to the fact that they believed you had over billed a client?

A. I don't know other than those. And, see, what happens, though, when -- they eventually hear it. And they didn't hear it from me because the only ones --

Q. I'm sorry. Who eventually hears it?

A. The adjustors will eventually hear it.

Q. Okay. What lawyers have raised this issue with you, if any? By that, I mean, I hear you were fired because you were over billing a client?

A. No one. It's just that when you leave in a cloud like that, you know, the bombs rush out the door. People suspect that you've done the worst thing. It's like they think I'm the Italian guy in the World Cup, you know, and the talk is he got angry and got head-butted.

Q. There's a lot of speculation?

A. Yes.

Q. Weren't you the one who publicized what the asserted reason was for your termination by faxing your complaint to various lawyers?

1 CERTIFICATE

2 STATE OF _____)

3 COUNTY OF _____)

4

5 I HEREBY CERTIFY that I have read the foregoing testimony consisting of 83 pages, numbered from 4 through 86, inclusive, and the same is a true and correct transcription of said testimony with the exception of the 7 corrections I have listed below in ink, giving my reasons therefor.

8

1. Page _____ Line _____ Correction _____

9 Reason _____

2. Page _____ Line _____ Correction _____

10 Reason _____

3. Page _____ Line _____ Correction _____

11 Reason _____

4. Page _____ Line _____ Correction _____

12 Reason _____

5. Page _____ Line _____ Correction _____

13 Reason _____

6. Page _____ Line _____ Correction _____

14 Reason _____

7. Page _____ Line _____ Correction _____

15 Reason _____

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17 Reason _____

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18 Reason _____

11. Page _____ Line _____ Correction _____

19 Reason _____

12. Page _____ Line _____ Correction _____

20 Reason _____

21

22 _____
GARY B. FERGUSON

23 SUBSCRIBED AND SWORN to at _____

24 this _____ day of _____, 200__.

25

A. I faxed the complaint to lawyers and that's -- that's true, I did that.

Q. And you have made no secret of the fact that you filed this lawsuit?

A. Correct.

Q. In fact, one of the reasons you filed a lawsuit is seeking vindication?

A. Was seeking damages, right.

Q. But in doing that, you'll acknowledge, will you not, that you're the one who has publicized the allegations that the firm made against you, not the firm?

A. No, that's not true. They told -- Elliott told me bar.

Q. In the bar?

A. I don't know that. I don't know who they've spoken to, I don't know what they've said. I do not know the answer to that.

MR. ECKERSLEY: I'm done.

(Deposition concluded at 11:27 a.m.)

1 CERTIFICATE

2 STATE OF UTAH)

3 COUNTY OF SALT LAKE)

4

5 THIS IS TO CERTIFY that the deposition of GARY B. FERGUSON, the witness in the foregoing deposition named, was taken before me, JAMIE R. BRIEY, a Certified Shorthand Reporter, Registered Professional Reporter and Notary Public in and for the State of Utah, residing at Salt Lake City, Utah.

8 That the said witness was by me, before examination, duly sworn to testify the truth, the whole truth and nothing but the truth in said cause.

10 That the testimony of said witness was reported by me in Stenotype and thereafter caused by me to be transcribed into typewriting, and that a full, true and correct transcription of said testimony so taken and transcribed is set forth in the foregoing pages numbered from 4 through 86, inclusive, and said witness deposed and said as in the foregoing annexed deposition.

14 I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the events thereof.

16 WITNESS MY HAND and official seal at Salt Lake City, Utah, this 26th day of July, 2006.

17

18 _____
JAMIE R. BRIEY, CSR, RPR
Utah license No. 361682

20 My Commission Expires:

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22 June 13, 2010

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<p>-\$-</p> <p>\$15,600 [1] 50:11</p> <p>\$22,000 [1] 19:16</p> <p>\$300,000 [1] 37:20</p> <p>\$75,000 [1] 10:18</p> <p>\$800,000 [1] 37:9</p> <p>-!-</p> <p>'76 [2] 5:10,13</p> <p>'80 [1] 5:15</p> <p>'81 [1] 5:15</p> <p>'83 [1] 5:2</p> <p>-.-</p> <p>.25 [2] 74:13,15</p> <p>.25s [1] 74:16</p> <p>-0-</p> <p>050921677 [1] 1:11</p> <p>-1-</p> <p>1 [7] 3:3 12:14,17 71:15 80:2,3 87:8</p> <p>10 [1] 87:17</p> <p>10:08 [1] 49:19</p> <p>10:18 [1] 49:19</p> <p>10:55 [1] 73:18</p> <p>11 [1] 87:18</p> <p>11.25 [2] 79:4,6</p> <p>11.75 [1] 62:8</p> <p>11:05 [1] 73:18</p> <p>11:19 [1] 83:24</p> <p>11:23 [1] 83:24</p> <p>11:27 [1] 86:19</p> <p>11:30 [2] 65:7 76:25</p> <p>12 [5] 3:3 9:4 23:18 38:11 87:19</p> <p>12:00 [1] 77:1</p> <p>12:09 [3] 77:20,21 78:9</p> <p>12:12 [2] 78:6,11</p> <p>12th [2] 23:17,19</p> <p>13 [3] 72:17 81:15 88:22</p> <p>13th [7] 23:18,19 67:15 67:19,20 68:4,15</p> <p>14 [2] 72:17 81:15</p> <p>1430 [1] 77:5</p> <p>14th [1] 77:6</p> <p>15 [5] 50:8 73:11 74:1 80:21 81:15</p> 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Exhibit B

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

GARY B. FERGUSON,)
	) Deposition of:
Plaintiff,)
	) ARTHUR GLENN
vs.)
)
WILLIAMS & HUNT, INC.,)
ELLIOTT J. WILLIAMS,	) Case No. 050921677
GEORGE A. HUNT, and KURT)
FRANKENBURG,	) Judge Tyrone Medley
)
Defendants.)

April 25, 2007 - 2:27 p.m.

Location: Strong & Hanni
3 Triad Center, Suite 500
Salt Lake City, Utah

Reporter: VICKY McDANIEL, RMR
Notary Public in and for the State of Utah

A P P E A R A N C E S

FOR THE PLAINTIFF:

CHARLES F. PETERSON, ESQ.
PETERSON LAW OFFICES
913 West River Street, Suite 420
Boise, Idaho 83702-7081
208.342.4633

EDWIN S. WALL, ESQ.
ATTORNEY AT LAW
406 Felt Building
341 South Main Street
Salt Lake City, Utah 84111
801.746.0900

FOR THE DEFENDANT:

M. DAVID ECKERSLEY, ESQ.
PRINCE, YEATES & GELDZAHLER
175 East 400 South, Suite 900
Salt Lake City, Utah 84111
801.524.1000

FOR THE WITNESS:

PHILIP R. FISHLER, ESQ.
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
801.596.1508

ALSO PRESENT: Gary B. Ferguson

I N D E X

ARTHUR GLENN:
Examination by Mr. Peterson

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E X H I B I T S

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

2 ARTHUR GLENN,

3 called as a witness, being first duly sworn, was
4 examined and testified as follows:

5 EXAMINATION

6 BY MR. PETERSON:

7 Q. For the record, will you go ahead and
8 state your name, please.

9 A. Arthur Glenn.

10 Q. How are you employed, Mr. Glenn?

11 A. Vice president of claims for Utah Medical
12 Insurance Association.

13 Q. What do you do in that capacity in terms
14 of hiring lawyers for your physician insureds?

15 A. You mean on the individual basis,
16 case-by-case basis?

17 Q. Yeah.

18 A. Normally when the physician calls in and
19 reports a claim, we'll talk to them and see if they
20 have any preference, if they've been represented
21 before or if they have any preference of an attorney.
22 If they do, we'll usually assign them that as long as
23 it's within one of the firms that we use. If not, we
24 will generally assign that on the basis of trying to
25 balance the caseload so the firms and the lawyers

1 have a balance of cases.

2 Q. How long have you worked for UMIA?

3 A. Since April of 1987.

4 Q. What did you do before that?

5 A. I was a regional supervisor for Aetna Life
6 and Casualty here in Salt Lake.

7 Q. Now, you know Gary Ferguson?

8 A. Yes, I do.

9 Q. How long have you known Mr. Ferguson?

10 A. Probably since 1983, 1984.

11 Q. How did you come to know him?

12 A. He did some work for us when we were with
13 Aetna, too, when he was with Snow, Christensen &
14 Martineau.

15 MR. FISHLER: He was with Richards Brandt.

16 MR. FERGUSON: I was at Richards Brandt.

17 THE WITNESS: Yeah, he was at Richards
18 Brandt, Miller & Nelson then and did work for us
19 there.

20 Q. (BY MR. PETERSON) Okay. And when you say
21 did work for you, you mean that he was the lawyer who
22 was employed to represent insureds?

23 A. Yeah, with Aetna. Yes, that's right.

24 Q. Did you -- in this particular case you
25 were served with a subpoena to bring documents. Did

1 you bring anything with you?

2 A. Yeah, I have one.

3 Q. Probably should have started there and
4 asked you. All right, what have you got?

5 A. That's a spreadsheet where I went back and
6 reviewed Gary's file billings.

7 MR. FISHLER: I'll tell you what I'm
8 thinking. Why don't you talk to him about something
9 else, and in the meantime I'll get some copies for
10 you.

11 MR. PETERSON: Sure. That's not a
12 problem.

13 MR. FISHLER: Well, I know it's not a
14 problem, but is that what you would like me to do?

15 MR. PETERSON: Sure. That would be great.

16 (Off the record from 2:29 to 2:31 p.m.)

17 Q. (BY MR. PETERSON) Did you bring any other
18 documents with you?

19 A. No.

20 Q. And what did you do to prepare for your
21 deposition today, if anything?

22 A. Nothing in particular.

23 Q. Did you have discussions with anyone?

24 MR. FISHLER: Other than counsel?

25 Q. (BY MR. PETERSON) Yeah, other than your

1 lawyer.

2 A. No.

3 Q. All right. So Gary was terminated on or
4 around the 5th of May, 2005, I'll represent to you.
5 Does that sound about right, from what you recall?

6 A. Yes.

7 Q. And how did you hear about him being
8 terminated?

9 A. The first I think I heard from Gary
10 himself. Gary called us and told us that he'd been
11 terminated.

12 Q. Called you specifically?

13 A. Yeah.

14 Q. Okay. Did he tell you why?

15 A. I think he told me that he'd been accused
16 of overbilling on cases.

17 Q. Okay. What else did he tell you about
18 that, if anything?

19 A. I don't remember specifically anything.

20 Q. Did he admit that he'd overbilled you?

21 A. No. He asked me if I'd ever had any
22 problem or complaint with his billing before.

23 Q. And what did you tell him?

24 A. Told him no, I hadn't.

25 Q. And no complaints, either?

1 A. No.

2 Q. Had you ever reviewed his bills before?

3 A. Yes. I've reviewed bills every month from
4 all of our attorneys.

5 Q. Is that part of the job that you hold? Is
6 that a function of the job?

7 A. Yes.

8 Q. All right. Tell me about how you review
9 the bills.

10 A. Normally we get bills in batches from all
11 the different firms. I will usually just pull out,
12 depending on how many there are, maybe ten bills and
13 go through them and just spot review them.

14 Q. What kinds of things are you looking for
15 when you do that?

16 A. I'm generally looking for things that
17 would stand out. For instance, if every attorney is
18 consistently reviewing the statute of limitations or
19 researching things that I would know have already
20 been researched; if there's things I think are
21 excessive; if administrative staff in the law firm
22 are billing for paralegal work that's actually
23 administrative work. That type of thing.

24 Q. Okay.

25 A. Just generally how much time is being

1 spent on task.

2 Q. And prior to this you had or had not
3 reviewed any of Gary's bills?

4 A. Yes, I had.

5 Q. And on any occasion had you gone to him
6 with a complaint about the bill or the size of it,
7 anything at all?

8 A. No.

9 Q. All right. So what else, if anything, do
10 you recall about the first conversation you had with
11 Gary concerning this?

12 A. The first conversation he asked me too if
13 we would still be able to use him had after he left
14 the firm.

15 Q. And what did you say?

16 A. I told him that I had to talk to Marty,
17 and I told him that that was going to be Marty's
18 decision, not mine, and I'd let him know as soon as I
19 heard something. At that point I hadn't heard from
20 anybody else other than Gary.

21 Q. But if Marty had said to you you couldn't
22 use him, that you can't use him -- now we've got the
23 double negatives, which is nice.

24 Let's assume that you had not been
25 directed by Mr. Osowski that you could not use him.

1 Would you have stopped using him at that point? In
2 other words, was the quality of his work such that
3 you would have continued to use him but for the
4 direction from Mr. Osowski?

5 A. I probably wouldn't. I wouldn't have had
6 enough information at that point to know one way or
7 the other. At that point I didn't know what
8 specifically was alleged or what the situation was,
9 so at that point I wouldn't have been able to make a
10 decision one way or the other.

11 Q. All right. So what else, if anything, do
12 you recall about this conversation, the first one
13 with Gary?

14 A. I think it was that conversation Gary told
15 me he was having surgery the next day to have his
16 thyroid removed, and he wanted to know if I could
17 find out and tell him before that. I told him, you
18 know, I'd let him know as soon as we found something
19 out.

20 And I think he told me if he was in
21 surgery to call his wife, left me a number and said
22 if he was in surgery to call and let his wife know
23 the answer.

24 Q. And by "the answer" we're talking about
25 whether or not he'd be able to keep his UMIA files?

1 A. Yeah. Well, I don't remember if -- I
2 don't remember specifically if those were discussed
3 or not, but whether he'd be able to continue to do
4 UMIA work.

5 Q. All right. Anything else about that
6 conversation you recall that you haven't told us?

7 A. No. That's all I remember.

8 Q. All right. Next conversation that you had
9 in any way relating to Gary Ferguson's termination?

10 A. The next would have been Marty calling me
11 the next day, the day after that.

12 Q. Okay. Tell me about that.

13 A. He told me that Gary had been terminated
14 for -- I think his words were "billing integrity,"
15 and to let my guys -- that his -- the files that he
16 had were going to stay with the Williams & Hunt firm
17 and to let my guys know that we weren't to use him on
18 any other cases.

19 Q. Okay. Now, I listened to you say that,
20 and it seemed odd to me. Did he say that he'd been
21 terminated or did he say he's been fired?

22 A. I don't remember. I think he -- he
23 probably said fired. I don't remember the exact
24 terminology.

25 Q. Okay. All right. Did he in any way

1 discuss what the billing issue was?

2 A. I think the only thing he told me was that
3 over the period of time in question that Gary had
4 billed more than Elliott or Bruce and had fewer
5 files. And I think that's the only thing he told me.

6 Q. Did you know what cases at that point Gary
7 had been working on? Would you generally have known?

8 A. Yes. I would have known some of the
9 bigger ones. I might not know all of them. I would
10 have known the bigger cases.

11 Q. Was he working on any -- I guess any big
12 cases, what you've described as big cases?

13 A. Yes. There were several big cases.

14 Q. And if somebody's working on big cases, I
15 take it you would expect they're likely going to have
16 bigger bills, they're going to spend more time?

17 A. Generally, yes.

18 Q. And so what, if anything, happened after
19 Marty called you? Did you in fact call -- you used
20 the term -- he said to you, call your guys and tell
21 them they aren't going to use them in the future.
22 Did you call somebody or tell others who worked for
23 you that they were not going to be using him?

24 A. Yes. We had a meeting. I called them all
25 together and told them what had happened, what had

1 been related to me.

2 Q. Who was at that meeting?

3 A. Doug Smith, who's a supervisor. Jerry
4 Emery, Bill Rouse, Tom Greene. Trying to think.
5 We've hired some others since then. I was trying to
6 remember who all was here at the time. Mike Embler.
7 And I think that's all that was there at the time.

8 Q. What positions did these people hold? You
9 said Doug Smith is a supervisor?

10 A. Doug Smith is a supervisor.

11 Q. Claims supervisor?

12 A. Yeah. The other ones with the exception
13 of Tom Greene are senior investigators, and Tom
14 Greene is an investigator.

15 Q. All right. What did you tell them?

16 A. I told them that Gary had been terminated
17 from Williams & Hunt and we weren't to use -- that we
18 couldn't assign any files to him, any more work. And
19 I told them not to discuss with anybody else as to
20 the reason -- I don't think I even told them the
21 reason. I might have told them about billing
22 problems, but I told them not to discuss with anybody
23 or speculate or discuss it with anybody else as to
24 what happened.

25 Q. Okay. Anything else at that meeting?

1 A. No.

2 Q. As a result of that meeting did you have
3 discussions with anybody else about Gary and this
4 situation?

5 A. Outside of the company?

6 Q. Well, let's start within the company
7 first, and then we'll go out.

8 A. At this time or subsequent to this
9 meeting?

10 Q. You know what, I've got you at a
11 disadvantage, and I'll tell you what I'm trying to do
12 is kind of chronologically go through it. The
13 question I guess that I should ask is what did you do
14 next, which is what all that prior stuff really
15 meant.

16 A. Okay. Doug Smith and I discussed, and I'm
17 not sure the time frame. During the month of May I
18 was gone almost the whole month for the next three or
19 four weeks traveling, and we had a PIA convention
20 meeting so we were gone. And I think actually Doug
21 and I talked about it at the PIA meeting in San Diego
22 and decided to go back and look at the bills for the
23 previous quarter and see if we saw anything unusual
24 or if there was anything that struck us as being odd
25 about the billing that we had questions about.

1 Q. Okay. And how did you go about doing
2 that?

3 A. Then we took all of the bills that had
4 been submitted for that quarter by Gary, by the firm
5 for Gary's work and put them on a spreadsheet.
6 That's what this spreadsheet is. And put by date how
7 many hours were billed by date and file and totaled
8 how many hours would have been billed in a given day.

9 MR. PETERSON: Okay. Let's go ahead,
10 then, and mark -- trying to figure out if we want to
11 mark the original and use it or if we want to save it
12 for you guys or what. Let's go off the record for a
13 minute and talk about this.

14 (Discussion off the record.)

15 (Exhibit 1 marked.)

16 Q. (BY MR. PETERSON) All right, we're back
17 on the record. You have been handed what's marked as
18 Deposition Exhibit 1 for this purpose, and you'll see
19 the one that I've handed you is a copy of a document
20 that you have in front of you that is a spreadsheet.

21 A. Yes.

22 Q. Does Deposition Exhibit 1, which is a
23 copy, appear to be a true and correct copy of the
24 document that you've referred to in your testimony
25 here, the spreadsheet that you created relating to

1 Mr. Ferguson's billings?

2 A. Yes, it does.

3 Q. And you produced today the actual
4 spreadsheet that you had created?

5 A. Yes.

6 Q. And it has some yellow highlights on it in
7 a couple of places, and we're going to leave that one
8 with you. But nonetheless, this is a true and
9 accurate copy of what you produced for us today?

10 A. Yes.

11 Q. Okay. All right. So tell me about
12 Deposition Exhibit 1 and how it came into being, what
13 you did, who did what.

14 A. Okay. We would have -- initially I think
15 Doug produced off our system this spreadsheet just by
16 taking the bills that had been submitted for the last
17 quarter from January through into April, if I
18 remember right. Actually into May.

19 Q. I see at the top we have first a date and
20 then below that there are numbers. U-11333, for
21 example, in column C, is that a case number?

22 A. Yeah. That would have been the number on
23 the bill.

24 Q. All right.

25 A. And then we just took that bill and

1 itemized every date that would have been billed on
2 the bill in the columns running down and then totaled
3 them over on the right-hand side. And that would
4 show on any given day how much was billed on that
5 day.

6 Q. Okay. Now, there are some notations on
7 Deposition Exhibit 1, and I want to go over to the
8 right-hand side. In handwriting at the top of the
9 first page it says "Audit of Gary Ferguson's files."
10 Do you know whose handwriting that is?

11 A. That's mine.

12 Q. Okay. And below that there are some
13 numbers, and then these would relate to -- it looks
14 like maybe the 3rd and 4th of January, and then some
15 handwriting on the right side that says "VA Beach,"
16 Virginia Beach?

17 A. Uh-huh.

18 Q. "Me, Doug, Shawn, 22 hours," and then the
19 word "Bobby" beneath that. Could you explain what
20 that refers to?

21 A. Okay. That was -- as I looked at those
22 two bills, that was a file, the Robb case, I think,
23 that Doug and I had actually traveled with the
24 attorneys to Virginia Beach to meet with experts.
25 And that was Doug Smith, myself, Shawn McGarry, and

1 Bobby Wright.

2 MR. FISHLER: Don't refer to the name of
3 the case, just refer to the numbers. Because the
4 physician involved has an attorney-client privilege,
5 so if you just --

6 MR. FERGUSON: Robb was the plaintiff's
7 name.

8 MR. FISHLER: Oh. Well, I didn't know
9 that.

10 THE WITNESS: That was probably U-9966.
11 And the Shawn 22 hours, what I did was look what Gary
12 had billed for the two days of that and Shawn
13 McGarry's bill. See, he billed essentially -- he
14 billed 22 hours and Gary billed 21.

15 Q. (BY MR. PETERSON) So Gary actually billed
16 an hour less than Shawn McGarry billed for
17 essentially the same time?

18 A. Yes.

19 Q. All right. And then beneath that it says
20 Bobby, and I'm not sure what that is.

21 A. That was the other attorney that traveled
22 with us, Bobby Wright.

23 Q. All right. Likewise, down below, the next
24 in handwritten form we start at -- it looks like it's
25 January the 14th, I believe. And it says "should be

1 1/17," and then there's a 22-hour entry, apparently.
2 I think it says 22 hours. And some handwriting on
3 the left. Could you go ahead and just tell us what
4 that's all about?

5 A. Okay. That one showed for the billing 22
6 hours the day. So I pulled both of the two files,
7 and there were actually two depositions taken. One
8 was on Friday and one was on Monday, but they were
9 both included on the billing showing the date of
10 Monday instead of Friday.

11 So I pulled the files to see, you know,
12 where the depositions were. That's the -- where it
13 says Richfield deposition. And where it puts it
14 should be on the 17th, that one was actually on the
15 bill showing the date of the 20 -- the 14th. There
16 were actually two depositions taken -- one on Friday,
17 one on Monday. They both just showed on the bill on
18 Monday.

19 Q. Okay. So the 22 hours that show up on the
20 date for the 14th actually represents just a mistake?
21 Somebody --

22 A. Yeah.

23 Q. -- has billed ten and three-quarters hours
24 on the 14th, and by your notes that should have been
25 billed on the 17th. Is that right?

1 A. Yes.

2 Q. All right. I don't see any other
3 handwritten entries here on the first page. Let's go
4 to the second page of the exhibit. And there's a
5 handwritten entry down kind of about two-thirds of
6 the way on the right-hand side, and it relates
7 apparently to March the 26th, eleven and
8 three-quarter hours.

9 A. Yes.

10 Q. Can you tell me about that?

11 A. That was the same case. I just made a
12 note to myself that that was a trip to Newport,
13 Virginia, I think, that Doug Smith had gone on with
14 Gary.

15 Q. Does that seem like an unreasonable period
16 of time, the 11.75 hours for that day?

17 A. No, not to go back to Virginia.

18 Q. All right. And there aren't any
19 handwritten notations on the third page, but at the
20 bottom of the third page, if we -- third page, not
21 the bottom but the final number in the right-hand
22 column, R, for Tuesday the 5th it looks like what
23 you've done essentially is total all of the time on
24 the right-hand side. Is that right?

25 A. Yes, that's correct.

1 Q. So for the period of time running from
2 January until it appears May the 4th, actually, that
3 there were 507 hours, 507.55 hours that were billed
4 for by Mr. Ferguson on behalf of UMIA clients --
5 insureds, actually; right?

6 A. Yes, on these bills.

7 Q. And again, not only did you review this
8 but you said Mr. Smith also reviewed it. Correct?

9 A. He put together the totals. He went
10 through the bills and totaled them onto the
11 spreadsheet, and then I reviewed them after that.

12 Q. All right. So did you come to the
13 conclusion, or did you form an opinion that
14 Mr. Ferguson had overbilled UMIA for this period of
15 time?

16 A. No, I didn't.

17 Q. Did you discuss this with Mr. Osowski?

18 A. I don't really remember if I did with
19 Marty or not.

20 Q. And the question before that was poorly
21 worded. Let me go back for a minute. I asked you if
22 you formed an opinion, and you said you did. What
23 you said I think was you did not or something. Well,
24 I didn't ask you what the opinion was. I think you
25 answered with what your opinion was. Do you have an

1 opinion whether or not he had overbilled for that
2 period of time?

3 A. Yes, I do.

4 Q. What is your opinion?

5 A. I didn't find anything unusual in the
6 billing that I would consider overbilling.

7 Q. So we were talking about meetings, and
8 that's how we got to this particular spreadsheet.
9 You and Doug Smith had decided that you would go back
10 and look at the bills, see if there was anything
11 unusual. Did you then meet with anyone from Williams
12 & Hunt to discuss this or any of the fact that he'd
13 been terminated?

14 A. About a month later, toward the end of
15 June Elliott called, Elliott Williams called when I
16 was out of the office and talked to Doug and wanted
17 to set up a meeting for them to show us what evidence
18 they had or what proof they had of overbilling.

19 Q. All right. How did that happen?

20 A. How did the meeting happen, or --

21 Q. No.

22 A. -- why did --

23 Q. Yeah. Had you called them first --

24 A. No.

25 Q. -- or talked to them about this?

1 A. No. Elliott called and said that Gary was
2 telling people things that weren't true about why he
3 was terminated, that he wanted to meet with us and
4 show us the evidence they had of why he was
5 terminated.

6 Q. Okay. Tell me about the meeting, where it
7 happened and when, if you remember.

8 A. It was toward the end of June at P.F.
9 Chang's restaurant, and there was myself and Doug
10 Smith, George Hunt, Bruce Jensen, and Dennis
11 Ferguson.

12 Q. Okay. And what, if any, proof did they
13 show you?

14 A. They didn't bring anything. And I talked
15 to George Hunt and told him that we had gone back and
16 reviewed the billing and that I didn't see anything
17 in it that was unusual. And he told me that the
18 basis for their firing Gary was not something that I
19 would be able to see on our bills, that they had a
20 computer program that they ran, and it was based on
21 the findings of that program that he had billed time
22 when he wasn't working, or something of that nature.

23 Q. So they told you he'd billed -- George
24 Hunt told you that he'd billed for time when he
25 wasn't working?

1 A. I believe so. That he had -- he
2 essentially said that he had billed more for the
3 quarter than either Elliott or Bruce and had fewer
4 cases.

5 Q. Now, if a man tells you that somebody's
6 billed you for more time than he's worked, would you
7 agree that that implicates the honesty of the
8 other -- of the person who supposedly has overbilled
9 you? In other words, I guess what I'm getting at is,
10 if somebody told me that my employee was billing me
11 for time they hadn't worked, I would think they were
12 dishonest. Did you form an opinion with respect
13 to -- did that cause you to have a feeling one way or
14 another with respect to Gary Ferguson about whether
15 or not he was honest?

16 A. I would draw that assumption from it, that
17 they at least thought that.

18 Q. They thought he wasn't being honest?

19 A. Yeah.

20 Q. That was what was -- what you understood
21 the communication from them to be?

22 A. Yeah. They told me specifically that he
23 had overbilled us for his work.

24 Q. Now, so then you're going to have this
25 meeting, and what do they tell you when you get to

1 the meeting? Is that what they tell you there?

2 A. Essentially, yeah.

3 Q. And they don't bring any proof of that,
4 though?

5 A. No.

6 Q. Did they bring you a piece of paper --
7 we've seen a sheet in the depositions in this case;
8 there's a piece of paper that purports to show from
9 the computer when he's logged into the computer. And
10 they purport to match that then to time that's billed
11 on that particular day. Did they show you any of
12 that?

13 A. No.

14 MR. FERGUSON: Let's just take a short
15 break here.

16 (Interruption; off the record briefly.)

17 Q. (BY MR. PETERSON) Anything else you
18 recall about the meeting at P.F. Chang's? Did you
19 tell them anything? Tell them what you thought about
20 the idea that you'd been overbilled?

21 A. I told them -- they asked about us
22 reviewing bills, and I told them that somebody --
23 somebody, for instance, on our board might ask, how
24 much money are we talking about. If somebody said
25 they overbilled us, how much money is it? Is it

1 \$5,000? \$10,000? Has it been \$50,000 a year for 20
2 years? So I said, "I'm trying to find out if there's
3 other billing, how much is involved and how it's
4 going to get resolved."

5 Q. What did you mean when you said "how it's
6 going to get resolved"?

7 A. Whether it's going to be paid back or how
8 it was going to be established how much had been
9 overbilled.

10 Q. Right. I guess your physicians are also,
11 since they're kind of the equivalent of shareholders
12 of a sort, I guess, in that you're -- from what
13 Mr. Osowski described, it's sort of a mutual benefit
14 type insurance?

15 A. It's not in the sense that they're
16 shareholders. It's not a mutual company in that
17 sense. We don't have a financial interest in shares
18 of stock.

19 Q. But nonetheless, they probably have an
20 interest in how the company's run in terms of their
21 out-of-pocket insurance costs per year?

22 A. I would think so, yes.

23 Q. And based on that were you concerned that
24 somebody was going to have to figure out how much
25 money your company was owed back?

1 A. Yes.

2 Q. You were owed money back by your account,
3 I take it, because you'd been told that you'd been
4 stolen from?

5 MR. FISHLER: Objection. Vague and
6 ambiguous, calls for a conclusion.

7 MR. PETERSON: Well, if you understand it.

8 MR. FISHLER: Go ahead and answer if you
9 can.

10 THE WITNESS: Yes.

11 Q. (BY MR. PETERSON) You'd been told by
12 these lawyers from Williams & Hunt that Mr. Ferguson
13 had billed for time; right?

14 A. Oh, that he's overbilled, yes.

15 Q. Yes. So he had billed you for time he had
16 not actually spent on your cases?

17 A. Yes.

18 Q. And as a result of that, he -- or the law
19 firm would have acquired something from you that it
20 was not entitled to?

21 A. Yes, I would assume so.

22 Q. What would that something be?

23 A. The dollar amount, you mean?

24 Q. It would be money; right?

25 A. Yeah.

1 Q. All right. So that meeting, as a result
2 of that meeting in June, is there anything else about
3 that meeting that you recall that you can add at this
4 point?

5 A. Now, when I brought up the issue of how
6 are you going to establish a dollar amount and how
7 are we even going to know what it was, they said that
8 Elliott was working with Marty on that, Mr. Osowski.

9 Q. All right. And Elliott is the general
10 counsel for UMIA?

11 A. Yes.

12 Q. And I take it he and Mr. Osowski have
13 been good friends, from what he described for us in
14 the deposition?

15 A. I assume so.

16 Q. Okay. When they called you and said they
17 were going to get together and they wanted to show
18 you proof at this meeting, were you expecting them to
19 bring you some sort of document or some sort of
20 evidence?

21 A. I wasn't sure at that point what they
22 meant. I kind of assumed that it would be on
23 specific cases, I suppose.

24 Q. Now, the program that they're talking
25 about, essentially do you understand -- what do you

1 understand about their computer system, if anything?

2 A. Nothing.

3 Q. Did they tell you what the program was?

4 A. They told me it was -- it was a program
5 that would monitor activity that was done on a
6 day-to-day basis. That's all they told me.

7 Q. How did you understand that?

8 A. It somehow would track the hours that were
9 used on the system or in the office. I don't think
10 they told me that much detail, just that the system
11 monitored the work flow of attorneys on an individual
12 basis.

13 Q. So if I come in and I turn my computer on,
14 log into the system, it would reflect that if I
15 was -- assuming for a minute I'm their lawyer, that
16 I'm on their system and on the clock. Is that what
17 you understood?

18 A. Yes.

19 Q. And if I log off and go to a deposition, I
20 would log off their system; right?

21 A. I'm not sure they got that much detail
22 about it.

23 Q. Okay. Well, what did you think about that
24 explanation?

25 A. I really didn't have enough information of

1 the system to know exactly what it was. I mean, they
2 didn't tell me the detail other than they used a
3 computer monitoring system to track the billing, so
4 they didn't tell me the detail of whether he logged
5 on or off or how it worked.

6 Q. Provide you any evidence at all other than
7 that explanation to substantiate the idea that Gary
8 Ferguson had overbilled UMIA?

9 A. No.

10 Q. And when you left there, did you leave
11 convinced that they had proved to you that he had
12 overbilled UMIA?

13 A. I left convinced from what they said that
14 whatever they were suspecting I wouldn't be able to
15 see on the bills..

16 Q. Did you follow up on that at all?

17 A. I don't remember. I think we had gone
18 through this again and looked back at files to see if
19 I saw anything, but I never saw anything past that.

20 Q. Okay. And then the next time you met with
21 anybody about this, do you recall, did you have
22 another meeting with anyone?

23 A. I don't believe so.

24 Q. Did you talk to Gary Ferguson about this
25 meeting?

1 A. Yes, I did, a couple -- I think either
2 that afternoon or the next day, because we had had
3 the previous conversation of -- well, I don't know if
4 I talked about that. Gary had called me a couple
5 days, coincidentally, before this meeting or a week
6 before or something and said, you know, at that point
7 is there a possibility that you and Marty and I could
8 sit down and discuss this, that there's a chance that
9 I could still do UMIA's work.

10 And I told him at the time that they had
11 called us and told us they were going to have this
12 meeting, and if they gave me specific allegations,
13 said anything specific that he did wrong I would be
14 happy to listen to his explanation as to what his
15 explanation was, and then if I thought there was a
16 reason that it would benefit us, we could sit down
17 and talk to Marty.

18 So I called him after the meeting and
19 said, "They didn't really tell me anything specific
20 that I could give you to address."

21 Q. Do you remember anything else about that
22 phone call, anything you may have told him?

23 A. No.

24 Q. Anything that he told you?

25 A. No, I don't remember.

1 Q. But he was still interested at that point
2 in doing UMIA work?

3 A. Yes.

4 Q. And at that point if you had been able to
5 decide, would you have continued to use him for UMIA
6 work?

7 A. I don't know. At that point, because
8 aside from the billing issues, the issue, I didn't
9 know at that time, and I still don't, all of the
10 undercurrent -- or all of the dealings back and forth
11 within the firm. And so what kind of feelings
12 existed on him leaving, I mean, I knew he was not
13 happy with it, obviously. If he were in a situation
14 then to be co-counsel with a law firm that there was
15 a clash between, that would have been a problem as
16 well.

17 So I don't know, given the information I
18 had and the lack of information I still have, I'm not
19 sure that I could make a decision on that based on
20 what I know.

21 Q. Okay. Prior to this time did you ever
22 have any reason to think that he should not be co --
23 or should not be a lawyer for UMIA? In other words,
24 had you had complaints about his work or seen
25 something that caused you -- prior to his termination

1 at Williams & Hunt that caused you concern about him
2 representing your insureds?

3 A. No.

4 Q. Had you ever had reported to you by a
5 doctor, one of your insureds, anything that caused
6 you concern with respect to the way your cases were
7 being handled?

8 A. I don't think so. I don't believe so.

9 Q. I asked a question of Mr. Osowski whether
10 or not any UMIA board member had ever talked to him,
11 expressed a concern about the use of alcohol by the
12 lawyers at Williams & Hunt, and he said no. I wonder
13 if anyone had ever done that with you.

14 A. I don't remember specifically.

15 Q. Did you know about the bar -- let's just
16 say the alcohol at the law firm?

17 A. No. At this time?

18 Q. Right. Yeah, at this time, at the time
19 this termination was going on.

20 A. No.

21 Q. When did you first learn about that?

22 A. Probably -- about there being a bar, being
23 liquor there? Probably six or eight months ago. In
24 discussion with one of the attorneys, they mentioned
25 that having a meeting with the plaintiff's attorney,

1 they were over there having drinks at the firm. That
2 was the first that I have heard that there was liquor
3 there.

4 Q. Was that a concern for you?

5 A. Not particularly. In the context that
6 that occurred, no, not particularly.

7 Q. Now, so we took the January meeting. Were
8 there any other meetings where this was discussed,
9 that you discussed this other than what you've
10 described here today? The last one I guess you
11 really described is having the telephone conversation
12 after the P.F. Chang's meeting talking to Gary.

13 MR. ECKERSLEY: You said the January
14 meeting.

15 Q. (BY MR. PETERSON) June. I apologize.
16 June.

17 A. What was the question?

18 Q. It was just poorly worded. Just wondering
19 what happened next, if anything.

20 A. I don't think there was -- there was never
21 any other discussion between myself and anybody at
22 the firm about it after that meeting.

23 Q. Okay. Is the reason that you have not
24 assigned Gary Ferguson any cases since then the
25 instruction of your superior, Mr. Osowski, that you

1 shouldn't do so?

2 A. Yes.

3 Q. Okay. Is there anything else about the
4 spreadsheet that you can tell us?

5 A. No.

6 Q. I asked you about some specific things.
7 Was there anything in here that stood out that caused
8 a concern or something that you --

9 A. No, I don't believe so. The ones we
10 looked at that were high billing for a day, we went
11 back and looked at the file.

12 Q. Sure. You know, if we were to take, for
13 example, that January, the billings relating to
14 Virginia Beach, there's one for ten hours and one for
15 eleven hours. I think it's like lines 5 and 6 or 4
16 and 5, right at the top there.

17 A. Yes.

18 Q. You would expect, would you not, that your
19 attorneys would occasionally be out of their office
20 representing your insureds?

21 A. Yes.

22 Q. As in, for example, going to a deposition
23 in some other state or some other city; correct?

24 A. Yes, that's correct.

25 Q. Would you expect to pay for their time

1 while they were on those out-of-office work
2 assignments?

3 A. Yes.

4 Q. And so whether or not an attorney had
5 logged into the office computer, you would expect to
6 pay for time they actually spent on your cases;
7 correct?

8 A. Yes, that's correct.

9 Q. Oh. Mr. Osowski indicated that
10 eventually the company received a credit, some
11 \$10,000 or so against a future bill. Can you tell
12 me, so did you make a request on UMIA's behalf for
13 reimbursement of some amount of money?

14 A. No, I didn't.

15 Q. Do you know how that happened?

16 A. No, I don't.

17 MR. PETERSON: I might be done. Can I
18 have just a minute?

19 (Recess from 3:08 p.m. to 3:11 p.m.)

20 Q. (BY MR. PETERSON) I guess one of the
21 questions I want to ask you about the compensation
22 and going back to the audit of Mr. Ferguson's files.
23 Time that you saw when you went through these bills,
24 did it seem to be in line with the work that was done
25 for you on the cases? In other words, did it seem

1 like the work that was done was in line with what you
2 expected for those cases?

3 A. Yes.

4 Q. And likewise, the amount of time that was
5 spent, did it seem in any respect excessive for the
6 cases that he was working on for you?

7 A. No.

8 Q. What about other attorneys at Williams &
9 Hunt? Did his billings seem excessive as related to
10 other attorneys who were also doing UMIA work? And
11 you may or may not have even considered it. I don't
12 know.

13 A. I don't know that we ever compared the
14 bills that way. I would look at other attorneys the
15 same way when I was doing spot reviews. But we
16 didn't actually track what one attorney's billing is
17 as opposed to another.

18 Q. But in those spot reviews his work would
19 not have stood out as being excessive?

20 A. No.

21 Q. And likewise, that would be the same case
22 in the spot reviews; you're not just reviewing
23 Williams & Hunt, you're also reviewing other law
24 firms doing work for UMIA; correct?

25 A. Yes.

1 Q. So his work in those spot reviews if you
2 would have reviewed it would have been consistent
3 with what you saw in other firms, not just his own?

4 A. Yes, that's true.

5 Q. At any point preceding this incident had
6 Gary given you either his work or something that had
7 given you cause to have concern about whether he was
8 being honest with you in his billings?

9 A. No.

10 Q. And so I take it that you never suspected
11 prior to this that he had overbilled you for time
12 worked?

13 A. No, I didn't.

14 Q. All right. And what about the quality of
15 his representation? How would you describe the
16 quality of the job he did for you at UMIA?

17 A. I think he did good work. He's a good
18 attorney.

19 Q. What about other lawyers in the firm? And
20 one of the issues in this case I guess that I'm
21 interested in has to do with the way that the firm
22 billed for expenses. Some of the attorneys' billing
23 is just simply a block that says travel and a number,
24 and some of the attorneys break them down what that
25 number really is. Were you aware that there was a

1 difference in the way you were billed?

2 A. Yes.

3 Q. How did Gary's bills reflect his travel
4 expenses, if you recall?

5 A. I think his were broken down pretty well,
6 if I remember.

7 Q. Was that the case also with the firm's
8 principals, Mr. Hunt and also Mr. Williams?

9 A. I don't think George Hunt ever billed us
10 on anything on claim files. He didn't work claim
11 files. The work he'd do with UMIA was specifically
12 for Marty, employment issues, things like that. And
13 the other bills would vary depending on -- from case
14 to case.

15 Q. Were you concerned at any point about
16 Mr. Williams' use of block billing for his travel
17 expenses, not breaking them out but simply giving you
18 a number?

19 MR. FISHLER: Let me interpose an
20 objection, vague and ambiguous. And let me see if I
21 can help you. When you say expenses, I would think
22 that would be like a plane ticket, hotel bill --

23 MR. PETERSON: Yeah.

24 MR. FISHLER: -- whereas the time spent on
25 the plane would be something else. And I'm not so

1 sure what --

2 MR. PETERSON: No, we're on the same
3 track. I'm talking just about expenses as opposed to
4 travel time.

5 MR. FISHLER: Out-of-pocket expenses?

6 MR. PETERSON: Correct.

7 THE WITNESS: So the question was did I
8 have concern about those? No.

9 Q. (BY MR. PETERSON) Did you ever review his
10 particular billings?

11 A. Elliott's?

12 Q. Yes.

13 A. Yes. I reviewed, yeah, some from all of
14 the attorneys.

15 Q. Okay. When you went to that meeting at
16 P.F. Chang's, did Mr. Williams show up for that
17 meeting?

18 A. No. He wasn't there.

19 Q. But didn't you testify that he was the one
20 who called and said he was going to show up and give
21 you the proof?

22 A. I don't think he specifically said -- now,
23 I'm getting this secondhand from Doug. I don't think
24 he said specifically he was going to come. He said
25 they wanted to meet with us and show us what the

1 specific claims were, allegations, I suppose.

2 Q. So you didn't have the initial
3 conversation to set up the meeting; it was actually
4 Mr. Smith?

5 A. Yes.

6 Q. And does he still work for UMIA?

7 A. Yes.

8 Q. All right. You said earlier that the
9 drinking had not caused you -- you weren't concerned
10 about the issue -- I can't remember exactly how I
11 asked you about the question, but whether or not it
12 was a concern to you to have that conversation here
13 that they were sitting down maybe at Williams & Hunt
14 and drinking or talking about -- you know what I'm
15 talking about?

16 A. Yes, I remember.

17 Q. I can't even remember exactly how we got
18 there. But you said it was not a concern to you that
19 they were drinking at that point in that context?

20 A. Well, the only conversation about that
21 was -- trying to remember the specific one. It was
22 just in the context that -- I think they were working
23 out the details of the release or something like
24 that, something of the fact of a structured
25 settlement agreement. And it was just, you know, we

1 were talking about that over a drink, and that's the
2 only context it was in. So there was nothing to give
3 me any indication that was a widespread problem or
4 that it was -- that there was anything more than
5 that.

6 Q. Would it be a concern to you at this
7 point?

8 A. Probably depends on it what extent it was
9 going on, what context.

10 Q. Is that something that's customary here in
11 Salt Lake to find that law firms are -- they have
12 alcohol on the premises, they get together and talk
13 about structured settlements, say, or some release
14 while they're having drinks in the office?

15 MR. FISHLER: Objection. Foundation.

16 Q. (BY MR. PETERSON) Is that something
17 you've experienced before?

18 A. No.

19 Q. If Mr. Osowski had told you simply that
20 Mr. Ferguson was leaving Williams & Hunt and going to
21 work for some other law firm, let's say Kipp &
22 Christian, and he was still going to do med-mal
23 defense work and you had had the option of sending
24 cases with him after he left, would you have done
25 that?

1 MR. ECKERSLEY: Objection. Calls for
2 speculation.

3 Q. (BY MR. PETERSON) You can still answer if
4 you understand.

5 A. Absent any of these allegations or
6 anything, just that he left the law firm and was
7 going to another law firm to practice?

8 Q. Yeah.

9 A. Would I still assign work to him? I
10 assume so.

11 Q. So there wasn't any issue with respect to
12 the quality of his representation, then?

13 A. No.

14 Q. The only thing that would prevent you from
15 assigning cases to him, essentially, would be the
16 nature of the allegations in this case?

17 A. Yes.

18 Q. During the time that he worked at Williams
19 & Hunt, did you keep pretty good track of the cases
20 that he was working on for UMIA?

21 MR. FISHLER: Objection. Vague and
22 ambiguous.

23 MR. PETERSON: Both, guilty.

24 Q. (BY MR. PETERSON) If you understand the
25 question, though, you can save us the time.

1 MR. FISHLER: An Alford plea or just a
2 straight plea?

3 MR. PETERSON: Straight plea. The
4 implication is just the same either way.

5 THE WITNESS: Some of them. It depends on
6 the value of the case. I would normally -- we would
7 have maybe 800 open files at any one time. I would
8 normally be more familiar with the larger cases,
9 cases that had, you know, reserved a half million
10 dollars. I would be pretty familiar with those.
11 Smaller cases I may never see except one time to set
12 the reserves; and I may not be familiar with those
13 much, either.

14 Q. (BY MR. PETERSON) Did you hesitate during
15 that time to assign those types of cases, cases with
16 a half million dollar reserve, big cases, did you
17 hesitate to assign the defense in this case to Gary
18 Ferguson?

19 A. No.

20 Q. Why not?

21 A. He had a lot of cases in that range, I
22 would think. I would think probably most of his
23 cases were larger cases.

24 Q. And you assigned him larger cases, I take
25 it, because you trusted him?

1 A. Yes.

2 Q. What about the way that he handled those
3 cases once he had them? Did he provide zealous
4 representation to his clients, your insureds?

