

2008

Gary B. Ferguson v. Williams and Hunt, Inc., Elliott j. Williams, George A. Hunt, and Kurt Frankenburg : 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 II

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

FILED
UTAH APPELLATE COURTS
JUL 29 2008

TABLE OF CONTENTS

Record Index

Volume I

Plaintiff's Summary Judgment Motion and Exhibits..... 1

Summary Judgment Hearing 09/17/2007 Transcript..... 2

Summary Judgment Ruling 09/20/2007 Transcript..... 3

Motion for Reconsideration 01/18/2008 Transcript 4

Volume II

Jury Trial 01/22/2008 Transcript Portion..... 5

Jury Trial 01/23/2008 Transcript 6

Case: 050921677
20080273

3RD DISTRICT COURT - SALT LAKE
FERGUSON, GARY B vs. FRANKENBERG, KURT

FILED
UTAH APPELLATE COURTS

MAY 30 2008

Document Title	Entry Date	Page Number
Complaint No Amount	12/09/2005	1-23
Motion for Admission Pro Hac Vice	02/17/2006	24-26
Answer of Defendants Williams & Hunt, Inc., Elliott Williams, George A. Hunt and I	02/23/2006	27-37
Suggestion of Death	02/23/2006	38-40
Order Granting Motion for Admission Pro Hac Vice	02/24/2006	41-47
Motion for Substitution of Personal Representative	04/07/2006	48-50
Motion for Stipulated Judgment	04/07/2006	51-58
Defendants' Memo in Opposition to Planitiffs' Motion for Stipulated Judgment	04/13/2006	59-62
Defendants' Memo in Opposition to Plaintiffs' Motion for Substitution	04/13/2006	63-67
Certificate of Service of Defendants' Initial Disclosures	04/18/2006	68-69
Memo in Support of Defts' Motion to Dismiss	05/01/2006	70-73
Defts' Motion to Dismiss Complaint	05/01/2006	74-76
Notice to Submit	05/05/2006	77-79
ORAL ARGUMENT	05/16/2006	80-82
ORAL ARGUMENT	05/22/2006	83-85
Stipulation	05/24/2006	86-87
Stipulation for Dismissal	06/21/2006	88-89
Order	06/22/2006	90-92
Notice of Deposition to Martin Oslowski	06/29/2006	93-95
Certificate of Notice of Deposition of Gary Ferguson	06/29/2006	96-97
Depomax Cover Letter	09/19/2006	98-101
Notice of Service	11/20/2006	102-103
Notice of Service	11/22/2006	104-105
Notice of Service of Discovery Requests	12/08/2006	106-107
Certificate of Service of Defendants Williams & Hunt, Inc., Elliott J. Williams, Georg	01/08/2007	108-109
Notice of Taking Deposition Duces Tecum of Art Glenn	03/05/2007	110-112
Notice of Taking Deposition Duces Tecum of Martin Oslowski	03/05/2007	113-115
Certificate of Service of Defts' Answers and responses to Pltf's First set of Interrog	03/05/2007	116-117
Amended Notice of Taking Deposition Duces Tecum of Art Glenn	04/09/2007	118-120
Amended Notice of Taking Deposition Duces Tecum of Martin Oslowski	04/10/2007	121-123
Second Amended Notice of Taking Deposition Duces Tecum of Martin Oslowski	04/12/2007	124-126
Second Amended Notice of Taking Deposition Duces Tecum of Art Glenn	04/12/2007	127-129
Second Amended Notice fo Taking Deposition Duces Tecum of Martin Oslowski	04/13/2007	130-132
Second Amended Notice of Taking Deposition Duces Tecum of Art Glenn	04/13/2007	133-135
Amended Notice of Taking Deposition Duces Tecum of Art Glenn	04/19/2007	136-138
Certificate of Readiness for Trial	04/26/2007	139-141
Memo in Support of Defts' Motion for Summary Judgment	05/02/2007	142-149
Deft's Motion for Summary Judgment	05/02/2007	150-151
SCHEDULING CONF.	05/14/2007	152-154
Motion to Strike Defendant's Motion for Summary Judgment for Failure to Timely F	05/15/2007	155-164

Case: 050921677
20080273

3RD DISTRICT COURT - SALT LAKE
FERGUSON, GARY B vs. FRANKENBERG, KURT

Document Title	Entry Date	Page Number
Memorandum in Opposition to Plaintiff's Motion to Strike	05/24/2007	165-167
Request to Submit for Decision	05/23/2007	168-170
Plaintiff's Opposition to Defendants' Request to Submit Motion for Decision	05/30/2007	171-181
Plaintiff's Reply to Defendants' Opposition to Motion to Strike	05/30/2007	182-184
Plaintiffs Memorandum in Oppositio to Defendants Motion for Summary Judgment	06/07/2007	185-410
SCHEDULING CONF.	06/11/2007	411
Minute Entry and Order Re: Pltf's Motion To Strike defts' Motion for Summary Judg	06/12/2007	412-414
Defendants' Reply Memorandum in Support of their Motion for Summary Judgmen	06/18/2007	415-430
Notice to Submit for decision	06/26/2007	431-433
Request to Submit for Decision	07/26/2007	434-436
ORAL ARGUMENT	08/13/2007	437-439
ORAL ARGUMENT	09/17/2007	440
PHONE CONF. RULNG 9/17/07	09/20/2007	441
SCHEDULING CONFERENCE	10/16/2007	442-443
Scheduling Order	11/01/2007	444-446
Order	11/01/2007	447-449
Letter from David Eckersley	11/02/2007	450-457
Notice of Appearance (Jeffrey Hunt)	11/13/2007	458-460
Defendants' Motion in Limine	11/16/2007	461-462
Memorandum in Support of Defendants' Motion in Limine	11/16/2007	463-467
Defendants' Motion for Reconsideration	11/16/2007	468-469
Memorandum in Support of Defendants' Motion for Reconsideration	11/16/2007	470-479
Plaintiff's Opposition to Defendants' Motion to Reconsider and Memorandum of La	12/06/2007	480-487
Plaintiff's Memorandum of Law Regarding Defendants' Motion in Limine Re: Variot	12/06/2007	488-492
Reply Memorandum in Support of Defendants' Motion in Limine	12/10/2007	493-497
Reply Memorandum in Support of Defendants' Motion for Reconsideration	12/10/2007	498-503
Notice to Submit for Decision and Request for Oral Argument	12/10/2007	504-506
ORAL ARGUMENT	12/19/2007	507-509
Certificate of Service of Subpoena Duces Tecum	01/09/2008	510-511
Objection to Subpoena	01/09/2008	512-514
Subpoena Duces Tecum	01/10/2008	515-517
Subpoena Duces Tecum	01/10/2008	518-520
Subpoena Duces Tecum	01/10/2008	521-523
Subpoena Duces Tecum	01/10/2008	524-526
Subpoena Duces Tecum	01/10/2008	527-529
Motion to Quash Subpoena to Barnes Banking Company	01/14/2008	530-531
Memorandum in Support of Motion to Quash Subpoena to Barnes Banking Compæ	01/14/2008	532-534
Subpoena Duces Tecum	01/14/2008	535-537
Defendants Requested Jury Instructions	01/15/2008	538-544
Defts Witness List	01/15/2008	545-547

Case: 050921677
20080273

3RD DISTRICT COURT - SALT LAKE
FERGUSON, GARY B vs. FRANKENBERG, KURT

Document Title	Entry Date	Page Number
Defts Designation of Exhibits	01/15/2008	548-551
Defts Objections	01/15/2008	552-553
Defts' Amended Designation of Exhibits	01/15/2008	554-557
Joint Jury Instructions	01/15/2008	558-591
Defts Requested Special Verdict Form	01/15/2008	592-596
Defts Amended Requested Special Verdict Form	01/15/2008	597-600
Defts' Amended Requested Jury Instructions	01/15/2008	601-607
ORAL ARGUMENT	01/18/2008	608
Request for Judicial Notice of Opposition Party Admissions and Requested Jury In	01/22/2008	609-647
Pltf's Proposed Jury Instructions	01/22/2008	648-703
Pltfs Supplemental Proposed Jury Verdict Form	01/22/2008	704-711
Pltf's Proposed Jury Verdict Form	01/22/2008	712-721
Pltfs Proposed Trial Exhibits	01/22/2008	722-730
Pltfs Trial Exhibits	01/22/2008	731-733
Pltfs Witness List	01/22/2008	734-736
Pltfs Supplement Proposed Jury Instructions	01/22/2008	737-784
Pltfs Proposed Voir Dire	01/22/2008	785-790
Jury list	01/22/2008	791-792
JURY TRIAL	01/22/2008	793-794
JURY TRIAL 2ND DAY	01/23/2008	795-796
Amended Joint Jury Instructions	01/24/2008	797-825
Jury -questions	01/24/2008	826
Pltfs exhibit List	02/13/2008	827
Defts Exhibit List	02/13/2008	828
Memorandum of Costs	02/22/2008	829-831
Judgment	02/26/2008	832-835
Order	02/26/2008	836-839
Order	02/26/2008	840-843
Notice of Appeal	03/25/2008	844-846
Request for Transcript	03/25/2008	847-848
Supreme Court of Utah-Letter to Counsel-Notice of Appeal has been filed, please i	04/04/2008	849-850
Supreme Court of Utah-Order-Twenty days from date of order matter will transfer-;	04/04/2008	851-852
Supreme Court of Utah- Order-Court has elected to Retain matter-Order to transfe	04/23/2008	853-854
Transcript of Court's Ruling (Telephone Conference) dated 9-20-07, Beverly Lowe,	05/19/2008	855
Transcript of Hearing dated 9-17-07, Beverly Lowe, CCT	05/19/2008	856
Transcript of Hearing dated 1-18-08, Beverly Lowe, CCT	05/19/2008	857
Transcript of Jury Trial, Volume I, dated 1-22-08, Beverly Lowe, CCT	05/19/2008	858
Transcript of Jury Trial, Volume II, dated 1-23-08, Beverly Lowe, CCT	05/19/2008	859
Transcript- Court's Ruling (telephone conference) Sep. 20, 2007	05/19/2008	860
Transcript- Hearing Sep. 17, 2007	05/19/2008	861

Case: 050921677
20080273

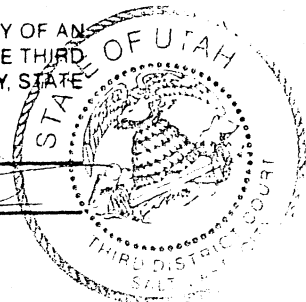
3RD DISTRICT COURT - SALT LAKE
FERGUSON, GARY B vs. FRANKENBERG, KURT

Document Title	Entry Date	Page Number
Transcript- Hearing Jan. 18, 2008	05/19/2008	862
Transcript- Jury Trial Jan. 22, 2008 (Volume I)	05/19/2008	863
Transcript- Jury Trial Jan. 23, 2008 (Volume II)	05/19/2008	864

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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 5

Jury Trial January 22, 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.

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) Case No. 050921677 PI
)
) (Volume I)
)
)
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Jury Trial
Electronically Recorded on
January 22, 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 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

INDEX

WITNESS: GARY FERGUSON

DIRECT EXAMINATION BY: MR. ORCHARD

PAGE

53

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1 MR. ORCHARD: Thank you, your Honor Plaintiff calls
2 Gary Ferguson to the stand.

3 THE COURT: Step forward, please, sir Raise your
4 right hand, please.

5 COURT CLERK: You do solemnly swear the testimony you
6 are about to give will be the truth, the whole truth and
7 nothing but the truth, so help you God?

8 THE WITNESS: I don't normally do this. I do.

9 THE COURT: Would you please be seated.

10 You may go forward, Counsel.

11 GARY FERGUSON,

12 having been first duly sworn,

13 testified as follows:

14 DIRECT EXAMINATION

15 BY MR. ORCHARD:

16 Q. You don't normally do what, act as a witness or tell
17 the truth?

18 A No, I don't normally act as a witness. I almost
19 always tell the truth, unless it's something about bad weather,
20 something like that.

21 Q. Mr. Ferguson, this is a unique experience for you,
22 isn't it?

23 A Yes, I'm usually where you are.

24 Q All right, but for once you get asked -- you get to
25 answer questions about things that impact you, and my question

1 is, you sat and listened to Mr Eckersley's statement about
2 what happened to you and the totality of this case. How did
3 that make you feel?

4 A. Very upset, because most of what he said that was
5 critical was inaccurate

6 Q These people don't know you, and so you need to tell
7 them who you are. Where did you go to high school?

8 A. I went to high school in West Anchorage Alaska. I
9 graduated in 1968. My father was in the air force, and so we
10 moved. So I spent the first part of my life overseas. We
11 lived in Okinawa, Formosa and Taiwan and Germany. Then we
12 finally ended up in Alaska, and I went to high school there.

13 Q. Where did you go to undergraduate school?

14 A. The University of Utah.

15 Q. What did you study?

16 A. English.

17 Q. Okay, and then why did you decide to go to law school?

18 A Well, because at the time I thought that it would be
19 something that I would be interested in, and it would give
20 you the ability to help people. A major part of the military
21 mission at that time was helping people overseas, and my dad
22 did that, and it was the way I was raised I figured if I can
23 go to law school, I can help people.

24 Q Okay You went to law school where?

25 A Santa Clara, which is outside of San Jose, in the

1 south bay area of California.

2 Q. Did you decide to return to Utah to practice law?

3 A. Yes.

4 Q Tell us about your first job?

5 A. I began with Moffat, Welling and Paulsen. It's no
6 longer in existence. It was a small firm, and I did insurance
7 defense. That was -- excuse me.

8 Q. Okay. When you say -- has -- how many years have you
9 been practicing law?

10 A. Thirty-one.

11 Q. In that time, how much of that has been spent doing
12 insurance defense law, where someone is being sued by someone
13 else, or they're claiming that they've been harmed by someone
14 else, and an insurance company is paying the bills for your
15 ~~work-for-the-defense?~~

16 A. Ninety-five percent or better has been for insurance
17 defense.

18 Q. What kinds of cases have you defended?

19 A. Most -- I started with auto cases, and then moved into
20 handling products liability cases, and civil rights cases, and
21 I handled them in State Court and in Federal Court.

22 Q. Okay.

23 A. Then eventually -- well, and I had my first medical
24 malpractice case in the late '70's. It was representing a
25 doctor at the University of Utah who had been sued in the death

1 of a young boy, and the boy had lupus erythematosus, which is
2 an autoimmune disease, and at that time there was no good way
3 of providing care, and the boy died. That was my first medical
4 malpractice case.

5 Q. Did you find that defending medical malpractice cases
6 was different from doing normal kinds of insurance defense
7 work?

8 A. Yes. In fact --

9 Q. Tell the ladies and --

10 A. -- excuse me.

11 Q. -- go ahead and tell the ladies and gentlemen, the
12 jury, the differences.

13 A. It's much harder. Insurance defense lawyers and
14 plaintiffs' lawyers will tell you that medical malpractice
15 ~~cases are the hardest ones to do, because you have to learn~~
16 the medicine, you already have to know the law, and you have
17 to have rapport with experts.

18 You need to be able to read medical articles and
19 understand them, and you put in a lot of hours and a lot of
20 travel, because on the plaintiff's side, almost all of our
21 experts are out of state. On the defense side, what you do is
22 you look for the best expert. It may be somebody in Manhattan,
23 it may be somebody at Stanford. So you're traveling, and you
24 have long days.

25 If -- it's like everything else. Preparation is

1 almost everything. If you don't prepare, you're not going to
2 do a good job.

3 Q. Did there come a time -- I think you said that you
4 started -- you took your first medical malpractice case in --

5 A. In the late 19 -- in the late '70's.

6 Q. Did you begin taking more and more medical malpractice
7 cases as your career went on?

8 A. I moved from Moffat, Welling to Richards, Brandt,
9 Miller and Nelson in roughly 1980 or '81. At that time
10 Richards Brandt was doing defense work for AETNA; and AETNA,
11 around that time, still had a large share of doctors that it
12 insured in Utah. So I started doing some of the AETNA defense
13 work. At that time Art Glenn was one of the adjusters.

14 Q. Tell us who Art Glenn is.

15 A. He's now the vice-president of claims for UMIA.

16 Q. Okay.

17 A. But he was an adjuster for AETNA -- one of their
18 senior adjusters in the early '80's -- and he gave me products
19 liability cases, really horrible cases to try, and I prevailed.
20 Eventually it worked into doing medical malpractice cases for
21 Art Glenn; and Doug Smith was at AETNA.

22 Q. Who's Doug Smith?

23 A. He's now -- he's now a senior claims representative
24 for UMIA. So my relationship goes back that far with them.
25 Something unfortunate happened at Richards, Brandt, one of

1 the -- one of the senior partners was out jogging, and he did
2 the medical malpractice work, and he was run over one night.
3 So he was 43 years old, he was killed, and he had a huge
4 caseload of medical malpractice cases.

5 So those cases, a lot of those came in my direction,
6 and I started doing more and more medical malpractice while I
7 was at Richards, Brandt.

8 Q In terms of the medical -- of the work that you're
9 doing for medical malpractice cases, would you describe them
10 as being cases that -- I think you said they were more time
11 intensive?

12 A. Yes.

13 Q. Does the amount of time that you must spend in a
14 medical malpractice case, because of the complexities of the
15 medicine in addition to the law, does it increase as the cases
16 are more significant, or the injuries more significant?

17 A. Right. You can start off with something as simple as
18 somebody leaving a sponge in the belly, and you get that case
19 settled, because there's no way you can defend that case, or
20 somebody as simple as somebody being burned by a bovi unit in
21 surgery. You get those, you get them settled.

22 The ones at the high -- or the ones with the most
23 exposure, the most complexity are -- include birth injuries;
24 and then you're dealing with fetal heart tracing, and you're
25 looking -- you're going minute by minute, saying, "Okay, what

1 should have been done at this time?" So as the exposure goes
2 up, the complexity generally goes up.

3 There's some -- I'm trying to think of some others
4 right now. Anesthesia cases, where you can end up with
5 horrible brain damage.

6 Q. Okay. So in terms of the complexity of the case, are
7 they sometimes more time intensive because they're complex
8 medically?

9 A. That, and usually frequently, like within a birth
10 injury case, you have more records. You've got a fetal heart
11 tracing that's been running for hours, you have nurse's notes,
12 you have doctor's notes, and then you've got all the followup
13 records. Frequently, if you have an injured child at birth,
14 they transfer them to Primary Children's Medical Center. So
15 you have all of those records to deal with, too.

16 Q. Well, and all --

17 A. And --

18 Q. -- well, I want to break down a medical malpractice
19 case, just because in this case we're dealing with billing, as
20 you know, right?

21 A. Right

22 Q. And so whether you have been billing for the time you
23 spent on these cases is going to be important.

24 A. Right

25 Q. So we're going to go into how you break down a medical

1 malpractice case in a second, but my question is, when -- not
2 only when the medicine is more complex, but when the stakes are
3 higher -- like, for instance, a brain injured child will need
4 care for the rest of their life --

5 A Right

6 Q -- and they're pinning it on a doctor --

7 A Right

8 Q -- saying, "You're liable," did that also increase the
9 amount of time?

10 A Yes, because --

11 Q Describe that for us

12 A. -- it increases the amount of time and effort in a
13 case, number one, because those are generally the cases with
14 the highest exposure. In Utah, the Legislature put a cap on
15 loss of quality of life, pain and suffering across the board,
16 and at this time it's right -- it's between 440,000 ad 500,000
17 So those are not huge cases, if you're just looking at that
18 amount of money

19 These birth injury cases, you add a life care plans,
20 which tells how much nursing care, medication, residency care
21 they're going to need for the rest fo their life, and those are
22 in the millions Then you add on the economic loss, because
23 the child will never be able to work So you get up to 5 or
24 \$6,000,000 in a severely brain injured child

25 Q Well, you say exposure, exposure to whom?

1 A. Well, it's to UMIA, to the amount of their policy
2 limit, and to the doctor, if UMIA doesn't settle it within
3 their policy limit.

4 Q Okay, I want to talk about -- talk about your work for
5 doctors in just a minute; but just so we can track what you
6 were doing with your career over the past 31 years, did there
7 come a point in time where -- you've talked about Richards,
8 Brandt, Miller and Nelson, and you're doing more medical
9 malpractice cases. Did there come a point in time where you
10 were doing mostly medical malpractice cases as your specialty?

11 A. Not at Richards, Brandt.

12 Q. Okay.

13 A. At Williams and Hunt.

14 Q. So when you went to Williams and Hunt, that's when you
15 developed your specialty in medical malpractice cases; meaning
16 that's primarily what you did?

17 A. Over time, yes.

18 Q But you were there with Williams and Hunt, essentially
19 within a few months of when they were founded?

20 A. I was one of the founding partners

21 Q Okay

22 A I left Richards, Brandt I was invited to join
23 Williams and Hunt, and before anybody had moved into the space,
24 I was practicing out of my '83 Chevy van I had my files in
25 there, and then once the office space was finished at Williams

1 and Hunt, I moved in with everybody else. I was one of the
2 founding partners.

3 Q. Well, did -- when you say you were working out of your
4 van, did you have the cases that you had had before, meaning
5 the clients, the adjusters who referred you cases, when you
6 moved from Richards, Brandt Miller and Nelson to Williams and
7 Hunt?

8 A. Yes.

9 Q. So you brought that book of business with you?

10 A. Yes.

11 Q. Okay, and you met with the defendants?

12 A. Yes.

13 Q. And they chose you to be one of their partners?

14 A. Yes.

15 Q. Not just an associate, a partner?

16 A. Right.

17 Q. And so you were a shareholder, and you shared profits
18 with them; is that right?

19 A. Right.

20 Q. Is that the kind of organization you had?

21 A. Yes.

22 Q. What was it called?

23 A. Well, it was Williams and Hunt, and it was, I think,
24 incorporated, and we had stockholders, and we divided up the
25 profits

1 Q. All right.

2 A. We took draws and then divided up the profits.

3 Q. How were you paid for your time? I know that you
4 billed clients. We'll talk about that; but how were you paid
5 as a shareholder?

6 A. When we initially formed, we met at Bruce Jensen's
7 house, and we figured out what did every person need to pay
8 their bills. So that became the draw for each person. Then
9 once we made -- once we had profit, then we started splitting
10 that up. Initially equally; then over time, it changed.

11 Q. Okay. Describe what it's like to be -- how long were
12 you with this firm?

13 A. Fourteen years.

14 Q. Describe for the jury what it's like to be in a
15 partnership with other lawyers.

16 A. Well, it's like a family. You spend more time with
17 the lawyers than you do at home. Frequently it takes a lot of
18 -- you argue at times over things. It's just like in a family.
19 You have differences of opinions. Hopefully everybody has the
20 law firm's best interest at heart; and that's pretty much the
21 way it was.

22 Q. You heard Mr. Eckersley talk about some items in his
23 opening statement where there would be times when you would
24 have disagreements with the decisions your partners were
25 making?

1 A. Just like I would with my wife.

2 Q. Were you able to resolve those differences for the
3 most part?

4 A. Yes For the first ten years, yes, we could do that.
5 Then after that, it became more and more difficult.

6 Q. So I want to talk to you about working for the doctors
7 who are, you said, exposed potentially in these kinds of cases.
8 Were there differences of opinions between you and other
9 lawyers even in your own firm, or lawyers like Shaun McGary
10 from time to time, about how much time or effort it required
11 for you to represent these doctors?

12 A. Well, there was between me and Elliot. I don't
13 remember anybody else. That was only towards the end of
14 March 2005. See, Elliot -- I was raised in the military. I
15 tend to be a little bit obsessive compulsive, you know, "You're
16 going to get all of this done. You're going to get it done on
17 time, and you're going to get it done right" --

18 MR. ECKERSLEY: Excuse me, your Honor.

19 THE WITNESS: -- and Elliot --

20 MR. ORCHARD: I could ask a question.

21 THE COURT: Excuse me, excuse me. The objection is
22 sustained.

23 MR. ORCHARD: Yes.

24 THE COURT: Restate your question.

25 Q. By MR. ORCHARD: Tell us about your practice, and how

1 you approached a case

2 A That's the way I did it, is I assumed very little,
3 because the first three letters of assume are ass, and that's
4 what you turn out If you start assuming that the plaintiff
5 was really injured, without following up to find out, you can
6 be completely embarrassed when somebody else finds out that he
7 was injured or you settled the case and paid too much money
8 because he wasn't injured

9 It's the same thing with medical records You think,
10 oh, well, this is probably in that record, and I can just
11 assume that's there You can't do that So I would -- I was
12 extremely careful to go through, make very few assumptions, and
13 go through and just check everything out

14 Q. Mr. Ferguson, did you ever in your career have a
15 doctor -- let me just ask you, were you successful as a medical
16 malpractice defense lawyer?

17 A Yes, very successful

18 Q Did you ever have a doctor who'd been accused of doing
19 something wrong, of causing a horrible injury, ever tell you,
20 "I think you're spending too much time on my case?"

21 A Never It's almost always the contrary They would
22 be calling late in the day to want to know on a case -- when
23 they knew something was happening, they'd be calling They'd
24 call late in the day They had -- most of them had my cell
25 phone number They could call me at home They could call me

1 on the road.

2 Never -- in fact, not only has no doctor ever told me
3 I was doing too much work on their file; more than once they
4 would tell me, "I can't do what you do. Now that I see what
5 you do, I can't do it."

6 Q. Did they -- did doctors who were in these situations
7 where they've accused of hurting somebody, whether it's a child
8 or a paraplegic case or whatever, did they need sometimes your
9 extra time and attention?

10 A. Frequently, frequently.

11 Q. Did you give that to them?

12 A. Oh, yes.

13 Q. Now, an insurance company is paying the bills for you
14 to represent them; is that right?

15 A. Yes.

16 Q. Did -- in your entire 31 years of practice, has an
17 insurance company -- first let me ask you, do they audit your
18 bills, meaning look at your bills?

19 A. Yes. In fact, over time, from the time I first
20 started practicing in '76, nobody was regularly auditing
21 bills, that I knew of. Then as time went on, Firemen's Fund
22 started auditing bills because they were finding that lawyers
23 in Southern California were over-billing them by huge amount.
24 From Firemen's Fund it grew and grew and grew until just about
25 everybody, including AETNA, USF&G, anybody I was doing work

1 for, they would audit the bills. You just knew that that was
2 going to happen.

3 Q Okay So how many -- how often would they audit your
4 bills?

5 A Well, the other insurance companies would audit them
6 every time they got them They would look at them, see if
7 they thought anything was inappropriate I don't know how
8 frequently they would take them to some kind of software or
9 something like that, but that was the practice; every bill was
10 scrutinized

11 Q In your entire career, did you ever have an insurance
12 company tell you that you're over-billing them?

13 A Never.

14 Q Did you --

15 A And I still haven't through today.

16 Q. Meaning even UMIA hasn't said it?

17 A Never, yes

18 Q Have they ever said, "You're just spending too much
19 time defending these doctors"?

20 A No In fact, the UMIA adjusters encourage us to spend
21 the time to do it right So no, they've never -- they've never
22 even once suggested that I was spending too much time defending
23 their doctors

24 Q Well, I want you to take the jury through briefly --
25 and they've heard some of this, but again, let's make sure it's

1 in evidence, as opposed to opening statement. I want you to
2 take them through what it means to defend a medical malpractice
3 case. Let's just take them through the steps.

4 A. Okay.

5 Q. And then what I'm going to do is I'm going to ask
6 you as we go through this, which one -- which of these steps
7 require you to be sitting at your desk in your office logged
8 onto your computer, okay? So let's just start with the first
9 things you normally do in a medical malpractice defense case.

10 A. By Utah law, the plaintiff, the one representing the
11 patient, sends out a notice of intent to commence action. It
12 can be a letter, it can be a formal pleading, but it's usually
13 a letter. That goes to the doctor. He forwards it to the
14 adjuster. The adjuster forwards it to me.

15 - - - I review that and determine what medical records we
16 need, who we need as experts, and who we need to do -- and what
17 medical research needs to be done. I can do that at my kitchen
18 sink.

19 Q. Okay, so let me stop you. At the time about this --
20 about the time of this case, 2003, 2004, 2005, who were you
21 doing work for primarily? Which company?

22 A. UMIA, because they have --

23 Q. Why have --

24 A. -- pardon?

25 Q. Go ahead.

1 A. UMIA. There may have been some leftover insurance
2 for other companies, but I sure -- the only one that I may
3 have had, that I can recall at this time, is another insurance
4 company represented mainly by Jody Burnett, Utah Government
5 Local Trust, or something like that. They defended counties,
6 cities, things like that, for slip and fall, civil rights
7 violations. I may have been doing that; but the majority of my
8 work was with UMIA, defending doctors.

9 Q. Percentage. Give us a percentage of how much of your
10 work as of 2005 was UMIA.

11 A. Oh, 2005, 100 percent.

12 Q. Okay, and when you say the adjusters were calling you
13 and asking you to represent their insureds, the doctors, who
14 were the adjusters?

15 A. Doug Smith, Tom Green, Bill Rouse, Jerry Emery. I'm
16 going to forget somebody. I've got cases from every adjuster
17 in the UMIA claims department.

18 Q. It didn't say Art Glenn?

19 A. Well, Art didn't usually assign cases. They would
20 come from the staff.

21 Q Okay. All right. Did you have these -- did you have
22 these same adjusters calling you to represent their insureds
23 over and over and over again year after year?

24 A. Yes.

25 Q. Without complaint?

1 A. Exactly, yes.

2 Q. And with you being successful?

3 A. Yes.

4 Q. Okay. A plaintiff sues a doctor. The doctor tenders
5 the defense to the insurance company. The insurance company
6 calls you, says, "Will you defend?"

7 A. Right.

8 Q. What are the first tasks you need to do?

9 A. After I get the notice of intent -- we've talked about
10 that -- then we prepare a notice of entry of appearance with
11 this agency, and we start preparing -- we meet with the doctor;
12 and almost all of those meetings are out of the office, because
13 they want us to travel to them. They don't really want to
14 drive downtown Salt Lake City to meet with their attorney.

15 - You have to understand that for the most part, they're
16 as upset as I am right now, because somebody's accused them of
17 doing something wrong, and causing all this harm. They are
18 very -- they're very prideful people. If -- sometimes on
19 certain occasions they'll say, "It's my mistake. Let's get
20 this settled. Let's move on;" but most of the time they start
21 out and they just say, "I didn't do anything wrong. I don't
22 want any money paid on this case."

23 The doctors have the right to authorize settlement.
24 If the doctor said, "This case isn't going to settle," UMIA
25 could not settle it. So I had to take every case from the

1 beginning, expecting that that case was going to go to trial.

2 Q. And you talked about exposure early, and we were just
3 talking about money. What are the other kinds of consequences
4 that can come from a lawsuit being successful; if you were
5 unsuccessful in defending the doctor, to the doctor?

6 A Then if it's in a jury trial like this, it's public.
7 So now the doctor -- let's say, even if he's in Salt Lake City,
8 he's got to worry about it showing up in the local newspaper,
9 on the media, that this doctor's been sued. The jury's awarded
10 a million dollars and these are the facts. That's the first
11 problem, is the publicity.

12 The second problem is whatever money is paid, if it
13 doesn't go to trial, if it's settled, whatever -- well, let me
14 back up. Whatever money's paid by UMIA on that case come -- is
15 added to the doctor's premium in the coming year. It's not --
16 it's not an easy science.

17 The underwriters come in, and they figure out, okay,
18 we paid a million dollars for this doctor. So how much are
19 we going to raise his premium? A lot of these OB's have got
20 premiums approaching six figures to start with. Now you have
21 UMIA adding on money to recover what they've paid out on this
22 loss, yeah, that's financially hurtful for that doctor.

23 I've had -- I had one orthopedist call me because of
24 the increases made by UMIA on his premiums on the settlement,
25 he was taking home no money. All the money was going to pay

1 UMIA because of the settlement. So they've got to worry about
2 pub -- adverse publicity. They've got to worry about increased
3 overhead in the form of the premium.

4 Then if any money is paid on the case -- I mean,
5 there's certain exceptions, but very few. If any money is paid
6 by UMIA on the case, then it's reported to the National Data
7 Bank. Right now the National Data Bank is not open to the
8 public. I mean, there are a lot of people that can access
9 it; insurance companies, hospitals, governmental agencies,
10 that will say, "Okay, Dr. X was sued for this, and UMIA paid
11 \$100,000 or \$1,000,000 to settle the case." So it's there
12 essentially forever.

13 Then that's bad enough, that every several years
14 doctors who are practicing in hospitals, they have to reapply
15 for privileges or credentials. One of the forms they have to
16 fill out is sit down, okay, we settle X case 400,000, and when
17 and what it's about. It hurts them. It hurts their pride,
18 and understandably so. They have to fill out that form every
19 couple of years to disclose that. Some -- and I've had them
20 call me back and say, "You know, if I'd have known I'd have to
21 do that, I never would have agreed to the settlement."

22 Q. Are these some of the things that you discuss with
23 them, the implications of what's going to happen when you meet
24 with them?

25 A. Yes.

1 Q. Are they also concerned about their own reputations
2 when they've sued?

3 A. Definitely.

4 Q. Well, based on your practice, Mr. Ferguson, did --
5 when you were meeting with a doctor or you were reading a
6 complaint, or you were reading medical records or you're doing
7 medical research, or you were talking to any of your experts to
8 try to learn about the case, did any of that necessarily mean
9 that you had to be sitting at your desk with your computer
10 logged on?

11 A. None. Absolutely none.

12 Q. How about -- did you have a laptop computer that you
13 used?

14 A. Yes.

15 Q. Tell the ladies and gentlemen of the jury what your
16 practice was in terms of working not only in the office, but
17 outside the office.

18 A. Williams and Hunt provided laptops to lawyers who
19 wanted to use them. I did. You use them because you're
20 traveling so much. You use them on airport. You can hook
21 up the wi-fi, you can connect to your email, you can do
22 research, you can create documents, you can do all of those
23 things. I had one, and that's what I used it for. At the
24 time, I could transfer documents from the PC to the laptop to
25 do the work.

1 Q. Okay. How about work that you -- did you -- where
2 would you work outside of the office, if you did?

3 A. I would work at home. I'd work while I'm waiting for
4 doctors. I'd work while I'm waiting to catch plane. I'd go
5 to coffee shops, places like that, where I had to concentrate
6 on what a witness had said, reading a deposition, or reading
7 a medical article, I didn't want a phone interrupting me. I
8 didn't want it breaking my concentration, my focus. I wanted a
9 good work product. So the best place to get that is out of the
10 office.

11 Q. Did anybody at Williams and Hunt raise any objection
12 to you working at home, working with your laptop, working in
13 airports, working with meetings with doctors, working in a
14 courtroom?

15 A. Absolutely not.

16 Q. In a deposition?

17 A. No.

18 Q. That was encouraged, though, wasn't it?

19 A. Right.

20 Q. Did having your computer logged on or logged off have
21 anything to do with the actual amount of time that you were
22 putting into a case defending a doctor or a nurse or hospital?

23 A. Absolutely not.

24 Q. And was there any requirement from Williams and Hunt
25 that when a lawyer walked into an office, they had to log on

1 their computer --

2 A. Absolutely not.

3 Q. -- and when they left, they had to turn it off?

4 A. Absolutely not.

5 Q. Was there any requirement of Williams and Hunt, and
6 did any of the other lawyers do this, that they would only bill
7 for time that they were working for doctors, when their
8 computers were turned on?

9 MR. ECKERSLEY: Objection, your Honor, foundation.

10 THE COURT: Sustained.

11 Q. BY MR. ORCHARD: Okay, are -- you've had a chance to
12 review some of the bills of the other people in this case?

13 A. Right.

14 Q. Are you familiar with that?

15 A. Yes.

16 Q. Were you familiar with their billing practices?

17 A. Yes.

18 Q. Were you familiar with how they -- did other members
19 of your firm take work home?

20 A. Not that I know of. I know that Elliot never -- never
21 did. I shouldn't say never. There's always an exception; but
22 as a rule, he would walk out of the office, no briefcase, and
23 just go home.

24 Q. Are you aware of any formal policy, either in writing
25 or orally, that stated that you could only bill time when you

1 had your computer on?

2 A. No.

3 Q. I mean, could a lawyer walk into your office and
4 turn their computer on, and go to a meeting, run an errand
5 for their wife, take their kids to Lagoon, come back and turn
6 the computer off?

7 A. Yes.

8 MR. ECKERSLEY: Objection, leading, your Honor.

9 THE COURT: Excuse me, the objection is sustained. The
10 answer is stricken, and the jury is admonished to disregard the
11 answer. Next question.

12 MR. ORCHARD: Sure.

13 Q. BY MR. ORCHARD: Would the computer being on or off
14 have anything to do with what the lawyer was actually doing for
15 the client?

16 A. No. I would walk around the office after 5, and there
17 would be all these offices -- at that time there were seven or
18 eight lawyers, and very seldom would there be a lawyer working
19 at their PC, but many of them were still on. Bruce Jensen
20 would leave his on George Hunt would leave his on Elliot
21 would leave his on So they weren't in their office, they
22 weren't working. It's after 5 and their computers are on.

23 Q. Did you know whether they were billing for that time
24 when they weren't at their computers, or not?

25 A I don't know what they were doing If they were

1 working on cases, if they were working on files, yes, they'd
2 be billing

3 Q But did that have anything to do with the computer?

4 A Pardon me?

5 Q Did that have anything to do with the computer?

6 A No, nothing

7 Q When did you first learn that they'd put the spyware
8 on your computer that told -- that said when it was on or when
9 it was off?

10 A At George Hunt's deposition

11 Q Did you learn that this program did anything other
12 than simply note when a computer was turned on or turned off?

13 A That's all that -- that's all I could interpret it to
14 mean. When the PC was turned on and when the PC was turned
15 off

16 Q And do you know whether there were other sophisticated
17 software programs that can track what documents you're working
18 on, how much time you're spending on them, the actual words you
19 put in, the keystrokes, things like that?

20 A I think the NSA has those

21 Q All right, but do you know if they're available or
22 not?

23 A Well, I suspect they are I've never -- I've never
24 gone looking for them but if you're wanting to find out what
25 somebody's doing at their PC, that's what you'd do

1 Q. Okay. Well, you were an insurance defense lawyer, and
2 did you from time to time find it necessary to determine if the
3 people who were suing your doctors were being honest?

4 A. Yes

5 Q. How did you go about uncovering the truth as to
6 whether or not someone who had sued your doctor was being
7 honest?

8 A. You'd get every document you could, starting with
9 medical records. Then you'd get W-2's. If they filed social
10 security applications, you'd get those. You'd get everything
11 that they filled out within, you know, some time period before
12 whenever this happened, and up until the present time.

13 So you'd gather all those documents, and you'd review
14 them. If you had an issue about whether or not they were
15 really injured, you'd go out and hire somebody to do video
16 surveillance on them.

17 Q Would you hire investigators to talk to people that
18 they knew, or do a background search to find out if they were
19 people who told the truth?

20 MR ECKERSLEY Objection, relevance, your Honor.

21 THE COURT Do you wish to respond to the objection?

22 MR. ORCHARD No, but I --

23 THE COURT The objection is sustained

24 Q BY MR ORCHARD Were there other methods that you
25 commonly used to -- in your practice, that you also know that

1 your law firm members used if they suspected that someone
2 wasn't telling the truth in their law practice?

3 A. Then in addition to everything I've said, sometimes
4 they would use investigation firms. One they used -- I
5 can't remember the name of it, but yes, they had private
6 investigators that they would use to find out -- talk to
7 neighbors, find out what witnesses or where they are, talk to
8 those, yes.

9 Q. Your partners used these investigators from time to
10 time?

11 A. Yes.

12 Q. Did they also use people who did video surveillance
13 from time to time?

14 A. Yes.

15 Q. If they suspected someone wasn't being honest?

16 A. Yes.

17 Q. Would you and your partners from time to time rely
18 on experts, like handwriting experts and others, to determine
19 whether or not a plaintiff was being honest about a signature?

20 A. Yes, or whether or not our client was telling us the
21 truth.

22 Q. Okay.

23 A. We'd have to check that out, too.

24 Q. Was that part of your job?

25 A. Yes. What UMIA wanted to avoid at almost all costs

1 was a surprise, especially a late -- a surprise late in the
2 case that was bad for us. They hated that. Adjusters hate
3 that, insurance companies hate that; and yes, and so that's
4 one of the things you've got to look at, is my -- what is a
5 jury going to think of what my client says? Is it credible;
6 is it persuasive, has anything been altered or modified?

7

8 Q. Okay. Again, I want to go through the steps you take
9 when you're defending a medical malpractice case. We've talked
10 about the complaint, reading through the medical literature,
11 meeting with the doctor?

12 A. Many times.

13 Q. Explain that.

14 A. Many times, and you have -- meet with them at the
15 beginning of the case, find out what they have to say, what
16 their input is, who they suggest for expert, what research
17 they might suggest, what's current. Then you meet them again
18 when they have this administrative hearing, and that goes on
19 for a half a day or more, depending on the preparation and
20 everything else. Then once the lawsuit's filed, you meet with
21 them again before their deposition

22 See, depositions, you'll see them in this case, it's
23 testimony cut in stone. Once a doctor says -- your client says
24 something in that deposition, it's almost impossible to change
25 it. So they need to know what the pitfalls are. There are

1 pages and pages of lists that you need to go through with the
2 doctor to let them know, "Okay, this is stuff you need to
3 avoid. This is stuff you need to avoid."

4 Q. Are you talking about preparing your doctors for
5 depositions?

6 A. Yes.

7 Q. How important was that to you in your job?

8
9 A. It's extremely important, because that's the best
10 chance a plaintiff had of damaging your case. Frequently
11 plaintiffs' lawyers would try to intimidate the doctor. So
12 you need to let them know, "Okay, these are the techniques
13 these lawyers use for intimidation."

14 Frequently these depositions -- not frequently, but
15 the rules at the time would allow deposition to go on for six
16 hours. So you've got your doctor, and it's not Guantanamo, but
17 it can be pretty bad. He's in there, and they're asking the
18 same questions up to seven times, trying to catch him, trip him
19 up, and the misrepresent what's in the medical records, they
20 misrepresent what's in the medical literature.

21 So you've got to let him know where you think that
22 might occur, how he needs best to prepare for it; and they're
23 -- and they're in a sensitive, emotional state.

