

1 But I think there is absolutely no question
2 that you have avoided answering the stark question I've
3 asked, which is, is this policy a malpractice negligence
4 policy, or is it a policy that governs everything that
5 could possibly happen in a lawyer's office?

6 MR. DARNELL: Object to the sidebar.
7 Object to sidebar.

8 MR. HAYES: It is not a sidebar.

9 Q. (BY MR. HAYES) Mr. Scherr, are you capable of
10 answering my question or not?

11 MR. DARNELL: Let me finish my objection.

12 MR. HAYES: Go ahead.

13 MR. DARNELL: Object to sidebar and object
14 to a recharacterization of the question.

15 MR. HAYES: That's fine. But it is written
16 down. It is going to be typed up and it is very clear.

17 A. I don't think it covers everything that happens
18 in a law office.

19 Q. (BY MR. HAYES) Are you capable -- you don't
20 think it covers everything that happens in an attorney's
21 office?

22 A. Correct.

23 Q. Then will you agree that it is specifically
24 designed to not cover -- turn to the exclusions, please.

25 It is specifically designed to not cover a

1 judgment or final adjudication based upon or arising out
2 of a dishonest act. Is that correct?

3 A. C1(a) speaks for itself. You just read part of
4 it.

5 Q. Then you agree it does not cover a judgment or
6 final adjudication based upon or arising out of a
7 dishonest act? Do you agree with that?

8 A. Yes, sir.

9 Q. What about any judgment or final adjudication
10 based upon or arising out of a deliberately fraudulent
11 act?

12 A. Criminal act?

13 MR. DARNELL: Excuse me. Are you asking
14 him duty to defend, or are you asking him coverage now?

15 MR. HAYES: I said coverage. I
16 specifically said "coverage." I am using the language
17 "to any judgment or final adjudication based" --

18 MR. DARNELL: Okay.

19 Q. (BY MR. HAYES) Is there any coverage or duty
20 to pay for a judgment or final adjudication based upon
21 deliberately fraudulent acts?

22 A. No.

23 Q. Is there a duty to pay to any judgment or final
24 adjudication based upon a criminal act?

25 A. No.

1 Q. Is there a duty to pay based upon a judgment or
2 final adjudication based upon a malicious act?

3 A. No.

4 Q. Is there a duty to pay for any judgment or
5 final adjudication based upon a deliberately wrongful
6 act?

7 A. No.

8 Q. Do we agree that in Texas -- and this is --
9 just give me a slight dispensation for this. I just
10 want to make sure whether or not -- because there is a
11 whole line of questions that I am going to deal with.

12 Do you agree or disagree, in Texas, in
13 terms of the duty to defend, the pleadings control that
14 issue on a duty to defend? When an insurance company
15 looks at whether or not they are going to defend a
16 claim, whether or not they defend is governed by the
17 four corners of the pleading and their policy, of
18 course, but the pleading controls?

19 A. You are asking a legal opinion.

20 Q. Okay. And you don't think that -- that's fine.
21 And that would call for a legal opinion on your part,
22 you could not answer absent it being a legal opinion?

23 A. Correct.

24 Q. Did you seek legal advice, factually, on that
25 question during the time that you were dealing with the

1 Home Insurance Company in the Beard, Petrosky, Bailey
2 lawsuits?

3 A. I'm an attorney. May I give legal opinions
4 myself?

5 MR. DARNELL: Well, he is asking if you
6 sought advice, not what the advice was.

7 Q. (BY MR. HAYES) Yeah. And if the answer is,
8 "No, I didn't need to," then I'm going to assume -- my
9 next question will be, would that be, Mr. Scherr,
10 because you knew the answer to that question yourself,
11 and you can say yes or no.

12 A. When you say "sought legal advice," do you mean
13 outside counsel apart from my firm?

14 MR. DARNELL: I think he means apart from
15 your body.

16 A. Apart from my body?

17 Q. (By MR. HAYES) Yeah. Did you go beyond Jim
18 Scherr?

19 Okay. My question to you is --

20 A. At what point in time are you talking about.

21 Q. My question to you is -- during the time that
22 the malpractice case -- remember we are calling the
23 malpractice case, the Petrosky, Beard, Bailey case filed
24 by Martie Georges, now Martie Jobe, filed against
25 yourself, another law firm and Noel Gage.

1 My question to you is, during the time that
2 the different pleadings were coming in and the
3 reservation of rights letters were sent back, did you
4 seek counsel from a lawyer, other than -- think about it
5 yourself -- when any of the reservation of rights
6 letters were sent by Home Insurance when they received a
7 different pleading? And there was eight of them they
8 received prior to trial.

9 A. Yes.

10 Q. Pardon?

11 A. Yes.

12 Q. Did you ever directly correspondence to them
13 yourself?

14 A. To Home Insurance?

15 Q. To Home Insurance.

16 A. No.

17 Q. Did you cause anyone else to write a letter to
18 Home Insurance on your behalf prior to Mr. Darnell's
19 letter in December of 1995 regarding the issues of a
20 duty to defend or coverage as it pertained to the
21 malpractice case?

22 A. I don't remember at this time.

23 Q. Pardon?

24 A. I don't remember doing so at this time.

25 Q. You don't remember doing so at this time?

1 A. Yes.

2 MR. DARNELL: He doesn't now remember doing
3 so then.

4 THE WITNESS: Right.

5 Q. (By MR. HAYES) Do you have records such
6 that --

7 A. No, sir.

8 Q. You don't. So the answer that you give me
9 today is as good an answer as you are going to ever come
10 up with because you don't have any better records; is
11 that correct?

12 You don't have any better way to check it
13 out than what you have just told me? You don't have a
14 diary? You don't have a secret file back at the house?
15 You have given him whatever you have got?

16 A. I have given to Mr. Darnell everything that I
17 have in my possession. I don't have a secret diary back
18 at my office --

19 Q. Or a file?

20 A. -- or a file at my house that I'm aware of that
21 I have got.

22 Q. What I want to do is, I want to leave a blank
23 in this deposition. And if Mr. Darnell should go back
24 to his office, and as he is getting ready to do
25 something else, he should come a cross that little

1 document, I want him to understand that I am saying that
2 I want to know about any responsive correspondence by
3 Mr. Scherr or on his behalf from the inception of the
4 Beard malpractice lawsuit up until the time that you
5 wrote your letter in December of 1995 asking for
6 \$117,000.

7 MR. DARNELL: What do you mean by
8 "responsive letters"?

9 MR. HAYES: Well, that they wrote him a
10 reservation of rights. He said, "I disagree with you."

11 MR. DARNELL: That's all I'm asking.

12 MR. HAYES: Yes. Any letters that were
13 written by him or on his behalf to the carrier
14 discussing the issues of duty to defend or coverage.

15 A. I think there was a letter that was sent to
16 Home Insurance asking them to defend or pay any claim
17 that was brought in that matter, but I think that has
18 been produced.