5 A. Yes.

6 Q. Did you feel like he recommended
7 settlements that were out of the range that you would
8 have expected in those kinds of cases?

9 A. No. I think Gary had good judgment with
10 settling cases, representing them.

11 Q. Have you known him long enough to have an
12 opinion with respect to his truthfulness?

13 A. I would think so.

14 Q. What's your opinion?

15 A. Well, in my experience with him I've
16 assumed he's always been truthful with me. He's been
17 very frank with evaluation of issues in the cases,
18 you know, where the case stands as far as
19 defensibility or settlement. I've never had any
20 reason to doubt his word on anything, any of his
21 work.

22 MR. PETERSON: Thank you. Nothing else.

23 MR. FERGUSON: Do you have any questions,
24 Dave?

25 MR. ECKERSLEY: No.

1 MR. FISHLER: We'll read and sign. Send
2 it to me.

3 (Deposition was concluded at 3:22 p.m.)

4 * * *

1 REPORTER'S CERTIFICATE

2 STATE OF UTAH)
3) ss.
4 COUNTY OF SALT LAKE)

5 I, Vicky McDaniel, Registered Professional
6 Reporter and Notary Public in and for the State of
7 Utah, do hereby certify:

8 That prior to being examined, the witness,
9 ARTHUR GLENN, was by me duly sworn to tell the truth,
10 the whole truth, and nothing but the truth;

11 That said deposition was taken down by me
12 in stenotype on April 25, 2007, at the place herein
13 named, and was thereafter transcribed and that a true
14 and correct transcription of said testimony is set
15 forth in the preceding pages;

16 I further certify that, in accordance with
17 Rule 30(e), a request having been made to review the
18 transcript, a reading copy was sent to Mr. Fishler
19 for the witness to read and sign before a notary
20 public and then return to me for filing with
21 Mr. Peterson.

22 I further certify that I am not kin or
23 otherwise associated with any of the parties to said
24 cause of action and that I am not interested in the
25 outcome thereof.

26 WITNESS MY HAND AND OFFICIAL SEAL this
27 26th day of April, 2007.

28 Vicky McDaniel, CSR, RMR
29 Notary Public
30 Residing in Salt Lake County

Case: Ferguson v. Williams & Hunt
Case No.: 050921677
Reporter: Vicky McDaniel
Date taken: April 25, 2007

WITNESS CERTIFICATE

I, ARTHUR GLENN, HEREBY DECLARE:

That I am the witness in the foregoing transcript; that I have read the transcript and know the contents thereof; that with these corrections I have noted, this transcript truly and accurately reflects my testimony.

PAGE-LINE	CHANGE/CORRECTION	REASON
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No corrections were made.

I, ARTHUR GLENN, HEREBY DECLARE UNDER THE PENALTIES OF PERJURY OF THE LAWS OF THE UNITED STATES OF AMERICA AND THE LAWS OF THE STATE OF UTAH THAT THE FOREGOING IS TRUE AND CORRECT.

ARTHUR GLENN

SUBSCRIBED and SWORN to at

this day of

200

Notary Public

Exhibit C

SCANNED

ROY A. JACOBSON, JR (#04780)
MEL ORCHARD III (#10328)
THE SPENCE LAW FIRM, LLC
15 South Jackson Street
P O Box 548
Jackson, Wyoming 83001
Telephone: 307-733-7290
Facsimile: 307-733-7290

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

	-----00000000-----	
GARY B. FERGUSON	}	
	}	
	}	
Plaintiff,	}	AFFIDAVIT OF GARY FERGUSON
	}	
vs.	}	
	}	
WILLIAMS & HUNT INC., ELLIOTT	}	
J. WILLIAMS, GEORGE A. HUNT,	}	
and KURT FRANKENBURG	}	
	}	Civil No. 050921677
	}	
Defendants,	}	Judge: Medley
	}	
	-----00000000-----	

Salt Lake County)
) ss:
State of Utah)

- 1 Under oath and on personal knowledge, I state as follows.
- 2 I have been licensed to practice law in Utah since 1976
- 3 I have handled medical malpractice cases in Utah since approximately 1978

4. Based on my personal experience as a trial lawyer practicing in Utah since 1978 I know as a matter of fact that trial lawyers do not limit the time they bill a client to the time the lawyer is at the law firm using the lawyer's office computer.
5. Trial lawyers, especially medical malpractice lawyers spend a good deal of their billable time away from the office taking depositions, researching, meeting with clients and experts, and working using laptop computers. This was my practice at Williams & Hunt from the time I started as founding partner/shareholder in April, 1991. This was also the practice of the other trial lawyers at Williams & Hunt, including Elliott Williams.
6. From before the creation of Williams & Hunt, Elliott Williams was the general counsel for UMIA, a professional medical liability insurance provider who insured physicians in Utah, Wyoming and Montana. The percentage of physicians insured in Utah varied over the years. UMIA was and still is the primary medical malpractice insurance provider for non-IHC Utah physicians. Elliott was and still is very good friends with Marty Osowski, the CEO of UMIA.
7. Elliott would say that he is the one who got Marty the CEO position with UMIA.
8. Williams & Hunt had liquor available and consumed by the attorneys every day that Elliott was in the office at the end of the day, which was most week days. Initially the liquor was kept and consumed in the lunch room/break room at Williams & Hunt. Williams & Hunt paid for the liquor.
9. Several years ago, when Williams & Hunt expanded to include the northeast corner of the floor, this expansion included the creation of a bar. The bar had a refrigerator, ice maker, liquor cabinets, wine glasses, cocktail glasses, a TV, couch, table, chairs, and was well stocked with liquor.
10. At the time the bar was completed Elliott would come by my office, initially at 5:00pm and say "Whiskey, Whiskey" to announce he was going to the bar and inviting me to join him. This happened almost every week day that Elliott was in the office, which was most of the time.
11. I would go back and drink with Elliott.

12. Attorneys in the office who did not drink with Elliott did not get any work of any significance from UMIA.
13. The attorneys drinking in the bar with Elliott on a regular basis included Bruce Jensen, George Hunt, Dennis Ferguson, Jody Barnett, Mark Anderson and me. Jody drank beer. The rest consumed at least two doubles or triples of whiskey or vodka before driving home.
14. On more than one occasion while I was drinking with Bruce Jensen and others in the bar, after Bruce had several drinks of whiskey he would talk to UMIA clients on the telephone.
15. On at least one occasion Bruce Jensen had so much alcohol in his system from drinking at Williams & Hunt that he passed out in the office, fell to the carpet and received a rug burn on his forehead. The rug burn was there for everyone to see for many weeks.
16. I finally told Elliott I could not drink with him anymore. He was, in my opinion becoming irrational. He accused me with spending too much time working on UMIA files. I told him I could no longer drink with him in the bar. Within a matter of weeks I was terminated by Elliott and George Hunt on May 5th, 2005. The reason given by them for my termination was over billing on my files. Both of them refused to identify any specific files. Even to today they cannot identify over billing on any specific files. I did not, nor have I ever, over billed a client. Knowing the billing practices at Williams & Hunt, I was probably the second most conservative biller with Jody Burnett being the most conservative biller. Jody did not usually bill clients for travel time.
17. Elliott worked less on the UMIA files that he had. When I would ask if how he could handle as many files as he did he said: "Benign neglect." I told him I could not benignly neglect the files sent to me.
18. For approximately two years prior to my termination, Williams & Hunt had problems with attorneys having long standing affairs with married and unmarried subordinates in the office. The attorneys were married. I knew that this was a violation of law and an uninsured risk to Williams & Hunt. On more than one occasion I suggested to George

Hunt, the managing partner that Williams & Hunt hire an expert in the area to advise us
He declined.

- 19 Paralegals would discuss with me their concerns over the affair that included the office manager with one of the founding shareholders. They paralegals believed that they would not be treated fairly by the office manager because of her affair with the shareholder. I was trying to get authority to hire an outside consultant during the late winter and spring of 2005 to advise the firm. Instead, I was terminated on May 5, 2005.
- 20 I told both George Hunt and Elliott that I had a thyroidectomy scheduled for May 6, 2005. I told them that this was the last time that the doctor could do it and follow up with me prior to going on a mission for the LDS church. I communicated this to both of them in conversation and in e-mail. So they knew at the time they terminated me on May 5th 2005 that I would also have the surgery the following morning.
- 21 Both George and Elliott told me on May 5th, 2005 that I had to have everything of mine out of the office that day. I returned that evening with my wife and children to pack up my personal belongings and could not get into the building. Someone at Williams & Hunt removed my magnetic card from the approved access list.
22. I had no opportunity to discuss George and Elliott's allegations with anyone. No attorneys were in the office. It appeared that all had been told to leave the office that Thursday, May 5, 2005 afternoon.
- 23 My son Ryan called the surgeon the night of May 5th and arranged to have my surgery moved to the last surgical case for May 6th so that me and my family could rush in the morning of May 6th and pack up my personal files, pictures, books and the like. I had to be NPO, which means no food by mouth starting the night before. So I was starving and trying to pack up my personal belonging while being confronted with preparing for surgery for a possibly cancerous tumor.
- 24 I knew from my experience as a medical malpractice attorney that one of the potential complications from a thyroidectomy was loss of voice. Elliott and Bruce Jensen had to have the same knowledge. Elliott and George knew that my disability coverage with W&H

would terminate effective the day of my termination by Williams & Hunt. Therefore I had no disability coverage at the time of the surgery. The disability policy on me at W & H would pay a significant portion of my income if I lost my voice and could no longer perform as a trial lawyer.

- 25 I was lucky. I did not lose my voice as a result of the thyroidectomy.
- 26 Both George and Elliott knew that my brother Christopher Ferguson committed suicide after being terminated from his position as a nurse anesthetist.
- 27 My income the last couple of years, including bonus ranged from 216,000 to approximately 250,000 per annum.
- 28 As of the date of this affidavit, my earned income since May 5, 2005 is \$59,893.00.
- 29 In order to pay living expense, I have withdrawn \$13,000 a month from my 401(k). The total withdrawn to date is \$312,000.
- 30 At the time of my termination on May 5, 2005, I had tens of thousands of dollars in work in progress to be billed to UMIA. The defendants received the financial benefit of all of this money because I had done the work, and Williams & Hunt no longer had to pay me. This money was a windfall to Williams & Hunt, further, Williams & Hunt reduced the partnership by 1 and reduced the denominator for profits received by the partners at the firm following my termination.
- 31 Starting approximately two years prior to my termination, Elliott had two children attending private colleges. He was paying the majority of the expenses including tuition. The sum exceeded 70,000 a year. George Hunt told me that Elliott did not have the money to pay these expenses and was in a financial bind.
- 32 I contacted many law firms in Salt Lake City to see if I could get a position. The only firm that made an offer was Siegfried & Jensen. It is my opinion, based on 30 years of practicing in Salt Lake City, Utah, that the reason most of the firms did not make me an offer was the cloud under which I left Williams & Hunt.

33. They additionally took every opportunity to inflict the maximum emotional and occupational hardships they could while I attempted to establish future employment, including contacting law firms with whom I had discussions. This was occurring while I was recovering from neck surgery.
34. There was only one case that I was defending at Williams & Hunt that had an attorney at Siegfried & Jensen as plaintiff's counsel: Sharon Fillerup, MD was the name of my client. Siegfried & Jensen agreed to refer the Fillerup case to another law firm.
35. The day that I was to begin practice at Siegfried & Jensen, Kurt Frankenberg and George Hunt informed Joe Steele at Siegfried & Jensen that they could not hire me because of conflicts of interest. There was only one file: Fillerup, MD where a conflict existed. Joe Steele told Kurt Frankenberg and George Hunt that Siegfried & Jensen would refer the Fillerup case to another law firm, specifically James McConkie and Brad Parker. This was done.
36. I was told not to come to Siegfried & Jensen until this was cleared up. I hired Charles Gruber to review the conflict issue. He said that given the fact that I had no personal knowledge of the other cases that Williams & Hunt defense lawyers were pursuing against Siegfried & Jensen attorneys, and the niche practice I was engaged in, in his opinion that I would not violate conflict laws by practicing at Siegfried & Jensen. Williams & Hunt attempted to hire Mr. Gruber after I hired him. Over a week later, Williams & Hunt finally agreed with Mr. Gruber's opinion. I executed an affidavit confirming that I had no personal knowledge of any of the other files that Williams & Hunt had with Siegfried & Jensen.
37. At Williams & Hunt there were no meetings to discuss cases. If one of the lawyers wanted to seek someone else's recommendation on a case, the attorney would discuss the case and then each would bill UMIA for that conference. Williams & Hunt knew from its own billing records that I had never discussed the cases Williams & Hunt had against Siegfried & Jensen attorneys when George Hunt and Kurt Frankenberg represented to Joe Steele that I had personal knowledge of cases other than Fillerup.

38. There was no basis in fact for George Hunt and Kurt Frankenberg's representations to Joe Steele that I had personal knowledge in cases in addition to Fillerup.
39. I spent over a week at home in distress believing that Williams & Hunt would be able to prevent me from ever getting a position with any law firm in Salt Lake City by their willingness to falsely represent material facts.
40. Prior to my termination by Williams & Hunt, Elliott represented Jim Gilson as Mr. Gilson's attorney in negotiating with Siegfried & Jensen the amount that Siegfried & Jensen would pay Mr. Gilson on plaintiff's medical malpractice cases Mr. Gilson handled as an employee of Siegfried & Jensen. Some of those files were UMIA defense files. Elliott was general counsel for UMIA at the same time; as a result, Elliott was in a conflict of interest. Elliott owed a duty of zealous representation to Mr. Gilson, which included placing the highest values Elliott could on UMIA cases. As general counsel for UMIA Elliott had a duty to keep those values as low as possible. Elliott was told by at least Bruce Jensen that he was in a conflict of interest. When I learned of Elliott's representation of Mr. Gilson, I asked Bruce if he agreed that Elliott was in a conflict. Bruce said yes. I asked Bruce if he told Elliott this, Bruce said yes, and that Elliott said he used general values for similar cases on the UMIA cases and saw no conflict.
41. I told both George and Elliott that I would need to take off a lot of time in May, 2005 to attend my son Ryan's graduation from medical school at the University of Utah Health Sciences Center and my daughter Megan's defense of her dissertation for her Ph. D. in biological oceanography at Scripps Institution of Oceanography, University of California, San Diego. These were to be the high points for my family and me. Instead, because of the actions of Elliott and George, these celebratory events were more akin to a funeral.
42. I had worked some weekends and holidays, in addition to working extra long hours so that I would be able to take time off in May. This is the reason I had more billable hours than others in the office. Bruce Jensen took off for a week's vacation during the same quarter and had fewer billable hours than I did at one point that quarter.

ROY A. JACOBSON, JR. (#04780)
MEL ORCHARD III (#10328)
THE SPENCE LAW FIRM, LLC
15 South Jackson Street
P O Box 548
Jackson, Wyoming 83001
Telephone: 307-733-7290
Facsimile: 307-733-7290

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

	-----ooo0ooo-----	
GARY B. FERGUSON	}	
	}	
	}	
Plaintiff,	}	AFFIDAVIT OF GARY FERGUSON
	}	
vs.	}	
	}	
WILLIAMS & HUNT INC., ELLIOTT	}	
J. WILLIAMS, GEORGE A. HUNT,	}	
and KURT FRANKENBURG	}	
	}	Civil No. 050921677
	}	
Defendants.	}	Judge: Medley
	}	
	-----ooo0ooo-----	

Salt Lake County)	
	)	ss:
State of Utah)	

1. Under oath and on personal knowledge, I state as follows.
2. I have been licensed to practice law in Utah since 1976.
3. I have handled medical malpractice cases in Utah since approximately 1978

4. Based on my personal experience as a trial lawyer practicing in Utah since 1978 I know as a matter of fact that trial lawyers do not limit the time they bill a client to the time the lawyer is at the law firm using the lawyer's office computer.
5. Trial lawyers, especially medical malpractice lawyers spend a good deal of their billable time away from the office taking depositions, researching, meeting with clients and experts, and working using laptop computers. This was my practice at Williams & Hunt from the time I started as founding partner/shareholder in April, 1991. This was also the practice of the other trial lawyers at Williams & Hunt, including Elliott Williams.
6. From before the creation of Williams & Hunt, Elliott Williams was the general counsel for UMIA, a professional medical liability insurance provider who insured physicians in Utah, Wyoming and Montana. The percentage of physicians insured in Utah varied over the years. UMIA was and still is the primary medical malpractice insurance provider for non-IHC Utah physicians. Elliott was and still is very good friends with Marty Oslowski, the CEO of UMIA.
7. Elliott would say that he is the one who got Marty the CEO position with UMIA.
8. Williams & Hunt had liquor available and consumed by the attorneys every day that Elliott was in the office at the end of the day, which was most week days. Initially the liquor was kept and consumed in the lunch room/break room at Williams & Hunt. Williams & Hunt paid for the liquor.
9. Several years ago, when Williams & Hunt expanded to include the northeast corner of the floor, this expansion included the creation of a bar. The bar had a refrigerator, ice maker, liquor cabinets, wine glasses, cocktail glasses, a TV, couch, table, chairs, and was well stocked with liquor.
10. At the time the bar was completed Elliott would come by my office, initially at 5:00pm and say "Whiskey, Whiskey" to announce he was going to the bar and inviting me to join him. This happened almost every week day that Elliott was in the office, which was most of the time.
11. I would go back and drink with Elliott.

- 12 Attorneys in the office who did not drink with Elliott did not get any work of any significance from UMIA
- 13 The attorneys drinking in the bar with Elliott on a regular basis included Bruce Jensen, George Hunt, Dennis Ferguson, Jody Barnett, Mark Anderson and me. Jody drank beer. The rest consumed at least two doubles or triples of whiskey or vodka before driving home
- 14 On more than one occasion while I was drinking with Bruce Jensen and others in the bar, after Bruce had several drinks of whiskey he would talk to UMIA clients on the telephone
- 15 On at least one occasion Bruce Jensen had so much alcohol in his system from drinking at Williams & Hunt that he passed out in the office, fell to the carpet and received a rug burn on his forehead. The rug burn was there for everyone to see for many weeks
- 16 I finally told Elliott I could not drink with him anymore. He was, in my opinion, becoming irrational. He accused me with spending too much time working on UMIA files. I told him I could no longer drink with him in the bar. Within a matter of weeks I was terminated by Elliott and George Hunt on May 5th, 2005. The reason given by them for my termination was over billing on my files. Both of them refused to identify any specific files. Even to today they cannot identify over billing on any specific files. I did not, nor have I ever, over billed a client. Knowing the billing practices at Williams & Hunt, I was probably the second most conservative biller with Jody Burnett being the most conservative biller. Jody did not usually bill clients for travel time
- 17 Elliott worked less on the UMIA files that he had. When I would ask if how he could handle as many files as he did he said 'Benign neglect'. I told him I could not benignly neglect the files sent to me
- 18 For approximately two years prior to my termination, Williams & Hunt had problems with attorneys having long standing affairs with married and unmarried subordinates in the office. The attorneys were married. I knew that this was a violation of law and an uninsured risk to Williams & Hunt. On more than one occasion I suggested to George

Hunt, the managing partner that Williams & Hunt hire an expert in the area to advise us
He declined

- 19 Paralegals would discuss with me their concerns over the affair that included the office manager with one of the founding shareholders. They paralegals believed that they would not be treated fairly by the office manager because of her affair with the shareholder. I was trying to get authority to hire an outside consultant during the late winter and spring of 2005 to advise the firm. Instead, I was terminated on May 5, 2005.
- 20 I told both George Hunt and Elliott that I had a thyroidectomy scheduled for May 6, 2005. I told them that this was the last time that the doctor could do it and follow up with me prior to going on a mission for the LDS church. I communicated this to both of them in conversation and in e-mail. So they knew at the time they terminated me on May 5th 2005 that I would also have the surgery the following morning.
- 21 Both George and Elliott told me on May 5th, 2005 that I had to have everything of mine out of the office that day. I returned that evening with my wife and children to pack up my personal belongings and could not get into the building. Someone at Williams & Hunt removed my magnetic card from the approved access list.
- 22 I had no opportunity to discuss George and Elliott's allegations with anyone. No attorneys were in the office. It appeared that all had been told to leave the office that Thursday, May 5, 2005 afternoon.
- 23 My son Ryan called the surgeon the night of May 5th and arranged to have my surgery moved to the last surgical case for May 6th so that me and my family could rush in the morning of May 6th and pack up my personal files, pictures, books and the like. I had to be NPO, which means no food by mouth starting the night before. So I was starving and trying to pack up my personal belonging while being confronted with preparing for surgery for a possibly cancerous tumor.
- 24 I knew from my experience as a medical malpractice attorney that one of the potential complications from a thyroidectomy was loss of voice. Elliott and Bruce Jensen had to have the same knowledge. Elliott and George knew that my disability coverage with W&H

would terminate effective the day of my termination by Williams & Hunt. Therefore I had no disability coverage at the time of the surgery. The disability policy on me at W & H would pay a significant portion of my income if I lost my voice and could no longer perform as a trial lawyer.

- 25 I was lucky. I did not lose my voice as a result of the thyroidectomy.
- 26 Both George and Elliott knew that my brother Christopher Ferguson committed suicide after being terminated from his position as a nurse anesthetist.
- 27 My income the last couple of years, including bonus ranged from 216,000 to approximately 250,000 per annum.
- 28 As of the date of this affidavit, my earned income since May 5, 2005 is \$59,893.00.
- 29 In order to pay living expense, I have withdrawn \$13,000 a month from my 401(k). The total withdrawn to date is \$312,000.
- 30 At the time of my termination on May 5, 2005, I had tens of thousands of dollars in work in progress to be billed to UMIA. The defendants received the financial benefit of all of this money because I had done the work, and Williams & Hunt no longer had to pay me. This money was a windfall to Williams & Hunt; further, Williams & Hunt reduced the partnership by 1 and reduced the denominator for profits received by the partners at the firm following my termination.
- 31 Starting approximately two years prior to my termination, Elliott had two children attending private colleges. He was paying the majority of the expenses including tuition. The sum exceeded 70,000 a year. George Hunt told me that Elliott did not have the money to pay these expenses and was in a financial bind.
- 32 I contacted many law firms in Salt Lake City to see if I could get a position. The only firm that made an offer was Siegfried & Jensen. It is my opinion, based on 30 years of practicing in Salt Lake City, Utah, that the reason most of the firms did not make me an offer was the cloud under which I left Williams & Hunt.

33. They additionally took every opportunity to inflict the maximum emotional and occupational hardships they could while I attempted to establish future employment, including contacting law firms with whom I had discussions. This was occurring while I was recovering from neck surgery.
34. There was only one case that I was defending at Williams & Hunt that had an attorney at Siegfried & Jensen as plaintiff's counsel: Sharon Fillerup, MD was the name of my client. Siegfried & Jensen agreed to refer the Fillerup case to another law firm.
35. The day that I was to begin practice at Siegfried & Jensen, Kurt Frankenberg and George Hunt informed Joe Steele at Siegfried & Jensen that they could not hire me because of conflicts of interest. There was only one file: Fillerup, MD where a conflict existed. Joe Steele told Kurt Frankenberg and George Hunt that Siegfried & Jensen would refer the Fillerup case to another law firm, specifically James McConkie and Brad Parker. This was done.
36. I was told not to come to Siegfried & Jensen until this was cleared up. I hired Charles Gruber to review the conflict issue. He said that given the fact that I had no personal knowledge of the other cases that Williams & Hunt defense lawyers were pursuing against Siegfried & Jensen attorneys, and the niche practice I was engaged in, in his opinion that I would not violate conflict laws by practicing at Siegfried & Jensen. Williams & Hunt attempted to hire Mr. Gruber after I hired him. Over a week later, Williams & Hunt finally agreed with Mr. Gruber's opinion. I executed an affidavit confirming that I had no personal knowledge of any of the other files that Williams & Hunt had with Siegfried & Jensen.
37. At Williams & Hunt there were no meetings to discuss cases. If one of the lawyers wanted to seek someone else's recommendation on a case, the attorney would discuss the case and then each would bill UMIA for that conference. Williams & Hunt knew from its own billing records that I had never discussed the cases Williams & Hunt had against Siegfried & Jensen attorneys when George Hunt and Kurt Frankenberg represented to Joe Steele that I had personal knowledge of cases other than Fillerup.

- 38 There was no basis in fact for George Hunt and Kurt Frankenberg's representations to Joe Steele that I had personal knowledge in cases in addition to Fillerup
39. I spent over a week at home in distress believing that Williams & Hunt would be able to prevent me from ever getting a position with any law firm in Salt Lake City by their willingness to falsely represent material facts
- 40 Prior to my termination by Williams & Hunt, Elliott represented Jim Gilson as Mr Gilson's attorney in negotiating with Siegfried & Jensen the amount that Siegfried & Jensen would pay Mr Gilson on plaintiff's medical malpractice cases Mr Gilson handled as an employee of Siegfried & Jensen Some of those files were UMIA defense files Elliott was general counsel for UMIA at the same time, as a result, Elliott was in a conflict of interest Elliott owed a duty of zealous representation to Mr Gilson, which included placing the highest values Elliott could on UMIA cases As general counsel for UMIA Elliott had a duty to keep those values as low as possible Elliott was told by at least Bruce Jensen that he was in a conflict of interest When I learned of Elliott's representation of Mr Gilson, I asked Bruce if he agreed that Elliott was in a conflict Bruce said yes I asked Bruce if he told Elliott this, Bruce said yes, and that Elliott said he used general values for similar cases on the UMIA cases and saw no conflict
- 41 I told both George and Elliott that I would need to take off a lot of time in May, 2005 to attend my son Ryan's graduation from medical school at the University of Utah Health Sciences Center and my daughter Megan's defense of her dissertation for her Ph D in biological oceanography at Scripps Institution of Oceanography, University of California San Diego These were to be the high points for my family and me Instead, because of the actions of Elliott and George, these celebratory events were more akin to a funeral
- 42 I had worked some weekends and holidays, in addition to working extra long hours so that I would be able to take time off in May This is the reason I had more billable hours than others in the office Bruce Jensen took off for a week's vacation during the same quarter and had fewer billable hours than I did at one point that quarter

Exhibit D

SCANNED

ROY A. JACOBSON, JR.
MEL ORCHARD III
THE SPENCE LAW FIRM, LLC
15 South Jackson Street
P.O. Box 548
Jackson, Wyoming 83001
Telephone: 307-733-7290
Facsimile: 307-733-7290

EDWIN S. WALL, Utah State Bar No. 7446
WALL LAW OFFICES
8 East Broadway, Suite 500
Salt Lake City, Utah 84111
Telephone: 801-523-3445

CHARLES F. PETERSON
PETERSON LAW OFFICES
913 W. River Street, Suite 420
Boise, Idaho 83702-7081
Telephone: 208-342-4633
Facsimile: 208-336-2059

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

GARY B. FERGUSON,

Plaintiff,

vs.

WILLIAMS & HUNT, INC., ELLIOTT J.
WILLIAMS, GEORGE A. HUNT, and
KURT FRANKENBURG,

Defendants.

Case No.: 050921677

**PLAINTIFF'S FIRST SET OF
REQUESTS FOR ADMISSION**

Plaintiff Gary B. Ferguson, by and through his attorney, hereby requests, pursuant to Rule 36(a), Utah Rules of Civil Procedure, that Defendants, within thirty (30) days from Defendants' receipt of this request, admit the truth of each of the following items for purposes of this action only, and subject to all pertinent objections as to the admissibility thereof that may be interposed at trial:

REQUEST FOR ADMISSION NO. 1. Admit that Dennis Ferguson's wife, in or around May 2000, was named Stacy.

REQUEST FOR ADMISSION NO. 2. Admit that partners of the firm spent time after the work day socializing and drinking together.

REQUEST FOR ADMISSION NO. 3. Admit that the firm paid for alcoholic beverages that were provided to employees and others.

REQUEST FOR ADMISSION NO. 4. Admit that Plaintiff Gary Ferguson voiced his opposition to the firm providing alcoholic beverages to employees.

REQUEST FOR ADMISSION NO. 5. Admit that Plaintiff Gary Ferguson became estranged from Williams and Hunt at some point in late 2004 or early 2005.

REQUEST FOR ADMISSION NO. 6. Admit that (as is alleged in paragraph 20 of the Complaint), a member of the firm had an extramarital affair with another firm member during or before the spring of 2004.

REQUEST FOR ADMISSION NO. 7. Admit that in late 2004, Defendant Hunt had taken responsibility to find an expert to resolve compensation issues in the firm.

REQUEST FOR ADMISSION NO. 8. Admit that Defendant Hunt was unable to find a compensation expert.

REQUEST FOR ADMISSION NO. 9. Admit that Plaintiff Gary Ferguson offered to find a compensation expert for the firm.

REQUEST FOR ADMISSION NO. 10. Admit that the firm's yearly compensation meeting for 2004, was delayed into February 2005.

REQUEST FOR ADMISSION NO. 11. Admit that by early 2005, Plaintiff Gary Ferguson was at odds with Defendant Elliott J. Williams.

REQUEST FOR ADMISSION NO. 12. Admit that in early March 2005, Defendant Elliott Williams reviewed the billing to UMIA for work done by Plaintiff Gary Ferguson.

REQUEST FOR ADMISSION NO. 13. Admit that the two items affirmatively alleged by Defendants at paragraph 11 of their Answer, were: a charge for Ferguson's review of various documents with his client in preparation for a deposition, and a charge for that deposition.

REQUEST FOR ADMISSION NO. 14. Admit that during the spring of 2005, Defendant Williams made it known to Plaintiff Gary Ferguson that he was unhappy the firm had advanced certain money for costs in a plaintiff's case.

REQUEST FOR ADMISSION NO. 15. Admit that Defendant Williams blamed Plaintiff Gary Ferguson, at least in part, for the use of the firm's money.

REQUEST FOR ADMISSION NO. 16. Admit that during the spring of 2005, Defendant Williams wanted to promote his secretary to the position of paralegal within the firm.

REQUEST FOR ADMISSION NO. 17. Admit that Plaintiff Gary Ferguson opposed the move in favor or promotion of another person.

REQUEST FOR ADMISSION NO. 18. Admit that other shareholders in the firm supported Plaintiff Gary Ferguson with respect to the promotion matter.

REQUEST FOR ADMISSION NO. 19. Admit that the promotion went to another person, not the person Mr. Williams had wanted to promote.

REQUEST FOR ADMISSION NO. 20. Admit that during the first five months of 2005, Plaintiff Gary Ferguson billed time for services rendered on behalf of UMLA insured physicians.

REQUEST FOR ADMISSION NO. 21. Admit that prior to March 2005, the firm had not instituted any review of Plaintiff Gary Ferguson's billings to determine whether or not he was over billing or under billing his clients.

REQUEST FOR ADMISSION NO. 22. Admit that employees of the firm were permitted to work outside the office.

REQUEST FOR ADMISSION NO. 23. Admit that employees of the firm were expected to bill clients for time they spent working outside the office.

REQUEST FOR ADMISSION NO. 24. Admit that prior to his termination from employment with the firm, Defendants electronically gathered information purporting to show when Plaintiff Gary Ferguson was working on this computer.

REQUEST FOR ADMISSION NO. 25. Admit that the firm had no requirement employees login to their computers before commencing work.

REQUEST FOR ADMISSION NO. 26. Admit that the firm had no policy of electronically collecting information on any employee of the firm to determine whether or not their billings matched the time they spent on their computer.

REQUEST FOR ADMISSION NO. 27. Admit that prior to Plaintiff Gary Ferguson's termination as an employee, members of the firm had not unanimously voted to terminate him and remove him as a shareholder.

REQUEST FOR ADMISSION NO. 28. Admit that at the time of Plaintiff Gary Ferguson's termination, Defendants knew that Plaintiff Gary Ferguson's economic interest in the firm exceeded the value of the Stock Buy/sell Agreement.

REQUEST FOR ADMISSION NO. 29. Admit that Defendants knew that by virtue of firing Plaintiff Gary Ferguson, he would be deprived of the benefit of his ownership interest in the firm.

REQUEST FOR ADMISSION NO. 30. Admit that Plaintiff Gary Ferguson's ownership interest in the firm included a share in the firm's pending cases.

REQUEST FOR ADMISSION NO. 31. Admit that Plaintiff Gary Ferguson's financial interest in the firm included potential revenues from the firm's business.

REQUEST FOR ADMISSION NO. 32. Admit that prior to firing Plaintiff Gary Ferguson, Defendants had been advised Mr. Ferguson was intending to go on vacation with his family.

REQUEST FOR ADMISSION NO. 33. Admit that prior to firing Plaintiff Gary Ferguson, Defendants had been advised Mr. Ferguson was intending to attend his daughter's defense of her dissertation.

REQUEST FOR ADMISSION NO. 34. Admit that prior to firing Plaintiff Gary Ferguson, Defendants had been advised Mr. Ferguson was intending on attending his son's graduation from medical school.

REQUEST FOR ADMISSION NO. 35. Admit that prior to firing Plaintiff Gary Ferguson, Defendants had been advised Mr. Ferguson needed to have surgery in early May 2005.

REQUEST FOR ADMISSION NO. 36. Admit that at the time of his firing, Plaintiff Gary Ferguson requested that he be given sufficient time to move his personal property.

REQUEST FOR ADMISSION NO. 37. Admit that the firm refused to provide Plaintiff Gary Ferguson with time to move his personal property.

REQUEST FOR ADMISSION NO. 38. Admit that the firm required that Plaintiff Gary Ferguson remove himself from the property immediately.

REQUEST FOR ADMISSION NO. 39. Admit that on May 5, 2005, Plaintiff Gary Ferguson was prevent from removing his personal property from the firm.

REQUEST FOR ADMISSION NO. 40. Admit that Plaintiff Gary Ferguson had surgery on May 6, 2005.

REQUEST FOR ADMISSION NO. 41. Admit that the firm advertised that Defendant Elliott Williams was, on May 5, 2005, general counsel to UMIA.

REQUEST FOR ADMISSION NO. 42. Admit that Defendant Elliott Williams is a close personal friend of the President of UMIA, Martin Oslowski.

REQUEST FOR ADMISSION NO. 43. Admit that the firm, its employees or agents, requested UMIA to remove Plaintiff Gary Ferguson as attorney for cases he had previously been defending.

REQUEST FOR ADMISSION NO. 44. Admit that the firm, its employees or agents requested that UMIA not assign any new work to Plaintiff Gary Ferguson.

REQUEST FOR ADMISSION NO. 45. Admit that the firm, its employees or agents provided new counsel from the firm to represent those UMIA insured who had previously been represented by Plaintiff Gary Ferguson.

REQUEST FOR ADMISSION NO. 46. Admit that Defendant Elliott Williams told the President of UMIA, Martin Oslowski, he could no longer trust Plaintiff Gary Ferguson's bill.

REQUEST FOR ADMISSION NO. 47. Admit that Defendant Elliott Williams told the President of UMIA that Plaintiff Gary Ferguson had over-billed UMIA for the firm's representation.

REQUEST FOR ADMISSION NO. 48. Admit that the firm, its employees and agents discussed with employees or agents of UMIA the question of whether or not UMIA had been over-billed by the firm for Plaintiff Gary Ferguson's representation of its physician insureds.

REQUEST FOR ADMISSION NO. 49. Admit that a representative of UMIA advised the firm that UMIA would likely seek reimbursement for any over-billed amount.

REQUEST FOR ADMISSION NO. 50. Admit that a representative of UMIA advised the firm, its employees or agents that UMIA would need to review evidence purporting to show that Plaintiff Gary Ferguson had over-billed UMIA.

REQUEST FOR ADMISSION NO. 51. Admit that a meeting occurred between UMIA representatives and the firm's representatives to discuss the issue of whether or not it had been over-billed by the firm for work done by Plaintiff Gary Ferguson.

REQUEST FOR ADMISSION NO. 52. Admit that the only documentation provided to representative of UMIA, purporting to support the allegation Plaintiff Gary Ferguson had over-billed for his time representing UMIA insureds, was a document purporting to show when Plaintiff Gary Ferguson was working at his computer.

REQUEST FOR ADMISSION NO. 53. Admit that Defendants advised UMIA representatives that Plaintiff Gary Ferguson's computer time records did not match his billing times.

REQUEST FOR ADMISSION NO. 54. Admit that Defendants advised UMIA representatives that Plaintiff Gary Ferguson's computer was not always "turned on" when his billing records reflected he was working on UMIA business.

REQUEST FOR ADMISSION NO. 55. Admit that prior to meeting with UMIA representatives on or about May 20, 2005, the firm, its employees or agents had not received any complaint from any representative of UMIA concerning the time billed by the firm for work done by Plaintiff Gary Ferguson on behalf of UMIA insureds.

REQUEST FOR ADMISSION NO. 56. Admit that at the time it terminated Gary Ferguson, the firm did not refund any money to UMIA based on the alleged over-billing by Plaintiff Gary Ferguson.

REQUEST FOR ADMISSION NO. 57. Admit that UMIA did not demand reimbursement for any time that had been billed by Plaintiff Gary Ferguson.

REQUEST FOR ADMISSION NO. 58. Admit that at the time it terminated Plaintiff Gary Ferguson, the firm had advertised Gary Ferguson to be a skilled, medical malpractice defense attorney.

REQUEST FOR ADMISSION NO. 59. Admit that representatives of the firm advised representatives of Siegfried & Jensen it would move to disqualify Siegfried & Jensen on any case in which the firm represented a defendant, if it hired Plaintiff Gary Ferguson.

REQUEST FOR ADMISSION NO. 60. Admit that prior to May 2005, cases within the firm were not the subject of firm-wide meetings.

REQUEST FOR ADMISSION NO. 61. Admit that the one potential conflict case between the firm and Siegfried & Jensen, assuming Plaintiff Gary Ferguson went to work for Siegfried & Jensen, was the Pack case.

REQUEST FOR ADMISSION NO. 62. Admit that it was agreed by Plaintiff Gary Ferguson and Siegfried & Jensen the case would be referred to outside counsel so there would be no conflict if he took a position of employment with Siegfried & Jensen.

REQUEST FOR ADMISSION NO. 63. Admit that Plaintiff Gary Ferguson had no personal knowledge of any other firm cases such that would have disqualified Siegfried & Jensen from representation against the firm based on its employment of Plaintiff Gary Ferguson.

REQUEST FOR ADMISSION NO. 64. Admit that the firm ultimately withdrew its objection to Plaintiff Gary Ferguson's employment with Siegfried & Jensen.

REQUEST FOR ADMISSION NO. 65. Admit that the firm ultimately conceded there was no real or imagined conflict that existed to prevent Plaintiff Gary Ferguson from becoming employed with Siegfried & Jensen.

REQUEST FOR ADMISSION NO. 66. Admit that prior to 2005, Elliott Williams had told a person he intended to fire Plaintiff Gary Ferguson and remove him as a shareholder in the firm.

REQUEST FOR ADMISSION NO. 67. Admit that Defendants told other firm employees that Gary Ferguson had been fired.

REQUEST FOR ADMISSION NO. 68. Admit that the Defendants gave a reason for the firing of Gary Ferguson to other firm employees.

REQUEST FOR ADMISSION NO. 69. Admit that the reason provided to other employees for Plaintiff's firing was that he had over-billed firm clients.

REQUEST FOR ADMISSION NO. 70. Admit that prior to May 2005, no other lawyer's time and billing records had been subjected to a review by the firm to determine whether time billed matched time logged into the firm's computer system.

REQUEST FOR ADMISSION NO. 71. Admit that prior to May 2005, Elliott Williams time and billing records had not been subjected to a review by the firm to determine whether time billed matched time logged into the firm's computer system.

REQUEST FOR ADMISSION NO. 72. Admit that prior to May 2005, George Hunt's time and billing records had not been subjected to a review by the firm to determine whether time billed matched time logged into the firm's computer system.

REQUEST FOR ADMISSION NO. 73. Admit that prior to May 2005, Kurt Frankenburg's time and billing records had not been subjected to a review by the firm to determine whether time billed matched time logged into the firm's computer system.

REQUEST FOR ADMISSION NO. 74. Admit that prior to May 2005, Jody Burnett's time and billing records had not been subjected to a review by the firm to determine whether time billed matched time logged into the firm's computer system.

REQUEST FOR ADMISSION NO. 75. Admit that prior to the Plaintiff's termination, some of the firm's attorneys use laptop computers for firm work outside the office.

REQUEST FOR ADMISSION NO. 76. Admit that work done for the firm, on behalf of the firm's clients, no matter where, may be billed whether the billing person is signed into the firm's computer system or not.

REQUEST FOR ADMISSION NO. 77. Admit that the firm has no eyewitness to a time that UMIA was billed for work done by Gary Ferguson who contradicts the assertion by the billing that Ferguson had done the work for that client.

REQUEST FOR ADMISSION NO. 78. Admit that before the Plaintiff was fired, attorneys at the firm were permitted to do a batch entry of their time into the billing system.

REQUEST FOR ADMISSION NO. 79. Admit that before the Plaintiff was fired, there was no requirement by the firm that any attorney remain logged into the computer system while working on firm business.

DATED this 30th day of November, 2006.

THE SPENCE LAW FIRM, LLC

Mel Orchard III
Attorney for Plaintiffs

~~PETERSON LAW OFFICES~~

Charles F. Peterson
Attorney for Plaintiffs

~~WALL LAW OFFICES~~

Edwin S. Wall
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2006, I caused a true and correct copy of
the foregoing to be mailed, first class postage prepaid thereon, ^{and faced} to the following:

M. David Eckersley
Prince, Yeates & Geldzahler
175 East 400 South, Suite 900
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to be 'CFP', written over a horizontal line.

Charles F. Peterson

RECEIVED
DEC 18 2006

FILED
JUNIOR DISTRICT COURT
06 DEC -8 AM 10: 04
POLICE DEPARTMENT
BY _____
DEPUTY CLERK

NOTICE OF SERVICE OF DISCOVERY REQUESTS - 1

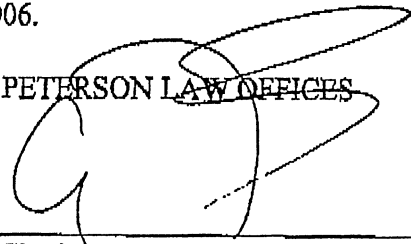
NOTICE IS HEREBY GIVEN that on the 1st day of December, 2006, a true and correct copy of the Plaintiff's First Set of Requests for Admission to Defendants and a copy of this NOTICE OF SERVICE OF DISCOVERY REQUESTS, were served as indicated and addressed as follows:

M. David Eckersley
Prince, Yeates & Geldzahler
175 East 400 South, Suite 900
Salt Lake City, UT 84111

☒ by U.S. MAIL
☐ by HAND DELIVERY
☐ by FACSIMILE
☐ by OVERNIGHT MAIL

DATED this 5th day of December, 2006.

PETERSON LAW OFFICES



Charles F. Peterson
Attorney for Plaintiffs

Exhibit E

CONDENSED TRANSCRIPT COPY

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

GARY B. FERGUSON and JULIE A.	)	Videotaped
FERGUSON,	)	Deposition of:
	)	<u>GEORGE A. HUNT</u>
Plaintiffs,)	
)	
vs.	)	Case No. 050921677
	)	Judge Medley
WILLIAMS & HUNT, INC., ELLIOTT)	
J. WILLIAMS, GEORGE A. HUNT,)	
BRUCE H. JENSEN, and KURT)	
FRANKENBURG,)	
)	
Defendants.)	
)	

July 17, 2006 * 1:01 p.m.

Location: CitiCourt
170 South Main Street, Suite 300
Salt Lake City, Utah 84101

Reporter: Susie Lauchnor, CSR, RPR

Notary Public in and for the State of Utah



CitiCourt, LLC
THE REPORTING GROUP

170 South Main Street, Suite 300
Salt Lake City, Utah 84101

SHEET 1

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

GARY B. FERGUSON and JULIE A. FERGUSON,)
Plaintiffs.)
vs.)
WILLIAMS & HUNT, INC., ELLIOTT J. WILLIAMS, GEORGE A. HUNT,)
BRUCE H. JENSEN, and KURT FRANKENBURG,)
Defendants.)

Videotaped
Deposition of:
GEORGE A. HUNT

Case No. 050921677
Judge Medley

July 17, 2006 * 1:01 p.m.

Location: CitiCourt
170 South Main Street, Suite 300
Salt Lake City, Utah 84101

Reporter: Susie Lauchnor, CSR, RPR
Notary Public in and for the State of Utah

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1	EXHIBITS	
2	NO.	DESCRIPTION
3	1	Complaint and Jury Demand
4	2	Answer of Defendants Williams & Hunt, Inc., Elliott J. Williams, George A. Hunt and Kurt Frankenburg
5	3	Printout from Web Site
6	4	Compensation/Revenue Four Year Breakdown and Partner Productivity/Compensation 2000-2004
7	5	Williams & Hunt Billing Rates
8	6	Statement of Account, Lynn Robb vs. Richard Cox, M.D., et al.
9	7	Williams & Hunt Timekeeper Diary
10	8	List of Log-In and Log-Off times
11	9	Meeting Notes
12	10	Williams & Hunt Employee Handbook 2005
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A P P E A R A N C E S

FOR THE PLAINTIFFS:
Charles F. Peterson, Esq.
PETERSON LAW OFFICES
913 West River Street, Suite 420
Boise, Idaho 83702-7081
(208) 342-4633

FOR THE DEFENDANTS:
M. David Eckersley, Esq.
PRINCE, YEATES, & GELDZAHLER
175 East 400 South, Suite 900
Salt Lake City, Utah 84111
(801) 524-1000

ALSO PRESENT:
Max Nelson, Videographer

-oOo-

GEORGE A. HUNT: I N D E X
Examination by Mr. Peterson

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P R O C E E D I N G S

MR. PETERSON: Yes, my name is Charles Peterson. I practice in association with the Spence Law Firm out of Jackson, Wyoming and we represent Gary B. Ferguson, the plaintiff in this case.

MR. ECKERSLEY: And I'm David Eckersley. I represent the defendants.