24 Q. Did -- how important did you feel like preparation of
25 the doctor was for a deposition? How important was this in the

1 grand scheme of what you did on a medical malpractice case?

2 A. Well, if you did not do it, one of the risks you
3 ran was having your doctor admit that some kind of medical
4 literature was controlling, and he hadn't abided by it. He was
5 negligent. So you have to pay money on it, or if you haven't
6 spent the time with him, you get him admitting that he fell
7 below the standard of care. He was negligent. Insurance
8 company hates that. Your doctor hates that.

9

10 Q. Okay.

11 A. So those are the kinds of problems you have to worry
12 about.

13 Q. Well, Mr. Eckersley talked about an April 8th, 2000
14 billing; and apparently some difference in whatever the
15 documents say they say, but some difference between you and
16 Mr McGary in terms of how much time you spent preparing the
17 doctor for deposition, or preparing for deposition; do you
18 recall that?

19 A. Yes.

20 Q. What case was that?

21 A. That was the Robb case.

22 Q. What did the Robb case deal with?

23 A. Lynn Robb -- well, I represented Emergency Medicine
24 Physician, and this all happened at Valley View Hospital in
25 Cedar City, and Lynn Robb was a construction worker in his

1 forties. He rolled his pick-up truck, he did not have his
2 seatbelt on; and he came up against a ceiling, and had his
3 neck really hurt him.

4 So he was taken to Valley View Hospital, and this is
5 like on Saturday or Sunday evening; and my client evaluates
6 him, and he does -- my client does everything appropriately.
7 They don't take off the backboard or the neck brace until
8 they've done a flat -- a plain film, an X-ray to see how his
9 neck looks.

10 Then they take those off, and then they -- my
11 client orders a CT scan. He does what evaluations he can
12 do physically, you know, poking and prodding, and Mr. Rogers
13 is not complaining of any paralysis or anything like that. My
14 doctor -- because Mr. Robb's inebriated, my doctor takes his --
15 ~~it is required that he have Mr. Robb admitted to the hospital~~
16 until he sobers up so that they can make sure that they're not
17 missing some areas of pain.

18 So my doctor calls the doctor to admit Mr. Robb.
19 He's admitted. The CT scan of the cervical spine is done,
20 and Mr. Robb sobers up before he's discharged. He's evaluated
21 by the doctor who admits him. The CT scan is read by a
22 radiologist, who says it's negative. Nothing wrong with that
23 CT scan.

24 Well, Mr. Robb goes home -- I'm compressing -- and
25 then roughly four or five days later, 911 is called early in

1 the morning, and it's Mr. Robb's mom, said he fell out of bed
2 and can't get up. Yeah, he was -- he had paralysis. It was --
3 he was going --

4 MR. ECKERSLEY: Your Honor, I'd ask that the Court
5 restrain the narrative. The question was, what did he do to
6 prepare the document.

7 THE COURT: Do you wish to respond to the objection?

8 MR. ORCHARD: I can -- I think it was an appropriate
9 response, and he was filling in and trying to fill time -- for
10 trying to save time for the jury, but I can ask -- I can break
11 up and ask questions.

12 THE COURT: Well, here's the problem. First of all
13 I am going to sustain the objection; but it is inevitable if
14 you ask narrative questions and the witness gives a narrative
15 response, then it's just inevitable that some portion of the
16 response is going to be improper for a large number of reasons.

17 MR. ORCHARD: Sure, and --

18 THE COURT: That's why --

19 MR. ORCHARD: Okay.

20 THE COURT: -- I would prefer that you conduct the
21 examination on a question by question basis as opposed to a
22 narrative basis.

23 MR. ORCHARD: You bet. Okay, I'll do that.

24 THE COURT: The reason for that is that it's going to
25 put me in a better position to rule on objections to questions,

1 and it will reduce the occasion for testimony to come in that
2 really is not relevant or objectionable on other grounds.

3 MR. ORCHARD: Sure, and your Honor, I'm just trying
4 to walk that fine line of not asking leading questions, which
5 I can't do on direct, and ask him open ended questions so I
6 cannot be leading. So it's that fine line. I'll try to do a
7 better job of that.

8 THE COURT: All right. You may go forward.

9 MR. ORCHARD: Thank you.

10 Q. BY MR. ORCHARD: Mr. Ferguson, so the Robb case was
11 a case where somebody was a paraplegic?

12 A. Because that was his ultimate injury yet.

13 Q. So you have -- and so the damages with a paraplegic
14 case are what?

15 A. There are millions, potentially millions, because they
16 need a life care plan, they've got an economic loss. My memory
17 is he was in his mid to late forties; so it was a lot of money.

18 Q. But they were blaming your doctor for essentially not
19 recognizing that he had a what, burst fracture, spinal cord
20 problem?

21 A. The plaintiff's attorney's a very good lawyer; and
22 he sued my doctor, he sued the radiologist, and he sued, I
23 believe, one other doctor, and they were all insured -- I mean,
24 the main players were insured by UMIA.

25 Q. Okay. So did you take the Robb case seriously when

1 you prepared that doctor for his deposition?

2 A. Definitely.

3 Q. Was there the chance that the doctor would have a
4 verdict against him that would be more than the insurance
5 coverage that was provided by UMIA?

6 A. Yes.

7 Q. They've talked about another case where you've did
8 some work, and let me ask you specific questions. The case --
9 I want to remind you, the West case --

10 A. Right.

11 Q. -- do you recall that case?

12 A. Well, that --

13 Q. The answer is do you recall the case?

14 A. Yes, I do.

15 Q. Okay. Was that a case that had serious implications
16 for the doctor that you were representing?

17 A. It was a birth injury claim. It's actually -- it was
18 filed as a birth injury, and it was actually hypoglycemia which
19 results in cerebral palsy to babies.

20 Q. So --

21 A. So it looks just like a cerebral palsy case.

22 Q. -- is a birth injury case -- I mean, from the person
23 who has a sponge left in their body, and the sponge is removed,
24 to the spectrum of the worst kind of damages, meaning that the
25 biggest life care plan, the most amount of money that's going

1 to be necessary to take care of these people, where do birth
2 injuries fit on this spectrum?

3 A. They're right up at the top.

4 Q. Meaning?

5 A. That's where the most money is likely to be paid, in
6 birth injury cases --

7 Q. Did you spend --

8 A. -- or in this case was a hypoglycemia case which
9 looked just like a birth injury case.

10 Q. Did you feel it was necessary in the West case to
11 spend a significant amount of time preparing for depositions in
12 that case?

13 A. Yeah.

14 Q. What was the outcome of your work?

15 A. I took the lead on -- I represented an OBGYN on the
16 West case. I took a lead on the plaintiff OBGYN perinatologist,
17 and his name is Barry Schiffer. Dr. Schiffer has been deposed
18 hundreds of times. So you've got all these depositions that
19 you'll look at.

20 As a result of the deposition I took Dr. Schiffer, and
21 he lost his membership in ACOP, which is the key organization
22 they have to belong to, to be certified. Not to practice, but
23 to certify and to testify effectively --

24 Q. What was the --

25 A. -- as an expert.

1 Q. What was the effect of that deposition, meaning in
2 terms of his ability to testify against you in the trial?

3 MR. ECKERSLEY: Objection, relevance.

4 THE WITNESS: The case suffers.

5 THE COURT: The objection is sustained.

6 THE WITNESS: Oh, excuse me.

7 THE COURT: The objection is sustained. The response
8 is stricken. The jury's admonished to disregard the answer;
9 and I would ask the witness that in the face of an objection,
10 that's his signal to remain silent so I can properly rule on
11 objections.

12 THE WITNESS: I apologize, your Honor.

13 THE COURT: All right. Next question, Counsel.

14 MR. ORCHARD: You bet.

15 Q. BY MR. ORCHARD: Was the result of your work, and the
16 time that you spent on behalf of that doctor successful for the
17 doctor?

18 A. Yes.

19 Q. Okay. How often are experts stricken, or experts'
20 certifications taken away by national organizations?

21 MR. ECKERSLEY: Objection, relevance.

22 THE WITNESS: Very infrequently.

23 MR. ORCHARD: Hold on.

24 THE WITNESS: Oh, excuse me I've blown the objection.

25 THE COURT. Again --

1 THE WITNESS: I apologize, your Honor.

2 THE COURT: Again, I'm going to sustain the objection.

3 THE WITNESS: (Inaudible).

4 THE COURT: Excuse me, let me finish. I'm going to
5 sustain the objection. The answer is stricken, and the jury
6 is admonished to disregard the answer; and again, I'll request
7 of the witness to give me an opportunity in the face of an
8 objection, to rule on the objection before you just blurt out
9 an answer.

10 THE WITNESS: I will, your Honor. As soon as I see
11 Mr. Eckersley stand up, I will not say anything.

12 THE COURT: Next question, please.

13 MR. ORCHARD: Your Honor, I didn't hear the grounds of
14 the objection.

15 ~~THE COURT: Relevancy.~~

16 Q. BY MR. ORCHARD: Okay. Mr. Ferguson, you may know --

17 THE COURT: And I think we've done a very good job,
18 both sides, of framing the issues that the jury is going to
19 have to decide, and --

20 MR. ORCHARD: I could move on.

21 THE COURT: -- I'm struggling with how a successful
22 result is really relevant to the heart of the issue, the issue
23 that the jury's going to be called upon to decide.

24 MR. ORCHARD: I can ask a question and clear it up, if
25 you'd like me to.

1 THE COURT: You may go forward.

2 Q. BY MR. ORCHARD: Do you recall that the meeting you had
3 with Mr. Williams when he complained about your bill was that
4 he felt like you were spending too much time working on the
5 case?

6 A. Are we talking about Merce?

7 Q. Yes, we're talking about the Merce case.

8 A. And are we talking about the meeting prior to March
9 16th?

10 Q. We are.

11 A. Yes. His objection was not that I was not doing the
12 work. His objection was that he didn't think the work was
13 necessary.

14 Q. Okay, and so some lawyers may have differences of
15 opinion as to how much time it requires to be successful for
16 a particular defendant?

17 MR. ECKERSLEY: Objection, foundation and relevance,
18 your Honor.

19 THE COURT: Do you wish to respond to the objection?

20 MR. ORCHARD: Nope.

21 THE COURT: The objection is sustained on both grounds.

22 Q. BY MR. ORCHARD: Do you have a familiarity as to whether
23 or not there is a difference in the amount of time you spend on
24 cases as opposed to Mr. Williams?

25 A. Yeah.

1 Q. Tell us about that.

2 A. Well, I'm in the office, I see what he does, I see how
3 he handles cases. On occasion we would travel together to the
4 same deposition --

5 Q. Okay.

6 A. -- that he was taking; and he did not prepare as much
7 as I did.

8 Q. Okay, and so at least you two may have had difference
9 of opinion as to how much time is necessary to get a result
10 which is a successful result for your client?

11 A. Yes.

12 Q. During that meeting -- and we'll go back to it -- did
13 Mr. Williams ever say to you, "I think you're over-billing,"
14 meaning "I don't think you're doing the work"?

15 A. We're talking about the meeting of (inaudible) Merce?

16 Q. Yes.

17 A. No, he never said I was over-billing. He just said,
18 "I don't think that you need to do this much work."

19 Q. Okay, and again, did any of the doctors or any of the
20 insurance agents that hired you ever tell you that they didn't
21 think you needed to do the work or --

22 MR. ECKERSLEY: Objection, your Honor, asked and
23 answered.

24 THE COURT: Do you want to respond?

25 MR. ORCHARD: I think he did answer that question; so

1 I'll move on.

2 THE COURT. Thank you. It was -- the question was
3 previously asked and answered.

4 Q. BY MR ORCHARD. So in addition to taking depositions,
5 tell us a little bit about conducting discovery again I don't
6 think we've heard that Conducting discovery is what?

7 A That -- includes preparing written questions that are
8 called "interrogatories," written requests for production for
9 medical records and things like that, and then it includes
10 request for admission, and depositions.

11 Q. Who writes those? Who writes the interrogatories,
12 request for admissions, request for production of documents?

13 A The firm had form interrogatories that we could
14 use; but you had to craft the attorney -- I did. I crafted
15 frequently with paralegal help, and sometimes the paralegals
16 did it exclusively, request for production of documents.

17 Q Okay Who took depositions?

18 A I did.

19 Q Who consulted with experts?

20 A. I did.

21 Q. When you took depositions, consulted with experts, did
22 that ever require the use of your computer?

23 A No.

24 Q Meaning the computer that you had in the office?

25 A The office PC, r-grt

1 Q. What other things would you do for a typical medical
2 malpractice client?

3 A. Assuming you could find supportive expert testimony,
4 and you start taking the depositions, you depose the plaintiff,
5 you depose whoever witnesses they -- whatever witnesses were
6 there that you needed to depose, and then you'd depose the
7 plaintiff's expert, their standard care expert, their damage
8 expert, and then my experts would be deposed.

9 Q. Okay.

10 A. Then once all of that's done, you try and -- if
11 there's reason to settle the case, then you try to settle it
12 between the lawyers, and if you could not do it that way, then
13 you'd do a mediation.

14 Q. Okay.

15 A. So for the mediation you'd prepare a mediation brief
16 or position paper. For the most part, I did that.

17 Q. Okay. Would you from time to time have Courts like
18 his Honor in this case, where the Judge would impose deadlines,
19 or the parties would stipulate to deadlines by which you would
20 have to complete certain work?

21 A. Yes.

22 Q. Would you be -- as of 2005, describe for the jury the
23 kinds of cases you were being referred by UMIA.

24 A. They were high exposure cases. Cases where UMIA was
25 concerned that they were going to have to pay a lot of money on

1 the case, or at least the risk was there.

2 Q. Okay. Did you find that as you, over the 14 years --
3 actually you'd been working with Mr Glenn and Mr. Smith since
4 '80, '81?

5 A. Right.

6 Q Did you find that over the 25 years of working with
7 these gentlemen, that they were continually sending you more
8 and more important, difficult, high exposure cases?

9 A. Yes.

10 Q. Did that, as of 2005, require more of your time to
11 defend these cases?

12 A. Yes.

13 Q. Were you busy?

14 A. Yes.

15 Q. Were you as busy as you wanted to be?

16 A. I was extremely busy during that period of time.

17 THE COURT: Mr. Orchard, since you've paused, this is a
18 good time to take the evening recess

19 MR. ORCHARD Yes, sir

20 THE COURT Okay, you may be seated

21 MR ORCHARD: Thank you

22 THE COURT: Members of the jury, what we're going to
23 do is take the evening recess, and probably before the end of
24 this trial, you're probably going to get tired of me giving you
25 these admonitions about what you're required to do during the

1 recesses; but the rules require that I remind you, of course,
2 that you have no discussions or conversations with anyone
3 regarding this particular case, including anyone at home.

4 Additionally, it's important that you continue
5 to refrain from having any contact whatsoever with any of
6 the parties to this case, any of the lawyers or any of the
7 potential witnesses.

8 It's important to remember my admonition to you
9 earlier about making no attempt, for example, to do any type
10 of independent research on your own, because everything -- your
11 decision on this case must be based only upon the evidence
12 that's introduced during the course of this trial, and not
13 based on something you may learn outside of this trial. Please
14 remember my admonition to you to refrain, for example, from
15 consuming any type of media exposure this case may have.

16 Last, it's very important that you continue not to
17 form any opinions, and keep open minds about this case as well.
18 If you've not already done so, I'm going to ask that you write
19 your names on the note pads. I am going to have my bailiff
20 collect those note pads, and we will be keeping those here
21 for safekeeping this evening, and they, of course, will be
22 redistributed to you tomorrow morning. I would ask that you
23 report promptly to the Court tomorrow morning at 9 a.m.

24 You may take the jury, and they're excused.

25 COURT BAILIFF: Please rise for the jury.

1 (Jury exits the courtroom)

2 THE COURT: You may be seated, and you may step down,
3 Mr. Ferguson. Counsel in terms of getting those instructions
4 to me on an electronic format, I believe that they can be
5 emailed to me if that's -- do you have that capacity?

6 MR. ECKERSLEY: Yes.

7 MR. ORCHARD: Yes.

8 THE COURT: I think in WordPerfect 10; and Tina will
9 give you the address and instructions. I see you frown,
10 Mr. Orchard. Is that going to be a problem?

11 MR. ORCHARD: WordPerfect 10, it's a little bit of a
12 problem. We have Microsoft Word, but I think I can give it to
13 you in a text only format. It's going to be hard for you to
14 keep the same format, to just cut and paste for you, Judge.
15 That's what I'm concerned about; but I can try and find a
16 program that will do that.

17 MR. ECKERSLEY: I don't have the slightest idea if
18 that's going to be a problem, your Honor. I'll have to ask
19 somebody who knows.

20 THE COURT: Excuse me for laughing, but I only chuckle
21 because I have to get that information from my support staff
22 also So -- but I do know that I've given you direct direction.
23 Just do the best you can. If it comes down to having to paste
24 and cut on the hard copy, Mr Orchard, that's what we'll do.

25 MR. ORCHARD Yes, sir

1 THE COURT: All right.

2 MR. ORCHARD: Did you say -- did you give us the email
3 address? I didn't hear what you said.

4 THE COURT: My clerk is going to give it to you after I
5 recess.

6 MR. ORCHARD: Oh, okay.

7 THE COURT: We will reconvene at 9 o'clock tomorrow
8 morning; and it seems -- do you have tomorrow's calendar there?

9 (Court confers with clerk off the record)

10 THE COURT: Okay, well, my point was is that you could
11 -- looks like we don't have anything in the morning before 9.
12 You could choose to leave items there on the table. We also
13 have a closet that locks.

14 An excellent point my clerk's informed me of. I am
15 the cohabitant abuse signing Judge tomorrow; with Judge
16 Lindberg, which means that there's the potential that during
17 the course of the trial tomorrow, individuals may come through
18 the door seeking my attention to sign the cohabitant abuse
19 protective orders.

20 At some point in time I'm going to have to break to
21 take a look at those petitions. I'm going to try and keep
22 the same schedule we have, but it might result, depending upon
23 how many and who has come through the door. It may result in
24 taking a few more frequent breaks than we would ordinarily
25 take. Just wanted to give you that information; but we'll

1 recess at this time and reconvene at 9 o'clock. I don't need
2 you here -- let's have Counsel and their clients here at 8.45,
3 okay? All right, we'll recess at this time.

4 (First day of trial 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.

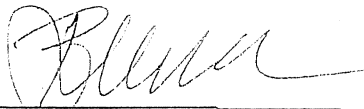
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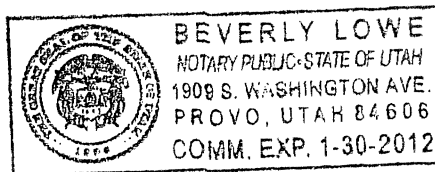
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My commission expires:
January 30, 2012



Beverly Lowe
NOTARY PUBLIC
Residing in Utah County



Tab 6

Jury Trial January 23, 2008

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

COPY

GARY B FERGUSON, et al,

Plaintiff,

vs.

WILLIAMS & HUNT, INC. et al,

Defendant.

)
)
)
)
) Case No. 050921677 PI
)
) (Volume II)
)
)
)

Jury Trial
Electronically Recorded on
January 23, 2008

BEFORE: THE HONORABLE TYRONE E. MEDLEY
Third District Court Judge

APPEARANCES

For the Plaintiff:

Mel C. Orchard
Charles Peterson
THE SPENCE LAW FIRM
15 South Jackson Street
P.O. Box 548
Jackson, Wyoming 83001
Telephone: (307)733-2290

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

INDEX

<u>WITNESS: GARY FERGUSON</u>	<u>PAGE</u>
DIRECT EXAMINATION BY: MR. ORCHARD	101
CROSS EXAMINATION BY: MR. PETERSON	107
REDIRECT EXAMINATION BY: MR. ORCHARD	164
RECROSS EXAMINATION BY: MR. PETERSON	171
FURTHER REDIRECT EXAMINATION BY: MR. ORCHARD	177
 <u>WITNESS: ELLIOT WILLIAMS</u>	
DIRECT EXAMINATION BY: MR. PETERSON	178
CROSS EXAMINATION BY: MR. ECKERSLEY	261
 <u>WITNESS: SHAWN MCGARRY</u>	
DIRECT EXAMINATION BY: MR. ECKERSLEY	263
CROSS EXAMINATION BY: MR. PETERSON	265
REDIRECT EXAMINATION BY: MR. ECKERSLEY	274
 <u>WITNESS: ARTHUR GLENN</u>	
DIRECT EXAMINATION BY: MR. PETERSON	274
CROSS EXAMINATION BY: MR. ECKERSLEY	295
REDIRECT EXAMINATION BY: MR. PETERSON	301
RECROSS EXAMINATION BY: MR. ECKERSLEY	305
 <u>WITNESS: RICHARD SLAUGHTER</u>	
DIRECT EXAMINATION BY: MR. ORCHARD	304
VOIR DIRE EXAMINATION BY: MR. ECKERSLEY	320
DIRECT EXAMINATION (resumed) BY: MR. ORCHARD	325
CROSS EXAMINATION BY: MR. ECKERSLEY	327
REDIRECT EXAMINATION BY: MR. ORCHARD	329

-o0o-

EXHIBITS

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
No. P-1, D-1	Copies of Emails	115
No. P-3	Timekeeper Diary	132
No. D-17	Handwritten Billing Record	174

-o0o-

P R O C E E D I N G S

(Electronically recorded on January 23, 2008)

COURT BAILIFF: All rise. Third District Court is now in session. The Honorable Tyrone Medley presiding. Please be seated.

THE COURT: The record should reflect that all Counsel and the parties are present. The jury is also present in the courtroom at this time. The witness may retake the witness stand.

THE WITNESS: Thank you, your Honor.

THE COURT: You may go forward, Mr. Orchard.

MR. ORCHARD: Thank you, your Honor.

GARY FERGUSON,

having been first duly sworn,

testified as follows:

DIRECT EXAMINATION

BY MR. ORCHARD:

Q. Good morning, Mr. Ferguson.

A. Good morning, Mr. Orchard.

Q. I think when we left off you were talking about the increasing responsibility that you had from UMIA and the number of cases you were being given, and the increased complexity of the cases, is that what you remember?

A. That's -- yes, that's where we left off, and that's --

Q. All right.

1 A. -- what had happened.

2 Q. I want to back up a second and ask you -- ask you what
3 professional organizations you belong to?

4 A. I'm a member of the Utah State Bar, the Wyoming State
5 Bar, the California State Bar, and I'm a member of the American
6 In Of Court, which is a teaching institution for lawyers and
7 Judges, and Salt Lake County Bar, other organizations like
8 that, Wyoming Trial Lawyers and Utah Trial Lawyers.

9 Q. Okay. Have you been sanctioned or censured or
10 reprimanded in any way from any of the State bars or the
11 ends of Court or any other organization in which you belong?

12 A. Never.

13 Q. Would stealing from a client be considered unethical?

14 A. Not only unethical, you can be disbarred for that.

15 Q. And have you been disbarred?

16 A. No.

17 Q. Criticized in any way by one of these organizations?

18 A. No.

19 Q. Let's talk about how Williams and Hunt go for their
20 time. Does the office have a billing system?

21 A. Yes.

22 Q. How would you make your billing entries?

23 A. You would go to the billing system and pull up the
24 template, and it would -- you would enter client identification
25 number, you'd enter the date, you'd enter a description of the

1 work, and then you would enter the time spent on that work.

2 Q. How would you -- what things did you rely upon in
3 putting in the time that you did on a particular case?

4 A. I kept a handwritten calendar, which is one of the
5 exhibits; and I would write down during the day what I had
6 done. So on that handwritten calendar I'd enter the case
7 name, and then abbreviations or brief descriptions of what
8 I did at the time I did it.

9 Q. Did you always write down the number of hours per
10 task on your calendar?

11 A. No. In fact, usually I did not write down the number
12 of hours, unless it was something that I was going to be out
13 of the office for a while, or may forget. Like if I traveled
14 to a deposition out of the state, and I would then write down
15 the number of hours, because by the time I got back in the
16 office I may have forgotten how many hours it was.

17 Q. How did you make sure that you were recording the
18 hours correctly?

19 A. My routine was to record -- to do the bill, to record
20 the entries at the end of each day. So long as I had time to
21 do it, I would do it at the end of each day, so everything I
22 did was fresh on my mind.

23 Q. Okay. I think you talked about the time you spent in
24 the office. Did you spend time in the mornings working?

25 A. Yeah.

1 Q. Before you got to the office?

2 A. Yes.

3 Q. How about at night, after you went home?

4 A. Yes.

5 Q. How would you put in the time that you would be
6 spending, if, for instance, you were putting in your time for
7 the day, but you anticipated doing work that night?

8 A. I would estimate the amount of time and enter it with
9 that batch before I left home.

10 Q. If you realized afterward, the next day, that the
11 amount of time you estimated was incorrect, how would you
12 correct it?

13 A. I would enter the batch entry number for that day,
14 pull up that day, and I could revise it. I could revise it up
15 or down.

16 Q. And were there times when you revised it up or down?

17 A. Yes.

18 Q. You heard Mr. Eckersley talk about the March 23rd bill,
19 and you billing 11.25 hours on that date; do you recall that?

20 A. Yes, I do.

21 Q. I don't want to go over it in painful detail, but
22 I would like to ask you about the work you did that day.
23 March 23rd, 2005, do you remember that day?

24 A. The only time that this day gained any significance
25 was 14 months later at George Hunt's deposition, where they

1 said I over-billed for this day. That's the first time I've
2 ever heard of it. So I went back --

3 Q. So let me ask you --

4 A. -- excuse me.

5 Q. -- how do you remember anything about this day, then?

6 A. I don't remember anything about this day.

7 Q. Okay.

8 A. The only thing I remember, after checking my calendar,
9 was that I had an ultrasound scheduled at St. Mark's Hospital.

10 Q. Do you remember the ultrasound?

11 A. I do.

12 Q. How long did the ultrasound work -- take?

13 A. I was the first person there. I was in and out of the
14 hospital. I was out of my car in the parking lot and back in
15 my car in the parking lot in less than 30 minutes.

16 Q. Why is it that you remember this day so well -- or is
17 this ultrasound?

18 A. Because it was a significant ultrasound. It's the
19 only one I can recall having in a while, and it was of my neck.
20 I can remember that it was done quickly. It may be because I
21 was the first patient there, and maybe just ultrasounds are
22 fast and quick, but I do remember that.

23 Q. You have that bill for the day of March 23rd in front
24 of you?

25 A. Yes.

1 Q. You've reviewed that?

2 A. Yes.

3 Q. Did you do the work? Did you work 11.25 hours that
4 day?

5 A. The only -- I don't remember anything I did on this
6 day, other than the ultrasound; but if I billed it, I did it,
7 and I did it on that day.

8 Q. Are there items on the bill that would have -- are the
9 items on the bill, do they reflect work you would have done at
10 all?

11 A. Yes.

12 Q. On your laptop?

13 A. Yes.

14 Q. With your dictation machine?

15 A. Yes.

16 Q. Was any of that work -- did any of that work require
17 that you be at the office on your computer?

18 A. The only work that would require that is, for example,
19 in Merce vs. Anderson, conference with Kurt Frankenberg. That
20 meant I was in the office.

21 Q. Anything else that would have required you being at
22 the office?

23 A. Any other entry where it says conference with somebody
24 in the office. That's only thing that required me to be in the
25 office Even with a conference, my computer didn't need to be

1 on --

2 Q. Excuse me.

3 A. -- and -- excuse me.

4 Q. Okay, and do you know -- I believe that Mr. Eckersley
5 said that was the day they first turned on this program that
6 tracked when you turned your computer on or off. Do you know
7 when that program was actually turned on that day?

8 A. No. Mr. Eckersley represented to me during my
9 deposition that the clock said 12:09, initially midnight;
10 9 minutes after midnight or something. Then he said, "No, it
11 looks like it was noon."

12 Q. Okay.

13 A. So that -- and I asked Mr. Eckersley in my deposition
14 if he would find out when the spyware was put on my PC, and he
15 said he would.

16 Q. Do you know?

17 A. And it turns out -- I still don't know. So it very
18 well could have been that I could have gone into the office
19 after -- before or after this ultrasound work, and it still
20 would not have shown up on their spyware.

21 Q. All right. I want to talk to you about the billing
22 that you did in the first few months of 2005. What did you
23 have planned in the spring of 2005 that was important to you?

24 A. I had -- I had a vacation with my wife; and that was
25 approximately two weeks towards the end of April. Then I

1 had both of my children receiving doctorates. My son was
2 graduating from medical school, and his graduation -- they were
3 within days of each other, because they were kidding each other
4 which one was going to become a doctor first.

5 I believe my son's was first, and he graduated from
6 the University of Utah Medical School in May 2005. Then my
7 daughter did her defense of her dissertation, which is what
8 you have to do to receive a Ph.D. She did that descriptions
9 to Oceanography in Loyola, California. She'd gone to school
10 there six years for that degree.

11 We made all the travel arrangements, everything, and I
12 let me partners know that I'd be doing that. That I'd be out
13 of the office to attend those graduations, and I was going to
14 take time to do it.

15 Q. When did you -- when did you let your partners know
16 that you would be making these trav -- that you'd be traveling
17 in the spring for these various things?

18 A. As soon as I learned of the dates. So I don't
19 remember. There were emails that told them when.

20 Q. And we haven't had a chance to do that, but in the
21 blue shirt, is that Julie, your wife, in the courtroom?

22 A. Yes.

23 Q. And is that Megan, your daughter --

24 A. Yeah.

25 Q. -- that we're talking about?

1 A. (No verbal response).

2 Q. First of all, how important was it to you that you
3 attend your son's graduation from medical school and your
4 daughter's defense of her dissertation?

5 A. It was a high point of my life as a parent, and I was
6 looking forward to it with great excitement. That is one of
7 the reasons why I was working so hard on the files I had,
8 getting as much work done, and every day, so that I would be
9 able to attend them. As a trial lawyer, things come up, and
10 you tell your family you're going to be there, and you can't;
11 but I was going to be there for theirs -- graduation.

12 Q. So did your spring schedule require that you have to
13 work harder on your cases in January and February and March?

14 A. Yes. In addition to having to set aside time in May
15 -- and I'd already set aside the vacation time, there were
16 scheduling orders in place in cases like Merce and Robb, where
17 the Court says you have a certain amount of time to get all of
18 this work done. Frequently those are hard to get extended. So
19 I was working to meet those deadlines as well.

20 Q. The Court imposed deadlines that we talked about
21 yesterday; is that what you're talking about?

22 A. Yes.

23 Q. Were you -- so you had a limited amount of time to do
24 the work --

25 A. Yes.

1 Q. -- in those cases?

2 A. Yes.

3 Q. And as I understand, the Merce case was a viral
4 encephalitis case of brain damage?

5 A. Yes.

6 Q. The Robb case was a paraplegic case?

7 A. Yes.

8 Q. Incidentally, do -- if you bill a lot of hours in a
9 month, 20 or 30 or 40 more hours in a month than you would in
10 another month, would that mean you get paid more that month?

11 A. No.

12 Q. Does your draw stay the same?

13 A. Yes.

14 Q. So if you billed more in January or February or March
15 than you normally would have in those three months, did you get
16 paid extra for that?

17 A. No.

18 Q. Okay. You talked about the Merce case, and I want to
19 discuss it with you briefly. Is this the case where you had a
20 large bill that you discussed with Elliot Williams?

21 A. Yes.

22 Q. How -- tell the jury just briefly how that came about.

23 A. Well, there was a lot of work being done in Merce by
24 myself and Mr. Frankenberg; and it was being done in such a
25 compressed period of time, short period of time.

1 Q. Why?

2 A. Because of the scheduling order and because of lawyers
3 calendars. So -- and it was -- that's why. There were a
4 number of witnesses who had to be deposed. We had a short
5 scheduling order. I mean, we had a limited time to do it.
6 We had witnesses coming from out of state; and we had numerous
7 defense Counsel. So we had to get the work done in a quick
8 manner.

9 Q. Was Mr. Frankenberg, who's back here, was he also
10 billing on that particular case?

11 A. He was.

12 Q. So you go to Mr. Williams with your bill?

13 A. Yes. Every --

14 Q. Tell us about that.

15 A. Okay. Every month we would get a draft of the bills
16 that are to be sent out to UMIA, and we review those bills
17 before they are sent out. I got the draft of the Merce bill,
18 and it was over \$20,000 for one month, essentially one month.
19 Maybe it's five weeks, maybe it's six weeks, but essentially
20 one month.

21 So I went to Elliot, and I said, "Elliot, you may want
22 to know about this bill," because Elliot meets with UMIA board
23 members. He's general Counsel for UMIA, and this is a large
24 bill in a short period of time.

25 Q. Why would you -- why would you go to your partner

1 Elliot on a bill like this?

2 A. Because it was so large in such a short period of
3 time, and I wanted him to see it so that if anybody at UMIA
4 asked him, "Okay, Elliot, what's going on in your office?
5 Here's a \$22,000 bill for 30 -- roughly 30 days work."

6 Q. Were you making yourself available to your partner to
7 tell him exactly what you had done on that day?

8 MR. ECKERSLEY: Objection, leading, your Honor.

9 THE WITNESS: Yes. Oh --

10 THE COURT: Excuse me. First of all, the objection
11 is sustained, and the witness' yes answer is stricken. I'm
12 admonishing the jury to disregard it. This is about the -- at
13 least the third time now that the witness has answered in the
14 face of an objection. I request again that the witness remain
15 silent when there is an objection.

16 THE WITNESS: I will, your Honor.

17 THE COURT: Next question, Counsel.

18 Q. BY MR. ORCHARD: Just wait. Just wait. What, if
19 anything, did you do to make yourself available in case there
20 were any questions by Mr. Williams about what you did to
21 justify the bill?

22 A. If I understand your question, I gave him the draft
23 copy of the bill. I also gave a draft copy to Mr. Frankenberg
24 to check. Then I just waited for any response from Elliot.

25 Q. Okay. Did you get a response from Elliot?

1 A. I did.

2 Q. What was that response?

3 A. He came into my office one day towards the end of the
4 day, and Elliot is generally good at hiding his emotions, but
5 I could tell that he was very angry over the bill. So I said,
6 okay, and he went off, and he said, "You've charged too much
7 time to prepare for this -- the deposition of your client.
8 You've charged too much time to prepare your client for the
9 deposition --" maybe I've already said that. "You charged
10 too much time to attend the deposition," and then I said, "No,
11 Elliot, you're wrong, for all of these reasons."

12 Q. Okay.

13 A. And it's --

14 Q. Did you tell him the reasons at the time of your
15 meeting?

16 A. Yes.

17 Q. Was he telling you that you didn't do the work, or was
18 he telling you that you were taking too much time?

19 A. He said I was taking too much time.

20 Q. Did you respond also in emails to Mr. Elliot -- or
21 Mr. Williams?

22 A. Yes, I did.

23 MR. ORCHARD: Your Honor, we have an entire notebook of
24 exhibits that we're going to be moving their admission. We've
25 agreed with Counsel -- I have an exhibit I want to show him.

1 I don't have the copy. Do you have that? Can I borrow this
2 copy? Thank you. I'm going to -- may I approach the witness,
3 your Honor?

4 THE COURT: You may.

5 MR. ORCHARD: Thank you.

6 Q. BY MR. ORCHARD: I'm going to show you the original
7 document. This is Plaintiff's Exhibit No. 1. Is this the --
8 it's also been marked as Defense Exhibit No. 1.

9 A. Yes.

10 Q. Is this the email that you sent to Mr. Williams?

11 A. Yes.

12 Q. In this email did you describe the work that you had
13 done on the Merce case?

14 A. Yes.

15 Q. Is this what you had described to Mr. Williams when
16 you talked to him in person?

17 A. Yes.

18 Q. Why did you put it in an email?

19 A. So that there would be a record of our conversation,
20 because -- and I was so upset at the accusation that I'd over-
21 billed. It was wrong, and people's memories of conversations
22 change. We see that all the time, especially in our job. So
23 I wanted it clearly set forth what he said to me, and what I
24 said to him.

25 Q. Okay. The bottom of that paragraph, the bottom of the

1 email --

2 A. Yes.

3 Q. -- do you see that paragraph you wrote? Would you
4 please read the bottom of that for us?

5 MR. ECKERSLEY: Excuse me, your Honor. Is Counsel
6 offering the exhibit? I think that's appropriate --

7 THE COURT: Well, if --

8 MR. ECKERSLEY: -- prior to reading it.

9 THE COURT: -- and if that's an objection, it's
10 sustained.

11 MR. ORCHARD: I'd be happy to off -- we were going to
12 offer them all. I'm happy to offer that one now, and then the
13 rest of them later on for -- to help move things along.

14 THE COURT: So the exhibit is now being offered?

15 MR. ECKERSLEY: I have no objection, your Honor. I
16 would note it's also Defense Exhibit No. 1, and I would offer
17 that as well, so it's received.

18 THE COURT: Both P-1 and D-1; is that the idea?

19 MR. ECKERSLEY: Yes, your Honor.

20 MR. ORCHARD: Yes.

21 THE COURT: P-1 and D-1 are received.

22 MR. ORCHARD: Thank you

23 (Exhibit Nos. P-1 and D-1 received into evidence)

24 Q. BY MR. ORCHARD: Would you read that final paragraph,
25 sir?

1 A. "Every minute of time I billed in Merce, I've worked.
2 I suggest in the future before you criticize anyone's time, you
3 know as much about what was done in the case as the person who
4 did it. Your criticism to me was hurtful. No one in this
5 office should criticize anyone's time spent in a file without
6 knowing everything about that file, and speaking in calm and
7 unhurried manner with the person billing the time. Don't
8 bother to ask about going to lunch or to the lounge. I will
9 join when I feel like it. Gary."

10 Q. Okay. Is that what you expected that -- thank you.

11 MR. ORCHARD: May I grab the exhibit notebook, your
12 Honor?

13 THE COURT: You may.

14 Q. BY MR. ORCHARD: Okay. Is that what you expected,
15 Mr. Ferguson, that one of your partners would do if they
16 believed you were over-billing; and that is, go to you and
17 know the details of the file?

18 A. Yes.

19 Q. I want to take you to the day you were fired by your
20 partners. Do you remember that day?

21 A. Yes.

22 Q. It was Mar -- it was May 5th of 2005; is that correct?

23 A. Correct.

24 Q. What do you remember about your meeting with your
25 partners when they fired you, when it began?

1 A. Both George and Elliot walked into my office, and that
2 was unusual. I can't remember if it ever happened before in
3 14 years. They sat down, and Elliot did almost all of the
4 talking. What he told me was that I was being fired for over-
5 billing, UMIA.

6 Q. How did you react?

7 A. I told him that I had not over-billed UMIA. Then I
8 asked him what files and what ca -- or what files and what
9 days did he believe I over-billed UMIA. He responded no
10 specific dates, no specific cases. He said, "We concluded
11 that you had over-billed, because you billed more than Bruce
12 Jensen and Jody Burnett.

13 Q. How did you respond to that?

14 A. Well, I didn't have the monthly time sheets to know
15 one way or other if that was true, but I told them -- they knew
16 that I had my kids' graduations coming up. I had something
17 else scheduled. They knew that I was working extremely hard
18 on these files. So I told them again, "I did not over-bill
19 UMIA, and I can show you. Just give me time." They said, "No,
20 it was unanimous. The partners unanimously said you're being
21 fired." I said, "Okay. What did you tell UMIA?" He said, "I
22 told Marty that you can no longer trust Gary's bills."

23 Q. How did you react to that?

24 A. I told him that he'd poisoned the well at UMIA.

25 Q. What did you mean when you said he poisoned the well

1 of UMIA?

2 A. By making that lie to UMIA, he -- it was going to
3 result in the -- all of my files being taken from me, no source
4 of income, nothing. Nothing to take to another law firm.

5 Q. Okay. Was Mr. Hunt in the room when Mr. Williams said
6 that?

7 A. Yes.

8 Q. Was Mr. Hunt taking notes?

9 A. Yes.

10 Q. Do you recall that he wrote down what you said about
11 Elliot poisoning the well with UMIA?

12 A. I saw that during his deposition when I reviewed those
13 notes.

14 Q. Okay. Had you ever been fired in your life?

15 A. Never.

16 Q. How did you react to this news?

17 A. Well, it's the worst -- I've never lost a child. So I
18 imagine that's the worst emotion, but it's the worst emotion I
19 have ever felt in my life. It was as if somebody had taken a
20 bat right to my stomach; and it was all I could do to breathe,
21 and as soon as George and Elliot left my office, and I could
22 recover enough to make a phone call, I called Art Glenn.

23 Q. What -- I want to take you back.

24 A. No, excuse me.

25 Q. No, it's okay. What was it about what they said that

1 was so hurtful?

2

3 A. Well, it wasn't true, and it was not only not true,
4 it's the worst thing you can accuse a lawyer of, stealing from
5 their client. You see lawyers get disbarred -- if they get
6 disbarred for anything across the country, it's stealing from
7 their client.

8 Q. Okay.

9 A. And that's what they did; they accused me of it.

10 Q. So you say you called Mr. Glenn?

11 A. I called Art Glenn, and I said --

12 Q. Remind us again --

13 A. -- it's just --

14 Q. -- remind us again briefly of who Art Glenn is.

15 A. He's vice-president of claims at UMIA.

16 Q. Okay. What did you tell Mr. Glenn?

17 A. What Elliot had told me. That I was being terminated
18 for over-billing, and that he told Marty that they could no
19 longer trust my bills.

20 Q. What did Mr. Glenn say?

21 A. Mr. Glenn said that -- and I also asked Mr. Glenn, "Do
22 you have any evidence, any suspicion that I was over-billing?"
23 He said, "Absolutely not," and he said that Marty would let him
24 know quickly what they were going to do.

25 Q. But was it out of Art Glenn's hands?

1 A. Yes.

2 Q. Did you talk to Mr. Glenn again?

3 A. He called me the following day and told me that Marty
4 had come in from -- well, I don't know if Marty came into his
5 office; but Marty had instructed him, instructed Art, to pull
6 all of my files, all my UMIA files, and reassign them to other
7 attorneys at Williams and Hunt.

8 Q. Did you -- were allowed to do another thing for any of
9 the -- how many -- how many cases did you have open -- how many
10 doctors or hospitals or nurses were you representing at this
11 time?

12 A. Well, according to Mr. Glenn's flow sheet, it's
13 approximately 14.

14 Q. Were you able to do anything else from that day
15 forward, meaning May 5th of 2005, for any of the UMIA cases
16 or any of these clients?

