

1 about? The trial?

2 MR. HAYES: Yeah.

3 Q. (BY MR. HAYES) I mean, where is Mr. Allen out
4 of?

5 A. I don't know.

6 Q. Well, let's look at his letter. Where is his
7 letter that he sends to you? What is the address on the
8 letter?

9 A. Houston.

10 Q. Well, did you get in your car and drive over
11 and see him?

12 A. No, sir. I was in the courtroom.

13 Q. Well, but the jury verdict has been rendered.
14 People are negotiating. Someone is telling you you have
15 to pay 117.5 out of your own back pocket. Did you get
16 in the car to drive across town to chat with this chap
17 for \$117,500, or did you just stay at the courthouse?

18 A. No, sir. I didn't get in my car and drive over
19 to Mr. Allen's office to chat with him. I stayed at the
20 courthouse.

21 Q. Did you send someone else to drive over to Mr.
22 Allen's office to chat with him?

23 A. No, sir, I did not.

24 Q. Did you have anyone else write him a letter or
25 send him a fax?

1 A. No, sir. I did not at that time.

2 Q. Well, in fact, nobody communicated anything to
3 him until well over a month later, when you had
4 Mr. Darnell write a letter on December the 10th; isn't
5 that correct?

6 A. I don't remember anybody communicating with
7 Mr. Allen, to my knowledge, from October 20th to
8 December 10th.

9 Q. Okay. But you did pay 117,500?

10 A. Yes, sir.

11 Q. Did you just figure that you would loan the
12 insurance ^{as} a little bit of money, and it was not really a
13 problem, that they were going to give it back to you?

14 A. I don't think you can take that -- make that
15 assumption.

16 Q. This sounds a like a stupid question, but I
17 want to make sure we are clear with each other. You
18 didn't suddenly, because the verdict came in, take leave
19 of your senses and become unable to function until early
20 December, did you?

21 A. Not that long.

22 Q. Well, did you take leave of your senses and
23 cease to be a person with reasonable temperament and
24 capacity to function as a sane and normal person after
25 this verdict was rendered for any period of time? Did

1 you go under the care of a doctor or a hospital?

2 MR. DARNELL: Object to the form of the
3 question.

4 A. I was a little shell shocked.

5 Q. (BY MR. HAYES) Did you come under the care of
6 a physician?

7 A. No, sir.

8 Q. Did you seek medical attention?

9 A. No, sir.

10 Q. Go to a hospital?

11 A. No, sir.

12 Q. Clinic?

13 A. No.

14 Q. When did you go back home, to El Paso?

15 A. As soon as I -- as soon as it was resolved.

16 Q. When was the next day that you went into your
17 office?

18 A. I don't remember.

19 Q. Do you have records that will reflect that?

20 A. No, sir. I don't keep time logs.

21 Q. Well, you have a busy trial schedule. Did you
22 try anything between the 25th of October and the 10th of
23 December?

24 A. Probably not.

25 Q. Sign up any new clients?

1 A. I'm sure that our firm signs up clients. But I
2 don't remember being very active for a few -- for a
3 little while after the trial.

4 Q. How long?

5 A. I don't remember at this time. I probably can
6 go back and look, but I didn't look at that.

7 Q. You have records that can reflect that?

8 A. I don't know. I may have. I haven't looked.
9 But it is seven years ago, so...

10 Q. Pardon?

11 A. That is eight years ago, so I would have to go
12 back and look.

13 Q. If I recall correctly, there were some
14 emotional issues associated with this case that had to
15 be worked through during the trial in addition to the
16 monetary issues; is that correct?

17 A. Yes, sir.

18 Q. I'm not trying to be flip. Is it correct that
19 you testified during the trial?

20 A. I did.

21 Q. More than once?

22 A. I did.

23 Q. Is it correct that you broke down on the stand
24 the second time you testified?

25 A. I don't know.

1 Q. Well, the reason I'm asking all this is, I'm
2 going to want to make sure that I know whether or not we
3 are going to hear, "At the time of the trial of this
4 matter, that the involvement on my part with this trial,
5 once it is all aggregated, was sufficiently disquieting
6 and disturbing to me that I really became less than
7 functional," for any period of time during the trial or
8 any period of time during the time immediately after the
9 verdict, when negotiations were ongoing, or later when
10 the time passed from the time of the settlement until
11 Mr. Darnell's letter of December the 10th as an excuse
12 for why there was such a long period of time between
13 your agreement to pay 117,500 on your own behalf and
14 Mr. Darnell's writing a letter asking for the money
15 back.

16 A. I don't think that there is anything about that
17 that would arise.

18 Q. In other words, you were perfectly competent to
19 handle your business from the time that you negotiated
20 the \$117,500 until such time as Mr. Darnell wrote his
21 letter?

22 A. I don't know that I was perfectly competent. I
23 was shell shocked and very disappointed at the verdict.
24 I was upset because I felt like I had worked my heart
25 out for my clients and they sued me. And I felt very

1 bad to be rejected by my clients and by a jury on the
2 findings. So that doesn't feel real good, okay?