GEORGE A. HUNT,

called as a witness, being first duly sworn,
was examined and testified as follows:

E X A M I N A T I O N

BY MR. PETERSON:

Q Just for the record, sir, would you go ahead and identify yourself?

A My name is George A. Hunt.

Q Mr. Hunt, what do you do for a living?

A I'm a lawyer.

Q Are you also a principal in Williams & Hunt, Incorporated?

A Well, yes, I'm a shareholder. That's not

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the correct name of the firm. It's just Williams & Hunt.

Q Williams & Hunt?

A A Professional Corporation.

Q Okay. Now, are you a defendant in this lawsuit?

A Yes.

Q By "this lawsuit" I'm talking about Gary B. Ferguson, and formerly it was and Julie A. Ferguson, versus Williams & Hunt, Inc., Elliott J. Williams, George A. Hunt, Bruce H. Jensen and Kurt Frankenburg, correct?

A Yes.

MR. PETERSON: Would you mark this as Deposition Exhibits 1 and 2, please?

(EXHIBITS-1-2 WERE MARKED.)

MR. PETERSON: I maybe gave you too much. There we go. Thanks.

Q (BY MR. PETERSON) Mr. Hunt, I'm showing you now what has been marked as Deposition Exhibit 1. Do you recognize that?

A Yes.

Q Have you reviewed it?

A Yes.

Q Would you go ahead and tell -- identify

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what it is, please?

A It's the Complaint and Jury Demand in the case that's the subject of this deposition.

Q Great. And now Exhibit 2, Deposition Exhibit 2, do you know what that is?

A It appears to be a copy of the answer that Mr. Eckersley filed on behalf of the defendants.

Q All right. And would you take a look at that, briefly, and make sure that it is a true and accurate copy, as best you recall, of the answer that was filed?

A It appears to be.

Q Had you reviewed that document prior to its filing?

A I think so.

Q Okay. Now, I want to ask you some questions about the answer that was filed in this case, but before we do that, maybe if we could just go through some background information.

Can you tell me how long you've been practicing law?

A Since September 1974.

Q And your primary practice would be what?

A Litigation and some real property and transaction work. It's a mix.

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Q Okay. I noticed, in looking at the Martindale site for your law firm, that you seem to emphasize, at least in part, medical malpractice. I take it mostly defense work?

A For the firm, yes.

Q Okay. And are you involved in medical malpractice defense work yourself?

A No.

Q How big a -- how big a law firm is it?

A Well, it depends on the day you ask, I suppose. Today we have seven lawyers.

Q Okay. Let's go back to May of 2005 at the time that Gary Ferguson was an employer -- an employee, excuse me, of the law firm. How big was it then?

A I think nine.

Q Okay. Now --

A Ten, actually.

Q Ten, okay. And how many staff members in the law firm?

A I'd have to count. We generally sit around 25 to 26 employees, including lawyers, so...

Q Okay.

A Fifteen, 16 staff people. Not all full-time. We have a couple of part-time staffers.

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Q You've mentioned that Gary -- or I asked you about Gary being an employee. Gary was, in addition to an employee at the firm, he was also a shareholder, wasn't he?

A That's correct.

Q Do you know whether or not he also served as a director?

A Technically, I don't think he did. In looking at our minutes and so forth, I think the only directors were myself and Elliott Williams and Jody Burnett and Bruce Jensen. But I think as a practical matter he was treated as a director because we would have board meetings and he would attend, as would the other shareholders.

Q Do you recall how long he was employed by Williams & Hunt?

A Fourteen years and one month, I would guess.

Q Okay. In reading your -- the answer in this case, as well as some documents that were produced in discovery, I noticed, or it appears at least, that your firm takes the position that all employees are essentially terminable at will; is that accurate?

A That's correct.

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SHEET 2

1 Q Describe for us, if you would, what you
2 consider to be terminable at will.

3 A Well, I believe that it means that the
4 employment of any individual has no specified term.
5 They could be dismissed at any time for any reason.

6 Q And if they were to be dismissed, if an
7 employee who was a lawyer was to be dismissed by
8 Williams & Hunt, who would make that decision?

9 A Well, typically it was -- the way we
10 operated, as a practical matter, was we would have a
11 board meeting and it would be addressed by the board,
12 either in a meeting or through polling, if you will,
13 so that everyone's input was obtained. We, in fact,
14 did that I think with most employees, not just
15 lawyers.

16 Q Okay. All right. You undoubtedly have a
17 Juris Doctorate degree?

18 A That's correct.

19 Q From?

20 A University of Utah.

21 Q University of Utah, okay. Do you belong
22 to any professional organizations?

23 A Yes, Utah Bar Association, American Bar
24 Association, Salt Lake County Bar Association.

25 Q Published any articles or books?

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1 A I published a few articles in the bar
2 journal, just a couple maybe.

3 Q Okay. What subjects?

4 A One I remember on mechanics liens.
5 Another one, I think, was on land use.

6 Q Is your emphasis personally in the
7 practice more of a real estate, land use kind of bent
8 as opposed to a medical malpractice defense?

9 A It is.

10 Q Have you ever been involved as an attorney
11 in a defamation case?

12 A I'm sure I have -- I have defended a
13 couple, maybe even been plaintiff's counsel in a
14 couple. No specific names jump to mind, but I think
15 over 33 years I probably have.

16 Q All right. I understand. And the same
17 with respect to intentional interference with
18 prospective business relations or economic relations,
19 whatever the tort is, however it's designated in Utah?

20 A Yes.

21 Q Same answer?

22 A Yes.

23 Q Okay. And have you ever been sued before?

24 A Yes.

25 Q And have you ever been deposed before?

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1 A Yes.

2 Q Just some general information, what you
3 were -- when and what the lawsuit was about.

4 A Well, once was a divorce.

5 Q Okay.

6 A And the other one was a suit down in Las
7 Vegas that involved some real property that I had
8 developed with some partners and it was one of those
9 Nevada construction defect cases that you probably
10 have heard about.

11 Q All right. So not sued in your capacity
12 as a lawyer but sued -- well, perhaps, in term of this
13 real estate development, but nothing similar to this
14 sort of case?

15 A No.

16 Q Okay. Undoubtedly when you were in law
17 school, though, you took courses in defamation,
18 slander, that sort of thing, if you took a torts
19 course?

20 A That's correct.

21 Q By your understanding, could you give us a
22 general description of what you believe the tort of
23 defamation constitutes?

24 A Honestly, Mr. Peterson, I'm not here to
25 give you legal advice. I'm here to testify about the

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1 facts.

2 Q Yeah, I understand that. You can go ahead
3 and answer the question, if you can.

4 A Defamation, I think, is a false statement
5 about -- published to a third person about the
6 plaintiff that damages that person specifically. And
7 if it's about the person's trade or business, then
8 damage is presumed.

9 Q And we call that -- we might call that
10 words that are defamatory, per se; is that right?

11 A Well, I think in Utah we just call it
12 business defamation.

13 Q Great, thank you. All right. Now, is it
14 fair to say that at the time that Mr. Ferguson was
15 employed by Williams & Hunt the bulk of his practice
16 involved the defense of civil actions?

17 A Depends on how you define bulk. Gary had
18 handled a couple of plaintiffs' cases where he billed
19 a lot of time for those as well.

20 Q Okay. Williams & Hunt, in terms of its
21 civil practice -- you don't do any criminal work, I
22 take it?

23 A That's correct.

24 Q And in 2005, do you know how many
25 plaintiffs' cases that you were carrying? The firm,

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not you personally.

A Oh, probably five or less.

Q Not a large percentage of your practice?

A No.

Q And, likewise, with respect to the work that you do in civil cases, I take it that most of this is insurance defense work?

A Well, yes, but not how you would normally classify insurance defense.

Q Okay. Tell me about that.

A Well, our insurance clients are specialized in the sense that the insureds also own the insurance company. So UMIA for physicians is a physician-owned insurance company. URMMA is a local government insurer that's owned by its insureds. The same thing with Utah Local Governments Trust. They're essentially -- they're technically insurance companies, but they're owned by their insureds. They're a mutual, so to speak.

Q Okay. How big a client is UMIA, or was it in 2005?

A It probably accounts for 60 to 65 percent of our billings.

Q What about URMMA?

A It's probably -- well, it varies depending

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on which cases we're handling for it. But between UR -- URMMA we call it.

Q Okay.

A And ULGTs, the trust, that probably accounts for another 20 to 25, depending on the cases that are active at the time.

Q Understandably that would vary year to year?

A Sure.

Q Okay. Does the firm engage in any business development practices to cultivate work, medical malpractice defense work?

A Not particularly -- well, that's not fair. We attempt to keep our existing clients happy and we develop the work that way. But we're not looking for new insurance companies to represent, if that's your question.

Q Okay. With respect to UMIA, I noticed at one point, even without looking at the complaint, I alleged that -- or Mel did, one of our -- I think whoever drafted the complaint, Mel alleged that UMIA was -- no, that Elliott Williams was the general counsel for UMIA, and the answer says something to the effect that, no, that's not accurate, that actually it's the law firm that is the general counsel for

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UMIA. Is that the case?

A I suppose you'd have to ask UMIA that question. They consult more lawyers than just Elliott. For example, I've provided legal advice of a business nature to UMIA on many occasions. And if it's a business related issue, then Marty Oslowksi, or one of the other employees at UMIA, will talk with me. If it's a med mal issue they'll usually talk to Elliott, or even an insurance-related issue, because those are his specialties.

As far as I know, there's not a written document in our firm that says who it is.

Q Is it your general understanding that Mr. Williams is the general counsel for UMIA?

A Well, I guess in a general sense, yes. You're talking about individuals, yeah.

MR. PETERSON: Yeah. We'll mark this as Deposition Exhibit 3, please.

(EXHIBIT-3 WAS MARKED.)

Q (BY MR. PETERSON) Deposition Exhibit 3 is a printout of one of the attorney profile pages from your Web site. Your firm Williams & Hunt has a Web site, right?

A Yes.

Q And undoubtedly you've seen it?

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A Yes.

Q Take a look at the second paragraph. This is for Elliott Williams. You'll see it says in the first sentence, or the first line of the second sentence, "He is general counsel and" -- actually, it printed badly, so what it says is "Lead defense counsel for the Utah Medical Insurance Association." That would be accurate, wouldn't it?

A Yeah.

Q Okay. Thank you. What's your relationship with Mr. Oslowksi?

A Well, he's been the chief executive officer of our primary client for a long, long time. I've known Marty since even before that time when he was an adjustor for Aetna insurance company back in the '70s.

Q Would you say that he is a close friend?

A Not a close friend, but he is a friend of many years standing. I don't do a lot socially with him, but I see him periodically at events and I've known Marty for a long time and his wife Deanne and their children.

Q All right. What about Gary, what was your relationship like with him prior to May the 5th of 2005?

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SHEET 3

1 **A** Well, he was a partner and a friend.
 2 **Q** Did you spend time together as friends?
 3 **A** At the firm, primarily. I've been to his
 4 home a couple of times when he's had little receptions
 5 or parties. That's pretty much the nature of the
 6 relationship.
 7 **Q** All right. Now, with respect to UMIA, are
 8 there other -- to the extent you know the answer to
 9 this, are there other law firms in Salt Lake that do
 10 medical insurance defense work -- or medical
 11 malpractice defense work, excuse me, for UMIA?
 12 **A** Yes. Yes.
 13 **Q** Okay. And those law firms, could you
 14 identify those for me, to the extent you know them?
 15 **A** Well, Strong & Hanni, Phil Fishler and
 16 Scott Williams; Kipp & Christian, Tony Eyre and Shawn
 17 McGarry. Let's see. Those are the primary firms. I
 18 think, on occasion, if you get a case with a lot of
 19 defendants where there are conflicts issued, they will
 20 hire lawyers outside of those firms, but it would be
 21 the unusual situation.
 22 **Q** And I take it that the way that those
 23 firms come into the defense in a case, generally, is
 24 that you have more than one doctor or perhaps -- does
 25 UMIA also cover hospitals?

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1 **A** Not in Utah.
 2 **Q** Okay.
 3 **A** Well, I take that back. They didn't -- I
 4 believe that this year they may have picked up a
 5 couple of small hospitals in the rural areas, but I'm
 6 not certain about that. But in Montana, for example,
 7 they do insure some hospitals.
 8 **Q** So, generally, multiple defendant cases,
 9 is that where another law firm would become involved?
 10 **A** Well, there, but also if the particular
 11 physician being sued has a history of being defended
 12 by one of the other lawyers in one of the other firms,
 13 then that physician has the -- I don't know if it's
 14 the right, but the privilege, I guess, of requesting a
 15 lawyer with whom he or she is comfortable and
 16 familiar.
 17 **Q** All right. With respect to Mr. Ferguson
 18 and his work at the firm, what -- if you know, what,
 19 generally, would you -- how, generally, would you
 20 describe his practice? What was his source of work?
 21 **A** Well, it depends on the point in time.
 22 When the firm began he had some insurance defense
 23 files that he had been handling at his previous firm,
 24 Richards Brandt, and he brought some work over to the
 25 firm and that was primarily, I believe, Aetna

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1 insurance files and perhaps some others, but he had
 2 some of his own insurance defense work that was sort
 3 of typical personal injury defense work. And then
 4 over time his -- I think the nature of his work
 5 changed and he gradually moved into the medical
 6 malpractice defense area and that -- he just sort of
 7 transitioned into that, as well as handing two or
 8 three plaintiffs' cases that he had brought in.
 9 **Q** So in 2005, if we were to look at January
 10 until May of 2005 when he leaves the firm, would it be
 11 fair to say that the bulk of his work was medical
 12 malpractice defense work?
 13 **A** Yes.
 14 **Q** And would it be fair to say that the bulk
 15 of that work involved UMIA files?
 16 **A** I think that's correct.
 17 **Q** Now, generally, with respect to Gary's
 18 work during 2005, let me ask you, did you have
 19 complaints about the nature of his defense work from
 20 any physician?
 21 **A** Not that I'm aware of.
 22 **Q** Did you have complaints about his defense
 23 work from UMIA?
 24 **A** No, I don't believe.
 25 **Q** How many other attorneys in your firm in

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1 2005 would have been working on UMIA cases?
 2 **A** Let's see. Five.
 3 **Q** Five others with Gary, so six total?
 4 **A** Yeah.
 5 **Q** So six total of the 10 lawyers or so?
 6 **A** Correct.
 7 **Q** Which, I guess, is actually about what you
 8 said, 60 percent of the revenue, so about six lawyers'
 9 worth of time?
 10 **A** Correct.
 11 **Q** All right. Do you have the complaint in
 12 front of you, or could you take it for just a minute
 13 and we'll take a look at it?
 14 **A** Yes, I have it here.
 15 **Q** Thank you. I'd like to go, if I can,
 16 first of all, if you would turn to paragraph 22 in the
 17 complaint. Excuse me, I don't want to -- I want to go
 18 back before that, I apologize. Let's go back to 18.
 19 Now, in paragraph 18 it's alleged as
 20 follows: It says, "Over the course of Ferguson's
 21 employment with the firm, partners were increasingly
 22 expected to spend time after the workday socializing
 23 and drinking together. This expectation was so
 24 fostered by the firm's senior shareholders that
 25 ultimately the firm built its own bar within the

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office and stocked it with alcoholic beverages. Employees, including Ferguson, were expected to drink with Williams & Hunt in order to be 'part of the team.'"

Now, in your answer to this particular paragraph, at paragraph seven this is what your -- this is what the answer says. "Defendants admit the allegation contained in paragraph 18 that there is a bar in the firm premises but denies the remaining allegations contained in paragraph 18 of the plaintiffs' complaint."

First, the bar itself, the bar was built at some point during the time that the firm was in existence, I take it? You rebuilt a room or did something; is that correct? How did that come about?

A Well, I think in our third expansion we took some -- about 1,600 square feet of space on the east side of the building. And the building is not a square building and the last about 400 square feet of the building was essentially a triangle, a little point.

Q Sure.

A It was not particularly usable for an office because of its shape and size and whatnot and so -- but the building wanted us to take it in order

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to square up other space. So we decided to do that and determined that a lounge would be a good use for that because our kitchen was very small and it got crowded and we wanted a place where we could put a television and be a little more comfortable. So that -- and plus we enjoyed spending time together after work, visiting and socializing. And so that prompted the decision to build the lounge.

Q Okay. Now, it is fair to say that after work there was time spent among the partners, at least, socializing, drinking together in the lounge?

A Well, that's correct, but it wasn't exclusive to the partners. I mean, we would often invite staff and others to come in.

Q Including other lawyers, correct?

A That's correct.

Q From other law firms?

A Correct.

Q And it is correct -- in the paragraph where it's alleged that the bar is stocked with alcoholic beverages, that part is also correct, isn't it?

A Yes, it's stocked with alcoholic beverages and nonalcoholic beverages.

Q Sure.

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A And ice and the usual.

Q Maybe some snacks?

A Yes.

Q All right.

A Indeed.

Q Okay. And I take it the law firm pays for the costs associated with stocking the lounge?

A Correct.

Q All right. Now, do you disagree with the assertion, then, that employees were expected to drink to be part of the team?

A I do disagree with that characterization.

Q Okay.

A They were welcome to participate if they wished.

Q Did either you or someone else go around the offices -- let's do it this way. It's a poorly worded question. Did you go from office to office on occasion after work and invite people to come into the lounge?

A Well, as I was walking toward the lounge, as they were sitting there I would let them know I was going to have a cocktail if I was in the office and if I was going to the lounge.

Q I understand. I understand. All right.

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Now, in 2004 did things change with respect to Mr. Gary Ferguson's participation in the lounge, the nightly sort of lounge activities? And I improperly characterized it as nightly. That might not be fair.

A Well, actually it was in 2003.

Q Okay. Tell me about that.

A Well, Gary was working on a plaintiff's case in 2003 and in -- he was billing a lot of time to it. And in June of 2003 I sent an e-mail to the board indicating that we had had to hit the credit line in order to meet payroll and that there were a few reasons why we had to do that and one of them was the fact that Gary was putting a lot of time into a plaintiff's case and was not generating income at that time.

And so, in any event, Gary reacted to that and was angry that I had sent it. And so during the course of that summer he was upset and, as a result of that, he quit socializing, not just in the lounge, but at lunch and otherwise with us for quite some time until he finally, about a year later, for some reason just started socializing again.

Q So he began socializing again in 2004 at some point?

A That's correct.

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SHEET 4

1 Q And then was that during the summer of
2 2004?

3 A Oh, heavens, I can't remember exactly. I
4 just remembered that after about a year he started
5 socializing again until the next incident.

6 Q All right. And would your e-mail have
7 been sent on May the 30th, 2003?

8 A Could have been.

9 Q If I show you one -- I don't have a hard
10 copy, but if I just show you a copy would that help to
11 refresh your memory, perhaps?

12 A Sure.

13 Q Okay. Can you see it okay?

14 A Yeah. Yeah, that's it.

15 Q Okay. So 2003, May the 30th, and it
16 says -- this is to you. And I take it -- it says to
17 the board, so probably all of your attorneys
18 essentially.

19 A No, the associates would not have been
20 included.

21 Q Okay.

22 A Just the shareholders.

23 Q Shareholders. "I was required to tap the
24 credit line today to meet payroll. This is the second
25 time this year and only about the fourth time in the

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1 12-year history of the firm I've had to do this. The
2 reason for it is threefold. UMIA has not paid us this
3 month, ULGT has withheld paying the \$50,000 bill on
4 the Summit County case and we now have over \$227,000
5 invested in the Pullen case, which costs us money and
6 takes Gary away from paying work."

7 And then the next paragraph says, "Each of
8 us needs to check receivables and call clients who are
9 in arrears. In addition, Gary needs to be as frugal
10 on the Pullen case as possible because every hour
11 invested in that case is also an hour where no regular
12 cash flow is generated. Let's pull it all together,
13 folks, and sometimes clients need to be kicked in the
14 ass. Thanks."

15 A fairly common kind of letter that a guy
16 managing a law firm might send?

17 A Well, I think so.

18 Q Okay. All right. He took offense to it,
19 apparently?

20 A Yes, he did.

21 Q And do you recall what the reason was that
22 he took offense to it?

23 A Well, I don't know. I mean, he's the only
24 one that really knows that. My impression was that he
25 felt he had somehow been singled out, that we were

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1 picking on him or something, and then he was -- the
2 case was getting close to a mediation or something and
3 he thought the timing was bad. That's what I
4 recollect.

5 Q All right. I take it the two of you
6 patched it up?

7 A Well, yeah. It took some time. I mean,
8 he was -- he had his door closed for several months.

9 Q Really? Well, let me show you, see if
10 this helps to refresh your memory. This is an e-mail
11 from you and then his response on June the 2nd. It
12 begins with, "George, thanks for the apology."

13 A Yeah, I recall that response, but that
14 didn't patch it up.

15 Q Okay. All right. So let's go, then, to
16 2005. I -- in paragraph 19 I said, "At some point in
17 late 2004 or early 2005, Ferguson stopped his
18 involvement in the nightly drinking and voiced his
19 opposition to this nightly ritual. He became
20 estranged from Williams & Hunt as a result."

21 Is it your recollection that in 2004 or
22 2005 he stopped or continued going to kind of the
23 evening sessions?

24 A Well, it wasn't -- it was a stop-start
25 kind of thing, and I didn't really keep track of it

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1 with any process. I mean, he just -- what I noticed
2 is that if he was angry at us he would not socialize
3 with us and then when he got over being angry at us
4 that he would start socializing again.

5 Q Sort of like everybody else, I take it?

6 A Well, it was more pronounced than
7 everybody else because nobody else in the firm stayed
8 angry as long as he did.

9 Q Okay.

10 A Or at least that's how it seemed to me.

11 Q Now, would it be fair to say that he had
12 become estranged from you by early 2005?

13 A Well, I think he -- it would be more
14 accurate to say he would periodically isolate himself
15 from everybody in the firm, not just me.

16 Q Okay.

17 A He would shut his door and then he
18 wouldn't interact with us.

19 Q In paragraph 20 of the complaint it says,
20 "During the spring of 2004, Ferguson suggested to
21 Williams & Hunt that the firm hire an expert to advise
22 them on matters relating to sexual harassment," and it
23 talks about an incident in the complaint.

24 Was there an issue that arose in 2004 or
25 2005 that may have caused conflict between yourself or

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myself and Mr. Williams with Mr. Gary Ferguson?

A Well, yeah, but it wasn't this. I mean, what happened, as I recall, was that when we built out the 1,600-foot addition that I've been talking about, there were some new offices created along with the lounge and some central space and so forth, and one of those offices I put Janet Walker, our controller and office manager, in it, and Gary disagreed with that decision and said he thought that it should have been a board vote to decide who went in the office.

Personally, I thought that was more of an executive function than a policy decision. But to humor him I polled the board and the vote was five in favor, four against and one abstention, and so -- at least that's my recollection. I could be wrong about that.

But anyway, the decision stood and I think that bothered Gary because he sent an e-mail or two that indicated that he thought that that was a bad decision, or something of that nature.

Q So that would be -- is that in 2004 or 2005?

A I think it was the fall of 2004, but I could have my dates wrong.

Q And is that about when the remodel

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occurred?

A It seems to me it occurred before that, but I could have my years screwed up here.

Q Okay. All right. How was that all resolved, if it was?

A Well, by the vote.

Q Okay.

A And that was kind of the end of it and Janet moved to the office and continues to occupy it to this day.

Q Was there some issue that arose in 2004 or 2005 about hiring a person who would come in and advise the firm either on -- I guess paragraph 20 really talks about sexual harassment. Paragraph 21 talks about compensation. They may have been two separate issues, if I remember correctly.

A Well, my recollection about that is that we had discussions in at least one, if not more than one board meeting, about getting a consultant, but my understanding was that the consultant was to help us on sort of transition issues, because several lawyers of the firm were about the same age or exactly the same age as I am and Gary is, or was, and we were looking at going to be retiring, hopefully, at some point and we were concerned about how could we -- how

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1 could we posit the firm to be nimble in transitioning
2 from the older group of lawyers retiring and the
3 younger lawyers either taking over or, perhaps,
4 merging with another firm or selling to another firm
5 or how were we going to handle that. And none of us
6 had any great ideas.

7 I mean we had ideas, but this was
8 something we hadn't dealt with before and I think it
9 was of concern to everyone in the firm about how we're
10 going to do this, you know, how we're going to make
11 this happen.

12 And so there were suggestions made about
13 getting a consultant to have some help on that, some
14 advice, some input, and so we started looking around
15 to see if we could find a consultant.

16 Q All right. Now, so did these three
17 matters that we've just discussed, the Janet Walker
18 moving into the new office, the hiring of a consultant
19 with respect to this compensation issue, or the hiring
20 of a consultant to handle sexual harassment issues,
21 did any of those three affect your relationship with
22 Gary Ferguson by the first of 2005?

23 A Well, the consultant issue certainly
24 didn't. And as I've stated, the consultant issue was
25 not to deal with sexual harassment or compensation, it

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1 was to deal with long-term planning and transitioning.

2 But, you know, Gary's response in 2003 to
3 the Pullen case and his later response about the Janet
4 thing and then he -- we had a little tiff over one of
5 our paralegals, Nikki, and her salary, what it was
6 supposed to be and what the discussion had been about
7 setting her salary and so forth. That was part of a
8 concern that I started to have about Gary and how he
9 was interacting with the partners and how he was
10 acting, generally, in the firm.

11 Q Let's go, if we can, to paragraph 23 in
12 the complaint. This is the paragraph that says, "In
13 early March 2005, Ferguson went to Williams to talk
14 about a bill for his work for UMIA. In particular,
15 Ferguson wanted to know what the cutoff amount was for
16 monthly billing for UMIA as his prior month's bill had
17 exceeded \$22,000."

18 Do you remember, generally, this issue?

19 A Well, I do, but my understanding came
20 afterwards. I mean, I didn't -- I wasn't directly
21 involved in that case or Gary's interaction with
22 Elliott or anything of that nature. So I didn't know
23 it at the time. Obviously, I later become aware of
24 what was happening on that case.

25 Q Did Mr. Williams share with you in March

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SHEET 5

1 or April of 2005 any information relating to this
2 issue that had arisen about his, Gary's, billings and
3 UMIA?

4 **A Yes, he did. Let me back up just a little**
5 **bit because I think it's necessary to understand kind**
6 **of the situation we were where -- when this occurred.**

7 **In a firm our size, when the lawyers all**
8 **have access to data from our billing program that**
9 **shows how many hours they're billing, how many**
10 **hours -- how much money they're generating, that sort**
11 **of thing, and we watch that pretty carefully, and it's**
12 **also pretty obvious who's working hard, who is**
13 **vacationing hard, who's there, who isn't, and what's**
14 **going on. And particularly beginning at early 2005 we**
15 **noticed that billings he was writing down were very**
16 **high compared to the other lawyers in the firm, and**
17 **yet he was still spending time at his cabin in**
18 **Wyoming, taking time off, and so forth and it was**
19 **starting to become noticeable, just as a general**
20 **proposition, that he was outbilling, for example,**
21 **Bruce Jensen, who is now deceased. But Bruce**
22 **essentially lived at the firm. He worked seven days a**
23 **week because he was single, he didn't have a family**
24 **and he spent a lot of time there.**

25 **And this became noticeable, to me at**

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1 **least, and I think to the other lawyers that this kind**
2 **of thing was going on and --**

3 **Q When did it become noticeable to you?**

4 **A Well, it became very noticeable early in**
5 **2005, but there were times before that when it was**
6 **noticeable as well. I remember Jody Burnett who --**
7 **one of the partners who spends a lot of time in night**
8 **meetings with city councils and so forth, it became a**
9 **standing joke between him and Bruce Jensen that you'd**
10 **get to the end of the year and Gary would have billed**
11 **more hours than Jody and yet Jody worked -- worked at**
12 **the office a lot more hours, spent what we observed to**
13 **be a lot more hours dealing with client matters.**

14 **And so that became sort of a -- between**
15 **Bruce and Jody it was a kind of a joke.**

16 **Q Would that have been a joke that he would**
17 **have made in 2004?**

18 **A Well, I don't know. You would have to ask**
19 **them, but I just remember that as a general**
20 **proposition.**

21 **Q When do you remember that, that having**
22 **been the case?**

23 **A Well, for several years prior to the**
24 **termination.**

25 **Q Okay.**

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1 **MR. PETERSON: This will be Deposition --**
2 **MR. ECKERSLEY: I can write it on there,**
3 **Chuck.**

4 **MR. PETERSON: Okay. I can't remember**
5 **which one we're on. Four now is it? Okay.**
6 **(EXHIBIT-4 WAS MARKED.)**

7 **Q (BY MR. PETERSON) This is Deposition**
8 **Exhibit 4. And on the second page of Deposition**
9 **Exhibit 4 you'll see the number of billable hours,**
10 **number of collect -- it's actually not hours, it's by**
11 **dollars, starting in 2000 and going to 2004 by partner**
12 **and, perhaps, even associates. I'm not certain about**
13 **that. I guess you could tell me that. But also,**
14 **then, their compensations.**

15 **And the first page of the document shows**
16 **all timekeepers, 2001 to 2004 salary, distributions,**
17 **et cetera. This is part of that system that you've**
18 **just been talking about, I take it? Do you recognize**
19 **this?**

20 **A Yes.**

21 **Q Let's talk about the system, first of all.**
22 **To the extent you know, what sort of a computer system**
23 **do you use in the firm?**

24 **A You mean software?**

25 **Q Yeah. Well, let's -- let's start, I**

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1 **guess, with basics. I take it it's probably a Windows**
2 **system?**

3 **A It's a Windows operating system.**

4 **Q And you use Windows servers?**

5 **A Window software on Dell servers.**

6 **Q On Dell servers, right. And each attorney**
7 **have their own computer?**

8 **A Their own desktop, yes.**

9 **Q And do some of the attorneys have laptops**
10 **in addition?**

11 **A Yes.**

12 **Q Are those provided by the firm?**

13 **A Yes.**

14 **Q Now, I've seen in the discovery that**
15 **you've produced so far there are these log-in sheets,**
16 **and we'll go to them a bit later, but you know what**
17 **I'm talking about, these -- this report that prints**
18 **out when a person logged in and logged out?**

19 **A I'm familiar with that.**

20 **Q Okay. So tell me your firm practice about**
21 **how that works. When an attorney comes in in the**
22 **morning, they log in and then, I take it, they log out**
23 **when they leave? Is that the practice?**

24 **A Well, that particular program is not on at**
25 **all times. It has to be activated.**

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Q Okay. And is it activated -- was it activated starting in January of 2005?

A No.

Q Was it activated in February of 2005?

A No.

Q March of 2005?

A Probably. I'd have to look at it to be certain.

Q How did it come about that it got -- became activated?

A I think it became activated after Gary -- after Elliott looked at that bill and we started becoming concerned about the amount of time Gary was billing to the client versus the time he was spending in the office.

Q All right. Well, let me stop you for a moment. You just said, "I think it became activated." Did you have something to do with its being activated?

A Yeah.

Q What did you do?

A We asked our computer IT person to activate it.

Q And now what I'm asking is whether you did it specifically, whether you asked your IT person to activate it.

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A I was certainly involved in the decision. I don't remember whether I was the one who spoke to her or whether I asked Janet to ask her to do it or whether Elliott was present. I just don't -- I can't remember specifically, but I was involved in the decision.

Q Who is -- who was in -- at that time, who was your computer IT person?

A Tracy Willingham.

Q In-house or out-of-house, outside consultant?

A Well, she was an independent contractor, but she was essentially captive to our -- I think largely captive to our firm.

Q Okay. And so you asked her to start doing what? Tell us what you had --

A Just activated a program that tracked log-in and log-out times.

Q For everybody in the firm?

A No.

Q Just for Gary?

A Yes.

Q Did you have anyone else in the firm's log-in and log-out to compare to?

A At that time, no.

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Q At any time prior to the date on which Gary was terminated, or fired, left your employment, at any time before that had you used that program to monitor any other attorney's log-in or log-out times?

A I don't think so. I think we had used it before on a paralegal or two. That's just my best recollection.

Q Now, tell me, with respect to the program, do you -- and your computer system, I guess, so if Gary was not in the office but was working on a case, for example, I noticed during that billing cycle in March there's time where he spent away from the office in a deposition, what would the system reflect, if anything?

A Well, it depends on whether he turned his computer off or not before he left the office.

Q And if he didn't turn it off, then what?

A Well, if he stayed logged in, which happens sometimes, but not always, it would reflect that he was logged in. I mean, it's a very simple program. All it -- we have a local area network and if you want to get in and use the programs you don't just turn your computer on, you turn it on and then you log-in with your log-in name and a password.

Q Sure.

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A And then if you turn the computer off or log-out, then you log-out. And all this little program measures is logging in and logging out.

Q All right. Now, is it your firm practice -- was it your firm practice at that point to require attorneys to log-in every day when they came to work?

A Well, I don't know that it was a written policy, but it was essentially expected of everyone when they came in to log-in because we communicated a great deal by e-mail and you had to be logged in to get your e-mail, to check your calendar, to perform the functions that enabled you to work.

So I think it would be fair to say that everybody was expected to log-in and check their computer when they came into the office, unless they were immediately leaving or something like that.

Q All right.

A And I think that was the practice of everybody, as far as I know.

Q Now, have you had a chance to look at Deposition Exhibit 4?

A Yeah, I've scanned over it.

Q Have you -- do you know where this came from?

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SHEET 6

1 **A I think it was part of some handout**
2 **materials we used at the end of 2004, early 2005 just**
3 **to analyze performance and that sort of thing.**

4 Q Right. Just on a -- on the basis of what
5 you said earlier about Jody, I'm curious. This GAH
6 would be you I take it?

7 **A Correct.**

8 Q And I'm referring now to page two of
9 Deposition Exhibit 4. EJW would be?

10 **A Elliott.**

11 Q Mr. Williams?

12 **A Yes.**

13 Q BHJ would be?

14 **A Bruce Jensen.**

15 Q Bruce Jensen. And this is -- Mr. Jensen
16 is now deceased at this point?

17 **A Correct.**

18 Q JKB would be Jody K...

19 **A Burnett.**

20 Q Burnett. GBF would be Gary --

21 **A Correct.**

22 Q -- Ferguson. DCF?

23 **A Dennis Ferguson.**

24 Q Dennis Ferguson. KMF?

25 **A Kurt Frankenburg.**

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1 Q CSJ?

2 **A Carolyn Jensen.**

3 Q And RCK?

4 **A Rob Keller.**

5 Q All right. Do you all work 50-hour
6 weeks -- or 50-week years? For billing purposes do
7 you calculate your time, generally, on a 50-week
8 years? In other words --

9 **A No.**

10 Q No. Some of you take more time off than
11 others, I take it?

12 **A Right. Amongst the shareholders we didn't**
13 **say -- we didn't have a hard-and-fast rule about how**
14 **many days you could take off. It was dictated more by**
15 **sort of the self-policing mechanism.**

16 **We had assumed from the beginning of the**
17 **firm that everyone would be fair and work hard and**
18 **make it work.**

19 Q Sure. The way all firms sort of start,
20 right?

21 **A I guess.**

22 Q All right. So, now, this might be
23 simplistic, but in looking at the number of hours
24 billed, if we were to take 2004, it's obvious just
25 from looking that BHJ -- who is again? Now, I've

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1 drawn a blank.

2 **A Bruce Jensen.**

3 Q Bruce Jensen billed more hours, it looks
4 like -- or more time, excuse me, more dollars than
5 anybody else in the firm, right?

6 **A Yeah.**

7 Q \$473,326. And the recovered or collected
8 \$430,681. And I noticed, taking a look at your rate
9 charts, your billing rates, in 2004 -- Deposition
10 Exhibit 5.

11 (EXHIBIT-5 WAS MARKED.)

12 Q (BY MR. PETERSON) Are you familiar with
13 this particular exhibit?

14 **A Yeah.**

15 Q In 2004 Mr. Jensen's billing was \$240, so
16 a bit less than either yours or Mr. Williams, correct?

17 **A Correct.**

18 Q So if we were to take his revenues billed,
19 \$473,326 in revenues and divide those by the billable
20 rate at \$240, that's about 1,972 hours of billable
21 time. Then I divided that by 50 weeks which came up
22 to 39.44 hours per week or 7.88 hours per day. Sound
23 about right?

24 **A Well, I think your mathematics are**
25 **probably correct, but that's not exactly how we**

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1 **tracked this. Our Juris program has another commonly**
2 **used analytical tool we call a timekeeper analysis**
3 **that shows the hours that are billed, the money that**
4 **was billed, the money that was collected that month,**
5 **and it has much more detailed information.**

6 **Because these numbers, if you simply look**
7 **at the collections for the year, you might have -- for**
8 **example, in 2003 Gary's collections would have**
9 **reflected a substantial amount of money on the Pullen**
10 **case that we finally collected in 2003 that reflected**
11 **work that had been done, perhaps, two or three**
12 **years -- over two or three years' time.**

13 **So simply determining -- you know,**
14 **dividing the collections by the number of weeks in the**
15 **year or days in the week, or whatever, doesn't really**
16 **reflect accurately the time that may have been worked**
17 **during that year or even billed during that year.**

18 Q Well, first, with respect to the program,
19 tell me the name of the program you're using.

20 **A Juris.**

21 Q Juris, okay. And do you know what version
22 of Juris you were using in 2005?

23 **A We try to stay up with whatever is the**
24 **most recent.**

25 Q Whatever the current was. Okay. Good.

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11 right. And in terms of your -- I appreciate what you said about how you would compare those numbers, but as a point of comparison, this partner productivity compensation sheet showing the number of years, is this calculated by Juris?

A I don't think this one is. I think this is -- the data in it comes from Juris, but the report itself is one that Janet just designed probably on Excel or Quattro or something and created columns and put the numbers in.

Q Right. Now, the purpose of this, though, was to try and illustrate, was it not, the revenues that came in per partner, that that partner was responsible for, correct?

A Yes.

Q At least in part, was this related to what you've already discussed earlier, that you were having -- all of you at about the same age, starting to have these discussions of how do we get out, how do we make this transition?

A That was part of the overall discussion. I think it was, yes.

Q If you were to look at the number of dollars generated, either billed or collected, during this time period, are the figures that are in

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1 appear just as it appeared the year before, correct?

A It could.

Q Well, did you review Mr. Ferguson's billable hours in January of 2005?

A We review everybody's billables every month.

Q Do you bill on a monthly basis --

A Yes.

Q -- to UMIA?

A Yes.

Q And not on an every-two-month basis?

A Well, the way UMIA works is that the individual files are actually billed every three months, but they're staggered so that every month we have a group of UMIA files that get billed. And the only exceptions are if you happen to be working on a file where you're putting in a significant amount of time in one file, say, so that the fees get over \$10,000 in a given month, then sometimes an exception will be made and that file will be billed in successive months rather than every third month.

Q Not an unusual occurrence, probably, in your business?

A Well, no. It happens when you usually -- it usually happens when you're close to trial, is the

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1 Deposition Exhibit 4 -- those are figures that came, though, from your computer system, from the Juris system that we've just been talking about?

A I believe so, yes.

Q Mr. Hunt, just even assuming we used my method for a moment and we looked at your revenues, as opposed to Gary's, the same math produces about 6.55 hours a day of billable time for you. Does that sound about right?

A It's a mathematical calculation, whatever it comes out to be.

Q Okay. Fair to say that lawyer billable hours vary greatly by day to day? And that's your point, isn't it, that you can't really tell from looking at the math?

A Well, I think that's true as a general proposition, they vary.

Q And a lawyer might be very involved at the first part of a year in a particular case in which his revenues would -- his hours would go up, and apparently his revenues also, and then that might change as the year went on, correct?

A It's possible.

Q And so at the end of the year the number might be higher or lower on a daily basis, it might

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1 most typical time, when you're prepping for trial or having a trial.

Q Or if you're taking a lot of depositions?

A It can.

Q By the way, does your firm have an hour -- a minimum number of hours that you charge if you're out of the firm for a day, for example, for depositions?

A No.

Q So you would expect that the billings would relate to the actual number of hours that were spent on the client's time -- the client's case, correct?

A Yes.

Q All right. Well, do you recall when it was in March or April that you started running that program? I may have asked you this and I've just lost it in my own mind.

A I don't remember. I'd have to look at the actual start date on it.

Q Okay. And when did you get printouts, if at all? When did you get the information from those programs running?

A I'm not certain when I got it. What happened was we initiated it and then Elliott was

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SHEET 7

1 looking at that and Janet was providing it to him from
2 Tracy and then he was looking at it, and I think the
3 first time it was brought to my attention was probably
4 in late April when we got -- I got the results of it
5 and we talked about what it meant.
6 Q Who brought it to your attention?
7 A It was probably Elliott and/or Bruce or
8 both of them.
9 Q Bruce Jensen?
10 A Jensen.
11 Q All right. Now, let's go back a minute.
12 You said that Janet, that would be Janet Walker?
13 A Yes.
14 Q And she was functioning as a paralegal?
15 A No, she was the -- she was our office
16 manager slash controller.
17 Q Okay. And she would have talked to the IT
18 person, who was?
19 A Tracy Willingham.
20 Q Tracy Willingham, all right.
21 All right. So take me, then, to that time
22 in April when somebody brings to your attention
23 whatever it is about Mr. Ferguson's hours, whatever it
24 is they told you. What can you tell me about that
25 conversation?

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1 A Well, my recollection is that I saw the
2 report and it reflected some disparity between the
3 hours he would bill during a day and his log-in time.
4 Q So between the time that he billed and the
5 time that his computer was turned on?
6 A Right.
7 Q Now, if he left the office but went to
8 work on a client's case, for example, a deposition, I
9 take it the law firm would expect him to bill the
10 time?
11 A Well, sure. And we made allowance for
12 that as we examined the report because what we also
13 did is we looked at his calendar so we could tell what
14 he was doing.
15 Q Okay. Where did you get his calendar?
16 A We got it off the computer. It's kept on
17 the computer.
18 Q Off of his computer or is it kept on the
19 server?
20 A Well, it's kept on the server. The server
21 downloads the desktop every night.
22 Q Okay. And in addition to that did you
23 review the actual time and billing trail for
24 Mr. Ferguson? In other words, the actual time and
25 billing entries into Juris.

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1 A I think those were available. I can't
2 recall whether I -- they were on the bills, you know,
3 printed out on the bills.
4 Q So when -- can you isolate for me any
5 better when this would have happened they brought this
6 to your attention?
7 A It seems to me it was late April or early
8 May, but that's sort of my best recollection at this
9 point in time.
10 Q Okay. There had been an incident in March
11 of 2005 in which there had been some e-mail back and
12 forth between Mr. Ferguson and also Mr. Williams, is
13 that correct, about a bill?
14 A I think so, about the --
15 Q The March billing?
16 A The Merce bill, yeah.
17 Q Yeah. And what, if anything, do you know
18 about that?
19 A Well, I just know that Elliott told me
20 that he had -- that Gary had asked him if he would
21 review a bill that he was intending to send to UMIA
22 because it was one of those situations where I think
23 they had billed it the prior month and then there was
24 a big balance, or something like that, and he wanted
25 Elliott to take a look at it, which Elliott did, and

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1 Elliott said he'd asked some questions about an entry
2 and Gary had responded and then Elliott didn't do
3 anything and then the next morning Elliott came in and
4 there was an e-mail from Gary that was critical of
5 what Elliott had done or said, and I think Elliott
6 felt mischaracterized of what had occurred in their
7 meeting.
8 Q This is the e-mail about whether or not
9 Elliott was claiming that he had overbilled UMIA?
10 A Uh-huh (affirmative). Yeah, something
11 like that.
12 Q All right. Well, in April of 2005, do you
13 know whether or not Gary Ferguson took any time off?
14 A I think he went on a dive trip somewhere
15 during that month.
16 Q Okay. So do you know how many days he
17 would have actually worked in April of 2005?
18 A Not off the top of my head, no.
19 Q And with respect to the prior months,
20 January, February, and March, do you know how much
21 time he had taken off?
22 A Not without looking back at the records I
23 couldn't tell you.
24 Q Did you consider the amount of time he had
25 taken off during those three months when you were

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Looking at the records to decide whether or not he had overbilled anybody?

A Well, probably generally, but the analysis on the overbilling was much more specific than that.

Q All right. Tell me about that.

A Well, as I understand, we took the log-in data, we compared it to his calendar and then compared it to the specific entries of time that he had billed for during that period and we -- what we noticed was that in some of the days he had billed the client for activities that had to take place in the office and the amount of hours that were billed to the client exceeded substantially the hours he was logged in, in the office.

Q Now, you don't know whether or not he was -- his computer had remained logged in during all the time that he was in the office though, do you?

A We assumed it had.

Q Yes, but you don't know whether it had?

A No.

Q And you don't know whether, in fact, he was in the office working on the case file, as the billing said it was -- said he was, or not, correct?

A Well, in some cases we knew he was not in the office billing on them.

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Q Do you know? Have you reviewed any documents to determine?

A Well, I know that after Gary's termination we canvassed the files and the actual active files where work was being done was around 10 or 12 and they were parceled out among the partners. There may have been another 10 that were inactive and no work was being done. They were just an open file where nothing was happening.

Q Did you communicate at all with Mr. Oslowksi about what was to happen to those files?

A No.

Q Did anyone from your law firm communicate to anyone at UMIA what was to happen with the files?

A No. Elliott was the only person in our office who talked to anyone at UMIA, and I believe he talked to Mr. Oslowksi. And I don't -- I wasn't there at the conversation, but Elliott has indicated to me that what he stated was that we've terminated Gary, it's your decision, meaning UMIA's decision, as to whether or not he works on any files, and that was it.

Q I thought you said that you were concerned about the client's best interest. He didn't relate anything to them about what you had found?

A I don't know. I don't know if he did or

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Q All right. So is that why you fired him?

A That was one. I think what -- the billing issue, what that did is it set up a situation where we had to act on it. We could no longer just let Gary pout for a few months until he started socializing and interacting with his partners again. We had to act on it because the client's interests were involved, we had specific knowledge of it and we felt a duty to go to the client and take some action as a result of it.

Q Okay. Well, what did you do then? You went to UMIA?

A I didn't, Elliott did. But that was after the termination, I think.