17 A. No.

18 Q. Even today have you ever gotten another UMIA client -

19 A. No.

20 Q. -- or case?

21 A. Excuse me. No.

22 Q. So you're fired that day. What were you required to
23 do, in terms of your office?

24 A. They to -- they told me I had to vacate immediately.
25 So it's at the end of the day, and I get in my car, and I drive

1 home. I walk in the door, and my wife's wondering why I'm home
2 so early, and I tell her why, and she looks like she's been
3 shot. She staggers around the house, and we -- I tell -- my
4 daughter's in town, and my son's in town. So we let them know
5 what has happened, and they come over to help me move my stuff
6 out, because I've got 14 years worth of stuff in my office;
7 furniture, legal books, form stuff, all kinds of stuff.

8 We all get together, and this is extremely hard, after
9 what's happened to me. We get together, we take our trucks,
10 and head over to the office. As soon as we get in the office
11 I try to use the pass key to get into the parking terrace so
12 that -- or the underground parking, so that I can go up to the
13 office and get my stuff out. They'd already taken me off the
14 list, so I could not even get into the building to move my
15 stuff out.

16 Q. Okay.

17 A. So we all --

18 Q. Excuse me, go ahead. What did you do to remove the
19 files?

20 A. We went in the next day as early as the office was
21 open, and under -- we had to move all that stuff out as quickly
22 as we could into pick-up trucks, and it's boxes and boxes and
23 furniture. Some of it was damaged, and some of it was given --
24 some of it was given to me by clients. So we're (down, and I
25 looked at that furniture, and I'm thinking -- I remember that

1 day. I know it doesn't have a lot of value, but that -- those
2 are the circumstances.

3 Q. Okay.

4 A. And they only gave us until like noon of the second
5 day to get everything out.

6 Q. How did this affect you from that day going forward?

7 A. I think about it every day. The first -- the first
8 time -- I don't know how many weeks. I couldn't sleep at
9 night. It's nothing but cold sweat, and I'm not one to
10 just sit back, move to another state or anything, because
11 my reputation had been damaged. I was not going to move
12 to another state like California or Wyoming where I could
13 practice. So I immediately started looking for someplace to
14 work as a lawyer, as a trial lawyer in Salt Lake County.

15 Q. What kinds of places did you look for work?

16 A. Looked at large defense firms, like Parsons, Behle;
17 Snow, Christensen and Martineau. Then I also looked at
18 smaller, and Strong and Hanni; and Kipp and Christian, and
19 none of them would offer me a position.

20 Q. Why not? What is the reason?

21 A. Well --

22 MR. ECKERSLEY: Objection, foundation, your Honor.

23 THE COURT: Sustained.

24 Q. BY MR. ORCHARD: Were you ever given the reasons why
25 they wouldn't hire you?

1 A. One of them said that I was too old, another one said
2 that I had too much capacity. I'm not sure what that means.
3 The other said that they just did not need lawyers.

4 Q. Did any of them ask you in the interview process about
5 whether or not you were able to bring any business with you?

6 A. I never even got to an interview.

7 Q. Were you able to represent to them, as part of your
8 resume, that you could bring business to them?

9 A. I knew that I could not. I did not have any.

10 Q. So unlike the time when you were first starting with
11 Williams and Hunt, did you have a book of business to bring to
12 anyone after you were fired from Williams and Hunt?

13 A. No, none.

14 Q. How long did you try to get a job doing the medical
15 malpractice defense work that you'd been doing?

16 A. Weeks, because it took time for some of them to make a
17 final decision, like Parsons, Behle and Latimer.

18 Q. Did you get another job?

19 A. I did.

20 Q. Who are you working for now?

21 A. Siegfried and Jensen.

22 Q. So instead of being able to represent doctors and
23 hospitals and nurses, what are you doing now?

24 A. I sue them.

25 Q. How does that make you feel, in contrast to what you

1 were doing before?

2 A. I'm very careful with the cases I take. They're
3 always -- they're always meritorious, and it makes me very
4 uncomfortable at times, because my son's halfway through his
5 anesthesia residency here in the State, and his dad's on the
6 phonebook.

7 Q. On the what?

8 A. On the phonebook. I'm on the back page of the phone-
9 book. So you can -- any of those people up at the U can turn
10 the phonebook over and see his dad.

11 Q. How does that make you feel?

12 A. Well, it makes me feel embarrassed for my son, that
13 he has -- you know, has to potentially deal with that in the
14 future.

15 Q. Okay. What's your arrangement with Siegfried and
16 Jensen, in terms of how do you earn income there?

17 A. There are no draws with me. I live on my 401-K.

18 Q. Still?

19 A. I'm -- yes. I'm paid -- medical malpractice cases are
20 set at one-third by the Utah State Legislature. So Siegfried
21 and Jensen's contract is one-third with their clients, and I
22 receive one-third of the one-third.

23 Q. Just so we're clear, you mean, medical malpractice
24 case for a plaintiff means that the lawyer's paid if you win
25 only, right?

1 A. Yes.

2 Q. And if you win, you get one-third of what's paid to
3 the client?

4 A. No, I get -- Siegfried and Jensen gets one-third of
5 what's paid to the client. I get one-third of what's paid to
6 Siegfried and Jensen.

7 Q. Okay. How much money did you make -- you're fired
8 May 4th -- May 5th of 2005. How much money did you make at
9 Siegfried and Jensen when you started in late June 2005 through
10 December?

11 A. My W-2 for 2005 from Siegfried and Jensen is \$1,082,
12 and that's a Christmas bonus.

13 Q. Did you settle any cases or try any cases?

14 A. No.

15 Q. Okay. How long does it take a typical medical
16 malpractice case, from the plaintiff's perspective to get
17 through settlement and trial, generally?

18 A. Usually between two-and-a-half and three years, if
19 you picked a good case.

20 Q. And if you haven't picked a good case, what happens?

21 A. You just wasted your time.

22 Q. How much money did you make in 2006 from Siegfried and
23 Jensen?

24 A. 22,000.

25 Q. How much did you make in 2007?

1 A. 67,000.

2 Q. When you were a partner with Williams and Hunt, by
3 2004, 2005, how much were you making a year?

4 A. It av -- there was -- it ranged, but it was -- the
5 range was from roughly 216,000 to 225 -- or 250,000, and
6 usually closer to 250,000.

7 Q. Per year?

8 A. Per year.

9 Q. Just one second.

10 A. Go ahead.

11 Q. Is there a difference in the benefits that you are
12 getting at Siegfried and Jensen, compared to what you were
13 getting when you were with Williams and Hunt?

14 A. The 401-K is less.

15 Q. Any other differences?

16 A. No.

17 Q. Do you get to take a draw?

18 A. No. That's not a benefit, or I -- that's just
19 compensation. There's no draw at Siegfried and Jensen.

20 Q. Well, I guess what I'm asking you is, what are the
21 differences in the employment, if we haven't talked about them?

22 A. At Siegfried and Jensen, I don't get paid unless I
23 settle a case. So I may not get paid for an entire year. At
24 Williams and Hunt I got paid every two weeks.

25 Q. Just like everybody else?

1 A. Yes.

2 Q. Okay. When your cases were taken from you that day,
3 who got them?

4 A. For the most part, Kurt Frankenberg.

5 Q. But your firm got your cases?

6 A. Right. Excuse me, Williams and Hunt.

7 Q. So Williams and Hunt got your cases and they got your
8 clients when they fired you on --

9 A. Yes.

10 Q. -- May 5th, 2005?

11 A. Yes.

12 MR. ORCHARD: That's all I have at this time.

13 THE COURT: Mr. Eckersley.

14 MR. ECKERSLEY: Thank you, your Honor. If I could have
15 a moment?

16 THE COURT: You may.

17 CROSS EXAMINATION

18 BY MR. ECKERSLEY:

19 Q. Mr. Ferguson, let's go back to where you started
20 yesterday in your testimony. You recall you gave the jury a
21 whole bunch of examples, a whole bunch of reasons why medical
22 malpractice cases require additional effort, in your mind, from
23 the run of the mill cases?

24 A. Yes.

25 Q. Do you recall that? Part of that was because of the

1 inherent complexity. That's what you testified?

2 A. Yes.

3 Q. And part of it was because of the risk to which your
4 client, the physician client was exposed?

5 A. Potentially exposed.

6 Q. And you went through a number of potential problems
7 that were inherent in malpractice cases for your client, the
8 physician?

9 A. Yes.

10 Q. You would agree with me, would you not, that that
11 entire testimony that you gave about the need for more work
12 to go to malpractice cases was just as true in 2003 as it was
13 in 2005?

14 A. Yes.

15 Q. And just as true in 2004 as it was in 2005?

16 A. Yes.

17 Q. Therefore, you would agree with me, would you not,
18 that that in no way speaks to the spike in your hours in 2005?

19 A. That was not the question. The question was, why were
20 they -- "Why did they take more time?" The question was not,
21 "Why did you have more time in 2005?"

22 Q. Right. So that -- all of that testimony you gave
23 yesterday about the need to work so hard on malpractice cases
24 did not speak to why your hours went up in 2005, did it?

25 A. Yes, it -- excuse me Yes, it does For those very

1 reasons, you have to spend more time on medical malpractice
2 cases.

3 Q. You were doing medical malpractice cases almost
4 exclusively in 2004; were you not?

5 A. Probably.

6 Q. So that all the factors you discussed were equally
7 applicable to 2004 -- excuse me -- as 2005?

8 A. You've not listed all of the factors, Mr. Eckersley.
9 The reason I had more time billed in 2005 --

10 Q. I'm not asking you why you had more time billed. I'm
11 asking you, isn't it true that everything you testified to as
12 to the reason why you had to work so hard on malpractice cases,
13 all of those factors, were equally true in 2004 as 2005?

14 A. That's not true.

15 Q. Tell me why.

16 A. Because in 2004 I did not have the scheduling orders
17 in place that I had in Merce and Robb.

18 Q. Is it your testimony that it was equally important,
19 barring scheduling orders, that you say contained your order,
20 to -- for the factors that you listed about complexity,
21 exposure to client, all of those were at play in 2004, just as
22 they were in 2005?

23 A. Also, in 2004 I did not have my children graduating.
24 I did not have four weeks of vacation --

25 Q. That's not my question, Mr. Ferguson. My question

1 was, were the factors you testified to the jury about, meaning
2 complexity of the case, importance to the client, risk to the
3 client equally applicable in 2004 as 2005?

4 A. Correct, yes.

5 Q. You testified at some length about your deposition
6 work in a case called West; do you recall that?

7 A. Yes.

8 Q. Are you aware that the West case was concluded long
9 before 2005?

10 A. Yes, but my reference --

11 Q. Thank you, sir.

12 A. -- no.

13 Q. You testified about doing some preparation for your
14 clients, and how important you thought that was, correct?

15 A. Yes.

16 Q. And then you talked a little bit about the Robb case,
17 and the depositions of April 7th and 8th; do you recall that?

18 A. I did not talk about those.

19 Q. Well, you testified in connection with the work that
20 was done. The question was posed to you, if in fact the lawyer
21 comes in and testifies that he was co-counsel in those cases,
22 or representing the co-defendant in those cases, and billed
23 less than half the time that you billed in connection with
24 those depositions, what would be the explanation for that; do
25 you recall that?

1 A. You're going to have to refresh my recollection,
2 Mr. Eckersley.

3 Q. You were asked that question, but you didn't really
4 respond to it. You started talking about how significant the
5 Robb case was, because it was a paraplegic case; is that right?
6 You talked about the exposure of your client, and what I'm
7 asking you is, with specific regard to April 7th and April 8th,
8 the depositions that took place on April 8th, did you prepare
9 any witness in that case?

10 A. We did not discuss April 7th and April 8th yesterday in
11 my direct testimony.

12 Q. I guess we'll leave that for the jury to decide, but
13 let's discuss it now.

14 MR. ORCHARD: Objection. Your Honor, I object to that
15 comment; it's not relevant. Ask that it be stricken.

16 THE COURT: Mr. Eckersley, I'm going to sustain the
17 objection, and let's try to --

18 MR. ECKERSLEY: Understood, your Honor.

19 THE COURT: -- avoid the editorializing; but you may go
20 forward.

21 Q. BY MR. ECKERSLEY: I've placed before you what has been
22 marked as Defendant's Exhibit 3. Do you see that?

23 A. Yeah.

24 Q. Are you familiar, generally, with this kind of
25 document?

1 A. Yes.

2 Q. And it's entitled "timekeeper diary;" is it not?

3 A. Yes.

4 Q. And this one purports to be specific to you?

5 A. Yes.

6 Q. Covering the time period between January 3rd -- that
7 would be the first page -- and April 14th being the last page;
8 do you see that?

9 A. Yes. Well, the date -- says, "Show entry narrative."
10 It says, "Date, 1/01/2005 to 4/30/2005."

11 Q. Okay. Do you see the first entry, that's actually --
12 what purports to be time worked?

13 A. Okay, yes.

14 MR. ECKERSLEY: And by the way, your Honor, we'd offer
15 Defendant's 3.

16 THE COURT: Any objection?

17 MR. ORCHARD: No, sir.

18 THE COURT: D-3 is received.

19 (Exhibit No. 3 received into evidence)

20 Q. BY MR. ECKERSLEY: And the first day indicates that the
21 first day in January they'd be billed for was January 3rd, 2005,
22 correct?

23 A. Correct.

24 Q. On the last page, do you see the last entry, where it
25 purports to show time that you billed?

1 A. Now, are we talking about page 21?

2 Q. Well -- yes.

3 A. Yes, I see that.

4 Q. Thursday, April 14th, 2005?

5 A. Yes.

6 Q. Now, if you would, would you find the date for which
7 it shows your time entries for March 23rd?

8 A. I've got it.

9 Q. Are you using --

10 A. It's Exhibit -- your Defense Exhibit 4.

11 Q. Okay. In your testimony today -- well, let's go to --
12 I'm sorry, I lost my train there. April 7th, are you at? I'm
13 sorry, I think I -- I might have directed you to March 23rd.
14 I'd appreciate if you go to April 7th now.

15 A. What page it's on?

16 Q. That would be 19.

17 A. Which exhibit?

18 Q. Defendant's 3, Mr. Ferguson.

19 A. I'm there.

20 Q. That says, "Thursday, April 7th"?

21 A. Yes.

22 Q. The first listing is for the Robb case; is it not?

23 A. Yes.

24 Q. It lists 3.25 hours; does it not?

25 A. Yes.

1 Q. It lists, "Conference with Sean McGary, preparation for
2 weigh depositions of Dr. Tippetts and Dr. Mark. Preparation
3 for depositions in conference with your paralegal," correct?

4 A. Correct.

5 Q. On that day, you didn't prepare any witness for the
6 deposition, did you?

7 A. No, I did not.

8 Q. And neither Dr. Tippetts, nor Dr. -- you've listed
9 Mark. That's an abbreviation; is it not?

10 A. Yes.

11 Q. Neither one of them were your client, were they?

12 A. No.

13 Q. In fact, if you go to the next page, to April 8th, do
14 you see the first entry there?

15 A. Yes.

16 Q. And it says, "10 hours preparation for and appearance
17 at deposition of Rick Tippetts, conference with Dr. Mark --" is
18 it Markovich?

19 A. I don't remember.

20 Q. And then "Appearance at deposition of Dr. Markovich.
21 Do you see that?

22 A. Yeah.

23 Q. All right. Do you recall those depositions?

24 A. No.

25 Q. Do you recall you didn't ask a single question in

1 either of those depositions?

2 A. That's not unusual.

3 Q. But it's true for those occasions, isn't it?

4 A. No, it's not unusual across the board for defense
5 lawyers. In fact, if a defense lawyer asks an inappropriate
6 question in the deposition of plaintiff's experts -- and that's
7 what these were -- it could cause trouble. So that's --

8 Q. So it's consistent with your practice often to ask no
9 questions?

10 A. No, that's not true. What we do is we decide who is
11 going to take the lead on plaintiff's expert. I don't remember
12 these deposition. I remember that Dr. Tippetts was a neuro-
13 surgeon, who treated and was designated by plaintiff's Counsel
14 as an expert in the Robb case. I don't remember Dr. Markovich
15 from Adam. So I don't know who he is, other than probably
16 plaintiff's expert, because my printed calendar says we set
17 aside these days to take the depositions of plaintiff's expert.

18 Q. So you don't re -- if it would have been plaintiff's
19 expert, you would have been asking questions, right?

20 A. Well, it all depended on how much the other -- whoever
21 was designated among the UMIA defense attorneys to take the
22 lead on that expert.

23 Q. Do you remember being designated to take the lead on
24 that expert on April 8th?

25 A. I don't remember anything about this It's three

1 years, Mr. Eckersley.

2 MR. ECKERSLEY: May I approach, your Honor?

3 THE COURT: You may.

4 THE WITNESS: Almost three years.

5 Q. BY MR. ECKERSLEY: Let me show you what purports to be
6 a copy of a deposition that Dr. Mark did -- Markovich shared,
7 and ask you if that refreshes your recollection about whether
8 you asked any question.

9 A. Dr. Markovich is -- this is what shows you what three
10 years will do. He was my expert in the Robb case. He was my
11 emergency medicine physician.

12 Q. So he was --

13 A. So he was -- just a second.

14 Q. -- your expert witness?

15 A. Yes, he was my expert witness. This has -- three
16 years had passed. Nobody raised this, and that -- you don't
17 ask your own expert witness questions. That's malpractice to
18 do that.

19 Q. So you agree with me you asked no questions at that
20 deposition?

21 A. Why? Otherwise I would have been committing
22 malpractice. I mean, objection after objection.

23 Q. But no (inaudible)?

24 A. Okay.

25 MR. ECKERSLEY: May I approach again, your Honor.

1 THE COURT: You may.

2 Q. BY MR. ECKERSLEY: Let me show you what purports
3 to be the transcript of Dr. Tippetts' deposition taken on
4 April 8th. Does that refresh your recollection as to the fact
5 that Dr. Tippetts was not anybody's expert. He was actually a
6 treating physician?

7 A. Dr. Tippetts was a neuro-surgeon. My memory is he
8 was the one when Mr. Robb was transferred by life flight from
9 Cedar City to LDS Hospital, Dr. Tippetts was one of the neuro-
10 surgeons who worked on him. So he was -- well, as you know,
11 Mr. Eckersley, in medical malpractice cases, subsequent
12 treating physicians are both fact witnesses and expert
13 witnesses; and the plaintiffs had designated Dr. Tippetts
14 as an expert witness, in addition to a fact witness.

15 Q. Do you recall, in point of fact, the first-- plaintiff
16 wouldn't be deposing their own expert witness, would they?

17 A. On occasion they do.

18 Q. There's no reason to think that's what's going on
19 here, is there?

20 A. I don't know. I'd have to read the entire deposition.

21 Q. Do you recall, in fact, that you made several
22 objections in that case, saying that it was inappropriate to
23 ask for expert opinion from his treating physician?

24 A. So that I could preserve that objection at trial.

25 Q All right So but if you made that objection, that

1 means that this person, in your opinion, was not an expert?

2 A. No, not necessarily.

3 Q. Now, do you have in front of you Defendant's Exhibit
4 18?

5 A. What is that? No, I don't. I just have 3 and 4,
6 defense 3 and 4.

7 Q. Have you seen this document before?

8 A. I saw it for the first time 14 months ago -- after I was
9 terminated --

10 MR. ECKERSLEY: -- We'd offer --

11 THE WITNESS: -- at George Hunt's deposition.

12 MR. ECKERSLEY: We'd offer Defendant's 18, your Honor.

13 MR. ORCHARD: Your Honor, we object. There has not
14 been an adequate foundation laid as to who created this, what
15 it's based on, anything like that.

16 THE COURT: The objection's sustained.

17 Q. BY MR. ECKERSLEY: Let me ask it this way. Do you
18 recall -- let's go back -- go back now to Defendant's 3, for
19 the date of April 8.

20 A. Defendant's 3?

21 Q. Yes.

22 A. Okay. April 8th, okay.

23 Q. What was your total hours billed on April 8th?

24 A. It's 11.25 hours.

25 Q. And do you know what day you created that bill?

1 A. No, I don't.

2 Q. Will you go to defendant's 4, Exhibit 4, and you'll
3 find in there the date where you billed time for April 8th.

4 A. Do you have the page number?

5 Q. Page 1. Each of these -- each batch date, that
6 doesn't have a running total.

7 A. Right. Okay, but this is one that was -- it has a
8 print date of February 1st, 2006, and a batch No. 1 -- 15503.
9 That's the one we're talking about?

10 Q. Is that -- no, it's 15420, dated 4/08/2005.

11 A. Okay. Again, a print date of February 1st, 2006, and
12 batch No. 15420. I see that.

13 Q. All right, and how many hours did you bill on that
14 day?

15 A. It's 11.25.

16 Q. And are you aware that you were in the office for only
17 9 hours on that day?

18 A. I have no memory of either of these days. How -- are
19 you -- just a second. May I have the Markovich deposition
20 back? Do you have -- may I look at the Markovich deposition?

21 Q. Are you looking for a concluding time?

22 A. The Markovich deposition was taken at Williams and
23 Hunt on April 8th. So I would have been there for the entire
24 time of that deposition.

25 Q. Then it wouldn't surprise you if your computer was on

1 during the entire time of that deposition, would it?

2 A. I wouldn't know one way or the other.

3 Q. You mean, you don't know today, is what you're saying?

4 A. Pardon me?

5 Q. You mean, you don't know today whether your computer
6 was on during the entirety of that deposition?

7 A. I have no idea.

8 Q. And can you look at your bill for that day and
9 determine how long after the deposition concluded you might
10 have called it a day and left the office?

11 A. Now, we're looking at batch No. 15420 again?

12 Q. Yes. Well, I was asking you to actually go to
13 Defendant's Exhibit 3, and look there; but the same work is
14 described on Exhibit 4. So if you can make that determination
15 from Exhibit 4, let me know.

16 A. I would have no idea how often -- how long I was in
17 the office at Williams and Hunt on April 8th, other than the
18 deposition time for Dr. Markovich. That's all I would know.

19 Q. Does the transcript show what time the deposition
20 ended?

21 A. At 3:45 p.m.

22 Q. Any -- but you can't tell us today how long you might
23 have been in the office after that?

24 A. It's almost three years ago.

25 Q. I understand. My question is, you cannot?

1 A. No, I cannot. I could have told you that in April of
2 2005, but I can't tell you now.

3 Q. Okay. Do you recall at the time of your deposition,
4 Mr. Ferguson, of me presenting you with a number of days
5 wherein I represented to you that the documents would
6 ultimately show that you billed on that day on your computer
7 for more time than had elapsed with you in the office on those
8 days?

9 A. I know that that was your conclusion. I disagreed
10 with it.

11 Q. And I asked you to explain that at the time; did I
12 not?

13 A. Yes.

14 Q. And after the deposition, you chose to supplement that
15 answer; did you not?

16 A. Yes.

17 Q. And what you did then was raise for the first time
18 this notion that you estimated your bills before you went home
19 at night?

20 A. No, that's not true.

21 Q. Do you recall using the phrase "I estimated my bills"
22 during your deposition?

23 A. I don't remember that one way or the other, but it's
24 just like anything. When you concentrate on it, and you start
25 thinking, okay, how else did I do it; yes, that's what those

1 sheets are for.

2 Q. So when you found your answer given at the deposition
3 to be inadequate, and on further contemplation, then you
4 remembered to estimate your time before you go home at night?

5 A. I did recall that, yes. My deposition was taken 14
6 months after I left Williams and Hunt, and at least that long
7 since I entered any time; but I specifically recall doing that
8 on numerous times where I would enter time on a day that I
9 was going to be doing it that night. You know that doctors
10 frequently are deposed after 5 o'clock. That's when they want
11 to be deposed, after 5 o'clock. They want to be deposed before
12 7 in the morning. So yes, I go in; and frequently I would
13 estimate that time, Mr. Eckersley, because I would not know
14 whether or not I'd have enough time in the morning to enter it,
15 or whether or not I'd even remember.

16 Q. Remember what?

17 A. Remember that I'd done -- gone to, say, a deposition
18 at 5 o'clock that night.

19 Q. My question was this. Do you recall at your deposition
20 you did not testify that you used to estimate your time for the
21 work you were going to do after hours?

22 A. I don't recall one way or the other.

23 Q. But you do know that you felt the need to supplement
24 your answer by putting in the language that said, "I estimated
25 my time."

1 A. In addition to other language.

2 Q. And I think I heard you say today that you would
3 come back and fix the billings if your estimate proved to be
4 inaccurate.

5 A. Right.

6 Q. Show me a case where you did that, sir.

7 A. How am I supposed to do that?

8 Q. Why -- why can't you do it?

9 A. I have none of the records. I haven't had access to
10 the records since May 5th, 2005. How am I supposed to do that?

11 Q. Mr. Ferguson, you're a lawyer; are you not?

12 A. Yes.

13 Q. And you know the discovery process and how it works;
14 do you not?

15 A. Yes.

16 Q. You know that you could have requested any documents
17 from the defendants that you wanted that were relevant to this
18 case; are you not?

19 A. Let me think about that. I saw no need to request
20 those records, and I can't -- for years --

21 Q. Is the answer to my question --

22 A. No.

23 Q. -- yes?

24 A. No, I'm not finished.

25 Q. Was the answer to my question, "Yes, I'm aware of

1 that"?

2 A. No.

3 Q. You're not aware that you could have requested
4 documents?

5 A. What I could have done, if I could remember a case
6 when that occurred, I could have said, okay, prepare a request
7 for production. Request the billing records from Williams and
8 Hunt for Dr. Smith -- or for Smith vs. Jones, and for this day.
9 Then we could have shown that; but I know -- I know that I
10 would estimate time, enter it, and then go back, get the batch
11 number, and revise the time either up or down. I know I do it.
12 I know I did it.

13 Q. Are you aware of any example of that happening in any
14 billing from January 3rd, 2005 to May 4, 2005?

15 A. Not three -- almost three years later, no.

16 Q. And you made no effort to determine that, due to
17 discovery process?

18 A. I could not recall any case at that time about it.
19 Can you -- did you go through all the Williams and Hunt
20 records, because you --

21 Q. That's not my question.

22 A. Okay.

23 Q. My question --

24 A. Excuse me, your Honor, I apologize.

25 THE COURT: Excuse me, let me interject here. I

1 ordinarily would not do this; but I want to make it clear,
2 as I would make clear to any witness, if you don't understand
3 the question, then you can ask Counsel for clarification of a
4 question. However, as a witness, you do not get the privilege
5 to ask Counsel questions. It's totally improper of any witness
6 to do that, and I'd ask that you refrain from doing that.

7 Next question, Counsel.

8 THE WITNESS: I will do so.

9 Q. BY MR. ECKERSLEY: Tell me the procedure that you think
10 you would use if you were going to go back and correct one of
11 your faulty estimates. Walk me through that.

12 A. You enter the batch edit number, and --

13 Q. Where? How?

14 A. In the billing system.

15 Q. From your computer?

16 A. From my computer. You put in the batch entry system,
17 and then it pulls up those days that you've entered that time,
18 and the file, and the description and everything, and then
19 you go in and adjust the time that you've put down. At least
20 that's the way it was, to the best of my recollection; but it's
21 been two-and-a-half or three years, Mr. Eckersley.

22 Q. And where do you think those corrections would appear?

23 A. I don't know where they appear.

24 Q. And would doing that create a -- excuse me, make a
25 different title, right? -- a record in the time entry batch

1 audit list under your entry?

2 A. I have no idea.

3 Q. You know, a couple of times you referred to yourself
4 as a trial lawyer; have you not?

5 A. Yes.

6 Q. It's something of a hyperbole; is it not? How many
7 cases did you try at Williams and Hunt to a jury?

8 A. They settled most of their cases.

9 Q. How many cases did you try at Williams and Hunt to a
10 jury?

11 A. I'd have to sit down -- I've got a list. I could
12 produce the list and find the number of cases I tried while at
13 Williams and Hunt. I cannot recall.

14 Q. It's like three or four, isn't it?

15 A. I'm not going to speculate, Mr. Eckersley.

16 Q. It's not five?

17 A. I don't know. I tried more cases there than anybody
18 else.

19 Q. When you were listing the organizations to which you
20 belong, I noticed you didn't list the American College of Trial
21 Lawyers.

22 A. No.

23 Q. And is it -- are there members of the firm who are
24 members of the American College of Trial Lawyers?

25 A. Pardon me? What was your question?

1 Q. Are there other members of the firm of Williams and
2 Hunt who are fellows of the American College of Trial Lawyers?

3 A. I believe Elliot is, and I believe he got Dennis in.

4 Q. And you know that the organization is one that is
5 limited to 1 percent of the membership of the bar?

6 A. I don't know that. I know that it's by invitation;
7 and from some of the members who I see who've been invited,
8 they are not, by far, the best trial lawyers in this state.

9 Q. Let's go to the 23rd, if we can; and go either way.
10 You can go Exhibit 4, you can go Exhibit 3. This is the 23rd
11 of March.

12 A. Right. Okay, I've got it.

13 Q. You got it? Now, in your direct examination you
14 indicated that some of the entries here are for work that was
15 performed at home; do you recall that testimony?

16 A. No, I said that it may have been performed at home.
17 It was per -- any part of this -- any of these items, other
18 than the office conferences, could be done at home, they could
19 be done in the library, they could be done in a doctor's
20 office, they could be done anywhere, except for the office
21 conferences.

22 Q. Look at the entries, if you would.

23 A. Okay.

24 Q. Do you see any there that you remember doing at home?

25 A. No, I don't remember anything about these entries.

1 Q. I will ask you to think back and see if you can
2 recall; and the jury will ultimately be the ones who will
3 be called upon to resolve this, but I believe your direct
4 testimony was --

5 MR. ORCHARD: Your Honor, I would move -- your Honor,
6 I think it's inappropriate for the editorial comment.

7 THE COURT: Well, okay.

8 MR. ORCHARD: I object. He can ask the question
9 without doing this.

10 THE COURT: Excuse me. Your objection is very, very
11 technically correct. At the same time, it is also a very
12 true statement, as I instructed the jury previously that they
13 will be called upon to resolve the questions of fact in this
14 particular case. So while it's technically correct, in any
15 real, meaningful sense, the statement is not improper.

16 Now, I'm going to request Mr. Eckersley to refrain
17 from doing it; but I want to make it clear, it's just a
18 reaffirmation of the instructions that I've already given
19 the jury as to they will be the final decision maker in terms
20 of what the facts are in this case.

21 MR. ORCHARD: My only point, your Honor, is that's your
22 job, and that's their job. That's not our job to comment on
23 it. That's my objection.

24 THE COURT: Next question, please.

25 Q. BY MR. ECKERSLEY: Do you see the entries for Robb vs.

1 Cox?

2 A. Yes.

3 Q. I take it you do not recall when you did that work or
4 where you did that work?

5 A. Correct.

6 Q. One of the entries is for preparation of a Bordereaux
7 report; do you see that?

8 A. Yes.

9 Q. Tell the jury what a Bordereaux report is.

10 A. A Bordereaux report is required by UMIA on the high
11 exposure cases. It's my understanding that UMIA takes that
12 information and passes it along to their re-insurance company.
13 So the re-in -- the values have to be as close to accurate
14 in those Bordereaux reports as possible.

15 What we are -- what Mr. Glenn and Doug Smith told me
16 is, "You've got to be thorough. You cannot leave out anything
17 that's happened between the last Bordereaux report and this
18 Bordereaux report." So they have to be factually accurate.
19 You have to contain the information from the deposition that
20 was taken in between the last Bordereaux report and this
21 most recent Bordereaux report, Court ruling information --

22 MR. ECKERSLEY: Your Honor, my question simply went to
23 what it was, not his methodology in preparing.

24 THE WITNESS: No, I'm answering your question.

25 THE COURT: Excuse me.

1 THE WITNESS: Excuse me.

2 THE COURT: The objection is going to be sustained.

3 Restate the question, Counsel.

4 Q. BY MR. ECKERSLEY: Bordereaux reports are something
5 that you give to UMIA to bring them up to date on the cases
6 that you're handling?

7 A. I get a letter from UMIA usually from Mr. Glenn that
8 said, "Please prepare a Bordereaux report in this case by this
9 date."

10 Q. And what you prepare is what I just described?

11 A. No, it's what I just described, before you interrupted
12 me.

13 Q. Is it, sir, a report to the company, bringing them
14 up to date on the files in your possession on which you're
15 working?

16 A. It's more than that.

17 Q. Is it at least that?

18 A. It's more than that.

19 Q. I note that you also have a time listed here for Smith
20 case; do you see that? It says, "Preparation of Bordereaux
21 Report," among other entries?

22 A. Which entry -- what number are you on now?

23 Q. Work your way down to about 5.

24 A. Okay, I see Merce at Cross. Is that the one you're
25 asking about?

1 Q. No, we're on March 23rd.

2 A. Right.

3 Q. Which exhibit are you on?

4 A. Exhibit 4.

5 Q. All right, go to Exhibit 3, if you would, so we're on
6 the same page.

7 A. Exhibit 3 is cut off on the left-hand column.

8 Q. Excuse me. You need to get to March 23rd.

9 A. (Inaudible).

10 Q. Pardon me? Page 16.

11 A. Thank you. Okay, now what is your question?

12 Q. My question is, do you see the time mentioned -- it
13 looks like it's actually the fourth entry for Smith case.

14 A. Yes, Smith vs. Long.

15 Q. At 1.75 hours?

16 A. Yes.

17 Q. And that has a Bordereaux report in it again; does it
18 not?

19 A. Yes.

20 Q. Do you recall that case?

21 A. I represented Dr. Wong.

22 Q. My question is, do you recall the case?

23 A. I'm trying to re -- I don't recall that specific case.

24 My memory is that it was a new case to me.

25 Q. Do you recall a case where Collin King was local

1 Counsel involving that client?

2 A. That's not --you've got the wrong case, Mr. Eckersley.

3 Q. Do you recall the substance of the Bordereaux report
4 that you prepared in connection with this case?

5 A. The case where Collin King was local Counsel was --

6 Q. That's not my question.

7 A. -- Pinson.

8 Q. Do you rec -- oh, thank you.

9 A. Monette vs. Pinson.

10 Q. Okay. Is there an entry for a Bordereaux report in
11 that file in that case on this date?

12 A. Yes.

13 Q. All right, and it includes, as I say, a Bordereaux
14 report; does it not?

15 A. Yes.

16 Q. Do you remember that Bordereaux report?

17 A. No.

18 Q. Do you know what period of time of the 3.25 hours
19 you have listed on this entry would have been devoted to
20 preparation of that report?

21 A. No.

22 Q. Do you remember if it was two paragraphs long?

23 A. I don't remember.

24 Q. Did you occasionally submit Bordereaux reports that
25 were two pages long -- two paragraphs long?

1 A. They could be, depending on the status of the case;
2 but usually there were multiple pages.

3 Q. Do you think that you did any of those preparation of
4 the Bordereaux reports out of the office?

5 A. I very easily could have.

6 Q. How do you typically do one; do you dictate?

7 A. I can dictate it, I can use my laptop, I can print off
8 a hard copy of the last Bordereaux report, make handwritten
9 entries on those. Any one of those ways.

10 Q. And when you're done doing your part, what do you do
11 with it -- with your work; give it to your secretary?

12 A. Well, that all depends on how I did it. If I did it
13 on the PC, there's -- Williams and Hunt had a document system
14 at the time, and I would rev -- either create or revise an
15 existing document, and then send an email to the secretary and
16 say, "Okay, this is what you need to do with this Bordereaux
17 report." If I dictate it, I give them the mini-cassette to
18 transcribe; and then they transcribe it, and then I edit it.

19 Q. Regardless of how you get the information to the
20 secretary, they would then start working on the document,
21 correct?

22 A. Usually.

23 Q. So if Williams and Hunt computer records showed all
24 three of these Bordereaux reports were being worked on and
25 concluded before 4:30 on the 23rd, that would indicate to you,

1 would it not, that this is not something you did at home?

2 A. No, that's not -- that's definitely not right. I
3 could have done it at work -- I mean, at home, brought it in,
4 in the office, and finished it.

5 Q. If you did it at home, that means you would have done
6 it the day before?

7 A. No, on the 23rd I could have done it anytime before --
8 I could have done it at anytime on the 23rd. See, I went to
9 my ultrasound first thing in the morning. It took 30 minutes,
10 max, to do that ultrasound. Then I had all of that morning to
11 do the Bordereaux report.

12 Q. My question is this. If, in fact, the records show
13 that all three of these Bordereaux reports had been inputted
14 and created documents by your secretary or secretaries -- and
15 I'll discuss that with you in a minute -- by 4:30, then they
16 wouldn't represent work that you were estimating you intended
17 to do at home after 5 o'clock?

18 A. I can't answer that from just that limited facts.

19 Q. It sounds like --

20 A. Because I could --

21 Q. -- excuse me, sir.

22 A. Excuse me.

23 Q. If it's done by 4:30, your input, and the creation of
24 documents done by 4:30, why can't you answer the question that
25 it doesn't represent work that you estimated your hours for

1 that you intended to take home? It can't, by definition, sir.

2 A. Because it could be in rough draft form. I could take
3 -- print it off, take it home and revise it. I could transfer
4 the laptop and do it.

5 Q. Are you aware that the Williams and Hunt computer
6 system keeps records of every time a document is entered?

7 A. Yes.

8 Q. And are you aware that it keeps records every time a
9 document is modified?

10 A. Yes.

11 Q. And so if what you've just described is thinking
12 something that might take place, there would be a record of
13 that, wouldn't there?

14 A. I would not know that. I have not been there for
15 almost three years. It was not -- I don't know that there
16 would be a record of that. Their system is not foolproof.
17 The staff that operates it is not foolproof.

18 Q. Sir, my question is, there would be a record.

19 A. I ask --

20 Q. I'm not asking you to editorialize about the
21 competence of your former associates and staff. I'm asking
22 you, do you know that there would be a record?

23 A. I do not know one way or the other.

24 THE COURT: Excuse me, Mr. Eckersley.

25 Members of the jury, we are going to take a ten-minute

1 recess at this time. Please remember all the admonitions I've
2 given to you previously. Those admonitions continue to apply
3 at this time. We'll recess for ten minutes. Kathy, you may
4 take the jury.

5 COURT BAILIFF: All rise.

6 (Recess taken)

7 COURT BAILIFF: All rise. Third District Court is
8 again in session. Please be seated.

9 THE COURT: Your witness may retake the witness stand.

10 Q. BY MR. ECKERSLEY: Mr. Ferguson, are you aware that
11 once a batch entry has been made and placed into the system by
12 the administrator, that the timekeeper can no longer access it?

13 A. I'm not aware of that one way or the other. I know
14 that I was able to access those that I had to change.

15 Q. Do you recall ever asking anyone in administration,
16 particularly Janet Walker or Nikki Bowen, to make changes for
17 you?

18 A. What I recall, we would get email --

19 Q. Sir, my question was this.

20 A. No.

21 Q. Do you recall ever asking Janet Walker or Nikki Bowen
22 to make changes in the batch entry audit list on your behalf?

23 A. At times I would -- when Nikki Bowen was my secretary,
24 I would ask her to make batch entry revisions to my billing
25 statements where there had been an error.

1 Q. Are you aware that at the time she was your secretary,
2 Nikki Bowen did not have the capacity to enter into the time
3 entry batch audit list to make revisions?

4 A. She got it done.

5 Q. She got what done, sir?

6 A. She got the changes made.

7 Q. And so to do that, she would have had to have gone to
8 Janet Walker and ask the changes to be made?

9 A. I don't know.

10 Q. But you believe you had occasions to ask Nikki Bowen
11 to enter your time or to change your time?

12 A. Yes.

13 Q. Okay, let's go to the meeting on May 5th, where your
14 termination is announced to you. Do you recall that meeting,
15 as you testified rather emotionally this morning?

16 A. Yes.

17 Q. Do you recall at that occasion that you indicated to
18 Elliot Williams that he was crazy, he was mentally ill, and he
19 was having a drug reaction?

20 A. No, I didn't say anything about a drug reaction.

21 Q. Did you say medication?

22 A. Not me.

23 Q. But you did say he was crazy?

24 A. I did.

25 Q. You said he was insane?

1 A. I said he was crazy.

2 Q. And you said that Mr. Hunt was a stooge; isn't that
3 correct?

4 A. Yes.

5 Q. And one of your complaints, as I understand it, was
6 they couldn't point to a specific file and say, "This file
7 represents the over-billing."

8 A. No, that wasn't the major complaint. The major
9 complaint was I had not over-billed. Then when I asked, yes,
10 they could not identify any file of any day.

11 Q. Imagine this with me, all right? Let's say that you
12 had someone working under you, who you knew to have been in
13 the office for only five hours, and they submitted a bill for
14 that day for ten hours; five hours on one case, five hours on
15 another. You knew they took no work home with them, and so
16 you knew that the bill had to be overstated by five hours, all
17 right? Using that as a hypothetical, are you with me?

18 A. Yes.

19 Q. All right. It would be impossible for you to determine
20 which of those bills was false; would it not?

21 A. The only way you could find that out was to go to the
22 person and ask them.

23 Q. Well, in my hypothetical, you know them to be false.
24 So the answer to the person who has lied would be irrelevant to
25 that analysis, wouldn't it?

1 A. How would you know it?

2 Q. Because you'd know five hours of work was done, ten
3 hours was billed to two files. You cannot know which of the
4 entries is false, whether it's A, B or a combination of both.

5 A. How do you know it's false?

6 Q. I'm asking you to assume it, sir.

7 A. No, I need to know more. I need to know how you know
8 it's false.

9 Q. You assume it, sir.

10 A. Again --

11 Q. That's my question to you.

12 A. -- I can't assume it.

13 THE COURT: Excuse me. I'm going to interject here.
14 It's fairly standard practice, at least in my experience, on
15 cross examination, for Counsel to be able to put hypothetical
16 questions to a witness. I would like to direct you at this
17 time to pay very close attention to the question that's put to
18 you, answer the question, and only that question, and don't
19 make any attempt to volunteer additional information beyond
20 which the question calls for, or an attempt to argue your
21 theory of the case. Counsel -- you have able Counsel here in
22 a position to do that. So I'm going to direct you at this time
23 to answer the question.