3 Q. I can respect that, Mr. Scherr. That is not my
4 point.

5 My point is, I'm going to argue that the
6 time from the 25th of October, when the settlement was
7 finally -- the judgment was signed by the judge, the
8 delay from that date until the 10th of December, when
9 Mr. Darnell sent his letter, is inconsistent with a man
10 who has paid \$117,000 -- or 117.5 out of his own pocket
11 and is at the 11th hour and 59th minute shocked to learn
12 that his insurance company takes a position that they
13 only have \$200,000 in coverage as opposed to \$600,000 in
14 coverage.

15 I want to make sure that if your excuse is
16 going to be "I was not capable of acting as an ordinary
17 business person would in dealing with my business
18 affairs," I want to hear it now so I can probe it with
19 you --

20 A. No.

21 Q. -- as opposed to hearing it at the time of
22 trial as an excuse and as a counter position to my
23 position that there is an inconsistency there.

24 A. No. That was not the issue at all. Okay?

25 Q. That's fine.

1 A. It is very obvious that there were different
2 positions between the insurance company and myself in
3 terms of their responsibilities to pay, and there was
4 some decisions that had to be made there at trial in
5 terms of settlement of multiple parties involved in
6 trying to get the matter resolved.

7 And the Home Insurance Company indicated
8 their position was very clear that they weren't going to
9 pay any more money than \$200,000. That's what their
10 position was.

11 And as soon as the choice at that point of
12 proceeding on, settling the case and turning it over --
13 from my standpoint, resolving the case, and then making
14 claim back against Home Insurance Company, to have them
15 pay for what was advanced by myself and my firm and to
16 provide defense and pay the claim of ^{the} Gillespie
17 lawsuit --

18 Q: Where is your letter to the insurance company
19 sent by you or on your behalf demanding that the legal
20 fees that you paid Hudgins be paid by the Home Insurance
21 Company similar to Mr. Darnell's letter, which is
22 Exhibit 39, asking for the --

23 A. I don't know.

24 Q. You don't know?

25 A. Yes, sir.

1 Q. Well, do you know there was such a letter?

2 A. No.

3 Q. Were you relying on Mr. Darnell to send that
4 letter; and thus, if no letter was sent, Mr. Darnell
5 didn't carry out your wishes? Did you instruct
6 Mr. Darnell to send that letter?

7 MR. DARNELL: Objection.

8 A. I think that is between myself and my counsel.

9 Q. (BY MR. HAYES) Well, I want you to understand
10 that I'm going to likewise take the position that the
11 time delay between the time that you were placed on
12 notice of the insurance position until you filed the
13 lawsuit against the Home Insurance Company, and
14 therefore, the first time incorporated a claim for the
15 attorney's fees associated with Gillespie is
16 inconsistent with your position that it is clear and
17 proper those monies were owed.

18 And I want to give you an opportunity to
19 tell me now that, "You don't understand. There is a big
20 mistake here. Mr. Darnell was asked to send that letter
21 and he didn't send it," or, he sent it and you don't
22 have it.

23 A. Home Insurance Company notified us with this
24 October 20th letter that you've marked as Exhibit 20B --

25 Q. Yes, sir.

1 A. -- that they were claiming that the Gillespie
2 case was a separate -- was a -- was all --

3 Q. A related matter?

4 A. -- was all under the \$200,000 per claim basis,
5 and they would not honor or they would not defend that
6 claim, they would not pay anything arising out of it,
7 and put us on notice that they weren't going to help us
8 on that case, and we were going to have to do it on our
9 own, and that was very clear from its inception that I
10 could start paying the bills myself after that.

11 Q. If you take a look, it is on, I think, the
12 third page back.

13 Q. Well, I'd like to discuss with you the
14 telephone conversation of October 19, 1995. Do you have
15 any memory of that telephone conversation?

16 A. Let me see --

17 Q. A conversation between you and Mr. Allen.

18 A. Vaguely, I do. I was in the courthouse in
19 Houston, and somebody handed me a cell phone, which was
20 Mr. Allen on the phone.

21 Q. I assume, at that time, in that telephone
22 conversation, he was probably as specific about \$200,000
23 being the maximum available by phone as he was by
24 letter, wasn't he, although probably a little less
25 verbose?

1 A. Well, Mr. Allen, at that time in our telephone
2 conversation, told me that it was their position that
3 they owed 200,000, and that they only had a limit of
4 200,000, and they would not be taking -- they would not
5 be taking any responsibility for the Gillespie lawsuit.

6 And his letter that he sent subsequent on
7 October 20th that you have marked as Exhibit 20B on page
8 3 states that.

9 MR. DARNELL: It is Exhibit 22 in that
10 book, Jim.

11 A. Exhibit 22 in the other document.

12 Q. (BY MR. HAYES) Well, the dilemma I'm faced
13 with is, if you look on the page that you've directed me
14 to, it says: Therefore, for the reasons set forth above
15 and for such other good and sufficient reasons that may
16 hereafter appear, this company is continuing to provide
17 you with a defense under a full reservation of all of
18 its rights with respect to coverage.

19 A. Where does it say that?

20 Q. Right there.

21 And Mr. Hudgins testified that they did
22 agree and assign him to defend the intervention until
23 such time as they exhausted their limits, which was
24 later in time than this.