Q Before the termination didn't you tell Gary that Elliott had called Marty and told him his bills couldn't be trusted?

A No, I didn't say that.

Q Do you know whether or not Elliott had called Marty before the termination?

A I don't know the answer to that. You'd have to ask Elliott.

Q How many files of UMIA's was Mr. Ferguson the counsel on for the law firm at the time that he was fired?

A I think 10 to 12.

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not. I know he did -- he indicated there was some concern. But how specific he got, you would have to ask Elliott.

Q Some concern about what?

A About the billing.

Q That the billings were not accurate?

A I just don't know how specific he got. I believe that Elliott discussed with Marty the concern about the billing and that that internally gave us a problem with what was going on and so we had terminated him for that, among other reasons.

Q Let me ask you, is it your testimony that you never met with anybody from UMIA to talk about his billings? By "his" I mean Gary Ferguson's billings.

A Not prior to the termination.

Q How about after the termination?

A Some months after Dennis Ferguson and I had a meeting with Art Glenn and Doug Smith, a luncheon meeting at P.F. Changs, and we met with them at that time.

Q Now, the P.F. Changs luncheon, do you recall when it was?

A It seems to me it was in the late summer of 2005, maybe August or September.

Q Could it have been before that?

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SHEET 8

1 **A** Oh, it could have been, but I don't think
2 it was.
3 **Q** Okay. Tell me about what happened at that
4 meeting.
5 **A** Well, let me think about that. It seemed
6 to me that I received some input, and I can't remember
7 from who in the office, indicating that -- it was
8 maybe Kurt Frankenburg or Carolyn Jensen that some of
9 the UMIA adjustors were speculating about why Gary had
10 been terminated and whatnot because they hadn't been
11 given much, if any, specific information by
12 Mr. Oslowksi. And so Dennis and I offered to meet
13 with Art and Doug to answer any questions they might
14 have about -- to clear the air about the termination.
15 **Q** All right. What did you tell them?
16 **A** Well, it was interesting because we went
17 to the luncheon and asked them if they had any
18 specific questions and they basically said no. So we
19 had a lunch and there was very little said to the
20 information that was exchanged at that time.
21 **Q** Didn't they ask you to bring evidence of
22 any overbilling that you had in the firm?
23 **A** No, they did not.
24 **Q** Did you discuss with them the nature of
25 any evidence you had of overbilling?

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1 **A** I think there may have been some very
2 general introductory information that -- it didn't get
3 specific though. I think we just told them that we
4 had -- that it had come to our attention that there
5 were some concerns about the billings and we felt
6 compelled to act on it, and then we asked them if they
7 had any specific questions and they said no.
8 **Q** Did you tell them about this program and
9 the difference between Gary's log-in times in the
10 office and the bills?
11 **A** I don't believe the discussion got that
12 specific, but that's my recollection.
13 **Q** So at the end of the day what was your
14 conclusion on March -- or, excuse me, on May the 5th
15 before you fired him, what was your conclusion about
16 whether or not he had overbilled UMIA?
17 **A** We concluded he had.
18 **Q** By how much?
19 **A** Well, in the -- in the month of April or
20 at least in the files, the UMIA files that were billed
21 in April, at the end of April --
22 **Q** Yes.
23 **A** -- I think we concluded that the dollar
24 amount was about between \$10,000 and \$11,000.
25 **Q** Overbilled?

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1 **A** Yes.
2 **Q** Okay. Any in March?
3 **A** There was some, and I'm not sure whether
4 we quantified it or not, but...
5 **Q** And in May?
6 **A** There was some in May, I think. Well,
7 see, the April files -- May billings that would go out
8 probably the first week in May would bill for time up
9 through the end of April.
10 **Q** Right.
11 **A** And so for the first, what, four or five
12 days in May, I don't recall whether there were --
13 whether we found anything or not.
14 **MR. PETERSON:** Six.
15 (EXHIBIT-6 WAS MARKED.)
16 **Q** (BY MR. PETERSON) I'm showing you now
17 what's Deposition Exhibit 6. That is a bill from
18 Williams & Hunt dated May 9, 2005 to UMIA regarding
19 Lynn Robb versus Richard Cox. Do you see this?
20 **A** I do.
21 **Q** Do you recognize it?
22 **A** Well, generally, yes.
23 **Q** If you were to go to page six of this
24 particular bill, you can see the time is recorded by
25 timekeeper. So you have Gary Ferguson, 100.55 hours.

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1 Do you see that?
2 **A** Yes.
3 **Q** Now, is this a case that you believe was
4 overbilled?
5 **A** You know, I don't know. Elliott handled
6 these bills that went out and the credits that were
7 given and so forth and so I'm not sure. I think it
8 probably was, but Elliott would have to answer that
9 question, I think.
10 **Q** Did you review this bill prior to the time
11 that Gary was fired?
12 **A** No, he was fired four days before this
13 bill was created.
14 **Q** Did you review the data that was used to
15 create this bill prior to the day that he was fired?
16 **A** I may have, but I can't tell you because I
17 can't remember the name of the case.
18 **Q** Am I to understand if I say to you what
19 specifically did he overbill on, you're not going to
20 be able to answer that question?
21 **A** I know some of the stuff, but I'm not sure
22 I know it all.
23 **Q** All right. Tell me what you know.
24 **A** Well, as I understand it, he worked a lot
25 on the Merce case and there was some deposition time

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that was overstated. This Robb case may have been one. If this was the guy, the physician from Utah County. I just can't remember.

But as I sit here I can't remember the specific entries and whatnot, but I just remember there were a couple of cases where he was -- he was writing down much more time than he had actually spent.

Q Wasn't this deposition time issue exactly the issue that was referred to in that e-mail between Mr. Williams and Mr. Ferguson?

A It may have been. That's why you probably should ask Mr. Williams about it. He's much more knowledgeable about these specific billing issues because UMIA was his client.

Q All right. Tell you what? If we can, let's take a break.

(A break was taken from 2:19 p.m. to 2:31 p.m.)

(EXHIBIT-7 WAS MARKED.)

Q (BY MR. PETERSON) All right. We are back on the record. I have handed you now what's been marked as Deposition Exhibit 7. I will tell you this was produced along with the initial Rule 26(b) disclosures. Do you recognize this document?

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Q But you don't recall specifically?

A No, I don't.

Q Is there any document, written record that would refresh your memory in terms of when that might have been?

A Oh, probably, if we could look at when the log-in monitoring started and had been concluded, that would give me at least a general frame.

Q All right. Well, we could take a minute and do that. You know, let's -- do you have a stapler?

No. Well, what I was going to do is just put these all together. We'll staple them afterwards. And let's make this deposition exhibit next, whatever that would be. These go with that also.

(EXHIBIT-8 WAS MARKED.)

Q (BY MR. PETERSON) Now, what I will tell you, sir, is that in the Rule 26 initial disclosure, I was provided with these documents that I think are the -- what you've been discussing, these logs, log-in times. Do you see that?

A I do.

Q All right. And so just for purposes of identifying them, at the bottom right-hand corner of each document you'll see a Bates number and these

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A Generally, yes.

Q Generally, if you would, just describe what that is.

A Well, this is the timekeeper diary report, which basically just shows the daily entries for a lawyer during a given period of time.

Q You mentioned the Robb case a minute ago and some deposition time. Do you see January 3rd, the entry Monday, January 3, 2005?

A Yes.

Q And you'll see, "Travel to Virginia Beach, Virginia and conference with Dr. Peter Clara; conference with defense counsel." Total billed hours of 11. Do you see that?

A Yes.

Q Is that the entry you were concerned about?

A No. And as I mentioned to you, Elliott was really the point on these billing issues. I discussed them generally after he had examined the specific data and formed some tentative conclusions and then I discussed them generally with him.

Q When did he form the tentative conclusions?

A I think during April sometime.

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would be Bates numbered, as I have them now in front of me -- or as you have them, if you would just read off the Bates numbers that you have in this group of documents.

A Well, they're prefaced with GF and then four zeros and then 79, 80, 81, 82. There's no 83.

Q Yeah. Actually, the next one, which is page three, is 83, but the copy doesn't show the Bates number so...

A The next one is 84.

Q Okay.

A And then 32, 33, 34 and 35.

Q All right. And all of those documents combined are contained in what we've now referred to as Deposition Exhibit -- is it 8?

A Yes.

Q Okay. All right. So, now, are these the documents that you're talking about?

A Yes.

Q All right. Tell me what these are and when you received the information that's in them.

A Well, the pages, such as the second page with the stamp 80, are just a printout of the little logon/logoff program that show the times that Gary's computer was logged in and logged off. The pages,

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1 such as the first page, are a compilation of the
2 information from the little log-in report together
3 with the hours that he apparently billed on those
4 days.

5 Q Now, there are some handwritten entries
6 there. For example, on the top right-hand side of
7 Deposition Exhibit 8, page one, which is marked as
8 Bates number 179 -- just the very first one that
9 you're looking at, sir.

10 A Yes.

11 Q Whose handwriting is that, if you know?

12 A It sort of looks like Janet Walker's, but
13 I can't be certain.

14 Q And Janet Walker is the office manager?

15 A Uh-huh (affirmative).

16 Q Or was at this point in time?

17 A Yes.

18 Q Is she still the office manager?

19 A Yes.

20 Q Did you have discussions with Janet Walker
21 about whether or not Mr. Gary Ferguson had overbilled
22 UMIA during 2005?

23 A No, I think my discussions with her were
24 primarily just about the logistics of gathering the
25 data.

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1 Q Did you tell her why you wanted the data
2 gathered?

3 A I may have.

4 Q What did you tell her, if you recall?

5 A Well, probably that -- well, I would be
6 speculating, but I think it's fair to state that I
7 would have alerted her to the fact that we had some
8 concerns about some billing issues with Gary.

9 Q When would that statement have been made?

10 A Well, likely sometime prior to March 23rd.

11 Q Since March 23rd is when, apparently, the
12 log-in time -- you started keeping track of that?

13 A Yes.

14 Q All right. So, now, if you were to take a
15 look at the second page of the exhibit, just so we
16 make a record of how this actually works, on the
17 left-hand side it says WILLHUNT, and there's a back
18 slash, GBF. I take it that's Gary B. Ferguson?

19 A Yes, I think that's his user designation.

20 Q And then it says log-off, Wednesday,
21 03/23/05, 12:09 p.m. And would that reflect to you
22 that on the 23rd of March at 12:09 p.m. he apparently
23 logged off of the computer system?

24 A Well, it appears to be what it says. I'm
25 assuming that's what it means.

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1 Q Is that how you understand the document?

2 A Well, yes, but I mean I don't -- I don't
3 profess to know how to read this program, how to
4 activate it. I mean, that's why Janet made the
5 compilation from it. I didn't make the compilation
6 from this little printout.

7 Q Are you having a hard time -- do you have
8 a hard time figuring out --

9 A No, I think that's --

10 Q -- what that is?

11 A That appears to be what it says.

12 Q Okay. And you talked to somebody about
13 what this printout was going to detail, correct?

14 A In general, yes.

15 Q And you told us earlier in your testimony
16 that what it would detail is when somebody would
17 logged on to the system or log-off?

18 A Correct.

19 Q So when it says log-on, is it safe to
20 assume that that's what it means, that he's logged on
21 the system?

22 A I think that's right.

23 Q So the second entry from the top says --
24 there's a log-on a 12:12 p.m., so three minutes after
25 he had logged off. Do you see that?

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1 A Yes.

2 Q All right. Now, tell me, then, the
3 process by which you took this data and determined
4 that he had overbilled UMIA. What did you do with it?

5 A Well, as I explained to you before, I
6 didn't do it. I had it done for me. But as I
7 understand the process that it went through is that we
8 had the log-on/log-off data so we could come up with a
9 number of how many hours he was in the office working,
10 we had the billed information, the hours billed from
11 the timekeeper diary report, and then from his
12 calendar we had the information as to what
13 appointments he had in or out of the office. And by
14 comparing and analyzing that data, we were able to
15 determine whether we believed he had actually worked
16 the hours that he had billed.

17 Q So with respect to the entry on the first
18 page of Deposition Exhibit 8 for 3/23, on the -- it
19 says time 12:09 to 5:10, log-in five. But that isn't
20 accurate from what you just reviewed, is it? He
21 logged in at 12:09 and -- he didn't log-in then, he
22 logged out at 12:09. He logged in at 12:12, right?

23 A Correct.

24 Q And did you start running the program in
25 the morning of 3/23 or did you begin running it at or

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round noontime?

A I don't know. My understanding was that that particular day Gary was out of the office all morning to a medical appointment.

Q Okay. How do you know that?

A From his calendar.

Q All right. And do you know whether or not he logged in at some point earlier that day, since you have a log-off at 12:09?

A I don't know.

Q Wouldn't he have had to log-in at some point in order to log-off?

A I assume so, yes.

Q So if you were to take, then, Deposition Exhibit 7 and open it to page 16, this would be a printout of Mr. Ferguson's billing hours that day, on March the 23rd. Have you reviewed that document before?

A Generally I think I have. I don't know if I've specifically looked at the entries.

Q You don't have an independent recollection as we sit here about how long Gary was out of the office on March the 23rd, do you?

A Not independent of the various...

Q The calendar?

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A The calendar and whatnot that I reviewed.

Q If I was to show you the calendar, would that assist you in any way with respect to what you might recall?

A Well, it might.

Q All right. I'm going to show you now, not on paper, I'm just doing it for purposes of seeing if it will help to refresh your memory. This is a copy of the calendar that was provided to me by counsel in the Rule 26 discovery. It's the 23rd, 8:30 to 9:30. Do you see that entry?

A Right.

Q Do you recall seeing Mr. Ferguson on the 23rd?

A I can't remember that.

Q Wouldn't expect you to. So the answer is no, you don't, correct?

A Correct.

Q So you don't know when he may have logged in on the 23rd of March 2005?

A No.

Q Taking a look at page 16 of Deposition Exhibit No. 7, this is the March 23rd billing for that day. Do you see that?

A Yes.

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1 Q So is it your position, then, that the
2 11.25 hours is an overbill?

3 **A Well, I believe that's correct.**

4 Q All right. So to confirm that, then, did
5 you contact any of the parties who are mentioned in
6 the billing statement to see whether or not they
7 actually did the things that are recorded there? For
8 example, it says, "Telephone conference with Miriam
9 re: Mediation," under -- this is the Robb case.

10 Did you look to see whether or not -- to
11 contact anybody with reference to that case to see
12 whether or not the items that are billed there
13 actually occurred?

14 **A I did not.**

15 Q Did anyone from your law firm?

16 **A I don't know.**

17 Q With respect to the second entry, "Various
18 communications with B. Rouse," on -- .25 hours, do you
19 see that?

20 **A Yes.**

21 Q Did anybody contact any of the parties or
22 counsel in that case to determine whether or not there
23 were various telephone communications?

24 **A I don't know. I did not.**

25 Q Let me ask you, does your firm have a

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1 policy with respect to the minimum number of hours
2 that you bill for a telephone call?

3 **A No, not really.**

4 Q Is there something reflected in your
5 retainer letter that indicates the number -- the
6 minimum number of billable hours or billable time for
7 a telephone call or just the minimum billable unit?

8 **A Could be. The retainer letter varies from
9 client to client.**

10 Q Doesn't your retainer agreement provide
11 that your minimum unit of billable time is a quarter
12 of an hour?

13 **A Not with all clients. Some clients insist
14 on a tenth of an hour.**

15 Q Do you know with respect to UMIA what the
16 insistence is?

17 **A I don't know because we've represented
18 them for so long I'm not even sure we even have an
19 active retainer letter on file.**

20 Q Okay. Well, does it sound to you like a
21 quarter of an hour is an unreasonable amount of time,
22 from your experience, 31 years as a lawyer, for
23 various communications?

24 **A No.**

25 Q Did you check on any of the items that

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1 followed? Did you check, for example, with Nikki
2 Bowen in preparation of this memorandum? Did you
3 review any of his pleadings in that case?

4 **A I didn't. As I mentioned to you before, I**
5 **think twice, Elliott was focused on the billing issue,**
6 **because UMIA was his client, and he did most of the**
7 **background investigation.**

8 Q So we could go through this -- because
9 we're both smart lawyers, we could go through it line
10 by line for the rest of the day, I suppose, but it
11 would be fair to say, would it not, that you did not
12 check -- or direct that any of those entries be
13 checked?

14 **A That's correct.**

15 Q Now, you mentioned earlier something about
16 credits. Was there a discussion of whether or not
17 UMIA would be refunded money at the lunch meeting that
18 you have previously described for us?

19 **A No. No. My understanding about that is**
20 **that there had been a previous discussion between**
21 **Elliott and Mr. Oslowksi.**

22 Q Tell me what your understanding is with
23 respect to that, the conversation.

24 MR. ECKERSLEY: Counsel, we've got a
25 problem here. I got a call from Elliott indicating

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1 that Mr. Oslowksi, through his counsel, Phil Fishler,
2 had indicated to Mr. Williams that Mr. Oslowksi wanted
3 to assert the privilege with regard to any
4 communications that he had with Mr. Williams.

5 I understand that there have been earlier
6 questions regarding that subject matter and I told
7 Mr. Williams that and I'm going to discuss that matter
8 further with Mr. Fishler.

9 But if it isn't something specifically
10 that Mr. Hunt has already testified about, I'm going
11 to have to assert the privilege.

12 MR. PETERSON: And direct him not to
13 respond?

14 MR. ECKERSLEY: And direct him not to
15 respond.

16 MR. PETERSON: And you're doing that on
17 behalf of a party that's not your client.

18 MR. ECKERSLEY: His client.

19 MR. PETERSON: He's told us it's not his
20 client.

21 MR. ECKERSLEY: Well, no. It's the firm's
22 client, it's his client. I don't think there can be
23 any dispute about that.

24 MR. PETERSON: So let's sure we make the
25 record. You're going to not allow your client to

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1 answer questions about what Mr. Oslowksi may have
2 said?

3 MR. ECKERSLEY: About what he said or any
4 advice he received, any communication from his
5 counsel.

6 MR. PETERSON: And the basis for that
7 objection is you're asserting the attorney-client
8 privilege as to that client?

9 MR. ECKERSLEY: Yes, on his behalf.

10 MR. PETERSON: On his behalf, okay. I
11 gotcha. Okay. So --

12 MR. ECKERSLEY: I want to say -- can we go
13 off the record for a minute?

14 MR. FERGUSON: Why?

15 MR. PETERSON: No, I'm not --

16 MR. ECKERSLEY: I'm going to attempt to
17 dissuade the client, to the degree I have any
18 influence, from asserting that privilege. I've just
19 been told that it's happened.

20 MR. PETERSON: Okay. I understand. All
21 right. Well, let me ask, I mean since we're on the
22 record about this, the information we received from
23 Mr. Oslowksi was that he was going to be out of town,
24 that's why he couldn't do the deposition.

25 MR. ECKERSLEY: No, he has people in town.

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1 He has people here from London who have business
2 relations with UMIA and that's the reason his time has
3 been taken up.

4 MR. PETERSON: I see. All right. Well,
5 I'll just proceed and if you want him to take -- and
6 assert a privilege, why you'll tell him when and
7 you'll --

8 Of course, you already know that.

9 THE WITNESS: I do what I'm told.

10 MR. PETERSON: All right. That seems
11 fair.

12 Q (BY MR. PETERSON) I don't want to ask --
13 here's what I want to ask you about: I want to ask
14 you about what you understand your partner -- or not
15 partner, shareholder, fellow member of your firm,
16 Mr. Williams, told Mr. Oslowksi about my client Gary
17 Ferguson's billing, okay, before he was fired, first,
18 let's start there.

19 MR. ECKERSLEY: And, you know, I'm going
20 to have to assert the privilege.

21 MR. PETERSON: How is that privileged?
22 I'm asking what an attorney told him, not a
23 communication that is designed to have anything to do
24 with providing legal services.

25 MR. ECKERSLEY: What you're asking about

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communication between two lawyers about what was said to the client. That's privilege. That would be disclosing the information made by the other lawyer to the client, the client to the lawyer.

Q (BY MR. PETERSON) What did he tell you -- well, no, that won't help us at all.

MR. ECKERSLEY: No.

Q (BY MR. PETERSON) All right. What did you tell Mr. Oslowksi, if anything?

A **Nothing. I never had a discussion with Mr. Oslowksi.**

Q Let's go back, then, to the meetings that you had. Do I take it correctly that you have only had one meeting about this with anybody from UMIA?

A **That's correct.**

Q That was the luncheon with Mr. Glenn and Mr. Smith?

A **At P.F. Changs, that's correct.**

Q P.F. Changs. And that would have been sometime in June of 2005, wouldn't it?

A **Could have been. I thought it was a little later than that, but it was after the termination sometime.**

Q Isn't it a fact, sir, that with respect to that particular luncheon Mr. Elliott Williams had

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1 A **I think that's correct.**

2 Q They also told you that the reason they
3 had been told that by Mr. Oslowksi was that Gary had
4 overbilled UMIA?

5 A **That is incorrect. They did not tell us
6 that.**

7 Q Now, didn't you purport to take evidence
8 with you in the form of what is similar to, or maybe
9 exactly, Deposition Exhibit 8, these computer logs and
10 printouts?

11 A **Dennis may have had that with him.**

12 Q Dennis Ferguson?

13 A **Yes.**

14 Q Didn't you have a discussion at the
15 meeting about these logs?

16 A **As I mentioned before, we asked them if
17 they had any specific questions and they -- they
18 didn't seem to have any and there was a general
19 discussion and that was the end of it. It was a very
20 short discussion about the termination or Gary or
21 anything else.**

22 My recollection is that we advised them
23 that we had information that was very specific that
24 indicated a problem and we had acted on it, and they
25 didn't have any further inquiry and we had lunch.

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1 agreed to meet with Mr. Smith and Mr. Glenn?

2 A **I don't believe so because he wasn't
3 there.**

4 Q Isn't it a fact that you had agreed to
5 meet with them for the purpose of showing them the
6 evidence of overbilling?

7 A **My memory is that the purpose was not that
8 specific. They had -- we had received information to
9 the effect that the adjustors had not been told much
10 about why Gary had been terminated and they were --
11 there was starting to be a lot of speculation about
12 it, and whatnot, and we agreed to meet with them and
13 answer questions, if they had any, about that so we
14 could clear up any misunderstandings.**

15 Q Isn't it a fact, sir, that they told you
16 they were advised they could not assign any cases to
17 Gary if he left your firm?

18 A **I think they said that's what they had
19 been told by -- not if he left our firm, but after the
20 fact.**

21 Q Yes.

22 A **They had been advised that they were not
23 to assign any cases to him.**

24 Q And they told you they had been advised
25 that by Mr. Oslowksi?

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1 Q What did you tell them the problem was?
2 You just told me it was very specific.

3 A **No, I told you that the discussion was
4 very general.**

5 MR. PETERSON: Stop. Could you read back
6 what he said?

7 (Pending question was read back by the
8 court reporter.)

9 Q (BY MR. PETERSON) I think we're both
10 right.

11 A **I think you're probably correct.**

12 Q So what was the specific information
13 relating to Gary's problem?

14 A **What you have in your hand there.**

15 Q Right, Deposition Exhibit 8. And you gave
16 them a copy of this, right?

17 A **No.**

18 Q You showed it to them?

19 A **We had it there.**

20 Q You showed it to them, correct?

21 A **My recollection is that we didn't give it
22 to them and go like this. Dennis had it in his hand,
23 we talked about it generally, they didn't have any
24 specific questions and that was it.**

25 Q Didn't one of them tell you that you were

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1 going to have to have more than time logs to support
2 the idea that Gary had overbilled UMIA?

3 **A No.**

4 Q Is it true that you told them that there
5 were no specific facts supporting the overbilling?
6 And by that I'm referring to factual matters, cases,
7 specific instances of overbilling.

8 **A No.**

9 Q Did you describe any specific instances of
10 overbilling?

11 **A I don't believe the discussion got that
12 specific. As I say, we had this general discussion
13 and it just didn't go anywhere.**

14 Q Okay. Now, with respect to the specifics,
15 what you're telling me today is that I have to wait
16 until I talk to Elliott Williams, he'll be able to
17 tell us the specific overbillings?

18 **A I think -- Elliott was the one who oversaw
19 the collection of the data, interpretation of the data
20 and the ultimate preparation of the summary reports.**

21 Q Summary reports, referring to Deposition
22 Exhibit 8?

23 **A Yes.**

24 Q Are there any other reports that detail
25 this data or otherwise interpret the data that was

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1 contained in Deposition Exhibit 8?

2 **A I don't think so.**

3 Q All right.

4 (EXHIBIT-9 WAS MARKED.)

5 Q (BY MR. PETERSON) So now you've been
6 handed what is Deposition Exhibit 9. And can you tell
7 me what that is?

8 **A These are some notes that I made the day
9 before the termination and then the day of the
10 termination during our meeting with Gary.**

11 Q All right. Let's start with 5/4/05. I
12 take it the top portion of this refers to a meeting,
13 or maybe your thoughts generally preceding to the
14 meeting. Tell me about that.

15 **A I believe this -- I made these during the
16 meeting we had with some or all of the other
17 shareholders when we were discussing the proposed
18 action.**

19 Q Where was the meeting?

20 **A It was in the office.**

21 Q When did it occur?

22 **A Late afternoon, May 4, 2005.**

23 Q Who was present?

24 **A Again, I can't recall specifically. I
25 think it was all the shareholders who were in the**

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1 **office at that time.**

2 Q What was the -- what was the basis or the
3 way that the meeting was called? How did it occur?

4 **A I think we just rounded up everybody that
5 was there, but I can't be certain. Maybe I sent an
6 e-mail, I don't know.**

7 Q If you had sent an e-mail it would be in
8 your e-mail, your server I take it?

9 **A It would have been at one time. Whether
10 the archiving function has put it somewhere else,
11 that's possible. But it would -- if it -- you know,
12 unless we've passed the time when that would occur, it
13 should be there.**

14 Q By the way, were you involved in any way
15 in the collection of the documents that were disclosed
16 in your initial Rule 26 disclosure?

17 **A Yes.**

18 Q And tell me the process by which you
19 searched for those paragraph two documents, the
20 documents relating to the case.

21 **A Let's see. Back in the fall of 2004 we
22 learned that -- from somewhere that Gary intended to
23 sue us and so I sent an e-mail out to --**

24 Q 2005 perhaps.

25 **A Yeah. Yeah.**

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1 Q I've seen your e-mail. It's in November
2 of 2005.

3 **A Yeah. I'm getting my years mixed up here.
4 But I sent an e-mail to everybody saying that we've
5 learned that Gary intends to sue us and so if you have
6 any e-mails or other documents related to the subject
7 matter, preserve them, print them out, do whatever so
8 that we are able to retain pertinent records.**

9 Q Okay. So with respect to the Rule 26,
10 though, what did you -- I guess I'm wondering how you
11 went about collecting up information and documents.

12 **A Well, there was that e-mail and then just
13 went around and talked to those who had been involved
14 and who were named in the complaint. I went in and
15 talked to Kurt Frankenburg, he had some documents,
16 Jody Burnett had some documents, Elliott had some
17 documents, I had some documents that I had gathered at
18 or about the time of the termination.**

19 **I also had some e-mail files that I
20 printed out. We had copies of the buy/sell agreement,
21 the insurance agreements, all those other things that
22 go along with that, and I just gathered them up. So
23 that was kind of the process.**

24 Q Now, do I understand, then, that all those
25 documents were provided in the Rule 26 -- the Rule 26,

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the initial disclosure, all of them that you had gathered up?

A Well, I think so. I gave them all to Dave.

MR. ECKERSLEY: Let me make a record --

MR. PETERSON: Sure. You betcha.

MR. ECKERSLEY: -- and have some input on it. There are some that were not because of my determination that they didn't relate to this. And I'll be happy to produce them to you, if you want.

MR. PETERSON: Sure. Okay. I understand. I just wanted to make sure we had the process down, that's all.

Q (BY MR. PETERSON) As a part of that, did you search your electronic data? By means -- by that I mean, for example, your archive files.

A Well, all I can say is what I did. I don't know how -- what each individual person involved did, but because of the e-mail I had sent out in November, I asked them to, you know, print it all out.

Q And if I show you that e-mail --

A I didn't do a global. I didn't do a global search of everybody's stuff or anything like that, no.

Q The server that you had in 2005, is it

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still the server that you have now?

A Yes.

Q And so the documents, whatever they may be, in terms of that server, if they were archived on that server -- have you had a system-wide crash that would have caused you to lose any data between May of 2005 and today?

A I don't think so. I have to qualify that by telling you I'm not sure exactly the internal software functioning of how it archives, deletes, or deals with that stuff.

Q Understood.

A It's beyond my expertise there.

Q Do you have a backup system in place?

A We do. We have an -- it's an off-site automatic system where a server somewhere else in the world reaches in and copies our hard drives on a periodic basis and saves the data on another server at another location.

Q Now, again, I don't have a hard copy of your e-mail, but I do have it dated Wednesday, November 9, 2005, 11:01. See if you could just take a look at it and tell me whether or not that refreshes your memory. Just for our purposes, I want to make sure I have the right one that you're referring to.

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A Yes, I believe that's the e-mail that I referred to.

Q All right, so "We have received information that Gary has retained counsel and will be suing us. Accordingly, I would ask that each of you isolate and save any documentation you have concerning Gary or the circumstances surrounding his termination."

That's what you've described for us before, right?

A Yeah.

Q "This includes any e-mails. Also, I suggest that any further communication regarding Gary be cleared by me, Elliott, or the counsel we've retained to represent us. Please refrain from discussing this situation with anyone outside the office, except our retained counsel. The situation is unfortunate, but our experience since the termination has confirmed it was indeed the correct course of action legally, economically, for clients' interest and for firm morale. Thank you for your cooperation. George."

That's essentially your message?

A Right.

Q All right. Now, did you direct anyone to

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search either your server or your backup -- like you I have no idea where that is in the world -- but for documents relating to this case?

A On a global basis, no.

Q And so what we have in terms of documents so far -- and I understand that this is just the initial discovery. Ours is the same situation, I understand that. But nobody has yet searched your server to determine whether or not every document that we have relating -- that you have relating to Mr. Ferguson has been provided?

A That's correct.

Q Are the memorandum at all -- did you author any memorandum, any e-mail, other than what you've provided, in 2005 at or near the time of his termination?

A No, I think I provided you everything that I created specific to the situation.

Q Okay.

MR. PETERSON: All right. So we've got about five minutes until the end of this tape.

Q (BY MR. PETERSON) Let's go back to the Deposition Exhibit 9. You have it in front of you?

A Yes.

Q So tell me -- there's some numbers, it

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1 looks like section 16-10a-808, and I don't know what
2 that refers to.

3 **A Well, it looks like that's a section out**
4 **of the Revised Business Corporation Act, but I can't**
5 **tell you today what it relates to or what it means.**

6 **Q Okay. That's fair. Next note says, "Hard**
7 **way or easy way. Severance package." By that you**
8 **were referring to what?**

9 **A Well, I think we had some discussion about**
10 **whether we should offer Gary a severance package and**
11 **let him, you know, agree to pay for his medical**
12 **insurance for a while so he could transition into**
13 **another position, and we determined that that would be**
14 **the thing we ought to do.**

15 **Q "Removal of directors," I'm not sure what**
16 **that means. Do you mean removal of him from the**
17 **directors?**

18 **A I can't remember what I meant by that.**

19 **Q All right. So now it says, "And go**
20 **through the reasons why we want him out." Then the**
21 **first bullet, "Loss of trust and confidence." What**
22 **were you referring to with respect to that?**

23 **A I think that's the billing issue.**

24 **Q Okay. Next one, "Bad-mouthing to UMIA."**

25 **A I think that has to do with some reports**

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1 **we had been receiving that Gary was making some**
2 **statements to UMIA adjustors that were critical of**
3 **lawyers in the office and how they handled their**
4 **cases.**

5 **Q Okay. Who told you that?**

6 **A Well, word had come back to us through**
7 **UMIA, and I can't exactly tell you how it -- who said**
8 **it, whether it was Elliott or one of the other lawyers**
9 **working for UMIA.**

10 **Q Let's put it on a first-person basis. Did**
11 **anybody at UMIA tell you that my client, Gary**
12 **Ferguson, had been bad-mouthing UMIA?**

13 **A No.**

14 **Q Or bad-mouthing you or any of your**
15 **lawyers?**

16 **A No. No.**

17 **Q "Disruptive with staff, harmony, et**
18 **cetera."**

19 **A That's something that I was directly and**
20 **personally involved in on almost a daily basis.**

21 **Q Okay.**

22 **A Gary had been responsible for the**
23 **termination of most of the staff people that we had**
24 **terminated, they had either worked for him or with**
25 **him, and that created a lot of work for me.**

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1 **And when he would get angry at us and**
2 **close his door, it would have an impact on staff**
3 **morale and harmony and it was very uncomfortable and**
4 **it was just difficult.**

5 **Q In 2005, had someone quit as a result of**
6 **his being disruptive?**

7 **A 2005. No, I think the previous**
8 **terminations had been Andy Deiss, who had some**
9 **problems, and he and Gary didn't get along and Gary**
10 **had announced that he would never vote for Andy for**
11 **partner.**

12 **Q When was that?**

13 **A Oh, geez. I can't remember whether that**
14 **was 2003 or 2004.**

15 **Q Okay. Anybody else?**

16 **A Oh, a series of secretaries. Rose, his**
17 **first secretary, a secretary he shared with Dennis**
18 **named Heather Barney, a secretary named Phyllis, a**
19 **secretary -- oh, I can't remember her name, a**
20 **redheaded gal, a paralegal, Sue Cortez.**

21 **Q When did those occur?**

22 **A Over a period of time.**

23 **Q Going back into the '90s?**

24 **A Yes. Yes.**

25 **Q When was the most recent person, before**
Page 91

1 the attorney who he said he would never vote for
2 partner?

3 **A Well, there was another paralegal, but I**
4 **think we were pretty much agreed about her. She had**
5 **some serious billing problems, Maryanne Bigler. So I**
6 **think the previous one would have been...**

7 **Q The most recent?**

8 **A The most recent, the lawyer.**

9 **Q So earlier when you said that all of the**
10 **disruptive stuff with respect to staff was largely his**
11 **fault, you spent time cleaning up after it, that**
12 **wouldn't have been in 2005, correct?**

13 **A Well, no, except the harmony issue and**
14 **having his door closed and --**

15 **Q I understand.**

16 **A -- and the pouting and all that.**

17 **Q I'll grant you the pouting.**

18 **MR. PETERSON: Okay. We're at the end of**
19 **the tape so we'll stop for now for a minute.**

20 **THE WITNESS: Okay.**

21 **(A break was taken from 3:10 p.m. to**
22 **3:16 p.m.)**

23 **Q (BY MR. PETERSON) All right. Sir, we**
24 **were discussing Deposition Exhibit 9. We were looking**
25 **at these notes that you had made and we're still on**

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he day prior to the termination. And then it says, "Decision unanimous." Were all of the shareholders at the meeting?

A No, my recollection is they weren't, but that I had contacted all of the other shareholders --

Q Okay.

A -- and asked them about their view.

Q And your recollection is that it was unanimous by the time you had this meeting?

A Yes.

Q Or after the meeting I take it. I didn't ask you when these notes were made, but when were the notes reflected in Exhibit 9 prepared?

A They were contemporaneous with the dates reflected here in the margins.

Q Thank you. And then the next bullet -- or next bullet point or dot is "Integrity, competence and trust."

A Right. And that, I guess, relates back up to the first item of the billing.

Q You basically had lost trust in him because of this billing issue, correct?

A Yeah. One other thing I should mention, and it maybe goes to the competence thing, we had been getting a lot of feedback from lawyers around town,

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particularly defense lawyers for UMIA, about Gary's behavior in depositions and aggressiveness with all counsel, opposing counsel, co-counsel, and that was of concern to us because it reflected, we thought, poorly on the firm and was not professional.

Q Who specifically complained?

A Well, let's see. We had received feedback from several UMIA defense counsel.

Q Who?

A Shawn McGarry, Phil Fishler, Dave Slagle, I think. That's my memory. And it kind of came through the grapevine. I didn't speak specifically with any of these individuals, that's just what it was reported.

Q Oh, so somebody told you that they had been told by Shawn McGarry, for example?

A Well, and in a couple of instances I had seen excerpts from depositions.

Q Right. I saw you included in the Rule 26 disclosure an excerpt from a deposition in which apparently Mr. Ferguson got into a feud with somebody else in the deposition about the way questions were being asked.

A Right.

Q But that's not entirely uncommon in the

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1 practice, that lawyers get into debates with each
2 other over evidentiary issues, is it?

3 **A** The kind of statements that were reflected
4 in that excerpt are uncommon, in my judgment. They're
5 unprofessional, in my judgment.

6 **Q** Okay. But didn't you previously testify
7 that you didn't have complaints from any of your
8 physicians or from UMIA leading up to the point where
9 you terminated him?

10 **A** I didn't, no.

11 **Q** And so this is not included in that sense,
12 it is attorneys?

13 **A** Yeah.

14 **Q** All right. But did you have a specific
15 attorney ever come to you and make a complaint about
16 Gary's performance in a deposition?

17 **A** No. I had -- I had one of -- a
18 plaintiff's -- a plaintiff had sent a letter at one
19 point.

20 **Q** A plaintiff sent you a letter?

21 **A** Yeah.

22 **Q** Did you produce that in the initial Rule
23 26 discovery?

24 **A** Yes.

25 **Q** What was that? What letter is that?

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1 **A** Oh, it's a letter from a fellow whose son
2 was a plaintiff. He had a rather rare syndrome where
3 he didn't recognize faces and he wrote a letter
4 claiming that Gary had ridiculed his son at breaks
5 during the deposition and that -- he was complaining
6 about that.

7 **Q** Did you investigate the claim?

8 **A** I went to Gary and talked to him.

9 **Q** Okay. Did he explain the circumstances?

10 **A** He dismissed it and said the guy was kind
11 of whacko and so I didn't follow up on it.

12 **Q** Did you substantiate at all, with anyone
13 else who was present during the deposition, whether or
14 not this statement that had been made to you by
15 this -- it's the father, I take it, of the plaintiffs,
16 isn't it?

17 **A** I think so.

18 **Q** Did you substantiate the allegations with
19 anyone?

20 **A** I think I later talked to another lawyer
21 who was involved in the case, and I can't remember who
22 that was, but they indicated that the guy was a little
23 bit imbalanced, so...

24 **Q** Not Gary, the guy?

25 **A** No, the guy.

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SHEET 13

1 Q Confirming what Gary had told you?

2 A Yes.

3 Q All right. The bullet point says, "Do an
4 outline." I take it that you probably didn't, from
5 what I've seen in the notes.

6 A I think that's probably right. Like so
7 many things, you know, you don't get around to
8 everything.

9 Q I understand. All right. The next note
10 is 5/5/05. "Meeting with GBF." I take it that's
11 Gary?

12 A Yes.

13 Q All right. And these are -- what occurs
14 here now in terms of these notes, this is your
15 recollection of things that he told you?

16 A Well, yeah. These require some
17 explanation, I suspect, because he's referring to
18 different people as we go along here.

19 Q I understand. Now, before I ask for any
20 explanation, let me ask this: You said these notes
21 were taken contemporaneous with the incidents, or
22 nearly contemporaneous. I take it that these notes
23 appearing after the 5/5/05 designation, you didn't
24 make those notes while he was speaking?

25 A Yes, I did.

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1 Q You did, okay. All right. Now, I'm
2 curious about one of the notes. "It says EJW poisoned
3 the well with UMIA." Do you recall what that was in
4 reference to?

5 A Yeah, Gary is -- was saying that Elliott
6 had said bad things, I guess, to UMIA about him and
7 that had affected his prospects, I suppose.

8 Q His prospects for future --

9 A Employment.

10 Q -- employment, with UMIA?

11 A Yeah.

12 Q When you met with him, first, tell me what
13 you told him in terms of the firing and who was
14 present. Let's start there.

15 A Me and Elliott and Gary.

16 Q Okay. Was it tape recorded?

17 A No, not by us.

18 Q Okay. What did you tell him?

19 A Well, my recollection is that Elliott did
20 most of the talking and --

21 Q What did Elliott tell him?

22 A Well, I believe he talked to him about
23 primarily the billing issues and then eventually got
24 into the -- just the general difficulties about, you
25 know, working with him and closed doors and inability

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1 to be open and discuss issues with partners and
2 disagree disagreeably -- disagree agreeably rather,
3 and do the kind of work that lawyers in a firm have to
4 do together to get along.

5 Q Well, were there issues that you had with
6 Gary about him disagreeing with something you had done
7 and not being agreeable, not disagreeing agreeably?

8 A Yes. What I've told you about the
9 decisions we would make in the board and then I would
10 go out to execute the policy that had been discussed,
11 whatever it might be, and Gary would come back and he
12 would remember it differently than everybody else in
13 the firm and so I would have to send out an e-mail.

14 And so I would send out an e-mail saying, am I missing
15 something here, Gary says this, this is what I
16 remember, and then it would come back that Gary was
17 the only one that remembered something the way he did
18 and then...

19 Q Did that happen often?

20 A It happened several times.

21 Q So I'm confused because the Rule 26-1
22 paragraph two disclosure says, this is all the stuff,
23 these are the documents that we have that relate to
24 this case. You've told me just a moment ago that this
25 is one of the reasons on which you terminated him,

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1 this harmony, et cetera, stuff.

2 A Uh-huh (affirmative).

3 Q So did you produce a bunch of documents,
4 e-mails that I don't have relating to times where you
5 had to go back, as you've just now described, and say,
6 you know, this is what Gary remembered?

7 A Well, my recollection was we produced two
8 in particular that I can recall, one relating to
9 Nikki's salary, the other relating to Janet's --

10 Q Are there others?

11 A -- office. Well, let me think. That's
12 all I can remember as I sit here right now, but those
13 were two specific ones.

14 Q But just moments ago didn't you tell me
15 this was a common problem that you had, you had to go
16 do this often?

17 A Do what?

18 Q Go through this e-mail process.

19 A Or go talk to the partners and clarify
20 what was going on. There were at least the two big
21 incidents that resulted then in the closed-door
22 sessions for several months.

23 Q Okay. The one that you described earlier
24 today, the one involving -- was it Nikki or was it
25 Janet that was the 5-4-1 vote? That was Janet,

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correct?

A That is Janet's office, that's correct.

Q So apparently he was in the four? He was in the minority?

A Correct.

Q Who is it who abstained from voting?

A I think Dennis.

Q Okay. Isn't it a fact that the comments that were made by Gary at this 5/5/05 meeting relating to Elliott poisoning the well were in response to Elliott having told him that he had already talked to Marty Oslowksi?

A I think they were in response to the initial conversation -- well, the initial statements that Elliott had made to him about the billing problem and that he determined that there had been overbilling and we had to deal with that.

Q Okay. And that determination, then, to terminate him was on 5/4/05?

A Correct.

Q Did you order -- as part of the severance package, did you order some sort of information or documents relating to his insurance?

A Not at that time, but I got that later because I sent on -- I think May the 20th I sent to

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Gary the severance package and we never received any response back from it and later I received a call from the insurance agent asking a question about Gary's policy that funded the buy/sell agreement indicating that Gary had requested that -- had presented it for a change in ownership, and so I did ask her to fax me a copy of the documentation she had on that.

Q Okay.

A So that came later in 2005.

Q With respect to Gary leaving the firm, was it a concern at all on your part that Gary, as a medical malpractice defense attorney, would leave the firm and take cases with him?

A Not really.

Q Did you have any discussion about that with Elliott?

A Probably in a general sense, but I don't remember anything specific about it.

Q Tell us, generally, what you discussed.

A Well, I think we just discussed what would occur if and when Gary was terminated, and my recollection is that the consensus was that we would not tell UMIA what or what not to do about sending cases to Gary, we would just inform them that he had been terminated, and "we" meaning Elliott, because he

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1 was the spokesperson, and that we would then keep our mouths shut and let them make their own decision.

3 Q But wasn't Elliott also the general counsel to UMIA?

5 **A He was.**

6 Q And a friend of Mr. Oslowksi's?

7 **A Yes.**

8 Q And you've already indicated earlier in your testimony that when you met with the two adjustors later that summer, they indicated they had been told by Mr. Oslowksi they could not assign any cases to Gary Ferguson, correct?

13 **A I think they said that later, yeah.**

14 Q Now, is it your position that no one at Williams & Hunt ever told Oslowksi he could not trust the bills that Mr. Ferguson had submitted?

17 **A Well, the only one -- the only person at Williams & Hunt who talked to Mr. Oslowksi about that was Elliott. I'm not certain of the specific words that Elliott used, but I don't think he told Marty that. I don't know though.**

22 Q Didn't he tell you that he had told Marty that?

24 **A No.**

25 Q All right. "EJW poisoned the well with

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1 UMIA." That is your note?

2 **A That's a note of what Gary said.**

3 Q Yeah. Well, why would that be discussed if there was no discussion with UMIA at this point about whether he would be assigned files in the future?

7 **A I don't know. Gary said that and I wrote it down. And I don't know why he said it, you'd have to ask him that.**

10 Q All right. So at the time you think he had roughly 10 open files or so for UMIA?

12 **A There were 10 or 12 files that had activity that required reassignment for someone to give them continuity, continue to work on them and fulfill tasks.**

16 Q Did each of those files ultimately stay with Williams & Hunt?

18 **A No, there were a couple that had to go out, or did go out. And I can't remember which ones they were, but there were a couple, I think, that were sent out.**

22 Q Who would know which of the files were sent out?

24 **A Probably Elliott.**

25 Q And would he have a list of the open

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SHEET 14

1 files?

2 **A** There's a list somewhere. Now, whether he
3 has it or Kurt -- Kurt and Carolyn were asked to go
4 through all the files, ascertain status, make a list
5 of -- give a brief synopsis of what the case was
6 about, seriousness, how they viewed the nature of the
7 case and what would be required, that sort of thing,
8 and they did that. And I suspect they made a list. I
9 wasn't privy to it. I didn't get involved in that
10 directly.

11 **Q** What, if anything, did you direct about
12 contact that any member of your firm should have with
13 respect to the physician clients?