24 Restate it.

25 Q. BY MR. ECKERSLEY: Question is this. If you have

1 knowledge that someone has worked five hours, but they have
2 billed ten hours, five on one file, five on another, it's
3 impossible for you to determine which of those entries is
4 false. It could be A is false, B is false, or a combination
5 of A and B is false; could it not?

6 A. I don't understand your question.

7 Q. What part of it don't you understand?

8 A. I don't understand it.

9 Q. All right. I'll walk through it again as slowly as I
10 can and as clearly as I can. You know that someone has worked
11 five hours. You know that they have presented a bill for ten
12 hours; five hours devoted to one case, five hours devoted to
13 another. All right; you with me?

14 A. (No verbal response).

15 Q. You can't know which of those entries is false, can
16 you?

17 A. I thought your hypothetical said to 100 percent
18 certainty, one of them is false; is that your hypothetical?

19 Q. No, sir. Listen again, please, if you would. My
20 hypothetical is this. You know five hours has been worked.
21 You know ten hours has been billed; five hours to one file,
22 and five hours to another. You don't know if the five hours
23 into the first case is false, or the five hours into the second
24 case is false, or that there's a false entry in combination in
25 one and/or the other, but you know that there's been a false

1 entry, correct?

2 A. I still don't understand your question.

3 Q. All right, then we'll leave it alone. You'd agree
4 with me, would you not, that if a lawyer had information
5 suggesting that his client had been over-billed, that he would
6 have a duty to go to that client and tell him so?

7 A. He would first have to reasonably --

8 Q. Sir, my question is, would he have a duty to go to the
9 client and tell him that?

10 A. After he reasonably investigated the facts.

11 Q. So the answer is yes, there would be such a duty?

12 A. After he did a reasonable investigation.

13 Q. And you would also expect the lawyer to try to make
14 amends to the client if he had reason to believe that the over-
15 billing had occurred?

16 A. After a reasonable investigation showed that the over-
17 billing occurred, yes.

18 Q. And you know that such occurred in this case with UMIA
19 and Williams and Hunt; do you not?

20 MR. ORCHARD: I'm sorry, object to -- it's vague. What
21 occurred?

22 Q. BY MR. ECKERSLEY: You know that there was a 10 -- over
23 a \$10,000 credit by the firm of Williams and Hunt to UMIA for
24 work that they believed you had over-billed?

25 A. I don't know that one way or the other.

1 Q. Have you ever seen bills that went out on the Robb and
2 Merce case in May of 2005?

3 A. I was fired May 5th, 2005 and locked out of the
4 building; so I would not have seen them.

5 Q. Do you know if your Counsel has seen them?

6 A. I don't know.

7 Q. Do you recall him showing them to you?

8 A. I don't recall.

9 Q. So if there are in fact over \$10,000 worth of credits
10 on that bill, you're just ignorant of that as you sit here?

11 MR. ORCHARD: That's asked and answered.

12 THE COURT: Overruled.

13 THE WITNESS: Yes.

14 Q. BY MR. ECKERSLEY: To your knowledge, did the firm ever
15 tell anyone outside of the firm, other than representatives of
16 UMIA, of the basis of your termination?

17 A. To my knowledge, they told Marty Osowski, they told
18 Art Glenn and Doug Smith.

19 Q. So the answer is, to your knowledge, you have no
20 knowledge of him telling anybody else?

21 A. Correct.

22 Q. No one that you asked for employment said, "No,
23 I'm not going to hire you, because you were fired for over-
24 billing"?

25 A. That's correct.

1 Q. In fact, the publicity associated with your being
2 terminated for over-billing was a result of actions you took;
3 was it not?

4 A. What publicity are you talking about?

5 Q. Didn't you, in your complaint in this action, assert
6 that Williams and Hunt say you were fired for over-billing?

7 A. Yes.

8 Q. And didn't you distribute that complaint to several,
9 approximately 12 members of the bar, by fax machine and
10 otherwise on the day that you filed it --

11 A. Yes, that's true.

12 Q. -- what in fact was the reason for your termination?

13 A. Excuse me, I apologize. That is true.

14 Q. So to the extent that it's known in the bar why you
15 were fired is your responsibility?

16 A. The grounds for -- the allegations of firing, yes.

17 MR. ECKERSLEY: That's all, your Honor.

18 MR. ORCHARD: May I redirect, your Honor?

19 THE COURT: Go ahead.

20 MR. ORCHARD: Thank you.

21 MR. ECKERSLEY: Excuse me, if I can give the admitted
22 exhibits to her.

23 THE COURT: You may.

24 MR. ORCHARD: We'll try to do that at a break or at
25 lunch and get all the exhibits in that we're going to agree to

1 admit, your Honor.

2 THE COURT: That's fine.

3 REDIRECT EXAMINATION

4 BY MR. ORCHARD:

5 Q. Mr. Ferguson, how long after you were fired did you
6 send out the complaint to your friends and colleagues?

7 A. Seven months.

8 Q. So for seven months did any of your colleagues or
9 friends, to your knowledge, know why you had been fired from
10 your firm where you were a partner in less than 24 hours?

11 A. No. To my knowledge, none of them knew.

12 Q. They just knew that you'd been fired?

13 A. Right.

14 Q. And some of them knew you didn't have any UMIA work;
15 is that right?

16 A. Yes.

17 Q. Mr. Eckersley made you a hypothetical based on ten
18 hours and two cases; and I want to take you back to the defense
19 exhibit, which I believe is No. 3.

20 MR. ORCHARD: To save time, may I approach the witness,
21 your Honor?

22 THE COURT: You may.

23 Q. BY MR. ORCHARD: On that date, would you please explain
24 to the ladies and gentlemen of the jury, for the hours that you
25 spent on that day that they are accusing you of over-billing

1 on, how many different cases? Were there just two?

2 MR. ECKERSLEY: Excuse me, because I did not hear the
3 date that you're speaking of.

4 MR. ORCHARD: I'm sorry, March 23rd.

5 THE COURT: The 23rd.

6 MR. ORCHARD: March 23rd.

7 Q. BY MR. ORCHARD: How many different clients or cases
8 were you billing for on that day?

9 A. According to the defense exhibit record, I billed on
10 ten cases on March 23rd, 2005.

11 Q. You also heard Mr. Eckersley say that you had spent
12 3.25 hours on your Bordereaux report for the Pinson case.
13 Would you look at that entry, please?

14 A. Yes.

15 Q. What else did you do for the Pinson case that's
16 reflected in your bill, the work, besides doing the Bordereaux
17 report for that entry?

18 A. Telephone conference with Douglas Smith, resettlement
19 negotiations and mediation, review of file, and preparation of
20 Bordereaux report, various communications with M. Smith, who's
21 Marvin Smith, a structured settlement person that UMIA uses,
22 and telephone conference with Paul Felt. I think Paul was to
23 be the mediator.

24 Q. So the Bordereaux report was one piece of all the
25 things you did in that 3.25 hours?

1 A. Yes.

2 Q. Mr. Eckersley talked to you about April 17th of 2005,
3 in preparation of witnesses.

4 THE COURT: I believe it's April 7th, Counsel.

5 MR. ORCHARD: Oh, I'm sorry, my L looked like a 1.

6 Q. BY MR. ORCHARD: April 7, 2005, do you remember that?

7 A. Yes.

8 Q. Just because you didn't prepare a witness, does that
9 mean that a lawyer doesn't prepare for a deposition?

10 A. No. You have to.

11 Q. Why do you have to prepare for a deposition, even if
12 you don't ask questions?

13 A. Because you have to have knowledge of the medical
14 records in order to make appropriate objections on misstating
15 the medical record. You need to know what your own expert's
16 area of expertise are. So you have to be fully versed in those
17 things, so you can make your objections.

18 Q. Okay. Did you make objections in the deposition that
19 Mr. Eckersley presented to you where he said you didn't ask any
20 questions?

21 A. Yes.

22 Q. How many?

23 A. Well, the deposition was 111 pages, and I was making
24 objections almost every other page

25 Q. Is that normal?

1 A. Yes, especially with the plaintiff's lawyer in that
2 case.

3 Q. You said it would have been malpractice to ask
4 questions of your own expert. Why do you say that?

5 A. Because unless your own expert has made a critical
6 mistake that needs to be re -- needs to be and can be reversed
7 in the deposition, you don't ask your expert question. If
8 it's not -- if he doesn't make any mistakes, there's no reason
9 to ask him that question, and if he makes minor mistakes, you
10 can correct, even with a correction sheet, or a file. That's
11 what you do, because every time you ask your expert question,
12 it just opens the door for plaintiff's attorney to ask them
13 more. One of the things you want, is you want that deposition
14 to end. You don't want it to keep going.

15 Q. You were at the depositions that were taken in this
16 case by Mr. Eckersley; is that right?

17 A. Yes.

18 Q. In the deposition of Marty Oslowski, did Mr. Eckersley
19 make any objection -- or did he ask any questions?

20 A. Not to my memory.

21 Q. Let me just refresh your memory.

22 MR. ORCHARD: May I approach, your Honor?

23 THE COURT: You may.

24 Q. BY MR. ORCHARD I'm showing you the deposition of
25 Martin Oslowski in this case. Can you see the bottom here when

1 it's asked if Mr. Eckersley has any questions?

2 A. He said, "No."

3 Q. Page 25, line 22, the deposition of Art Glenn was also
4 (inaudible) in this case. Did Mr. Eckersley ask any questions
5 -- do I need to ask permission, your Honor?

6 THE COURT: You may.

7 MR. ORCHARD: Thank you.

8 THE WITNESS: Not that I recall. On page 45, line 23,
9 Mr. Eckersley -- no.

10 Q. BY MR. ORCHARD: The deposition of George Hunt, the
11 deposition of Elliot Williams, do you have any recall that
12 Mr. Eckersley asked any questions?

13 A. My memory is he asked no questions.

14 Q. See the bottom of the page there?

15 A. Yes, page 129, line 20, Mr. Eckersley:

16 A. No, nothing I can think of.

17 Q. Mr. Eckersley asked you about being a lawyer and the
18 discovery process. As I understand it -- well, you tell me.
19 Did you have any access to any of the files, or any of the
20 records that your former law firm --

21 A. No.

22 Q. -- after May 5th of 2005?

23 A. Excuse me, no.

24 Q. I asked you about the discovery process, and I want to
25 show you the discovery that we sent out.

1 MR. ORCHARD: May I approach again, your Honor?

2 THE COURT: You may.

3 Q. BY MR. ORCHARD: And these were the defendant's answers
4 and the responses to our request for production of documents
5 and our interrogatories where we ask some questions about the
6 case. Do you recall that?

7 A. Yes.

8 Q. Do you see request No. 6?

9 A. Yes. It says, "Please produce all tangible things
10 including but not limited to photographs, video recording,
11 films, movies, drawings, pictures, computer generated displays,
12 illustrations, models, et cetera, showing, depicting or
13 representing defendant's claim that plaintiff was over-billing
14 by any client of Williams and Hunt while under their employ."
15 Their response is, "Already provided. Time sheet match up log
16 on, log off records, calendar and comparisons."

17 Q. When we ask for billings on request for production of
18 No. 13, we ask them, "Please provide a copy of billable records
19 for defendant Williams and Hunt for the months January through
20 May 2005." We said, "By this request, plaintiff does not
21 object to removing client names or confidential information,
22 but rather seeks the daily billing information for the firm by
23 employee." What was their response?

24 A. "Summary of hours, bills attached hereto."

25 Q. It gives a summary?

1 A. Right.

2 Q. Do the specific bills we get?

3 A. No.

4 Q. "Request for production of documents," No. 18. It
5 says, "Please provide a copy of any record which defendants
6 contend supports their contention that plaintiff over-billed
7 UMIA," and their response?

8 A. "Already provided parenthetical time records, batch
9 entry sheets, log on, log off records, and comparisons."

10 Q. You see that was signed under oath by George Hunt and
11 Elliot Williams?

12 A. Yes.

13 Q. Okay. Have you ever seen in this case other computer
14 records, Bordereaux reports, any other documents that they
15 -- that Mr. Eckersley talked to you about in your cross
16 examination that suggests you over-billed, other than what's
17 here?

18 A. No.

19 Q. You under -- you heard him ask you the question
20 of whether or not you knew if there were computer records
21 that showed every time you opened a record, or every time
22 a document was modified, has anything like that ever been
23 produced, despite our request in this case?

24 A. Not that I've seen.

25 Q. Did they -- did they produce -- Mr. Ferguson, did

1 they produce the deposition that they used to cross examine
2 you with?

3 A. Excuse me, I didn't understand that question.

4 Q. My question is, what we asked them to produce, did
5 they ever produce the deposition of Mr. Tippetts or of Vincent
6 Markovich?

7 A. No, the first time I saw those were today.

8 Q. Did Williams and Hunt address any of the issues
9 regarding the April 7 or April 8 depositions of doctors before
10 they fired you for over-billing?

11 A. Absolutely not.

12 Q. Did they address any of the bills from 3/23 on the
13 extra five or six hours they claim you worked or billed and
14 didn't work, before they fired you for over-billing?

15 A. Not only did they not do that, they asserted that the
16 over-billing was not for specific cases and not for specific
17 days.

18 MR. ORCHARD: That's all I have. Thank you.

19 THE COURT: Anything else?

20 MR. ECKERSLEY: Yes, just briefly.

21 THE COURT: Go ahead.

22 RECROSS EXAMINATION

23 BY MR. ECKERSLEY:

24 Q. I assume you have no information regarding what I
25 might have billed for those depositions which I attended and

1 did not ask questions?

2 A. No, that's attorney work product or attorney/client --

3 Q. So the answer is you don't know?

4 A. -- so I don't have it.

5 Q. Let me show you what's been marked as Defendant's

6 Exhibit 17. Can you identify that for me?

7 A. This is one of the pages from my handwritten calendar
8 that I talked to you about.

9 Q. And it's actually for March 23rd; is it not?

10 A. Well, it was originally printed off as March 22nd, and
11 it's stricken through -- the 23rd is written at the top.

12 Q. And do you see the entries that you've made there?

13 A. Yes.

14 Q. And I'd agree that your handwriting's not very good,
15 but can you tell me if you make these entries sequentially?

16 That is, is the top entry the first thing that you worked on?

17 A. There's no way of telling.

18 Q. And I note, from reading those, you can tell this does
19 correspond with your March 23rd billing; does it not? These --

20 A. I haven't --

21 Q. -- not -- the case names?

22 A. I'd have to go through one at a time and compare them.

23 I have Defense Exhibit 4 here. Is that what you're --

24 Q. Look at Exhibit 3.

25 A. What page?

1 Q. I think whatever page May -- I mean, March 23rd is on.

2 A. Okay, I have it.

3 Q. Can you conduct the comparison you were talking about?

4 A. Well, on Defense Exhibit 3 at page 16, for March 23rd

5 the first entry is Robb vs. (Inaudible), whereas on the

6 handwritten, Defendant's Exhibit No. 17 is Bruce. Then the

7 next entry on the billing record is Bird vs. Redding. Then

8 Bird vs. Redding is six lines down -- or six entries down on

9 the handwritten billing. The next one on the --

10 Q. Mr. Ferguson, perhaps it would be easier if you could

11 just conduct this not orally; just read it over and satisfy

12 yourself that these are the -- these billings -- that this

13 Exhibit 17 corresponds the same day as the March 23rd billing.

14 A. I apologize. I thought your question was, are they in

15 the same order.

16 Q. No, I'm off that question. My question now is, are

17 they -- did they reflect the same events?

18 A. Yes.

19 Q. Okay. Now, with a couple of exceptions there, there's

20 no time recorded on Exhibit 17 --

21 MR. ECKERSLEY: -- by the way, your Honor, I'd offer

22 Exhibit 17.

23 THE COURT: Any objection?

24 MR. ORCHARD: No, sir, no objection.

25 THE COURT: D-17 is received.

1 (Exhibit No. D-17 received into evidence)

2 THE WITNESS: There's no time entries on Exhibit 17,
3 correct.

4 Q. BY MR. ECKERSLEY: Well, look at the Bird entry. There
5 is what purports to be a time entry there; is there not?

6 A. Yes.

7 Q. At .25?

8 A. On the other side.

9 Q. And that would be what you typically do to make note
10 of the time that you had worked?

11 A. Not typically. As I explained on these records, it's
12 not usually written down on the handwritten one, unless it's a
13 day out of the office where I might forget the amount of time.

14 Q. Is it in your -- the time written out in the left-hand
15 side of the Bird entry corresponds exactly with the time on the
16 billing; does it not?

17 A. Yes.

18 Q. Okay. Go up to the Toscano entry; do you see that?

19 A. Yes.

20 Q. Does there appear to be a time there that's been
21 written and crossed out?

22 A. I think that is the file number. Yes, you can look
23 at the bill, and the bill shows the file number is 1573, and
24 that's the number next to the Toscano --

25 Q. Oh, that's the file number?

1 A. Right.

2 Q. Okay, thank you for that. You frequently have
3 referred to having UMIA clients; have you not?

4 A. Pardon me?

5 Q. I said you have frequently referred to having UMIA
6 clients; have you not?

7 A. Yes.

8 Q. When you came to the firm, you brought no medical
9 malpractice files with you, did you?

10 A. I did.

11 Q. What files were those, sir?

12 A. They were AETNA files.

13 Q. AETNA left the medical malpractice insurance market in
14 the early '80's; did they not?

15 A. Well, what they had is they had some -- they still
16 had medical malpractice files. I don't know -- they still had
17 medical malpractice files.

18 Q. Do you have any recollection of any cases you were
19 working on?

20 A. Not at this time.

21 Q. Are you aware that Art Glenn went to UMIA in 1987?

22 A. Yes.

23 Q. All right.

24 A. Well, yeah, that sounds right.

25 Q. So to the degree that you were working on files for

1 UMIA, you recognized that you were working on files for Elliot
2 Williams' client?

3 A. Elliot Williams was general Counsel for UMIA. We --

4 Q. And a close -- go ahead.

5 A. Excuse me.

6 Q. And a close personal friend of the President and CEO?

7 A. Right.

8 Q. And you understood that he had great control over how
9 UMIA was going to give out the work?

10 A. Who?

11 Q. Elliot Williams.

12 A. He didn't really.

13 Q. That's your belief?

14 A. Well, that is, because his influence with Marty --
15 Marty was the CEO; Marty was not over claims. Art Glenn was
16 over claims.

17 Q. And it was at Marty's direction that Art Glenn could
18 not assign you any more cases?

19 A. Right.

20 Q. So he had complete control over the distribution of
21 the files; did he not?

22 A. At that instant he did.

23 Q. Did it ever occur to you -- for instance, when you
24 sent out the email of March 16, 2005, that it was not in your
25 economic interest to get on the wrong side of Elliot Williams?

1 A. When I sent that --

2 Q. Sir --

3 A. No.

4 Q. -- did it occur to you?

5 A. No, it did not.

6 MR. ECKERSLEY: Thank you, that's all.

7 THE WITNESS: It did not.

8 MR. ORCHARD: I'm not use to direct cross, redirect and
9 recross, but the -- he went outside the scope. May I just ask
10 him to explain the last answer, and that's all I have?

11 THE COURT: You may. Put the ques -- you have to do it
12 in a question format, though.

13 MR. ORCHARD: That's why I really love a Court reporter,
14 because I can ask them to read it back. I think I can remember
15 it.

16 THE COURT: Well, we're not going to read it back; and
17 if you can't remember the question, then I'm going to have him
18 step down.

19 MR. ORCHARD: All right, let's test my memory.

20 FURTHER REDIRECT EXAMINATION

21 BY MR. ORCHARD:

22 Q. Okay, the question was about the economic power of
23 Mr. Elliot Williams.

24 A. Yes, and that's -- it's like speaking truth to power.
25 That's what it is. Mr. Williams was the power. I was speaking

1 the truth.

2 MR. ORCHARD: Okay, that's all.

3 THE COURT: You may step down.

4 Your next witness, Counsel?

5 MR. PETERSON: Elliot Williams.

6 THE COURT: Mr. Williams, would you be sworn and have a
7 seat on the witness stand.

8 COURT CLERK: You do solemnly swear the testimony you
9 are about to give will be the truth, the whole truth and
10 nothing but the truth, so help you God?

11 THE WITNESS: Yes.

12 THE COURT: Please be seated.

13 MR. PETERSON: May I retrieve this before we get going?

14 THE COURT: You may.

15 MR. ECKERSLEY: And may I give Exhibit 17 to the clerk,
16 your Honor?

17 THE COURT: You may, and -- yeah, and those that have
18 been received ought to find their way over here --

19 MR. ECKERSLEY: Yes.

20 THE COURT: -- so they don't get lost.

21 ELLIOT WILLIAMS,

22 having been first duly sworn,

23 testified as follows:

24 DIRECT EXAMINATION

25 BY MR. PETERSON:

1 Q. All right. Let's just start, if we can, Mr. Williams,
2 by having you describe for us generally what it is that you do
3 for a living.

4 THE COURT: Okay, and before we do that, just for
5 record purposes, Counsel, would you have him state his name
6 and his --

7 MR. PETERSON: Oh, I'm sorry, your Honor.

8 THE COURT: -- business address. I mean, I know we all
9 know who he is, but I'd like the record to--

10 MR. PETERSON: You bet, I apologize.

11 THE COURT: -- have that information.

12 THE WITNESS: Yes, my name is Elliot Williams, and our
13 office is at 257 East 2nd South in Salt Lake.

14 Q. BY MR. PETERSON: Okay, and you're a shareholder and
15 essentially one of the named members of the law firm in this
16 case, Williams and Hunt?

17 A. Yes.

18 Q. Now, in that capacity, your law firm itself started
19 back in the early 1990's; is that right?

20 A. April 1st, 1991.

21 Q. All right, and was it as Gary Ferguson described, or
22 we heard yesterday perhaps, that in essence you went from
23 another law firm into starting your own firm?

24 A. That's correct.

25 Q. And when you did that, did you take work from some

1 particular source with you to start the firm?

2 A. Yes, all of us did.

3 Q. And in particular, did you have the expectation at
4 the time you formed the firm that you would be doing insurance
5 defense type work?

6 A. My expectation was to continue working on medical
7 malpractice defense cases for the UMIA. I was also outside
8 general Counsel for the Utah Medical Association. Both
9 entities came with us to our new firm.

10 Q. All right. Likewise, did Mr. Ferguson join the firm
11 shortly after or around that same time?

12 A. Around that same time, yes.

13 Q. Why did you bring him in?

14 A. We had known Gary for some time; and he seemed like
15 a good trial lawyer. The objective of forming our own firm
16 was to have a firm in which our friends worked, and we worked
17 together as friends for a long time, and we thought Gary would
18 be a good fit --

19 Q. He was a friend?

20 A. -- and he was for a long time.

21 Q. I apologize, I spoke over you. He was a friend for a
22 long time, correct?

23 A. Yes, he was.

24 Q. All right, and a good lawyer for a long time, I take
25 it?

1 A. Yes, I agree.

2 Q. He was a shareholder, and what did that mean in the
3 context -- so that the jury understands, what did that mean in
4 the context of the law firm? Did it mean something more than
5 he just received a salary, I guess is where I'm going?

6 A. Well, our firm is a professional corporation. We each
7 own a single share of the -- of stock. That's what it means.

8 Q. And is -- ultimately are the firm's revenues divided
9 somehow among shareholders?

10 A. Yes. Actually, for the first four years we paid each
11 other exactly the same, even though we brought in different
12 revenue.

13 Q. And then --

14 A. Then as our productivity changed, then so did the
15 compensations reflect that.

16 Q. And so the compensation arrangement may have changed
17 to the point where some shareholder might get a bit more, say,
18 than another shareholder; is that fair to say?

19 A. Yes.

20 Q. And that would have been done based on what you
21 perceived to be the amount of work that was coming into the
22 firm -- or excuse me, not the amount of work, but the amount of
23 revenues, I suppose, generated by the shareholder?

24 A. That's one feature, sure.

25 Q. And other features?

1 A. Absolutely.

2 Q. For example, in your position, you are, I suppose,
3 somewhat of a rainmaker, as we say, in the business. That term
4 you understand; do you not?

5 A. Yes.

6 Q. Tell the ladies and gentlemen of the jury what's a
7 rainmaker.

8 A. Well, a rainmaker generally is a lawyer who brings
9 work into the firm not only for himself to do, but for others.

10 Q. And that has value to other members of the firm,
11 doesn't it?

12 A. I think so.

13 Q. And that may cause you, for example, to be compensated
14 more than, say, another lawyer who's also a shareholder?

15 A. Could have been. It wasn't, though.

16 Q. Okay. Likewise, in addition to that, sometimes share-
17 holders who have administrative duties may make more money than
18 others; is that fair to say?

19 A. That's fair to say.

20 Q. And likewise, your billing rates probably differed
21 from attorney to attorney, I take it, from the beginning and
22 ultimately even today, I suppose, within your firm; is that --

23 A. Yeah, that's right.

24 Q. And would your rate be likely among the highest, I
25 take it, of the lawyers in your law firm?

1 A. It is.

2 Q. And by the same token, was Mr. Ferguson's rate less
3 than yours while he was a member of the Williams and Hunt law
4 firm?

5 A. Yes.

6 Q. Is it fair to say from your recollection of events,
7 that Gary Ferguson enjoyed being a member of the Williams and
8 Hunt law firm at least for the bulk of that time?

9 A. Yes, I think so, until about 2003.

10 Q. Okay. Did he participate, as you expected he would,
11 during those years taking cases, defending cases, that sort of
12 thing?

13 A. Yes, he actually chose to limit the number of cases
14 that he worked on. I think he did that to manage stress.

15 Q. I think -- did he do that later, as opposed to not
16 2003, but wasn't -- hadn't you previously testified that that
17 occurred sometime around 2005?

18 A. I thought it was earlier than that, but -- in fact,
19 I'm quite sure he had had a caseload of 12 to 14 cases, maybe
20 half a dozen of them active at any given time. It had been the
21 case for quite a while.

22 Q. All right. Now, while you were shareholders -- you've
23 referred to him at times as a partner, a business partner,
24 correct?

25 A. Yes.

1 Q. And in that sense, you wanted to be associated with
2 him while he was your partner or your shareholder, right?

3 A. Yes.

4 Q. You wanted to be in business together, correct?

5 A. Yes. Yeah.

6 Q. And you did that because you trusted him as a lawyer
7 and a fellow member of the firm, correct?

8 A. That eventually ceased, but yes.

9 Q. Sure, understand. At some point in time you fired
10 him?

11 A. Yes, we did.

12 Q. Okay. Now, generally with respect to Mr. Ferguson as
13 a lawyer in the Williams and Hunt law firm, if we were to take
14 a look at the time that he spent there, his practice developed
15 to the point where it was largely UMIA medical malpractice
16 insurance defense by 2005?

17 A. Except for a couple of plaintiff's cases he took, yes.

18 Q. All right, with respect to those cases that came from
19 UMIA, is it fair to say that he took cases that were assigned
20 by personnel at the Utah Medical Insurance Association?

21 A. That's correct.

22 Q. Describe for us, if you would, how that process
23 occurs. How is it that a case might come to be assigned to,
24 say, Gary Ferguson, as opposed to some other lawyer in the
25 firm. I know you had another Ferguson, a Dennis Ferguson, if I

1 remember correctly; is that right?

2 A. Yes, that's right.

3 Q. Okay, and I don't know whether that Mr. Ferguson did
4 medical malpractice defense. Did he?

5 A. He did.

6 Q. Okay. So tell the ladies and gentlemen of the jury
7 how that process occurred. How does the -- Gary Ferguson might
8 get a case?

9 A. Sure. When a physician receives a notice that there's
10 going to be a claim, he or she will call the UMIA. That's the
11 insurance company. The claim representative will interview
12 the physician by telephone, get information about the claim.
13 He'll ask the physician if he or she has worked with a lawyer
14 previously, and if they'd like to work with that lawyer again.
15 If that's the case, then that's how the case is assigned.

16 If they've had no prior experience, if they have a
17 preference, maybe for someone good at speech or something, if
18 they know one of the lawyers, they can request that lawyer.
19 That request is almost always granted. If none of those things
20 happen, then the claim adjuster can assign the case to any one
21 of the UMIA lawyers who does work for them.

22 Q. Now, that raises a point. There are other law firms
23 in the Salt Lake area who do defense work for UMIA --

24 A. Yes.

25 Q. -- in the medical malpractice area.

1 A. That's correct.

2 Q. And you frequently find your -- maybe not frequently,
3 but do you occasionally find yourself together with another law
4 firm representing what we call "co-defendants," two separate
5 doctors, per se?

6 A. Sure.

7 Q. Okay, and when that happens, the duty that you have as
8 a lawyer to client would preclude you from representing, say,
9 both of those doctors; and so a separate doc -- a separate
10 attorney is provided. Isn't that what happens?

11 A. That's often the case. Not always, but often.

12 Q. Okay. Now, in that respect, sir, would it be fair
13 to say that the number of law firms doing insurance defense,
14 medical malpractice defense work in the Salt Lake area is
15 somewhat limited, small?

16 A. Yes.

17 Q. Is it -- would it be fair to characterize your
18 particular area of law as a niche practice, perhaps?

19 A. I think it's a specialty within civil litigation.

20 Q. How many Salt Lake attorneys do you commonly deal with
21 who do the kind of work that you do as a medical malpractice
22 insurance defense lawyer?

23 A. (No verbal response).

24 Q. And by that, I mean here in the Salt Lake area?

25 A. Yes, I understand. There are lots of new associates

1 getting involved in the work. It's probably 20 or less.

2 Q. And in terms of your particular law firm, how many
3 within your firm?

4 A. Let's see, there are -- I guess 5.

5 Q. And when you describe there being 20 or less, how many
6 separate law firms would that likely entail? There's yours --

7 A. Just for UMIA work?

8 Q. Yeah.

9 A. Four that I could think of offhand.

10 Q. Okay. What would those law firms be?

11 A. Kipp and Christian; Richards, Brandt, Miller and
12 Nelson; Dave Farris with the Campbell firm; and I'm probably
13 missing --

14 Q. And, of course, your own?

15 A. And our own, right.

16 Q. All right. So it's a pretty small pool, right?

17 A. I guess I forgot our own.

18 Q. Would you agree it's a small pool of lawyers?

19 A. Yes, I think so. It's a specialized practice.

20 Q. Now, is what you do more detail oriented, do you
21 suppose, than say standard accident type litigation or standard
22 -- the kind of work that other insurance defense lawyers do?

23 A. I think the nature of the work is a little different
24 because we deal with the medical issues that requires more
25 expertise in that area. Other than that I don't think it

1 differs really very much.

2 Q. Do you have -- do you have to have specialized
3 knowledge in the area of the medical aspect of the case --

4 A. Yes.

5 Q. -- in order to properly defend?

6 A. Yes.

7 Q. And likewise, do you have to have contact with the
8 physicians themselves, not just maybe your client physician,
9 but other physicians that may have been involved in the
10 treatment or care of the person?

11 A. Those individuals would be a part of the discovery
12 that we undertake. We don't meet with them, because we don't
13 have the opportunity to speak with physicians who took care of
14 a patient. That's confidential information we're not entitled
15 to have, except for the deposition.

16 Q. All right. As part of your practice do you routinely
17 find and interview, ultimately hire expert witnesses to appear
18 on behalf of your physician, whoever it is, who's been sued for
19 malpractice?

20 A. Yes.

21 Q. And when you hire an expert witness, that person is
22 hired to come in and essentially take a look at what was done,
23 and offer an opinion as to whether or not that practice was
24 within the reasonable -- well, tell us, what is the opinion
25 usually --

1 A. Within the standard of care.

2 Q. The standard of care?

3 A. Yes.

4 Q. By that you mean what a reasonably prudent physician,
5 under the circumstances, would have done; isn't that right?

6 A. That's right.

7 Q. So what you're looking to do is to find somebody,
8 an expert witness, another physician, who can come in and
9 essentially say, "I've looked at what this doctor did, and
10 his practice was within the standard of care," right?

11 A. Yes.

12 Q. And if you found one of those folks, and he's your
13 witness for trial, do you customarily take his deposition?

14 A. No.

15 Q. And if his deposition was being taken by, say, a
16 plaintiff's lawyer, do you customarily ask a lot of questions?

17 A. No.

18 Q. Is it fair to say that during those depositions, you
19 may indeed ask no questions at all?

20 A. Absolutely.

21 Q. Is it fair to say that during those depositions, you
22 may make numerous objections?

23 A. Not usually.

24 Q. If you make objections, what is the point of the
25 objection?

1 A. Well, the point of the objection is to make a record
2 that the form of the question is improper. That's about it,
3 except if a question is asked about an area of privileged
4 information that we're not entitled to have.

5 Q. Or perhaps --

6 A. The form of the question is the only objection that I
7 believe I'm entitled to make.

8 Q. All right. Do you have the rule in Utah that says
9 objections other than as to the form of the question shall be
10 reserved --

11 A. That's correct.

12 Q. -- as far as depositions?

13 A. Uh-huh.

14 Q. Okay. All right. All right, so now -- but in terms
15 of taking your expert witness to a deposition, is it customary
16 for you to meet and prepare your expert witness before you go
17 to his or her deposition?

18 A. It is.

19 Q. And do you bill for the time that you spend preparing
20 for the deposition?

21 A. I do.

22 Q. If the witness has published articles, let's say in
23 medical treatises, is it customary in your business to review
24 those articles?

25 A. Not typical, but sometimes. Not very often, actually.

1 Q. Do you --

2 A. There are very few articles that are really directly
3 on point.

4 Q. Okay, understood; but do you go out and look for
5 articles written by expert witnesses?

6 A. We look for articles that are germane to the medical
7 issues in the case, regardless of by whom they're authored.

8 Q. Once you find the articles, do you read them?

9 A. I certainly do.

10 Q. And if you find the articles and you read them, do you
11 bill for that time?

12 A. I do.

13 Q. By the way, are you a person who relies on a computer
14 for your practice?

15 A. Yes.

16 Q. And are you a laptop person?

17 A. No.

18 Q. Okay. Desktop?

19 A. That's right.

20 Q. And what sort of familiarity did you have with respect
21 to the log in and log out times before that time in March,
22 whenever the log outs for Mr. Ferguson started? How much
23 familiarity did you have with that process?

24 A. None.

25 Q. All right. Is it fair to say there was no requirement

1 at your law firm that attorneys log in before they could bill
2 for their time?

3 A. That's right.

4 Q. And like --

5 A. It's just something we did.

6 Q. Sure, understood. Likewise, sir, if you were out
7 taking a deposition, you hadn't logged in that day, and you
8 took the deposition and you were out, and you had to come back
9 from Provo or wherever you were, would you bill for your time
10 regardless of whether or not you'd logged in?

11 A. Of course.

12 Q. Now, let me ask you some questions, if I may, first
13 of all, general questions about the types of benefits that a
14 shareholder at the Williams and Hunt law firm enjoyed. In this
15 particular case with Mr. Ferguson, do you know whether or not
16 he had deferred compensation in some form or another?

17 A. We have -- well, we made contributions to a retirement
18 plan, yes. Is that what you mean?

19 Q. Yeah.

20 A. Yes.

21 Q. Is it a 401-K type plan?

22 A. Something like that.

23 Q. And so --

24 A. It's a pension plan.

25 Q. Okay. All right, so the employee makes a contribution;

1 and does the law firm make a percentage contribution?

2 A. Actually we make a contribution on behalf of the
3 employee.

4 Q. So the law firm makes the contribution. Is it 15
5 percent?

6 A. We try to keep it 15, yes.

7 Q. So in addition to whatever a person's salary might
8 have been -- let's say that the salary was \$100,000 -- or
9 the share for that year. The law firm would have kicked in
10 an additional \$15,000 into that particular pension plan or
11 retirement plan?

12 A. That was our objective. I'm not sure we made it every
13 year, but we tried.

14 Q. Understood. Likewise, sir, did you have a matching
15 program, an additional program in addition to that 15 percent?
16 Did you have a 401-K matching program where the shareholder
17 could set aside some money and it also would be matched?

18 A. No.

19 Q. Did the law firm provide medical insurance?

20 A. We did.

21 Q. Did it provide dental insurance?

22 A. It did not.

23 Q. Did you provide life insurance?

24 A. We did.

25 Q. Did you provide disability insurance?

1 A. Yes.

2 Q. Was a shareholder permitted to take a vacation, and
3 still receive his or her draw during the time that he or she
4 was gone?

5 A. Yes.

6 Q. With respect to vacation time, was there a particular
7 limit on the amount of vacation time a shareholder at the
8 Williams and Hunt law firm could take around the time that's
9 relevant in this case, 2005?

10 A. Was there a limit, you say?

11 Q. Yes.

12 A. No.

13 Q. And so --

14 A. You're more concerned about productivity, I think.

15 Q. Right.

16 A. And taking care of our clients.

17 Q. Understood. All right, so if Mr. Ferguson took, for
18 example, that time in April to take his wife on a vacation, he
19 could have expected at that point to still receive his draw,
20 regardless of whether he was there billing, correct?

21 A. Yes.

22 Q. Okay. Now, additionally, with respect to the Williams
23 and Hunt law firm, these draws -- describe for the jury, if you
24 would, please, what the draw really represents.

25 A. Well, draw really represents, essentially, a salary.

1 Q. All right, and is the draw something that the share-
2 holders at the Williams and Hunt law firm can expect that they
3 will continue to receive while they're shareholders there?

4 A. Yes.

5 Q. And the draw itself, is it somehow figured into
6 another number, or is there another bonus or some other
7 calculation at the end of the year that goes -- either I
8 guess in addition to the draw, or perhaps you take the draw
9 out of a bigger number? How do you -- how do you compensate?

10 A. Well, the draw or the salary is decided by all of us
11 on the board, by consensus. Then profits generated beyond
12 overhead, which would be all the salaries for all of the
13 employees, including ourselves, and the overhead of the firm,
14 the excess is distributed evenly among the shareholders.

15 Q. Okay, and I may have misled somebody here. I'm using
16 the term "draw." You used it, too, I think; but technically
17 speaking, as lawyers, it isn't really a draw. It is a salary,
18 because they are employees; isn't that right?

19 A. Yes.

20 Q. Okay Now, with regard to the salary of a shareholder
21 at the Williams and Hunt law firm if, for example, a share-
22 holder billed more time in February than he did in March, would
23 that impact in any respect his salary?

24 A. No. At least not that year.

25 Q. He wouldn't get any additional money for billing more

1 time that year?

2 A. Well, let me -- and I'll actually correct myself. A
3 few years ago, because the -- one of our partners was so much
4 more productive than the rest of us, we set aside a separate
5 fund that we could distribute semi-annually to reward an
6 attorney who had an exceptional period of time. For example,
7 a trial involves a great deal of time and preparation, and a
8 great deal of effort. So we had some extra money to distribute
9 to reward those whose productivity was exceptional. So in that
10 sense, yes, it could have impacted a distribution on semi-
11 annual basis.

12 Q. Okay. Was that the circumstance in 2005?

13 A. I think so.

14 Q. All right. Now, with respect to the money itself
15 that comes into the law firm, it doesn't come into the partners
16 individually or the shareholders individually, it comes to the
17 law firm, and the law firm pays the money out in the form of
18 salaries, correct?

19 A. That's correct.

20 Q. Okay. Was Mr. Ferguson's share of the income prior
21 to 2005 -- or share of the -- I don't know how we want to say
22 it, essentially, but a share that was attributable to his
23 ownership interest in the Williams and Hunt law firm, was it
24 ever increased because he had billed so many hours that it
25 somehow set him apart? Was that the situation?

1 A. I'm not sure I understand the question.

2 Q. That's a poorly worded question.

3 A. You'll have to give me another try.

4 Q. I'll try again, I apologize. I guess what I'm asking
5 you is, did a circumstance develop at all over the course of
6 his employment with your law firm that caused you to raise his
7 salary because he had simply billed so many hours in the years
8 preceding 2005?

9 A. Well, we met once a year to look over the productivity
10 over the past year. There were adjustments made based on
11 productivity. I don't recall any specific instance with Gary
12 where there was a change in his routine. He was pretty steady
13 most of the time.

14 Q. In fact, before 2005, before the point where this
15 lawsuit arises from, the termination or firing or whatever,
16 before that time, if you looked back at the number of hours
17 he billed on an annual basis, would it be fair to say that he
18 was not in the highest group of billers among the lawyers of
19 the firm?

20 A. That's right.

21 Q. Somewhere closer to the middle, isn't it?

22 A. I'd have to look at the numbers specifically, but I
23 would be -- it's certainly not in the highest group.

24 Q. All right. Now, let's see if we can have the witness
25 handed -- let's see, where are our exhibits

1 MR. PETERSON: May I confer with Counsel for just a
2 moment?

3 THE COURT: Go ahead.

4 (Counsel conferring off the record)

5 MR. PETERSON: Your Honor, as I understand it, Exhibit
6 -- Plaintiff's Exhibit 1 is admitted already. I would move the
7 admissions of Exhibits 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14,
8 15 and 17.

9 THE COURT: Mr. Eckersley?

10 MR. ECKERSLEY: No objection, your Honor. No. 17 has
11 already been admitted.

12 MR. PETERSON: Oh, I'm sorry.

13 THE COURT: Those exhibits are so received.

14 (Exhibit Nos. 2 through 5 and 7 through 15 received
15 into evidence)

16 MR. PETERSON: And for purposes of expediting the
17 testimony, may I simply provide the witness with the exhibits
18 at this point, and we'll proceed through them?

19 THE COURT: You may.

20 MR. PETERSON: Thank you.

21 Q. BY MR. PETERSON: All right, sir. Taking a look at
22 Plaintiff's Exhibit 1, this is the March 16th email, correct?

23 A. It is.

24 Q. And with respect to email, there's been some testimony
25 about it today, and your version of the event perhaps just

1 differs, I suppose, based on what I heard in opening, but --

2 A. It does.

3 Q. -- okay. All right, but generally what happened is
4 that -- tell me generally what happened, with respect to March
5 the 16th, as you recall. Let's just do it that way.

6 A. Okay. Well, let me give you a little prelude to that
7 We had noticed a substantial change in the number of hours
8 Gary was billing, without observing any change in his work
9 productivity. That is, what he seemed to be doing seemed to
10 be the same as always, but now the hours were greater.

11 Q. Okay, and I'm going to stop you now and ask you a
12 question, if I may. When you use the term "we," who are you
13 referring to?