19 Q. (BY MR. HAYES) You are talking about your
20 initial transmittal letter?

21 A. Yeah.

22 Q. I understand that. That's not what I'm talking
23 about.

24 A. All right.

25 Q. I want to make sure, if we had any --

1 A. I'm not aware of any others.

2 (Requested item, 1)

3 MR. DARNELL: Let me ask one question,
4 before we leave there.

5 MR. HAYES: Sure.

6 (Discussion off the record)

7 Q. (BY MR. HAYES) Did you ever have any
8 conversations with -- let me ask this question: Who do
9 you feel adjusted this claim on behalf of Home? Was it
10 Oscar Allen?

11 A. The only person I had any dealings with at all,
12 and it was extremely limited, was Oscar Allen.

13 Q. Okay. I would assume that Mr. Hudgins, because
14 he was retained by the insurance company to defend you
15 in this case, did not engage in offering you advice on
16 issues of coverage or duties of defense?

17 A. Correct. Duties of defense in terms of the
18 litigation, not in terms of the defense of the insurance
19 policy itself.

20 Q. In terms of defending the lawsuit, I would hope
21 he had a lot of discussions with you, Mr. Scherr.

22 I'm talking about, did you engage in
23 conversations with him about any controversies that you
24 had or might have had with the insurance company about
25 the issues of their duty to defend or their duty to pay.

1 A. That's true. Hudgins made it clear that he
2 would not be involved in that issue.

3 Q. Now, in his scrupulous attempt to not be
4 involved in that issue, did Mr. Hudgins ever volunteer
5 any opinion that was like off the cuff, but despite --

6 A. No, sir.

7 Q. So, if I am seeking persons who are witnesses
8 to any dispute between Mr. Scherr and Home Insurance
9 arising out of Home's policy and that policy's
10 relationship to the lawsuit, the malpractice case filed
11 by Beard, Mr. Hudgins is not a witness in terms of
12 discussions with you to that dispute, is he?

13 A. In terms of advice, that's correct.

14 Q. Okay. Well, has he suggested to you that he
15 has any factual information that the insurance company
16 did not fulfill its obligations under the policy?

17 A. That's really broad for me to answer. But,
18 again, he has not given me any advice one way or the
19 other.

20 Q. I didn't ask you for advice. My question to
21 you is -- as you understand, we have to answer
22 interrogatories about fact witnesses, persons with
23 knowledge of relevant facts.

24 A. Mr. Hudgins stayed out of the insurance issue,
25 period.

1 Q. Thank you.

2 How did you learn that the Beard lawsuit
3 was brewing, or was going to be filed or was filed?

4 A. Ms. Georges -- strike that. Well, you can't
5 strike that.

6 Q. You can say Georges or Jobe, that's fine. We
7 understand it.

8 A. Ms. Jobe approached me at the courthouse here
9 in El Paso, Texas, and brought -- asked me if I would
10 execute a check made payable to herself, myself, Noel
11 Gage, Beard, Bailey and Petrosky for a settlement she
12 had entered into with all of the defendants in the
13 underlying litigation. And I indicated to her that I
14 did not want to execute the check at that time.

15 And I think within a couple of days
16 thereafter, I was -- I learned of the lawsuit being
17 filed in Houston, being served shortly thereafter.

18 Q. Did you ever file any claim notice to the
19 insurance company or provide them any specific
20 information?

21 A. Which insurance company?

22 Q. Home Insurance Company?

23 A. About the lawsuit?

24 Q. Yes.

25 A. Yes, sir, I think I did. I think I sent a

1 letter to Home Insurance Company enclosing a copy of the
2 lawsuit with a simple letter asking them to defend me in
3 the lawsuit and to pay any judgment that might be
4 rendered against me in the event a judgment was so
5 rendered.

6 Q. I'm going to hand you a document and ask you
7 whether or not this document bears any writing that is
8 your writing on it?

9 MR. HAYES: I'm going to mark it first.

10 (Exhibit marked, 38)

11 A. Yes, sir.

12 Q. (BY MR. HAYES) What is that exhibit, sir?

13 A. My signature is on two pages and my handwriting
14 on a date next to my signature.

15 Q. There is language there to the effect that:

16 "10. Description of claim, suit or incident: Class
17 action petition for chiropractors against insurance
18 companies to prevent discrimination -- case settled --
19 now three of the parties are now trying to avoid paying
20 fees and ~~defenses~~^{expenses}. A. Description of alleged act, error
21 or omission upon which claim is based: Fee dispute --
22 claimants are trying to avoid paying fees and expenses
23 due applicant."

24 A. That's what it says.

25 Q. Did you provide that information to Home

1 Insurance?

2 A. I signed it, yes, sir. That's not my
3 handwriting.

4 Q. Well, I understand. Either someone made it up
5 or they wrote down what is their best, honest attempt to
6 encapsulate your information.

7 MR. DARNELL: Object to form.

8 Q. (BY MR. HAYES) So my question is, could you be
9 the basis for that information?

10 A. Yes, sir.

11 Q. Was that -- the early correspondence that I
12 have looked at, Mr. Scherr, on the Beard lawsuit,
13 malpractice case, is that your view of it was that it
14 was basically a fee dispute between you and Ms. Georges
15 and --

16 A. Jobe.

17 Q. You're right.

18 -- Ms. Georges, Jobe now, and Drs. Bailey,
19 Petrosky and Beard. Is that the way you felt it was
20 initially, or what you felt it was initially?

21 A. I did.

22 Q. Okay. I'm going to stop and take a brief
23 break. While I do that, what I would like you to do is
24 scoot through the different --

25 A. I have.

1 Q. Pardon?

2 A. The exhibits, I've read them.

3 Q. You've already done them?

4 A. I'm ready for you. I'm ready to review them.

5 I'm ready for you, but -- I'm ready to answer any
6 questions you have on them.

7 Q. Well, here's what I'm going to do. I'm just
8 going to give you a preview of coming attractions. I'm
9 going to say, Here comes a pleading. What did you do?
10 And it is going to be either, I sent it to the insurance
11 company or, Later, Don sent it to the insurance company.
12 Did they write you a letter back? Yes. Did you read
13 the letter? Yes or no.

14 A. It is 2:00.

15 Q. I know. I'm trying to give you enough
16 information so that when I get back, we can blast
17 through this --

18 A. I'm ready.

19 Q. -- if I don't have to. I don't want to spend a
20 lot of time on anything, if I don't have to.

21 A. Yes, sir.

22 Q. So I'm offering you an opportunity to look at
23 that.

24 (Recess from 2:02 p.m. to 2:34 p.m.)

25 Q. (BY MR. HAYES) Mr. Scherr, were you the first

1 individual that was served with this lawsuit, the Beard
2 lawsuit?

3 A. I don't remember.

4 Q. Well, the reason I ask, if one looks at the
5 pleading or any of the pleadings, there is more than one
6 defendant. I was just wondering if maybe Mr. Gage or
7 someone from his firm called you or you got served
8 first, or do you remember?