25 So how can that be, Mr. Scherr? Again, can

1 you explain that to me?

2 A. No. I don't -- I don't know how much money had
3 been paid --

4 Q. Well, obviously, \$50,000 remained because they
5 hadn't paid the \$50,000, Mr. Scherr.

6 MR. DARNELL: Wait. Let him finish his
7 answer.

8 MR. HAYES: Excuse me. I just want to make
9 sure we don't --

10 MR. DARNELL: Let him finish his answer.

11 Q. (By MR. HAYES) Finish your answer.

12 A. In my conversation with Mr. Hudgins and then
13 Mr. Allen, my understanding was the balance was 50,000
14 left out of the 200,000. If they had or had not
15 exceeded that -- I saw a later letter that it went over
16 that -- I was unaware at that point of exactly how much
17 was left.

18 Q. Well, the point I'm making to you is, you sent
19 them the intervention. They sent you back a letter.
20 And they raised the issue of related claims, did they
21 not?

22 A. For the first time, in the October 20th, 1995
23 letter, they brought the reservation of multiple claims.

24 Q. Okay. And they also told you that they would
25 continue to provide you a defense under a reservation of

1 rights, correct, on page 3?

2 A. That's what the letter says. My best
3 recollection of my conversation with Mr. Allen was the
4 company had exhausted the \$200,000.

5 Q. They hadn't settled the case for \$50,000 yet.

6 A. But my understanding is that once they paid the
7 50,000, that would exhaust the 200,000.

8 MR. HAYES: Strike that just for a second.

9 Q. (BY MR. HAYES) Chronologically, you haven't
10 got a verdict yet at the time you talked to Mr. Allen on
11 the 19th?

12 A. I think we did.

13 Q. No, you didn't. I will tell you that,
14 factually, you didn't get a verdict until the 20th. It
15 is a Friday. You go back and look, you are going to
16 find out that the verdict came in on the 20th or after
17 the time that you had your conversation with Mr. Allen.

18 MR. DARNELL: Object to form.

19 Q. (BY MR. HAYES) I'm not trying to be difficult,
20 but there is no reason for us to argue about something
21 that -- I mean, entertain the possibility that at the
22 time you spoke to Mr. Allen, the case had not gone to
23 the jury yet.

24 MR. DARNELL: I think we may be getting
25 confused, because I don't know that he has ever tied it

1 to a date. You've tied a conversation to a date, but I
2 don't think he has.

3 MR. HAYES: The conversation date is in the
4 letter on the 20th.

5 MR. DARNELL: That assumes that there was
6 only one conversation.

7 MR. HAYES: Well, but this letter on the
8 20th is the letter that gives him the information that
9 he says is new and relates it back to the 19th. I don't
10 think there is any question but that the conversation we
11 are talking about occurred on the 19th.

12 Q. (BY MR. HAYES) What I'm trying to tell you is
13 that there is no question but that the case has not gone
14 to the jury on the 19th.

15 A. Where do you get that?

16 Q. I've got it from a log that I have got.

17 A. May I see it, please?

18 Q. Sure.

19 A. What exhibit is it?

20 Q. It isn't an exhibit yet. I will make it an
21 exhibit.

22 MR. DARNELL: It should be in the jury
23 charge, the date.

24 MR. HAYES: The jury charge has no date on
25 it.

1 MR. DARNELL: It doesn't?

2 MR. HAYES: No.

3 I will mark these two items and provide
4 them to you and your counsel for review. They have been
5 provided because they are Bates stamped. I mean, this
6 is not a mystery here.

7 (Exhibits marked, 40 and 41)

8 Q. (BY MR. HAYES) Here. Look at them.

9 MR. HAYES: Jim, do you have these papers?

10 MR. DARNELL: We have got them.

11 MR. HAYES: I mean, I don't want anyone
12 looking at me like I'm pulling something out, that it is
13 a secret.

14 A. Is this from the claim file of Oscar Allen?

15 Q. (By MR. HAYES) Yeah. It is Oscar's stuff.
16 Like I said, you have got it already, Mr. Scherr. I
17 mean, it is not like I'm trying to get cute here. Those
18 are Bates stamped and turned over to you.

19 A. What is your question?

20 Q. My question is, obviously, on the 19th, when
21 you had a conversation with Mr. Allen, the jury verdict
22 had not been rendered, if those documents are correct;
23 isn't that true?

24 A. I don't know that the dates are correct.

25 Q. If the dates are correct, though, the jury

1 verdict has not been rendered on the 19th; isn't that
2 correct?

3 A. Mr. Allen's notes speak for themselves.

4 Q. Is there some reason you don't want to say that
5 is correct?

6 A. For some reason, in my mind, I thought we had
7 gotten the verdict on one day and we argued the next
8 day. I don't remember the dates. I can't remember if
9 it was Thursday when we got the verdict and then Friday
10 we were going to argue the second part, or whether it
11 was Monday and Tuesday.

12 Q. Let me tell you what Ms. Jobe would say if you
13 were to discuss it with her as she said in her
14 deposition. She said that the verdict came in on a
15 Friday.