14 A. I'm referring to the original partners in the firm.

15 Q. Meaning?

16 A. It would be George.

17 Q. George Hunt?

18 A. George Hunt, Jody Burnett, Dennis Ferguson, and Bruce
19 Jensen.

20 Q. And when you say that "we had noticed this," when had
21 you noticed it?

22 A. Well, we get monthly summaries of productivity.
23 His January numbers were off the chart. February followed,
24 also very high. Those two months were definitely different
25 than we'd seen -- ever seen before I think it's also been

1 mentioned that Bruce worked about seven days a week, most
2 nights, all weekends.

3 Q. You're talking about Bruce Jensen?

4 A. Bruce Jensen, and his numbers were behind Gary; and
5 Gary never worked weekends, never worked evenings. That was
6 suspicious, but we -- that's all we had. So he came into my
7 office shortly before the 11th of March, and said he had this
8 major bill, wanted my advice as to whether or not it could be
9 billed sooner than quarterly; and I said, "Sure, that's fine.
10 If you'd like me to review the bill, I'd be happy to do that,
11 in case anyone asks questions."

12 Q. And by "anyone," you were referring to anyone at UMIA?

13 A. I was, and so I did that. Then -- should I go on?

14 Q. Sure, go ahead.

15 A. All right. I reviewed the records and -- or the bill,
16 I should say. That's all the information I had. Didn't have
17 his calendar, which was closed to us. Didn't have any other
18 information about how he generated -- how he did the time. I
19 was just looking at the description of the time -- billing
20 activity and the time.

21 I noticed that he had I believe about 31 hours for
22 preparation for his own client's deposition, and to attend the
23 deposition. That seemed like a lot to me, having done that for
24 all these years. So I went into his office and did what I had
25 promised to do. That is, look at the bill and see if there

1 were areas in which there might be questions.

2 I was not angry. I didn't ask him to cut his bill. I
3 didn't accuse him of over-billing. What I said was, "This
4 seems like a lot of time to spend on these projects. You may
5 get some questions about it." He offered an explanation that
6 was not as detailed as this email, but basically assured me
7 that he was working on the case, working hard, and that was the
8 end of the discussion.

9 Q. Now, when you say you had the February -- you had
10 the bill at this point in time, and this is in March. So you
11 would be referring to a bill for a time that had been spent in
12 February of 2005, correct?

13 A. I think so.

14 Q. And with respect to what deposition did you have
15 questions?

16 A. It was his client's deposition.

17 Q. Which case?

18 A. Mr. Anderson.

19 Q. Oh, Mr. Anderson, okay. With respect to that, this
20 would be a Dr. Anderson, correct?

21 A. Yes, uh-huh.

22 Q. And so you had entries that showed the time, in
23 particular for that deposition, correct?

24 A. Yes.

25 Q. Now, you --

1 A. And preparation for it, yes.

2 Q. Sure, understand. If you would take a look at Exhibit
3 No. 2 for just a moment, and I draw your attention in Exhibit
4 No. 2, let's see if -- can you find for me the entries relating
5 to this particular issue? Are they -- are they on page 8 of
6 Exhibit 2, Tuesday, February the 8th; Wednesday, February the
7 9th; Thursday, February the 10th; and then the following page 9,
8 Friday, February the 11th?

9 A. Let's see. Yeah, looks like we've got an entry for
10 six-and-three-quarter hours on February 8, which included
11 review of medical records, the conference of Kurt Frankeberg
12 in preparation for his client's deposition.

13 Q. And supplement trial outline, right?

14 A. Yeah.

15 Q. Well, this particular entry doesn't tell me how many
16 times -- how much time is spent on any one of those items.

17 A. That's right.

18 Q. Now, are your bills that you submit, your bills like
19 this?

20 A. Yes.

21 Q. And so you don't take, for example, that first entry,
22 "Review of medical records," do you take and always separate
23 out how many hours you spend on that task?

24 A. No.

25 Q. Likewise, the next entry, "Conference with Kurt

1 Frankenberg," do you take and separate out, necessarily, how
2 much time you spend on that task?

3 A. No.

4 Q. Likewise, "Preparation for client's deposition," do
5 you separate out always how much time you spend per task?

6 A. No.

7 Q. And the same would be true with "Supplemental trial
8 outline," assuming that you -- I'm assuming you create a trial
9 outline. That's kind of a common thing to be done, I suppose?

10 A. Not by me.

11 Q. Not by you, okay.

12 A. I wait until it's closer to trial.

13 Q. Closer to trial, okay. All right. Well, with respect
14 to those items, there would be a file, an actual office file
15 for the Merce case, wouldn't there?

16 A. Several files, actually.

17 Q. Yes, and in that particular case, you would have, for
18 example, files of medical records, correct?

19 A. Binders of medical records.

20 Q. Binders. Did you go and check the binders to see how
21 much -- in terms of medical records, what are we talking about?
22 Are we talking about, you know, a binder like say what I'm
23 showing you here, four or five, six inches of stuff; or were we
24 talking about a small binder, as I'm showing you here, say half
25 an inch of stuff?

1 A. Depends on the case.

2 Q. Did you go check?

3 A. No.

4 Q. So you don't know?

5 A. I never accused him of over-billing his time. I
6 just raised the question about was the time actually -- I was
7 thinking in my mind, how could you spend 31 hours for your own
8 client's deposition?

9 Q. But he didn't --

10 A. But I didn't -- I didn't accuse him of anything. I
11 didn't do the research to determine whether or not these bills
12 were accurate or not.

13 Q. Yeah, let's stop there for a moment. Your point is
14 that six-and-a-half hours to review this file might not be too
15 much, correct? The big file.

16 A. Certainly if it's the first time through, that's
17 right.

18 Q. But six-and-a-half hours to review the little file
19 might be too much, in your opinion?

20 A. It might.

21 Q. But a reasonable thing to do might be to investigate
22 what the file looked like that he billed for the time, correct?

23 A. That's what I wanted to do.

24 Q. Right.

25 A. If I wanted to look at the bill to give him adv_ice

1 about it, I didn't need to do that.

2 Q. If it was your case, and someone was questioning your
3 time, would you think that a reasonable thing to have done
4 would have been to have them look at the file to see what it
5 was you had reviewed?

6 A. It would -- it would really depend.

7 Q. You wouldn't want them to go review your work?

8 A. I would say that if someone had a question about my
9 time spent or bill, I would be happy to discuss it with them;
10 but I wouldn't -- I wouldn't do this. That was the problem
11 with that meeting.

12 Q. I thought your point was that you found out he had
13 billed 20-some hours and it was too much time.

14 A. No, I said you might get some questions about that.

15 Q. Uh-huh. With respect to the next entry, on February
16 the 9th, 2005, would it be the same situation, essentially?
17 There's 7.25 hours billed, but you have no investigation with
18 respect to whether or not that time actually was spent on the
19 file, correct?

20 A. I don't know -- I have a description of 7 and a
21 quarter hours for preparation for and a meeting with his
22 physician.

23 Q. Did you call the physician?

24 A. I'm sorry?

25 Q. Did you call the physician and ask him whether or not

1 Gary Ferguson spent the time with him to prepare for his
2 deposition?

3 A. No, but I remember asking him how did he get a doctor
4 to spend that much time with him, seven hours. Of course
5 there's travel to and from Provo.

6 Q. Travel to and from Provo.

7 A. I think I asked him how he got a doctor to spend that
8 much time with him to prepare for deposition.

9 Q. And my question to you was, did you check what he told
10 you?

11 A. No, I didn't call --

12 Q. But again, it's not your contention that this was
13 over-billing, right?

14 A. That's right.

15 Q. And likewise, it's not your contention on February 8th,
16 that's over-billing, correct?

17 A. I didn't have the information to draw that conclusion.

18 Q. And you still don't, correct?

19 A. That's true, I still don't have that information.

20 Q. Correct. With respect to February the 10th, your
21 answer is essentially going to be the same, isn't it? You
22 didn't check on the items that are listed there, but which you
23 questioned, correct?

24 A. On February 10?

25 Q. Right.

1 A. Your question is what again? I'm sorry.

2 Q. Did you check to determine whether or not any one of
3 those items, any one of them had a reference in a file? Did
4 you call anybody who's listed there, any of those things?

5 A. No, none of that would have helped me.

6 Q. But again, your position now, today, is that you're
7 not saying that's over-billing, correct?

8 A. We don't have the information to know that, one way or
9 the other.

10 Q. And would the answer be the same with respect to
11 February the 11th?

12 A. The 12 hours for the deposition?

13 Q. Correct.

14 A. I don't have the information to know if that's
15 accurate or not.

16 Q. All right. Now, without the information to know,
17 would you agree that if you don't have that information, had
18 you accused Gary Ferguson of over-billing on any of those
19 dates, February the 8th, February the 9th, February the 10th,
20 February the 11th, without having investigated any of those
21 entries, would you agree that that would be unreasonable?

22 A. Yes, I -- and I did not do that.

23 Q. Well, let's take a look at the email, which is Exhibit
24 No. 1.

25 A. Okay.

1 Q. In the body of the email, Mr. Ferguson said in
2 response to you, that you had questioned whether he spent
3 12 hours on Merce that day. Then he provided you with the
4 description of the things that he had done, correct?

5 A. That's what he said.

6 Q. And you had no information that you obtained in
7 response to that, correct? You didn't go out and check any
8 of the things that he tells you in that paragraph?

9 A. That's correct.

10 Q. Likewise, then he goes through and he mentions what
11 happened on the 7.25 hours. He gives you very specific things.
12 For example, he says -- read us what he says in the second
13 paragraph with respect to the 7.25 hours. Go ahead and read
14 from the exhibit.

15 A. "You questioned whether I had to spend 7 and a
16 quarter hours meeting with Dr. Anderson to prepare him for
17 his deposition. If you had not rushed through the bill, you
18 would have noticed --" excuse me -- "that part of the 7 and a
19 quarter hours was spent in this office preparing to meet with
20 Dr. Anderson, going over medical records and depositions. I
21 then drove to Provo, and met with Dr Anderson for a couple of
22 hours and drove home."

23 Q Now, preparing for the meeting, reasonable thing to do
24 as a lawyer, isn't it?

25 A Yes

1 Q. Having the meeting with the doctor, if it's in Provo,
2 you've got to drive there. Another reasonable thing to do,
3 correct?

4 A. Yes.

5 Q. Having the actual meeting, good practice, really,
6 isn't it --

7 A. Of course.

8 Q. -- in terms of preparing your client?

9 A. Of course.

10 Q. Exactly the same sorts of things you would do under
11 the circumstances, defending a doctor in Provo; isn't that
12 true?

13 A. I think so.

14 Q. And likewise, once you get there, you're going to
15 drive back, correct?

16 A. That's the plan.

17 Q. All right. However much time it takes is however much
18 time it takes --

19 A. That's right.

20 Q. -- correct?

21 A. Yes.

22 Q. Is it fair to say that it is important for you, as a
23 medical malpractice insurance defense lawyer, representing a
24 physician charged with malpractice in a case like this, to do a
25 good and thorough job?

1 A. Yes.

2 Q. That's what you're tasked to do as a lawyer generally,
3 right, to do the very best job you can for the client?

4 A. I think each of us in our office has that reputation.

5 Q. Absolutely. Not suggesting otherwise, sir. You do
6 the work that needs to be done to defend the client; that's
7 right, isn't it?

8 A. That's right.

9 Q. Likewise, let me ask you with respect to the next
10 paragraph -- two paragraphs down. It says, "As I told you last
11 Friday, plaintiff's Counsel were trained by Bob Sykes; and like
12 him, misrepresent medical records, testimony and the literature
13 and it always takes time to prepare for these guys --" I'm
14 sorry. "It always takes more time to prepare when these guys
15 are deposing your client." You've experienced plaintiff's
16 lawyers like that?

17 A. I think it's overstating it; but the preparation is
18 the preparation. I don't think you do more because of the
19 lawyer on the other side.

20 Q. And to be sure, sir, you're not suggesting that you
21 know more about what was required to defend properly Dr. Merce
22 than Gary Ferguson, the lawyer who was defending Dr Merce?

23 A That's correct I never said that.

24 MR. ORCHARD. You mean Dr Anderson

25 Q. BY MR PETERSON Or I'm sorry, Dr Anderson Merce is

1 the plaintiff.

2 A. That's right.

3

4 Q. All right. Now, when your review of the bill was over
5 for this particular issue, did you mark down the bill?

6 A. No.

7 Q. Okay. So the time that was entered on the bill by
8 Mr. Ferguson, which you told your partners you thought was
9 probably too much time, right?

10 A. No.

11 Q. Well, let's take it one step at a time. The time that
12 was on the bill got billed to UMIA, right?

13 A. That's right.

14 Q. UMIA paid it, correct?

15 A. Yes, they did.

16 Q. And the law firm took in the money, right?

17 A. Yes.

18 Q. Did you tell UMIA after receiving this bill in
19 February that you had concerns about Gary Ferguson's billing?

20 A. We had concerns about his billing, but we could not
21 determine, based on the information that we had available to us
22 at that time -- namely his bill -- which was alone insufficient
23 to tell us that We needed more information. That's why we
24 got it.

25 Q. Well, you didn't just have his bill, correct?

1 A. That's about it.

2 Q. Well, your law firm had all of the entries that had
3 been -- that had been made not just by Mr. Ferguson, but by
4 every other lawyer in the law firm and every other person
5 working on that case, the Merce case, correct?

6 A. We had statements of all that, yeah.

7 Q. And your jurist's software allows you to create a
8 separate report, detailing specifically which lawyers did what,
9 which billing personnel did what, and when they reported each
10 and every entry, correct?

11 A. Okay. You mean, with respect to like memoranda,
12 correspondence, written documents?

13 Q. No, I'm just talking about time that was billed now.

14 A. Would you state the question again? I'm not sure I
15 followed you.

16 Q. Sure. Do you know whether or not your software allows
17 you to go back and check the detail of when each entry was made
18 in the billing system for that bill that you -- we're talking
19 about now in February on the Merce case?

20 A I don't -- I don't know if I knew that at the time. I
21 learned later that a record is kept whenever -- I mean, when a
22 lawyer at his computer enters 12 hours for a deposition, there
23 is a record kept of when that entry is put in the computer,
24 yes.

25 Q Sure

1 A. Yeah, okay.

2 Q. There's all kinds of things you could have obtained if
3 you really wanted to check out the entries, right, including
4 the actual file?

5 A. Well, I guess I could have found that when he entered
6 his time for the 12 hours in the deposition, it's not going to
7 tell me anything about the time spent in the deposition, is it?

8 Q. Well, I don't know. I don't know, sir.

9 A. I don't think it is.

10 Q. All right. Now, with respect to Exhibit 3, if you
11 would, for just a moment, can you take a look at Exhibit 3?

12 A. Uh-huh.

13 Q. Exhibit 3 is a -- can you tell us what it is,
14 generally?

15 A. It's a calendar.

16 Q. And is this a calendar that comes off of your
17 computer?

18 A. Looks like it.

19 Q. And is this particular calendaring system that you
20 use, is it Microsoft Outlook?

21 A. I think so.

22 Q. And you use the server edition?

23 A. I don't know.

24 Q. You don't know?

25 A. I really don't know.

1 Q. Well, don't you have entries for you as a lawyer on a
2 firm calendar?

3 A. Yes.

4 Q. And in fact, the law firm calendar itself, then, is it
5 kept on your computer?

6 A. My calendar is accessible to everybody in the firm,
7 actually.

8 Q. Well, I understand that. Where is your calendar file
9 kept?

10 A. You mean, in the computer?

11 Q. In the computer system. You say it's accessible by
12 everybody. Is it kept on your desktop computer?

13 A. Yes.

14 MR. ECKERSLEY: Objection, foundation, your Honor. I
15 don't think this witness knows where his files are kept.

16 THE COURT: Do you wish to respond?

17 MR. PETERSON: I'll change --I'll ask another question.

18 THE COURT: Go ahead.

19 Q. BY MR. PETERSON: Okay. What do you know about the
20 calendaring system and where it's kept?

21 A. What I know about the calendaring system is I can
22 bring up my calendar on my screen. I can enter appointments, I
23 can delete appointments, I can check other lawyer's calendars.
24 Those are the things I can do with the calendar on my computer.
25 That's about the extent of my knowledge of it.

1 Q. But you do not know where the actual calendar file is
2 placed within your system?

3 A. No, I don't.

4 Q. All right. Now, with respect to this particular
5 exhibit, Exhibit No. 3, at the very bottom of the exhibit
6 there's a date right below the sticker. Do you see the date?

7 A. Yes.

8 Q. What's that date?

9 A. I'm not sure.

10 Q. The one that says 4/18/2005, 2:31 p.m.?

11 A. Could have been the day that was printed out. I don't
12 know. I'd be guessing. It's probably the most likely --

13 Q. Isn't this a document that you relied on ultimately in
14 making the decision as to whether or not you were going to fire
15 Gary Ferguson?

16 A. Yes, we relied on his calendar as one of the pieces of
17 information.

18 Q. And you got the calendar off of the computer system?

19 A. I had someone else get it off for me, yes.

20 Q. You didn't do it yourself, personally?

21 A. Gary closed his calendar to us; so we had no access to
22 it.

23 Q. Well how did the person who got it get it, then?

24 A. The administrator can do that.

25 Q. Do each of your -- do each of you have a password?

1 A. Yes, to get on the computer.

2 Q. And is there a place where all the lawyers passwords
3 are kept in your law firm?

4 A. I don't know, to tell you the truth.

5 Q. So when you say he closed the calendar to everyone
6 else, what you're really telling us is that he had a password
7 and you didn't know how to get to it?

8 A. No. There is a feature on our computer which allows
9 me to bring up someone else's calendar. We use that so we
10 can find out if someone else is available to cover for us, for
11 example, for an appointment that we can't make. He had us --
12 he had whoever it is, our computer person, take his name off
13 so that it was not an option for us to look at his calendar.

14 Q. Let me stop for a minute. You say he had whoever
15 it was, our computer person. Did you see Gary Ferguson have
16 anybody take his name off his calendar so you couldn't have
17 access to it?

18 A. What I know is that no one in the office could gain
19 access to his computer.

20 Q. Not what I asked. I'm asking you, when you make a
21 statement like "He had our computer person take his name off
22 so we couldn't have access to it," who did he have do that?

23 A. It would have been either Janet or Tracy.

24 Q. Who was it?

25 A. I don't know.

1 Q. Did you ask Mr. Ferguson at any time before you fired
2 him, so that you could see his calendar, to say, "Gary, I can't
3 get your calendar. Can I get to it? Will you help me?" Did
4 you do something like that?

5 A. No.

6 Q. You're saying he had somebody else take his name off
7 the calendar so you couldn't get to it, because you want the
8 jurors to think that he was trying to hide something from you,
9 right?

10 A. No. He took it off so we could not put items on
11 his calendar. What happened was a misunderstanding, lack of
12 communication, actually, between my secretary and I and Gary,
13 involving a deposition that I hoped he would cover for me. My
14 secretary put it on his calendar, thinking I had already talked
15 to Gary. I had not. He was upset. So at that point he made
16 it impossible for anyone to see his calendar or put anything on
17 it. That's what happened.

18 Q. And is that what he told you?

19 A. Yes.

20 Q. Well, I thought a minute ago you told us that he had
21 someone -- you didn't know who -- make it so that he couldn't
22 get on there, you couldn't get onto it.

23 A. I think that's what I just said, yeah.

24 Q. You were the -- were you the manager of this law firm
25 at this point?

1 A. No.

2 Q. Could you have said to him, "Listen, that's nonsense.
3 I want access to your calendar. Make sure I can get on it"?

4 A. No.

5 Q. Why didn't you just fire him for that? I mean, for
6 crying out loud, you couldn't get to his calendar.

7 A. Why would I fire him for that?

8 MR. PETERSON: Maybe this would be an appropriate place
9 to break, your Honor, for lunch, before I go to another area,
10 if the Court's inclined?

11 THE COURT: Members of the jury, we will take our lunch
12 recess at this time. It's very important that you remember
13 the admonitions I've given to you previously about having no
14 discussions or conversations with anyone about this case,
15 including no discussions or conversations amongst yourselves.

16 Continue to avoid having any contact whatsoever with
17 any of the lawyers, their clients or any of the witnesses on
18 this particular case. I'm sure you recall my admonition to
19 you to refrain from doing any type of independent research or
20 gathering of information on your own. Also avoiding any media
21 coverage. It's important to continue to keep open minds and
22 not form any conclusions about this case.

23 We'll recess at this time. Kathy will collect your
24 notepads and redistribute them to you. I'll ask that you
25 return promptly this afternoon at 1:15. Kathy, you may take

1 the jury.

2 (Jury exits the courtroom)

3 THE COURT: You may be seated, and you may step down.
4 Just a couple of quick questions. Mr. Peterson, Mr. Orchard,
5 when on the -- when on the radar screen do you anticipate
6 resting your case?

7 MR. PETERSON: Today.

8 THE COURT: When today?

9 MR. PETERSON: Well, our last witness is an economist
10 and I would think would probably -- would probably by 3 o'clock
11 or maybe --

12 MR. ORCHARD: That's optimistic.

13 MR. PETERSON: Depending on how long cross goes. I
14 don't know.

15 THE COURT: You know, that answer's never sufficient
16 for me, because you tell me nothing by that response; and I'm
17 asking the questions for the obvious reasons.

18 MR. PETERSON: Sure.

19 THE COURT: And I'm not being critical; I'm just trying
20 to manage the case. We've committed to the jury that we were
21 going to take three days of their time. I didn't expect, and
22 I'm sure you didn't either, that it was just going to be three
23 days of the plaintiff's case. I'm beginning to wonder now
24 whether I'm going to have to give the jury some advance notice
25 of some additional obligation on their parts I'm trying to

1 understand where we are in the trial of this case.

2 MR. ORCHARD: And you know, your Honor, we didn't
3 anticipate that voir dire and then openings would take us --
4 when you say three days for the plaintiff's case, we didn't
5 begin our case until I don't know what time in the afternoon.
6 So we --

7 THE COURT: You know, I hear you; and I know that it's
8 difficult at times to gauge, for example, how long the jury
9 selection process is going to take. My only response is that
10 in my experience, that time period was not excessive; and
11 if you leave it to me, the reason why it's taken so long is
12 because at least one of the important factors is your choice
13 to elicit the testimony in a narrative format. Narrative
14 format testimony always takes longer.

15 Again, I'm not being critical of you. I'm just
16 stating what I think the situation is. Be that as it may, I
17 want to know where we are, and when you're going to be done.

18 MR. PETERSON: Well, I really -- I just spoke with
19 Mr. Eckersley about this again. I really do anticipate,
20 frankly, that we'll be done today; and we've talked about
21 we're going to add in one of their witnesses at 1:30 out of
22 order, if the Court permits us to do that I've agreed to
23 try and accommodate in that respect. We still should be done
24 easily by tomorrow -- the whole case by tomorrow at noon, would
25 you think?

1 THE COURT: Well, let's stay with you for right now --

2 MR. PETERSON: I --

3 THE COURT: -- the plaintiff's case. So what time
4 today will you be done?

5 MR. PETERSON: In -- I would think still we'll be done
6 by 4 or 4:30.

7 THE COURT: Let's assume for a moment, Mr. Eckersley,
8 they are done at 4:30. When are you done?

9 MR. ECKERSLEY: At 10 at the latest.

10 THE COURT: Okay.

11 MR. ECKERSLEY: Assuming cross examination is --

12 THE COURT: Yeah, I know you can't -- neither of you
13 control that. So I understand that. Okay. Anything else you
14 want to say to me, now that you've found (inaudible)?

15 MR. PETERSON: No. He asked whether I was counting
16 Mr. Glenn, and I am. I anticipate we have two more witnesses.

17 THE COURT: And just out of curiosity, and I'm --
18 again, this -- who is the individual that approaches you in
19 that respect?

20 MR. PETERSON: Mr. Jacobson, who is --

21 THE COURT: Who is he? I'm sorry, who is he?

22 MR. PETERSON: Mr. Jacobson, who is on pleadings.

23 THE COURT: I didn't know that that was --

24 MR. PETERSON: Yeah.

25 THE COURT: -- Mr. Jacobson on the pleadings, and I

1 only asked the question because I'm security conscious --

2 MR. PETERSON: Oh.

3 THE COURT: -- when someone steps into the well. That's
4 all. Let me ask this question, Mr. Eckersley. Have you had a
5 chance to take a look at the plaintiff's requests for judicial
6 notice of certain -- that they maintain to be party admissions?

7 MR. ECKERSLEY: You know, I did generically, your
8 Honor; and I noticed there were many of them to which I had
9 an objection. I have not gone through and made specific
10 objections. If the Court wants me to, I will.

11 THE COURT: So does that mean you intend to give me
12 something in written opposition to that request or not?

13 MR. ECKERSLEY: That hadn't been my intent. I intended
14 to -- but I guess the Court wants me to; so I will.

15 THE COURT: Well, I need to -- I need to get myself to
16 a point where I'm fully informed as to what your position is.

17 MR. ECKERSLEY: Yes.

18 THE COURT: I've read their request and I'm trying to
19 understand how I'm going to receive your opposition. That's
20 all.

21 MR. ECKERSLEY: Previously I filed essentially a blank
22 objection --

23 THE COURT: Correct.

24 MR. ECKERSLEY: -- proceeding in this fashion, your
25 Honor.

1 THE COURT: Correct. That didn't help me.

2 MR. ECKERSLEY: Okay. If that doesn't help, you will
3 get something more specific, your Honor, and I'll try to get it
4 to you shortly.

5 THE COURT: And Mr. Orchard and Mr. Peterson, have you
6 -- obviously started looking at the instructions. Have you
7 taken a look yet at Mr. Eckersley's requested supplemental
8 instructions?

9 MR. ORCHARD: I looked at the first set. I haven't had
10 a chance to look at the second set they sent to me; but I can
11 make objections to those, if you'd like me to do so.

12 THE COURT: Are you able to do so right this second?

13 MR. ORCHARD: I could -- what I want to do is I want to
14 compare his supplemental with my supplemental to see where we
15 agree.

16 THE COURT: So you haven't done that yet?

17 MR. ORCHARD: I have not, sir. I'm sorry.

18 THE COURT: All right. Let's do it this way, then.
19 Let's definitely plan on at least Counsel remaining here after
20 the jury is excused this evening, so we can handle some of
21 these issues we need to get out of the way. Okay, we'll see
22 you at 1:15.

23 (Recess taken)

24 COURT BAILIFF. All rise. Third District Court is
25 again in session Judge Medley presiding Please be seated.

1 THE COURT: The record should reflect that all Counsel
2 and parties are present. The jury is also present in the
3 courtroom at this time. Mr. Peterson.

4 Q. BY MR. PETERSON: Mr. Williams, if you would, could you
5 turn to Exhibit 2, please. I've asked you some questions
6 before about specific entries in Exhibit 2. I don't want to
7 belabor the point; but would it be fair to say that during
8 -- prior to the time that you fired Gary Ferguson, first, you
9 had in your possession essentially Exhibit 2, or something
10 essentially the same as this particular exhibit dated April
11 the 18th, 2005?

12 A. Yes.

13 Q. Would it also be accurate to say that before you fired
14 Gary Ferguson, you did not take him through any particularized
15 entry, and dispute or inquire about the activities that were
16 billed?

17 A. That's correct.

18 Q. Is it correct to say that at the time you fired Gary
19 Ferguson, the reason you gave him with respect to over-billing
20 was that he had billed more time, as opposed to billed a
21 specific entry that was wrong?

22 A. I should say, we made the decision --

23 Q. Understood.

24 A. -- as a board to terminate his employment. We were
25 unable to determine which specific entries -- typically we're

1 unable to determine which specific entries reflected bills for
2 work he did not do.

3 Q. And you did not --

4 A. Collectively we came to that conclusion.

5 Q. Okay, I understand, sir. I'm not suggesting it was
6 your decision individually. You did not, though, go through
7 and provide him with a specific date of something you believe
8 to have been over-billed?

9 A. Yes, that's right.

10 Q. A specific entry, a specific file?

11 A. That's true.

12 Q. All right. Now, take a look at Exhibit 3, if you
13 will. Can you tell us generally what Exhibit 3 is?

14 A. I think we've identified this before as a calendar.

15 Q. Okay, this is the calendar we were talking about.
16 This particular printout at the bottom, you'll see it says
17 April 18, 2005, 2:31 p.m. Is it fair to say that you had
18 either this particular item or its equivalent at the time
19 that you fired Gary Ferguson?

20 A. Yes.

21 Q. And again by "you," I'm not referring to you in
22 particular. I'm talking about collectively.

23 A. Thank you. Yes, we had.

24 Q. And had you taken Exhibit 3 or its equivalent, or any
25 item in Exhibit 3, talked to Gary Ferguson, told him that you

1 thought there was something in here that was incorrect or
2 improperly mounted to a billing?

3 A. No.

4 Q. With respect to Exhibit 3, please, if you would turn
5 to page 9. In particular I'd like you to take a look at
6 February the 22nd.

7 A. Yes, I have it.

8 Q. At 5 o'clock p.m., do you see the entry?

9 A. I do.

10 Q. Would you read what it says, please.

11 A. It says, "Take laptop home to work at home tomorrow."

12 Q. It is fair to say, is it not, that Gary Ferguson used
13 his laptop from time to time away from the office, correct?

14 A. I don't know that.

15 Q. Well --

16 A. I see one entry when he took it home. I don't know
17 that there are any others.

18 Q. So you suppose that he had that laptop had only used
19 it just on this one occasion?

20 A. I don't know.

21 Q. Did you inquire about the use?

22 A. No.

23 Q. Now, take a look at Exhibit 4, please. Exhibit 4,
24 could you identify it?

25 A. These are timekeeper diary, it's called. It's a list

1 of daily billings that Gary entered in the computer.

2 Q. You may recall, sir, that this particular report on
3 the left-hand side at the top, dated May the 1st, 2005, first
4 did you have in your possession this information on May the 2nd
5 of 2005?

6 A. I'm not certain of that, actually.

7 Q. The information would have been within your computer
8 system, correct?

9 A. Somebody could have got it.

10 Q. Are you saying you don't know whether or not you
11 reviewed this information before you fired him?

12 A. I honestly don't remember. I know the calendar was
13 copied, the bills were copied, and our information about his
14 computer time were all collected together and analyzed by all
15 of us. I'm not sure it was as late as the 2nd of May.

16 Q. Well, let's stop for just a moment. You say the bills
17 were collected. UMIA bills were sent, by your account, every
18 couple of months; isn't that correct?

19 A. What we gathered were the timekeeper diaries.

20 Q. That's what I was wondering, if you meant that
21 instead. You gathered up the timekeeper diary. That was --

22 A. Or maybe it was the bills. I don't remember for
23 sure, to tell you the truth. It could have been the bills,
24 or it could have been the timekeeper diaries; it's the same
25 information.

1 Q. Yeah, it would be the same information. The timekeeper
2 diaries, though, would reflect all of the billings to UMIA, as
3 opposed to billings by a particular case. In other words, the
4 bills that you submit on behalf of UMIA in the Merce case, it's
5 just the Merce case that goes in that particular --

6 A. Yes, that's right. That's right. So it was most
7 likely the diary.

8 Q. With respect to Exhibit 4, I know that you don't know
9 if you in fact had it before; but you don't dispute that it was
10 produced in discovery by you, do you, as part of this case?

11 A. You have it. So obviously we produced it.

12 Q. And you don't dispute, do you, that it was created on
13 the date that your computer says it was created?

14 A. That is, May 2?

15 Q. Yeah.

16 A. No, I guess not.

17 Q. And did you take any of the entries in Exhibit 4, go
18 to Gary Ferguson and say, "Listen, I have a question about a
19 particular entry in Exhibit 4"?

20 A. No, we've had that discussion already.

21 Q. Right. So the same thing applies to this one, correct?

22 A. Yeah, I meant the discussion with Gary, but the bill
23 -- no, I did not discuss these specific entries with Gary.

24 Q. And if you were to take a look at Exhibit 4, you'd see
25 these are entries dated April 27th through April 29th. Wouldn't

1 this be the time after he had come back from his vacation with
2 his wife?

3 A. Yes.

4 Q. Now, take Exhibit 5, if you would please.

5 A. Okay.

6 Q. Again, at the bottom right-hand side you'll see a
7 date, 5/2/2005, 9:32 a.m. This is the April calendar; is it
8 not?

9 A. I have a sticker at the top of this one, I can't see.

10 Q. I apologize. May I approach and show the witness?

11 MR. ECKERSLEY: I'd stipulate that that's what it says,
12 your Honor.

13 MR. PETERSON: Good enough, sir?

14 THE COURT: Either way.

15 THE WITNESS: That's fine for me.

16 Q. BY MR. PETERSON: All right. Did you review this
17 before you fired him?

18 A. Yes, I'm sure we did.

19 Q. Okay, and when he was on vacation, I mean, you knew
20 about that in advance, right?

21 A. Yes.

22 Q. And likewise you knew about the fact that he was going
23 to take some time in May to go, as he's described, with his
24 kids, one graduating from medical school, the other one doing
25 her dissertation. You knew about that, too, right?

1 A. Yes.

2 Q. Okay. All right. Now, so we go then to May the 4th,
3 if I might, okay, of 2005. On May the 4th, 2005, you had a
4 meeting with Mr. Martin Osowski; isn't that correct?

5 A. It was either the 4th or the 5th, I think.

6 Q. Well, you fired Mr. Ferguson. The actual termination
7 took place on May the 5th.

8 A. Correct.

9 Q. Before you terminated him, you met with Mr. Osowski?

10 A. Yes, it was very close to the proximity to that.

11 Q. So if it was the 4th or the 5th, one of those dates, but
12 it's before?

13 A. I believe so, yes.

14 Q. All right. Now, you met with Mr. Osowski where?

15 A. We went to the Oster Bar to have lunch.

16 Q. Okay. Now, at what time of the day on the 5th did you
17 fire Mr. Ferguson?

18 A. I believe it was mid-afternoon.

19 Q. After lunch, you think?

20 A. Oh, yes.

21 Q. Okay.

22 A. It was 3 or 4 or something like that.

23 Q. Okay, before you had that meeting with Mr. Ferguson,
24 do you recall where you were on the 5th of May 2005 at lunch
25 time?

1 A. I don't.

2 Q. All right, now --

3 A. Unless it was with Marty.

4 Q. Marty Osowski?

5 A. (No verbal response).

6 Q. All right. Let me ask you first of all about your
7 relationship with Mr. Osowski. Mr. Osowski was an adjuster
8 -- was it for AETNA at the time?

9 A. In the '70's, yes. That's where I met him.

10 Q. In the '70's. He sent you cases?

11 A. Actually he worked with my mentor, John Snow, and I
12 worked on cases.

13 Q. And when you left to form your own law firm, he -- was
14 he then already with UMIA?

15 A. Yes.

16 Q. And while he was at UMIA, he was the source of cases
17 for you, correct?

18 A. Yes.

19 Q. Now, did you have an expectation that based on your
20 performance as a lawyer, on behalf of UMIA's positions, that
21 you would continue to receive cases if you did a good job?

22 A. Yes.

23 Q. And if you continued to satisfy Mr. Osowski or the
24 adjusters at UMIA, you expected that when new cases came in,
25 they would bring them to you, correct?

1 A. I assume that.

2 Q. And you were the general Counsel for UMIA?

3 A. That's correct.

4 Q. In that capacity you spoke directly to Mr. Osowski, I
5 take it, on a frequent basis?

6 A. Yes.

7 Q. Provided Counsel and advice to him as their lawyer,
8 correct?

9 A. I did. That's correct.

10 Q. Now, with respect to other lawyers in your firm, if
11 they worked on UMIA cases, obviously you expected they would
12 do a sufficiently good job to likewise get more work into the
13 firm, right?

14 A. Yes.

15 Q. And wasn't that always the case before May the 5th of
16 2005 with respect to Gary Ferguson?

17 A. Did we have the same expectation of him?

18 Q. Sure.

19 A. Yes.

20 Q. And wasn't it always the case that UMIA continued to
21 bring cases to Gary Ferguson while he was your employee?

22 A. Yes.

23 Q. Now, when you met with Mr. Osowski, you told him that
24 he couldn't trust Gary Ferguson's bills; isn't that correct?

25 A. That's not what I told him.

1 Q. You told him you were firing Gary Ferguson?

2 A. What I told him was --

3 Q. Did you tell him that you were firing Gary Ferguson?

4 A. Yes, I told him we were -- yes, that's right. I told
5 him that's what we had to do.

6 Q. Did you tell him you could not trust his bills?

7 A. No, I said we had formed the belief, after reviewing
8 information we'd collected, that we could not trust the
9 accuracy of his bills. That was the decision we had made;
10 and that was one of the reasons why we had to terminate his
11 employment.

12 Q. All right, let me make sure I've got it correctly.
13 After reviewing the information that you had obtained -- you
14 just said that, right?

15 A. That's right; that's what we did.

16 Q. And you could not trust the accuracy of his bills?

17 A. Yes. It appeared to us that he was billing more time
18 than he actually worked.

19 Q. And it appeared to you he was billing more time than
20 he actually worked?

21 A. Yes, that's right.

22 Q. All right, let's stop there. There is no clock at
23 your law firm by which shareholders or attorneys signed in when
24 they came to work, correct?

25 A. That's correct.

1 Q. There was not requirement that anyone sign in on any
2 form when they enter the office to being the work, correct?

3 A. That's correct.

4 Q. And there was no requirement that anyone approve a
5 shareholder's time; that is to say the amounted time that they
6 were actually in their office for their work, correct?

7 A. That's correct.

8 Q. So with respect to whether or not he had billed for
9 more time than he was actually working, did you draw the
10 assumption that the fact he might not have been logged into
11 his computer meant he hadn't been working?

12 A. That's -- we had three pieces of information, if I
13 could explain this.

14 Q. Go ahead.

15 A. Okay. As you said, we didn't have a clock that
16 someone checked in with when they came to the office. What
17 we had instead was the ability to monitor when the computer
18 went on. The computer goes on first thing, because it has
19 all of our email messages on it, it has our calendar for the
20 day on it, and it has all of our phone messages.

21 The first thing you do is turn on the computer.
22 That's the time clock, if you will, piece of this. We also
23 knew when the computer was turned off when the lawyer left the
24 office, when Gary left. To determine what he was doing outside
25 the office, for example, we wanted to get his calendar, which

1 we did, so we could see appointments on his calendar; and the
2 third piece of information we had was the description of his
3 time.

4 So by using those three pieces of information, we
5 could determine when he was out of the office, at depositions,
6 meetings, whatever it may have been, because it was on his
7 calendar. We could tell when he was in the office doing work,
8 because his computer would be on; and we could look at the
9 description of his work and see if it was the kind of work
10 customarily done in the office or not.

11 All of us met together, the five of us, went over the
12 information in detail; and with about 150 years of combined
13 experience in this kind of work, came to the inescapable
14 conclusion that he was over-billing for what he was doing.
15 It was very obvious.

16 Q. When did you meet, the five of you?

17 A. Well, it was actually after the 18th, because I think
18 that's when they printed out the materials, or sometime not
19 long after that. We've done -- when he returned from the
20 dive trip, we started -- we had another five or six days of
21 monitoring. I think we took that into account as well, but
22 there was a persistent --

23 Q. Mr. Williams --

24 A. -- there was a persistent pattern there.

25 Q. -- what I asked was when you met.

1 A. I'm sorry.

2 Q. Do you know the date that you met?

3 A. I don't know the specific day. I think we've met
4 several meetings, actually.

5 Q. A moment ago you said, "The five of us met." You were
6 asked about whether or not you all met in your deposition,
7 whether you had met and obtained a unanimous decision in a
8 meeting to fire him. Is this the same meeting we talked about
9 in your deposition?

10 A. What you asked in your deposition was, we have a
11 meeting to make the decision as to when Gary would be fired.
12 What we did was we had individual conversations on the 5th of
13 May, and probably the 4th. At the time it finally come, we
14 couldn't avoid it any longer, and we had to do it. These were
15 -- I'm talking about now our meetings to analyze the data that
16 we collected.

17 Q. All right. Let's go -- if I can, let's go back for
18 just a moment to the April calendar that we were just looking
19 at a minute ago, okay?

20 A. Okay. Is that Exhibit 5?

21 Q. Yes, it is Exhibit 5, exactly.

22 A. Okay.

23 Q. It is accurate, is it not, that Mr. Ferguson was out
24 of the office from the 14th of April until the 20 -- came back
25 in on the 25th of April; isn't that correct?

1 A. That's what his calendar says. I seem to think he had
2 some time billed on the 14th or 15th, but in any event, he was on
3 his dive trip during that time, yeah.

4 Q. Now, did you meet, the five of you, between the week
5 of April the 18th and the 22nd?

6 A. I think so, probably.

7 Q. But do you know whether you met?

8 A. Well, like I said, I think we met several times to
9 go over this. It's not something we took lightly. It's not
10 something we wanted to do.

11 Q. I'm not asking for this commentary. What I'm asking
12 you is do you know whether you met during that week?

13 A. I'm quite sure we did, yes.

14 Q. When?

15 A. I can't tell you the specific day.

16 Q. Where?

17 A. In our office.

18 Q. Who was there?

19 A. George, Bruce Jensen, Jody Burnett, and myself, and
20 Dennis Ferguson, yeah. We also had additional discussions
21 with those five, the five of us initially. Then we shared
22 this information as we -- and analyzed it with Kurt Frankenberg
23 and Carol Jensen.

24 Q. Well, what information did you share that week?

25 A. That all of the data clearly demonstrated to us that

1 there was a substantial amount of time that was billed that had
2 not been worked. That was the conclusion we had to reach.

3 Q. Take a look at Exhibit 2.

4 A. I have it.

5 Q. Okay, Exhibit 2, this particular report's dated April
6 the 18th, 2005. Is your testimony here today under oath that
7 you shared this particular report with those four other people
8 during the week that we've just been discussing?

9 A. That's my best memory.

10 Q. Is it accurate to say that you don't have any notes of
11 those document -- or of those meetings?

12 A. Well, we have the summaries we prepared with the data;
13 but we kept no minutes of the meeting. No, we didn't do that.

14 Q. And is it difficult for you to look back and try now
15 to determine whether or not you had a meeting that week in
16 April?

17 A. The specific date, yeah, obviously.

18 Q. Because a couple, three years almost had passed,
19 correct?

20 A. Yes.

21 Q. And you would agree that it's difficult looking
22 backwards to try and figure out where you were on a particular
23 day or a particular time three years later, correct?