14 **A** I didn't say anything about that one way
15 or another. I think Elliott dealt with the UMIA files
16 and the UMIA clients and if they were told something
17 he would have told them that. I just was not involved
18 in that process.

19 **Q** Were there letters sent to the clients
20 advising them of the change in counsel?

21 **A** I think there were, but, again, I didn't
22 draft them or even read them. This was not my client.
23 I didn't have any direct involvement in that.

24 **Q** Let me ask you about your practice as a
25 lawyer there preceding May the 4th -- or May the 5th
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1 of 2005. Was it your practice to turn your computer
2 on and leave it on at all times while you were in the
3 office?

4 **A** Yes.

5 **Q** Was there ever an occasion where you
6 turned it off before you left the office?

7 **A** Oh, I'm sure there would have been an
8 occasion where that occurred.

9 **Q** Likewise, were there occasions where you
10 left the computer on? For example, at the end of the
11 day you went back to have drinks with the other
12 lawyers in the lounge.

13 **A** Certainly, but it was my practice that the
14 last thing I did before I left was to sit down, bill
15 my files and turn my computer off.

16 **Q** Right. I'm not suggesting that you would
17 have billed for that time, I'm just saying as a matter
18 of fact there was a rather loose practice, wasn't
19 there, in terms of rules regarding when you turned on
20 or turned off your computer?

21 **A** Sure. As I mentioned before, it was
22 just -- it was typical for people to turn their
23 computer on, log-in when they arrived and turn it off
24 and log-out when they left.

25 MR. PETERSON: All right. The employee

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1 handbook. Is this 10?

2 (EXHIBIT-10 WAS MARKED.)

3 **Q** (BY MR. PETERSON) So, sir, I tell you
4 that Deposition Exhibit 10 is a copy of a Williams &
5 Hunt employee handbook for 2005 that was provided to
6 me in the Rule 26 disclosure. Have you seen this
7 before?

8 **A** Yes.

9 **Q** And is this a true and correct copy, to
10 the best you can determine, quickly looking at it, of
11 what was in existence in terms of your employee
12 handbook in 2005?

13 **A** For a portion of the year, yes.

14 **Q** What portion of the year?

15 **A** This particular one was created by --
16 actually, by Ray, Quinney & Nebeker after Gary was
17 terminated and in connection with their assistance in
18 preparation of the severance agreement.

19 **Q** Okay. Could you turn to the section on
20 standards of conduct, please? It's section 10. I
21 apologize, the pages are not numbered on the bottom so
22 it's not easy. And it's Roman numeral 10?

23 **A** Roman numeral nine?

24 **Q** Or nine, I'm sorry. I apologize. And it
25 says "The following list of rules and offenses are

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1 examples of conduct that may subject employees to
2 discipline." Do you see that?

3 **A** Yes.

4 **Q** Now, turn the page, if you would. And the
5 fifth bullet point down that begins "except," would
6 you read that for me?

7 **A** "Except for party-time declared by
8 Elliott, being under the influence of or using alcohol
9 during work times. Possession of or using illegal
10 drugs is strictly prohibited."

11 **Q** So, now, this is another law firm that has
12 created this document for you?

13 **A** Yeah, I think this might have been a
14 holdover from our previous ones, I don't know. I
15 mean, Elliott was the chairman of the entertainment
16 committee, which was a committee of one, and he would
17 periodically declare like party-time like on
18 St. Patrick's Day, or whatever, and we would cut off
19 early in the afternoon and bring some hors d'oeuvres
20 in and celebrate.

21 **Q** And retreat to the firm lounge?

22 **A** Yeah, but party-time declared by Elliott
23 meant primarily when the whole firm would celebrate an
24 occasion.

25 **Q** So other than those party times, any

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2 lawyer who was under the influence or even using
3 alcohol during work times was subject to discipline?

3 **A Sure.**

4 Q Depending upon whether or not whoever the
5 managing partner was at the time wanted to discipline
6 that person, I take it?

7 **A Well, I think what this was designed to**
8 **reflect is, you know, if during the time you're**
9 **working and billing a client you're intoxicated,**
0 **that's not acceptable. After work is another thing.**

1 Q Who made the -- who was the decision maker
2 on May of 5th -- or, excuse me, May the 4th of 2005?
3 Who was the manager of your corporation? I don't know
4 what you call that person, but whoever --

5 **A That's me, I'm the president.**

6 Q So on May the 4th of 2005 you were the
7 president, you had the ability to decide to fire Gary
Ferguson, right?

9 **A I think so.**

0 Q Entirely on your own, likely?

1 **A Well, I think I could have. I chose not**
2 **to.**

3 Q Right. And you ultimately made the
4 decision to fire him, correct?

A I think it was collective. It was a

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1 **collective decision, a unanimous decision. I sought**
2 **the input of all the shareholders.**

3 Q And each one told you that you should fire
4 him?

5 **A They agreed with the decision to fire him,**
6 **yes.**

7 Q I understand they agreed with your
8 decision, that's one thing, but you just told me that
9 you sought the input of each of them. What input did
10 they provide?

11 **A Well, my recollection was it was different**
12 **on a lawyer-by-lawyer basis, but at the end of the**
13 **conversation they all agreed that we should terminate**
14 **Gary.**

15 Q Can you recall a specific thing that any
16 of them said that provided input to you for purposes
17 of your decision making?

18 **A Yes, I believe it was in those**
19 **conversations that I learned some of this information**
20 **about other defense counsel in his cases bringing up**
21 **information about his conduct during depositions and**
22 **in hearings and so forth.**

Q And who told you that?

23 **A Oh, I believe that both Kurt Frankenburg**
24 **and Carolyn Jensen mentioned something at that time.**

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1 Q Did Mr. Williams tell you in advance what
2 he was going to tell UMIA about the termination?

3 **A I think generally he did.**

4 Q What, generally, did he tell you?

5 **A That he was going to tell them that we had**
6 **lost confidence in Gary within the firm and there were**
7 **trust issues and we had decided to terminate him and**
8 **they could make their own mind up about whether or not**
9 **he continued to do work for UMIA.**

10 Q And the trust issues would relate to?

11 **A Well, the billing primarily.**

12 Q It's safe to say that if Gary had taken
13 files with him he would have been able to continue
14 doing medical malpractice defense work, correct?

15 **A I assume so.**

16 Q And so you would have known in advance of
17 the termination, you would have understood that if you
18 could keep him from taking files you could essentially
19 keep him from doing med mal defense work, correct?

20 **A Is this a hypothetical you're asking me?**

21 Q Sure, make it a hypothetical.

22 **A I suppose.**

23 Q You intended that he would not do medical
24 malpractice defense work after leaving your firm,
25 didn't you?

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1 **A No.**

2 Q No?

3 **A That was his -- that was the client's**
4 **choice. We can't prevent a client from giving him**
5 **work.**

6 Q But you can tell the client you don't
7 trust the lawyer, correct?

8 **A I suppose so.**

9 Q And that's what you told -- not you, but
10 you knew in advance that's what Elliott was going to
11 tell Mr. Oslowksi, the head of UMIA?

12 **A I think he was going to -- as I testified,**
13 **he was going to tell Marty that we had lost trust and**
14 **confidence in Gary, yeah.**

15 Q And he was also going to tell him that it
16 related to the billing issue, correct?

17 **A I don't think that the general discussion**
18 **Elliott and I had was that specific. He was going to**
19 **try to keep it general.**

20 Q All right.

21 **A And whether he kept it general, I don't**
22 **know.**

23 Q Because you weren't there?

24 **A That's right.**

25 Q Do you recall having, as part of the

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SHEET 15

1 conversation that you had with Doug Smith and Art
2 Glenn, them indicating to you, one of them indicating
3 to you, that Gary is on the road a lot so computer
4 evidence is not going to be enough to indicate
5 anything?

6 **A No, our discussions with them never got
7 that specific.**

8 **Q** Okay. Can we move on to after Gary leaves
9 and he's going to try to go to work now as a
10 plaintiff's lawyer. Can you tell me what you know
11 about the conversations you had with Joe Steele
12 relating to the potential conflict issue?

13 **A Sure. That whole thing started out as we
14 were trying to apportion the cases that Gary had been
15 working on that we were asked to keep.**

16 **Kurt Frankenburg had a couple and one of
17 them was a case that Joe Steele was the plaintiff's
18 lawyer on and Joe had contacted Kurt and asked about
19 whether his firm could stay involved in the case
20 representing the defendant and so Kurt wrote him a
21 letter about that and an issue developed about whether
22 there was a conflict of interest that would prevent
23 Joe Steele and/or Siegfried & Jensen from continuing
24 to act as plaintiff's counsel on the case. And I
25 think it involved a woman doctor named Thorup.**

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1 **And so Joe and Kurt were discussing that
2 issue back and forth and then Kurt came to me and
3 explained the situation and said, what should we do?
4 And we talked about it and decided the prudent thing
5 to do would be to get an outside third-party legal
6 opinion about whether this representation could
7 continue and then to follow the advice we got. So we
8 contacted Al Sullivan at --**

9 **Q** Snell & Wilmer?

10 **A -- Snell & Wilmer and Al wrote us a letter
11 and then we did what the letter said, and then I think
12 at the same time Joe contacted a fellow named Charles
13 Gruber and we had the impression that Gruber had given
14 Joe the same advice that Sullivan had given to us.
15 And so that's kind of how it went down, as far as I
16 know.**

17 **Q** Didn't you have a former employee named
18 Gilson?

19 **A** We did for a very short period of time.

20 **Q** And Gilson was an attorney who worked for
21 your firm and then he was fired?

22 **A** Yes.

23 **Q** I don't remember -- do you remember what
24 he was fired for?

25 **A** Yeah, he was drinking on the job and he

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1 **couldn't -- he couldn't function as a lawyer. He
2 couldn't perform the functions that we expected of one
3 of our lawyers.**

4 **Q** And didn't he go to work, then, for
5 another firm in which this same issue arose about
6 whether or not he could work for the other firm?

7 **A** You know, I don't recall it. If he did I
8 **wasn't directly involved in it, so I don't know.**

9 **MR. ECKERSLEY:** Was it another firm or was
10 it the same firm?

11 **MR. FERGUSON:** He went to work for
12 Siegfried & Jensen.

13 **MR. ECKERSLEY:** Right.

14 **Q** (BY MR. PETERSON) And you don't know
15 whether or not your firm ultimately represented Gilson
16 trying to get him split from Siegfried & Jensen, do
17 you?

18 **A** I -- my memory is that after it had
19 occurred, Elliott told me he reviewed some sort of an
20 agreement between Siegfried & Jensen and Jim and I
21 found that out sometime after the fact. That's all I
22 recall about that.

23 **Q** So your firm fired him, he then went to
24 work for Siegfried & Jensen and Elliott Williams
25 negotiated the settlement with Siegfried & Jensen when

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1 he left there; isn't that what happened?

2 **A** I don't know whether Elliott negotiated it
3 or whether he just reviewed the agreement. I have no
4 idea about that.

5 **Q** Wasn't this an issue that was raised by
6 Mr. Steele ultimately to you?

7 **A** Not to me. He may have raised it with
8 Kurt, I don't know.

9 **Q** All right. Let me ask you some questions
10 about -- next about the complaint. Have you provided
11 copies of the complaint to any other law firm?

12 **A** Yes.

13 **Q** Other than your counsel?

14 **A** I don't think so. I haven't.

15 **Q** Have you had discussions with anyone, not
16 an attorney-client relationship, but with anyone about
17 this case?

18 **A** Yes.

19 **Q** With whom have you had discussions?

20 **A** A person at the -- our professional
21 liability carrier.

22 **Q** Okay. Relating to whether or not there
23 was coverage?

24 **A** Sure.

25 **Q** Other than that, with whom have you had

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"discussions?

A Outside the law firm?

Q Yeah.

A Probably just with my wife.

Q Okay. What did you tell people inside the law firm, the staff, for example, with respect to why Gary was fired?

A Well, I think it was different with different staff because various of the staff members had more knowledge. For example, Janet knew a lot more than the individual secretaries.

We tried to keep it general and just say that, you know, Gary had been terminated and for a variety of reasons and we tried not to get into specifics with the staff.

Q Did you tell anyone that Gary had been terminated because he had overbilled UMIA?

A I had some discussions with Katie Voytovich about -- we got more specific into the reasons for termination.

Q Who is Katie Voytovich?

A She is a paralegal.

Q Why did you have discussions with her about that?

A Well, because she came to me with some

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documentation that she had and that, and then we just got into a discussion.

Q So did you -- by your response, should I interpret that to mean that you did tell Katie Voytovich, a paralegal at your firm, that you terminated Gary because he had overbilled UMIA?

A I think the -- it was not that specific, but there was a discussion about the billing issue, I think.

Q Would those statements have implied to her that Gary was dishonest in his billing?

A I don't know.

Q Would the statements that you made to Art Glenn during the meeting that you had with him have implied that Gary was dishonest with respect to his billing of UMIA?

A Well, again, it sort of depends on what Art thinks about it. I didn't think that they did, or that that was the purpose for them. We were just talking about some -- that, generally, we had lost trust and confidence in him. And the billing certainly was an issue, it was a part of that discussion.

Q Did you intend by your statements for them to take any action?

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1 A No, we intended that to be an
2 informational meeting because we wanted to clear the
3 air about any myths that were floating around or
4 inaccurate information, if they wanted the
5 information.

6 Q I guess I should probably ask what it is
7 that Katie brought you, what documents?

8 A Oh, boy. She had some -- she had some
9 information about some reports and memoranda that she
10 had written that -- she had basically written the
11 substance of them. And she showed me a couple of
12 documents where Gary had cut and pasted them together
13 electronically and then given them to her for a final
14 review and she had to completely rewrite them, and
15 then he billed the client a bunch of money for them, a
16 bunch of hours for them, and she felt she couldn't
17 bill it because he had, and so she didn't, and that's
18 how the issue of billing came up.

19 Q Okay. And this all occurred after you had
20 fired him?

21 A Yes.

22 MR. ECKERSLEY: And those are the
23 documents that I called, from what they produced to
24 me, for my own reasons, they didn't really relate to
25 what we're doing here.

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1 MR. PETERSON: Okay.

2 MR. ECKERSLEY: And you're welcome to look
3 at them if you want.

4 MR. PETERSON: No, I gotcha. That's fine.

5 Q (BY MR. PETERSON) So I just -- as I'm
6 looking at the information, then, that you had at the
7 time that you fired Gary, you had not investigated a
8 single source entry in any of the time and billing
9 entries to determine whether or not it was accurate?

10 In other words, by that I mean you had not called, for
11 example, a doctor about who a deposition had been
12 billed 11 hours, you had done nothing like that?

13 A Well, no, we had not done an outside
14 investigation. But what we had done is we had looked
15 at deposition transcripts, we had looked at when the
16 deposition started and when it ended, which is always
17 reflected in the transcript, so you know how much time
18 it took to actually take the deposition. We had the
19 logs, we had his calendar and we had his billings and
20 we had analyzed -- I say "we," I mean Elliott or
21 others in the firm had analyzed that fairly carefully
22 to determine that there had been overbilling.

23 Q All right. And you believed that there
24 had been overbilling at the time that you fired him?

25 A Yeah.

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SHEET 16

1 Q Did you compare his records with any other
2 attorney's records? In other words, did you compare
3 the number of hours, for example, that he provided you
4 with and compared it to some other attorney's records?
5 **A In the office?**
6 Q Yes, in the office.
7 **A No.**
8 Q Of course that begs the question, outside
9 of the office, did you compare them against some --
10 **A No, we didn't have anything to go along.**
11 Q What actions did Williams & Hunt take with
12 respect to the overbilled amounts?
13 **A Two things, as I understand it. We gave**
14 **UMIA a credit of about somewhere between \$10,000 and**
15 **\$11,000 on the bills that were sent out the first week**
16 **in May reflecting time for the previous month or two,**
17 **and then I understood that Elliott offered to go back**
18 **and audit previous bills and to try to come up with**
19 **further amounts and he was directed by UMIA not to do**
20 **that.**
21 Q All right. Let's take those two things.
22 When did you issue the credit?
23 **A It was either in the May bills or in the**
24 **June bills, and I'm not sure which.**
25 Q Did you send out the May bills

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1 believing -- the May bills I just showed you didn't go
2 out, the one we looked at, until May the 9th.
3 **A Yeah. And they don't all go out on the**
4 **same day, by the way.**
5 Q So on May the 9th when you sent the bill
6 out you believed that it was false?
7 **A No, and it may have -- see, the credit may**
8 **not have appeared just on this bill, but in the UMIA**
9 **bills as a group there was a credit for that amount of**
10 **money. And so I think in order to determine it you**
11 **would have to have all the UMIA bills that went out at**
12 **that time and then you would find the credit somewhere**
13 **in there. Elliott can probably help you with that.**
14 Q But May the 9th, 2005, by then you had
15 already concluded that he had overbilled UMIA during
16 the month of May, correct?
17 **A (Witness nods head up and down.)**
18 Q Yes?
19 **A Yes.**
20 Q And you had determined in the Robb versus
21 Richard Cox case he had overbilled them, correct?
22 **A Yeah.**
23 Q And you knew that at the time, or believed
24 it at the time you sent the bill out?
25 **A Yeah.**

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1 Q And this bill dated May the 9th, 2005, is
2 this the bill that went out to them?
3 **A Yes. It was one of the bills, yes.**
4 Q And is there a credit in this bill for the
5 amount that you think was false?
6 **A Excuse me?**
7 Q Well, the bill to your client May the 9th,
8 total fees \$28,720.25.
9 **A Uh-huh (affirmative).**
10 Q And 100 hours of that time, or \$17,937.75
11 relates to Gary Ferguson, right?
12 **A Right.**
13 Q So you're telling me that you knew at the
14 time you sent this bill out that it was false?
15 **A No. No. We knew that -- we knew that at**
16 **the time this bill went out that there was a billing**
17 **problem in some of Gary's entries. They may well have**
18 **been corrected by the time this bill went out so that**
19 **the additional time was not reflected, I don't know.**
20 **But I do know that we figured out, you know, based on**
21 **the numbers that were on Exhibit 8, where we had**
22 **specifically identified overbillings, we took those**
23 **hours and gave UMIA a credit for the full amount of**
24 **those hours so that they didn't -- they were not**
25 **paying for entries we believed to be incorrect.**

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1 Q Well, let's take a look at that, first of
2 all. So your position is that on the right-hand side
3 of Exhibit 8, every time that the computer is not
4 turned on during that time it's an overbilling?
5 That's your position?
6 **A Well, not necessarily because I told you**
7 **we would then compare that against the billing, the**
8 **actual billing entries for the date plus the calendar.**
9 **So you had to look at the four components to figure it**
10 **out.**
11 Q All right. So this bill, Deposition
12 Exhibit 6, okay, "3/26/05, GBF. Traveled to Newport
13 Beach with Doug Smith. 11.75 hours." Right?
14 **A Right, but let's look at 3/23 where he**
15 **billed --**
16 MR. ECKERSLEY: Stay where he is on that
17 one.
18 MR. PETERSON: Well, no, I'm the lawyer,
19 you're the witness this time.
20 THE WITNESS: Yes, Mr. Peterson. I
21 understand that.
22 MR. PETERSON: You don't have to call me
23 mister, that's not necessary.
24 Q (BY MR. PETERSON) 3/26/05. 11.75 hours.
25 No corresponding entry on his computer at work. So

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that 11.75 hours is okay, right?

A Yeah, because they've obviously looked at the calendar and determined that he was out of the office that day in Newport Beach.

Q Okay. So now let's go to 3/28, all right?

A All right.

Q Nine and a half hours are charged on the billing system, correct?

A Right.

Q That's what the entry is?

A Right.

Q The computer is on, apparently, 5.5 hours?

A Right.

Q The number four next to it means there's four hours that are in dispute, correct?

A Well, I think so.

Q Isn't that your point, that he's overbilled by four hours? You just used the term a minute ago that it reflected the amount that he had overbilled.

A Well, I think so. The reason I say I think so is that there's the four hours that's reflected there, I don't know whether that was then compared against the calendar or whatnot. I think we would have to look at what was actually billed to the

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A Right.

Q And these are your records, right?

A Well, sure, but my point is that you need to have that in front of you as well as just the log-in time to determine whether that's an overbilling or just a reflection of the difference between the log-in and the hours billed.

Q And you have assumed for purposes of this, when you use the term overbilling what you're referring to is the difference between the time his computer is on and the time that is billed on the billing system, correct?

A It's not that simple and I explained this to you three times now. There are four components I've looked at.

Q I understand that. I understand you looked at the calendar. But when I look at your numbers on deposition -- on your logs, Deposition Exhibit 8, and I see 3/28 you show the computer log-in time at 8:13, log-out time at 2:45, 5.5 hours is essentially the difference between those two numbers?

A Right.

Q 9.5 is the number of hours that were billed by Mr. Ferguson during that day, we know that we can correspond those to Deposition Exhibit 7,

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client that day.

Q Well, this is part of that 3/28, but not all of it. This is one of the clients, correct, Deposition Exhibit 6? This is just the bill for Lynn Robb?

A Well, and you're assuming that he worked on more cases than just the Robb case on that day and I don't know the answer to that. Maybe he did and maybe he didn't.

Q Well, we do know that because you have Deposition Exhibit 7 in front of you and that includes the actual entries for March 28th. Here are the UMIA clients he worked on March 28th, according to your computer. Robb versus Cox, you know that case, right?

A Right.

Q Smith versus Wallin?

A Right.

Q Dejong versus DeJohn?

A Right.

Q Monnett versus Pinson?

A Right.

Q Suchy versus -- I'm not sure how you pronounce that -- Fagnant? Fagnant? Rochell versus Christiansen, Bruce versus Tanner Memorial, Hess versus Burrell?

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correct?

A Correct.

Q We know the clients. And so on the right-hand side where the number four is there, that represents the difference between the 9.5 hours billed and the 5.5 hours during which his computer was turned on?

A Right. Correct.

Q All right. It doesn't represent anything further than that in terms of your actually having contacted anybody about what he did for them on March 28th?

A That's correct. That's correct.

Q And that's the case with respect to every other date, isn't it?

A As far as I'm -- my involvement, yes. I don't know whether anybody else contacted him or not, but I don't know if they did.

Q All right. You would agree, would you not, that if you tell UMIA that they can't trust Gary Ferguson, that that is likely to have an impact on his ability to get UMIA case files?

A Well, probably, but we didn't tell them that. We told them we didn't trust Gary Ferguson.

Q I thought you didn't tell them anything?

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SHEET 17

1 A Well, I didn't personally. I used the
2 editorial we.
3 Q So you don't know what they were told?
4 A No, Elliott is the one who knows that.
5 MR. PETERSON: Thank you. I might be
6 done, I just want to take a minute, few minutes break
7 and talk to my client.
8 (A break was taken from 4:03 p.m. to
9 4:07 p.m.)
10 MR. PETERSON: All right. I don't have
11 any additional questions today. I would reserve the
12 right to continue this deposition based on the
13 invocation of the attorney-client privilege, but that
14 would be the only thing that I have.
15 Additionally, I guess we need to ask
16 whether or not you want to sign, whether or not you
17 want your client to review and sign. I assume you do.
18 MR. ECKERSLEY: Read and sign.
19 MR. PETERSON: Anything else?
20 MR. ECKERSLEY: No, nothing I can think
21 of.
22 MR. PETERSON: Great. Thank you.
23 (Whereupon, the deposition was concluded
24 at 4:07 p.m.)
25

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1 Case: Ferguson vs. Williams & Hunt, et al.
2 Case No.: 050921677
3 Reporter: Susie Lauchnor
4 Date taken: July 17, 2006

WITNESS CERTIFICATE

5 I, GEORGE A. HUNT, HEREBY DECLARE:
6 That I am the witness in the foregoing
7 transcript; that I have read the transcript and know
8 the contents thereof; that with these corrections I
9 have noted this transcript truly and accurately
10 reflects my testimony.

8 PAGE-LINE	CHANGE/CORRECTION	REASON
9		
10		
11		
12		
13		
14		

15 No corrections were made.

17 I, GEORGE A. HUNT, HEREBY DECLARE
18 UNDER THE PENALTIES OF PERJURY OF THE LAWS OF THE
19 UNITED STATES OF AMERICA AND THE LAWS OF THE STATE OF
20 UTAH THAT THE FOREGOING IS TRUE AND CORRECT.

GEORGE A. HUNT

21 SUBSCRIBED and SWORN to at
22 this day of
23 2006.

Notary Public

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REPORTER'S CERTIFICATE.

1 STATE OF UTAH)
2) ss.
3 COUNTY OF SALT LAKE)
4 I, Susie Lauchnor, Registered Professional
5 Reporter and Notary Public in and for the State of
6 Utah, do hereby certify:
7 That prior to being examined, the witness,
8 GEORGE A. HUNT, was by me duly sworn to tell the
9 truth, the whole truth, and nothing but the truth;
10 That said deposition was taken down by me
11 in stenotype on July, 17, 2006, at the place therein
12 named, and was thereafter transcribed and that a true
13 and correct transcription of said testimony is set
14 forth in the preceding pages;
15 I further certify that, in accordance with
16 Rule 30(e), a request having been made to review the
17 transcript, a reading copy was sent to GEORGE A. HUNT
18 for the witness to read and sign before a notary
19 public and then return to me for filing with CHARLES
20 F. PETERSON.
21 I further certify that I am not kin or
22 otherwise associated with any of the parties to said
23 cause of action and that I am not interested in the
24 outcome thereof.
25 WITNESS MY HAND AND OFFICIAL SEAL this
17th day of July, 2006.
Susie Lauchnor, CSR, RPR
Notary Public
Residing in Salt Lake County

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Exhibit F

SCANNED

FEB 4 2006

M. David Eckersley (0956)
PRINCE, YEATES & GELDZAHLER
175 East 400 South, Suite 900
Salt Lake City, Utah 84111
Telephone: (801) 524-1000

Attorneys for Defendants
Williams & Hunt, Inc.
Elliott J. Williams, George A. Hunt
and Kurt Frankenberg

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GARY B. FERGUSON and JULIE A.
FERGUSON,

Plaintiff,

v.

WILLIAMS & HUNT, INC., ELLIOTT
J. WILLIAMS, GEORGE A. HUNT,
BRUCE H. JENSEN and KURT
FRANKENBERG,

Defendants.

ANSWER OF DEFENDANTS
WILLIAMS & HUNT, INC.,
ELLIOTT J. WILLIAMS,
GEORGE A. HUNT and
KURT FRANKENBERG

Case No. 050921677

Judge: Tyrone Medley

Defendants Williams & Hunt, Inc., Elliott J. Williams, George A. Hunt and Kurt
Frankenberg hereby submit the following answers to the allegations of Plaintiffs'
Complaint.

FIRST DEFENSE

Responding to the specific allegations of Plaintiffs' Complaint, Defendants admit, deny and affirmatively allege as follows:

1. Defendants admit that jurisdiction and venue are proper in this Court.
2. Defendants admit the allegations contained in paragraphs 3, 4, 5 and 6 contained in Plaintiffs' Complaint.
3. Defendants affirmatively allege that Bruce H. Jensen is deceased.
4. Defendants admit the allegations contained in paragraphs 9, 10, 11, 12, 13, 14 and 15 of Plaintiffs' Complaint.
5. Defendants deny the allegations contained in paragraph 16 of Plaintiffs' Complaint.
6. Defendants admit the allegations contained in paragraph 17 of Plaintiffs' Complaint.
7. Defendants admit the allegation contained in paragraph 18 that there is a bar in the firm premises but denies the remaining allegations contained in paragraph 18 of Plaintiffs' Complaint.
8. Defendants deny the allegations contained in paragraph 19 of Plaintiffs' Complaint.
9. Defendants deny the allegations contained in paragraphs 20, 21 and 22 of Plaintiffs' Complaint.

10. Defendants admit the allegations contained in paragraph 23 of Plaintiffs' Complaint, except to deny that Elliott Williams wanted to review the bill and affirmatively allege that Elliott Williams offered to review the billing.

11. Defendants deny the allegations contained in paragraph 24 of Plaintiffs' Complaint and affirmatively allege that Elliott Williams was surprised at the time devoted to two items.

12. Defendants admit the allegations contained in paragraph 25 of Plaintiffs' Complaint.

13. Defendants deny the allegations contained in paragraphs 26, 27, and 28 of Plaintiffs' Complaint.

14. Defendants admit the allegations contained in paragraph 29 of Plaintiffs' Complaint, except to deny that Williams & Hunt has any partners.

15. Defendants deny the allegations contained in paragraphs 30 and 31 of Plaintiffs' Complaint, except to admit that Mr. Ferguson's billing practices contributed to the decision to terminate him.

16. Defendants admit that they informed Plaintiff Gary Ferguson that the other shareholders had unanimously voted to terminate him and to remove him as a shareholder.

17. Defendants admit that Plaintiff Gary Ferguson was informed that there were questions about his billings owing to the fact that he was billing more hours than Bruce Jensen during the same time period and Mr. Jensen spent much more time in the office.

Defendants further admit that Mr. Ferguson gave explanations for the relative comparison of his billings with those of Mr. Jensen.

18. With regard to the allegations contained in paragraph 34 of the Plaintiffs' Complaint, Defendants admit that Mr. Ferguson was a shareholder of the firm immediately prior to his termination and deny the remaining allegations contained in paragraph 34.

19. Defendants deny the allegations contained in paragraphs 35, 36, and 37 of Plaintiffs' Complaint.

20. With regard to the allegations contained in paragraph 38 of Plaintiffs' Complaint, Defendants admit that Plaintiff could take time off work but, for lack of sufficient information and belief deny the remaining allegations contained in paragraph 38.

21. Defendants deny the allegations contained in paragraph 39 of Plaintiffs' Complaint.

22. Defendants admit the allegations contained in paragraph 40 of Plaintiffs' Complaint.

23. Defendants admit that they knew Mr. Ferguson was having a biopsy in the near future but deny they knew it was to be on the day following the date on which he was fired.

24. Defendants deny the allegations contained in paragraph 41 of Plaintiffs' Complaint.

25. With regard to the allegations contained in paragraph 42 of Plaintiffs'

Complaint, Defendants admit that they did not allow Mr. Ferguson to enter the office after hours on May 5, 2005.

26. Defendants have no knowledge with regard to the allegations contained in paragraph 43 of Plaintiffs' Complaint, and therefore deny the same.

27. Defendants admit that Mr. and Mrs. Ferguson and their children came to the firm offices on the morning of May 6, 2005 to take his personal property. Defendants are unaware of the remaining allegations contained in paragraph 44 of Plaintiffs' Complaint and therefore deny the same.

28. Defendants deny the allegations contained in paragraph 45 of Plaintiffs' Complaint and affirmatively allege that the Firm is general counsel to UMIA.

29. With regard to the allegations contained in paragraph 46 of Plaintiffs' Complaint, Defendants admit that Elliot Williams spoke with the President of UMIA concerning the Firm's belief regarding the bills that had been submitted to UMIA by Mr. Ferguson but deny the remaining allegations contained in paragraph 46.

30. With regard to the allegations contained in paragraph 47 of Plaintiffs' Complaint, Defendants lack information and belief regarding such allegations and therefore deny the same.

31. Defendants deny the allegations contained in paragraph 48 of Plaintiffs' Complaint.

32. Defendants admit the allegations contained in paragraph 49 of Plaintiffs'

Complaint.

33. Defendants admit the allegations contained in paragraph 50 of Plaintiffs'

Complaint.

34. Defendants admit the allegations contained in paragraph 51 of Plaintiffs'

Complaint.

35. With regard to the allegations contained in paragraph 52 of Plaintiffs'

Complaint, Defendants admit that Ferguson had done legal work for UMIA during the period of his employment with the firm and that such work had produced income for the firm.

36. Defendants deny the allegations contained in paragraph 53 of Plaintiffs'

Complaint.

37. Defendants lack sufficient information and belief regarding the allegations contained in paragraphs 54 and 55 of Plaintiffs' Complaint and therefore deny the same.

38. With regard to the allegations contained in paragraph 56 of Plaintiffs'

Complaint, Defendants admit that Mr. Jensen, Mr. Hunt and Mr. Dennis Ferguson met with representatives of UMIA to answer their questions about Mr. Gary Ferguson's termination and that Mr. Elliot Williams was not in attendance at the time of this discussion. Defendants deny the remaining allegations contained in paragraph 56.

39. Defendants deny the allegations contained in paragraph 57 of Plaintiffs'

Complaint.

40. Defendants deny the allegations contained in paragraphs 58, 59, 60, and 61 of Plaintiffs' Complaint.

41. With regard to the allegations contained in paragraph 62, Defendants admit that Gary Ferguson was 55 years old at the time of his termination. Defendants deny the remaining allegations contained in paragraph 62 of Plaintiffs' Complaint.

42. Defendants lack sufficient information and belief regarding the allegations contained in paragraph 63 of Plaintiffs' Complaint and therefore deny the same.

43. With regard to the allegations contained in paragraph 64 of Plaintiffs' Complaint, Defendants admit that Gary Ferguson has become associated with the law firm of Siegfried & Jensen. Defendants lack information and belief regarding the remainder of the allegations contained in paragraph 64 and therefore deny the same.

44. With regard to the allegations contained in paragraph 65 of Plaintiffs' Complaint, Defendants admit that they had discussions with Joe Steele concerning the ethical considerations raised by Gary Ferguson's employment with Siegfried & Jensen and deny the remaining allegations contained in paragraph 65.

45. With regard to the allegations contained in paragraph 66 of Plaintiffs' Complaint, Defendants admit that both the law firm of Williams & Hunt and Siegfried & Jensen retained independent counsel to advise them concerning the potential for ethical violations arising from Mr. Ferguson's change of employment. The Defendants further admit that Mr. Gary Ferguson, as a part of discussions regarding the conflict question,

agreed to execute an affidavit indicating that he had no personal knowledge about cases in which he did not directly participate wherein Siegfried & Jensen was the plaintiff.

Defendants further acknowledge that the case which Mr. Ferguson had been defending in which Siegfried & Jensen was representing the plaintiff was in fact referred to new counsel owing to Mr. Ferguson's obvious conflict of interest in that case.

46. Defendants deny the allegations contained in paragraphs 67, 68, and 69 of Plaintiffs' Complaint.

47. Defendants lack sufficient information and belief regarding the allegations contained in paragraph 70 of Plaintiffs' Complaint and therefore deny the same.

48. Defendants lack sufficient information and belief regarding the allegations contained in paragraph 71 of Plaintiffs' Complaint and therefore deny the same.

49. Paragraph 72 of Plaintiffs' Complaint makes no factual allegations and therefore requires no response.

50. Defendants have previously responded to the allegations contained in paragraph 73 of Plaintiffs' Complaint.

51. Defendants deny the allegations contained in paragraphs 74, 75, and 76 of Plaintiffs' Complaint.

52. With regard to the allegations contained in paragraph 77 of Plaintiffs' Complaint, Defendants acknowledge that they spoke with representatives of Siegfried & Jensen concerning the professional conflicts that might arise owing to Mr. Ferguson's

employment with that firm. Defendants deny the remaining allegations contained in paragraph 77.

53. Defendants deny the allegations contained in paragraphs 78, 79, 80, 81, and 82 of Plaintiffs' Complaint.

54. With regard to the allegations contained in paragraph 84 of Plaintiffs' Complaint, Defendants admit that they changed the combination lock on the office subsequent to Mr. Ferguson's termination and that he did not have a access to the office when locked. Defendants deny the remaining allegations contained in paragraph 84 of Plaintiffs' Complaint.

55. Defendants deny each and every allegation of the remaining paragraphs of Plaintiffs' Complaint which have not specifically been responded to previously.

SECOND DEFENSE

Plaintiff Julie A. Ferguson's Complaint fails to state a claim for which relief may be granted.

THIRD DEFENSE

Any communications by members of the firm regarding Plaintiff Gary Ferguson were privileged.

FOURTH DEFENSE

Defendants' actions regarding Plaintiff Gary Ferguson were done without malice.

FIFTH DEFENSE

Any statements of Defendants regarding Gary Ferguson which were published to third parties were true.

SIXTH DEFENSE

By accepting the benefits provided for in the Buy/Sell Agreement with Williams & Hunt, Inc., Plaintiff Gary Ferguson is estopped from asserting a claim for wrongful termination.

DATED this 23rd day of Feb., 2006.

PRINCE, YEATES & GELDZAHLER

By M. David Eckersley
M. David Eckersley
Attorneys for Defendants

Exhibit G

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P R O C E E D I N G S

MARTIN J. OSLOWSKI,

called as a witness, being first duly sworn, was
examined and testified as follows:

EXAMINATION

BY MR. PETERSON:

Q. For the record, would you go ahead and
identify yourself, please.

A. My name is Martin Joseph Osowski.

Q. Mr. Osowski, you're here today for a
deposition. Did you get served with a notice for the
deposition and a subpoena?

A. I did.

Q. And in the subpoena I know that we asked
you to bring any records that you may have relating
to the matter that's the subject of this action or
the firing of Gary Ferguson, anything relating to
this. Did you bring any documents today?

A. I don't have any documents.

Q. And when you say you don't have any, do
you mean you personally or do you mean you as in
UMIA? In what capacity are you answering that
question?

A. I'm answering in the capacity that I did
not make any notes after a meeting I had with

1 Elliott. When I got back to the office I did not
2 make any further notes. I just have no record
3 relating to it.

4 Q. Okay, great. Thank you.

5 All right. Tell us just for the record,
6 what is your position at UMIA?

7 A. I'm president and chief executive officer.

8 Q. How long have you held that position?

9 A. Since December of 1986.

10 Q. Prior to that what did you do?

11 A. I was vice president of claims from August
12 of '79 through the time of getting the presidency
13 position.

14 Q. At UMIA?

15 A. At UMIA. And prior to that time I worked
16 for Aetna Life and Casualty handling claims for about
17 seven years.

18 Q. Are you also licensed or have you ever
19 been licensed to sell insurance?

20 A. Licensed. I honestly don't remember. I
21 know I'm a licensed agent in the state of Utah and
22 the state of Montana. And I don't think I've kept my
23 adjustor's license, because I haven't handled a claim
24 for 25 years, 20 years.

25 Q. What was the nature of your license?

1 Property and casualty?

2 A. Property and casualty agent.

3 Q. All right. Do you know -- in this case do
4 you know Gary Ferguson?

5 A. I do know Gary.

6 Q. How do you know Gary?

7 A. Through his association with Williams &
8 Hunt.

9 Q. And how long have you known him, if you
10 know? Can you go back for us and tell us when you
11 think?

12 A. To my knowledge, the firm was formed
13 somewhere in the early 90's, maybe 1991. So I guess
14 I've probably known him since that time.

15 Q. Have you known him socially or just
16 through business?

17 A. Mostly socially.

18 Q. Tell me about that.

19 A. Well, like I said, I have not handled a
20 claim since I became president and CEO. So I had
21 very little interaction with him at the law firm in
22 terms of in attending our insureds. So my contacts
23 were limited to an occasional cocktail after hours in
24 the break room or attending social functions. The
25 main one I remember is the party at Bruce Jensen's

1 house before the opening ceremonies of the Olympics.

2 Q. Have you ever been to Gary's house?

3 A. I have not. I do not even know where he
4 resides.

5 Q. All right. Let me ask you about his
6 involvement with UMIA. Now, if you would, just
7 generally, UMIA represents -- or is an insurance
8 company that handles insurance for physicians; is
9 that correct?

10 A. Right. We insure physicians for their
11 medical professional liability.

12 Q. I can't remember; do you also do some
13 hospitals at this point?

14 A. A few, two or three small hospitals in
15 Utah and eight in Montana. I wouldn't call them
16 hospitals. Most of them have an average acute care
17 bed rate of one.

18 Q. Okay. All right. And in that sense, are
19 UMIA physicians also -- are they shareholders? Is it
20 some sort of a mutual organization? Or what's the
21 relationship of the physician insureds to the
22 company?

23 A. The technical term for our type of
24 organization is a reciprocal exchange. So in theory
25 the doctors are exchanging insurance contracts.

1 They're agreeing to insure one another.

2 Q. All right.

3 A. But we're governed as a mutual because
4 that enabling statute sunsetted I think seven years
5 after we formed. So as far as the insurance
6 department is concerned, we're governed like a mutual
7 insurance company.

8 Q. Does that make any difference in the way
9 you run the business? Is there some advantage to
10 that as opposed to being a reciprocal?

11 A. Reciprocal versus mutual?

12 Q. Yeah.

13 A. No. I think they both operate on a -- I
14 mean, we're both corporations; we both have to be
15 physically viable; but we operate on not for profit
16 philosophies.

17 Q. Williams & Hunt is the law firm, at least
18 one of the law firms that has been involved in
19 representing physician insureds in malpractice cases
20 for UMIA; correct?

21 A. That's correct.

22 Q. Tell me about that. How long has that
23 been going on? And in that capacity, I guess, did
24 you know Gary at all as one of your lawyers,
25 essentially?

1 A. I've known Elliott Williams since probably
2 1975. He was John Snow's protégé -- or underling, I
3 guess I should say.

4 MR. ECKERSLEY: I think Elliott would
5 prefer protégé.

6 THE WITNESS: Protégé. I know he would.
7 So he was his underling. Elliott and I developed a
8 relationship that we have maintained that long. He
9 was with Snow, Christensen & Martineau. He and a
10 couple of the other lawyers were unhappy, disgusted
11 with what was going on internally, and I suggested
12 maybe they go out and form their own law firm, which
13 they investigated and did.

14 Q. (BY MR. PETERSON) On the assumption that
15 if they formed their own firm that UMIA would use
16 them as counsel?

17 A. Yes.

18 Q. Send them some business?

19 A. We would send them some business.

20 Q. Not suggesting there's anything wrong with
21 that. I just sort of heard that in your voice, and
22 you said you suggested it.

23 A. Yeah.

24 Q. Okay. And you knew that Gary Ferguson was
25 one of the lawyers who was involved in the Williams &

1 Hunt firm?

2 A. I don't think immediately. I mean, I knew
3 that Gary was either inside or somehow became part of
4 the firm. It was formed. But I had no control over
5 that or who they recruited.

6 Q. Okay. Did you know -- do you recall when
7 you first heard that Gary had been terminated by
8 Williams & Hunt?

9 A. It was at a meeting that I had with
10 Elliott Williams.

11 Q. All right. Would that meeting have
12 occurred after the termination or before?

13 A. I honestly don't have any recollection of
14 that. I'll tell you about the conversation, but I
15 can't remember whether it was before Gary was
16 terminated or just prior to his termination. But it
17 was around it.

18 Q. Okay, that's fair. And if I represent to
19 you that he was terminated on the 5th of May, 2005,
20 does that sound like about the right time frame?

21 A. Yeah, it does; but I couldn't tell you
22 whether Elliott's meeting was in March, April, or
23 May. I can just tell you it was in the spring and
24 maybe a day like today or something like that.

25 Q. All right. Go ahead and tell me where the

1 meeting occurred. Let's just go right to the
2 meeting.

3 A. I think we had lunch at the Oyster Bar.

4 Q. At the Oyster Bar, okay. And how did that
5 happen? What happened?

6 A. Elliott called me and said that he needed
7 to discuss something with me.

8 Q. All right. And what did you discuss?

9 A. Well, he advised me that as his duty as
10 general counsel for UMIA, that he had a duty to
11 disclose that Gary's billing practices had come under
12 question. He indicated that they decided to keep
13 track of when he was logging in and off his computer,
14 and that within the first couple of days of doing
15 that that I think Gary had some kind of medical
16 problem he had to take care of or had a medical
17 appointment and came in about midday and left around
18 five o'clock and billed UMIA for approximately 11
19 hours of work that day.

20 Q. Did he give you -- did he show you any
21 documents, anything relating to that?

22 A. He did not.

23 Q. So with respect to his billing, with
24 respect to the day that you're talking about where he
25 came in around noon and left around five, did he tell

1 deposition at home that morning and they spent two
2 hours at their home and billed you for the two hours,
3 you would expect that also?

4 A. I trust my attorneys. When they send me a
5 bill, I pay it.

6 Q. Okay. And prior to this point in time
7 that you met with Elliott Williams, had you ever
8 discussed with Mr. Williams any concerns that he may
9 have had either personally or on behalf of his law
10 firm with respect to Mr. Ferguson's billing
11 practices?

12 A. Not that I recall.

13 Q. Likewise, what about Mr. Ferguson as a
14 lawyer for your company? Had you had problems with
15 him in terms of the way he represented your physician
16 insureds?

17 A. I have no knowledge of how he represented
18 our insureds. I haven't handled a case for 25 years,
19 like I said. So I didn't interact business wise much
20 with Gary.

21 Q. That's fair. You're running the company,
22 essentially?

23 A. I'm running the company, yeah. I'm not
24 handling claims.

25 Q. Have you ever had any complaints from your

1 claims department with respect to either the amount
2 of time that he was billing or the way he was
3 representing your clients?

4 A. No.

5 Q. So until you were told by Mr. Williams
6 that there was this concern about his billing, would
7 it be fair to say that you would have expected to
8 continue having cases assigned to Gary if he had
9 continued to work for Williams & Hunt?

10 A. I don't make the decision as to the
11 assignment of the cases. We generally give our
12 insureds the right to choose their defense counsel.
13 All we generally require is that the lawyer have the
14 experience in defending physicians.

15 Q. Do you know how many cases Gary was
16 defending for UMIA at the time that he was fired?

17 A. I was told about twenty.

18 Q. And how did you deal with those cases, if
19 you know how they were dealt with, in terms of
20 reassigning lawyers to represent your physicians?

21 A. During that meeting Elliott made it very
22 clear that those cases were UMIA cases and that I had
23 a decision to make regarding their disposition.

24 Q. And how did you go about making that
25 decision?

1 A. You know, I attended a presentation made
2 by a pretty prominent defense attorney in Chicago,
3 and he stressed two points that have stuck with me
4 for a long time. First is, you must and should pay
5 your defense counsel an adequate hourly wage so that
6 they can make a decent living or you'll lose them to
7 the plaintiff's bar. And the second thing is, if you
8 don't trust your defense attorneys, fire them and
9 find somebody who you do trust.