16 A. Okay.

17 Q. And that you were going to come back on Monday
18 and do the second phase of the trial.

19 A. Okay.

20 Q. During the weekend, negotiations commenced such
21 that you didn't have the second phase of the trial.

22 A. Okay.

23 Q. And Judge Abbott was being elevated to the
24 Supreme Court, and he locked you guys up until you got
25 the paperwork done, which is why the judgment is signed

1 before all the releases are signed, if you will look at
2 the releases. You can check my schoolwork, if you want.

3 The bottom line is, on the 19th -- there is
4 absolutely not one shred of evidence that on the 19th
5 the jury had come back when you have your conversation
6 with Mr. Allen. I think it is going to be very clear,
7 as you said before, Mr. Allen was clear on the phone
8 too, 200,000 is all we got.

9 You then go in and have a verdict come
10 back. 200,000 is all you got. They give you 50-. You
11 pay 117.5. Others pay other amounts of money.

12 Now, my specific question to you, what I
13 was trying to ask you before, is, you knew -- if
14 Mr. Allen's notes, Exhibit 40 and 41, are correct, when
15 you have the telephone conversation with him, and, in
16 fact, when the letter was sent out and you had already
17 been informed by the telephone call the day before, you
18 knew when the verdict came back what the insurance
19 company's position was, didn't you?

20 A. I don't remember the facts that way. I don't
21 remember the dates and times the way that you are
22 talking about.

23 Q. Well, then, you tell me how you remember the
24 dates and times so that when we try this case and the
25 jury evaluates your testimony, they will know the fact

1 pattern against which your testimony is to be compared.
2 So you tell me what your memory is, okay, and I'll just
3 write it down quietly.

4 And I would like to add to it, though, your
5 letter of transmittal -- where is your letter of
6 transmittal? -- of the intervention, which is the 16th,
7 which means the intervention occurs three days before
8 your telephone call.

9 A. This letter, on October 16th, 1995, is sent off
10 by an attorney who is working for a firm at the time
11 from El Paso, Texas.

12 Q. Whose name is on that letter?

13 A. It says "James Kennedy for Jim Scherr."

14 Q. What does it say in that letter? How is that
15 letter written, "Mr. Scherr is in trial," or does it
16 say, "I"?

17 A. It says: "I'm presently in trial in the
18 underlying case in Houston. The court severed the plea
19 in intervention to a separate trial. A request is
20 hereby made to defend me on the plea in intervention and
21 pay any impending judgment that may be assessed. If you
22 have any questions, please feel free to contact me.
23 Very truly yours, signed, James Kennedy for James F. --
24 Jim Scherr.

25 Q. So you dictated that letter over the telephone

1 to somebody?

2 A. Yes, sir.

3 Q. Okay. That is not that young man being in
4 Houston, Texas?

5 A. Correct.

6 Q. So what does that mean, the fact that it is
7 sent by some guy at your direction and he merely signed
8 something you dictated? What impact does that have on
9 anything?

10 Does that change anything? Is there
11 anything to be gleaned from that, other than you used
12 him to sign a piece of paper that you sent back -- you
13 called on the phone to someone in your office, dictated
14 a letter, and it went out under your signature signed by
15 him?

16 A. That's the fact.

17 Q. That means that on that date you knew about the
18 intervention, didn't you?

19 A. I did.

20 Q. The 16th -- that is October 16th. And you sent
21 the letter to the carrier on that date, didn't you?

22 A. Yes, sir.

23 Q. Okay. And you said, "It has been severed. We
24 are staying in trial -- we are in trial"?

25 A. Yes, sir.

1 Q. On the 19th -- October the 19th, you and
2 Mr. Allen had a conversation on the telephone?

3 A. I don't remember if it was the 19th or the
4 20th. I don't remember the particular date. I
5 thought -- just to get it cleared up, I thought our
6 conversation with Mr. Allen took place after we had
7 already gotten news of the first part of the verdict.
8 That's how I basically remember it.

9 Q. I understand. Let's go to the letter that
10 Mr. Allen sent you -- where is it? -- Number 20B. What
11 does Mr. Allen say in that letter?

12 A. The letter speaks for itself. It says, "A
13 telephone conversation of October 19th."

14 Q. Do you have any factual basis to dispute that
15 that telephone conversation occurred on the 19th?

16 A. Just what I remember.

17 Q. Do you have a contemporaneous document --

18 A. No, sir.

19 Q. -- or anything other than your memory to say
20 that it didn't take place on that date?

21 A. I'm not aware of any.

22 Q. Are you going to suggest to the jury that, in
23 your opinion, Mr. Allen is manipulating dates here,
24 being -- attempting to distort the truth?

25 A. No. The letter speaks for itself.

1 Q. But, I mean, you're like "I don't remember that
2 way." I mean, it is either you are wrong or he is
3 right?

4 A. I'm not saying -- you are not characterizing my
5 testimony correctly.

6 Q. Well, then characterize it in your own way, so
7 that I can understand how we reconcile a letter that has
8 a date in it, you with no documentation, and yet you
9 dispute that it occurred on the 19th.