24 A. Yes, it is for me, yes.

25 Q. Likewise, wouldn't you assume it would be for

1 Mr. Ferguson?

2 A. I have no doubt.

3 Q. All right. So is it your testimony that that's the
4 week that you met and made the decision you were going to fire
5 him?

6 A. I think I've said that several times.

7 Q. Did you meet -- or did you have any documents other
8 than the one that we've identified that had actually been
9 printed out prior to that date, Exhibit 2?

10 A. And your question about that is?

11 Q. Do you have any other documents? You've said a minute
12 ago --

13 A. Yeah.

14 Q. -- "We compared the information that we had."

15 A. Yeah, we had an additional exhibit that has not been
16 introduced yet.

17 Q. The computer log?

18 A. Yes.

19 Q. Now, the computer log itself, when was the computer
20 program turned on to record the log in, log off times?

21 A. The 23rd of March.

22 Q. The 23rd of March. So Mr. Ferguson was present,
23 let's see, in March. Then the 23rd in -- I don't have March's
24 calendar. Do you remember what day -- I can't remember off
25 the top of my head. If we go to No. 3, let's try that. Go to

1 Exhibit 3, the 23rd of March, page 13, Wednesday. That's right,
2 there was the testimony this morning about the 23rd --

3 A. Looks like Thursday to me.

4 Q. Or Thursday. I -- well, the bottom of the page,
5 23 March, that looks like Wednesday.

6 A. Oops, that's the 3rd, I beg your pardon.

7 Q. Okay.

8 A. Yeah, it was Wednesday.

9 Q. Now, did you do the actual placement of whatever it is
10 that you did in terms of the computer?

11 A. No.

12 Q. And when you've talked about the computer, are you
13 talking about the server?

14 A. I don't know. I don't know the details of that.

15 Q. Well, do you know whether or not you were monitoring
16 the desktop computer that he used, his log ins from that
17 computer?

18 A. The computer in his office, yes.

19 Q. But not his laptop?

20 A. That's correct.

21 Q. It is fair to say that at this point although some
22 nearly three years have past, you've never done an analysis to
23 determine, as your Counsel said earlier, the dates and times
24 documents were created on the laptop, have you?

25 A. Yes.

1 Q. You have?

2 A. Uh-huh.

3 Q. Yet, in discovery when you were asked to produce all
4 of the records that you had relating to any claim you had, you
5 didn't produce anything relating to the laptop, did you?

6 A. I haven't seen them, and it was done just recently.

7 Q. You waited until now to do it? What were you waiting
8 for?

9 A. Well, sometimes you get things prepared right before
10 trial. One of the things we wanted to determine is whether
11 or not documents had been checked out of the system into his
12 laptop and then brought back. There were none.

13 Q. Let's see, you have a report that's been prepared that
14 details all the documents and when they were created and the
15 time that he was on his laptop?

16 A. Let me say that I have been -- understand that a
17 search has been made of those records, and that was the
18 conclusion that Tracy reached. No documents had ever been
19 taken out during the time period we were monitoring.

20 Q. Have you examined the laptop?

21 A. No.

22 Q. And you were a defendant in this case. You've signed
23 off on, for example, the interrogatories where you were asked
24 about all the claims that you had?

25 A Yes, I did

1 Q. And on the request for production of documents, you
2 filed -- you specifically swore under oath a response, when you
3 were asked to produce all of his documents, reports, records?

4 A. Yes.

5 Q. You didn't produce the laptop, did you?

6 A. I don't know if you asked for the laptop.

7 Q. Well, when I said, "Any and all documents or things."
8 That's sort of customary language that's used by lawyers like
9 yourself.

10 A. Uh-huh.

11 Q. Civil lawyers, right?

12 A. I suppose.

13 Q. Yes?

14 A. I suppose so.

15 Q. Were you confused by the terms?

16 A. Now. Well, I don't even -- I did not know those
17 records existed.

18 Q. When did you find out they existed?

19 A. Last week.

20 Q. You remember as a lawyer that you have this obligation
21 to supplement discovery, right?

22 A. Uh-huh.

23 Q. Tell the jurors what that means. What does that mean?
24 When they -- you have a duty to supplement. What does that
25 mean?

1 A. Well, I'm not sure what the duty to supplement is,
2 to tell you the truth. I know we've got the obligation to
3 provide you with the information we have at the time you make
4 the request; and I think we did.

5 Q. The Utah Rules of Civil Procedure, did they require
6 you to supplement answers to discovery when new materials
7 become available?

8 A. I think we're required to correct answers that later
9 prove to be wrong; but no, I haven't looked at it in a while,
10 and I'd have to see it, to tell you the truth.

11 Q. How long have you been a lawyer?

12 A. Been a lawyer since 1974.

13 Q. Is it your testimony that you have never supplemented
14 discovery on behalf of a client?

15 A. I think I have supplemented --

16 Q. When we say supplement, you --

17 THE COURT: Excuse me, just a second.

18 MR. PETERSON: I apologize.

19 THE COURT: Mr. Peterson, all I'm trying to avoid here
20 is two people talking at the same time, so the record is clear.

21 MR. PETERSON: Yes, sir, I apologize. I realized I
22 talked over.

23 THE COURT: Go ahead.

24 THE WITNESS: Let me clarify my answer. What we
25 typically see is request for supplementation of interrogatories

1 and request for production. That didn't occur here.

2 Q. BY MR. PETERSON: Doesn't your Utah rules say, "The
3 attorney shall have a continuing duty to supplement answers in
4 discovery"?

5 A. I think I told you I can't remember for sure.

6 Q. A minute ago you didn't even know what supplement
7 meant. Do you know what it means?

8 A. No, I know what supplement means.

9 Q. Well, were you planning on letting us know what your
10 report said at some point before the trial was over?

11 A. Well, the information was provided to our attorneys,
12 and I have not been aware, frankly, of a lot of the discovery
13 requests that had been made. The only one I'm aware of is a
14 set of interrogatories and request for production that were
15 filed a long time ago, and some have been done; but I haven't
16 really followed discovery since then. For example --

17 Q. You're not really suggesting, are you, that as a
18 lawyer, an officer of the Court, you didn't understand that
19 you have a duty under Utah law to supplement or add to
20 additional discovery matters that you have, are aware of,
21 and were requested originally?

22 A. My expectation is that the obligation to supplement
23 additional documents would be part of a Court order, scheduling
24 order that would pertain to disclosure of documents for trial.
25 That was what my assumption was.

1 Q. Did you review the Court's order in that regard in
2 this case?

3 A. I did not.

4 Q. Are you familiar with Rule 26 discovery, the Utah
5 Court Rules?

6 A. I know of Rule 26.

7 Q. Okay, see if you're familiar with this rule, 26(e),
8 supplementation of responses. "A party who's made a disclosure
9 under subdivision (a), or responding to a request for discovery
10 to a response is under a duty to supplement the disclosure or
11 response to include information thereafter acquired for and by
12 the Court or in the following circumstances." Then it goes on
13 to describe those circumstances. Have you read that rule?

14 A. Well, see, I think I've mentioned the order of the
15 Court --

16 Q. Have you reviewed --

17 A. I also mentioned supplementation in the previous
18 answers proved to be incorrect. They might be pretty close.

19 Q. Pretty close.

20 A. Okay.

21 Q. Did you review the order of the Court to see whether
22 this Court requires it?

23 A. My attorney did that.

24 Q. If in fact you have additional information that was
25 not disclosed before, would you agree that that is information

1 which would make a prior answer incorrect, the one where I said
2 to you in discovery, "Give me everything that you've got that
3 you think supports your claims"?

4 A. No, I don't think so. I think the obligation to
5 supplement would be part of the Court order.

6 Q. Guys like you call that "trial by ambush"?

7 A. No.

8 Q. Let's take a look --

9 A. I abide by the Court rules --

10 Q. -- if we can --

11 A. -- Court's orders.

12 Q. -- your point when you fired Mr. Ferguson was that he
13 had out-billed everybody else in the firm, right?

14 A. January and February he did.

15 Q. Well, but you didn't fire him in February or January.
16 You fired him in May.

17 A. That doesn't change his billing practice for January
18 and February.

19 Q. All right, let's take a look at Exhibit 7, if you may.

20 A. Okay.

21 Q. Tell us what Exhibit 7 is.

22 A. This is a summary of hours billed -- worked and billed
23 for the period from January 1, '05 to January 31st.

24 Q. You call this a "timekeeper analysis" in your law
25 firm, correct?

1 A. That's the title of the document, yes.

2 Q. This particular one you have in front of you is dated
3 at the top, it was printed out on February the 8th, 2005,
4 correct?

5 A. I see that.

6 Q. All right. So taking a look at this particular
7 information would tell you how much time had been billed that
8 month and year-to-date for each of your billable employees,
9 correct?

10 A. That's right.

11 Q. That would include all of your lawyers, right?

12 A. Lawyers, yes, uh-huh.

13 Q. Okay, take a look now, next at Exhibit 8, if you
14 would, please. At the top you'll see it's dated Tuesday,
15 June 14th, 2005, after you'd fired Mr. Ferguson; do you see
16 that?

17 A. Yes, I see it.

18 Q. This particular report is a timekeeper analysis
19 covering the month of February 2005, correct?

20 A. Yes.

21 Q. Again, all of the billable information year to date
22 and for the month in 2000 -- in February of 2005, right?

23 A. Yes.

24 Q. Now, for example, if we were to take a look at Elliot
25 Williams, the second entry on the report, it would show that

1 you billed 175.25 hours during the month of February, correct?

2 A. Yes, uh-huh. That's what it says.

3 Q. And 329.75 January and February combined. That's your
4 year-to-date number, correct?

5 A. Yes, that's correct.

6 Q. Well, let's take a look at Gary Ferguson. In February
7 he billed 184.5 hours. So 7 hours more than you did.

8 A. Yes.

9 Q. And his cumulative number at that point is 404. So
10 he's about, let's say, 50 hours more, okay? Correct?

11 A. That's 70, actually.

12 Q. Well, I think, sir, that 404, and you're at what?

13 A. At 329.

14 Q. Yeah, 329, right; 70. Take a look at Bruce Jensen.
15 This is the lawyer you were talking about before, correct?

16 A. Right.

17 Q. He was at 345 hours for the year at that point, right?

18 A. That's right.

19 Q. Now let's take a look at Exhibit 9, please. This is
20 the records relating to March of 2005. Now, this is not --
21 it's the same timekeeper analysis, correct?

22 A. Yes.

23 Q. At the top, April the 12th, 2005, right?

24 A. Yes.

25 Q. And so you had this information in your computer

1 system, and perhaps, indeed, in this particular form that is
2 Exhibit 9; and you had it by April the 12th, 2005, correct?

3 A. I assume that's right.

4 Q. Did you review it?

5 A. I may have.

6 Q. But you don't know?

7 A. This was not -- this was not, as I mentioned, part of
8 the three pieces of information we were gathering; but it's
9 just a cumulative summary. As I've said, the cumulative
10 summary is what caught our attention in January and February.

11 Q. Isn't this a cumulative summary of the time that each
12 and every one of your billable employees has billed for the
13 first three months of the year?

14 A. It is. Well, yeah, the --

15 Q. In fact, it's the same as --

16 A. -- hours billed in March and accumulated for the year
17 so far, yes.

18 Q. All right. So now let's take a look at your hours in
19 March, 142.25 hours. Directly below you, Mr. Jensen, Bruce, he
20 had 269 hours for the month, almost twice what you got.

21 A. He's the guy who works seven days a week.

22 Q. Yeah, that's a lot of hours, 269.

23 A. That's a lot of hours, yeah.

24 Q. And that 269 hours, how many -- how many days in
25 March; 31? What's that; like, 8, 9 hours a day for every day

1 of the month, right?

2 A. That's -- that was Bruce.

3 Q. And Gary Ferguson billed 176 hours, and by that point
4 his total was 580.80; 580.80. So around 581 hours, correct?

5 A. Yes.

6 Q. At that same point Bruce Jensen -- although the first
7 month -- the first month he billed less than 200 hours -- by
8 the end of March, he had caught up and exceeded even Gary
9 Ferguson. He had billed 615 hours, correct?

10 A. That's what it says, yes.

11 Q. Likewise, sir, take a look at your attorney Mark
12 Anderson, towards the bottom of the fourth. That month, in
13 March, he billed 240 hours -- or 241, almost, correct?

14 A. That's what it says, yes.

15 Q. His year-to-date 653.75 hours, right?

16 A. That's correct.

17 Q. So if in fact you reviewed the summaries of how
18 much time your attorneys billed in April, before you made
19 the decision to fire Gary Ferguson, this would have been the
20 last complete month he would have had, if in fact it's as
21 you've testified, that you made the decision during the last
22 week of April, right?

23 A. Yeah, I think that's right.

24 Q. Because you wouldn't have printed out any bills yet
25 for April until the month was over, right?

1 A. I don't know that.

2 Q. Well, was it customary to bill your clients, UMIA, in
3 the middle of the month?

4 A. Well, I don't know that -- well, maybe -- we probably
5 -- in fact, I'm sure we did not to pay the bills, but what we
6 would have had available to us would have been the timekeeper
7 diary that we talked about. Gary could have printed that
8 anytime.

9 Q. Looked at that already, didn't we?

10 A. Yeah, that's right.

11 Q. But the timekeeper diary you looked at only included
12 Gary Ferguson's time. Your claim to Gary was that he had
13 billed more time than anybody else. Looking at that wouldn't
14 have told you whether he billed more time than anyone else,
15 correct?

16 A. By the end of the third -- by the end of the first
17 quarter, Bruce had out-billed him, that's correct.

18 Q. Because he --

19 A. Gary's hours were still 130 hours more than the
20 baseline he'd had for the two previous years.

21 Q. Okay.

22 A. That's what we were looking at, without any apparent
23 change in his work habits.

24 Q. But there were apparent changes, weren't there?

25 A. I didn't see any.

1 Q. You didn't know about the Merce case, the amount of
2 time he'd spent?

3 A. I saw how much he billed.

4 Q. Did you call UMIA and ask them if they had a concern
5 about that?

6 A. UMIA would not have had the information to form a
7 judgment about that.

8 Q. They would have had each and every time and entry
9 billed that you had sent them.

10 A. They'd have the bills, and the bills alone. That was
11 not sufficient. It wasn't sufficient for us.

12 Q. Take a look at Exhibit 10 now.

13 A. Okay.

14 Q. Through the end of April, you fired him May the 5th?

15 A. Correct.

16 Q. Would you agree that Exhibit 10 would summarize, at
17 that point in time, at least on a monthly basis, would be the
18 best evidence of how many hours had been billed by each of your
19 lawyers and billable timekeepers through the end of April 2005,
20 the month preceding the termination?

21 A. All right.

22 Q. Is that a "yes"?

23 A. Yes.

24 Q. Start at the top. Bruce Jensen, 781 hours. We'll go
25 down to your entry, Elliot Williams, 156 hours that month, 628

1 hours total. Mark Anderson, 171 hours, 825 hours total for the
2 year. That's the most, isn't it? I mean didn't he -- he even
3 out-billed Jensen, right?

4 A. Yes, he did.

5 Q. So Jen -- if we were to place those in order -- and
6 then let's go right below you, your named partner Mr. Hunt,
7 George Hunt, 701.95 hours, right?

8 A. Yes.

9 Q. Now, turn to page 2. Gary Ferguson, 671 hours. Even
10 by your own records, he was fourth, when you fired him, in the
11 amount of time that he'd billed, correct, not the top billing?

12 A. Yes, he'd billed 91 hours for the month; and that was
13 the month of the dive trip and the other time he took off.

14 Q. Now, the other time he took off was supposed to be
15 May.

16 A. Yeah. Well, the dive trip.

17 Q. That's right. Something that you all knew about; just
18 like you all knew about him going in May to take time off to be
19 with his family, correct?

20 A. I think so.

21 Q. It wouldn't be your testimony here today that you
22 have never, in the history of being a lawyer, spent more time
23 working on a case before you went on vacation so that you'd
24 have the work done, correct?

25 A. That would be something I could do, sure.

1 Q. And that is something that would be reasonable under
2 the circumstances for even Mr. Ferguson, correct?

3 A. If that's what he wanted to do, that's fine. I have
4 no problem with working.

5 Q. And likewise with respect to attorney billing in
6 general, you can't look at a particular month and determine
7 whether or not somebody has over-billed, because the months
8 change; the billing amount changes from month to month,
9 correct?

10 A. No, that's not correct. That's not what we did.

11 Q. Let's take a look, if it's not correct, at your
12 billings, then. Go back to Exhibit 7.

13 A. Okay.

14 Q. Elliot Williams, 154 hours, correct?

15 A. Yes.

16 Q. Exhibit 8, Elliot Williams 175.25 hours.

17 A. Yes.

18 Q. Shorter month, more hours?

19 A. Yes.

20 Q. The bill changed; it differed, correct?

21 A. Yeah, I worked --

22 Q. By 25 hours?

23 A. Yeah, I worked more hours in February.

24 Q. And that wasn't any big deal, was it? If your work
25 required you to work more hours in February, that's what you'd

1 do?

2 A. Yeah, I did the work, yes.

3 Q. Take a look at Exhibit 9.

4 A. Okay.

5 Q. Elliot Williams, 142 hours. Now you're down about 33
6 hours from the month before. Less work to do, right?

7 A. I don't know what was going on in March, to tell you
8 the truth. I can't remember.

9 Q. You can't remember what was going on in March of 2005.
10 You might have gone out, taken a vacation and done something?

11 A. Yeah, could well have. I don't know.

12 Q. Why in the world would you expect that Gary Ferguson
13 would have recalled those events?

14 A. What events?

15 Q. What he was doing that month in 2005. Your Counsel
16 showed him the March 23rd bill today.

17 A. Yeah.

18 Q. Said, "Tell me what was going on with all these
19 things." He wanted him to explain those individual entries.
20 Do you think you could take a look at your March 23rd timekeeper
21 entries and tell us what you were doing and when?

22 A. I think my description of the time billed would allow
23 me a pretty good idea of where I was and what I was doing as it
24 related to my work. Yes, I think it would be pretty helpful.

25 MR. PETERSON: May I approach the witness?

1 THE COURT: You may.

2 Q. BY MR. PETERSON: I'm showing you now, these are
3 defendant's answers, responses to plaintiff's interrogatories
4 and request for production of documents.

5 A. All right.

6 Q. The very last page of this document, before this
7 exhibit, okay, do you see your signature?

8 A. Yes. Well, actually I don't. It's not there.

9 Q. Well, I don't either. George Hunt, Kurt Frankenberg.

10 A. Oh, yeah.

11 Q. We had to go a page back.

12 A. There I am, okay.

13 Q. You swore under oath that this all was true, right?

14 A. Right.

15 THE COURT: Have you approached for the reason you want
16 to?

17 MR. PETERSON: Yes, I have.

18 THE COURT: Okay, you can go back to the podium.

19 Q. BY MR. PETERSON: You say that in order to do that with
20 respect to your bills, we'd have to actually take a look at
21 them, right? Have to actually see them.

22 A. What I said was, if I looked at my description of my
23 work on a given day, it would give me a pretty good idea of
24 where I was and what I was doing. I think that was my answer.

25 Q. In request for production No. 13, were you asked

1 as follows: "Please provide a copy of billing records for
2 defendant Williams and Hunt, Inc. for the months January
3 through May 2005. By this request, plaintiff does not object
4 to removing client names or confidential information, but
5 rather seeks the daily information for the firm by employee."
6 Your response was -- do you recall -- "Summary of hours
7 attached hereto." Why were you unwilling to produce your
8 billing records to be examined, to determine whether or not,
9 as we've looked at his, your hours --

10 A. There has never --

11 Q. -- part of that detail?

12 A. -- there has never been a claim made relating to me.

13 Q. Isn't your claim that he billed more time than you
14 did?

15 A. I beg your pardon?

16 Q. Isn't your claim that he billed more time than you
17 did?

18 A. Is it my claim that -- I still don't understand your
19 question.

20 Q. When you fired Gary Ferguson, you said he billed more
21 time than everybody, including yourself, correct?

22 A. No. What I said was, in January and February, his
23 billing pattern was different than it had been before; and
24 during those two months, my memory was he was billing more
25 than Bruce and anyone else in the firm (inaudible).

1 Q. When you looked at February, you found out that wasn't
2 really true, didn't you?

3 A. No, Mark Anderson, an associate did.

4 Q. All right.

5 (Counsel conferring off the record)

6 Q. BY MR. PETERSON: Okay. When you went to meet with
7 Mr. Osowski, you knew that if Mr. Osowski did not trust Gary
8 Ferguson, he would not keep giving him cases, correct?

9 A. That's -- that would be a fair guess on my part as to
10 what he would do. It was his decision, I think.

11 Q. I understand it was his decision, but you well knew
12 from your relationship with him that trust was an important
13 component to his retaining Counsel.

14 A. Including me.

15 Q. Including you, that's right. When you went to see
16 Mr. Osowski, you told him that you did not trust Gary's bills,
17 correct?

18 A. That was a conclusion that we had to make.

19 Q. Understood. You told him likewise that he had over-
20 billed for time on cases for UMIA, correct?

21 A. That was the conclusion we had to reach.

22 Q. So you don't deny that you told him you over-billed,
23 and you don't deny that you told him you could not trust his
24 bills, correct?

25 A. That's what we told him. That's what I told him.

1 Q. By implication, didn't you intend that he understand
2 that to mean likewise UMIA could not trust his bills?

3 A. What I said to Marty was -- and I told him, "I hope
4 you remember we had this conversation" -- that the decision
5 about what to do with the cases Gary had been working on in
6 our office, and whether Gary was going to get new cases from
7 UMIA, was his decision to make. I wasn't going to have any
8 input on it.

9 Q. Well, no, but that's sort of nod, nod, wink, wink, go
10 ahead and give them to me; he's been over-billing you, isn't
11 it?

12 A. Well, I fulfilled the duty I owed to my client, to
13 communicate information he needed to have; and I fulfilled
14 that duty. What he chose to do after that was his decision.

15 Q. But you well anticipated that you were getting all
16 those files right back, correct?

17 A. I had to -- the expectation that the files would stay
18 with us, yes.

19 Q. Now, this was in the exercise of your obligation to a
20 client, correct?

21 A. Absolutely.

22 Q. But in addition to being a lawyer, as part of that,
23 you're an officer of the Court, correct?

24 A. I am.

25 Q. And as part of the duties that you have as a lawyer

1 licensed in this state, there are ethical obligations that you
2 must follow; they are mandatory, correct?

3 A. That's correct.

4 Q. If Gary Ferguson in fact was over-billing a client,
5 would you agree that by over-billing the client, he was in
6 essence taking money to which he was not entitled?

7 A. I think he was billing for time he did not work.

8 Q. That wasn't what I asked. Would you agree that he
9 would thereby be taking money from a client to which he was not
10 entitled?

11 A. Yes, and we reimbursed it.

12 Q. I'm not asking about the reimbursement. Do you agree
13 with me?

14 A. Yes.

15 Q. That would violate the ethical rules of professional
16 code of responsibility for lawyers; isn't that correct?

17 A. Yes.

18 Q. Now, as a lawyer, you also have obligations to the
19 bar, correct?

20 A. That's correct.

21 Q. And to the public at large, correct?

22 A. Yes.

23 Q. One of the obligations you have as a lawyer and to the
24 bar of the State of Utah is to report known ethical violations
25 by other lawyers, correct?

1 A. I think so.

2 Q. And it's mandatory?

3 A. I think so. In the setting where there is a concern
4 that an unethical practice may be ongoing and damage the
5 public, I think that's the circumstance. We talked about it.
6 We didn't want to do that to Gary.

7 Q. And you didn't do it?

8 A. And we didn't do it to Gary.

9 Q. You didn't report him to the bar, even though you have
10 a higher obligation to the public at large, because you didn't
11 believe it was true?

12 A. No, I don't think he would have -- I don't think this
13 was a risk to the public. What he did to the UMIA was not.

14 Q. What he did to the UMIA, in your sense, what you
15 conveyed to UMIA was that he had over-billed and taken money
16 he was not entitled to, correct?

17 A. That was the obligation I had to report to it.

18 MR. PETERSON: Thank you.

19 THE COURT: Mr. Eckersley.

20 MR. ECKERSLEY: Thank you, your Honor.

21 CROSS EXAMINATION

22 BY MR. ECKERSLEY:

23 Q. Was it an easy decision to make?

24 A. No, it was not.

25 Q. Why?

1 A. Well, we'd been friends for a long time.

2 Q. When you told Mr. Osowski what you told him, did you
3 believe it?

4 A. Absolutely.

5 MR. ECKERSLEY: That's all for -- at this time, your
6 Honor.

7 THE COURT: You may step down. Thank you.

8 MR. ECKERSLEY: If I could have a moment, your Honor.

9 THE COURT: Okay. So do you wish him to remain here
10 while you're taking this moment?

11 MR. ECKERSLEY: Oh, no, your Honor. What I'm checking
12 is to see if we have witnesses who think they're required to
13 wait out in the hall.

14 THE COURT: All right. You may step down.

15 (Cell phone rings in courtroom)

16 THE COURT: If anybody else is in the cell -- in the
17 courtroom has a cell phone on, please turn them -- put them in
18 an off position.

19 MR. ECKERSLEY: Your Honor, by stipulation, we've
20 agreed to take a witness out of order, and to accommodate his
21 schedule and have Mr. McGarry testify for the defense during
22 part of the plaintiff's case.

23 THE COURT: Mr. Peterson?

24 MR. PETERSON: That's fine, your Honor.

25 THE COURT: Okay. You may do so. Would you raise your

1 right hand, please, sir.

2 COURT CLERK: You do solemnly swear that the testimony
3 you are about to give will be the truth, the whole truth and
4 nothing but the truth, so help you God?

5 THE WITNESS: Yes.

6 THE COURT: Will you please step this way and be
7 seated.

8 THE WITNESS: Thank you, your Honor.

9 SHAWN MCGARRY,
10 having been first duly sworn,
11 testified as follows:

12 DIRECT EXAMINATION

13 BY MR. ECKERSLEY:

14 Q. State your name, please.

15 A. Shawn McGarry.

16 Q. How are you employed, sir?

17 A. I'm a lawyer.

18 Q. And in Salt Lake City?

19 A. Yes.

20 Q. With what firm?

21 A. Kipp and Christian.

22 Q. As part of your --

23 THE COURT And I apologize for this interruption, but
24 when there's a question about the spelling of the name, again,
25 for record purposes, just spell your first and last name

1 THE WITNESS: Shawn, S-h-a-w-n McGarry, M-c capital G-
2 a-r-r-y.

3 THE COURT: Thank you. Go ahead, Counsel.

4 Q. BY MR. ECKERSLEY: Have you had, during your practice,
5 occasion to do medical malpractice defense work?

6 A. I have.

7 Q. And have you done that at the behest of UMIA?

8 A. Yes, along with other carriers.

9 Q. Do you recall specifically defending defendants in
10 cases where Mr. Gary Ferguson also was defending defendants?

11 A. I do.

12 Q. Do you recall in particular the case of Robb vs.
13 Hatch, et al?

14 A. I do.

15 Q. And who did you represent in that case?

16 A. Harvey Hatch.

17 Q. And do you recall who Mr. Ferguson represented?

18 A. I don't know if his first name was Richard, but it was
19 Dr. Cox. He was the emergency room physician.

20 Q. Do you recall depositions that occurred on April 8th of
21 2005 in that case?

22 A. Generally.

23 Q. Have you had occasion to look at your billing records
24 relating to what you did on April 8th of 2005?

25 A. I have.

1 Q. And what do they indicate you did with regard to the
2 Hatch case?

3 A. It indicates I attended the deposition of a neuro-
4 surgeon, Dr. Tippetts. I met with Gary Ferguson to -- and
5 Dr. Markovich --to prepare for the deposition of Dr. Markovich,
6 and attended a deposition for Dr. Markovich.

7 Q. And for that work what did you bill UMIA?

8 A. Six hours.

9 MR. ECKERSLEY: That's all the questions I have, your
10 Honor.

11 THE COURT: Mr. Peterson.

12 MR. PETERSON: Yes, your Honor.

13 CROSS EXAMINATION

14 BY MR. PETERSON:

15 Q. Good afternoon, sir.

16 A. Good afternoon.

17 Q. Do you recall when the deposition of Rick Tippetts
18 was?

19 A. I believe it was April 8, 2005.

20 Q. I didn't mean it to be that -- I just meant like time
21 of day?

22 A. Morning.

23 Q. And do you recall where it was?

24 A. I believe it was in his office, which was a building
25 adjacent to LDS Hospital.

1 Q. And was Dr. Tippetts a witness on behalf of the
2 plaintiffs?

3 A. I don't -- I don't know that you could characterize it
4 that way. He was a treating physician; and his deposition was
5 being taken by Norm Yonker.

6 Q. Norm Yonker?

7 A. Who was the plaintiff's lawyer.

8 Q. All right, and then likewise, in addition to that
9 deposition, did you attend a deposition that same day of
10 Dr. Markovich?

11 A. Yeah, Markovich is I think the way you said it.

12 Q. Markovich, okay. All right.

13 A. I did.

14 Q. And where was that deposition taken?

15 A. That deposition, I believe, was in Mr. Ferguson's
16 office at Williams and Hunt.

17 Q. Now, and whose doctor was Dr. Markovich?

18 A. I believe he was an expert witness. He's an ER
19 physician. He was an expert witness that was retained by
20 Mr. Ferguson.

21 Q. Now, did you see Mr. Ferguson's billing with respect
22 to March -- or to April the 8th of 2005 for that period of time?

23 A. No, I have not.

24 Q. And do you know whether or not Mr. Ferguson did
25 additional things beyond just attending those two depositions

1 for which he billed UMIA?

2 A. I do not.

3 Q. Now, likewise, was -- were you -- you didn't subpoena
4 or -- not subpoena. You didn't notice up either of these
5 depositions, I take it?

6 A. I did not.

7 Q. And who did you have again, which doctor?

8 A. He's a radiologist. His name is Harvey Hatch.

9 Q. Okay, so this is the case where the radiol -- there's
10 a question about whether the ER doctor missed the fracture, or
11 the radiologist missed it, or maybe nobody missed it and he
12 broke his neck somewhere else, right?

13 A. Correct.

14 Q. All right. Did you have your own expert witness on
15 behalf of your doctor, the radiologist?

16 A. Ultimately I did.

17 Q. Okay, and with respect to that doctor, did you meet
18 with him?

19 A. Yes, I did. I met with -- actually Mr. Ferguson met
20 with him as well.

21 Q. Did you go over the case with him?

22 A. Yes.

23 Q. Did you give him records to review?

24 A. I did.

25 Q. And did you spend time with him preparing for his

1 deposition, if he ever was deposed?

2 A. He was deposed; and yes, I did.

3 Q. Now, we're talking in this case about two depositions,
4 neither of which were witnesses whose depositions you were
5 taking, correct?

6 A. Correct. I believe Mr. Yonker noticed both of those
7 depositions.

8 Q. Is it unusual for a plaintiff's attorney to notice up
9 the deposition of, first, the treating physician, and second,
10 one of the defendant law -- defendant's doctors?

11 MR. ECKERSLEY: He had an expert come in?

12 THE WITNESS: I believe this --

13 Q. BY MR. PETERSON: Expert witness.

14 A. -- wasn't a defendant doctor. This was an expert
15 witness. I can't really say anything is unusual. It is so
16 dependent on the schedule of various physicians. It may have
17 been slotted that way. I don't recall why a treating neuro-
18 surgeon was first deposed, and then later the same day, an
19 expert witness in the emergency room.

20 Q. Okay, and I really didn't mean it to be that -- the
21 question wasn't really that skillfully put, I apologize.

22 A. No, that's fine.

23 Q. What I really meant was, I could do it -- let's do
24 it two questions. One, if you're -- from your practice,
25 plaintiff's lawyers in medical malpractice cases typically

1 take the depositions of treating physicians, correct?

2 A. Yes.

3 Q. When they take that deposition, they ask that
4 physician all kinds of questions, right?

5 A. Correct.

6 Q. And if you're -- in this case, for example, you
7 represent a doctor; but this particular witness is not part of
8 your case, he's not your expert, he's not your doctor, are
9 there ever occasions where in that situation you don't ask any
10 questions?

11 A. Yes.

12 Q. Okay. Are there ever occasions in those types of
13 circumstances where what you do is sit back and see what
14 they've got, gather information?

15 A. Certainly.

16 Q. I mean, isn't that part of what goes on in these
17 depositions; the lawyer who isn't at risk, for example, can
18 sit back and learn as much as he can about the case without
19 ever giving away any of his hand, right?

20 A. That's true. I think that's true irrespective of
21 whether you're at risk, so to speak, or not. I think you have
22 to make that call throughout the pendency of the deposition.

23 Q. And those are calls that are made by the individual
24 lawyer based on what they perceive the case to be at the time,
25 correct?

1 A. Certainly.

2 Q. During the deposition of this particular treating
3 physician, my client Gary Ferguson was there, wasn't he?

4 A. I believe he was, yes.

5 Q. Did he do anything at the deposition that caused
6 you to be concerned that he wasn't fulfilling his duties to
7 zealously represent his client?

8 A. Not that I recall.

9 Q. And likewise, if he spent time preparing for that
10 deposition, is that something that you would find to be
11 unreasonable in the defense of a doctor, in the type of case
12 we're talking about?

13 A. No. To spend any amount of time; is that your
14 question?

15 Q. Yeah.

16 A. Then I would have to certainly look at it more closely,
17 but yeah, I would think he would need to spend time to prepare
18 for a deposition.

19 Q. I mean, this was a big case, wasn't it?

20 A. It was.

21 Q. And a lot at stake both for your doctors, right, both
22 client -- both doctors?

23 A. Yes.

24 Q. Both doctors essentially insured by UMIA; lots of
25 money at risk, right?

1 A. Yes.

2 Q. And when lots of money's at risk and they're big
3 cases, medical malpractice defense lawyers spend time to be
4 fully prepared to represent their clients. That's what you do,
5 right?

6 A. They should.

7 Q. I mean, isn't that the thing that keeps UMIA bringing
8 you back cases, because you do a good job representing their
9 docs?

10 A. Yes, you'd like to think so.

11 Q. Now, with respect to Dr. Markovich -- close as I'm
12 going to get --

13 A. That's fine.

14 Q. -- probably with the name, sir -- that particular
15 deposition, again, this is an expert who's been retained by
16 Gary Ferguson, correct?

17 A. Correct.

18 Q. So this is the doctor who ultimately his client is
19 going to be relying on to establish that he operated within the
20 standard of care when Mr. Merce showed up at the emergency room
21 that day, correct?

22 A. Mr. Robb.

23 Q. Mr. Robb, I apologize

24 A. That's all right.

25 Q. Wrong case.

1 A. Yes, I -- you know, in fairness, I can't remember if
2 he was the only expert for Mr. Ferguson's client; but certainly
3 he would have been fulfilling that role.

4 Q. Now, when you are a medical malpractice defense lawyer
5 and you've got a doc on the line, you're going to spend time
6 preparing for your expert's deposition even though you do not
7 anticipate ever asking your expert a single question; isn't
8 that true?

9 A. That's true.

10 Q. The reason you don't anticipate asking your expert
11 a single question is because you don't want to create any
12 additional areas of inquiry for the other side, the plaintiff,
13 right?

14 A. That's true in part. There are certainly times when
15 you have to ask questions, if something's been misleading.

16 Q. Right, but if that isn't the case, and in your
17 personal judgment, your professional judgment as a trained
18 lawyer specializing in medical malpractice defense, you've had
19 situations where your expert's been deposed, and you didn't ask
20 a single question; isn't that true?

21 A. Certainly is.

22 Q. And if Gary Ferguson didn't ask a question, you
23 wouldn't find fault with that either, would you?

24 A. No, not without any more information.

25 Q. Did they tell you that in addition to the time for

1 those depositions, the actual depositions, he billed UMIA for
2 preparing for the depositions that day?

3 A. Who's "they"?

4 Q. Well by "they," I apologize, I mean the defendants.
5 Did they show you Gary Ferguson's billing time for that day?

6 A. I haven't seen any billing. I was simply asked to --
7 I was actually subpoenaed to bring time for this one day's
8 entry. I don't know what Mr. Ferguson billed on that.

9 Q. Have you ever billed for ten hours in a day as an
10 attorney?

11 A. Certainly.

12 Q. Is ten hours for a day that you've been working, is
13 that an abnormal number of hours to bill for as a medical
14 malpractice defense lawyer?

15 A. It would all depend on what you did that day, if you
16 put in ten hours of billable work.

17 Q. And if you put in ten hours of billable work, then
18 you'd bill for ten hours of billable work, correct?

19 A. Certainly.

20 Q. You're not offering any opinion as to whether or not
21 Gary Ferguson's bill that day was reasonable or unreasonable,
22 are you?

23 A. No.

24 Q. You're just here to tell us how much you billed?

25 A. Correct.

1 MR. PETERSON: Nothing further, thank you.

2 THE COURT: Anything else for this witness?

3 MR. ECKERSLEY: One question.

4 REDIRECT EXAMINATION

5 BY MR. ECKERSLEY:

6 Q. Did you bill for that six hours including your
7 preparation for the depositions?

8 A. Yes.

9 MR. ECKERSLEY: Thank you.

10 THE COURT: You may step down.

11 THE WITNESS: Thank you, your Honor.

12 THE COURT: Mr. Orchard or Mr. Peterson.

13 MR. PETERSON: Yes, Art Glenn.

14 THE COURT: Just step this way, please, sir. Raise
15 your right hand.

16 COURT CLERK: You do solemnly swear that the testimony
17 you are about to give will be the truth, the whole truth and
18 nothing but the truth, so help you God?

19 THE WITNESS: I do.

20 THE COURT: Would you please be seated.

21 ARTHUR G. GLENN,

22 having been first duly sworn,

23 testified as follows:

24 DIRECT EXAMINATION

25 BY MR. PETERSON:

1 Q. For the record -- for the record, sir, would you
2 please state your name and spell it.

3 A. My name is Arthur G. Glenn, G-l-e-n-n.

4 Q. Mr. Glenn, what do you do for a living?

5 A. Vice-President of Claims Utah Medical Insurance
6 Association.

7 Q. And what exactly is that position? What is entailed
8 by -- in being the Vice-President of Claims for the Utah
9 Medical Insurance Association?

10 A. Short answer is I simply oversee all the claim
11 operation for UMIA in the states that we do business.

12 Q. And sir, the more -- can you give me a little longer
13 answer? Do you supervise -- do you supervise people below you?

14 A. Yes, I have a supervisor and eight investigators
15 that work in our company. I oversee their operation, and I
16 establish the reserves on cases. That would be the amount
17 of money that we've set aside to pay claims on the case. I
18 participated in discovery with the attorneys and with the
19 investigators that are handling the cases, and evaluate
20 witnesses, that type of thing.

21 Q. By the way, are you familiar with the -- with the
22 notion of supplementing discovery in a lawsuit?

23 A. A little bit, yeah.

24 Q. What does that mean to you?

25 A. Just the type of discovery that needed to be done to

1 prepare for the case.

2 Q. Produce -- do you produce documents as part of your
3 work, or is that done by the lawyers representing you?

4 A. It's pretty much done by the lawyers.

5 Q. All right. Now, let me ask you with respect to Gary
6 Ferguson. Do you know Gary?

7 A. Yes, I do.

8 Q. How do you know him?

9 A. As a defense attorney, he's worked with companies that
10 I've worked for since about 1982, '83.

11 Q. Have you ever sent Gary cases to defend?

12 A. Yes.

13 Q. Why?

14 A. I'm not sure I understand that.

15 Q. Well, why would you send him a case, as opposed to
16 somebody else?

17 A. Well, it depends. The way we assign cases, there may
18 be a specific reason to give cases. Certain lawyers specialize
19 in certain type of cases. Sometimes it's just to balance the
20 caseloads among our attorneys. Sometimes when the loss is
21 reported by the physician, they request an attorney, they've
22 used an attorney before. So it could be any number of reasons.

23 Q. From your relationship with Gary Ferguson, you go back
24 to the 1980's; is that right?

25 A. Yes.

1 Q. And did you first know him in your capacity as a
2 claims adjuster?

3 A. I think I was a supervisor at AETNA when I first was
4 working with Gary.

5 Q And in that capacity did you send Gary Ferguson cases,
6 insurance defense cases?

7 A. Yes.

8 Q. And then at some point you left and went to work for
9 UMIA; is that right?

10 A. Yes.

11 Q. And when you went to work for UMIA, did you have any
12 role in the assignment of cases to the Williams and Hunt law
13 firm?

14 A. Initially when I went to work with UMIA, I don't think
15 the Williams and Hunt firm was formed at that time. We were
16 basically working with the same attorneys, but they were with
17 different firms. I think it formed a couple of years after I
18 went with UMIA; but we were assigning basically the same way as
19 we do now

20 Q All right You assigned cases to Mr Williams, I take
21 it?

22 A Yes

23 Q. Is Mr Williams a skilled medical malpractice defense
24 lawyer --

25 A Yes

1 Q. -- from what you've seen?

2 A. Uh-huh.

3 Q. Your general Counsel for the Utah Medical Insurance
4 Association, correct?

5 A. Yes.

6 Q. And likewise, when Mr. Williams went out on his own,
7 he left another law firm and formed Williams and Hunt, he did
8 so, to your knowledge, with the expectation he would receive
9 cases from UMIA to defend, correct?

10 A. Yes, that's correct.

11 Q. Now, with respect to Mr. Ferguson, at some point
12 Mr. Ferguson joins the Williams and Hunt law firm essentially
13 pretty close to the time that they form; is that what you
14 recall, or do you know?

15 A. I think that's -- I think that's correct. I'm not
16 sure of the exact dates, but I think that's right.

17 Q. And at some point after he joined the law firm, did
18 you begin sending him -- and by "you," I really mean UMIA,
19 not you personally, but let's just take the broader "you" for
20 just a moment -- UMIA send medical malpractice cases to Gary
21 Ferguson?

22 A. Yes.

23 Q. All right, and over time, I take it that you would not
24 have been in a position at UMIA that you would have necessarily
25 been assigning cases on your own; other people would have done

1 that?

2 A. Normally. That's the normal course, yes.

3 Q. Okay, but you used a term a few minutes ago. You said,
4 "We send them out to our attorneys." It is your practice, is
5 it not, at UMIA, essentially to have a set of attorneys who you
6 trust to do UMIA work?