9 A. I don't remember.

10 Q. What did you do after you got served with the
11 petition?

12 And what number in the exhibit notebook is
13 that petition? It should be, I believe, Number 6, but
14 check me.

15 A. It is.

16 Q. What did you do when you received that
17 petition?

18 A. Sent it to Home Insurance, to my agent, and
19 asked the agent to have the carrier defend and pay the
20 claim.

21 Q. Had the carrier what?

22 A. Have the carrier defend the claim and pay any
23 judgment that may be brought on it.

24 Q. And what else did you do?

25 A. Actually, I think I talked to Oscar Allen or

1 somebody from Home Insurance Company.

2 Q. Would you look at what -- well, let me do
3 this -- is Oscar Allen's letter to you of March 2nd,
4 1994, is that contained as an exhibit?

5 A. I don't know.

6 Q. I don't think so.

7 MR. DARNELL: What number? I'm sorry?
8 What date?

9 MR. HAYES: March 2nd, 1994.

10 MR. DARNELL: I don't think we got that
11 one.

12 MR. HAYES: We are going to mark this as --
13 ma'am, what I want to do is, 6 is the petition. I want
14 to mark this 6A. I'll make it 6A.

15 (Exhibit marked, 6A)

16 Q. (BY MR. HAYES) I'm going to hand you 6A and
17 ask you whether or not this looks like a letter that you
18 received from Mr. Allen and if it refers to a telephone
19 call in there?

20 MR. HAYES: And I'm going to borrow a
21 stapler so I can staple that.

22 Q. (BY MR. HAYES) Would you staple that, Mr.
23 Scherr, please.

24 A. And your question is?

25 Q. My question to you is, is that a copy of a

1 letter that you received from --

2 A. Yes, sir.

3 Q. -- the Home and from Oscar Allen relating to a
4 telephone call that you had with Mr. Allen -- or
5 telephone calls you had with Mr. Allen and the providing
6 of the Beard lawsuit to Home?

7 A. Yes, sir.

8 Q. (Reading) This correspondence confirms our
9 telephone conversation of February 25, '94 and February
10 28, '94 relative to the captioned matter. Your fax of
11 February 22nd, 1994 transmitted the following documents:
12 plaintiff's original petition, plaintiff's first set of
13 interrogatories, request for production, order for
14 service and plaintiff's request for admissions to
15 Defendant James Scherr. Please use the claim number
16 noted above on all correspondence related to this
17 matter.

18 Did you, by telephone call, request that
19 you could represent yourself in this matter? Is that
20 accurate?

21 A. I remember having a conversation with Oscar
22 Allen indicating that there was a dispute over whether
23 we were entitled to attorney's fees and expenses on the
24 portion that Ms. Jobe was claiming was hers and
25 discussing with him, with Mr. Allen, that we would

1 request the opportunity to defend ourselves, and we
2 would be bringing a counterclaim for our attorney's fees
3 and expenses on that portion that Ms. Jobe was claiming
4 was hers. It was, basically, a dispute over attorney's
5 fees and expenses.

6 And Mr. Allen indicated that would be
7 acceptable and notified me somehow in writing about
8 that.

9 Q. It says: I consented to your request.
10 However, we agreed that if this matter is not resolved
11 within 45 days, the Home would assign counsel to handle
12 your defense.

13 A. Yes, sir. That's what the letter says.

14 Q. Is that your memory of what occurred?

15 A. I don't remember the assignment of 45 days of
16 counsel. We may have, may not have. I don't remember
17 that.

18 Q. Did you respond in writing or have anyone
19 respond in writing on your behalf to Exhibit 6A when you
20 received it?

21 A. I don't remember. I don't remember at this
22 time if I did or didn't.

23 Q. Well --

24 A. I'm not -- I have not found any letters.

25 Q. Pardon?

1 A. I have not found any letters.

2 Q. Well, do you recall taking issue with any of
3 the things that were said in Exhibit 6A by Mr. Allen on
4 behalf of the Home Insurance Company when you received
5 that letter and reviewed it?

6 A. I do not recollect any conversation with Oscar
7 Allen or anything in writing responding to that letter.

8 Q. I agree. But I'm asking a different question,
9 I apologize. Maybe you didn't understand my question.
10 Let me try again.

11 Do you recall when you received Exhibit 6A
12 and read-- did you read 6A when you got it?

13 A. I'm sure I did.

14 Q. As you sit here today, do you recall saying to
15 yourself, "Well, I just don't agree with that; that is
16 just not right" to any of the things that were printed
17 in 6A by Home Insurance Company, as it acknowledges
18 receipt of your lawsuit, acknowledges telephone calls
19 and provides you with a reservation of rights by the
20 Home?

21 A. When I received the letter, I looked at it and
22 I thought this was a typical reservation of rights
23 letter sent off by an insurance company whenever claim
24 is made on any case.

25 Q. That wasn't my question either. I'll try

1 again.

2 A. That was what was in my mind. That's what I
3 thought, and I didn't do anything about it.

4 Q. Well, my question is, did you also have the
5 thought at the same time, "I don't agree with what they
6 have written in this letter"? Do you remember having
7 that thought at that time when you read that letter?

8 A. Frankly, I don't remember what my thoughts were
9 at that time.

10 Q. So you have no present memory, as you sit here
11 today, of reading that letter, and saying to yourself,
12 "I simply don't agree with them on the following
13 points"?

14 A. No recollection.

15 Q. And you, to follow up, don't know of any letter
16 sent by you or on your behalf in response to that
17 letter, as you sit here today?

18 A. Correct. That's correct. I don't remember.

19 Q. You don't remember whether you sent one or not
20 or --

21 A. No. You were correct. I'm not aware of any
22 letters that were sent in response to this letter.

23 Q. May I see that for a second?

24 You notice at the bottom, it says: The
25 policy's limits of liability are \$200,000 each claim and

1 \$600,000 aggregate. Your \$5,000 deductible applies to
2 defense costs and loss payments per claim. Please
3 recognize that your limits of liability are
4 self-liquidating. Accordingly, as defense costs accrue,
5 your available limits for continued defense and
6 indemnity are correspondingly decreased.

7 Home told you that in that first letter,
8 didn't they?

9 A. That letter speaks for itself.

10 Q. Did you just not remember that when you told me
11 earlier in this deposition that you didn't know whether
12 or not that was contained in the policy? Do you
13 remember when we had that discussion and I pointed it
14 out to you?

15 A. That's different than the letter. I wanted --
16 I was asking you to assist me in finding the language in
17 the policy to which the statement in this letter refers
18 to.

19 Q. Did Mr. Allen point out the exclusions in the
20 policy in the reservation of rights?

21 A. Well, the letter, in and of itself, on page 2
22 has two paragraphs quoted out of the policy.

23 Q. Discussing exclusions?

24 A. One paragraph has one exclusion, yes, sir.

25 Q. May I see the letter for a second?

1 Did they put you on notice that they felt
2 punitive damages were not -- were possibly not covered
3 under the policy?

4 A. That's what I understood the letter was for.
5 Yes, sir.

6 Q. Did you perform any legal work on behalf of
7 yourself in this lawsuit --

8 A. In the --

9 Q. -- defense of this lawsuit --

10 A. Yes, sir, I did.

11 Q. -- during the 45-day period referred to in
12 Exhibit 6A?

13 A. Yes, sir, I did. But, as I sit here today, I
14 don't remember what it was.

15 Q. Did you send a bill to the Home Insurance
16 Company to, in essence, credit your deductible against
17 your efforts and services on your behalf?