10 A. First off, I think I made it clear that what I
11 recollect is that I got -- somebody handed me a
12 telephone, a cellular telephone, and I talked to
13 Mr. Allen on the telephone. Mr. Allen and I discussed
14 what to do about settlement. Mr. Allen advised me of
15 the balance left on the 200- was about 50-, that it was
16 going to be the position of Home Insurance Company that
17 the claims against the Gillespie case were not -- there
18 would not be an aggregate limit of 600,000 on it, and
19 that the 50,000 was all that was remaining.

20 Q. And that is your memory of the conversation
21 with Mr. Allen?

22 A. That is about it.

23 Q. And you think that that conversation took place
24 on the 19th?

25 A. I don't remember the date. What I best

1 recollect, it was after I had learned that the jury had
2 come in against us.

3 Q. Could you have had had two conversations with
4 Mr. Allen, one on the 19th and one later?

5 A. Not to my knowledge. I only had one
6 conversation with Mr. Allen that I remember.

7 Q. The problem I am faced with is, Mr. Allen has
8 got notes in his record, he has a letter to you in which
9 he clearly disagrees with what you just said, doesn't
10 he?

11 A. His letters speak for themselves.

12 Q. But they disagree with you and your version.
13 If they are to be taken literally and read as if they
14 are truthful, they are inconsistent with your version
15 that you just gave us, aren't they?

16 A. His letter speaks for itself.

17 Q. Is there some reason you are unwilling to
18 acknowledge that there is inconsistency with what you
19 just told us and what he has written down at that time
20 on documents?

21 A. I don't know what Mr. Allen's notes reflect. I
22 know what I best, basically, remember.

23 Q. Let me just go through it with you, then. This
24 is becoming tedious, so we'll attempt to deal with it.

25 A. How about if I make it simple? It appears that

1 my recollection and Mr. Allen's recollection in his
2 letter are inconsistent.

3 Q. Fine.

4 And, number two, his letters, if they were
5 written when they were reported to have been written,
6 were written contemporaneously with the events, weren't
7 they?

8 A. I can't speak for Mr. Allen.

9 Q. They either were written contemporaneously with
10 the events -- and I will come over and highlight the
11 dates -- or you will agree that they were written
12 contemporaneously with the dates. Which is it going to
13 be?

14 A. Mr. Allen can speak about his own letters.

15 Q. Would you give me the date of the letter that
16 you got, which is -- is that 20B?

17 A. Yes, sir.

18 Q. What is the date on letter 20B?

19 A. First off, I didn't get a letter from
20 Mr. Allen. I was in Houston.

21 MR. DARNELL: What is the date on the
22 letter?

23 A. The date of the letter is October 20th.

24 Q. (BY MR. HAYES) Does the letter of October 20th
25 refer to an October 19th telephone call between you and

1 Mr. Allen?

2 A. That's what the letter says.

3 Q. Did you write a letter to Mr. Allen on the 16th
4 at which time you gave him the plea in intervention, as
5 Exhibit 20A would show?

6 A. A letter from my office was sent on October
7 16th.

8 Q. Did you sign that letter?

9 A. No, I did not.

10 Q. Did someone sign that for you?

11 A. Yes, sir.

12 Q. Did you dictate that letter?

13 A. Yes, sir.

14 Q. Now, the next thing we have is we have Exhibits
15 40 and 41. Have you seen Exhibit 40 and 41?

16 A. Yes, sir. They have been provided today to me.

17 Q. Are you disputing that I provided them to your
18 counsel or my firm provided them to your counsel at some
19 previous period of time with a disclosure?

20 A. No.

21 Q. I just want to make sure.

22 Now, what is the date on Exhibit 40, if it
23 is to be believed?

24 A. October 19th, 1995.

25 Q. I will read into the record what this says.

1 A. You can attach it.

2 Q. I can read it into the record because I want it
3 to be clear that you have heard it.

4 (Reading) I received a call from Oscar
5 regarding the status of this trial. The case is
6 continuing. The judge has issued some favorable rulings
7 for us which include disqualifying the plaintiffs'
8 expert and essentially disallowing plaintiffs' line of
9 questioning relating to personal issues which have no
10 bearing on the case at hand.

11 The insured testified for three days and
12 apparently did well for himself.

13 Did you testify for three days?

14 A. I don't remember.

15 Q. (Reading) The insured retracted consent to
16 settle after the plaintiffs' expert was disqualified.

17 Did you do that? Did you retract consent
18 to settle after the plaintiffs' expert was disqualified?

19 A. Not that I recollect.

20 Q. (Reading) We have advised the insured in
21 writing that his policy limits are only 200,000 and have
22 been eroded by approximately 125,000 in defense costs.
23 This information did nothing towards getting his consent
24 to settle again.

25 Did that occur?

1 A. Not that I recollect.

2 Q. (Reading) Last, another suit has surfaced
3 against the insured relating to the same matter. The
4 plaintiffs in this new matter attempted to intervene in
5 this trial but were denied the request.

6 Did that occur? Did that occur, factually.

7 (Reading) Another suit has surfaced against
8 the insured relating to the same matter. The plaintiffs
9 in this new matter attempted to intervene in this trial
10 but was denied the request.