10 I've lived by that for a long time. And
11 this became an issue of trust. I trust Elliott's
12 judgment. There was some question as to how we were
13 being billed, and on the basis of trust I instructed
14 that those files would stay with Elliott's law firm.

15 Q. Did you talk to the physicians who you
16 insured?

17 A. No.

18 Q. So with respect to the physicians, did you
19 send them any sort of communication, do anything to
20 tell them -- and when I say "you" I mean UMIA at this
21 point -- did UMIA take any action to inform the
22 physicians why their lawyers were being changed?

23 A. Not that I'm aware of.

24 Q. Did you direct any action be taken at all
25 with respect to determining if in fact Gary Ferguson

1 had overbilled UMIA?

2 A. I'm sorry. I didn't understand the
3 question.

4 Q. That's a poor question. I'm sorry, sir.
5 Did you tell anybody to do anything to see whether or
6 not he had in fact overbilled you?

7 A. No.

8 Q. So -- and I'm not suggesting this is
9 wrong. What I hear you saying is you just relied on
10 your lawyer. Elliott said he had an issue; that was
11 good enough for you?

12 A. Well, Elliott, Bruce and other members of
13 the firm. It wasn't just Elliott.

14 Q. Okay. Tell me about the conversation with
15 Bruce.

16 A. I didn't discuss this with Bruce.

17 Q. Did you discuss it with --

18 A. Elliott relayed to me that there were
19 other members. It was basically what Elliott told
20 me.

21 Q. Okay. Did you have any discussions with
22 any other member of the law firm about this issue?

23 A. Not prior to Gary's termination. May have
24 afterwards, just in passing.

25 Q. Who would that be, if you recall?

1 A. I don't recall.

2 Q. Okay. Did UMIA receive some sort of a
3 credit against its time against its bills for the
4 time that apparently Mr. Williams believed had been
5 overbilled?

6 A. We did.

7 Q. And when did that happen?

8 A. I don't recall specifically the time
9 frame, but it was after Gary's termination. And I
10 got a bill direct from the law firm, basically
11 indicating that they had provided us a credit. I
12 think this was Gary's final billing, and that the
13 billing was based upon the time that they thought was
14 appropriate. And it was approximately a \$10,000
15 credit.

16 Q. Now, when we started this and I asked you
17 about your involvement with the law firm, you said
18 something about you had had contact with Gary
19 sometimes -- you said, I have it in quotes, cocktails
20 in the after hours in their break room.

21 A. Yeah.

22 Q. You've used the term "break room." Tell
23 me about this break room. I'm thinking that it was
24 Mr. Williams, but it was either Mr. Williams or
25 Mr. Hunt testified that they had a bar in their

1 office. Is that the same room you're talking about?

2 A. I mean, it's not in one of the lawyers'
3 offices.

4 Q. No, no, it was in their break room.

5 Right. Did this break room have a bar in it?

6 A. I don't recall. I mean, I've been down
7 there four or five times in the last ten years. So
8 it's not like -- you know, one time they only had the
9 one break room that I'm aware of. That was the one
10 about in the middle of the office. And then I didn't
11 even know that the new break room at the end of the
12 office had gone in until Bruce Jensen died.

13 Q. And the new break room is a separate room.
14 It's about a conference room size. Is that right?

15 A. I don't think it's that big. It's not as
16 big as --

17 MR. FISHLER: Let me object as vague and
18 ambiguous as to "conference room size."

19 THE WITNESS: It's not as big as this
20 room.

21 Q. (BY MR. PETERSON) No, I would have said
22 expensive, spacious conference room size if I was
23 referring to this one. But little conference rooms.

24 MR. FISHLER: If you would like, we can
25 recess and go to a smaller room.

1 MR. PETERSON: No, I'm grateful to be
2 here. This is nice.

3 Q. (BY MR. PETERSON) Okay. Well, this
4 particular break room, do you know, sir, whether or
5 not this break room is the one that they had, you
6 know, bar stools --

7 A. No.

8 Q. -- a television?

9 A. No.

10 Q. No?

11 A. No. This was just a little kitchen,
12 kitchen area. The one in the middle, sort of the
13 middle of their conference room. They had a
14 refrigerator, a sink, a dishwasher, a table that sat
15 four people.

16 Q. Okay.

17 A. Maybe six.

18 Q. You said you didn't even know they had
19 another break room until Bruce Jensen's --

20 A. After Bruce died, they apparently put one
21 in on the back end.

22 Q. Did you go into that one?

23 A. I've been in that one when they had
24 Bruce's one-year memorial.

25 Q. You knew that they served liquor in that

1 one?

2 A. Did I know that they served liquor in that
3 one?

4 Q. Uh-huh.

5 A. They have liquor in it.

6 Q. Is this the one they have -- you know, it
7 looks like a real bar, has glassware like a bar,
8 shelves like a bar?

9 MR. FISHLER: I'm going to object. It's
10 vague and ambiguous.

11 Answer if you can.

12 MR. PETERSON: It is all those things.

13 Q. (BY MR. PETERSON) Do you know, sir?

14 A. I recall it's a little nicer than the old
15 kitchen one.

16 Q. Okay. So it might not be the same one
17 that I'm talking about. Where physically is it in
18 relation to the firm?

19 A. As you walk in their front door you walk
20 into a glass conference room. The original one I'm
21 talking about is make a right turn, go past some
22 lawyers' offices and make another right. The new one
23 is walk into the building and walk down the hall to
24 the left.

25 Q. One of the allegations in this case is

1 that Mr. Ferguson has alleged that after he stopped
2 engaging with other members of the firm socially at
3 their bar that it was about six or seven weeks later
4 that he essentially was terminated.

5 A. I have no knowledge of that.

6 Q. Did you ever have conversations with any
7 of the board members on your -- at UMIA about -- did
8 any board member ever express concern to you about
9 drinking by members of this firm?

10 A. No.

11 Q. Let me ask you specifically about what you
12 were told by Mr. Williams with respect to Gary and
13 his bills. Did Mr. Williams tell you that you could
14 not trust Gary's bills?

15 A. No, did he not say that.

16 Q. Can you recall what he said specifically?

17 A. I think he used the term "overbilled."

18 Q. How did you interpret that, then?

19 A. That he may have been billing for work
20 that he didn't do or billing more hours than he
21 actually spent on the task.

22 Q. And you said earlier that one of the two
23 things that you had learned at that meeting in
24 Chicago was if you didn't trust your lawyers you
25 should fire them and replace them. I take it after

1 this meeting with Elliott you didn't trust Gary
2 anymore to be your lawyer?

3 A. It was an issue of trust. That's why the
4 files stayed with Williams & Hunt.

5 MR. PETERSON: I might be done. Just one
6 second.

7 (Recess from 2:13 p.m. to 2:16 p.m.)

8 Q. (BY MR. PETERSON) I want to go back to
9 this whole -- just to the bar issue, and then I'll
10 leave you alone.

11 A. All right.

12 Q. So describe -- can you just describe for
13 me what the room was that you went in and drank,
14 where you drank with these guys?

15 MR. ECKERSLEY: At which time?

16 THE WITNESS: At which time?

17 Q. (BY MR. PETERSON) Good question. From
18 what you've described, there were apparently two.

19 A. Two.

20 Q. Let's take the most recent one first.
21 That would have been at the one-year anniversary of
22 Bruce Jensen's death, I take it. Is that right?

23 A. Right.

24 Q. Okay. Tell me about that room.

25 A. Probably a third the size of this. It has

1 a kitchen table in it with I believe four to six
2 chairs. It has an ice maker, a sink. What can I
3 say?

4 MR. FISHLER: Fridge?

5 THE WITNESS: I believe it has a fridge.

6 Q. (BY MR. PETERSON) Television?

7 A. That I don't recall.

8 Q. Okay. I don't know; I'm just curious.

9 But stocked with alcohol?

10 A. To my knowledge, yes.

11 Q. And to your knowledge, because you drank
12 it?

13 A. Yes, because I did drink it, yes.

14 Q. What did you drink when you were there? I
15 mean, I take it they had whatever it was you drank.

16 A. I drink scotch.

17 Q. And they had the type of scotch that you
18 wanted?

19 A. Actually, they didn't.

20 Q. They didn't, okay.

21 A. I drink Cutty and James Beam and they
22 stock Dewar's.

23 Q. Okay.

24 MR. ECKERSLEY: How thoughtless. I'll
25 pass that along.

1 Q. (BY MR. PETERSON) I was going to ask if
2 they had remedied that situation. All right. What
3 about the other room that you mentioned? You
4 mentioned the break room.

5 A. The other one I would call a kitchen area.

6 Q. Was it the same situation in terms of them
7 having alcohol present?

8 A. To my knowledge, yes.

9 Q. Are you aware whether or not they had
10 groups, say, after work of the lawyers meeting
11 together, sitting down socially and drinking at the
12 law firm?

13 A. I mean, did I know that that occurred?

14 Q. Yeah.

15 A. I was invited a couple of times, so I
16 certainly did on the times I was invited to come
17 down.

18 Q. Anything else about either of those rooms
19 that stands out in your memory in terms of figuring
20 out whether -- see, they've described them themselves
21 or admitted that they had built a bar. I can't
22 remember which ones used the term "bar"; that they
23 had an extra conference room that wasn't big enough
24 to be a conference room and they turned it into a
25 bar. That might be the room you're discussing most

1 recently. I'm not sure.

2 A. It might be.

3 Q. Okay. All right. You mentioned a couple
4 of other occasions you'd been there drinking with
5 them or in the office when they were drinking. Can
6 you describe -- do you remember anything about those
7 occasions?

8 A. No.

9 Q. What about Mr. Ferguson? Do you remember
10 seeing Gary there?

11 A. I think so. Not every time. I think Gary
12 may have been there once or twice. I was down there
13 myself probably five or six times in the last ten
14 years. So it's not like I go down there every day or
15 every week or something like that.

16 Q. I understand that. I understand that.
17 All right.

18 What about, you had conversations after
19 you had learned from Elliott that they were going to
20 fire or had fired Mr. Ferguson. Did you have
21 conversations with Art Glenn about this?

22 A. Actually, after the meeting with Elliott I
23 got back and called Art and told him that Elliott and
24 I had met and that Gary was or was going to be
25 terminated. I explained to him it was a trust issue.

1 I indicated and directed him to leave those files
2 with Williams & Hunt and indicated that we would not
3 be using Gary in the future to do defense work.

4 Q. Okay. Did you tell Art that there was an
5 issue about overbilling?

6 A. I believe I may have mentioned that.

7 Q. If you recall, what did you tell him?

8 A. That it was an issue of overbilling and
9 that that was the reason for termination. At least
10 that's what I was told. I mean, it wasn't a long
11 conversation. It was Art, he was being terminated by
12 Williams & Hunt, it's a trust issue, it's
13 overbilling, and we won't be using him in the future.
14 It wasn't Art's decision to make; it was mine.

15 MR. PETERSON: Understood. Understood.
16 All right.

17 I don't think I have any other questions.
18 That's good. Thank you.

19 MR. FERGUSON: Do you have any, Dave?

20 MR. ECKERSLEY: No.

21 MR. FISHLER: We'll read and sign. Just
22 send it here.

23 (Deposition was concluded at 2:22 p.m.)

24 * * *

25

1 REPORTER'S CERTIFICATE

2 STATE OF UTAH)
) ss.
3 COUNTY OF SALT LAKE)
4

5 I, Vicky McDaniel, Registered Professional
6 Reporter and Notary Public in and for the State of
7 Utah, do hereby certify:

8 That prior to being examined, the witness,
9 MARTIN J. OSLOWSKI, was by me duly sworn to tell the
10 truth, the whole truth, and nothing but the truth;

11 That said deposition was taken down by me
12 in stenotype on April 25, 2007, at the place herein
13 named, and was thereafter transcribed and that a true
14 and correct transcription of said testimony is set
15 forth in the preceding pages;

16 I further certify that, in accordance with
17 Rule 30(e), a request having been made to review the
18 transcript, a reading copy was sent to Mr. Ferguson
19 for the witness to read and sign before a notary
20 public and then return to me for filing with Mr.
21 Peterson.

22 I further certify that I am not kin or
23 otherwise associated with any of the parties to said
24 cause of action and that I am not interested in the
25 outcome thereof.

26 WITNESS MY HAND AND OFFICIAL SEAL this
27 26th day of April, 2007.

28 Vicky McDaniel, CSR, RMR
29 Notary Public
30 Residing in Salt Lake County

1 Case: Ferguson v. Williams & Hunt
Case No.: 050921677
2 Reporter: Vicky McDaniel
Date taken: April 25, 2007
3

4 WITNESS CERTIFICATE

5 I, MARTIN J. OSLOWSKI, HEREBY DECLARE:
6 That I am the witness in the foregoing
transcript; that I have read the transcript and know
7 the contents thereof; that with these corrections I
have noted, this transcript truly and accurately
reflects my testimony.

8 PAGE-LINE CHANGE/CORRECTION REASON

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16 _____ No corrections were made.

17 I, MARTIN J. OSLOWSKI, HEREBY DECLARE UNDER THE
18 PENALTIES OF PERJURY OF THE LAWS OF THE UNITED STATES
OF AMERICA AND THE LAWS OF THE STATE OF UTAH THAT THE
19 FOREGOING IS TRUE AND CORRECT.

20 MARTIN J. OSLOWSKI

21 SUBSCRIBED and SWORN to at

22 this day of

23 200

24 Notary Public
25

Exhibit H

COPY

CONDENSED TRANSCRIPT

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

GARY B. FERGUSON and JULIE A. FERGUSON,	)	Videotaped
	)	Deposition of:
	)	<u>ELLIOTT J. WILLIAMS</u>
Plaintiffs,)	
)	
vs.	)	Case No. 050921677
	)	Judge Medley
WILLIAMS & HUNT, INC., ELLIOTT)	
J. WILLIAMS, GEORGE A. HUNT,)	
BRUCE H. JENSEN, and KURT)	
FRANKENBURG,)	
)	
Defendants.)	
)	

July 18, 2006 * 12:58 p.m.

Location: CitiCourt
170 South Main Street, Suite 300
Salt Lake City, Utah 84101

Reporter: Susie Lauchnor, CSR, RPR

Notary Public in and for the State of Utah



CitiCourt, LLC
THE REPORTING GROUP

170 South Main Street, Suite 300
Salt Lake City, Utah 84101

SHEET 1

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

GARY B. FERGUSON and JULIE A. FERGUSON,)
Plaintiffs,)
vs.)
WILLIAMS & HUNT, INC., ELLIOTT J. WILLIAMS, GEORGE A. HUNT,)
BRUCE H. JENSEN, and KURT FRANKENBURG,)
Defendants.)

Videotaped
Deposition of:
ELLIOTT J. WILLIAMS
Case No. 050921677
Judge Medley

July 18, 2006 * 12:58 p.m.

Location: CitiCourt
170 South Main Street, Suite 300
Salt Lake City, Utah 84101

Reporter: Susie Lauchnor, CSR, RPR
Notary Public in and for the State of Utah .

Page 1

PROCEEDINGS

MR. PETERSON: Charles Peterson for the plaintiff.

MR. ECKERSLEY: Dave Eckersley for the defendants.

And I apologize, but I've got to take this.

(A break was taken from 12:59 p.m. to 1:01 p.m.)

ELLIOTT J. WILLIAMS,

called as a witness, being first duly sworn,
was examined and testified as follows:

EXAMINATION

BY MR. PETERSON:

Q For the record, would you state your name please?

A Yes, Elliott James Williams.

Q Mr. Williams, what do you do for a living?

A I'm a lawyer.

Q With what --

THE VIDEOGRAPHER: Excuse me, you don't
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A P P E A R A N C E S

FOR THE PLAINTIFFS:
Charles F. Peterson, Esq.
PETERSON LAW OFFICES
913 West River Street, Suite 420
Boise, Idaho 83702-7081
(208) 342-4633

FOR THE DEFENDANTS:
M. David Eckersley, Esq.
PRINCE, YEATES, & GELDZAHLER
175 East 400 South, Suite 900
Salt Lake City, Utah 84111
(801) 524-1000

ALSO PRESENT:
Max Nelson, Videographer

-oOo-

I N D E X

ELLIOTT J. WILLIAMS:
Examination by Mr. Peterson

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have that mic on.

MR. PETERSON: Well, the mic, you think that's going to be good, huh? All right. Can you hear me now?

THE VIDEOGRAPHER: That's good.

Q (BY MR. PETERSON) With what firm do you practice?

A Williams & Hunt.

Q How long have you been with that firm?

A We formed April 1, 1991.

Q And you know Gary Ferguson?

A I do.

Q How do you know him?

A I met Gary when I was at Snow, Christensen & Martineau. It was probably -- it could have been 25 years ago.

Q So before you formed Williams & Hunt?

A Oh, yes.

Q Okay.

A Sure.

Q And did you meet him there as an attorney?

A Yes, I think he came -- he was applying for a position, as I recall.

Q Now, if I understand the sequence of events, the firm was formed and then about a month
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later Gary joined the firm; is that correct?

A Actually, Bruce Jensen and I left Snow, Christensen & Martineau the end of February and worked out of the medical association office and I think we offered Gary a job with us early in March, as I recall, because I think he was already leaving Richards Brandt and worked out of his car, as I recall, and then out of our office for a while until our office was ready the first of April.

Q Okay. And he's been with you, essentially, ever since?

A That's right.

Q Until he --

A Until May of last year.

Q Until he was terminated last year. And do you know what the date would be for that?

A May 5.

Q Okay. All right. Nor, what, if anything, have you reviewed in preparation for your deposition today?

A The documents I have in front of me, which are the records I understand were disclosed to you --

Q Okay.

A -- as part of the initial disclosures.

Q The initial Rule 26 disclosures?

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1 more billed hours than anyone else in the firm, which
2 was suspicious. He didn't spend the time in the
3 office that all of us did. Some in particular spent a
4 lot more time in the office, weekend and nights. So
5 we were concerned about that.

6 Gary came into my office to ask if he --
7 if I thought it was appropriate for him to send
8 another bill on the Merce case. It had been billed in
9 January. We typically bill those files quarterly. He
10 came in at the first part of March indicating that I
11 think he had billed something like \$28,000 during
12 February and wanted to know if UMIA would have any
13 problem if he billed the case again, and I told him I
14 didn't think so.

15 I offered to review the bill. In case
16 UMIA had any questions I would be able to answer them.
17 Gary thought that was a good idea, and so I did.

18 **Q** Okay.

19 **A** After reviewing the bills I went into his
20 office and said there may be some questions raised
21 about the time spent in connection with Gary's
22 doctor's deposition. Over 32 or 33 hours, I think, in
23 preparation for and to attend his own client's
24 deposition. And I said, are there things I don't know
25 about as to why it would take so much time for a

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1 **A** Correct.

2 **Q** Great. Anything else?

3 **A** No.

4 **Q** And with whom have you spoken about your
5 deposition?

6 **A** No one.

7 **Q** Now, I wanted to begin, if I could, just
8 by asking you about your assessment. If we were to go
9 to February of 2005, so before any -- essentially any
10 of this started with Gary.

11 **A** "This" meaning what?

12 **Q** "This" meaning -- well, let's do it this
13 way: There was a series of e-mails that we saw, an
14 e-mail from Gary to you discussing the possibility
15 that he had overbilled a client, and I think that was
16 in March of 2005. Do you recall that e-mail?

17 **A** Very well.

18 **Q** Okay. Tell me about that, first of all,
19 how that e-mail -- how that issue arose and what you
20 recall about that.

21 **A** You mean, you want the background?

22 **Q** Sure.

23 **A** All right. Well, I think for some time we
24 had had some concerns about the hours Gary was
25 billing. By that time of the year I think Gary had

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1 deposition, almost a week's worth of work, and we went
2 over the items. He didn't have much of an
3 explanation.

4 I think one of the hopes for that meeting
5 was that we would be able to raise Gary's level of
6 awareness of the billing concerns we had, but it
7 didn't turn out that way. I remember that was a
8 Friday, as I recall.

9 He came back I think it was Wednesday
10 morning and I was surprised to see him in his office.
11 He rarely got there before I did. And he was in with
12 his door closed preparing an e-mail, which arrived on
13 my screen shortly after. So that's what led to that
14 e-mail.

15 His memory of our discussion was
16 completely different than what had actually occurred.
17 I had not angrily accused him of anything. We had a
18 discussion about the specifics of his bill. I didn't
19 suggest that he cut it, I didn't make any demands, I
20 didn't do anything other than express concerns.

21 **Q** And the concerns you expressed related to
22 just this one 32 to 33 hours' worth of preparation for
23 the deposition?

24 **A** Looking over the rest of the bill, that
25 was what seemed unusual to me.

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<p>SHEET 2</p> <p>1 Q And when we're talking about "the bill,"</p> <p>2 we're talking about a billing statement that went to</p> <p>3 UMIA with respect to a particular case, correct?</p> <p>4 A I assume it went unchanged to UMIA, yes.</p> <p>5 Q Well, let's -- I may have asked a poor</p> <p>6 question. I reviewed a bill yesterday with your</p> <p>7 partner, Mr. Hunt -- I've used the term partner, I</p> <p>8 apologize, but Mr. Hunt.</p> <p>9 A That's fine, sure. That's how we refer to</p> <p>10 each other.</p> <p>11 Q Right, I understand. So I reviewed with</p> <p>12 him a copy of the bill yesterday and it appears that</p> <p>13 your billing system uses a by-case billing method. By</p> <p>14 that I mean a bill to UMIA is not necessarily</p> <p>15 consolidated to include all of your cases.</p> <p>16 A That's true. A separate bill is prepared</p> <p>17 for each case.</p> <p>18 Q Right.</p> <p>19 A Right.</p> <p>20 Q And all of the timekeepers who would have</p> <p>21 worked on that bill, their hours would appear with</p> <p>22 respect to that case for whatever period of time there</p> <p>23 was?</p> <p>24 A That's correct.</p> <p>25 Q All right. Now, let me just look through</p> <p style="text-align: right;">Page 9</p>	<p>1 going through four -- it looks like 4/29, I guess,</p> <p>2 4/30. If we go to the charges there's some telephone</p> <p>3 charges on 4/30.</p> <p>4 A Yes.</p> <p>5 Q And this would be a typical billing that</p> <p>6 we might see from your system; is that correct?</p> <p>7 A Yes.</p> <p>8 Q Now, with -- so when you've said that you</p> <p>9 reviewed a bill that Gary brought to you, would it</p> <p>10 have been a bill similar to what we have in front of</p> <p>11 us in Deposition Exhibit 6?</p> <p>12 A Yes.</p> <p>13 Q And for what case would that bill have</p> <p>14 corresponded?</p> <p>15 A It was the Merce case.</p> <p>16 Q Okay. And do you know what -- can you</p> <p>17 tell us what the Merce case involved?</p> <p>18 A I never -- I didn't ever work on the case.</p> <p>19 As I recall, it was a patient who had developed</p> <p>20 encephalitis, I think, and the claim was a delay in</p> <p>21 diagnosis of that condition which led to some brain</p> <p>22 injury, as I recall.</p> <p>23 Q And do you recall who the plaintiffs'</p> <p>24 counsel was in the Merce case?</p> <p>25 A I think it was Matt Raty, I think.</p> <p style="text-align: right;">Page 11</p>
<p>1 our deposition exhibits yesterday and see. Maybe we</p> <p>2 can find that and just take a quick look at it, in</p> <p>3 fact. Well, I know we had one yesterday.</p> <p>4 Okay. This is -- I'm going to show you</p> <p>5 now Deposition Exhibit 6 from yesterday.</p> <p>6 MR. PETERSON: Do you have the deposition</p> <p>7 exhibits from yesterday?</p> <p>8 THE COURT REPORTER: I don't.</p> <p>9 MR. PETERSON: That's okay. We can, after</p> <p>10 this deposition is complete, make sure that we attach</p> <p>11 to this deposition any of the ones that we use here.</p> <p>12 Q (BY MR. PETERSON) So this is Deposition</p> <p>13 Exhibit 6 from the deposition of George Hunt, okay?</p> <p>14 A Okay.</p> <p>15 Q All right. So this is a billing dated</p> <p>16 4/30/2005 and this is to the Utah Medical Insurance</p> <p>17 Association and it relates to a particular case, Lynn</p> <p>18 Robb versus Richard Cox?</p> <p>19 A Yeah. The bill is dated May 9, 2005.</p> <p>20 Q Right, I apologize.</p> <p>21 A Okay.</p> <p>22 Q It's billing through 4/30/2005.</p> <p>23 A Yes, I see that.</p> <p>24 Q Okay. And it includes information, time</p> <p>25 and billing entries starting on March the 1st of 2005</p> <p style="text-align: right;">Page 10</p>	<p>1 Q Okay. Who is Bob Sykes?</p> <p>2 A Bob Sykes is a personal injury plaintiffs'</p> <p>3 attorney here in town.</p> <p>4 Q And did this case that we're talking about</p> <p>5 involve somebody who related to Mr. Sykes' office?</p> <p>6 A No.</p> <p>7 Q Okay. That's another case, that's the</p> <p>8 Anderson case, right? Or is Anderson the defendant in</p> <p>9 Merce?</p> <p>10 A I think he is, yes. I think that was</p> <p>11 Gary's client.</p> <p>12 Q Right, Dr. Anderson?</p> <p>13 A Right.</p> <p>14 Q Merce is the plaintiff?</p> <p>15 A Right.</p> <p>16 Q Now, did you review the deposition -- or,</p> <p>17 excuse me, the e-mail and your response that you sent</p> <p>18 either to Gary or out to the other members of your</p> <p>19 firm?</p> <p>20 A Yes, uh-huh (affirmative). As part of the</p> <p>21 disclosures.</p> <p>22 Q Right. And I'm going to just show you,</p> <p>23 actually, an exhibit from this morning which will now</p> <p>24 become an exhibit, I guess, to this. This is from</p> <p>25 Gary's deposition this morning. It says Ferguson two</p> <p style="text-align: right;">Page 12</p>

at the bottom, so just for purposes of identification.

A Yes.

Q Is this the e-mail that we're talking about?

A This is the one we're talking about.

Q All right.

A And my e-mail sending it to some of the other partners.

Q Okay. First, let me ask you, with respect to this, you said a few moments ago that Gary didn't really have any explanation for why he spent more time on this particular deposition in preparation. His e-mail outlines some of those reasons, doesn't it?

A It does.

Q And you reviewed the e-mail. Did you think that his explanation was out of line?

A What struck me most was his opening sentence, actually, where he said, "Last Friday you strongly and angrily suggested that I had overbilled UMIA in this case. You are wrong." That's -- that was what was significant about the e-mail.

His justification for the time, I don't know if it was accurate or not. I never accused him of overbilling. What I said was spending as much time as he had for his own client's deposition, knowing

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that he was very familiar with the testimony offered by other witnesses, he spent a lot of time on that case, and I thought it was unusual, reading the body of the explanation, that he thought he had to review all of those depositions and records again when I thought he was very familiar with them. But I don't take issue with that. What is important is his response to my discussion.

Q So he took --

A So I never accused him of overbilling. We never deducted anything from UMIA's bill. It had nothing to do with what eventually happened, except for his response to our discussion.

Q Because he said that you were angry when --

A His perception of an inquiry from me was a challenge to him and he somehow convinced himself that I had been angry, pounding my fist on the desk or something.

Q Well, he doesn't say that, does he?

A Well, strongly and angrily, so whatever. And, of course, if one had any concerns about Gary, his conclusion was we were wrong.

Q Okay.

A As my response to the others indicated, I

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**1 really had thought after our discussion on Friday that
2 I had not been as candid as I might have been, and
3 even with that he took it as a personal assault.**

4 Q Did you make it --

5 A That was what was important

6 Q Okay. I apologize for cutting you off.

7 A That's all right.

8 Q Did you make a decision, then, at this
9 point that you were going to start monitoring Gary's
10 bills?

**11 A What I did -- what we did in response to
12 this was I had bills prepared and I took them home
13 over a weekend and reviewed them.**

14 Q Okay. Now, let me just stop you.

15 A Uh-huh (affirmative).

16 Q You've used the term "we." I want
17 you to -- if you're going to say "we," then identify
18 who it is that you involved in this process.

**19 A Probably all of the partners to whom I
20 sent my e-mail.**

21 Q So did you meet with them and tell them
22 that you were going to do this?

**23 A Well, we got together and we talked about
24 what we perceived to be a problem that we had to deal
25 with.**

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1 Q When did you get together?

**2 A Oh, it was probably -- it could have been
3 that night.**

4 Q All right.

**5 A But we had a problem on our hands because
6 we had a situation where we were convinced that Gary
7 was overbilling his time. We had a need to correct
8 that problem. It was not going to happen by
9 confronting him or discussing the issue with him, we
10 were convinced, because of how he had responded so
11 strongly to my discussion.**

**12 So what I did was I took bills home over
13 the weekend, looked over them, and I couldn't tell,
14 looking at his bills, if the time was accurately
15 recorded or not. And so it was after that and, again,
16 discussion with my partners that we decided we needed
17 more information in order to determine the accuracy of
18 Gary's bills.**

**19 And at that point I learned that we could,
20 through a program with the computer, monitor log-on
21 and log-off times. I learned I could get a copy of
22 Gary's calendar, which was closed to all of us in the
23 firm. He had made that decision sometime before. And
24 so I was able to compare the three pieces of
25 information that I had now, the bills and the daily**

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SHEET 3

1 entries for time spent, which was more important than
2 the bills on individual cases.
3 So I could see what was billed on a given
4 day, I could see where he was and I could see how much
5 time he had spent in the office.
6 Q Well, when you reviewed the calendars
7 didn't you find that they didn't -- they weren't very
8 informative about where he was, what the calendars
9 were were an indication of where he was intending to
10 be on some dates, and little more than that?
11 A Well, it was helpful. If his calendar
12 said he was traveling someplace for a deposition and
13 the bill said traveling to that destination for a
14 deposition and returning, it was helpful, sure.
15 Q But in terms of going forward from when
16 you started that process on March the 23rd until you
17 ended the process around the end of April, as I
18 recall, following the log, during that period of time
19 do you recall how many times his calendar indicated he
20 was traveling?
21 A I don't.
22 Q And, in fact, do you recall that during
23 the last two weeks of April he wasn't even in the
24 office, he was on some sort of a dive vacation for 10
25 days?

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1 A Yeah, he was in Borneo. There were no --
2 you see on the log that his computer was off during
3 that time, sure.
4 Q Okay. So really, with respect, then, also
5 to when you say you took bills home, what bills did
6 you acquire to take home as part of your review? What
7 do you mean by that?
8 A Okay. What I took home, I think -- I'm
9 trying to remember. It might have been that we had
10 the list of log-on and log-off times. I had nothing
11 to do with the preparation of the document or
12 gathering the information really.
13 Q Well, let's be clear.
14 A What I had -- just to clarify and answer
15 your question, what I had was a copy of the timekeeper
16 diary and calendar and I think it had been summarized
17 already by the time -- at least a portion of it, by
18 the time I looked into it.
19 Q Well, let's go back for a moment. This
20 occurs before March the 23rd. Your meeting with
21 Gary --
22 A No, this is after we had gathered
23 information about when he was in the office, as
24 determined by the computer, and his calendar and then
25 the statements of the timekeeper diary.

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1 Q Well, let's go back. Here's what you said
2 in your testimony a minute ago: You got together with
3 your other partners. You were convinced Gary was
4 overbilling. You needed to correct the problem so you
5 took the bills home over the weekend and looked at
6 them. Then you decided that you needed more
7 information and that's when you started monitoring the
8 logs.
9 A Uh-huh (affirmative).
10 Q Now, clearly you didn't have the
11 timekeeper diary that you provided in Rule 26. Under
12 Rule 26 it's dated Monday, April the 18th.
13 A All right.
14 Q Second, you didn't have the log because
15 you hadn't decided that you were going to start doing
16 that, that occurred on March the 23rd.
17 A I think the confusion is that there
18 were -- there was an attempt on my part, in looking at
19 just the billing statements on individual cases, to
20 determine if they looked to be a fair billing for time
21 spent, and I couldn't determine that. Looking at his
22 description and the amount of time for that work, it
23 told me nothing about what he had actually done. That
24 was what he actually billed.
25 Q Right.

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1 A So it was after that that I got the
2 additional information from the computer and from his
3 calendar. So I now had the three pieces of
4 information so I could compare what was actually
5 billed, what time he spent in the office and, using
6 the calendar, could help determine whether the bills
7 looked accurate or not.
8 Q But that wouldn't have happened until
9 sometime in the -- near the end of April?
10 A Probably.
11 Q So let's go back for a moment. What I
12 asked you was what bills did you take home, because
13 you said you took bills home, looked at them, then
14 that caused you to make the decision that you should,
15 in fact, start monitoring using that logging program
16 that we've discussed.
17 A Right.
18 Q Or maybe I misunderstood you. I thought
19 that's what you said.
20 A What I took home the first time --
21 Q Yeah.
22 A -- was a bill that looked like this.
23 Q Great.
24 A Okay?
25 Q For which case?

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1 **A I think probably the entire month's**
 2 **billing.**
 3 Q For Gary?
 4 **A Yeah.**
 5 Q And so when you say the month's billing,
 6 that would have been in March before the March billing
 7 would have been compiled. So would it have been, say,
 8 the January or February of 2005 billing?
 9 **A I don't remember for sure. To tell you**
 10 **the truth, I don't. I don't remember if we ran a**
 11 **separate bill, which we can do. I don't remember.**
 12 Q Sure. And when you say "we," who are you
 13 referring to?
 14 **A In terms of preparing the bill?**
 15 Q Yes.
 16 **A Our office manager.**
 17 Q And who is that?
 18 **A Janet.**
 19 Q Okay.
 20 **A I don't know how to do any of this.**
 21 Q That was my next question was outside of
 22 Janet or someone else, do you know how to run the
 23 bill?
 24 **A No, I've never done it.**
 25 Q And with respect to your practice, do you

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1 enter your time yourself or do you have someone else
 2 do it?
 3 **A No, I enter my own time.**
 4 Q And I think I found out yesterday you use
 5 Juris. Is that your billing system?
 6 **A Right.**
 7 Q And do you do that on a daily basis?
 8 **A Yes.**
 9 Q From your experience with Juris, have you
 10 ever had an occasion where you entered some bills, say
 11 in a batch form, and the date that comes up is
 12 essentially the date from -- if you were going, for
 13 example, two days, you start entering them in a batch
 14 form, say it's 6/29/05, and then they all get entered
 15 as 6/29/05 and you have to go back in and change
 16 because some of them were 6/30, not 6/29, that sort of
 17 thing?
 18 **A It can happen.**
 19 Q Not that that's anything unique to Juris.
 20 I think we have the same thing in Time Slips. It's
 21 the same exact problem.
 22 **A Yeah. True.**
 23 Q Likewise, I'm wondering in terms of your
 24 policy do you have a minimum billing that you use?
 25 **A It's a quarter of an hour.**

Page 22

1 Q So if you were to sit down and rattle off
 2 five telephone calls in a quarter -- in a half an
 3 hour's time, regardless of how much time you spent per
 4 telephone call, the billing statement would reflect a
 5 quarter of an hour per -- essentially per client?
 6 **A If one chose to do that.**
 7 Q Right. You might choose not to bill it at
 8 all?
 9 **A That's right.**
 10 Q On a yearly basis, do you know where
 11 Gary's time had been, his billable time, compared to
 12 other partners -- or other shareholders? Excuse me, I
 13 go back to using the same term.
 14 **A It was lower.**
 15 Q It was lower than yours or lower than some
 16 of the others? Fair to say middle or lower end of the
 17 middle of the billable time?
 18 **A I think that's fair.**
 19 Q And during the early part of 2005, what do
 20 you know about his caseload and how active his
 21 caseload was during the early part of 2005?
 22 **A Sometime before that Gary had made the**
 23 **decision that he was going to limit the number of**
 24 **cases that he was going to accept, and I think he**
 25 **probably had less than 10 active cases. Probably -- I**

Page 23

1 **think it was 15 or 16 open files. So he had limited**
 2 **the number of cases he worked on.**
 3 Q But hadn't he limited it because of the
 4 amount of activity in the files that were open and
 5 working?
 6 **A No. I think as a matter of managing his**
 7 **stress he chose to accept fewer cases.**
 8 Q Do you know -- at the time that you made
 9 this decision to start looking at his bills, your
 10 testimony so far today has been that you had some
 11 concern because he had already spent more hours, I
 12 think I heard you say, than anybody else?
 13 **A He had billed more hours.**
 14 Q Billed more hours. Than anyone else in
 15 the firm?
 16 **A Yes. Correct.**
 17 Q And you made that determination when?
 18 **A I don't remember. I think we get**
 19 **summaries of monthly hours billed.**
 20 Q And so we could recreate, for example, the
 21 months of January and February from your data to come
 22 up with those reports?
 23 **A I think so.**
 24 Q And you said we had been concerned for
 25 some time. The e-mail is dated in March, if I

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SHEET 4

1 remember correctly. Can you tell us when that was?
 2 **A The e-mail he sent to me --**
 3 Q Yeah.
 4 **A -- is dated March 16th.**
 5 Q So around the middle of March, by then you
 6 had already become concerned, or did this cause you to
 7 go look and then you became concerned?
 8 **A I was concerned -- we were concerned**
 9 **before March 16.**
 10 Q When you say "we," who are you including?
 11 **A I think all the partners were.**
 12 Q And had you met and discussed this issue
 13 previously before March the 16th?
 14 **A I think so.**
 15 Q With whom had you had discussions about
 16 it?
 17 **A Well, I'm sure I talked to Bruce and**
 18 **Dennis and Jody and George.**
 19 Q Okay. Is it fair to say that by late
 20 2004, early 2005 that Gary had become more isolated in
 21 terms of his contacts with the rest of his partners or
 22 shareholders?
 23 **A It kind of went in stages. In 2003 there**
 24 **were issues that came up. You've seen the e-mails**
 25 **about that. He went into seclusion for quite a period**
 Page 25

1 of time after that. It kind of blew over and then he
 2 chose not to isolate himself for a time. And there
 3 were issues that arose late 2004 about firm
 4 management, succession planning, which Gary turned
 5 into concern about salary structure, which was not
 6 actually what we had been talking about. But, anyway,
 7 it became a major issue for him and it became very
 8 confrontational again.
 9 Q In 2004?
 10 **A Late 2004.**
 11 Q All right. So he's a thorn in your side,
 12 why don't you just get rid of him in 2004?
 13 **A Well, we could have. I think -- I think**
 14 **we owed more to each other than that. We started the**
 15 **firm as a group of friends and Gary was one of those**
 16 **and he was a friend of ours for a long time and we**
 17 **didn't want to make that decision lightly.**
 18 Q In 2005, do you know as you sit here now
 19 whether at the time that you approached mid March 2005
 20 whether, in fact, Gary had billed more or less hours
 21 than you had?
 22 **A I think he had billed more. I think he**
 23 **had billed more than Bruce Jensen. I've never billed**
 24 **as much as Bruce in my life.**
 25 Q Yeah, I saw that from the documents we
 Page 26

1 looked at yesterday.
 2 **A He's a guy who worked seven days a week.**
 3 Q All right. You came pretty close in 2004
 4 to billing as many as he did?
 5 **A But never matched him.**
 6 Q Okay. All right. Do you know what type
 7 of computer system that you use? I know that you're
 8 using Juris, but do you know anything about the
 9 computers at all in your law firm?
 10 **A Not really.**
 11 Q So who would you rely on --
 12 **A I'm pretty illiterate when it comes to**
 13 **computers.**
 14 Q Okay. Who would you rely on for
 15 information about your computer system?
 16 **A Tracy is our computer consultant.**
 17 Q And her last name is?
 18 **A She just got married and I've forgotten**
 19 **her last name, got married a while ago.**
 20 Q Not to anybody in your law firm, to
 21 somebody outside of the firm?
 22 **A Right.**
 23 Q Otherwise you would know the name?
 24 **A Right.**
 25 Q All right. Has she been around for a
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1 while in terms of her participation in your firm with
 2 the IT stuff?
 3 **A Yes.**
 4 Q So she --
 5 **A Less so recently, but, yeah, for quite a**
 6 **while.**
 7 Q Okay. Do you know what her background is
 8 in terms of education and experience?
 9 **A I don't.**
 10 Q And when you've -- in this case when it
 11 came time to create records or have records created,
 12 is it Tracy who you would have relied on to get
 13 computer records for you?
 14 **A And Janet.**
 15 Q And Janet?
 16 **A Right.**
 17 Q Who is the office manager?
 18 **A Correct.**
 19 Q Okay. All right. When did you decide to
 20 terminate Gary?
 21 **A I think when we had the information that**
 22 **confirmed our concerns or suspicions.**
 23 Q All I asked you is when.
 24 **A I'm trying to do that, because I don't**
 25 **remember a date.**
 Page 28

Q Okay.

A What I remember is this was important information to us that, combined with lots of the other issues with Gary, that that convinced us that the experience I had in discussing the Merce case with him, his response to any kind of criticism or comment, that this was a problem we couldn't fix except by having Gary leave.

And so it was -- when this information became available, I think as a group we discussed how can we -- can we deal with this in any other way, and the consensus was we could not.

Q Did you meet as a group of shareholders on May the 4th?

A No, we met -- we talked individually with everyone in the firm.

Q On May the 4th --

A I think in the days leading up to that.

Q -- of 2005?

A I think on May the 4th the decision was made that, yeah, today's the day we have to do this.

Q Well, yesterday when --

A That's my memory.

Q Okay. I understand. Yesterday when

Mr. Hunt testified he indicated that there was a

Page 29

meeting on May the 4th and he had notes from the meeting that he said he made contemporaneously with the meeting. Do you recall meeting on May the 4th, 2005?

A I don't recall all of us meeting together.

Q Neither he did.

A I think what happened was George probably met with everyone. I probably spoke to a number of folks too. The consensus was this was inevitable. The tough part was executing that decision, because it was not a pleasant experience.

Q And who did that fall to?

A I think to George and me.

Q Okay. And you met with him, with Gary, on May the 5th of 2005?

A That's correct.

Q And you -- who actually told him that he was fired?

A We both -- George and I both did. We didn't walk in and say, you're fired. We walked in and told him we needed to talk and that we had a problem.

Q All right. Did one of you tell him he was fired?

A I don't think we ever said "you're fired".

Page 30

Q Well, what did you tell him?

A I think we told him that the -- that his partners had decided that our relationship wasn't working and we couldn't go on.

Q Had -- before you spoke to Gary on the 5th of May, 2005, had you spoken to anyone at UMIA about Gary and the billing?

A I had a conversation with the president and CEO.

Q Mr. Osowski?

A Yes.

Q And that would have been on May the 4th, 2005?

A I don't recall the specific date, to tell you the truth.

Q It was before --

A It was right around that time. It was either right before or that day.

Q Okay. What did you tell him?

A I can't tell you.

Q Why?

A Because I met with him as the UMIA's general counsel and I've been told that he wants to keep our attorney-client conversation confidential.

Q Well, were you having a discussion

Page 31

relating to legal services?

A We were having a discussion in an attorney-client privileged setting and I'm not going to disclose the substance of our conversation. I can't, he's told me not to. His counsel has told me not to.

Q When did that all occur? When did he or his counsel tell you not to?

A Yesterday.

Q And how did it occur?

A I spoke to Phil Fishler, his attorney, I had a couple of conversations with Phil, and it was his decision to not waive, even conditionally or in a limited way, our attorney-client privilege.

Q With whom does Mr. Fishler practice?

A Strong & Hanni.

Q And when you say you had a couple of conversations with Mr. Fishler, when were those -- can you tell me when those conversations would have occurred?

A Oh, I think -- well, yesterday. I think yesterday I had a couple of conversations with him.

Q Did you have any before that?

A I don't recall any, no.