18 A. I don't remember.

19 Q. Do you remember paying \$5,000 as a deductible
20 in the Beard malpractice case?

21 A. I think I did, but I can't -- I don't remember
22 specifically at this point.

23 Q. Did you ever pay more than \$5,000 as a
24 deductible in that case?

25 A. To Home Insurance or Don Hudgins?

1 Q. Did you ever pay more than \$5,000 as a
2 deductible under that policy in the Beard malpractice
3 case?

4 A. Well, when we resolved and settled the case, we
5 paid --

6 MR. DARNELL: He is talking about a
7 deductible.

8 A. Well, I don't know how that is applied. But I
9 know that we paid over \$100,000 in the settlement of the
10 Beard case.

11 Q. (BY MR. HAYES) How much did you pay in
12 settlement of the Beard case personally?

13 A. Personally?

14 Q. His letter indicates 117,000?

15 A. Yes, sir. We paid 117,500 -- I thought it was
16 125,000. I did see there was one -- I saw a letter
17 showing 117,500 in the settlement, but I thought we had
18 sent off a check for 125-.

19 Q. Well, look at the settlement documents.

20 A. I am. I am looking at Exhibit 24. It says
21 117,500.

22 Q. Paid by you?

23 A. Correct.

24 Q. 50,000 paid on your behalf by Home Insurance?

25 A. Yes, sir. That's what the release says.

1 Q. For which your lawyer has requested \$117,500
2 from Home Insurance by letter? Would you like me to
3 direct you to his letter, Mr. Darnell's letter?

4 A. No. You don't need to.

5 Q. Is there any question but that Mr. Darnell
6 asked for all of the money that you paid out of your
7 pocket to settle the underlying case on your behalf back
8 from Home Insurance Company?

9 A. No dispute.

10 Q. Did you know that that was the amount he asked
11 for?

12 A. I think I received a copy of correspondence
13 from my counsel.

14 Q. Did you correct him or feel the need to correct
15 him on that number?

16 A. I didn't correct him.

17 Q. So, in a case in which you have paid a \$5,000
18 deductible, the insurance company has paid defense costs
19 and expenses to lawyers and paid \$50,000, and you paid
20 117,500 on your own, your request for reimbursement to
21 the company was 117,500; is that correct?

22 A. Yes, sir.

23 Q. Now, why didn't you ask for 107,500?

24 A. I don't understand your question.

25 Q. His letter suggests that there are multiple

1 claims in that lawsuit. You have told me earlier that
2 you recognized, for each claim, there is a \$5,000
3 deductible. If you have three chiropractors, Drs.
4 Bailey, Beard and Petrosky, that is 15,000 in deductible
5 for those three claims, if you are going to expand the
6 limits beyond 200,000 for one claim.

7 Why didn't you ask for 107,500, recognizing
8 that you owed deductible on the other two claims, Mr.
9 Scherr, if indeed you had multiple claims?

10 A. Are you asking me a legal opinion?

11 Q. No. I'm asking you why you did that
12 mathematically.

13 If you didn't need a legal opinion to tell
14 me your deductible is \$5,000 a claim, you have a lawyer
15 writing a letter on your behalf suggesting that there is
16 more than one claim, and yet you make a demand for
17 117,500 and don't correspondingly recognize that you owe
18 a deductible -- an increased deductible of \$5,000 for
19 each additional claim. Why did you do that?

20 A. We also provided to you documentation that we
21 spent additional funds beyond that 117,500 far in excess
22 of 10,000, 20,000, 40,000 dollars in defending the
23 claims that had been brought between this case --
24 between the Beard case and the Gillespie case.

25 Q. That's not my question.

1 A. And so --

2 Q. That is not my question.

3 You asked for \$117,500 to recoup the money
4 you spent settling the underlying Beard case at a time
5 when the Gillespie case had been severed, made no
6 mention of the Gillespie case --

7 A. May I see the letter, please?

8 Q. Sure. Absolutely.

9 MR. HAYES: This letter has not been marked
10 yet; is that right, Jim?

11 MR. DARNELL: Huh-uh.

12 MR. HAYES: This will be Number 39.

13 (Exhibit marked, 39)

14 Q. (BY MR. HAYES) I hand you Exhibit Number 39,
15 which is the letter sent to Mr. Allen by Mr. Darnell,
16 your lawyer. When you have completed reading that
17 letter, let me know.

18 A. I am.

19 Q. Do you acknowledge any case in that letter
20 other than the Beard case?

21 A. No, sir.

22 Q. Do you ask for any monies in that letter except
23 for the total amount that you paid in settlement of the
24 Beard case out of your own pocket, 117,500?

25 A. That's the demand.

1 Q. Does your lawyer, on your behalf, suggest that
2 there is more than one claim associated with the Beard
3 case, and that, as a result of that, the limits of
4 200,000 per claim are expanded to \$600,000?

5 A. It says the aggregate limit for the above case
6 is 600,000, according to --

7 Q. It is 200,000 per claim. How do you -- what
8 times 200,000 gets you 600,000, Mr. Scherr?

9 A. Three.

10 Q. Thank you.

11 Did you acknowledge an obligation in that
12 letter to pay a deductible of 5,000 per claim that you
13 hadn't paid, Mr. Scherr?

14 A. First off, I don't know and this letter does
15 not address the deductible. Second, in terms of
16 claiming that we had or had not paid the \$5,000 per
17 claim, I would like to take a look at the billing
18 records that we had submitted to Home Insurance Company
19 in terms of moneys that had been incurred in the defense
20 of that claim prior to December 10th, 1995 that were
21 spent from our firm.

22 Q. Are you suggesting that there is an
23 understanding between you and Oscar Allen that, indeed,
24 Oscar Allen has already charged you 10,000 more dollars,
25 representing the deductible in two other claims?

1 A. No, sir.

2 Q. Will you agree with me that if you have three
3 claims, under that policy, you have a \$15,000 deductible
4 total, 5,000 a claim?

5 A. That's the way the policy -- that is what the
6 dec sheet on the front says, the deductible is \$5,000
7 per claim.

8 Q. Did not the letter that Mr. Allen sent to you
9 that you received, that is, Exhibit 6A -- would you look
10 at that letter?

11 A. Yes, sir.

12 Q. Look at it, please.

13 Does it not say that the deductible is
14 \$5,000?

15 A. Yes, sir.

16 Q. When you received that claim, Mr. Scherr, did
17 you take the position that you were dealing with one
18 lawsuit with three claims? Was that your position at
19 the time you received that lawsuit and the time that you
20 received that letter?

21 A. I don't know what position I was taking at all
22 at that point. I don't think I was taking a position.

23 Q. Well, you are saying you hadn't taken a
24 position at that point?

25 A. Correct.

1 MR. DARNELL: At which point?

2 Q. (BY MR. HAYES) At the time that you received
3 the letter marked 6A.

4 A. March 2nd, 1994.

5 Q. When is the first time that you took the
6 position with your insurance company that the underlying
7 Beard lawsuit was more than one claim?