11 Was the intervention -- did the
12 intervention arise during the pendency of the Beard
13 trial and was it severed?

14 A. Yes. That did take place.

15 Q. (Reading) We have advised the insured that if
16 this trial erodes all of his limits, there will be no
17 coverage for the loss going forward unless we settle for
18 the balance of the limits and obtain a global
19 settlement.

20 Did they tell you that?

21 A. I don't remember.

22 Q. (Reading) Counsel expects to rest tomorrow with
23 the verdict by the beginning of the week. As further
24 information becomes available, I will advise.

25 A. Okay.

1 Q. Next --

2 A. Can I save some time?

3 Q. Sure.

4 A. What is the question that you are trying to
5 make? And I'll see if I can solve it for you.

6 Q. No. I'm perfectly content at going this way,
7 because the other way doesn't ever seem to work.

8 This is the next letter, which is -- what
9 date is this? What date is this, Exhibit Number 41?

10 A. It says October 19th.

11 Q. It says from Oscar Allen, and this, obviously,
12 what I just read, Exhibit 40, is someone reporting on a
13 communication they had with Oscar Allen, isn't it?

14 A. I thought this was from Oscar Allen.

15 Q. No. That is a report to someone based upon
16 their -- someone above -- these are a level above Oscar
17 going up a level above that person.

18 A. Who is this one from?

19 Q. This is from Pepe -- Michele Pepe, and it is to
20 William Suda. It says so right up there.

21 Now, let's look at the memo from Oscar
22 Allen to both of those persons. Is that what that would
23 appear to be, an e-mail to both?

24 A. Yes, sir.

25 Q. Let's see what it says.

1 (Reading) My apology for this late report
2 concerning the trial of this matter. Although your
3 e-mail of this date does provide a concise summary of
4 the trial events, I do need to add some corrections and
5 expand the report.

6 Evidently, this followed this report, 40.
7 41 followed 40, according to the first sentence.

8 MR. DARNELL: Object to form.

9 A. Okay.

10 Q. (BY MR. HAYES) Again, not trying to be
11 difficult, but it would look like what happened is, the
12 person, Michele Pepe, wrote to William Suda, copying
13 Oscar Allen. Oscar Allen, after seeing that, then sends
14 what is 41. Does that appear to be at all potentially
15 logical?

16 A. Yes, sir. That appears to be.

17 Q. Let's look at Number 41. And I stand corrected
18 on one thing, because there is a handwriting note here
19 that says, "Clarify. Never retracted his consent, but
20 took his money off the table."

21 Is it possible that that is opposed to
22 "withdrawing your consent" that insurance money be
23 spent, you simply, after the expert was disqualified,
24 removed your money?

25 A. No. You're helping to refresh my memory a

1 little bit. I think -- I don't remember at this time.

2 Q. Okay. Well, let's look at what Oscar Allen
3 says.

4 A. Can you kind of address your -- without going
5 through all of the whole --

6 Q. I'm going to ask you questions.

7 (Reading) The case proceeded to trial on
8 October 5th, 1995.

9 Is that your memory of what happened?

10 A. Yes, sir, or thereabouts.

11 Q. (Reading) The defendants extended an offer that
12 involved giving up their claim for expenses and attorney
13 fees, and the plaintiffs will get all the funds, 370-,
14 deposited in the registry of the court. Additionally,
15 the insurers involved, Coregis, Ben Beard, and Home,
16 Scherr, offered a combined 80,000, 50- from Home and 30-
17 from Coregis. The plaintiffs countered with a \$900,000
18 demand. The plaintiffs believe they have a shot at
19 punitive damages. On 10/18, the defendants offer
20 400,000 which was rejected.

21 Do you have any memory of those facts
22 occurring?

23 A. No.

24 Q. (Reading) The judge did disqualify plaintiffs'
25 expert but he allowed into evidence the affair between

1 the insured and his secretary. The insured cried when
2 he was questioned about the affair. Defense counsel
3 attempted to diminish any potential adverse effects by
4 asking the insured whether the relationship with the
5 secretary affected his attorney-client relationship with
6 the plaintiffs, and the insured responded that it did
7 not.

8 The plaintiffs wanted to establish that the
9 insured committed fraud by padding expenses. The
10 secretary testified that the insured inflated his
11 charges and padded bills. Our expert, Jeff Roberts, was
12 excellent in establishing that no breach occurred and no
13 fraud occurred. He also testified that all bills were
14 proper and correct.

15 The judge has been very controlling by
16 limiting the time for evidence to both sides. The court
17 recessed on 10/12 and 10/19, and the court was in
18 session for only a half a day on 10/11 and 10/18.

19 A plea in intervention was filed by 17
20 chiropractors who were making the same allegations as
21 the Beard plaintiffs. They were represented by the
22 insured in the underlying class action suit. The court
23 severed the plea. Therefore, we are looking at another
24 suit after this trial.

25 I believe you told me that that occurred,

1 factually, that the intervention was filed and severed;
2 is that correct, Mr. Scherr?