Q Had you had conversations with

Page 32

<p>SHEET 5</p> <p>1 Mr. Oslowski before that about you appearing at this 2 deposition?</p> <p>3 A Yes.</p> <p>4 Q When would those conversations have 5 occurred?</p> <p>6 A I don't recall. He spoke to me about the 7 receipt of the notice and a conflict in his schedule 8 and one of the things that he wanted to talk to Phil 9 about was getting the deposition -- seeing if he could 10 get the deposition postponed. That was what I recall 11 recently.</p> <p>12 Q You met in June of 2005 with Art Glenn -- 13 and I can't remember what Mr. Smith's name is?</p> <p>14 A Doug.</p> <p>15 Q Doug Smith.</p> <p>16 A No. Not with respect to Gary.</p> <p>17 Q That's right. I apologize. Did you have 18 a conversation with them to set up a meeting?</p> <p>19 A No, not about Gary.</p> <p>20 Q Okay. Did you have any conversations with 21 either Mr. Smith or Mr. Glenn in any respect relating 22 to Gary after May the 4th of 2005?</p> <p>23 A I probably did, but I don't recall any 24 discussions at length or in detail with them. I -- 25 no.</p> <p style="text-align: right;">Page 33</p>	<p>1 the firm and so we allocated those cases.</p> <p>2 Q Did you ask UMIA to keep the cases?</p> <p>3 A I guess I can't answer that either. It's 4 their choice. It was their decision.</p> <p>5 Q I understand. I understand you're in a 6 bad sort of situation in terms of providing that 7 testimony.</p> <p>8 A I have to honor the confidentiality of 9 discussions with my client.</p> <p>10 MR. PETERSON: All right. I want to take 11 a break.</p> <p>12 (A break was taken from 1:39 p.m. to 13 1:47 p.m.)</p> <p>14 MR. PETERSON: Rather than proceed any 15 further, what we're going to do is continue this 16 deposition, stop now and continue it. We'll go ahead 17 and file a motion and see if we can get the court to 18 order -- give you an order so you can testify about 19 those things since those are the things really that we 20 need to ask you about anyway. So at this point we'll 21 simply continue the deposition.</p> <p>22 MR. ECKERSLEY: Well, what I'd indicate to 23 you, Chuck, is I don't have any problem, obviously, 24 with you seeking the court's guidance or an order on 25 the privilege question, but I don't see why we don't</p> <p style="text-align: right;">Page 35</p>
<p>1 Q Did you describe for anyone at UMIA why 2 you had terminated Gary?</p> <p>3 A I don't think I can tell you, can I?</p> <p>4 Q I don't know.</p> <p>5 A If I -- I've been told that I am to 6 protect the attorney-client privilege, I'm not going 7 to discuss the substance of conversations with them or 8 anyone else, really, over there.</p> <p>9 Q I understand. Did you give any 10 discussions at anyone at UMA -- UMIA with respect to 11 what they should do with Gary's existing case files?</p> <p>12 I suppose it's the same.</p> <p>13 MR. ECKERSLEY: Same.</p> <p>14 THE WITNESS: I guess I can't answer.</p> <p>15 Q (BY MR. PETERSON) Okay. I understand. 16 What, if anything, did you instruct -- did you give 17 any instructions to anyone in your own law firm about 18 what should be done with Gary's case files?</p> <p>19 A That was not up to us. That was the 20 client's decision.</p> <p>21 Q That's not what I asked you. I asked you 22 what, if anything, you instructed them.</p> <p>23 A About Gary's caseload?</p> <p>24 Q Yeah.</p> <p>25 A Well, we were told the cases would stay in</p> <p style="text-align: right;">Page 34</p>	<p>1 do the other stuff while we're here.</p> <p>2 MR. PETERSON: I'm not interested in doing 3 the other stuff until I get an -- get that issue 4 resolved by the court. We're going to end up coming 5 back anyway, so whether we do it then or now for my 6 purposes it doesn't make any difference. I'd rather 7 do it then.</p> <p>8 MR. ECKERSLEY: I understand your 9 position, I'm just indicating to you that if you don't 10 prevail on that motion, that position is over.</p> <p>11 MR. PETERSON: I can take that chance.</p> <p>12 MR. ECKERSLEY: Okay.</p> <p>13 MR. PETERSON: I'm not worried about that.</p> <p>14 Thanks.</p> <p>15 MR. ECKERSLEY: Thank you.</p> <p>16 (Whereupon, the deposition was concluded 17 at 1:48 p.m.)</p> <p>18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 36</p>

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Susie Lauchnor, Registered Professional Reporter and Notary Public in and for the State of Utah, do hereby certify:

That prior to being examined, the witness, ELLIOTT J. WILLIAMS, was by me duly sworn to tell the truth, the whole truth, and nothing but the truth;

That said deposition was taken down by me in stenotype on July 18, 2006, at the place therein named, and was thereafter transcribed and that a true and correct transcription of said testimony is set forth in the preceding pages;

I further certify that, in accordance with Rule 30(e), a request having been made to review the transcript, a reading copy was sent to ELLIOTT J. WILLIAMS for the witness to read and sign before a notary public and then return to me for filing with CHARLES F. PETERSON.

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

WITNESS MY HAND AND OFFICIAL SEAL this 18th day of July, 2006.

Susie Lauchnor, CSR, RPR
Notary Public
Residing in Salt Lake County

Page 37

Case: Ferguson vs. Williams & Hunt, et al.
Case No.: 050921677
Reporter: Susie Lauchnor
Date taken: July 18, 2006

WITNESS CERTIFICATE

I, ELLIOTT J. WILLIAMS, HEREBY DECLARE:
That I am the witness in the foregoing transcript; that I have read the transcript and know the contents thereof; that with these corrections I have noted this transcript truly and accurately reflects my testimony.

PAGE-LINE	CHANGE/CORRECTION	REASON
_____	_____	_____
_____	_____	_____
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_____ No corrections were made.

I, ELLIOTT J. WILLIAMS, HEREBY
DECLARE UNDER THE PENALTIES OF PERJURY OF THE LAWS OF
THE UNITED STATES OF AMERICA AND THE LAWS OF THE STATE
OF UTAH THAT THE FOREGOING IS TRUE AND CORRECT.

ELLIOTT J. WILLIAMS

SUBSCRIBED and SWORN to at

, this day of
2006.

Notary Public

Page 38

Exhibit I

A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
1	Date	U-11333	U-9966	U-10518	U-10676	U-10957	U-10139	U-11176	U-10527	U-10741	U-11157	U-11220	U-10939	U-11092	U-11363	U-11461	Total
2	January																0
3	1																0
4	2																0
5	3																0
6	4																0
7	5																0
8	6																0
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34	February																0
35	1																0
36	2																0
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54	20																0
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EXHIBIT 1

DATE 4-25-07

WIT Glen

CHICAGO, LLC

DATE	TIME	FA	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
56	T	22	0.75	1.75	0.5	0.5	0.5						2.75	0.75					7
57	W	23	1	6.25													0.5		7.75
58	T	24		6.75			1.25												8.5
59	F	25		12															12
60	S	26		0.5															0.5
61	S	27																	0
62	M	28		2.5															2.5
63	March																		0
64	T	1		3.75							0.25		0.25	0.75			0.5		7.75
65	W	2		3.25					0.5										7.25
66	T	3		2.75													0.25		3.5
67	F	4						0.5											0.5
68	S	5																	0
69	S	6																	0
70	M	7		3					0.5					1.75					8.75
71	T	8		7.25	0.25						0.75								7.75
72	W	9		6.5				0.25	0.25		0.25						0.25		7.5
73	T	10	0.25	3.75					2.25								0.75		7.25
74	F	11		0.25				1	3.5										4.75
75	S	12																	0
76	S	13																	0
77	M	14		1.5	6.25				0.5										8.25
78	T	15		0.75	2.25														3.25
79	W	16		0.5				0.25			1.25						0.5		6.5
80	T	17		2.75				1	3.25										2.75
81	F	18			0.75						0.5		0.5				0.25		2
82	S	19																	0
83	S	20																	0
84	M	21		11.3															11.3
85	T	22		1.25				0.5	0.25		3.25							1.75	7
86	W	23		3.25	0.25				0.25	0.5	1.75			0.25			0.25		6.5
87	T	24																	0
88	F	25		3.25									0.75	1.25					5.25
89	S	26		11.75															11.75
90	S	27																	0
91	M	28		3.5						0.25	2								7
92	T	29		1.25					0.25	5.75	0.5								8
93	W	30														0.25			0.5
94	T	31		2.75			1	1.75			0.5								7.25
95	April																		0
96	F	1		2.75			2.5		0.25		0.5								6
97	S	2																	0
98	S	3																	0
99	M	4																	0
100	T	5																	0
101	W	6		0.25			0.5	0.25	0.25	0.5	2.75						0.75		5
102	T	7		3.25			1.25		0.5	2.75	0.75						0.25		4.25
103	F	8		10													1		6.25
104	S	9															0.5		10
105	S	10																	0
106	M	11		3.75															0
107	T	12		0.5					0.25		0.25						0.75		5
108	W	13		2.25					0.25	2.75	1.75						0.75		6.5
109	T	14		1.25					0.25								0.25		7.5
110	F	15																	1.75
																			0

REPORT - DOW

[illegible]

Exhibit J

1/4/05

3 16-10a-808

- Hard way or easy way. Sequence pkg.
- Removal of Directors
 - + Go through the reasons why we want him out:
 - Loss of Trust & Confidence
 - Badmouthy to UMIA
 - Disruptive w/ staff; harmony, etc.
 - Decision unanimous
 - Integrity, competence & trust
 - Do an outline.

5/05 - Mtg w/ 6BF

Crazy, mentally ill, medication, Kow Tow, handle all work; Geo is a stooge, no mgmt., no follow-up; young people all intimidated, all about ego and his failure to go to lunch and have cocktails. ESW poisoned the well w/ UMIA; El jealous of him; all about El's ego and the fact that Gary wouldn't Kow Tow to him; Threat that "someday you (El) will be sorry."

(9)

Bruce bills 3x what Gary bills for the same work. Jody just goes along - he has no mind of his own.

- no mention of Fry, Rob or Audrey; couldn't believe that Kurt would support this action.

Everyone unfair; no introspection, no personal responsibility

Tab 2

Hearing September 17, 2007

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

GARY B FERGUSON, et al,

Plaintiff,

vs.

WILLIAMS & HUNT, INC. et al,

Defendant.

COPY

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) Case No. 050921677 PI
)
)
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)
)

Hearing
Electronically Recorded on
September 17, 2007

BEFORE: THE HONORABLE TYRONE E. MEDLEY
Third District Court Judge

APPEARANCES

For the Plaintiff:

Edwin S. Wall
Charles Peterson
WALL LAW FIRM
8 East Broadway, Suite 500
Salt Lake City, Utah 84111
Telephone: (801) 523-3445

For the Defendant:

M. David Eckersley
PRINCE, YEATES & GELDZAHLER
175 East 400 South, Suite 900
Salt Lake City, Utah 84111
Telephone: (801) 524-1000

Transcribed by: Beverly Lowe, CSR/CCT

1909 South Washington Avenue
Provo, Utah 84606
Telephone: (801) 377-2927

P R O C E E D I N G S

(Electronically recorded on September 17, 2007)

COURT BAILIFF: All rise. Third District Court is now in session. The Honorable Judge Medley presiding. Please be seated.

THE COURT: This is case No. 050921677. Counsel, would you identify yourselves for the record, please.

MR. PETERSON: Charles Peterson and Ed Wall for the plaintiff.

MR. ECKERSLEY: Dave Eckersley for the defendant, your Honor.

THE COURT: You may go forward, Mr. Eckersley.

MR. ECKERSLEY: Thank you. As your Honor's aware, this is our motion for summary judgment; and the complaint of the plaintiff is essentially that he was defamed by the defendants in connection with his termination from their law firm. The allegation is that by telling the UMIA, a client of the law firm, the reasons for terminating Mr. Ferguson, that that constituted defamation.

Obviously, your Honor, at this stage of the proceedings you have to assume, and you are required to do so, that the statements made by the defendants were untrue. That is, when they told UMIA that they had terminated Mr. Ferguson for over-billing, that they were in fact making a false statement.

However, that does not give rise to a cause of action,

1 because the UMIA as a client of the firm, had an interest in
2 knowing why a lawyer who was working on their cases had been
3 terminated by their law firm. Therefore, the statements made
4 to UMIA were privileged; and there hasn't been any dispute in
5 this case that they were in fact conditionally privileged
6 statements.

7 Therefore, the issue becomes whether the plaintiff has
8 any evidence that those statements were made out of malice, as
9 opposed to with a good faith belief in their truth. That is
10 what the defendant -- excuse me, the plaintiff has entirely
11 failed to do in this case, is bring forth any evidence that
12 the statements were made with malice. His suggestion is, and
13 he has asserted in his affidavit, that because the statement is
14 so utterly fanciful, as to be frivolous, that therefore it must
15 have been motivated by malice.

16 The law is clear, and all the cases are clear, that
17 the fact that the statements made that might prove to be
18 untrue does not lead to a presumption of malice. In fact,
19 the presumption is to the contrary. The presumption is that
20 the statement was made in good faith, and the burden falls
21 upon the plaintiff to demonstrate to the contrary. That
22 demonstration has not been made in this case.

23 In fact, the only assertion by the plaintiff that a
24 statement must be motivated by malice is his contention that
25 it was untrue. Well, as we have pointed out in memorandum

1 submitted in this matter, the good faith of the law firm in
2 making the statements is amply demonstrated. What happened
3 was when concern arose about Mr. Ferguson's billings, they --
4 the law firm -- set up a system of monitoring his use on the
5 computer. They noted that as they ran that example, checking
6 it against his billings, that on a routine basis, he was
7 billing many more hours than he was actually present in the
8 office, and billing for office work.

9 For particular example, on the very first day that
10 they started monitoring at his law firm, they noted that he
11 billed 11 point -- well in excess of 11 hours on that day,
12 and he was only in the office for 5 hours. Under the system
13 as they use it, the billing system of Williams and Hunt, each
14 lawyer logs in his own time, and does so from his own computer.
15 On that day, March 23^d, 2005, Mr. Ferguson billed 11.25 hours,
16 and he did so, at best case, by 5 o'clock in the afternoon,
17 when he'd only been in the office since noon. So he billed for
18 twice the amount of time that he was actually in the office,
19 and did on the exact same day as is reflected on the billing.

20 Obviously we cannot establish at this point that
21 Mr. Ferguson engaged in over-billing. The Court has to
22 presume, consistently with his affidavit at the summary
23 judgment stage, that he did not. What we can establish without
24 question, is that the law firm in good faith believed that he
25 did. That was the basis for the action they took with regard

1 to Mr. Ferguson. That was the basis for the statement they
2 made to their client, which was privileged.

3 At this point it is the burden of the plaintiff
4 to come forward and establish evidence to the contrary; and
5 there has been no such assertion in this case to any concrete
6 fact showing that defendants did anything other than act in
7 good faith in making the statements that are alleged to be
8 inflammatory.

9 THE COURT: Mr. Eckersley --

10 MR. ECKERSLEY: Yes.

11 THE COURT: -- I want to talk to you a moment about
12 what I think to be at least the core issue in terms of this
13 motion for summary judgment that is -- that I have some concern
14 about. That is whether or not the conditional privilege has
15 been forfeited as a result of conduct alleged by your clients.

16 I think this is really where I'm having a difficult
17 time, particularly in the context of a motion for summary
18 judgment, because you maintain the accounting system there
19 at the law firm where your clients formed a belief that the
20 plaintiff was over-billing, but yet I have -- I can't -- and
21 I apologize for not recalling whether it's in affidavit form
22 or deposition form, but I'm fairly certain there was evidence
23 presented by the plaintiffs to the extent that it was common
24 not only there at the law firm, but common in the practice of
25 law for lawyers to bill time when they're not physically at the

1 office in front of a computer.

2 I think that's one of the positions taken by the
3 plaintiffs in this particular case; and the significance of
4 that is whether or not that evidence is sufficient evidence to
5 raise a genuine issue of material fact as to whether or not
6 your clients formed an honest -- or had an honest belief, an
7 honest, reasonable belief in the challenged statements that
8 they made. That's where I'm really stuck at on this particular
9 motion.

10 MR. ECKERSLEY: Let me say, your Honor, you're
11 absolutely correct, it's both in deposition and in affidavit
12 form, that Mr. Ferguson has contended that he did a lot of
13 work outside the office when he wasn't physically sitting in
14 front of his computer.

15 If that were enough, that would be a material issue
16 of fact, if there weren't the privileged question. However,
17 because there is the privileged question, he has to establish
18 that the views formed by the law firm and expressed to their
19 client were formed and expressed out of malice to Mr. Ferguson.
20 There is no testimony to that effect.

21 What we have demonstrated is the firm made an honest
22 evaluation. They looked at the kind of work he billed for --

23 THE COURT: Hold on, and I hope you can hold that
24 thought for me, because I want to hear -- I want to hear the
25 end of that thought. The way malice is defined in the context

1 of determining whether or not a conditional privilege has
2 been forfeited, there's more than one way to dem -- make
3 that demonstration; but if you can -- if the plaintiffs can
4 establish through evidence a genuine issue of material fact
5 that your clients could not have reasonably believed in the
6 truth -- not that it was truthful or not, but a reasonable
7 belief in the honesty or truthfulness of the statement that
8 was published, then that is sufficient -- that may very well be
9 sufficient for malice, may be sufficient to defeat the motion
10 for summary judgment. That's where I'm really stuck at on this
11 motion.

12 MR. ECKERSLEY: Your Honor, there are two ways that you
13 can forfeit the privilege. One is excessive publication --

14 THE COURT: Correct.

15 MR. ECKERSLEY: -- and that clearly did not occur in
16 this case.

17 THE COURT: Okay.

18 MR. ECKERSLEY: There are two very limited publications
19 of a statement. The second is through malice, spite, ill will
20 or hatred, all right? Now, the case law is clear.

21 THE COURT: Well, but you stopped. See, you said
22 spite, ill will or hatred; and I think there is another prong
23 which malice can be demonstrated. It's not just those prongs
24 that you just described, and that's maybe where --

25 MR. ECKERSLEY: I think I understand your point.

1 THE COURT: Okay, go ahead.

2 MR. ECKERSLEY: I think your Honor -- what your Honor
3 is suggesting is, if there is absolutely no basis for forming
4 the opinion that an inference of malice can be drawn from a
5 statement being made which is utterly factually unfounded.

6 That is not this case, because what we have is whether
7 -- whether there's an affidavit saying it's flawed or not, we
8 have the logic of doing the comparison of the time in which
9 Mr. Ferguson was in his office working with his billings, and
10 looking at it over a period of about three weeks, and finding
11 that there was a consistent and repetitive pattern, where he
12 was billing for things like conferences and telephone calls,
13 when he wasn't in the office.

14 The inference to be drawn from that is that he's
15 billing for time that he was not in fact working. Whether
16 that is correct or not, there is a foundation for that
17 judgment. Given the fact there's a foundation for that
18 judgment, the law presumes that the judgment and expressions
19 about the judgment were made in good faith; and shifts the
20 burden to the plaintiff to demonstrate not just the falsity of
21 the statement that was made, but the motivation for it being
22 out of malice. That is what is utterly mis --

23 THE COURT: And what case are you relying on for that
24 last statement? Because that's not the way I've read the case
25 law, and I can't recall right now whether or not that either of

1 you cited the case to me that I'm thinking in terms of. We'll
2 get to that in a moment, but what case law are you relying on
3 for the last legal proposition you've just stated?

4 THE COURT: In Utah, it's the Seegmiller case that says
5 that it's the plaintiff that bears the burden of proof. Albeit
6 it is in a footnote, but it says once it has been established
7 that there is a conditional privilege, the burden shifts to the
8 plaintiff to demonstrate malice.

9 I cited to the Court a number of cases from other
10 jurisdictions saying the fact that the statement was false
11 does not raise an inference that it was motivated by malice.
12 The classic case is the -- there's a doctor who's employed
13 by a hospital who's been supplied by an agency. The agency
14 supplies the doctor to the hospital. The hospital goes to the
15 agency and says, "You've got to get rid of this person. She's
16 incompetent."

17 She sues based on that statement; and the Court
18 says, "That's not proof of malice." The fact that she had an
19 argument with the guy who made the statement is not proof of
20 malice. You have to show something that's concrete and not
21 conjecture, that shows that the motivation for making the
22 statement wasn't to promote your own interest, wasn't for any
23 reason other than the desire to hurt the plaintiff. That's
24 what's utterly absent here. There is no demonstration from the
25 facts that the motivation in making the statement was solely to

1 hurt the plaintiff, to cause injury, as opposed to communicate
2 a good faith -- although you have to presume false -- belief.

3 That's why the plaintiff's case fails at this point,
4 because regardless of whether the allegation is true or not
5 true, it was made on the basis of a rational decision formed by
6 the defendants after the comparison of his computer records to
7 his billing records. That, as a matter of law, is a sufficient
8 basis to make a statement.

9 THE COURT: Whether or not it's -- the decision is
10 supported by a rational basis, that -- if you answer that, of
11 course, in the affirmative, that is a decision that you and
12 your clients have made in this particular case. In the context
13 of the summary judgment motion, isn't the question whether or
14 not there is sufficient evidence to raise a genuine issue of
15 material fact as to whether or not there was a reasonable basis
16 that would support that decision -- or support the publication
17 in this particular case?

18 MR. ECKERSLEY: I would submit no, your Honor, for
19 this reason. The law presumes -- by shifting the burden to
20 the plaintiff, the presumption is that the statements were made
21 in good faith. Then the question becomes, what evidence does
22 the plaintiff have that it was not? That is what's totally
23 absent here. There has been no testimony from the people who
24 made the statements, from the people who heard the statements,
25 that they were motivated.

1 THE COURT: How could it -- how could it -- how could
2 it be totally absent, if their response is, "Our practice has
3 all along been that you could bill for hours when you are not
4 in the office"?

5 MR. ECKERSLEY: Your Honor, because that goes to the
6 merits of what you're struggling with resolving that question
7 should be for the jury, but it is not; because it isn't the
8 accuracy of the judgment. It's the fact that the judgment was
9 made in good faith, and --

10 THE COURT: I don't disagree with that.

11 MR. ECKERSLEY: -- the law pre -- and the law presumes
12 that it was, in the absence of evidence to the contrary. There
13 is no evidence to the contrary in this case. The only thing
14 there is, is Mr. Ferguson's conjecture that it must have been
15 for other reasons. The cases are clear that the plaintiff's
16 conjecture that the statement was made out of malice is not
17 evidence of malice. There needs to be much, much more than
18 that; and in this case there's nothing.

19 THE COURT: Let me read this language to you --

20 MR. ECKERSLEY: Please.

21 THE COURT: -- and hear what your response is. I'm
22 getting this out of -- and maybe you've determined that this
23 case has no application. I'm getting this out of the Waymont
24 vs. the Clear Channel Broadcasting case, which is a Utah
25 Supreme Court case, a 2005 case.

1 I'm not going to read the whole case verbatim, but I
2 want to go to this language and hear what your response is.
3 Of course, there were some -- there were some Constitutional
4 issues raised in this particular case, but tech

5 MR. ECKERSLEY: The public figure analysis is not
6 applicable here.

7 THE COURT: Exactly.

8 MR. ECKERSLEY: Yeah.

9 THE COURT: And I quote, "While actual malice refers
10 to the Constitutionally mandated level of fault necessary in
11 public figure cases, malice in the context of a conditional
12 privilege is simply a means of determining when the privilege
13 is forfeited." Then it cites the Russell case.

14 Then again I quote, "Contrary to Clear Channel's
15 understanding, however, proof of knowledge of, or reckless
16 disregard for a statement's falsity would satisfy either
17 standard."

18 I quote again, "Providing that knowledge of, or
19 reckless disregard for a statement's falsity constitutes an
20 abuse of the conditional privilege," it says, "in determining
21 malice with respect to a qualified privileged offense, the
22 focus is not on whether the content of the statements are
23 malicious, but whether they are maliciously published."

24 In this particular situation, the claimed malice -- or
25 one aspect of the claimed malice is that these statements that

1 one cannot form a reasonable belief as to the truthfulness --
2 not whether they were true or not, but a reasonable belief as
3 to their truthfulness, because of the history of billing
4 practices in this firm and in the industry.

5 MR. ECKERSLEY: Your Honor, two things.

6 THE COURT: Go ahead.

7 MR. ECKERSLEY: Okay. First, I think the analysis is
8 different when you're talking about a public figure case.

9 THE COURT: Oh, I agree. I agree with that.

10 MR. ECKERSLEY: And is different when the defendant
11 is a news reporting agency. There is actually an affirmative
12 duty, the duty to know or should have known, that will satisfy
13 the recklessness. So if the reporting agency did nothing to
14 verify the statements that they put out, they forfeit their
15 conditional privilege if they're false, under particular
16 circumstances; but that's if they essentially don't make an
17 effort to investigate and verify.

18 All right. That does -- really doesn't apply to
19 private defamation case; but even if it did, what we have here
20 is the effort made to determine the accuracy of the statements
21 ultimately published. Whether the effort was successful or
22 unsuccessful doesn't change the calculus. It doesn't change
23 who bears the burden at this point to prove that the statement
24 was made with malice.

25 If it were a public figure case, what the plaintiff

1 could do to establish that it was made fo -- that you forfeited
2 the conditional privilege, was to show that the reporting
3 agency really didn't do anything to investigate the accuracy
4 of the statements that they repeated or that they made.

5 That couldn't be done here. Even if it was a public
6 figure case, we have a concrete effort to undertake -- to
7 determine the accuracy of the statements that were ultimately
8 made. Therefore, the issue of whether they're true or false
9 -- and the Court has to assume they're false at this point --
10 doesn't factor into the conditional privilege waiver, because
11 the effort was made.

12 The question simply becomes, what evidence do they
13 have that in fact the statements were made with malice, ill
14 will or hatred; and the answer is no. The law presumes that
15 they were not; and that's where we are in this case, your
16 Honor.

17 THE COURT: And the best case you can give me is that
18 what you cite as the Seegmiller and the out of --

19 MR. ECKERSLEY: Yes, we --

20 THE COURT: -- out of jurisdiction cases?

21 MR. ECKERSLEY: Most -- as the Court is probably aware,
22 most of our cases involving defamation essentially turn on
23 cases where the issue is this person or was this person a
24 public figure; and that's sort of the Constitutional debate
25 as to what the degree of protection that a public figure has,

1 as opposed to a private person about whom statements are not
2 conditionally privileged.

3 I wish we had -- the cases that I've cited from other
4 jurisdictions -- and they're numerous -- were Utah cases.
5 They aren't, but their logic is the same, and it's universally
6 applied; which is, in the absence of something other than the
7 plaintiff simply saying, "They must have hated me to say that,
8 because it couldn't be true," that's no evidence to defeat a
9 motion for summary judgment.

10 As the Court is aware, I'm sure, from having read the
11 memorandum, there are a lot of cases that say that, and their
12 logic is consistent. It's consistent with the Seegmiller case
13 in Utah, which says once the conditional privilege has been
14 established, which is not in dispute in this case, the burden
15 is upon the plaintiff to prove malice.

16 You can't do that -- and there is a Utah case just
17 generally dealing with summary judgment, that's cited in the
18 memorandum saying you don't meet your burden under Rule 56 by
19 merely speculating that something must have been the case. It
20 has to be based on concrete knowledge; and that's absent in
21 this case, your Honor.

22 THE COURT All right. Thank you. Go ahead, Counsel

23 MP PETERSON. Good morning, your Honor.

24 THE COURT: Good morning

25 MR. PETERSON: I've cited the Waymont in the case --

1 the case in my brief; and you quoted from what essentially is
2 a footnote, I believe, in Waymont. Directly, that footnote
3 goes to some language in the body of the decision that says as
4 follows: "Whether the publication is conditionally privileged
5 is a question of law, unless a genuine fact exists regarding
6 whether the scope of the privilege has been transcended or the
7 defendant acted with malice," citing to (Inaudible).

8 Then it says, "Evidence of malice in this context
9 may include indications that the publisher made the statement
10 with ill will; that the statements were excessively published;
11 or --" and of course, I think this is where the Court was going
12 -- "that the publisher did not reasonably believe his or her
13 statements."

14 Now, what the Court says there in the footnote, as you
15 correctly cite, Court is saying, look, when it comes to the
16 defendant in this case, they're under the belief that there
17 would have to be an estab -- we'd have to establish that actual
18 malice existed.

19 In the First Amendment context, what they're talking
20 about essentially is this, I think. That when you talk about
21 speech and defamation cases of the type in Waymont, when you
22 start talking about the right to publish the types of things
23 that were published in Waymont, the question becomes whether
24 or not there was not just a reckless disregard for the truth.
25 The argument is that it has to -- the conduct of the defendant

1 would have to rise to the level of at least reckless disregard
2 for the truth, and perhaps an intentional falsehood in the
3 way that it publishes the information, to get past the
4 Constitutional privilege

5 What I understood the Utah Supreme Court to be saying
6 is no, no, no, no, no You don't even need that here In the
7 context of the question that the Court raises today, whether or
8 not this privilege has been abused to the point that it's gone,
9 what you need to establish as the plaintiff is simply -- well,
10 what they say, that idea that you could have a -- something
11 less than a real belief in the nature of the fact gathering,
12 I suspect, really is what they're getting at. That you can
13 gather the facts in such a way that even you don't believe
14 them So that's really the third way that you establish
15 malice

16 Okay. Let me give you evidence in the record that
17 establishes an issue of fact in this regard. First, with
18 respect to the method of collection It's interesting, we
19 took the deposition first of George Hunt, and asked him about
20 the method of collection When you go to his deposition, you
21 find this explanation of first, well, we've got -- he says in
22 his deposition, "In a firm our size, where all of the lawyers
23 have access to the data on our billing program that shows how
24 many hours they're billing, how many hours, how much money
25 they're generating, that sort of thing, we watch it pretty

1 carefully."

2 That all sounded great, except that it fell apart. As
3 you go through the deposition, then you get him back -- he
4 back-traces, he backs -- steps away from that, and he says,
5 "Well, look. The truth is, first of all, I'm not an expert in
6 computers," and second, when I asked him, "So was this program
7 in place by which you intercepted the amount of time that my
8 client was supposedly over-billing?" He says, "Well, no, we
9 didn't actually put that into place until March.

10 "When?" "Well, Mr. Ferguson went to --" I believe
11 it's Mr. Williams and said, "I have an issue about this UMIA
12 billing. It's going to exceed the \$10,000 per month limit,"
13 and they got into a discussion about that. The following week,
14 Mr. Ferguson -- it's noted in the depositions -- sends an email
15 to Mr. Williams and says, "Look, you've accused me of over-
16 billing, and I'm telling you right now I didn't over-bill
17 anybody."

18 It's after that, in March, that they put into place a
19 program. Well, what did they really monitor? Not how much
20 time he was really working on a client's files; but rather, how
21 much time he was logged into the computer.

22 So now I'm in Court today, and I've got with me my
23 computer, and I began my travels to get here this morning at
24 5 30. Certainly no one would take the position that I'm not
25 entitled to bill for my time from the time that I began my

1 work on this case. That is to suggest work that is directed
2 towards achieving an end to this case.

3 The deposition of Mark Osowski, the President of
4 UMIA, I said to Mr. Osowski, "Certainly you expected your
5 attorneys to bill you for the time they actually spent on the
6 case?" "Yes." "Whether or not they were in the office?" His
7 answer, "Yes."

8 I also asked him about why he stopped assigning cases
9 to Gary Ferguson. He said -- I think it's sort of a -- it's an
10 interesting statement in the context of this case. From his
11 deposition at page 14, "As you know, I attended a presentation
12 by a prominent defense attorney in Chicago, and stress two
13 points that have stuck with me for a long time. First is, you
14 must and should pay your defense Counsel an adequate hourly
15 wage so that they can make a decent living (inaudible) to the
16 plaintiff's bar. The second thing is, if you don't trust your
17 defense attorneys, you fire them and you find somebody you do
18 trust."

19 You see, for Mr. Osowski, it was first and foremost,
20 with respect to Gary Ferguson, an issue of trust. The trust
21 that he had built up with them, and go with Art Glenn, who
22 was in charge of assigning the cases, Mr. Osowski, and even
23 in this case, Mr. Hunt, in his deposition, when asked if they
24 had ever had complaints about the way that Mr. Ferguson was
25 doing his job for UMIA Insureds, the physicians, in each case

1 they all said the same thing, "No." Mr. Hunt said it in his
2 deposition, Mr. Osowski said it, and so did Mr. Glenn. It's
3 a matter of trust.

4 If the methodology isn't sufficient on which to destroy
5 a person's reputation with his chief source of clients, and
6 that person is a lawyer, well, it's a matter of trust. There's
7 a factual issue that is raised by the testimony of those three
8 men in their depositions with respect to whether or not these
9 defendants could have, should have reasonably relied on what
10 they had gathered as evidence supporting the notion that
11 Mr. Ferguson was billing falsely for his time.

12 In deposition I said, "What did this suggest to you?"
13 "Well, it suggested to us," Mr. Osowski said, "that he wasn't
14 being truthful." He says in the next page or so, "I trusted
15 Elliot Williams, but I couldn't trust Gary Ferguson based on
16 what I had been told." Well, that's what the case is about.

17 You see, if in fact -- I would suggest to the Court if
18 in fact Williams and Hunt just had simply had enough of Gary
19 Ferguson, and decided to dump him, then they could have done
20 so, in the absence of firing him for a reason that contravenes
21 public policy. Mr. Ferguson has suggested in his brief that
22 they got into this dispute in March.

23 In his email you may recall he says to Mr. Williams,
24 'I'm not going to be socializing with you anymore. Don't
25 ask me about it. We all know after the depositions that the

1 socializing is the drinking at the firm's bar. Don't ask me
2 to do that. I'm not going to do it." George Hunt says, in his
3 deposition, "Over the course of the years we found that when
4 Gary and us -- when we had disputes, Gary would retreat to his
5 office, close the door, and --" in Mr. Hunt's words -- "pout.
6 He wouldn't come out and drink with us. He wouldn't come out
7 and socialize with us."

8 Well, look. If they just had enough, he was an
9 employee, and they could have fired him; but that isn't what
10 happened in this case. They went well beyond that. They
11 destroyed his reputation with UMIA. There probably is no
12 greater niche, practice, I suspect -- well, maybe there are,
13 but certainly this is one of them. The defense of medical
14 malpractice claims, it's always the same lawyers in virtually
15 every town.

16 I mean, you get guys who specialize -- young men and
17 women who get to be older young -- older men and women who
18 specialize in this one area of practice. So when those cases
19 come in, that's where the cases go. Gary Ferguson was one of
20 those men. His entire life devoted to one niche area of
21 practice, essentially.

22 In his deposition he's asked by Counsel for the
23 defendants, "How much money were you making a year?" "About
24 a quarter of a million dollars plus benefits per year."
25 So real damages resulting from what? Well, you know from

1 Mr. Osowski's deposition; that he couldn't trust that Gary
2 Ferguson wasn't over-billing.

3 The best evidence in the case that raises the issue
4 of fact in this regard, well, what did UMIA's adjuster, the
5 head of claims do when it decided to investigate the question
6 whether or not Gary Ferguson had over-billed? You find that
7 spreadsheet at Exhibit I, and it was an exhibit to the
8 deposition.

9 "Well," he says, "here's what we did. We went and we
10 took a look at his billings to us, and we scheduled them out
11 all on an Excel spreadsheet, and when we had concluded, here's
12 what we had discovered. He had under-billed us on at least
13 two occasions." I said, "Well, where?" and he points to two
14 occasions. One which I'll highlight for the Court, just to
15 remind you.

16 He said -- and this is the UMIA claims guy, Mr. Glenn.
17 He says, "Look, we made a trip from Salt Lake to Virginia Beach
18 to take some depositions, me and two lawyers. Lawyer No. 1
19 billed me for 22 hours on day such and such. Mr. Ferguson
20 billed me for 21 hours, an hour less than lawyer No. 1 billed.
21 By the way, I thought lawyer No. 1's bill was fine; but I
22 thought that simply Ferguson had spent -- under-billed us by
23 at least an hour."

24 Then he cites to another occasion where you see two
25 two days that are combined into one day's billing. No dispute,

1 by the way, by the defendants that the jurist program -- their
2 billing program -- looks like all the other legal billing
3 programs. When you sign in, as Mr. Ferguson points out in
4 his deposition -- no dispute of this -- you sign in, and you
5 pull up -- you're going to add a timer -- a time sheet for a
6 thing -- tasks that you've done that day. It pulls up the last
7 date that you entered a time entry.

8 So on Monday, if you were last entering time on Friday,
9 it pulls up Friday's date. Mr. Glenn points out in his spread
10 sheet an exact occasion where on the 17th, Mr. Ferguson bills
11 for 11.5 hours, but in fact, if you go back to the 14th, as he
12 did, there were two depositions; one on the 14th, a Friday,
13 one on the 17th, a Monday. What had happened was, they simply
14 combined them into one day. Mr. Ferguson suggested both in his
15 deposition, his affidavit, and in the complaint, that that's
16 probably how he would explain those things, but he had other
17 explanations.

18 I don't think that that's what really matters in this
19 case. What really matters, of course, is the question of
20 whether or not this raises an issue of fact precluding summary
21 judgment. I think it does, without a doubt. Maybe the best
22 evidence in that regard, well, Exhibit No. J, these are the
23 handwritten notes from George Hunt as they fire my client a day
24 before he's to go in for surgery. These are his handwritten
25 notes.

1 Now, at the top of the notes, on May 4th you see what
2 he says are meeting notes between he and Elliot Williams. He
3 says, "Go through the reasons why we want him out." Then
4 there's a list of reasons. Then on 5/5/05, meeting with GBF,
5 Gary B. Ferguson. In these notes you find this sort of cryptic
6 little reference, "EJW poisoned the well with UMIA."

7 I said in deposition, "Well, where in the world did
8 that come from? What does that mean?" Well, he says it means,
9 as I recall, Gary said that Elliot Williams had poisoned the
10 well with UMIA. I asked Mr. Hunt, had Mr. Williams met with
11 Mr. Osowski at UMIA and discussed with him the reason for the
12 firing? He says in his deposition, "Well, not until after we
13 fired him."

14 Well, it turned out, of course, that that was not the
15 case. Before they fired Mr. Ferguson, as Mr. Osowski pointed
16 out in his deposition, indeed as Mr. Hunt -- or excuse me,
17 Mr. Williams pointed out in his deposition, before they fired
18 him, they met with Martin Osowski, and told him about the
19 billing problems, and their concerns that he was over-billing
20 before.

21 Then when UMIA did their independent analysis, in the
22 deposition I asked Mr. Glenn, the person most familiar, "Do you
23 have an opinion with respect to what you did, looking at all
24 the records, as to whether or not my client over-billed UMIA?"
25 "Yes, I have an opinion." "What's your opinion?" "He didn't

1 over-bill us."

2 So look, Judge, I think that they could have fired
3 him, frankly; but I think that at the point in time that they
4 ruined his reputation with UMIA, and took him out of a niche
5 practice, that at that point in time, then their actions are
6 judged differently. Even if they are conditionally privileged,
7 if the statements are conditionally privileged --

8 THE COURT: Well, you're not -- you're not -- are you
9 -- I didn't ever get the impression you were challenging the
10 existence --

11 MR. PETERSON: Of the conditional privilege?

12 THE COURT: -- of the conditional privilege.

13 MR. PETERSON: I'm not.

14 THE COURT: All right.

15 MR. PETERSON: Even if they are, though, and I'll
16 assume that they are, they have to act in such a way to form
17 a reasonable belief in the truthfulness of statements. You
18 can't -- they can't just simply go off and tell UMIA that he's
19 lying to them about their billings.

20 I asked Mr. Osowski in his deposition, "Well, what
21 did all this mean to you? What did you -- what did it imply to
22 you when you were told that Gary Ferguson had over-billed UMIA?
23 What did it imply?" Mr. Osowski, in his deposition says -- or
24 excuse me, Mr. Glenn says, "It implied that he was dishonest."

25 Lawyers live and die by reputations. It's as simple

1 as that. We get or don't get clients in cases based on
2 reputation. So when you destroy a person's reputation, I
3 think what the Utah Supreme Court has said is one prong by
4 which a person may establish actual malice is to establish
5 that there was no reasonable basis on which to have believed
6 the statement that you've used to destroy that person's
7 reputation. I don't have anything else.

8 THE COURT: What is your response to Mr. Eckersley's
9 position regarding the burden of proof he maintains you
10 have, and the holdings of the out-of-jurisdiction authorities
11 that he cites?

12 MR. PETERSON: Well, they're out-of-jurisdiction
13 authorities, the Utah Supreme Court in July this year, in a
14 case entitled O'Connor vs. --

15 THE COURT: Is this a case you cited in your --

16 MR. PETERSON: No, this is new since then. O'Connor
17 vs. Burningham comes down July 31st, 2007. In O'Connor, here's
18 what they say. Another jur -- another question about when do
19 you abuse -- what's the -- how do you pass a motion for summary
20 judgment, and in this context O'Connor -- I guess I can tell
21 you.

22 O'Connor is a case about a women's basketball coach
23 at a high school, and the parents of this -- she gets fired,
24 essentially, and the parents communicate what they believe to
25 be the reasons for her firing to some potential employers and

1 other people at large.

2 The District Court says, "Well, she's a public figure.
3 So she's got a higher burden of proof." The Supreme Court
4 ultimately in O'Connor says, "Well, first of all, she's not a
5 public figure; and by the way --" here's what they say at page
6 38.

7 "Whether a statement is entitled to the protection of
8 conditional privilege presents a question of law. Whether the
9 holder of the privilege lost it, due to abuse of process is a
10 question of fact." They cite Waymont, they cite Berhaney vs.
11 Nordstrom, and they cite Combs vs. Montgomery. They say -- in
12 this case, the District Court didn't get to that issue. So
13 we're sending it back. They never got there because they found
14 that she was a public figure.

15 The law in Utah, I think, is clear.

16 THE COURT: So that's all that case says about that --

17 MR. PETERSON: Correct.

18 THE COURT: -- about that issue? Go ahead.

19 MR. PETERSON: But it's consistent, I think, Judge,
20 with -- it's consistent with Waymont, which has been the law,
21 and a good articulation of the law starting in 2005. Waymont
22 is nothing really new. I mean, the articulation there is
23 essentially based on the Nordstrom decision, which I'm not
24 sure, but I think it's a '98 decision, if I'm -- I could be
25 wrong by the date, but I don't think Utah law has changed in

1 that respect.

2 Clearly, I think, Judge, O'Connor vs. Burningham,
3 decided this past July 31st, tells us that the law in Utah is
4 still the law of Waymont.

5 THE COURT: Thank you. Go ahead, Mr. Eckersley.

6 MR. ECKERSLEY: Your Honor, I think where we have to
7 remain focused is on -- is on this question. We don't -- I
8 haven't really heard expressed much disagreement about what
9 the law is. The law clearly is that there is a conditional
10 privilege. Once the conditional privilege is established and
11 it's not contested in this case, the burden shifts to the
12 plaintiff to prove malice.

13 The issue with regard to malice isn't whether the
14 statements are true or untrue. For your purposes you have to
15 assume at this point that they're untrue. The issue is whether
16 the plaintiff has evidence to demonstrate that the untrue
17 statements were published with malice. There is no such
18 evidence. You did not hear any.

19 There was a suggestion that because of the disputed
20 timing about whether Mr. Williams spoke to Mr. Osowski before
21 or after the actual termination, that somehow raises an issue
22 of malice. How? I heard no explanation of that. There is
23 confusion in the record of whether it was a luncheon meeting
24 right before they fired Gary, or if it was a luncheon meeting
25 right after the fired Gary. That's a factual issue, but it's

1 immaterial.

2 The issue presented by the motion is, is there
3 evidence in the record to demonstrate that the statements
4 were made with malice?

5 THE COURT Malice defined under our law is satisfied
6 particularly at a summary judgment stage, if there is evidence
7 that raises a material issue of fact as to whether or not the
8 statement -- the publisher did not reasonably believe in the
9 truth of the statement.

10 MR. ECKERSLEY: Your Honor, I think arguably that's a
11 correct statement, but let me suggest this.

12 THE COURT: Go ahead.

13 MR. ECKERSLEY: The law presumes to the contrary; and
14 the evidence to come forward to create such a question has to
15 be presented by the plaintiff. We have indicated to the Court
16 -- there's no dispute about it -- the steps we went through to
17 verify the belief that we formed. Whether they were right or
18 wrong -- at this point the Court has to assume they were wrong.
19 That's just the law -- they were, in fact, reasonable.

20 Then the issue is, gee, is that enough in light of
21 these potential explanations? That's not an issue of fact for
22 resolution The issue of fact is, were the statements made
23 with malice The statement made, Counsel's theme was trust.
24 "We don't trust Mr. Ferguson's billings." Was that made with
25 good faith? The law presumes it was What's the evidence that

1 it wasn't?

2 Is it nitpicking with the analysis they did? Doesn't
3 matter. They did an analysis and formed the opinion. If the
4 opinion is expressed in good faith, which the law presumes it
5 was, it's privileged. It is not actionable; and there's no
6 evidence to the contrary, your Honor.

7 THE COURT: All right. Thank you, Mr. Eckersley.

8 MR. ECKERSLEY: Thank you.

9 THE COURT: I'd like to know if the two of you can
10 be available by telephone Thursday afternoon for a telephone
11 conference wherein I'm going to rule on this motion?

12 MR. ECKERSLEY: What -- I'm sorry, your Honor, what day
13 is Thursday?

14 THE COURT: What day is Thursday?

15 MR. ECKERSLEY: Other than Thursday.

16 THE COURT: Thursday is the --

17 COURT CLERK: The 20th.

18 THE COURT: -- 20th of --

19 MR. ECKERSLEY: Yes.

20 THE COURT: -- September.

21 MR. ECKERSLEY: Yes.

22 THE COURT: I guess I -- I did look at Thursday's
23 calendar. I thought it was (inaudible). Are you looking
24 at it right now? Just a second. All right, 3 o'clock on
25 Thursday. Will that work?

1 MR. PETERSON: Your Honor, I have a sentencing in a
2 Court at 1:30. I would hope to be done by 3 o'clock. I'll
3 make sure that I clear it out one way or the other, and that
4 I'm available at 3 o'clock.

5 THE COURT: Okay, and I assume we have your contact
6 information?

7 MR. PETERSON: Yes, sir. I will provide it.

8 THE COURT: Now, during this interim I want you to
9 know, just so you understand how this -- how this worked,
10 and this may be of no significance to you whatsoever, I had
11 actually resolved this motion for summary judgment, and had
12 committed to a short minute entry and order, and then received
13 the request for oral arguments. So obviously I took it back.
14 I also gave this case -- I assigned it to my law clerk, who
15 I've conversed with this case about.

16 During this break, I'm going to go back now and take
17 a look at the Seegmiller case, and probably take a closer look
18 at the authority cited by Mr. Eckersley that are not from this
19 jurisdiction, just so that I can get a better handle on their
20 rationale and analysis.

21 I'm struggling with this case because it appears to
22 me that how ill will is established in these kinds of cases is
23 defined in the Waymont case. Not that that's the only case,
24 but it is defined in the Waymont case. So this is a fairly
25 close call, as far as I'm concerned; but that's what I'm going

1 to do during this interim period of time. I'll resolve it by
2 Thursday at 3 o'clock.

3 MR. PETERSON: Thank you, your Honor.

4 MR. ECKERSLEY: Thank you.

5 THE COURT: Anything else?

6 MR. ECKERSLEY: No, sir.

7 THE COURT: All right. We'll recess at this time.

8 COURT BAILIFF: Court's in recess.

9 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.


That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

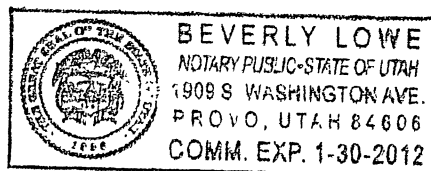
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 15th day of May 2008.