7 A. Yes, that's true.

8 Q. And is it fair to say that that number of attorneys is
9 fairly limited?

10 A. Depends on your term. I think in relation to the
11 number of attorneys in the state, yeah, sure.

12 Q. I think Mr. Williams this morning testified that he
13 thought there were probably 20 or so. Would that probably be
14 accurate?

15 A. Probably so, yes.

16 Q. And perhaps five law firms in the valley that you
17 might assign casework to?

18 A. Yes.

19 Q. And so to be a member of a law firm that receives
20 those types of cases is a fairly select thing, isn't it?

21 A. Yes, it is.

22 Q. And with respect to the assignment of cases, while you
23 were at UMIA, let me ask you, before May 5th of 2005, had you
24 ever had a complaint from any physician about the job that Gary
25 Ferguson had done in his or her representation?

1 A. Not that I recall, no.

2 Q. Had you ever voiced any concern prior to the time that
3 Mr. Ferguson was fired from Williams and Hunt, had you ever
4 voiced any concern about his billing practices, first, to Gary?

5 A. No.

6 Q. Had you ever voiced any concern about his billing
7 practices to anyone at Williams and Hunt?

8 A. No.

9 Q. Now, as part of your job, did you audit attorney
10 bills?

11 A. Yes and no. Not in the sense of an accounting
12 principal. It's more a view of attorney bills.

13 Q. Sure, and you review them based on your years and
14 years of experience seeing attorney bills, correct?

15 A. Yes.

16 Q. You probably, at the point you're at -- how long had
17 you. Let's go back to 2005 for just a minute. About how long
18 had you been in this business, say, in 2005?

19 A. For 35 years.

20 Q. All right, so you've seen a lot of attorney bills,
21 probably, come across your desk in 35 years?

22 A. I have.

23 Q. And during that time, have there been bills that
24 caused you concern, that you thought maybe were over-billing?

25 A. There's bills that have caused me concern; and it may

1 be over-billing, it may be something else that I've looked at
2 and looked into the reasoning behind it.

3 Q. But was that ever the case with respect to Gary
4 Ferguson?

5 A. I don't recall. Not that I recall.

6 Q. And with respect to the process that you're using,
7 you're looking at the amount of time in judging, as a general
8 basis, I suppose, whether or not it seemed out of the ordinary
9 for your experience in similar cases?

10 A. There's two things I would look at. One is basically
11 what the time is being billed; and secondly, what work is being
12 done and who's billing it. When I review bills, for instance,
13 I would look to see if there's work that's being done by --
14 billed as paralegal time that's essentially clerical work,
15 and should be billed as clerical work; or if there's work that
16 attorneys are doing that probably a paralegal would be doing.
17 That's one way I look at it. The other is just the time you've
18 spent on different tasks.

19 Q. And the first thing that you've mentioned, whether or
20 not what is essentially you're being billed as if this person
21 is a paralegal, when in fact they're more like a secretary, or
22 you're being billed for attorney time when the task is more
23 like a paralegal, that's something that you would have acquired
24 experience with over the same 35 years, correct?

25 A. Yes.

1 Q. And that's really to insure that you're not paying
2 a higher rate per hour -- in other words, you're not paying
3 for a lawyer, when really it's work that should be done by a
4 paralegal?

5 A. That's correct.

6 Q. All right. Now, with respect to Mr. Ferguson, prior
7 to May the 5th of 2005, were you familiar with his reputation
8 at UMIA, with respect to his ability as a medical malpractice
9 defense lawyer?

10 A. Yes, I think generally, yes.

11 Q. And what was his reputation, in terms of his abilities
12 as a medical malpractice defense lawyer?

13 A. You mean, within the company?

14 Q. Yeah, within the company.

15 A. I think he had a good reputation. People were
16 comfortable working with him. We'd all worked with him on
17 cases.

18 Q. And likewise, prior to the time that he was fired by
19 the Williams and Hunt law firm, were you -- did you have a
20 personal opinion with regard to his overall ability as a
21 medical malpractice defense lawyer? I'm not asking about
22 reputation; I'm talking about your personal opinion at this
23 point.

24 A. I thought he was a good attorney.

25 Q. Good enough that you continued to assign cases to him

1 until March the 5th of 2005, correct?

2 A. Yes.

3 Q. Now, go back, if you would, just to the first part of
4 the year, 2005. Was Gary Ferguson working on, say, 13 or 14
5 files for UMIA?

6 A. At least. Maybe a little more. I think something in
7 that range.

8 Q. And the files that he was working, were some of them
9 big cases?

10 A. Yes. Most of our cases are pretty good sized.

11 Q. Okay, and those cases that he was working on, did
12 he ever give you cause to believe that he wasn't doing his
13 absolute best at providing a zealous representation of your
14 insured physicians?

15 A. No.

16 Q. Now, with regard to what happened on or about May the
17 5th of 2005, did you get a telephone call from Gary on that day?

18 A. Yes.

19 Q. What did he tell you?

20 A. He called and said that he'd been fired from Williams
21 and Hunt for over-billing, and asked if -- first asked if I'd
22 ever had any complaint about his billing, if I'd had any
23 concern with it or heard anything prior to that. Asked me if
24 he'd still be able to do work for UMIA after he left Williams
25 and Hunt. I think that was the gist of the conversation and

1 what he asked.

2 Q. Would he still be able to do work for UMIA after he
3 left Williams and Hunt. The ultimate decider of that would not
4 be you, though, would it?

5 A. No, that's correct.

6 Q. The person who would make that decision would be who?

7 A. Marty Oslowski, the president of the company.

8 Q. A day -- that day or a day later, did Mr. Oslowski
9 come to you with any particular direction with respect to files
10 that Mr. Ferguson had in existence on behalf of UMIA?

11 A. He called -- Marty called me the next day, and told me
12 that the files -- I think he said there were 20 files that Gary
13 was handling that were going to be left with the Williams and
14 Hunt firm, and that we weren't to assign any more work to Gary.

15 Q. And if Mr. Oslowski told you that you could not assign
16 any more work to Gary Ferguson, is it fair to say that you
17 could not, under any circumstances, do so?

18 A. Yes.

19 Q. He is your boss?

20 A. Yes.

21 Q. Now, at some point, did there come a time when you met
22 with members of the Williams and Hunt law firm, to try and find
23 out what the evidence was of his over-billing?

24 A. Yes.

25 Q. Tell us about that.

1 A. The meeting itself or how the meeting was set up or --

2 Q. Let's start with how it was set up, sir.

3 A. I believe Elliot Williams called our office -- and I
4 think I was either on the phone or out of the office. I don't
5 recall which -- and talked to Doug Smith, who's the supervisor,
6 and said that -- told him that Gary had been telling some
7 people things about why he was fired that -- I don't -- I don't
8 know the exact terminology, but he said that he'd been telling
9 people things that weren't true about what went on; and they
10 wanted to meet with us and go over what evidence they had, or
11 the reason for his termination.

12 Q. All right, now let's stop for a minute. He calls you
13 and he tells you that he's heard that Gary Ferguson is telling
14 things that are false about why he's been fired, right? That's
15 the first thing?

16 A. Yes.

17 Q. And he wants the chance to get together with you and
18 show you the evidence of why he was fired, correct?

19 A. Yes.

20 Q. Did he seem concerned about his law firm's reputation?

21 A. Well, I don't know that, because I didn't have the
22 conversation with him.

23 Q. So what did you do; did you arrange a meeting?

24 A. Yes, we set up a meeting to meet.

25 Q. And prior to going to that meeting, did you take a

1 look at Gary Ferguson's billings for the time January 1st
2 through the end of April or the time that he was fired, May
3 the -- whatever the date was, May the 5th? Did you do something
4 with respect to that information you had?

5 A. Yes, we had actually -- we had actually done that
6 before -- before this occurred, right after I got notice that
7 Gary had left. We actually went through and reviewed all of
8 the bills that had been submitted from the first of the year
9 until either the end of April or into part of May, but all of
10 the bills had been submitted up to that point.

11 Q. Why did you do that?

12 A. To find out if we saw anything that was glaringly
13 obvious, anything that we should have picked up, or anything
14 that I thought was unusual.

15 Q. All right. Did you create a spread sheet with respect
16 to what you found?

17 A. Yes, we did.

18 MR. PETERSON: May I approach, your Honor?

19 THE COURT: You may.

20 Q. BY MR. PETERSON: Sir, I'm going to hand you an exhibit
21 that is No. 15. Do you recognize Plaintiff's Exhibit No. 15?

22 A. Yes, I do.

23 Q. What is it?

24 A. It's a spreadsheet that we created with the billing.

25 Q. Did you set out in detail the individual billing

1 entries that were -- that you found on the UMIA bills, as
2 they related to Mr. Ferguson on the spreadsheet?

3 A. Yes, what the spreadsheet did was essentially put the
4 dates down the left side, and then the file numbers that Gary
5 had, and the total -- everything that was billed on those files
6 by date.

7 Q. All right. Now, on the right-hand side of this
8 particular exhibit, there's some handwriting. For example, I
9 think it relates to -- looks like January the 3rd and 4th or the
10 4th and 5th. You know, I can't honestly tell. If we put -- I
11 guess we could put a sheet underneath, maybe we could do it
12 that way.

13 A. Yes.

14 Q. Do you see that handwriting?

15 A. Yes, I do.

16 Q. Okay, and actually I was right the first time. It
17 looks like it's the third and the fourth, okay? There's some
18 notes on the side. Do you see what that says?

19 A. Yes.

20 Q. What does it say?

21 A. It says, "Virginia Beach, me, Doug, Shawn, 22 hours,
22 and Bobby."

23 Q. Okay. This refers to a trip that you took to Virginia
24 Beach with Shawn McGarry, who was just a witness in here?

25 A. Yes.

1 Q. Doug Smith?

2 A. Yes.

3 Q. And Gary, correct?

4 A. And Bobby Wright, yes.

5 Q. Oh, and Bobby Wright, okay. Apparently Shawn --

6 there's a hyphen. It says, "22 hours." Do you see that?

7 A. Yes.

8 Q. So that was a comparison between the time that
9 Mr. Ferguson billed UMIA for that trip and what Shawn McGarry
10 billed for the trip, correct?

11 A. Yes.

12 Q. And in fact, Mr. McGarry billed an hour more than
13 Mr. Ferguson did for the same trip, right?

14 A. Yes.

15 Q. I mean, I'm not saying that was right or wrong. I'm ---
16 just saying that's what the note means; is that right?

17 A. That's correct.

18 Q. Now, likewise, if you take and go further down the
19 page, you'll see an entry -- some entries that relate to the
20 14th of January, and there may be some information on the side
21 that says something about "Should be 1/17," and some more
22 writing in the triangle, and some notes. What did that refer
23 to?

24 A. Okay. It says, "It should be on the 17th." This day,
25 which would have been the -- I think it's the 14th --

1 Q. Looks like the 14th.

2 A. -- would have been the 14th, there were two depositions
3 billed on the same day, and there was a total of 22 hours. So
4 we looked at the depositions -- actually the 14th was a Friday.
5 One of the depositions was actually taken on Monday.

6 Q. So --

7 A. The one -- the one that says, "Should be on the 17th."
8 That deposition was actually taken on Monday, but the two
9 depositions for Friday and Monday were just billed on the same
10 day.

11 Q. So it wasn't a matter of whether or not the time
12 amounts seemed reasonable, but somehow the billing entries
13 got put on the wrong date?

14 A. Yes, we had -- we had pulled those depositions and
15 looked at the date on those depositions. One was taken the
16 14th, one was taken the 17th; and there's nothing billed on the
17 17th.

18 Q. All right. Now, likewise on the second page, if you
19 would, there's an additional handwritten entry on the right-
20 hand side, second page of the exhibit. It's line 90, sir. It
21 just says, "Newport/Doug."

22 A. Yes.

23 Q. Can you tell us what that represents?

24 A. That was a case we looked at because of the number of
25 hours billed; and it was a day that Doug Smith, the supervisor,

1 traveled to Newport Beach, California with Gary Ferguson --

2 Q. Did the --

3 A. -- on that deposition.

4 Q. Did the time that was billed there seem unreasonable,
5 given the time going back and forth to Newport Beach?

6 A. No.

7 Q. So you reviewed the time entries. Did you come to the
8 opinion that UMIA had been over-billed for its time, based on
9 what you reviewed?

10 A. Not based on what I found, no.

11 Q. Now, with respect to the time that is here, do you
12 know whether or not you reviewed actually all of the time that
13 was in the Williams and Hunt law firm system, as opposed to in
14 your actual billings?

15 A. - No, we would have just billed -- or would review the
16 bills that we had at the time.

17 Q. And so when you asked to meet with them, did you have
18 the expectation that they would provide for you additional
19 documents or evidence, proving that, as they had claimed,
20 Mr. Ferguson had over-billed?

21 A. I'm not sure what I really expected them to have.
22 They told us they were going to show us something. So I
23 didn't really -- I assumed that it might be specific things
24 on specific cases; but I didn't really have an opinion as to
25 what they were going to bring.

1 Q. All right. Tell us what happened when you got to the
2 meeting.

3 A. We met at PF Chang's Restaurant, and there was George
4 Hunt and Bruce Jensen and Dennis Ferguson, and Doug Smith and
5 myself, and talked a little bit about him. I think I told them
6 at the time that Doug and I had gone back through all of Gary's
7 bills since the first of the year and didn't find anything that
8 was unusual.

9 Q. What did they tell you with respect to that?

10 A. They said that the evidence that they had wasn't
11 something that we'd be able to see on the bills.

12 Q. What did they tell you the evidence they had was?

13 A. They said that they had a computer program that they'd
14 run in their office, that -- and I'm not sure that there was a
15 lot of detail talked about. Just that it was on the basis of
16 that computer program records.

17 Q. Did they tell you that the computer program records
18 they had related to log in and log off time of some computer,
19 either a server or a desktop or a laptop?

20 A. I'm not sure how much detail there was. They just
21 said it related to log on and log off times, times worked in
22 the office; but I'm not sure there was enough -- there was
23 detail given about what type of computers it was on.

24 Q. When you left there, had they convinced you that you'd
25 over-billed UMIA?

1 A. No, I was convinced that -- of what they said, that we
2 wouldn't see what they were talking about on their bills.

3 Q. Did they tell you that they had gone and investigated
4 any particular item, similar to what you had done? For example,
5 going and looking at the records to see whether or not a
6 deposition had occurred, or an event had taken place that was
7 constant or consistent with the billing? Did they talk to you
8 at all about doing any investigation?

9 A. No, not -- not to that extent, no.

10 Q. What did they tell you they did, if anything, other
11 than just the log in, log out sheet?

12 A. I don't think they gave us detail past that, just that
13 they mentioned that Gary had had a fewer number of files, and
14 had billed more than other attorneys in the firm, with fewer
15 number of files, and was out -- was not in the office as many
16 hours as other attorneys.

17 Q. All right. Let me ask you if you would take a look at
18 Exhibit No. 10. I will tell you that Exhibit 10 is a document
19 entitled "Timekeeper Analysis;" and this particular document
20 was -- is dated February the 22nd of 2007, and it shows time-
21 keeper entries -- essentially the billable time for the month
22 of April 2005.

23 A. Do you want me to take this out?

24 Q. You bet. It's two pages, sir. Did they show you a
25 document -- undoubtedly wouldn't have shown you this particular

1 document, but did they show you one like it? This one hadn't
2 been created at the time you met with them.

3 A. No.

4 Q. Did they tell you, regardless of what they showed you
5 -- did you know they had an attorney named Bruce Jensen?

6 A. Yes.

7 Q. And did they tell you how many hours he had billed in
8 that first four months of the year before they fired him?

9 A. No.

10 Q. Did you -- did they talk to you about how many hours
11 Elliot Williams had billed --

12 A. No.

13 Q. -- in that same time?

14 A. No.

15 ~~-- Q. Did they talk to you about how many hours Mark~~
16 Anderson had billed?

17 A. No.

18 Q. But they told you that Gary Ferguson -- the proof
19 was that Gary Ferguson had out-billed all the other lawyers,
20 correct?

21 A. I don't know that they said all of them. I think he
22 said that he'd billed more than Bruce or Elliot in that period
23 of time.

24 Q. Well, with respect to Bruce Jensen, do you see the
25 number at the top, Exhibit 1, do you see that year-to-date

1 number, 781.25 hours --

2 A. Yes.

3 Q. -- year-to-date; and also you said Elliot?

4 A. Yes.

5 Q. Okay, 628.75 hours; do you see that?

6 A. Yes.

7 Q. Mr. Hunt, 701.95 hours?

8 A. Yes.

9 Q. Mark Anderson, 825.4 hours?

10 A. Yes.

11 Q. Now, turn to page 2, their records, Gary Ferguson,

12 671.8 hours. Do you see it?

13 A. Yes, uh-huh.

14 Q. By your account, wouldn't that make him fourth highest
15 biller?

16 A. Yes.

17 Q. Mr. Glenn, although you know Mr. Ferguson in your
18 capacity at UMIA, would it be fair to say that the two of you
19 are social friends?

20 A. I don't know that you'd call us social friends. That
21 would depend on how you define social friends, I suppose.

22 Q. Have you ever been to his house?

23 A. No.

24 Q. Been out to dinner with him and his wife?

25 A. No.

1 Q. Has he ever been to your home?

2 A. No.

3 Q. You wouldn't slant your testimony to favor Gary
4 Ferguson?

5 A. No.

6 MR. PETERSON: Nothing further.

7 THE COURT: Members of the jury, we are going to take
8 a ten minute recess at this time. Please remember all of the
9 admonitions I've given to you previously. Those admonitions
10 continue to apply. We'll recess for ten minutes. Kathy, you
11 may take the jury.

12 COURT BAILIFF: All rise.

13 (Recess taken)

14 COURT CLERK: All rise. Third District Court is again
15 in session. Please be seated. .

16 THE COURT: You may have the floor.

17 MR. ECKERSLEY: Thank you, your Honor.

18 CROSS EXAMINATION

19 BY MR. ECKERSLEY:

20 Q. Mr. Glenn, you would concede, would you not, that in
21 looking at the billings that you looked at with Mr. Ferguson,
22 unless there was something truly anomalous, you wouldn't be
23 able to tell if he actually spent the time that he claimed he
24 spent?

25 A. Yes, that's right.

1 Q. And so when you said you saw no evidence, what you
2 mean is you saw nothing so dramatically out of whack that you
3 could form the judgment just from the amount of the bill that
4 it was an over-bill?

5 A. Yes, that's correct.

6 Q. Do you have Exhibit 15 in front of you?

7 A. Yes.

8 Q. Now, as I understood it, you indicated that this was
9 prepared by -- was it you and Mr. Smith in conjunction?

10 A. Yes.

11 Q. And that what you were looking at were the actual
12 bills that you had in your possession as of the date you put
13 this together?

14 A. That's correct.

15 Q. Was it typical for Williams and Hunt not to bill on
16 every single file every single month?

17 A. Yes.

18 Q. So as of the time you put this together, there might
19 have been work that had been done by Mr. Ferguson that simply
20 wasn't reflected in the bills that had been transmitted to you?

21 A. Probably in the earlier -- in the later months, that's
22 probably true.

23 Q. Let me show you Exhibit No. 3 -- Defendant's Exhibit
24 No. 3, which has been introduced into evidence, and ask you if
25 you've ever made a comparison between the timekeeper records

1 showing Mr. Ferguson's bills and the Exhibit 15 -- Plaintiff's
2 Exhibit 15 that you put together?

3 A. No, I've never seen the timekeeper diary.

4 Q. Would it surprise you if there's 180 extra hours
5 on the timekeeper diary more than appear on your exhibit,
6 Plaintiff's Exhibit 15?

7 A. For that four month period of time?

8 Q. Yes.

9 A. No.

10 Q. All right, and in fact, would you do this for me,
11 would you see if you can find -- I know this is a little bit
12 cumbersome, but see if you can find the date of February the
13 11th of 2005 on both -- on both documents?

14 A. Okay.

15 ~~Q. -- Have you got that?~~

16 A. Yes.

17 Q. Now, how many hours do you show having been billed as
18 of that date by Mr. Ferguson -- on that date by Mr. Ferguson?

19 A. On our spreadsheet on --

20 Q. Yes, on yours.

21 A. Oh, there's nothing shows, then.

22 Q. And what is shown on his timekeeper diary?

23 A. Twelve hours.

24 Q. That would suggest to you that you had not been billed
25 on that case for that work at the time you put together your

1 spreadsheet; would it not?

2 A. Yes.

3 Q. Does the number of total hours, if it is in fact 689
4 in the first four months, doesn't that strike you as a lot of
5 hours?

6 A. Is that from this spreadsheet?

7 Q. Well, 507 is what you have. What I'm asking you to
8 assume is the actual number for the time worked and billed by
9 Mr. Ferguson ultimately for 689 hours.

10 A. I'm not real good at math without a calculator. I
11 couldn't tell just by the number of hours. I'd have to see
12 how it was broken down. I mean, I'm not sure that I could tell
13 whether that figure would be high, low or normal.

14 Q. It would be very infrequent for you to get a bill from
15 a shareholder at Williams and Hunt with total number of hours
16 for the year exceeding 2,000, wouldn't it?

17 A. No, it probably wouldn't.

18 Q. Other than Bruce Jensen?

19 A. I don't know, because we don't normally total by the
20 total number of hours. So I'm not sure what the total would
21 be.

22 Q. That's not a just -- that's just not a calculation
23 which you're in the habit of making?

24 A. No, no.

25 Q. Yes, that you're not?

1 A. Yes, I'm not.

2 Q. Okay, thank you. At the -- were you in the courtroom
3 for the testimony of Shawn McGarry?

4 A. No, I wasn't.

5 Q. Assuming that the testimony was that on the day of
6 April 8th, he attended the same depositions of Mr. Ferguson,
7 prepared for the same depositions as Mr. Ferguson, and spent
8 six hours doing so --

9 A. I did hear that testimony, yes.

10 Q. -- okay, and that Mr. Ferguson over the previous day
11 and that day billed approximately thirteen hours for that work,
12 same work. Wouldn't that raise some question in your mind?

13 A. That would depend on who the expert witnesses were and
14 whose witnesses they were and what he's done.

15 ~~Q.~~ Assuming that the plaintiffs took the deposition, and
16 that both the lawyers -- that is, the UMIA lawyers, Mr. McGarry
17 and Mr. Ferguson -- asked no questions; and to the extent that
18 there was a meeting with the expert witness, both of them
19 attended that same meeting, wouldn't that raise questions?

20 A. It might raise something we'd look at, yes.

21 Q. At the meeting that you had with -- I think you said
22 that it was George Hunt, Dennis Ferguson and Bruce Jensen, do
23 you recall that meeting?

24 A. Yes.

25 Q. Were you shown a document of the form of Defendant's

1 Exhibit 18?

2 A. No, we were not.

3 Q. Did you see whether or not Mr. Ferguson -- that is,
4 Dennis Ferguson -- had that -- had a document with him, that he
5 offered to show you?

6 A. No, he didn't offer to show me anything. I don't know
7 if he had it with him or not.

8 Q. Have you ever been told by Mr. Ferguson that he is to
9 estimate hours he intended to work before he had worked them,
10 and bill for them before they were completed?

11 A. No.

12 Q. Do you think that's an appropriate practice?

13 A. Repeat that again.

14 Q. Had you ever been told by Mr. Ferguson that he would
15 estimate hours that he anticipated working in the future, but --
16 bill for them before they were worked? Is that appropriate?

17 A. That would depend on what it was, I think, and what
18 the circumstances were.

19 Q. What circumstances would make that all right?

20 A. Well, I would think, for instance, if it was right at
21 the end of the year, and they were going to do the billing, and
22 they knew there was a trip coming up, or a deposition coming
23 up, and they were going to do the billing to close out the end
24 of year books before that, that might be a time that that would
25 be acceptable.

1 Q. But it wouldn't be acceptable as a routine matter,
2 would it?

3 A. It's not a normal practice, no.

4 Q. And if it was done on a fairly regular basis, and
5 there were never any corrections made to match up the estimate
6 with the actual time worked, that would not be appropriate,
7 would it?

8 A. Well, I don't know. I'd have to see the individual
9 circumstance. It would depend on what the circumstance were,
10 I think, why it was being done. I'd certainly ask for an
11 explanation of why it was being done.

12 Q. That would be a red flag?

13 A. Yeah. Yes, that's right.

14 Q. If you were in a position to assign work to someone
15 for UMIA, and they had a broken, hostile relationship with
16 Williams and Hunt, you wouldn't be in a position to give them
17 any work, would you?

18 A. I'm not sure I understand the question.

19 Q. What I'm asking is, isn't it important that the
20 lawyers that UMIA hires, outside the law firm of Williams and
21 Hunt, have a working relationship with the lawyers inside of
22 Williams and Hunt?

23 A. Generally, yes.

24 MR. ECKERSLEY: Thank you. That's all, your Honor.

25 REDIRECT EXAMINATION

1 BY MR. PETERSON:

2 Q. Let me go back for just a moment. Your understanding
3 of the billing process, the attorneys themselves do not compile
4 bills on a monthly basis and send to UMIA, do they?

5 A. No.

6 Q. The bill -- what the attorneys do is enter time into a
7 billing system, correct?

8 A. Yes.

9 Q. And have you ever seen any evidence in this -- at this
10 law firm that anybody ever estimated anticipated hours and then
11 billed for them -- that is to say, sent UMIA a bill for those
12 hours before they had worked them?

13 A. Have I ever seen evidence of that?

14 Q. Yes.

15 A. No, I haven't.

16 Q. Now, in a circumstance where a person is going to be
17 out of town, for example, on a deposition on one day, and he
18 was entering his time the day before, would it strike you as
19 odd that an attorney might enter what he anticipated for the
20 following day, subject to being revised if that estimate was
21 wrong?

22 A. No, that wouldn't seem unusual.

23 Q. And that's entering time, not billing the law -- not
24 billing UMIA, correct?

25 A. Yes.

1 Q. Now, likewise, with respect to Shawn McGarry, you were
2 asked whether or not Gary Ferguson -- if Gary Ferguson billed
3 13 hours for that day and the previous day. Did they tell
4 you how much time Shawn McGarry billed the day prior to the
5 deposition, for which he billed UMIA six hours?

6 A. No.

7 Q. Well, if you were really going to make that comparison
8 count, wouldn't you need to know how much time both lawyers
9 billed for both days?

10 A. I'd need more information than that, as well.

11 Q. You'd need to know what the depositions were about?

12 A. Yes.

13 Q. Whose experts they were, if they were expert
14 depositions?

15 A. Yes..

16 Q. Has there ever been a concern on your part that Gary
17 Ferguson under-prepared for expert depositions?

18 A. No

19 Q. Ever been a concern on your part that he over-
20 prepared?

21 A. No.

22 Q Now, you were just shown a document, this timekeeper
23 billing -- I'm not sure which one they used Did you use --

24 MR ECKERSLEY No 3

25 Q BY MR PETERSON No 3 Exhibit 3 contains entries

1 for Gary Ferguson for his time each and every time that entry
2 was made from January until some point in April; do you see
3 that? If you look at the first, it's like January the 2nd or
4 3rd, right?

5 A. January 3rd.

6 Q. Right, and then at the very end it tells you what the
7 final date was; do you see that?

8 A. The January 3rd through April 14th, yes.

9 Q. So when you went and had this meeting in which you
10 thought you were going to see the evidence of over-billing,
11 wouldn't you have expected to be shown that sort of detail, the
12 actual entries that they suspected were in fact over-billed?

13 A. Probably, yes.

14 Q. Take a look at the top of that document, the very
15 top of the first page says "Exhibit 3." The date is Monday, ~~the~~
16 April 18th, 2005. Your meeting occurred after this report was
17 created, correct?

18 A. Yes.

19 Q. Did they give you a copy of this report?

20 A. No.

21 Q. Did they ask you to penalize any of the data that's in
22 the report?

23 A. No.

24 Q. If they had, you might have been able to determine
25 whether or not there was some basis for a claim of over-

1 billing, correct?

2 A. Perhaps.

3 MR. PETERSON: Nothing further. Thank you.

4 THE COURT: Anything else, Mr. Eckersley?

5 MR. ECKERSLEY: One question.

6 RE CROSS EXAMINATION

7 BY MR. ECKERSLEY:

8 Q. I believe you indicated earlier that if -- by looking
9 at the time entries themselves, the only way you would have any
10 question, have any ability to determine if there was over-
11 billing, is if the entry was just shockingly high for the work
12 described; is that correct?

13 A. No, not -- if I understand your question, is that the
14 only thing that would cause a red flag; is that what you're
15 asking?

16 Q. I'm asking you to tell me anything that you could do,
17 at looking at the time entry and the time that went with that
18 work, to determine if that work was or was not performed?

19 A. What I would normally do, if I have a question on a
20 bill, which arises periodically, I would do a number of things.
21 First, look at the file itself and see what was done on that
22 day. Maybe talk to other attorneys or our insured in the case,
23 if I had a question there was something actually done.

24 So I would look a number of different ways, and then
25 talk to the attorney himself and ask him -- if there was an

1 explanation that I couldn't arrive at, to my satisfaction, I
2 would ask him what his explanation would be for it.

3 Q. I apologize, but that's prompted a second question.

4 THE COURT: Go ahead.

5 Q. BY MR. ECKERSLEY: You've heard Mr. McGarry testify,
6 did you not, that his bill of 6 hours included his preparation
7 for the deposition?

8 A. Yes.

9 Q. Did you have an occasion to talk to him about the
10 disparity?

11 A. No. To Mr. McGarry?

12 Q. Right.

13 A. No.

14 MR. ECKERSLEY: All right. That's all, your Honor.

15 ~~THE COURT: You may step down. Your next witness,~~
16 Mr. Orchard or Mr. Peterson.

17 MR. ORCHARD: I'd like to call Richard Slaughter to the
18 stand, please.

19 THE COURT: Will you step forward, please, sir. Come
20 this way. Will you raise your right hand.

21 COURT CLERK: You do solemnly swear the testimony you
22 are about to give will be the truth, the whole truth and
23 nothing but the truth, so help you God?

24 THE WITNESS: I do.

25 THE COURT: Would you please be seated.

RICHARD SLAUGHTER,

having been first duly sworn,

testified as follows:

DIRECT EXAMINATION

BY MR. ORCHARD:

Q. Would you please state your name and address for the record, sir.

A. Richard Slaughter, 907 Harrison Boulevard, Boise, Idaho.

Q. You're an expert witness; is that correct?

A. Yes.

Q. Tell the ladies and gentlemen of the jury your profession, your area of expertise.

A. I do work as an economist. I was going back a little bit. -I began to develop econometric models-with the -- to forecast the State economy and revenues for the State of Idaho in January, February of 1977. I was Chief --

Q. Before you --

A. Go ahead.

Q. -- I want to go over your history --

A. Sorry.

Q. -- but let me see --

A. All right.

Q. -- if I can summarize. You're here to tell the jury about the economic losses that have been suffered by Gary

1 Ferguson --

2 A. Yes, I am.

3 Q. -- as a result of the termination on May 5th, 2005; is
4 that correct?

5 A. Yes.

6 Q. Would you just give them a brief thumbnail sketch of
7 your educational background?

8 A. Okay. I have a PhD. in International Law Organization
9 in Economics from the University of Denver Graduate School of
10 International Studies. I have -- I've taught political science
11 courses. I've also taught international economics at Colorado
12 Women's College, which is now part of the University of Denver.
13 I've taught introductory economics at Boise State University.

14 Q. Let me focus now on your training and work history
15 that pertains directly to your role as an economist giving us
16 projections of economic loss for the purposes of this case.

17 A. Okay. In 1976 I took a position with the State of
18 Idaho in the Governor's Executive Office; and very shortly
19 thereafter began to work on developing econometric models to
20 forecast the State economy and State revenues. In 1977 I be --
21 or I'm sorry. In 1980 I became Chief Economist, with full
22 responsibility for that activity.

23 To give a little bit of an idea, an econometric model
24 sounds more like a black box than it actually is. What you do
25 in a model is to take discrete elements of the economy, such as

1 employment in construction and employment in manufacturing,
2 employment in State government and so on; and you forecast how
3 much you expect employment to be in each of these areas. You
4 also then tie that to what you expect the average wage to be.

5 In doing that, you use usually linear regression,
6 but you can use more sophisticated techniques to create a
7 linear relationship between the variable you're interested in
8 and other variables that exist nationally that impact that
9 particular thing. For example, if you want employment in
10 construction, a variable that you want -- would use to forecast
11 it with is housing starts. You obtain these forecasts from an
12 outside consulting firm, and go ahead with it.

13 The reason for doing all of that is that you want to
14 know how much personal income there is in the State during the
15 next fiscal year, and how much economic activity there is in ~~the State~~
16 the State, so that you can then forecast personal and corporate
17 income tax revenues and sales tax revenues.

18 Q. Did you develop these economic models?

19 A. Yes.

20 Q. How were they used?

21 A. I'm sorry?

22 Q. How were they used?

23 A. These were used by the exec -- by the Governor. Well,
24 basically they were used by me to forecast the State economy,
25 and then revenues. My revenue projection became the Governor's

1 executive revenue projection, plus or minus any changes in
2 taxes.

3 During the period when I was doing it, that became the
4 official -- pretty much the official projection for the State;
5 so that in effect, the Legislature couldn't spend more money
6 than I said they were going to have, without raising taxes.

7 Q. Have you been hired as an expert to do forensic work,
8 like the work you're doing in this particular case, before?

9 A. Yes, I -- first, I left the State in 1984. Prior to
10 leaving the State, for a couple of years I had been financial
11 advisor to the State Treasurer. I went into consulting in
12 1984, and I was the financial advisor to the State Treasurer a
13 couple of times after that.

14 I began doing forensic work in '85 or '86, sometime
15 about that time, which is primarily involved with looking at
16 people's economic loss from injury, from employment disputes,
17 from medical malpractice and so on.

18 Q. So how many times, approximately, have you done a
19 projection of economic loss?

20 A. Well, I haven't counted them, but it's been 22 years.
21 So I would expect 300 would not be too high a number.

22 Q. Qualified as an expert in many Courts across the land.

23 A. Yes. I wouldn't -- I haven't testified that many
24 times. Many cases settle.

25 Q. When you do a projection of economic loss, do you do

1 them for people who have -- are claiming to be injured, and
2 also those who are defending a case, and have hired you to
3 analyze whether the other expert's economic projection is
4 correct?

5 A. Yes, I do.

6 Q. My question is, are you hired by both sides of the
7 isle?

8 A. I'm hired by both sides of the isle, but usually not
9 in the same case.

10 Q. Okay. So what did you -- what did you do in this
11 particular case, in terms of what did you look at?

12 A. Okay, in this particular case, Mr. Ferguson had been
13 terminated by his -- the law firm for which he had worked;
14 and he had an employment history and an earnings history with
15 that firm. So the first thing you want to do is to make a
16 forecast or a projection from the date of the termination
17 until, in this case -- well, either the date of his retirement,
18 permanent withdrawal from the labor force, or the date at
19 which a replacement income would fully replace the lost income.
20 That's the first thing you do.

21 Q. Okay, and so what you're going to be prodding for this
22 jury is the actual amount of money that he lost in both income
23 and benefits from the time of his termination to the time of
24 this Court date, and then you're going to give us a projection
25 of what you believe is a reasonable probability of what he will

1 lose in the future, based upon the incidents in this case; is
2 that right?

3 A. Basically. I don't do it quite that way. I make --
4 I provide a total loss number both on the loss side and on
5 the replacement side. Then I -- well, a total loss number, a
6 total replacement number, and then I calculate the loss to --
7 essentially the date of trial. In this case it's the loss to
8 the 17th of -- well, to November of 2007.

9 Q. You do it a different way, but essentially we're
10 talking about the same thing; is that right?

11 A. Yes, it is.

12 Q. And so do you also take into consideration a time
13 value of money, if there had been money that the person would
14 invest, or that there's money that they have to replace in
15 income stream?

16 A. Yes, you have --

17 Q. What's that called?

18 A. I'm sorry?

19 Q. What's that called?

20 A. It's necessary, when you're going into the future, to
21 project increases in the nominal value of loss, and then it's
22 necessary to discount that with -- in a case such as this one,
23 the amount at which the plaintiff would be able to invest and
24 award in a safe investment in order to cover those costs.

25 When Counsel mentioned time value of money, what she's

1 really talking about is if I were to loan Counsel \$10,000 for
2 one year, I wouldn't have the use of that money for that year,
3 just as if I'd loaned him my house or my car or something else,
4 some other asset that I have I wouldn't have use of it for
5 that period of time So when he repaid me at the end of the
6 year, he would pay interest on that That's what I would earn
7 for doing without the money during that period of time If
8 he's using my house or my car it's called "rent," and if he's
9 using my money it's called "interest "

10 Q Did you take into consideration the time value of
11 money both in what has lost -- been lost to date, and also what
12 is going to be -- what you believe will be reasonably lost in
13 the future?

14 A Yes.

15 -- -- Q. Let's talk about

16 A I'm sorry

17 Q Did you have something you --

18 A No, you --

19 Q. -- wanted to add? Let's talk about your projection,
20 and then let's talk about the assumptions that you made in
21 reaching your projection

22 A Okay

23 Q What are the assumptions that you have relied upon in
24 forming your opinion in this case?

25 A Well, it's necessary to know several things about the

1 plaintiff, when you're looking at economic loss. One of them
2 is their age, of course. So you need to know their birth date.
3 You need to know the date of whatever event brought you to this
4 point. In this case, termination of Mr. Ferguson from Williams
5 and Hunt. You need to know what his earnings history was with
6 his former employer; and that -- in order to get to lost
7 income.

8 On the replacement side, you need to know what the
9 earnings history is of the replacement or mitigating income
10 stream. In this particular case that's not totally clear cut,
11 because he had gone from a position where he was earning a
12 fairly straightforward salary and et cetera, the way that the
13 pay schedule was put together.

14 Q. What do you mean -- what do you mean by that? You
15 mean when he was at Williams and Hunt?

16 A. Well, yes, at Hunt and Williams it's an established
17 firm, it's an established practice. He has an amount of money
18 from back several years that's fairly consistent, even though
19 it's dependent in some -- to some extent on the volume of
20 business in the firm.

21 Then he's going to a more entrepreneurial situation,
22 where he has to create the business pretty much from scratch.
23 So it was necessary to forecast or project the rate of growth
24 in Mr. Ferguson's caseload, and how many cases might settle
25 each year, and/or be tried, and what the payout would be to

1 the firm and to Mr. Ferguson.

2 Q. Okay. Are there any other assumptions that you relied
3 upon in forming your opinions in this case?

4 A. Then the financial assumptions that you have to adopt
5 are both the increase in the lost income, and for that I use
6 the average private wage in the United States. Now, it's
7 probably true that attorney's income might rise faster than
8 that in a business, because we've been having increased
9 disparity of income between the top and the bottom; but I
10 use the average wage in the United States, which currently is
11 about 4 percent.

12 Then on the discount side, I adopt a long -- the rate
13 over the last 30 to 40 years of long-term treasury bonds,
14 because it's not appropriate to -- you could -- you could
15 ~~assume that a plaintiff would invest an award in something~~
16 that would pay them 10 or 12 or 15 percent a year; but that
17 would be assuming a great deal of risk. So you assume
18 something that is long term, in the case of a long term loss,
19 and is as safe an investment as you can find; and that's
20 treasury bonds.

21 Q. Any other financial assumptions that you reached?

22 A. I don't think so.

23 Q. Now, did you make a comparison between not just
24 income, but the benefits that were available at Williams and
25 Hunt that are not available at Siegfried and Jensen?

1 A. Yes, the analysis on both sides includes the salary
2 component. It also includes fringe benefits.

3 Q. Which are -- which ones are those?

4 A. Fringe benefits, you start with the employer's share
5 of Social Security tax, which is 6 2 percent, up to a cap of --
6 last year or the year before, \$90,000 a year. Anyway, that's
7 the number that's in my analysis. So we have 6.2 percent up to
8 \$90,000 a year.

9 Then you have medical insurance and life insurance;
10 and in each side of the equation, my understanding is that
11 they were pretty much the same. So I assumed \$800 per month
12 of medical insurance; and since they're the same on both sides,
13 it washes out.

14 Then at Williams and Hunt, it's my understanding that
15 Mr. Ferguson enjoyed a company contribution to his 401-K plan
16 of 15 percent of his pay. With his current employment, he
17 doesn't have any employer contribution to his 401-K. Then
18 everything else I assume at about half a percent, which doesn't
19 amount to much.

20 Q. Okay. So as you look at the comparison, are you --
21 did you -- well, let me ask you, based upon the information
22 that you had, and based upon the assumptions that you reached
23 in your experience in this particular line of work, did you
24 reach reliable opinions for this jury?

25 A Yes, I did

1 Q. Did you base it on reasonable principals of scientific
2 reliability in your field of expertise?

3 A. Yes.

4 Q. Tell us about your projection.

5 A. Okay. Now, as I said before, I had to project
6 Mr. Ferguson's replacement income. In this case that means
7 the rate at which he is able to build a medical malpractice
8 business, and enjoy the returns from that, and on --

9 Q. As a plaintiff's lawyer?

10 A. Pardon?

11 Q. As a plaintiff's lawyer, instead of as a defendant's
12 lawyer. Now, as a defendant's attorney, he would normally be
13 working directly for an insurance company or an association or
14 whatever, and paid by the hour. So the time that he puts in
15 pretty much determines his income.

16 As a plaintiff's attorney, he is paid a contingency
17 fee, which in my understanding of his situation, the firm
18 is paid approximately 30 percent of an award that goes to
19 plaintiffs, and Mr. Ferguson receives about one-third of that
20 number. So he's getting one-ninth or just a little over 10
21 percent of whatever the awards are.

22 In order to get that, he has to -- of course you've
23 got to develop the case, and you have to bring it to settlement
24 or trial, and you don't get paid until all of that happens. So
25 when you're starting out, as he was in 2006, and the situation

1 that I had, you have to make a judgment as to how rapidly that
2 will happen.

3 My judgment is that, based on conversations with
4 Mr. Ferguson, that in 2007, for example, he'll have six new
5 cases and settle three of them. Working up to 2012, he'll
6 have about ten new cases, and settle eight, because it takes
7 two to three years from the initial -- initially accepting a
8 case until it settles or goes to trial.