3 MR. DARNELL: Object to form. Everything
4 before the question.

5 A. What was the question, please?

6 Q. (BY MR. HAYES) My question is, a plea in
7 intervention was filed by 17 chiropractors -- is that
8 correct? -- and it was filled, as this would indicate,
9 and severed.

10 A. Yes, sir.

11 Q. I choose to not ask about the other facts,
12 whether they occurred, because I consider them
13 nonsensical, and I don't think they relate to what you
14 and I are interested in. I could go through them in
15 excruciating detail, but I tend to think it would
16 probably be silly. Do you agree?

17 MR. DARNELL: Object to sidebar.

18 A. Yes, sir.

19 Q. (BY MR. HAYES) Thank you.

20 (Reading) The insured has a 200/600 policy.
21 We have paid 89,000 to date and counsel estimates
22 unbilled fees and expenses of approximately 35-. I have
23 discussed this situation with the insured and will
24 confirm by overnight and certified mail tomorrow.

25 Did he discuss that with you, Oscar Allen,

1 by the 19th of October as he reports?

2 A. Again, he did discuss with me, but I don't
3 remember the date.

4 Q. (Reading) The insured has taken the position
5 that the suit by the 17 chiropractors is a new claim and
6 subject to a new \$200,000 limit.

7 Did you tell him that?

8 A. That is not quite quoting correctly. I said
9 that there was a new claim. I didn't say a new \$200,000
10 limit.

11 Q. (Reading) I have taken the position this is all
12 one claim. My coverage position will not change except
13 that the policy may be eroded and we would have no
14 further obligation.

15 I expect the jury [sic] to go to the jury
16 on 10/23.

17 Would that indicate that, at that point in
18 time, the case had not gone to the jury, if he is
19 correct, by the 19th?

20 A. That's what his report shows.

21 Q. Do you have any documentation to tell me today
22 that it went to the jury?

23 A. Not with me, no, sir.

24 Q. Where is it?

25 A. I don't know. I don't know if I have any

1 documentation.

2 Q. Well, Ms. George's, slash, Jobe indicated it
3 was on a Friday, okay? And my notes, when I went back
4 and looked, the 20th is a Friday.

5 Now, obviously -- well, did the jury come
6 back the very same day that they received the case, or
7 did they deliberate overnight and come back the next
8 day, or do you remember?

9 A. I don't remember.

10 Q. Is it possible, factually, that you had been
11 informed about the limits associated with the case --
12 the underlying -- the Beard malpractice case being
13 \$200,000 before the jury returned?

14 A. Yes.

15 Q. Now, the jury returns, and it would seem to me,
16 factually, there is really no reason at that point to go
17 back to Home Insurance Company, because if Mr. Allen is
18 correct, he has already waxed poetic about what he feels
19 the position of the insurance company is.

20 MR. DARNELL: Object to form.

21 Q. (BY MR. HAYES) Is that not correct? You were
22 aware of what his position was?

23 A. Yes, sir. As I indicated early on, sometime
24 during the trial, I was aware of their position.

25 Q. Were you at all concerned that the -- well, did

1 you see the charge -- do you have a memory of seeing the
2 charge before it was submitted to the jury?

3 A. No, sir.

4 Q. You have no memory of that?

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

6 Q. Did Mr. Hudgins tell you, or did anyone tell
7 you that the charge that was to be submitted to the jury
8 contained no negligence allegations?

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

10 Q. Did anybody tell you that, if the verdict that
11 was contained in the charge was adverse to you and then
12 reduced to a judgment, that there may well be no
13 coverage for that judgment?

14 A. Not to my recollection.

15 Q. Have you ever been told, and excluding this
16 gentleman -- well, strike that. I can't because there
17 are some lawyers.

18 Let me try it this way: Mr. Hudgins --
19 well, you were sensitive to the fact that if you went to
20 the punitive phase, there was a reservation rights on
21 punitive damages contained in the very first letter that
22 you received from Home Insurance Company; is that not
23 correct?

24 A. Yes.

25 Q. Were you concerned at that point that you might

1 be exposed to an uninsured exposure if the case, given
2 this jury's attitude, went to the jury on punitive
3 damages at the time that you settled the case?

4 A. You know, there is differing areas. First is
5 the area of the errors and omissions policy, which would
6 have covered actual damages. Second was the area of
7 punitive damages, which we had already -- I had already
8 been notified, by reservation of rights, early on that
9 that was excluded -- being excluded under the terms of
10 the policy according to Home Insurance Company.

11 So the other end is, there had been talks
12 from the other parties in litigation about trying to get
13 the case settled. So it behooved all of us to try to
14 get it settled at that point.

15 Q. When the case went to the jury -- everybody has
16 kind of an expectation. You try cases -- did you expect
17 to win? Expect to lose? Didn't really know?

18 A. Didn't really know.

19 Q. Were you surprised by the verdict?

20 A. Yes.

21 Q. Were you surprised by the fact that the verdict
22 contained a finding of intentional conduct on your part
23 in terms of the breach of fiduciary -- the breach of
24 fiduciary duty?