8 A. I don't remember.

9 Q. Well, we are going to go through and look at
10 each petition and every piece of paper that I have got
11 that was sent to you by the Home Insurance Company. And
12 I want to know whether or not we are going to see a
13 single letter from the Home Insurance Company to you
14 that says anything other than that the deductible is
15 \$5,000. Do you know the answer to that question, or do
16 we need to go through the exercise?

17 A. You don't need to go through the exercise.

18 Q. What is the answer? They told you the
19 deductible is \$5,000 each and every time, didn't they?

20 A. To the best of my knowledge, that's true.

21 Q. Pardon?

22 A. That's true, to the best of my knowledge.

23 Q. You never disputed that, did you?

24 A. To the best of my knowledge, that's true.

25 Q. You never said, "Wait, fellows, you're making a

1 big mistake here. There are three claims. I owe you
2 \$15,000 in deductible," did you?

3 A. To the best of my knowledge, that's true.

4 Q. Is it clear that the first time Home Insurance
5 Company is placed on notice by you or anyone on your
6 behalf that there are multiple claims to be viewed by
7 the policy as multiple claims such that the limits of
8 the policy are greater than \$200,000 available for the
9 Beard lawsuit was when Mr. Darnell sent his letter in
10 December?

11 A. Say it again, please.

12 Q. Sure.

13 Is it fair to say that the very first time
14 you or anyone on your behalf told the Home Insurance
15 Company that the limits available for the Beard lawsuit
16 was not \$200,000 but was \$600,000 because that lawsuit
17 reflected three claims under the policy?

18 A. I'm still not understanding your question. Are
19 you asking at a time or -- I didn't follow your
20 question.

21 MR. HAYES: I'll have her read it back. It
22 is probably the tone of my voice or something because it
23 was a very clear question.

24 (Pertinent question read)

25 A. I'm sorry. I'm having a very difficult time

1 understanding the question. If you could restate it in
2 a way that I can understand it.

3 Are you asking me, was it the first time
4 when I got the letter? Was it the first time when
5 Mr. Darnell sent the letter? Are you asking me, was it
6 the first time when I learned that there was only
7 \$50,000 left on the policy?

8 Q. (BY MR. HAYES) Let me say it to you this
9 way --

10 A. That's what I don't understand.

11 Q. I will work you through it, Mr. Scherr. Don't
12 you worry. I'll be very patient and I'll work you
13 through it.

14 A. I know you will.

15 Q. When you received Exhibit 6A in response to
16 Exhibit 6, which was the Beard petition, it clearly set
17 out that the deductible in that case was \$5,000, didn't
18 it?

19 A. Yes, sir.

20 Q. And that clearly means that the applicable
21 limit on that particular lawsuit is \$200,000 because it
22 is \$5,000 per claim.

23 A. No. That is not the way I understood it. I
24 don't think this letter ever told me that Home Insurance
25 Company was making the determination that there was only

1 one claim being made.

2 Q. Your suggestion is, a literal reading of that
3 letter that says your deductible, in effect, on this
4 matter is \$5,000 didn't tell you that they viewed it as
5 a \$200,000 single claim case. Is that what you are
6 telling us, Mr. Scherr?

7 A. That's correct. In fact, it says very clearly,
8 and I'll quote it, The policy limits of liability are
9 200,000 each claim and 600,000 aggregate. Your \$5,000
10 deductible applies to defense costs and loss payments
11 per claim.

12 When I read that, and I read it today, it
13 says there are three people suing. It was 200,000 each
14 claim, 600,000 aggregate.

15 Q. Well, then, Mr. Scherr, when they only asked
16 you for \$5,000 as a deductible, I guess you called them
17 on the phone or wrote them a letter and said, "You guys
18 screwed up, dudes. I owe you 10 more thousand dollars
19 because there are three claims here," didn't you?

20 A. I don't remember receiving a bill from them for
21 5,000 on it, and I don't remember calling them up and
22 telling them that they should bill me 10,000 more.

23 Q. Well, then, let me ask you this question, out
24 of curiosity: Why, in heaven's name, would you agree to
25 pay 117,500 of your own money to settle a case that had

1 \$600,000 in limits, in your mind, in the first place?

2 A. The insurance company made it clear that they
3 would not pay any more than \$50,000.

4 Q. The reason --

5 A. May I finish?

6 Q. Go ahead.

7 A. We were in the middle of trial. The jury had
8 come in with findings on the first phase of the trial.
9 The co-defendant and his insurance company and myself
10 and Mr. Hudgins and my insurance company had resolved
11 with Ms. Jobe and her clients how to resolve the dispute
12 and close it down. And we agreed to come up with 115-
13 -- 117,500 -- I thought it was 125,000 -- out of our
14 pockets without signing anything, without releasing in
15 any way, without agreeing with Home Insurance on its own
16 unilateral interpretation of its policy --

17 Q. May I see --

18 A. -- that it was limited to 50,000 more under
19 the terms of the policy.

20 Q. May I see Mr. Darnell's letter, please?

21 A. Yes, sir.

22 Q. Mr. Scherr, I'm really somewhat intrigued by
23 this. You make it sound like -- and I just want to ask
24 you the naked question. Are you going to take the
25 position that from the beginning, you understood that

1 when the three chiropractors filed the lawsuit against
2 you that they filed, Beard, Petrosky and Bailey, and
3 that pleading was sent to Home Insurance Company and
4 Home Insurance Company sent you 6A in response to it,
5 that you felt that there was some chance that Home
6 Insurance Company viewed this case, the Beard case, as
7 being a case with limits of potentially \$600,000? Is
8 that what you are telling me, and you are going to tell
9 the jury when we try this case?

10 MR. DARNELL: Object to form.

11 A. Make it clear to me -- I'm having a hard time
12 with the way you've asked the question.

13 Q. (BY MR. HAYES) It is very clear. It is very
14 clear. Either you viewed -- and it is pretty stark.

15 Mr. Oscar Allen wrote you a letter, and in
16 Mr. Allen's letter he said to you you have \$5,000
17 deductible. He didn't say 15,000. He said you have a
18 \$5,000 deductible. He said you have a policy that has
19 \$600,000 aggregate, \$200,000 a claim. He never
20 mentioned multiple deductibles.

21 He also, in that letter, provided you with
22 policy language that says that this policy doesn't apply
23 to punitive damages. And then, to any judgment or final
24 adjudication based upon or arising out of any dishonest,
25 deliberately fraudulent, criminal, maliciously or

1 deliberately wrongful acts committed by the insured. So
2 he clearly was reserving his rights at that time.

3 And my question to you is, are you
4 suggesting to me that, at that point in time, it was
5 your thought process that you had up to \$600,000 in
6 limits on the Beard lawsuit available to protect you?