9 Q. Did you make a projection that at least at some point
10 that -- well, from what Gary has told you, and from what you
11 know about the practice, that there will come a point in time
12 where hopefully Gary will be making as much money as he was
13 making before as a defense lawyer?

14 A. Yes, I did.

~~15 Q. What did you base that on?~~

16 A. And this is perhaps a bit optimistic, but I assume
17 that he will reach that level in 2012.

18 Q. Okay.

19 A. Basically four, four-and-a-half years from now, he
20 will be earning as much in his new practice as he was in the
21 former one.

22 Q. Okay. So let's go through -- let's go through your
23 projection, then, that this jury can rely upon, based upon the
24 firing. Did you look at how much money he made in 2005?

25 A. Yes, I did.

1 Q. Do you remember how much that was?

2 A. About \$76,000, 75 of which was from Williams and Hunt.

3 Q. So \$1,000 from Siegfried and Jensen, and 75 from
4 Williams and Hunt?

5 A. Yes.

6 Q. So his loss in that year is based upon previous years
7 is what?

8 A. The loss from that year totaled \$95,000, and would
9 have a present value of 105,000.

10 Q. And when you say \$105,000, it means that if he would
11 have invested the money, he would have earned interest on it?

12 A. No. It's discounted at the same way that the future
13 losses are discounted.

14 Q. Okay.

15 ~~Q. A.~~ So that when we're talking about past losses, the
16 number goes up. When we're talking about the future losses,
17 the present value goes down.

18 Q. Okay, that's what you were talking about when you were
19 saying time value of money working on both sides of the date,
20 being today's date, date of trial?

21 A. Yes.

22 Q. Okay, all right. So how much did Gary lose when you
23 compared salary and benefits in 2006?

24 MR. ECKERSLEY: Objection, your Honor, this is not
25 relevant. The witness has testified this is a loss calculation

1 based on the fact of his termination. The claim here is not
2 wrongful termination. Everyone's conceded that he was lawfully
3 terminated. The claim here is defamation and intentional
4 interference. They have heard no testimony that he's made any
5 calculation for either of those claims.

6 THE COURT: At this point the objection is sustained.

7 Q. BY MR. ORCHARD: Are you making these calculations from
8 the basis that -- from whatever the reason, whatever the reason
9 the jury decides the reason may be or not may be, that there
10 was a difference in the income that he was able to earn at one
11 time, compared to what he's earning now?

12 A. Yes.

13 Q. I mean, you haven't made any conclusion about whether
14 there was a wrongful termination --

15 ~~A. I draw no conclusions whatsoever as to liability or~~
16 causation or anything else.

17 MR. ECKERSLEY: Excuse me, your Honor. Could I voir
18 dire?

19 THE COURT: Go ahead.

20 VOIR DIRE EXAMINATION

21 BY MR. ECKERLSEY:

22 Q. Sir, it's true, is it not, that you were not asked,
23 and you in fact did not make any attempt to calculate the
24 economic loss from Mr. Ferguson's alleged defamation, or the
25 alleged intentional interference?

1 A. That is correct.

2 MR. ECKERSLEY: Thank you. I would make an objection
3 to any further opinions from this witness, your Honor.

4 THE COURT: Do you wish to respond?

5 MR. ORCHARD: You bet.

6 THE COURT: Go ahead.

7 MR. ORCHARD: Would you like me to do it through a
8 question, or would you like me to respond to him?

9 THE COURT: Well, I'm not sure. How do you choose to
10 respond? Well, you know, let's do this. This may very well be
11 one of those occasions where it's most appropriate to hear your
12 argument outside of the presence of the jury. I explained to
13 the jury on the first day of the selection a phase of the case
14 that there might be occasions where I have to entertain legal
15 arguments outside of your presence. This is -- that time has
16 arrived.

17 Let me also note, before I excuse you to the jury
18 deliberation room, you should also know, members of the jury,
19 that I have some added responsibilities also today. I'm also
20 the co-habitant abuse signing Judge today. So I have some
21 added responsibilities that it's likely I'm going to address
22 during this recess as well. I'm going to call it a 20 minute
23 recess and try to keep it that as best as I can.

24 It's very important that you remember all of the
25 admonitions I've given to you previously. Those admonitions

1 continue to apply during the course of this recess. We'll
2 excuse the jury at this time. Kathy, would you take the jury
3 out?

4 COURT BAILIFF: All rise.

5 (Jury exits the courtroom)

6 THE COURT: The record should reflect the jury's been
7 excused. You may be seated. Go ahead, Mr. Orchard.

8 MR. ORCHARD: Your Honor, this expert has been retained
9 like any other injury case, whether it be because of product
10 liability or medical malpractice or personal injury. Whatever
11 the reason for it, this expert is here to testify as to a
12 date of loss, whatever the reason, and his projections of
13 what that date of loss is going to mean for the future, and
14 what the losses have been from the time of the injury, which
15 ~~is May 5th 2005, forward to today's date, based upon economic~~
16 projections that are done in all occasions.

17 So it's not -- or it doesn't matter whether it's
18 wrongful termination or defamation, or whether it's intentional
19 interference with the prospective -- or interference with the
20 prospective economic relationship. It's the date that it all
21 occurs.

22 It's not in dispute with the parties; it's May 5th
23 of 2005 that happened. So this expert's not going to be
24 commenting on whether that was the right thing or the wrong
25 thing or which claim. It's that there was an injury that

1 occurred.

2 We've got several claims that are hopefully going to
3 be before the jury on this issue; and that because of that
4 injury, there have been losses suffered. That is the realm of
5 an economist. So I would submit that this is the right kind of
6 expert for the (inaudible).

7 THE COURT: Do you wish to give me a proffer of what
8 you anticipate this witness is going to testify to?

9 MR. ORCHARD: Just what I --

10 THE COURT: Well, I've heard his testimony so far,
11 but can you give me a proffer of exactly what he's going to
12 testify?

13 Mr. ORCHARD: He's going to testify that there are
14 losses that corroborate what Gary Ferguson's testimony was on
15 ~~the stand of how much money he's lost. Then he's going to give~~
16 us a projection of how much money he's reasonably expected that
17 Gary will lose in the future because of his inability to earn
18 income.

19 I can tell you -- I can tell you the numbers he's
20 going to say. The net value -- net present value of the loss,
21 as I understand it -- correct me if I'm wrong, Mr. Slaughter,
22 is 1.43 million dollars 700.44.

23 THE COURT: Anything else?

24 MR. ORCHARD: No, sir.

25 THE COURT: Go ahead, Mr. Eckersley.

1 MR. ECKERSLEY: Your Honor, he's testified twice
2 that what he has calculated is the loss attributable to
3 Mr. Ferguson's termination. That's not an issue in this case.

4 THE COURT: He did use the word "termination." I mean,
5 there's no question about that; but go ahead.

6 MR. ECKERSLEY: And he had also testi --

7 THE COURT: And I take that back. I'm not sure if it
8 was a witness who actually used "termination," but Mr. Orchard
9 definitely used the word "termination."

10 MR. ECKERSLEY: And I would submit, your Honor, that I
11 heard the witness say "termination or loss of the job" on two
12 separate occasions. He's testified affirmatively that he was
13 not asked to and he made no effort to come to a calculation of
14 loss in any way attributable to the claims that we're here
15 ~~trying. That is, the defamation action or the intentional~~
16 interference. Therefore, he's purporting to offer an opinion
17 that is irrelevant to the issue before the jury.

18 THE COURT: The record's going to -- overrule the
19 objection. The Court is satisfied at this point that a proper
20 foundation has been laid for this witness' testimony, and this
21 argument really goes to whether or not this Court properly
22 instructs the jury as to the scope of -- the appropriate scope
23 of the damage claim -- damage component of the claim for the
24 claims that are being tried in this case. So the objection's
25 over-ruled.

1 We're going to recess. I have two petitions. Is
2 there something else you want to say?

3 MR. ORCHARD: I'm sorry, just housekeeping. Your
4 Honor, we're going to have a motion that we're going to take
5 up with you, and we anticipate that this will be our last
6 witness. We have a motion in light of some testimony this
7 afternoon we're going to need to take up with you at some
8 point, and whenever you want to do it.

9 THE COURT: Well, my testimony is going to be is to get
10 as much testimony of this witness in as possible, and get this
11 jury out of here. So I'm hoping in ten minutes we can get the
12 jury back in and proceed with this witness' testimony.

13 How much -- how long do you expect to have this
14 witness on direct?

15 ~~MR. ORCHARD: I was right at the end. Five minutes.~~

16 THE COURT: Okay, we'll recess for ten minutes.

17 COURT BAILIFF: Court's in recess.

18 (Recess taken)

19 COURT BAILIFF: All rise. Third District Court is
20 again in session. Please be seated

21 THE COURT: You may go forward, Counsel.

22 MR. ORCHARD: Thank you, your Honor.

23 DIRECT EXAMINATION (resumed)

24 BY MR. ORCHARD:

25 Q. Mr Slaughter, would you please tell the ladies and

1 gentlemen of the jury your projection of Gary Ferguson's losses
2 as a result of the events of May 5th, 2005? Go ahead.

3 A. May I use the board for that?

4 Q. You have to ask (inaudible).

5 THE COURT: You may.

6 THE WITNESS: My estimate of the present net value of
7 his lost income stream is \$3,766,193. My estimate of present
8 value of his replacement income stream is \$2,322,449. So that
9 the present value of his net loss -- and this is from the date
10 of the event in 2005 to -- well, through his retirement, and
11 I'll mention that in just
12 a minute, is \$1,443,744; and the loss to December 1 of 2007
13 -- that's because I did this calculation in November -- is
14 \$820,000 -- \$820,666.

~~15. Now, both of these numbers, I want to tell you, are~~
16 calculated -- because of the differential in fringe benefits
17 in the 401-K contribution, I ran the entire analysis out to
18 the date of his expected retirement at age 66; but from the
19 -- from 2012, which was the date I mentioned earlier, until
20 that retirement, everything on both sides is exactly the
21 same number. So it nets out to zero, other than the 401-K
22 contribution. So these numbers could be reduced by a bit, but
23 they'd be the same. This number would be the same with either
24 methodology.

25 Q. Thank you. Is this the entirety of your opinion?

1 A. This is my opinion as to Mr. Ferguson's loss, yes.

2 MR. ORCHARD: Thank you. That's all I have.

3 THE COURT: Mr. Eckersley.

4 MR. ECKERSLEY: Thank you, your Honor.

5 CROSS EXAMINATION

6 BY MR. ECKERSLEY:

7 Q. Just so we're clear, sir. The calculation of the loss
8 is what you believe to be his economic loss because he lost his
9 employment at Williams and Hunt?

10 A. No, I believe that to be the difference between the
11 income stream he would have received through 2012, had he
12 continued at Williams and Hunt, and the income stream that he
13 -- that I expect he will receive in his current position at
14 Siegfried and Jensen through the same period of time.

15 ~~Q. But what you were calculating was how much he lost, was it?~~
16 because he lost his job at Williams and Hunt?

17 A. No, there's no because in it. I mean, there was an
18 event that occurred, for whatever reason.

19 Q. Right.

20 A. And due to that event --

21 Q. That event being his termination.

22 A. Okay, or whatever, but when he --

23 Q. Let me --

24 A. No, no --

25 Q. -- it was his termination; was it not?

1 A. Yeah, but I'm not testifying that he was terminated.

2 Q. No, we all can see that he was terminated.

3 A. Okay.

4 Q. And that was the premise you were given, was it not?

5 A. Okay, because --

6 Q. And that's where you began your analysis with the lost
7 generated by his termination?

8 A. Okay, I'm testifying as to his loss, his net loss
9 after litigation, because of the event that brought us here
10 today, whatever that was.

11 Q. Well --

12 A. If it's termination, it's termination.

13 Q. You assumed it was the termination that you were to
14 focus on as the event for the focus of your calculation?

15 ~~A. I'm sorry, Counselor, I -- then -- I suppose it's a~~
16 question I've never been asked. It's my understanding that the
17 event is stipulated and understood. So my analysis began --

18 Q. When you say the event --

19 A. My analysis begins on a particular date.

20 Q. May 5th?

21 A. May 5th of 2005.

22 Q. And the assumption that you start with is he's going
23 to have no more income from Williams and Hunt from that day
24 forward?

25 A. That is correct

1 Q. And you were not asked to make any calculation, and
2 you did not make any calculation of laws relating to some
3 purported injury he might have had for defamation?

4 A. No, my calculation is of his capital loss, the
5 differential in his expected income only.

6 Q. By vir -- his capital loss by virtue of not being
7 employed at Williams and Hunt?

8 A. Yes.

9 MR. ECKERSLEY: Thank you.

10 REDIRECT EXAMINATION

11 BY MR. ORCHARD:

12 Q. So the difference that you've calculated is that
13 Mr. Ferguson has suffered a loss because he's no longer a med-
14 mal defense lawyer working for Williams and Hunt, and now is
15 ~~having to work as a plaintiff's lawyer for Siegfried and~~
16 Jensen; is that right?

17 A. Well, I have to scenarios.

18 Q. Okay.

19 A. One is continuing with Williams and Hunt, and the
20 other is building practice at Siegfried and Jensen. The
21 difference between the two are the numbers that are on the
22 board.

23 Q. So whether he's terminated, whether he's defamed,
24 whether they interfere with his ability to earn money, whether
25 they intentionally interfere with his ability to --

1 MR. ECKERSLEY: Objection, leading, your Honor.

2 Q. BY MR. ORCHARD: -- keep his contracts with UMIA --

3 THE COURT: The objection is sustained.

4 Q. BY MR. ORCHARD: For whatever reas --

5 THE COURT: Excuse me.

6 MR. ORCHARD: I was doing a new question.

7 THE COURT: Okay, I couldn't tell if it was a new
8 question or not.

9 Q. BY MR. ORCHARD: For whatever reason that Gary Ferguson
10 was no longer able to earn income as a medical malpractice
11 defense lawyer, your calculations are assuming that that income
12 stream was lost by May 5th of 2005; is that correct?

13 A. Yes, it is.

14 Q. That's all I have.

15 ~~MR. ECKERSLEY: Nothing further.~~

16 THE COURT: You may step down.

17 THE COURT: I'm not sure who to address, Mr. Peterson
18 or Mr. Orchard?

19 MR. ORCHARD: Your Honor, that's all the evidence we
20 have. The plaintiff rests. We, again, would like to make some
21 motions at some point with you, your Honor, but --

22 THE COURT: Mr. Eckersley?

23 MR. ECKERSLEY: Defense has a motion at this point,
24 your Honor.

25 THE COURT: Can I get the three of you to approach for

1 a moment.

2 (Discussion at the bench off the record)

3 THE COURT: Members of the jury, what we are going to
4 do at this point in time -- it's about 5 minutes after 4 -- we
5 are going to take the evening recess at this time. It's pretty
6 obvious that there are some legal issues that I'm going to need
7 to resolve outside of your presence; and we were just simply
8 discussing whether it's more efficient to take care of those
9 legal issues now, or move forward and take care of them
10 sometime tomorrow.

11 I'm satisfied from Counsel's statements that it's
12 probably a more efficient use of your time to excuse you now,
13 and then let me hear the legal arguments from Counsel and
14 resolve those issues.

15 ~~I know you are aware of this already, but it is very~~
16 important that you continue to follow the admonitions I've
17 given to you previously about having no conversations or
18 discussions with anyone regarding this case, including any
19 discussion amongst yourselves.

20 It's important to continue not to have any contact
21 whatsoever with any of the lawyers, parties or witnesses in
22 this case. It's important that you continue to refrain from
23 attempting to learn anything about this case outside of this
24 trial. That includes any media exposure or any independent
25 research on your own.

1 It also still remains very important that you continue
2 to keep open minds and not form any opinions or conclusions
3 about this case as well. I'm going to excuse you at this time,
4 and I'm going to ask that you report promptly to the Court
5 tomorrow morning at 9 a.m.

6 By the way -- and I'm always a little hesitant or
7 reluctant to give you like 100 percent guarantees, but we are
8 still on track and still on time in terms of the time period
9 that I told you it was going to take to try this case. Of
10 course, we have to factor into that equation, as well, your
11 deliberations on this case, which have no time limit; but I
12 want to let you know at least that we are still on track and
13 we are still on time at this point.

14 I'm just reluctant to guaran -- reluctant to give
15 ~~you a 100 percent guarantee, because I'm not certain of what~~
16 tomorrow will bring; but it looks like we're going to get it
17 done within the time that we committed to you when we first
18 started.

19 So I'll excuse at this time. Kathy will collect your
20 notepads; and Kathy, you may take the jury out.

21 COURT BAILIFF: All rise.

22 (Jury exits the courtroom)

23 THE COURT: And the record should reflect that the jury
24 has been excused from the courtroom. Mr. Eck -- well, does it
25 matter which order we take these motions?

1 MR ORCHARD. I don't think so, your Honor.

2 THE COURT. Well, go ahead, Mr. Eckersley, let's hear
3 your motion.

4 MR. ECKERSLEY. Obviously, your Honor, I'd be making
5 a motion for a directed verdict at this time. I know that
6 your Honor considered this matter seriously at the time of the
7 summary judgment motion, and articulated to me your concern
8 specifically with regard to a quote in the O'Connor case from
9 Justice Sneer, that quote --

10 THE COURT: And in Wayment also.

11 MR. ECKERSLEY: -- that quote -- quote the Hales case.
12 The Hales case is, in fact, a 1948 case back before the law
13 changed with regard. I would submit that --

14 THE COURT: But they're still citing to it, right?

15 ~~MR. ECKERSLEY: -- they are citing to it with, as I recall, parenthetically~~
16 parenthetically in (c)(f). What that ever meant, I've never
17 been sure, but I tell you that they are not citing to it as
18 current authority for the proposition that rec -- I mean, that
19 lack of reasonable basis for belief is still the law.

20 THE COURT Oh, now, so this is -- this is part of the
21 same discussion that we had earlier. Generally I'm not sure I
22 disagree with your statement, because I think the law is set
23 out in those cases -- and is it 601 of the restatement?

24 MR ECKERSLEY It's 600

25 THE COURT Oh, 600 of the restatement I intend to

1 give instructions consistent with the language in 600 of the
2 restatement. My concern, as I indicated to you -- and I think
3 you know where I'm headed on this, but my concern was that
4 that language that addressed the issue of -- in determining
5 whether or not the defendants knew of the falsity, or acted
6 in reckless disregard, there is a sig -- and these are not my
7 words, again. There is a suggestion that the Hales case, and
8 whether or not there is a reasonable basis for the belief -- I
9 mean, and this is the quoted language -- is important. So let
10 me hear what you have to say about that.

11 MR. ECKERSLEY: All right. Let me interject this.
12 That under 600 of the restatement, the question is, what is
13 in the mind of the speaker. There is no evidence in this case
14 that the speakers, Mr. Hunt and Mr. Williams, did not believe
15 ~~what they were saying, or that they had facts in front of them~~
16 making it highly improbable that what they were saying was
17 true. That is the restatement focus. It's what they're
18 thinking.

19 THE COURT: Now, it's interesting when you say that,
20 and I'm trying to sit here and be quiet and listen to you;
21 but since we started this trial, and I knew I was going to
22 be addressing this issue once again, in all likelihood, that
23 I'd try to do some additional research on this very question
24 that you're raising, because I could find nothing in Wayment,
25 O'Connor, certainly nothing in the older cases, Hales, that

1 spoke in terms of whether or not this was a subjective test.

2 I did find a couple of Alaska cases that clearly state
3 that this test is a subjective test. So, in essence, you do
4 have to stand in the shoes of the defendant. So that's the
5 vantage point from which this determination is to be made
6 versus an objective test; but I could not find anything in
7 Utah case law --

8 MR. ECKERSLEY: I would suggest, your Honor, it's
9 inherent in the --

10 THE COURT: Excuse me, one last thing.

11 MR. ECKERSLEY: I'm sorry.

12 THE COURT: Even though -- and I just -- I want to put
13 this on the record. Even though -- I think it's in the Wayment
14 Clear Channel case that the Supreme Court cited the Alaska case
15 ~~that I'm referencing, and distinguished it, but it was on a~~
16 different proposition. It wasn't on this proposition of
17 whether or not this is an objective or subjective test.

18 I only place that on the record because at least
19 the Supreme Court read the same Alaska Court case that I'm
20 referencing now, that I believe clearly states that it's a
21 subjective test. Go ahead, I'll just be quiet.

22 MR. ECKERSLEY: What I would suggest is that Section
23 600, the first prong, is inherently subjective. That is, what
24 the defendant knew, what the speaker knew, only focuses on the
25 knowledge of the speaker. So it is an inherently subjective

1 test.

2 The second prong is that even if the speaker had the
3 subjective belief that what they were saying was true, they
4 could not formulate that belief if there is so much objective
5 evidence that it makes it highly improbable, highly improbable
6 that what they're saying is true.

7 It's the you can't bury your head in the sand in
8 the face of a mountain of evidence, even if you subjectively
9 believe. I still think that's true if you have all of this
10 information objectively that directs you in a -- that you
11 shouldn't believe what you believe. That part can be overcome.
12 It is not entirely subjective.

13 What it requires is the mountain of evidence to the
14 contrary of your statement, which you are not allowed as a
15 ~~matter of law to disregard, because to do so would be to~~
16 recklessly disregard it. We don't -- there's no mountain here.
17 There's nothing here. There is only Mr. Ferguson's statement
18 that he doesn't believe -- well, that he didn't over-bill.
19 That's all there is.

20 You'll recall when we started the case, there had been
21 an earlier suggestion at summary judgment you were going to
22 hear testimony that the computer program was such that it could
23 account for these problems. That testimony was not offered.

24 So we're down now simply to Mr. Ferguson's statement
25 that he didn't over-bill. That is not the quantum of evidence

1 that is required to show that the defendants, the speakers,
2 couldn't have had to believe that the statement was true,
3 because there's nothing there that they're recklessly
4 disregarding. There's just no evidence to the contrary.

5 There's one little statement, the testimony of the
6 plaintiffs. It's certainly admissible, but it is not the
7 quantum of evidence to demonstrate therefore because Gary
8 said it wasn't true, the stuff we had we have to disregard.
9 That's just if he says it, by God, it's improbable that it
10 could not be true. That's what you have to find. That's what
11 the test is under 600, your Honor.

12 THE COURT: Thank you, Counsel. Mr. Peterson or
13 Mr. Orchard. Mr. Peterson.

14 MR. PETERSON: Well, I've likewise read those cases,

15 ~~and I am--here's what I am convinced--I am convinced~~

16 THE COURT: Well, can I start you off with a question?

17 MR. PETERSON: Sure.

18 THE COURT: Do you agree with the proposition that it
19 is a subjective test?

20 MR. PETERSON: I don't.

21 THE COURT: You don't. What are you relying on for
22 that?

23 MR. PETERSON: I am relying on the language of the
24 Court in O'Connor, as well as the language from the restatement
25 itself, in particular what I guess I would call the fifth

1 prong, whether the publisher lacked a belief in the truth of
2 the defamatory matter published, or lacked reasonable grounds
3 for so believing. Which raises, I believe an issue of fact
4 with respect to whether or not --

5 THE COURT: And what section of the restatement did you
6 just quote?

7 MR. PETERSON: As I understand it, I think it's 600, if
8 I'm -- if I'm misstating the section. I'm looking actually at
9 Mr. Orchard's instruction there.

10 THE COURT: Well, let's don't --

11 MR. ECKERSLEY: I don't believe that's a correct
12 statement. We better get to it.

13 THE COURT: -- let's time out. Mr. Orchard, I want you
14 to be seated for a moment. I'm going to let you Counsel in a

15 ~~second. Listen, I -- since we started this trial, I didn't go~~
16 -- I did not go back and pull 600, but I have a copy of it on
17 my desk, and I almost want to bet you dinner it doesn't say
18 that.

19 MR. PETERSON: You might be right.

20 THE COURT: Well, but it's important this -- I mean,
21 this is an important --

22 MR. PETERSON: Yes.

23 THE COURT: This is an important issue in this case,
24 so I'm --

25 MR. PETERSON: Let me --

1 THE COURT: -- do you know for sure what you are saying
2 to me --

3 MR. PETERSON: Here's where I'm getting --

4 THE COURT: -- is an accurate statement?

5 MR. PETERSON: That is the 600 --

6 THE COURT: Do you have a copy of it?

7 MR. PETERSON: I don't. Here's what I'm reading from.
8 I'm reading from O'Connor.

9 THE COURT: Mr. Orchard, can you -- did you give him
10 something that --

11 MR. ORCHARD: Yes, absolutely. I gave him our jury
12 instruction that quotes the five prongs directly from O'Connor
13 vs. Burming -- Burningham.

14 MR. PETERSON: Right.

15 ~~MR. ORCHARD: Which is a 2007 case, and from that, the~~
16 Court -- Utah Supreme Court says, "Here are the restatements
17 that we believe are applicable.

18 THE COURT. Okay

19 MR. ORCHARD: And they quote 600, 590 --

20 THE COURT: All right, let --

21 MR. PETERSON: And I'm cite -- that was what I was
22 going to read to you, directly from O'Connor. "The (inaudible)
23 may have abused, and therefore lost this conditional privilege
24 as a refuge, if, for example, they knew their statements
25 regarding Mr. O'Connor were false --" I think that is the

1 subjective component -- "or acted with a reckless disregard
2 as to their falsity. See restatement second of torts, Section
3 600."

4 That was the --

5 THE COURT: Yeah, but when you see that section, I
6 think it defines reckless disregard as a substantial belief
7 in the -- in the falsity of the statement. That's just like
8 a hair step down from actual knowledge. I don't see how that
9 changes if -- I don't see how that changes the subjective
10 nature of the test. If -- so help me understand your thinking
11 on that.

12 MR. PETERSON: I'm not sure I can help you any more
13 than to say --

14 THE COURT: Well, then that helps me.

15 ~~MR. PETERSON: That's my position~~

16 THE COURT: Okay, all right.

17 MR. PETERSON: Let me add something else to this. I --
18 as we were -- as I was listening to Mr. Williams today, he said
19 at one point in his testimony, "We were unable to, as a Board,
20 to come to a conclusion that he had over-billed at the time he
21 was fired." That, I believe, is the state of the evidence with
22 respect to what Mr. Williams said today.

23 Now, I believe, frankly, that there are issues of fact
24 that need to be resolved by a jury with regard to this -- the
25 motion is simply -- it's an extension of what we've already

1 argued the motions for summary judgment. I don't think that
2 the law in that regard has changed. We just simply rely on the
3 briefing that we did on the motion for summary judgment that
4 sets up as to our position with respect to what belies in this
5 regard.

6 MR. ORCHARD: (Inaudible)?

7 THE COURT: Go ahead. Mr. Orchard's coming (inaudible)

8 MR. PETERSON: Go ahead.

9 MR. ORCHARD: If you read farther -- Mr. Peterson just
10 read the first two prongs, the O'Connor --

11 THE COURT: And what are you reading from right now?

12 MR. ORCHARD: The O'Connor opinion.

13 THE COURT: Go ahead.

14 MR. ORCHARD: It doesn't just talk about whether or not

15 ~~they know it~~ to be false or acting with reckless disregard

16 They say "or the publisher lacks reasonable grounds for so

17 believing." So if someone who is accused of defaming another

18 says, "I believed it to be true," the Utah Supreme Court is

19 saying, "Well, that's not enough." Were there reasonable

20 grounds to support a reasonable basis to take reasonable steps?

21 THE COURT: I hear that, but I want -- I just want to
22 place on the record, I did read that differently.

23 MR. ORCHARD: I see -- go ahead.

24 THE COURT: Let me just place -- I read it differently
25 at least in this context. That the test is knowledge of the

1 falsity or reckless -- I'm setting aside ill will. Let's set
2 that phrase aside for right now. Knowledge of the falsity or
3 reckless disregard.

4 In determining reckless disregard, that a factor could
5 be an important factor, could be this concept of whether or not
6 there is a reasonable underlying basis for the statement, but
7 I did not read O'Connor or the Wayment case to suggest that
8 that statement alone, whether or not there is a question of
9 an underlying reasonable basis for the statement by itself
10 would satisfy the ultimate threshold requirement of reckless
11 disregard, which requires a demonstration of substantial
12 knowledge of the falsity. That's how that phrase is defined
13 in the restatement.

14 So, I mean, I've placed on the record how I read the
15 cases, how I read the restatement, and I ~~guess you guys are~~
16 double teaming Mr. Eckersley right now, but is there anything
17 else you want to say?

18 MR. ORCHARD: Yes.

19 THE COURT: Because I have to give him a chance to
20 respond.

21 MR. ORCHARD: Well, I think it's important enough
22 that in order for this Court to make this determination that
23 there's an adequate record on directed verdict again, these
24 were briefed earlier; but I think that the Court was very clear
25 that we're not talking about the reckless disregard --

1 THE COURT: You're talking about the Supreme Court?

2 MR. ORCHARD: Yes, and I'm going to be more clear.

3 The Court in O'Connor wasn't talking just about the reckless
4 disregard, which is an act, they can act of ill will or spite,
5 they can act with knowledge of falsity, they can act where they
6 recklessly disregard, they just cover their eyes and don't
7 look, and they can act if they simply say something that they
8 think is true, but don't have a reasonable basis, is the next
9 prong.

10 The reason why I say in this context, is in the
11 context of conditional privilege, the Court said if you want
12 to establish a privilege, you have the requirement to prove
13 it, and the Court makes the decision. Once the Court decides
14 there is a decision -- or there is a privilege, then we have
15 ~~the burden to show there's not a reasonable basis. Then it's~~
16 abused, the privilege is abused.

17 So the Court is clearly saying in the context of
18 an asserted privilege, here's how you can abuse it. You
19 can abuse it if you make a statement that you don't have a
20 reasonable ground to believe it's true. I think that's very
21 clear; and what the Court does is it cites restatement of
22 torts 595, 600, 604, 605, 605(a) and then (c), see also Hales.

23 So I think that what the Court is saying that
24 in the context of the very narrow item of their defense,
25 conditional privilege, abuse of the privilege can be proven

1 in the following ways, and we submit that that's covered by
2 O'Connor. Thank you, your Honor.

3 THE COURT: Mr. Eckersley.

4 MR. ECKERSLEY: Your Honor, let's see if I can set this
5 clear to, I think, all of us, your Honor, have read the cases,
6 your Honor, just understanding the issues. I want to shift the
7 focus, if I can, this way. To say we use the phrase "reckless
8 disregard," but what does that mean? What that means is you
9 have to have a reckless disregard of existing facts, making it
10 improbable that what you're saying is true. It's not --

11 THE COURT: Isn't it high -- is it highly improbable?

12 MR. ECKERSLEY: Yeah, I think it's highly improbable.

13 THE COURT: Well, I mean, I'm trying to remember the
14 exact language used in your statement.

15 ~~MR. ECKERSLEY: And I am as well. I'm just -- I'm~~
16 struggling.

17 THE COURT: I think it's highly --

18 MR. ECKERSLEY: I think it's highly unlikely that it's
19 true, or highly improbable that it's true. What I want to
20 focus on is what goes into that equation to that determination,
21 are the facts in possession of the speaker. Here we have no
22 evidence of facts in possession of the speaker that suggest
23 that what they said and believed was highly improbable. That's
24 the focus.

25 I think it's important to bear in mind that this

1 conditional privilege is intended to immunize actual false
2 statements. That's its purpose. Now, we have an unusual
3 situation here, because frequently what happens is this
4 privilege is asserted when someone reports to someone else
5 what a third party told them, as in I come to you and say,
6 you know, somebody in your employ is stealing money.

7 You take that information, and you communicate it to
8 some third party, and it turns out that's not true. The issue
9 is, can you be liable for defamation for having made that
10 untrue statement? This is a privilege, assuming you tell
11 somebody who's it's important to know, that makes it so you
12 cannot have any such liability. The presumption is it's
13 supposed to be dealing with admittedly false statements.
14 That's what it's entitled -- that's what it's designed to
15 protect.

16 Here, however, we don't have that, because we're
17 talking about the speakers themselves. So under the first
18 prong, it's clearly subjective. It's "did they know?" They
19 know means what's in their head; or did they recklessly
20 disregard facts that make it highly improbable.

21 No facts here. It's not reckless disregard in a void.
22 Has to be a mountain of evidence. Instead, "I don't care if
23 you did believe it. Look at all of this." That makes your
24 belief unreasonable.

25 THE COURT: Anything else?

1 MR. ECKERSLEY: No.

2 THE COURT: All right. I understand --

3 MR. ECKERSLEY: There's additional component to my mot
4 -- there's another motion.

5 THE COURT: Oh, I'm sorry. Go right ahead.

6 MR. ECKERSLEY: That would be for the dismissal of the
7 intentional interference claim, for the reason that there is
8 no evidence of damage, which is an element; and I submit that
9 when all was said and done, it was clear that the testimony put
10 on by the economist was that he had calculated the losses,
11 economic loss coming from determination which was not wrongful.

12 Additionally, there has actually been no evidence put
13 forth that the interference took place. I mean, Mr. Glenn
14 couldn't testify that but for the statement made to him, it
15 ~~would have been likely that he -- or to Mr. Osłowski related to~~
16 him, that it would have been likely that Mr. Ferguson would
17 have had work.

18 His only testimony about the likelihood of future work
19 was that it would be improbable for him to get work if he had
20 broken relationship with Williams and Hunt, because UMIA needs
21 other lawyers that they hire to have a working relationship
22 with Williams and Hunt

23 So I submit that that claims for both rea -- claim
24 fails for both reasons No evidence to suggest that there
25 was a damage in the sense of but for the defamation he would

1 have got work, and no evidence of any damage arising from it
2 whatsoever.

3 THE COURT: I don't think I gave either plaintiff's
4 Counsel the opportunity to respond to that aspect of your
5 motion. So I'll need to hear from them now.

6 MR. ORCHARD: I think that the law is -- thank you,
7 your Honor. I don't think that the law has -- well, the law
8 hasn't changed since the time we briefed this, and the Court's
9 decision shouldn't change on this. Again, for this business --

10 THE COURT: Can I get you to reserve your marks to the
11 interference claim that Mr. Eckersley just addressed? Is that
12 what you're going to do?

13 MR. ORCHARD: Yeah.

14 THE COURT: Okay.

15 ~~MR. ORCHARD: Yeah.~~ MR. ORCHARD: Yes.

16 THE COURT: All right.

17 MR. ORCHARD: With regard to the business relationship
18 expectancy, whether it's tortious interference with the
19 prospective business advantage or tortious interference with
20 contract, we have evidence that both took place. Improper
21 purpose to harm the other -- the other -- to interfere with
22 the contract, and improper means by doing it by defaming the
23 person, meaning that they -- that it wasn't true that Gary was
24 ever over-billing.

25 By doing that, by telling Marty Osowski that, we know

1 that the result from Art Glenn's own testimony is that he was
2 told in no uncertain terms, "You may not give Gary work,"
3 because of what Elliot Williams said. That statement, we
4 contend -- and the evidence and a reasonable juror could
5 believe, was an improper means by saying something that wasn't
6 true. They defamed him. Said he was stealing from his client,
7 essentially.

8 So that element of the law -- of Utah law, has been
9 met both with an improper purpose and an improper means; and
10 there was a business expectancy that's been admitted by the
11 defendants in their testimony. Elliot Williams even said,
12 "I expected that when we fired him, we would get his cases."
13 It's already been established there was a contract, an implied
14 contract, at least, between UMIA and the lawyers that they hire
15 for the various doctors.

16 We know that Gary's contract was interfering with
17 the doctors, the 14 cases he had. He didn't earn another dime
18 for them. The law of -- the prospective business relationship
19 talks about the fact that they know there was an expectancy of
20 a future relationship or future business with UMIA, which they
21 knew.

22 If he states that Williams and Hunt isn't defamed --
23 they don't say that UMIA, you can't trust his bills. He's been
24 over-billing, well, then Gary Ferguson is still there today
25 earning money with UMIA. That's the reasonable expectancy that

1 everyone has. At least it's a jury question as to that.

2 So the law hasn't changed. There's enough facts
3 already in the record to support that, to go to the jury, and
4 it's one that the jury should decide.

5 THE COURT: All right. Anything else, Mr. Eckersley?

6 MR. ORCHARD: No, sir, thank you

7 MR. ECKERSLEY: Just perhaps, your Honor, Counsel
8 didn't hear my argument. My argument was damage is an element.
9 There's no damage -- no evidence of damage flowing from the
10 alleged intentional interference.

11 MR. ORCHARD: I can address that if you'd like, your
12 Honor, but I -- go ahead.

13 THE COURT: No. This is what I'm going to do. I'm
14 going to -- I have O'Connor on my desk. I'm going to go back
15 and take a look at it again. We're going to recess right now,
16 and I'll see you back here at 5 o'clock.

17 MR. ECKERSLEY. Very good, your Honor.

18 MR. ORCHARD. Yes, sir.

19 COURT CLERK: Court's in recess.

20 (Recess taken)

21 COURT CLERK: Please rise. Third District Court is
22 again in session Please be seated.

23 THE COURT The record should reflect that all parties
24 and Counsel are present The jury is not present at this time.
25 Counsel, I've taken the additional opportunity to take a look

1 at O'Connor, and I am going to rule as follows.

2 First of all, let me say that I am going to grant
3 the motion for a directed verdict, and I am doing so for
4 the following reasons. First of all, this Court previously
5 determined that the statements at issue in this case were
6 privileged. They are entitled to the conditional privilege.
7 That issue is -- I don't think there's any question that that
8 issue is in fact a question of law.

9 I think it's also equally correct from the Waymont
10 Clear Channel case, the O'Connor case, that the question of
11 whether or not the conditional privilege is abused or not is
12 generally a question of fact. I think that's clearly set forth
13 in those cases as well.

14 What this Court is finding, however, that based upon
15 the current state of this record, this Court will find, even
16 considering the record and the evidence presented in a light
17 most favorable to the plaintiff, as this Court must consider
18 the evidence, this Court would find that no reasonable jury
19 could find that the conditional privilege was abused.

20 I am specifically finding that in order to demonstrate
21 that the conditional privilege was abused, there needs to be
22 sufficient evidence that the defendants knew the statement at
23 issue was false. This record -- this Court is finding that no
24 reasonable jury could so find.

25 The next threshold test is reckless disregard. This

1 Court is finding that no reasonable jury could find that
2 reckless disregard as to the truth -- the falsity at this
3 statement at issue, based on this record.

4 Consistent with the restatement, the term and phrase
5 "reckless disregard" is defined as "or reckless disregard
6 that the truth of falsity exists when there is a high degree
7 of awareness of probable falsity or serious doubt as to the
8 truth of the statement. In this Court's opinion, anyway, no
9 reasonable jury could so find.

10 This Court is finding, anyway, that these tests are in
11 fact subjective tests; and I am going to go ahead and rely on
12 the Alaska case that I referenced to you earlier. That is the
13 case of DeNardo v. Backs; and it's found at 147 P3d. 672. It's
14 a 2006 Supreme Court of Alaska case.

15 ~~Because the tests were determining whether or not~~
16 the privilege was abused or not, is a subjective test. The
17 questions really become, is there sufficient evidence to give
18 this case to a jury that the defendant knew that the statements
19 were false? This Court cannot so find.

20 The next question then becomes, is there sufficient
21 evidence in the record to give this case to the jury that the
22 defendants entertained serious doubt as to the truth of the
23 statements? On this record the Court could not -- this Court
24 cannot so find.

25 The next question is, based on this record is there

1 sufficient evidence in order to give this case to the jury that
2 the defendants had high degree of awareness of the probable
3 falsity of the statements at issue in this particular case? I
4 cannot so find.

5 Further, this Court finds that no reasonable jury
6 could find that the defendant's lacked a reasonable belief in
7 the truth of their statements.

8 Finally, this Court would find that there's really no
9 evidence in the record that the statements at issue were made
10 with ill will, or they were excessively made. For those
11 reasons the Court is going to grant the relief requested.
12 Let me also note that the remaining interference claim, this
13 Court is finding that based on this Court's ruling on the fact
14 that the communication was privileged, there can be no improper
15 purpose or improper means.

16 That is the full extent of this Court's ruling. I'm
17 going to instruct Mr. Eckersley to draft the order consistent
18 with this Court's ruling, granting the motion for a directed
19 verdict. I'll give any of you the opportunity to place
20 anything on the record you wish to place on the record at
21 this time.

22 MR. ORCHARD: You're not going to change your mind, I
23 guess, Judge, is that what you're -- I mean, this is your
24 ruling?

25 THE COURT: Well, I -- because I have a very thick

1 skin, I'll take that question in all professionalism and
2 honesty.

3 MR. ORCHARD: Absolutely. I mean, I did it the best --

4 THE COURT: I'm --

5 MR. ORCHARD: -- way.

6 THE COURT: -- I'm sure it is. The answer to that
7 question is no. For whatever it's worth, it's not -- and it's
8 probably worth nothing, because we have a tendency at times to
9 be 100 percent result oriented, for whatever it's worth, I've
10 really enjoyed having the three of you in front of me. I
11 think for the most part the case has been tried in a very
12 professional manner. You've certainly been very respectful
13 and professional to this Court and that is greatly appreciated.
14 Anything else?

~~15 MR. ECKERSLEY: No, your Honor.~~

16 THE COURT: All right. We'll recess at this time.

17 COURT BAILIFF: Court's in recess.

18 THE COURT: Oh, and just so the record is clear on this
19 point, for obvious reasons, and consistent with this Court's
20 ruling, I'm going to discharge the jury at this point. I'm
21 going to try to reach them at home so they don't come here
22 tomorrow. I'm assuming you'd have no reason to have a problem
23 with that at all, correct?

24 MR. ECKERSLEY: Correct.

25 THE COURT: All right, thank you.

1 MR. ECKERSLEY: Your Honor, might I make an inquiry;
2 can I leave this stuff here tonight? Do I get somebody to come
3 help me tomorrow?

4 THE COURT I'm not sure you can, but you can have that
5 conversation with my clerk, because she'll tell you what she'll
6 have then on the calendar

7 MR. ECKERSLEY Thank you

8 (Trial 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.

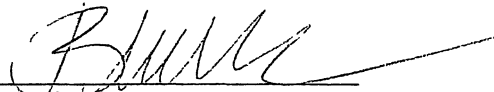
That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

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 19th day of May 2008.

My commission expires:
January 30, 2012


Beverly Lowe
NOTARY PUBLIC
Residing in Utah County