My commission expires:
January 30, 2012


Beverly Lowe
NOTARY PUBLIC
Residing in Utah County



Tab 3

Court's Ruling September 20, 2007

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

_____	)	COPY
GARY B FERGUSON, et al,)	
)	
Plaintiff,)	
)	
vs.	) Case No. 050921677 PI	
)	
WILLIAMS & HUNT, INC. et al,)	
)	
Defendant.)	
=====)	

Court's Ruling
(Telephone Conference)
Electronically Recorded on
September 20, 2007

BEFORE: THE HONORABLE TYRONE E. MEDLEY
Third District Court Judge

APPEARANCES

For the Plaintiff:	<u>Edwin S. Wall</u> <u>Charles Peterson</u> WALL LAW FIRM 8 East Broadway, Suite 500 Salt Lake City, Utah 84111 Telephone: (801) 523-3445
For the Defendant:	<u>M. David Eckersley</u> PRINCE, YEATES & GELDZAHLER 175 East 400 South, Suite 900 Salt Lake City, Utah 84111 Telephone: (801) 524-1000

Transcribed by: Beverly Lowe, CSR/CCT

1909 South Washington Avenue
Provo, Utah 84606
Telephone: (801) 377-2927

P R O C E E D I N G S

(Electronically recorded on September 20, 2007)

THE COURT Okay, are all of you still there?

MR. WALL: Yes, your Honor, Edwin Wall here.

MR. ECKERSLEY: I am, too.

THE COURT Okay This is case numbered -- and we should be on the record at this time, and this is case No 050921677 Just for record purposes, let's have Counsel identify themselves, starting with Counsel for the plaintiff.

MR. PETERSON. Charles Peterson.

MR. WALL. Edwin Wall.

MR. ECKERSLEY: And Dave Eckersley for the defendants.

THE COURT Okay. Thank you, Counsel. As you know, this is the time that I set for ruling on the defendant's motion for summary judgment. I've had an opportunity to take a look at the authorities that I indicated to you that I wanted to review at oral argument, and consequently I am going to rule as follows

I am going to deny the motion for summary judgment. I'm doing so for the following reason, basically That is that primarily, based upon the affidavit and deposition evidence from the plaintiff in this particular case, I am of the opinion that there are genuine issues of material fact as to whether or not the conditional privilege which applies to the statements at issue was forfeited or not

1 The Utah cases -- and I'm making specific reference to
2 Russell V. Thompson, which that case was cited to me, also the
3 Wayment vs. Clear Channel case, that was cited, I'm satisfied
4 that those statements -- excuse me, that those cases hold for
5 the proposition that a conditional privilege can be forfeited.

6 Those cases defined -- define malice, basically, as
7 a means of determining whether or not the privilege has been
8 forfeited. The privilege can be, in fact, forfeited if the
9 privileged statements are made with ill will, or statements
10 were made by the defendants and the defendants did not
11 reasonably believe the statements were true.

12 I think that there are genuine issues of material
13 facts as to whether those -- the subject statements were made
14 with ill will, or whether or not the defendants reasonably
15 believed the statements were true. It is those factual
16 disputes that precludes me from granting the relief sought
17 by the defendants in respect to this motion.

18 So I am going to deny the motion and ask Counsel
19 for the plaintiff to draft an order consistent with that
20 determination. If it's possible for the order to come to me
21 approved as to form by Mr. Eckersley, I would prefer it that
22 way. If that can't be accomplished, then consistent with -- I
23 think it's 7(f), just submit the proposed order to me within 15
24 days from today. Any -- do either of you have any questions
25 about that?

1 MR. ECKERSLEY: No, your Honor.

2 MR. WALL: No, sir.

3 THE COURT: All right, anything else?

4 MR. ECKERSLEY: Your Honor, I think that both sides
5 are of the view that we're -- discovery is concluded and we're
6 ready to go to trial.

7 THE COURT: Well, I'm not going to give you a trial
8 date. We're not going to try you tomorrow. I appreciate that,
9 but what I think I would prefer that you do -- and I don't -- I
10 don't think I've given you this information previously,
11 Counsel, but let me just take a moment.

12 I already know from my calendar that I won't get this
13 case tried this year. By the way, how long do you think it's
14 going to take to try this case?

15 MR. ECKERSLEY: I really don't think it's more than
16 three or four days.

17 MR. WALL: I agree with that.

18 THE COURT: Let's just assume it's three or four days,
19 and I made an assumption here that it's a jury trial, and that
20 doesn't matter in terms of when I'm going to be able to get
21 the case on the calendar; but the real problem I'm currently
22 having is that I have on my calendar at the -- within the first
23 quarter of this coming year, a two-month jury trial.

24 I already know that I'm going to have to make some
25 adjustment in -- on that setting, because I learned last week

1 that my criminal rotation which I'm required to handle, I
2 received that assignment for last week, and that criminal
3 assignment interferes with the two-month jury trial that I
4 have set in the first quarter of next year.

5 So it's going to help you a great deal if I get that
6 case adjusted first, and then understand how quickly I can get
7 you on my calendar. I'm hoping to be able to do that within a
8 week. In fact, I have that case on my calendar for motions
9 this coming Monday.

10 So what I would suggest is that possibly we put you on
11 hold now; and maybe my clerk can give you a date and time when
12 you can get back in here. I'm going to prefer that it probably
13 be, let's see, maybe two weeks from now. The dust will have
14 settled on that other case by then; and I can give you a more
15 firm setting, is what I'm trying to suggest to you. That's
16 the best I can do right now. I think that was your request,
17 Mr. Eckersley.

18 MR. ECKERSLEY: Yes. I'm just possibly wondering if
19 we're looking at a date for us to get together again or not.

20 THE COURT: Yes, I think I'm going to have my clerk
21 give that to you in just a moment, okay?

22 MR. ECKERSLEY: Yes.

23 THE COURT: I'm going to put you back on hold. Hold
24 on.

25 COURT CLERK: Okay, I want you to hit (inaudible).

1

(End of recording)

REPORTER'S CERTIFICATE

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STATE OF UTAH)

) ss.

COUNTY OF UTAH)

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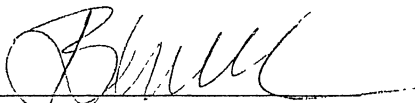
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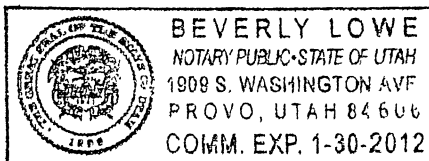
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 15th day of May 2008.

My commission expires:
January 30, 2012


Beverly Lowe
NOTARY PUBLIC
Residing in Utah County



Tab 4

Hearing January 18, 2008

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

GARY B FERGUSON, et al,

Plaintiff,

vs.

WILLIAMS & HUNT, INC. et al,

Defendant

COPY

Case No 050921677 PI

Hearing
Electronically Recorded on
January 18, 2008

BEFORE · THE HONORABLE TYRONE E. MEDLEY
Third District Court Judge

APPEARANCES

For the Plaintiff:

Mel C Orchard III
Charles Peterson
THE SPENCE LAW FIRM
15 South Jackson Street
P O. Box 548
Jackson, Wyoming 83001
Telephone: (307)733-7290

For the Defendant

M. David Eclersley
PRINCE, YEATES & GELDZAHLER
175 East 400 South, Suite 900
Salt Lake City, Utah 84111
Telephone: (801)524-1000

Transcribed by. Beverly Lowe, CSR/CCT

1909 South Washington Avenue
Provo, Utah 84606
Telephone: (801) 377-2927

P R O C E E D I N G S

(Electronically recorded on January 18, 2008)

COURT CLERK: Please rise. Third District Court is now in session. The Honorable Tyrone Medley presiding. Please be seated.

THE COURT: Okay. This is case numbered 050921677. Let's have Counsel identify themselves for the record.

MR. ORCHARD: Mel Orchard for the plaintiff.

MR. PETERSON: And Charles Peterson also for the plaintiff.

MR. ECKERSLEY: Dave Eckersley for the defendants, your Honor.

THE COURT: Mr. Eckersley, you may go forward, sir.

MR. ECKERSLEY: Thank you. Your Honor, I don't know in what order you want to take these motions.

THE COURT: Well, I was thinking we probably should start with taking the motion for reconsideration first.

MR. ECKERSLEY: Very good, your Honor. As you recall, the defendants made a motion for summary judgment in this matter, and briefed the issue of each of the claims that were asserted by the plaintiff. In their opposition the plaintiffs only focused on the defamation case and the intentional interference with prospective economic relations.

My assumption, therefore, was that the remaining claims were going to be discontinued. In speaking with Counsel

1 subsequently, it became clear that that was not going to
2 happen; and that was why I've asked the Court to reconsider
3 both the substantive motion on defamation and the collateral
4 motions with regard to the other claims.

5 In order, the first one that I'd ask the Court to
6 consider is the allegation of intentional infliction of
7 emotional distress. As pointed out in my brief, the Courts
8 in Utah, the Appellate Courts and the Supreme Court, have
9 repeatedly held that a termination coupled with allegations of
10 defamation do not rise to the level of intentional infliction
11 of emotional distress. Such conduct is not what is required by
12 our case law, which is outrageous conduct that simply isn't
13 present in the circumstances alleged by the plaintiff.

14 The Zumidakis case expressly holds that a termination,
15 allegedly wrongful termina -- discharge, coupled with false
16 statements, does not constitute the intentional infliction of
17 emotional distress. So we ask that that claim be summarily
18 judged.

19 The next claim is for wrongful discharge. As we have
20 pointed out, Mr. Ferguson has acknowledged, and it is true
21 that he was an employee at will. Under Utah law he can be
22 terminated for any reason or for no reason. The only exception
23 to that is if the termination is in violation of public policy.
24 There has been no public policy identified by the plaintiff
25 that it suggests that his termination violates.

1 While he suggested that it might have been because he
2 wasn't socializing, there's no Utah policy regarding -- a
3 public policy regarding a termination because someone won't
4 socialize with somebody, even though there's no evidence that
5 that was the basis of his termination. The wrongful discharge
6 is unsupported by the evidence; and summary judgment should
7 also be granted on that claim.

8 Then there is a claim additionally with regard to
9 Mr. Frankenburg, that he should remain a defendant in this
10 case; but there is absolutely no evidence of any tortuous
11 conduct on the part of Mr. Frankenburg, and there has been
12 no suggestion in the briefing of this matter that there's any
13 such conduct.

14 They said that he should remain a defendant because
15 he acted in concert. Without particularly knowing what that
16 means, there is no allegation of conspiracy in this case. So
17 Mr. Frankenburg clearly should not be a defendant if this
18 matter goes to trial.

19 There was also initially a claim that there was an
20 interference with a prospective economic relations with regard
21 to Mr. Ferguson's dealing with Siegfried and Jensen. The
22 suggestion there was that somehow his employment was delayed
23 because the defendants raised an issue with regard to whether
24 there were conflicts of interest between the Siegfried and
25 Jensen firm and Williams and Hunt in cases where Mr. Ferguson

1 had been employed by Williams and Hunt at a time when Siegfried
2 and Jensen was Counsel for plaintiffs in cases against the
3 insureds who had been defended by Williams and Hunt.

4 It was acknowledged in deposition that that clearly
5 presented an issue with regard to conflict of interest. The
6 issue was ultimately resolved in less than a month, and his
7 employment went forward.

8 So that -- I submit that that could not be intentional
9 interference with respect to economic relations, because there
10 was nothing improper about the query that was made, the issue
11 that arose, and the ultimate disposition; nor is there any
12 evidence that it caused Mr. Ferguson any economic damages,
13 which is an element of that claim. So again, I would submit
14 that that claim needs to be resolved.

15 That brings us, ultimately, to my request that the
16 Court reconsider its ruling with regard to what is, in essence,
17 the substance of this case, which is the asserted defamation.
18 In the initial briefing I did not make clear that the question
19 that was presented in some of the older Utah cases about
20 whether or not a conditional privilege could be forfeited if
21 the defendants acted without a reasonable basis for believing
22 the truth of their statement

23 As I pointed out in the memorandum requesting
24 reconsideration, since the Constitutional cases in the mid
25 '70's, Sullivan and Gertz came out, and the restatement was

1 changed. The law was made clear that to forfeit a privilege,
2 a conditional privilege, a statement -- the speaker has to
3 know that the statement was false, or has to act with reckless
4 disregard. Reckless disregard is defined as meaning -- having
5 a facts -- knowledge of facts which showed to a high degree
6 of probability that the statement the speaker makes is false.
7 There's absolutely no evidence of that in this case.

8 What we have in this case, as your Honor is aware, is
9 concern arose about Mr. Ferguson's billings. An investigation
10 was conducted. A comparison was made of the time that he was
11 spending in the office with the time that he was billing. For
12 example, on the very first day that the computer program was
13 turned on, the record showed that Mr. Ferguson was on -- logged
14 onto his computer for five hours. He billed his time that same
15 day, had to be before 5 o'clock in the afternoon. At the time
16 he billed was 11 25 hours, the very first day they started
17 making this comparison.

18 So obviously they had reason to believe what they
19 ultimately told to representatives of the UMIA, which was,
20 "We don't think you can trust Mr. Ferguson's bills." That
21 was the statement that was made. There's a reasonable basis
22 for believing it.

23 Even if there was some contention made by Mr. Ferguson
24 in his affidavit that they didn't have a reasonable basis
25 because of who he was or what problems he says the computer

1 system has, there were no facts in the possession of any of the
2 defendants suggesting to a high degree of probability, which is
3 the legal standard, that in point of fact, the statement they
4 made, which is "Mr. Ferguson's bills can't be trusted," was
5 untrue. That is what has to be demonstrated before you have a
6 case that's admissible to the jury.

7 That's why we've asked the Court to reconsider all of
8 the collateral issues and the predominant issue, because the
9 only other claim that would be left remaining is the asserted
10 intentional interference with respected economic relations.
11 The basis of that claim is that the improper means by which the
12 interference supposedly occurred was defamation. So if there
13 is no defamation, that claim falls as well, your Honor.

14 THE COURT: Thank you, Counsel.

15 MR. ORCHARD: Good morning, your Honor.

16 THE COURT: Good morning.

17 MR. ORCHARD: Mel Orchard for the plaintiff. If you
18 want to ask questions about our briefing, I'm happy to answer
19 those. Otherwise I'll just respond in turn to the issues
20 raised.

21 THE COURT: At this point I really have no questions,
22 but you may go forward.

23 MR. ORCHARD: Okay, thank you. Then I'll be brief.
24 Mr. Eckersley began with a statement that there's an assumption
25 that the claims that weren't raised directly in our briefing

1 were somehow discontinued by us I think that statement, to
2 begin with, is a fallacy, because it assumes that somehow we
3 have the burden on summary judgment if issues aren't even
4 raised To say that we discontinued a claim when they didn't
5 raise the claims in summary judgment is -- Mr. Eckersley has
6 much more experience than that

7 They have the burden to raise issues in summary
8 judgment. To say there's no genuine issue of material fact
9 or they're going to prevail is a matter of law. They didn't
10 raise those issues. They focused almost entirely on the issue
11 of actual malice, and whether or not that fit within the
12 conditional privilege.

13 I understand this Court's ruling in some of the
14 conversations that were -- that took place during your ruling
15 before from Mr. Peterson, stated that you addressed that issue
16 of conditional privilege and malice, and what the burden was.

17 Again, if the conditional privilege has been abused
18 by excessive publication, not an issue in this case, that they
19 didn't have a reasonable -- they didn't have reasonable grounds
20 to believe the statements they were making, that's a jury
21 question. You've already addressed that issue, and I think
22 that's been submitted and proved to you through the hundreds
23 of pages of affidavits and depositions that we've submitted.

24 To come here on a motion to reconsider, again the
25 burden is on them to raise it in the first place To come

1 back here means there has to be an extraordinary circumstance,
2 extraordinary new law, new facts. Your Honor, they raise
3 these issues with Mr. Frankenburg, but there's no affidavit
4 or deposition or new fact that they submit that they -- that
5 they append to their pleadings that would help you make a
6 decision on whether or not we even get past the threshold issue
7 of whether this is an extraordinary circumstance, as opposed to
8 what Utah and Wyoming and Idaho and a lot of different states
9 have called the cheatgrass of litigation. That's to come back
10 and get a second bite at the apple.

11 This Court considered these issues. I know you
12 considered them carefully. We know our briefing was very
13 detailed. So the issue really comes down to whether or not
14 Utah law does allow for a jury question to be presented on the
15 issue of conditional privilege, and whether or not the issue is
16 was there a reasonable basis to believe that it was true when
17 they said that Gary was over-billing.

18 An on/off switch on a computer, when they have already
19 admitted in the request for admissions and in their answer,
20 that attorneys would bill for time not associated with their
21 computer all the time, shows that that basis was unreasonable;
22 but if one juror would believe that that's unreasonable,
23 that's enough to sustain the burden on summary judgment,
24 that a reasonable juror could believe that they didn't have
25 a reasonable basis. That reasonable lawyers would do much more

1 before they give somebody the career death penalty, before they
2 destroy his career.

3 There is a point that I want to concede. Mr. Eckersley
4 raised the issue of whether or not conduct of Kurt Frankenberg
5 later on, in discussing issues with Siegfried and Jensen, in
6 and of itself was tortuous, was intentional interference.
7 That's one of our weaker issues. I want to tell you up front
8 that's one of our weaker issues, because whether or not this
9 was part of the continuing conspiracy -- and we didn't allege
10 conspiracy, but conspiracy it was -- Elliot Williams said in
11 his deposition this was a unanimous decision to fire Gary for
12 over-billing.

13 If that false premise existed from the beginning,
14 which it did, because he never over-billed, and we know proof
15 is in the pudding that later on UMIA said he actually -- I
16 mean, he didn't over-bill; he under-billed. He never over-
17 billed. That that entire basis, that entire premise was
18 suspect to begin with. Kurt Frankenburg was one of those
19 people in the unanimous decision all the way through.

20 So even though it's more of a question for this Court
21 as to whether that continued conduct afterwards constituted an
22 intentional interference with prospective business advantage or
23 contract, still a reasonable juror could believe that it was a
24 furtherance of this conspiracy, a furtherance of this decision
25 to destroy Gary Ferguson completely. They don't want a

1 competitor taking those cases; and the beneficiary of all of
2 those UMIA cases, most of them went to Mr. Frankenburg. He had
3 a direct monetary interest in how they defamed and destroyed
4 Gary Ferguson. That is the substance of that claim.

5 Your Honor, there's been nothing new to submit to you
6 that would justify for you to reconsider anything you did
7 before. I'm happy to answer any questions, but otherwise,
8 (inaudible).

9 THE COURT: I really don't.

10 MR. ORCHARD: Thank you very much.

11 THE COURT: Mr. Eckersley.

12 MR. ECKERSLEY: Very briefly, your Honor. The statement
13 made that it's a (inaudible) issue to the jury is whether
14 or not they had a reasonable basis for their belief is an
15 incorrect statement of the law. The issue is whether they
16 knew their statements were false, or whether they had facts
17 that suggested to a high degree of probability that they were
18 false.

19 There was no evidence of either of those points.
20 In the absence of such evidence, the restatement makes it
21 clear the case cannot go to the jury because the conditional
22 privilege has not been lost. Frankly, your Honor, statements
23 can be made as to what effect this termination has; and you'll
24 notice no one addressed the -- or why the termination was a
25 wrongful discharge, because there's no facts that would support

1 that under law.

2 Without regard to what the effect of the termination
3 had on Mr. Ferguson's behalf, economically or otherwise, the
4 point of the matter is that the law does not prohibit what was
5 done in this case. In fact, the law sanctions what was done.
6 Utah law is very clear that if somebody has an interest in why
7 an employee was terminated, you have a privilege to tell them
8 why that employee was terminated. That's all that happened
9 here, your Honor.

10 That's why we'd ask the Court to reconsider, because I
11 didn't make that point clear enough. When we first moved for
12 summary judgment we were focusing on the ill will or spite
13 component of malice; but malice has two meanings in the law of
14 defamation, and one of them isn't the ill will or spite, which
15 is what we focused on the first time. One of them is that you
16 have to act with knowledge of falsity, or with knowledge of a
17 high probability that your statement is false. No evidence of
18 that in this case.

19 At summary judgment it is the burden of the non-moving
20 party to come forward with some evidence that demonstrates
21 there's a material dispute, a material issue of fact that's
22 in dispute. There's no evidence that's been presented on
23 that point, your Honor, and that is the burden.

24 It has been recognized by the United States Supreme
25 Court, and by our Supreme Court. In this context, the motion

1 for summary judgment, if you are the non-moving party, you have
2 to present evidence on which you have the burden, and they have
3 not done it.

4 THE COURT: Excuse me. Thank you, Mr. Eckersley.
5 Kathy, would you get me some water. First of all, I am going
6 to rule on this motion for reconsideration right now. Let me
7 start out by saying initially, I don't believe I'm prohibited
8 from reconsidering the motion to reconsider. I say that
9 because this Court's prior ruling certainly wasn't certified
10 as a final judgment. I think under Rule 54 -- I think it's
11 54(b) -- this Court has that authority.

12 Additionally, the case cited by the plaintiffs, in my
13 opinion, does not have application to non-final judgments or
14 decisions. So I think I have the authority to entertain the
15 motion to reconsider, and I have entertained -- re-entertained
16 that motion. I am going to rule as follows.

17 Oh, well, I should also note, it is suggested in
18 Mr. Eckersley's motion that this Court may have misapplied
19 and misinterpreted the law. I want to make it clear, I have
20 very thick skin. No problem with any lawyer suggesting that at
21 all. I don't agree with that assessment, and in just a moment
22 I'm going to ex -- come back to that point and explain why.

23 However, I will acknowledge it may very well be that I
24 was somewhat inartful in orally articulating the basis for my
25 denial of the defendant's motion for summary judgment; and

1 certainly the order that I signed denying the motion was,
2 albeit approved as to form by Mr. Eckersley, was just a rather
3 generic, fairly non-descript order, which in reality was very
4 summary in why this Court denied the defendant's motion for
5 summary judgment.

6 As it relates to this motion for reconsideration,
7 I'm granting the motion in part and denying it in part. I'm
8 granting it in terms of granting such summary judgment on the
9 claim of intentional infliction of emotional distress. By
10 doing so I'm relying on the Zumidakis and the Franco cases
11 that were cited in the memoranda in support, consistent with
12 this Court's finding that their -- that cause of action is
13 not viable as a matter of law, because it's not the kind of
14 outrageous conduct required to support the cause of action.

15 As to the wrongful discharge cause of action, I'm
16 granting the motion for summary judgment. I'm doing so because
17 it's undisputed that the plaintiff was an employee at will;
18 and in terms of and as a result of his at will status, his
19 performance is really not at issue, and the only exception
20 to that doctrine would be a public policy exception. This
21 Court would find after canvassing the record, that there is no
22 issue to be submitted to a jury on a public policy exception.
23 Consequently, the Court is going to grant that aspect of the
24 motion to reconsider.

25 I'm also going to grant the motion as it relates to

1 the intentional interference with contract and prospective
2 economic relations, as it relates to Siegfried and Jensen.
3 Additionally, I'm granting that portion of the motion to
4 reconsider that relates to the defendant Frankenburg, because
5 after canvassing the record, Court is unable to find any
6 conduct attributable to Mr. Frankenburg that would support a
7 viable cause of action. So in that respect, the motion is
8 granted.

9 The intentional infliction -- intentional interference
10 with contract and prospective economic relations as to UMIA
11 will remain intact; and also this Court's denial of the motion
12 for summary judgment as to the defamation cause of action will
13 remain intact.

14 Here is the issue for me on the defamation cause of
15 action. Again, I'm -- I don't take issue or have any problem
16 with any argument articulated by Mr. Eckersley, but here's the
17 issue from my vantage point. I'm of the opinion that I did not
18 misinterpret or misapply the law that is required to be applied
19 as to the defamation cause of action.

20 If I didn't make it clear in my prior ruling, I
21 definitely wish to make it clear now that the communication,
22 which is the subject of this defamation cause of action, which
23 centers around over-billing, that there is a suggestion that
24 there was a communication about trust. That was still in the
25 context -- it wasn't stand alone; it was in the context of the

1 over-billing communication.

2 So the communication at issue for this defamation
3 cause of action is in fact the over-billing. This Court is
4 finding, as a matter of law, because it is in fact a question
5 of law, that the defendants are entitled to a conditional
6 privilege for those communications. I thought I'd made this
7 clear. Maybe I hadn't; but I'm making it clear now.

8 As a result of those communications being subject to a
9 conditional privilege, I agree 100 percent with Mr. Eckersley's
10 description of what the responsibility of the plaintiff is at
11 summary judgment, and what it will be at trial in their attempt
12 to meet their respective burdens, to demonstrate, as set forth
13 in restatement second torts, Section 600, regarding knowing
14 that the communication is false, or a reckless disregard as
15 to the truth or falsity of the statement. That section of
16 the restatement comes through pretty -- is applicable, and is
17 pretty clear, because it's described in the Wayment vs. Clear
18 Channel case, which was cited.

19 There is another case that I located, which I wasn't
20 sure it was cited by either side. It may have been, but I
21 certainly took a look at it and relied on it. It's O'Connor
22 vs. Birmingham, which is a Utah Supreme Court opinion. I think
23 it came down in July of this year. It's at 165 P.3d 1214.
24 The Wayment case, the O'Connor case, they both cite to, and
25 rely upon another Utah Supreme Court case, which is Hales vs.

1 Commercial Bank, a very old case, a 1948 case, before I was
2 born.

3 The more recent cases rely on that case; and this is
4 the language out of -- out of those cases; and I'm reading from
5 the O'Connor case at this moment. "The publisher's lack of
6 belief in the truth of the defamatory matter published, or his
7 lack of reasonable grounds for so believing, while immaterial
8 to the existence of the privileged occasion --" and this is
9 a quote -- "is important, as constituting an abuse of the
10 occasion, which deprives him of the protection which it would
11 otherwise afford."

12 So this language that is cited in the memoranda
13 in support of the motion for reconsideration, where it is
14 suggested that this Court previously ruled that a fact question
15 existed regarding the defendant's good faith basis for their
16 belief in the truthfulness of their statements, that's not
17 complete.

18 I mean, and the reason why it's not complete is this
19 Court is going to instruct the jury, if we get to that point,
20 with the requirements to stride in restatement second --
21 Section 600. I'm going to do that, because I think that
22 is the applicable law in this particular case; but in the
23 determination of whether or not the subject communications
24 were made with knowledge that they were false, or in reckless
25 disregard as to the truth or falsity, these cases tell me that

1 the lack of reasonable grounds for believing in the truth of
2 the communications is important

3 Not only is it important, those two recent cases
4 clearly tell me that the question of whether or not the
5 privilege has been abused, is generally a question of fact.
6 So it is that context and format that this Court evaluates
7 the defendant's motion for summary judgment

8 So what my responsibility is, in the context of this
9 motion -- and this is Justice Nehring's direction to trial
10 Court Judge's and the O'Connor opinion -- is that it's my
11 responsibility to canvass the record, to determine whether or
12 not there is evidence which raises a genuine issue of material
13 fact whether or not the communication was made with knowledge
14 that it was false or in reckless disregard.

15 Now, unfortunately in those cases, hardly any guidance
16 as to what is enough to create a genuine issue of material
17 fact? Espec -- particularly in the context of this kind of
18 case I looked hard, and couldn't really find much guidance
19 other than the standard guidance in ruling on motions for
20 summary judgment

21 In fact, in the Wayment case, that case was reversed
22 in part, sent back to the trial Court, and there is a section
23 in that case where there's a brief line there, basically
24 says, "We find the evidence of records sufficient to create a
25 genuine issue of material fact Of course, I went looking for

1 it -- identifying what that was, and it wasn't there. So it
2 really left me wanting.

3 So in this particular case -- and I will make this --
4 I don't think it's worth any value, but this case was a very
5 close call, quite frankly. It was such a close call, when I
6 was satisfied I had the authority to reconsider my decision, I
7 went ahead and reconsidered it, and reconsidered all of it; and
8 it's still a very close call.

9 I mean, if nothing else -- if nothing else, the
10 plaintiff's deposition and affidavit testimony takes the
11 position that he did not over-bill UMIA. He certainly appears
12 to be a competent witness to be able to offer that opinion,
13 based upon his experience as a lawyer, and the years working
14 with the firm and working with UMIA.

15 From this Court's vantage point, that certainly is
16 admissible, competent evidence consistent with Rule 56. I
17 have to be very careful not to cross the line of weighing the
18 evidence. Now, I don't know what weight should be given to
19 the plaintiff's testimony that he did not over-bill UMIA. I
20 -- this is a -- they already tell me it's a question of fact,
21 anyway, in the context of this analysis.

22 He goes on to suggest, and he appears to be competent
23 to offer testimony regarding the inaccuracies of the computer
24 time program there at the firm. There appears to be competent
25 evidence in the record that there were no complaints by UMIA of

1 the plaintiff over-billing them.

2 Now, and again, I -- I mean, I can almost hear the
3 counter arguments coming back, but I'm trying really hard --
4 and I know they're there; but I'm trying very hard not to cross
5 the line to weigh the evidence. I know there's evidence on
6 the other side. I got that part; but I am not yet at a point,
7 for example, and I may never get there, where I could -- where
8 I would be comfortable and satisfied in making the decision
9 that based upon the records evidence I have before me, and the
10 context of this motion for summary judgment, that no reasonable
11 jury could find in plaintiff's favor on the critical legal
12 criteria that must be demonstrated whereby he can't survive
13 summary judgment on this case.

14 Mr. Eckersley takes the position that at some point
15 in time, after the closure of the plaintiff's case, that we
16 may very well be in the same position. If that happens, so
17 be it. I mean, it's a common practice. When I say it's a
18 common practice, it's very common, if nothing else, for appeal
19 purposes, for plaintiffs to make a motion at that point in time
20 for a directed verdict.

21 Wouldn't surprise me if I entertained one in this
22 particular case. While those motions are rare, I'm not going
23 to shy away from it. I mean, I can see it coming; but the
24 problem is, is that I don't know what the -- what evidence is
25 going to be introduced at the trial. I know what I have in

1 front of me as record evidence for the purpose of a motion for
2 summary judgment; but who knows what's going to happen at the
3 time of trial. I just can't predict that at this point in
4 time.

5 Just trying to think if I stated everything I indicated
6 to say -- wanted to say. I ought to make this point; and maybe
7 I should give each side an opportunity to deal with this, if
8 you think this remains an issue. You should know that my --
9 initially in my ruling here today was not based on a theory or
10 claim that there are some admissions against the defendants
11 which are deemed admitted as a result of failure to timely
12 respond.

13 You know, if we have an issue about that, because I
14 don't want to cross this bridge at trial, some suggestion that
15 the defendants may be precluded from challenging some position
16 set forth in these request for admissions that were deemed
17 admitted, I did not deem any request for admissions admitted,
18 because I couldn't find -- although I recognize my prior ruling
19 was probably silent on this point -- that the responses to the
20 request for admissions were untimely or improper. So I want to
21 at least put that on the record so I don't have to deal with
22 that next week.

23 I think that's it. Mr. Eckersley, the next motion.

24 MR. ECKERSLEY: The next motion, your Honor, is our
25 motion in limine regarding the four topics. I think that the

1 first one that we made reference to was the subject of alcohol
2 consumption on the premises of the law firm. There was some
3 suggestion that that might -- that Mr. Ferguson's belated
4 refusal to engage in that conduct led to his termination,
5 I think that the Court's ruling on the wrongful discharge,
6 having dismissed that claim sort of moots that whole point.
7 Therefore, there's no relevance to that particular activity or
8 evidence relating to that, to the issue that remains, which is
9 simply defamation (inaudible).

10 Also, there are allegations in the complaint regarding
11 Mr. Ferguson's supposed assertion of a dispute about sexual
12 harassment policy, or sexual harassment going on. Again,
13 there's no evidence of any sexual harassment in the firm.
14 It's not relevant to the defamation action anyway. At least
15 it's been candidly admitted that, you know, there was a
16 romantic relationship between two employees at the firm, who
17 are now married, but that is not in any way relevant to the
18 remaining issues in this case.

19 The two other issues were the suggestion that it
20 was somehow improper to terminate Mr. Ferguson on the day
21 before the defendants were aware that he was going to have
22 a biopsy performed. I suggest that that is simply something
23 that's been submitted for its sympathetic effect on -- no, useful
24 sympathetic effect by the plaintiff on the jury and the fact
25 that Mr. Ferguson's brother committed suicide, apparently, and

1 somehow in response to his own termination. Again, I think
2 that's submitted solely for the purpose of trying create a
3 sympathetic emotional response from the jury, and it's in no
4 way relevant to any of the issues that are now still pending in
5 this case.

6 THE COURT: Thank you. Counsel.

7 MR. PETERSON: Well, I was thinking back to the Wayment
8 decision, your Honor, and in Wayment the Court says that when
9 you're considering in the context of deciding whether the
10 privilege is abused, and it takes a look at what malice is,
11 you may recall (inaudible) the last time, it says there are
12 three ways, essentially, to get there. The first is just
13 simple -- sort of the old common law notion of ill will,
14 malice, that sort of spite type of directive.

15 So the evidence that we're talking about in this case,
16 those three particular pieces of evidence that he's referring
17 to, evidence that he had -- Mr. Ferguson had sent -- and there
18 is an email that was offered, by the way, as part of the --
19 it's one of the exhibits. There's an email that goes from
20 Mr. Ferguson on the 16th back and says -- essentially at the
21 16th of March and says, "Look, and don't expect me to come in
22 and socialize in the lounge. I'm not going to do that." Of
23 course, that precedes -- essentially this is in response to
24 the first notion that he has in some way over-billed UMIA.

25 So the evidence, itself, all of that evidence is

1 relevant to the more common law notion of malice. That is to
2 suggest that they went to UMIA, and told UMIA that he had over-
3 billed, not just in the absence of a reasonable investigation,
4 which is the second prong suggested by Wayment -- the third was
5 excessive publication, and I don't -- we've never raised that
6 issue. The first is ill will or spite; the second is the lack
7 of a reasonable investigation.

8 Each of those pieces of evidence goes to establish
9 that ill will or spite against Gary Ferguson that is used by
10 -- in this case, Williams and Hunt, as a way of poisoning the
11 well with UMIA. I know that you've examined those records
12 and the depositions I guess now twice. You may recall that
13 Mr. Osowski, from UMIA, testified about the fact that he had
14 been told essentially about the lack of trustworthiness in the
15 billings; and Mr. Glenn testified that in fact he had been
16 directing and could not employ Mr. Ferguson in the future,
17 after Osowski had his conversation with the representatives
18 of the Williams and Hunt law firm.

19 THE COURT: I thought Mr. Glenn said it was -- wasn't
20 his call to make.

21 MR. PETERSON: He did. He said, in essence, "It wasn't
22 my call." Then he goes on to explain that -- you may recall I
23 asked him then, "Well, would you have hired him in the absence
24 of this?" and he says at that point in the deposition, "I'm
25 not sure, because it would have depended upon Mr. Ferguson's

1 ability to cooperate with co-defense Counsel in the event of a
2 medical malpractice case. What he said was, you're right; that
3 it was Mr. Oslowski's call, the President of UMIA.

4 Now, the theory of -- the point of all this, the
5 drinking issue, the point of the -- the question of disputes
6 over not just an affair, but also over a compensation issue;
7 and I can't recall what the -- I'm now missing what the third
8 one was, and I apologize.

9 THE COURT: Well --

10 MR. PETERSON: Oh, the termination the day before
11 surgery --

12 THE COURT: Uh-huh.

13 MR. PETERSON: -- but the point of all of that -- and
14 there is also a March email to Mr. Williams, where he says he's
15 going to be having surgery. So the point of that evidence is
16 to establish that first prong that the Court in Utah leaves
17 open in Wayment, and also Braney vs. Nordstron, which is the
18 case that precedes Wayment. I did mention O'Connor. Before
19 O'Connor, the July case that you're referring to now. I talked
20 about briefly, when we argued this the last time, essentially
21 confirms Wayment, and as you indicate, cites to that as
22 authority for I know the Court's position here today.

23 I'm not going to suggest that any of those things in
24 and of themselves is compelling enough to establish on its own
25 common law malice; but what I would suggest to the Court is

1 this. That each of those things, when added to the others, as
2 well as the circumstances that are described in this case, and
3 the way that this termination occurs, the lack of what they
4 did in terms of investigation in the case, to determine whether
5 or not he had over-billed, all of that is probative of the
6 question of common law malice, the first prong left open by
7 the cases that you've referred to today. So that was the
8 theory for it.

9 THE COURT: All right, thank you. Mr. Eckersley.

10 MR. ECKERSLEY: I'll start with what I take to be the
11 concession that his brother's suicide in no way relates to
12 that. I heard --

13 THE COURT: Well, let's see --

14 MR. ECKERSLEY: -- no argument about --

15 THE COURT: -- if he -- I don't know if that's a
16 concession or not. Let's --

17 MR. PETERSON: We want to double team.

18 THE COURT: That's fine. Go ahead, finish your
19 argument, Mr. Eckersley.

20 MR. ECKERSLEY: It's ineffective double teaming.

21 THE COURT: Have a seat, Mr. Eckersley. Go ahead and
22 be seated.

23 Finish your statement. We want to say about the
24 brother's suicide.

25 MR. PETERSON: Right. That really was an element that

1 went to the -- when in the instruction, the pattern instruction
2 that deals with loss of reputation, and it talks about the
3 emotional stress, there's something in that instruction, as I
4 recall, where that -- and anxiety. So I'm not certain, to be
5 candid, Judge, where that (inaudible).

6 THE COURT: All right. Go ahead, Mr. Eckersley.

7 MR. ECKERSLEY: Now that we've got the issues in this
8 case defined down to essentially being a defamation claim,
9 and then the defamation being the predicate for a potential
10 intentional interference claim, the issue with regard to -- as
11 it was framed earlier on with regard to the drinking had to do
12 with termination, that claim's gone. The issue with regard to
13 the affair had to do with the termination. That claim's gone.
14 These things are not relevant, and I'd simply submit it on that
15 basis, your Honor.

16 THE COURT: All right. What's the problem?

17 MR. PETERSON: Well, no real problem. I apologize.
18 I just simply wanted to read one sentence, if I might, from
19 the Court's -- from the decision in Wayment, that I think is
20 exactly what I was --

21 THE COURT: Go ahead.

22 MR. PETERSON: -- if I may.

23 THE COURT: Quickly.

24 MR. PETERSON: Citing the case, the Court in Wayment
25 vs. Clear Channel indicates that "Malice in the context of the

1 rule may include indications that the publisher made the
2 statements with ill will, or did not recently believe the
3 statements." Those are the two options. That's at page 49,
4 and that was the basis.

5 THE COURT: All right. Go -- Mr. Eckersley, I'm sorry,
6 go ahead. Anything else?

7 MR. ECKERSLEY: No, your Honor, we'll submit it.

8 THE COURT: All right. Listen, this is what I'm
9 going to do regarding this motion in limine. I'm going to
10 grant the motion in limine as full -- in full, as prayed for.
11 What I mean by that is that the issue of the members of the
12 firm's drinking practices at their firm location, the claimed
13 allegation of affairs between employers and employees, the
14 plaintiff's medical procedure, which as I had noted scheduled
15 -- which was scheduled on May 6th, 2005, and the plaintiff's
16 brother's suicide, in this Court's view, those categories of
17 evidence are not relevant. They do not meet our rule of
18 evidence definition of relevance, No. 1.

19 No. 2, even though this concept was not raised as
20 a basis -- I don't think it was raised by -- as a basis --
21 Mr. Eckersley's motion -- and I do want to make it clear.
22 When I say that they are not relevant, I want to make it clear
23 that I am finding that they are not relevant, irrespective of
24 how this Court ruled on the motion for reconsideration. They
25 do not meet our statutory defi -- our rule definition for

1 relevance.

2 In addition, I find that they have zero probative
3 value for the assertions that the plaintiff maintains; but in
4 the event that they had any probative value, which I struggle
5 with, these categories of evidence, their potential wrongful,
6 prejudicial impact weighs any slight probative value that they
7 may have, and could easily lead this jury to be wrongfully
8 prejudiced or biased against the defendants because they
9 consume alcohol at their place of work, or because there may
10 be alleged affairs at their place of work.

11 Plaintiff's medical procedure, plaintiff's brother's
12 suicide, clearly they can mislead the jury, and may very
13 well wrongfully inflame the jury's sympathy in favor of the
14 plaintiffs and against the defendants in this case. It's just
15 not even a close call.

16 There was actually -- there was actually another -- as
17 I went through everything, there was actually another category
18 of claims that are not the subject of this motion in limine
19 that I had some concern with, which I'm not going to rule on
20 here today, because I don't -- has not been properly raised in
21 a brief, but just sending it out to you, I had some concern,
22 because I saw it fitting into the same category.

23 There was a claim that -- I think the claim was that
24 Mr -- or the plaintiff was terminated because Mr. Williams
25 needed to support two kids to go through college or something

1 like that Just didn't seem to meet the rule -- definition
2 of relevancy for me I ran it through a 403 analysis, and it
3 didn't pass muster on the 403 for me So the motion is granted
4 for those reasons

5 MR ECKERSLEY Thank you, your Honor.

6 THE COURT And I'm instructing Mr Eckersley to draft
7 orders consistent with the manner in which I ruled here today
8 Now, we're scheduled to start Tuesday at 9 o'clock Just in
9 case I need something from you, I'd like you here at 8 30

10 At some point in time you're going to have to put
11 in an electronic format for me your respective proposed
12 jury instructions and jury forms, and they may need to be
13 resubmitted now, in light of my ruling here today.

14 MR ECKERSLEY Yes, your Honor, and I would indicate
15 that it's not in electronic form We had a hard copy form
16 here It's going to have to be modified

17 THE COURT And that's fine, but I'm going to need
18 - what I was trying to say is that not only will I need a
19 hard copy, but I will need them in an electronic format The
20 problem is, my secretary is on a cruise right now, and I have
21 to find out who is going to be substituting for her, and I
22 don't know what they're going to require, but I will get that
23 communicated to you, in all likelihood, first thing Tuesday
24 morning I'm not sure there's anything else -- or is there
25 something else I need to pay attention to?

1 MR. ECKERSLEY: I need an email address to which I
2 would send our electronic format of jury instructions.

3 THE COURT: I'll get that to you when I find out what
4 the format --

5 MR. ECKERSLEY: Okay.

6 THE COURT: -- should be.

7 MR. ORCHARD: Your Honor, your normal practice with
8 regard to jury instruction conferences, so we know when we
9 can --

10 THE COURT: You know, that's an excellent question,
11 but that is -- I hate to sound like a wishy-washy Judge. I've
12 done it differently. I'm depending upon -- depending upon the
13 nature of each case, the amount of dispute there is between the
14 parties as to their respective jury instructions.

15 I'm not accustomed to sitting down in a conference
16 room with Counsel on one side of the table, and going --
17 pouring through each jury instruction. I doubt seriously if
18 I'm going to do that. I haven't started looking at the jury
19 instructions yet; so I don't know how much of a fight there is
20 going to be or not.

21 MR. ORCHARD: Well --

22 THE COURT: So I can't give you any more information
23 other than that --

24 MR. ORCHARD: Okay. Well --

25 THE COURT: -- other than to say I'm going to give you

1 an opportunity to place your objections on the record so you
2 can preserve your rights as to any requested instructions
3 denied or any instructions given by the Court.

4 MR. ORCHARD: I think the Court's ruling is going to
5 help us; and Mr. Eckersley and I have gotten along well in
6 this process of trying to come up with joint instructions. We
7 did provide the Court with joint instructions; and then we've
8 also submitted supplemental instructions. I think the Court's
9 ruling is going to help us pare those down, whether we like it
10 or not; and we can hopefully come up with a substantial number
11 that will be joint instruction. Then we'll submit the others
12 separately.

13 MR. ECKERSLEY: I believe that to be accurate as well,
14 your Honor.

15 THE COURT: Okay. Anything else?

16 MR. ECKERSLEY: No, your Honor.

17 MR. ORCHARD: Your Honor, there is one final issue that
18 we wanted to raise, just because we just filed this. Do you
19 want to argue this, Chuck?

20 THE COURT: No, I don't know if I'm going to let you
21 argue it, but --

22 MR. ORCHARD: Well, can I just --

23 THE COURT: -- you probably should start by telling me
24 what it is first.

25 MR. PETERSON: Sure. I just -- I was -- this week I

1 was trying to figure out what I was going to do with not
2 admissions that were made in the course of -- there's no
3 assertion on our part that they're late; or at this point
4 that's clearly not the issue, but there were responses to
5 their question --

6 THE COURT: Time out. Do you have a motion that you
7 filed today?

8 MR. PETERSON: I filed a -- no.

9 THE COURT: So what are you doing, then, right now?

10 MR. PETERSON: I was --

11 THE COURT: I'm not trying to give you a hard time.
12 I'm just trying to --

13 MR. ORCHARD: Trying to save you time.

14 THE COURT: -- understand what you're doing.

15 MR. PETERSON: Well, there is an in -- I wanted to
16 find out what the Court's practice was with respect to admitted
17 matters, whether or not the Court instructs on them or not. We
18 have undertaken to prepare just an instruction that goes along
19 with the request for admission that were admitted.

20 THE COURT: You know, I don't have a practice --

21 MR. PETERSON: Okay.

22 THE COURT: -- a standard practice. I'm going to
23 evaluate your instruction --

24 MR. PETERSON: Okay.

25 THE COURT: -- and determine whether it's appropriate

1 or not I can tell you -- and I think I've mentioned this to
2 you -- for the most part, if I think I have a dispute, I start
3 with Muj1 first I don't know if the type of instruction
4 you're identifying, if there is a stock instruction in Muj1 or
5 not That's the best guidance I can really give you

6 MP PETERSON That's fine We'll try and work with
7 Counsel on it It's not an issue

8 THE COURT All right Anything else?

9 MR PETERSON No

10 THE COURT Okay, we'll recess at this time

11 MR PETERSON Okay

12 THE COURT Oh, and we are in recess, and I don't --

13 (End of recording)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify.

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

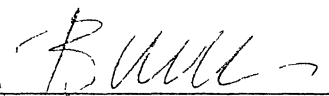
That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording

I further certify that I am not interested in the outcome thereof

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker

WITNESS MY HAND AND SEAL this 15th day of May 2008.

My commission expires
January 30, 2012


Beverly Lowe
NOTARY PUBLIC
Residing in Utah County