7 A. My understanding was that I had \$600,000 of
8 coverage --

9 Q. In that lawsuit?

10 A. -- to provide defense to claims that I had
11 against me --

12 Q. That's a very, very --

13 A. -- per claim. The maximum that I had was
14 \$200,000 per person.

15 Q. Let me ask you this question: Based on the
16 pleading filed, the pleading is 6, how much limits did
17 you feel you had available under ^{pleading} pleading, that is
18 Exhibit 6?

19 A. You are asking legal opinions now. Is that
20 what you are asking?

21 Q. If you want to take the position that it
22 requires a legal opinion to answer that, then I will say
23 we will move on. Just stake out that ground and tell
24 me --

25 A. Let me make it clear. The letters that were

1 sent to me by Oscar Allen said it was \$200,000 per
2 claim, \$600,000 aggregate, \$5,000 deductible per claim.
3 At no point that I recollect in any one of those
4 letters, until we got to trial, was I advised that it
5 was the position of Home Insurance Company that it was
6 \$200,000 for the entire claim of Beard, Bailey and
7 Petrosky.

8 Q. And how did they convey that to you?

9 A. When I learned that they had used up \$150,000
10 in defending the lawsuit and there was approximately
11 \$50,000 left and we were in the middle -- we were in
12 trial and discussing trying to resolve the case, that's
13 when we learned -- that's about the time that I learned
14 how much money was left and that they were taking the
15 position that it was a 200,000 aggregate for all the
16 claims that had been brought by Beard, Bailey and
17 Petrosky.

18 Q. I want to make sure I understand this. What
19 you are suggesting to me is, this particular case and
20 the potential maximum limits available for that
21 particular case, you felt, up until the time that there
22 was an attempt to settle the case after the verdict,
23 that the insurance company should be responsible up to
24 \$600,000; is that correct? And then the insurance
25 company told you, "We are real sorry" --

1 MR. DARNELL: Wait. He never answered your
2 first question.

3 MR. HAYES: I thought that was a
4 preliminary to the main point.

5 Q. (BY MR. HAYES) Fine. Answer that question?

6 A. Correspondence that I had had led me to believe
7 that I had \$600,000 coverage.

8 Q. And so how did you convey your shock and
9 amazement to the insurance company that there was this
10 lack of communication between you and the insurance
11 company on the limits available? How did you convey
12 that to them?

13 A. Well, we were in trial, as I best recollect.

14 Q. Well, but Mr. Darnell represented you?

15 A. Not in the trial.

16 Q. He represented you at the time?

17 A. Yes, sir.

18 Q. He represented you in your dispute with Home
19 Insurance Company. He was there to deal with that issue
20 for you.

21 My question to you is, how did you convey
22 to them that particular position?

23 MR. DARNELL: Are you saying I was there at
24 the time of trial?

25 MR. HAYES: No. You were his lawyer, and

1 you were there as an -- excuse me.

2 Q. (BY MR. HAYES) In terms of any potential
3 dispute with Home Insurance Company -- well, strike that
4 a second.

5 Are you telling me that you never -- and I
6 don't know what the advice was. Is it your testimony
7 that you never communicated or sought legal advice about
8 the limits available in the Beard case until after the
9 settlement of the Beard case? Is that your testimony?
10 The first time I ever talked to a lawyer
11 about this, sought any legal advice, was after I settled
12 the case and then went to figure out what I should do.
13 Is that your testimony?

14 A. No.

15 Q. Hm?

16 A. No.

17 Q. In fact, isn't it true that when the
18 intervention was filed, the insurance company informed
19 you that it was their position that all this was one
20 related event? Isn't that correct, Mr. Scherr?

21 A. That's not fully correct. They notified me
22 that they thought that the intervention by Gillespie was
23 arising out of the same -- was a related claim, and
24 therefore, only covered by the per claim. That's what
25 their letter said to me.

1 May we go off the record for a second?

2 Q. Sure.

3 (Recess from 3:13 p.m. to 3:14 p.m.)

4 Q. (BY MR. HAYES) Would you look at Exhibit 20 in
5 the exhibit notebook, sir? What is 20B -- or 20?

6 A. The Gillespie lawsuit.

7 Q. Would you look at 20A and identify it?

8 (Exhibit marked, 20A)

9 A. Yes, sir.

10 (Exhibit marked, 20B)

11 Q. Would you look at 20B? Is that the letter you
12 received in response to 20A in which you sent the
13 intervention to Home Insurance?

14 A. Yes, sir.

15 Q. In 20B, which is a time prior to the verdict
16 being rendered, is it not, in the --

17 A. You know, I was in Houston at a trial. I don't
18 know.

19 Q. Well, would you like me to go and do that for
20 you? I will be more than pleased to demonstrate to you
21 that the verdict occurred --

22 A. On what day?

23 MR. DARNELL: Before we get there, what is
24 the date on that letter?

25 MR. HAYES: Which letter?

1 MR. DARNELL: 20B.

2 MR. HAYES: For your benefit, 20A --

3 MR. DARNELL: I got that one.

4 MR. HAYES: -- is the letter on October
5 16th from Mr. Scherr --

6 MR. DARNELL: I'm with you there.

7 MR. HAYES: -- to Home Insurance. Then we
8 have a October 20, '95 letter from Home Insurance back
9 to Mr. Scherr. That is Exhibit 20B.

10 MR. DARNELL: That is Exhibit 22.

11 MR. HAYES: It is now 20B as well. Make a
12 note, it is a duplication.

13 A. All right. So what is your question?

14 Q. (BY MR. HAYES) In terms of when the -- when
15 the -- on the 25th day of October was the day that the
16 agreed order of dismissal occurred.

17 A. Okay.

18 Q. And that dismissal was after the 20th of
19 October, a Friday, when the jury came back.

20 A. Okay. All right. Thank you.

21 Q. Now, as I understand the facts -- and let me
22 see if I'm correct about this, factually speaking -- you
23 had a charge that was prepared at a charge conference.
24 Then you had the jury argument, and the jury went out,
25 and the jury came back with the verdict that is

1 indicated on --

2 MR. HAYES: The verdict hasn't been
3 introduced, has it?

4 MR. DARNELL: Uh-huh.

5 Q. (BY MR. HAYES) Which exhibit is it?

6 A. 23.

7 Q. 23 is the charge, okay.

8 If you look at Exhibit 23, that charge was
9 argued to the jury; is that correct? That's the charge
10 that was argued to the jury; is that correct?

11 A. I don't know.

12 Q. Were you there the day that the final arguments
13 took place?

14 A. Yes, sir.

15 Q. Did you participate in looking at the charge
16 prior to it being submitted to the jury?

17 A. I don't think I did, but I don't remember.

18 Q. You don't think you did?

19 A. I don't remember looking at the charge.

20 Q. Okay. Well, let's look at it today.

21 A. I have looked at it since.

22 Q. Where are the negligence allegations in that
23 charge? Which special issues are the negligence
24 allegations?

25 A. I didn't see them.

1 Q. Didn't see any?

2 A. No, sir.

3 You are asking for a legal opinion now.

4 Q. No. I don't think I'm asking for a legal
5 opinion if you could read that -- a juror could read
6 that and see if there is a definition of negligence.

7 Is there a definition of negligence in that
8 charge?

9 MR. DARNELL: Object to sidebar.

10 MR. HAYES: Then don't provoke the sidebar,
11 Mr. Darnell. I think that was invited under the new
12 definition of invited sidebar.

13 MR. DARNELL: We are right back to punching
14 the guy in the nose again.

15 Q. (BY MR. HAYES) Is there a definition of
16 "negligence" contained in that charge?

17 A. No, sir.

18 Q. Okay. Is it a great leap of faith that if a
19 jury receives a special issue that involves negligence,
20 that there is a definition provided by the judge? Does
21 that take a legal expert to do that, someone who is an
22 expert at insurance law, or is that something that
23 anyone who has a law degree knows?

24 A. There is no negligence in this charge that I
25 saw in terms of definitions or issues.

1 Q. Okay. Now, would it take a, in your opinion, a
2 legal opinion -- a legal expert opinion to say whether
3 or not, if that verdict were reduced to a judgment -- a
4 final judgment, whether or not there would be coverage
5 for that particular verdict under this policy?

6 A. Well, there was an issue on breach of fiduciary
7 duty, and there is coverage for breach of fiduciary
8 duty.

9 Q. Where is there coverage for breach of fiduciary
10 duty?

11 A. You are asking for a legal opinion.

12 It is under paragraph B-1, second page:
13 When the insured renders or fails to render services as
14 an administrator, conservator, receiver, executive,
15 guardian, trustee or any similar fiduciary capacity, the
16 insured's acts and omissions in such capacity shall be
17 deemed for the purposes of this section, ^{to} be it the
18 performance of professional services for others in the
19 insured's capacity as a lawyer, provided that this
20 coverage shall not apply to any loss sustained by the
21 insured as the beneficiary or distributee of any trust
22 or estate.

23 Q. So that is your -- where you would direct me to
24 the answer of that question, then; is that correct?

25 A. Well, that specific language includes breach of

1 fiduciary duty. The paragraph -- first paragraph does
2 not limit it to negligence. In fact, negligence is not
3 even defined, not even worded in the first paragraph.

4 It says that provides coverage, quote,
5 caused by any act, error, omission for which the insured
6 is legally responsible and arising out of the rendering
7 or failure to render professional services for others in
8 the insured's capacity as a notary public or a lawyer.

9 Q. Okay. Let me ask you this question: Have you
10 read question number 1 in the charge?

11 A. I have.

12 Q. Have you read question number 2 in the charge?

13 A. Yes.

14 Q. In your -- do you suggest that it takes an
15 expert opinion in insurance law to be able to say
16 whether or not the combination of question number 1 and
17 question number 2 clearly triggers the exclusion that
18 you and I have discussed earlier, to a judgment or final
19 adjudication based upon or arising out of any dishonest,
20 deliberately fraudulent, criminal, maliciously or
21 deliberately wrongful acts or omissions committed by the
22 insured?

23 A. Yes.

24 Q. Do you think that calls for a legal opinion?

25 A. Yes.

1 Q. Well, we won't ask you that. You are not
2 designated to do that.

3 Did you ever -- how did you first come to
4 know that the insurance company was taking the position
5 that they only had a maximum limit of 200,000 in the
6 Beard case?

7 A. At the commencement of trial or in that time
8 period.

9 Q. And how did that come to your attention? It
10 was in association with the intervention, I assume? The
11 intervention caused the issue to come up, in your
12 estimation?

13 A. I don't remember if it was the intervention or
14 discussions about trying to settle.

15 Q. Well, is it not true that initially, in the
16 case, you withdrew authority to the insurance company to
17 settle? You withdrew your agreement to settlement?
18 They had an expert struck or something --

19 A. I don't remember.

20 Q. -- and I read a notation --

21 A. I don't remember. Okay.

22 Q. Well, if Hudgins said you did, you are not
23 going to argue with Hudgins, are you?

24 A. I just don't remember.

25 Q. Just one of those small matters that kind of

1 just didn't stick in your mind, whether or not you told
2 them, "Absolutely not, we are not going to settle this
3 case, top side or bottom. I'm going to get my \$350,000
4 that is in the registry of the court." You just don't
5 have any memory of that, right?

6 A. At this time, I don't -- I didn't look at or
7 review to refresh my memory about settlement
8 negotiations in preparation for the deposition.

9 There was some hard negotiating that was
10 taking place from all parties concerned. Frankly -- not
11 from all parties. I would say that there was
12 discussions about trying to settle. But in terms of
13 trying to get resolved by all parties, we were unable --
14 it was never anywhere close to discussing settlement
15 prior to trial.

16 So I don't remember if offers were revoked
17 or not or if there was authority to offer a settlement.
18 I don't remember there ever being an offer to settle
19 which was then revoked. But if you say there was -- or
20 you have something to show it to me, I don't remember
21 that. Okay.

22 Q. I want to be clear. I want to be clear. At
23 some point in time, there was a willingness on your
24 part, according to Mr. Hudgins, to entertain the idea of
25 settlement. I believe the operative act suggested was

1 that an expert of the plaintiffs was stricken by the
2 judge; that, as a result of that, the interest in
3 settlement evaporated on the part of you and other
4 defendants.

5 A. You know, I don't remember that. I don't
6 remember it that way.

7 Q. What do you remember? What way do you remember
8 it?

9 A. I remember discussions from my standpoint about
10 discussing settlement and being interested in getting
11 resolved from its inception, and I remember some pretty
12 hard lines being taken by other parties involved in the
13 litigation.

14 Q. On your side or the other side?

15 A. On some of the other sides.

16 Q. Was this an acrimonious litigation?

17 A. No. Yes -- wait. Your word is "acrimonious"?

18 MR. DARNELL: They didn't like each other.

19 Q. (BY MR. HAYES) It was not amicable. It was
20 acrimonious?

21 A. Yes, sir. It was acrimonious.

22 Q. It got personal, so to speak?

23 A. Yes, sir.

24 Q. If I were to say to you that, if I looked at
25 the first pleading, the original petition, and I went up

1 and traced all the way through to the eighth amended
2 original petition, and that there was a negligence
3 allegation or a malpractice allegation contained in each
4 one, are you in a position to agree or disagree?

5 A. You know, I just saw the eighth amended
6 petition. Through the seventh amended petition, there
7 was claims of negligence. I have not had the chance to
8 read the eighth.

9 Q. Well, look at it.

10 MR. DARNELL: We have gone about an hour.
11 While he's looking at that, can we take a break? Five
12 minutes?

13 MR. HAYES: Absolutely. Take 10.

14 Can he answer this one question?

15 MR. DARNELL: Sure.

16 A. It looks like on page 6, there is a list of
17 negligence allegations.

18 Q. (BY MR. HAYES) That's what I said. So I'm
19 correct, all the way through the eighth, there are
20 negligence allegations contained?

21 A. Yes, sir.

22 Q. Have you seen the ninth?

23 A. Yes, sir, I have.

24 MR. HAYES: We will take a break, and we'll
25 talk to you about that for a second.

1 (Recess from 3:28 p.m. to 3:40 p.m.)

2 Q. (BY MR. HAYES) Out of curiosity, did the --
3 after they paid the \$50,000 on your behalf in the
4 settlement, factually speaking, I would assume, at that
5 point, the company took the position -- Home Insurance
6 took the position that they exhausted their limits; is
7 that correct?

8 A. Yes, sir.

9 Q. Did they pay any further monies on your behalf?

10 A. No, sir.

11 Q. Who paid for the defense of the Gillespie case?

12 A. I did.

13 Q. You paid Hudgins?

14 A. I did. Me or my law firm did.

15 Q. Now, my next question to you is, when you
16 represented the chiropractors in the underlying suit --

17 A. Yes, sir.

18 Q. -- were you acting in the capacity of an
19 administrator? Conservator? Receiver? Executor?
20 Guardian? Or trustee?

21 A. I was representing them as attorney.

22 Q. I understand that. But you know what, are you
23 going to tell me that it calls for an insurance lawyer
24 expert's answer to tell me whether or not, when you
25 represented them as a lawyer, you represented them as an

1 administrator, a conservator, a receiver, an executor, a
2 guardian or a trustee?

3 A. I was representing them as an attorney. And
4 what that means --

5 Q. Were you in probate court?

6 A. No, sir.

7 Q. Were you probating an estate?

8 A. No, sir.

9 Q. Were you setting up a trust?

10 A. No.

11 Q. Were you rendering advice on a trust?

12 A. You know, we sued for constructive trust, if
13 I'm not mistaken, actually, when we filed our original
14 petition.

15 Q. Well, if you want to stretch enough to suggest,
16 Mr. Scherr, that when you were acting as the attorney
17 for the chiropractors in the underlying suit which gave
18 rise to three of the chiropractors suing you, that you
19 were in a relationship to those chiropractors such that
20 you were rendering or failing to render services as an
21 executor, conservator, receiver, executor, guardian or
22 trustee, I would like you to stake out that ground now,
23 and let's move on.

24 A. I don't have the amended petition that was
25 filed in the underlying case. I think we made a claim

1 for constructive trust in that case.

2 However, I was representing them as an
3 attorney in my -- and apparently, from a legal
4 standpoint, that places the attorney in a fiduciary
5 capacity.

6 Q. That is not my question. Were you rendering
7 services as an attorney as an administrator, for
8 example, as an administrator of an estate?

9 A. No.

10 Q. Were you rendering services as an attorney as a
11 conservator of an estate?

12 A. No.

13 Q. Were you rendering services as an attorney as a
14 receiver?

15 A. No.

16 Q. Were you rendering services as an attorney as
17 an executor?

18 A. No.

19 Q. Were you rendering services as an attorney as a
20 guardian?

21 A. No.

22 Q. Were you rendering services as an attorney as a
23 trustee of a trust?

24 A. Again, I think we filed suit on a constructive
25 trust.

1 MR. DARNELL: He is asking whether you were
2 a trustee.

3 A. No. I was not a trustee.

4 Q. (BY MR. HAYES) The only fiduciary capacity
5 that you had in relation to Drs. Beard, Petrosky and
6 Bailey is the same fiduciary responsibility that every
7 lawyer has to a client when they undertake a
8 representation; isn't that correct?

9 A. You are asking for a legal opinion. But I
10 think the legal opinion is, true.

11 Q. If the jury returns a verdict and the verdict
12 is adverse to you, Mr. Gage and Mr. Gage's law firm; is
13 that correct?

14 A. Yes, sir.

15 Q. Who took the lead in negotiating the
16 settlement?

17 A. I don't know.

18 Q. That reminds me of the three monkeys. I can't
19 get anybody to tell me they took the lead.

20 MR. DARNELL: Object to form.

21 Q. (BY MR. HAYES) I mean, it is your \$117,500.
22 You, obviously, have to have somebody that you know is
23 going in dealing with Ms. Jobe. Who is the person that
24 is dealing with her?

25 MR. DARNELL: Object to the sidebar.

1 A. My understanding is that Mr. Hudgins dealt with
2 Ms. Jobe.

3 Q. (BY MR. HAYES) Have you read Mr. Hudgins'
4 deposition?

5 A. I have.

6 Q. You know he said that he didn't do that in his
7 deposition. He said somebody else took the lead. The
8 implication is that it was either you or Mr. Gage.

9 A. Mr. Gage had separate counsel, and it may very
10 well have been Mr. Gage and his attorney that took lead
11 on negotiating the settlement, and that Mr. Hudgins was
12 dealing with them on my behalf.

13 Q. Well, did you ever speak to Ms. Georges, now
14 Jobe, about the settlement once the verdict came in?
15 Did you talk to her and negotiate at all with her?

16 A. No, sir.

17 Q. How did the sum of \$50,000, as you understand
18 it, come up as the sum that would be contributed by the
19 carrier to the settlement?

20 A. From what I recollect, that was the balance
21 left on the \$200,000.

22 Q. Is there any question in your mind that the
23 insurance company expended more than the total of
24 \$200,000, when you take into consideration the
25 deductible, the legal fees and expenses and the

1 settlement --

2 A. I don't know.

3 Q. -- on that claim?

4 A. I don't know.

5 Q. Well, you have no ability to contest that
6 statement, do you?

7 A. I have not reviewed their payments.

8 Q. My question is, you have no ability to contest
9 that statement, do you?

10 A. At this point in time, I have not looked at
11 that, so I don't know.

12 Q. I want you to tell me each and every fact upon
13 which you would base a statement that they didn't spend,
14 taking into consideration the \$5,000, the \$50,000 and
15 the legal fees and expenses in the Beard case, that they
16 didn't pay up to or exceed \$200,000?

17 A. I have not seen an accounting, so I don't know.

18 Q. Do you have an accounting in your possession?

19 A. No.

20 Q. Did you dispute their statement that there was
21 only \$50,000 remaining at the time that that statement
22 was conveyed to you by someone?

23 A. No.

24 Q. Who conveyed to you?

25 A. Mr. Hudgins.

1 Q. What was your response to Mr. Hudgins?

2 A. I thought we had \$600,000 worth of coverage.

3 Q. What did he say to you?

4 A. There is \$50,000 left.

5 Q. And it is out of 200,000, not 600,000?

6 A. Yes, sir. Something to that effect.

7 Q. Did you attempt to contact Mr. Allen directly
8 or ask to speak to Mr. Allen, make efforts to talk to
9 Mr. Allen at that time?

10 A. I don't remember.

11 Q. Did you energize a lawyer on your behalf to
12 talk to Mr. Allen at that time?

13 A. I don't remember.

14 Q. Well, you don't remember any communication with
15 Mr. Allen, do you, as you sit here today, after the time
16 that information was provided to you?

17 A. That's correct.

18 Q. You don't have a letter you sent him that you
19 can direct me to?

20 A. Correct.

21 Q. You don't have a phone record that shows you
22 placed calls to wherever Mr. Allen was?

23 Where was Mr. Allen? Is he in Houston at
24 this time?

25 MR. DARNELL: Which time are we talking