25 A. Yes.

1 Q. Were you surprised that the jury found that you
2 committed fraud?

3 A. Where is that.

4 Q. It is on Count 3, Mr. Scherr?

5 A. Yes.

6 Q. The fraud count, are you going to tell me that
7 it takes an insurance specialist to know whether or not
8 that is excluded, or do you think that the fraud count,
9 at least, is excluded, based on the policy?

10 And I will hand you the policy, and I will
11 direct your attention to the exclusion, where it says:
12 To any judgment or final adjudication, based upon or
13 arising out of any dishonest, deliberately fraudulent,
14 criminal, maliciously or deliberately wrongful acts or
15 omissions committed by the insured.

16 A. I think that is a legal question.

17 Q. Okay.

18 A. But it does -- no. I think it is --

19 Q. A legal question?

20 A. Well, there is a provision in here under
21 that --

22 Q. Is it a legal question, or do you have an
23 answer?

24 MR. DARNELL: Object to form.

25 A. I'll leave that as a legal question.

1 Q. (BY MR. HAYES) Okay. And I assume that
2 whether or not the first count and the second count are
3 covered is a legal question as well?

4 A. I believe they were covered. The first
5 question was covered. The second question, I don't
6 know.

7 Q. Well, do you know if the second question takes
8 the first one out of coverage because it is an
9 intentional act?

10 A. That is a legal question.

11 Q. So whether or not question number two renders
12 the question in question number one, and thus, one and
13 two, beyond the scope of coverage and within an
14 exclusion is a legal question to you?

15 A. Yes, sir.

16 Q. And whether or not question number three about
17 fraud is covered, again, that is a legal question?

18 A. Well, there is a provision for fraud in an
19 exclusion in the policy.

20 Q. Okay. Well, if you are going to be consistent,
21 I'm not going to try to jackhammer you into an answer
22 that might be advantageous to me. If you want to say,
23 "Those call for legal conclusions," then fine. I'm not
24 trying to get an admission out of you that someone is
25 going to use later.

1 Shall we just say, respectfully, whether or
2 not there is coverage if this verdict was reduced to a
3 judgment is a matter that you feel calls for a legal
4 opinion?

5 MR. DARNELL: Object to sidebar.

6 Q. (BY MR. HAYES) Is that fair?

7 A. What?

8 Q. Is it fair to say that it is your position that
9 whether or not if this verdict was reduced to a judgment
10 such that the policy is triggered for coverage, because
11 the policy requires that, that whether or not there is
12 coverage is a matter that calls for a legal opinion?

13 A. Yes, sir.

14 MR. HAYES: Off the record.

15 (Discussion off the record)

16 Q. (BY MR. HAYES) The lawsuit, Scherr versus
17 Home, this lawsuit, is the pleading your work product,
18 Mr. Darnell's product, or anyone else's work product?

19 MR. DARNELL: I instruct him not to answer.
20 That could get into attorney-client communication.

21 Q. (BY MR. HAYES) No. I ask if you wrote the
22 pleading. You are not representing yourself, pro se,
23 are you?

24 A. No, sir.

25 Q. Strike that question. You're right. I'm

1 sorry.

2 The theories of liability in that pleading,
3 I'd like you to look at the pleading in your case.

4 A. Would you please share with me.

5 Q. I have to find it first. It is -- I do have a
6 question first.

7 (Exhibit marked, 42)

8 Q. The famous Ninth Amended Original Petition --
9 Plaintiffs' Ninth Original Petition, do you know why
10 that is filed?

11 A. No, sir.

12 Q. Why is there a Ninth Original Petition in this
13 particular Beard, Bailey and Petrosky lawsuit?

14 A. I don't know.

15 Q. You have no understanding of that?

16 A. No, sir.

17 Q. Does it take a legal expert to tell you whether
18 or not a pleading that is filed after a judgment is
19 entered has any effect in a case?

20 A. Yes.

21 Q. Okay. So we need to boot that to someone else,
22 because I will tell you that this document was not
23 faxed -- or was not filed until after Judge Abbott's
24 final judgment had been entered in this lawsuit.

25 So you want me to ask someone who is a

1 legal expert on it?

2 A. You want my opinion?

3 Q. No. I want to make sure that we are consistent
4 here. That is fine. No. I'm not trying to make you
5 give me anything or answer any questions that are
6 outside the purview.

7 What I don't want to do, and I have had it
8 happen is have somebody suddenly wax poetic in a trial
9 about things that I should have already taken care of.
10 That is a little embarrassing.

11 Plaintiffs' Original Petition in this
12 lawsuit, I'm going to mark this as the next exhibit.

13 Do we need to take a break so you can
14 consult with counsel about something or point something
15 out?

16 MR. DARNELL: No.

17 MR. HAYES: We need a little levity in this
18 room. There is no reason not to have some.

19 MR. DARNELL: We weren't going for levity.

20 MR. HAYES: Why not go for levity?

21 (Exhibit marked, 43)

22 Q. (BY MR. HAYES) What are the theories of
23 liability pled in that case?

24 A. What is in the pleadings.

25 Q. Pardon?

1 A. What is in the pleadings. You want some
2 levity. What is in the pleadings.

3 Q. I understand. Just tell me quickly.

4 MR. DARNELL: What is that, 42?

5 MR. HAYES: No. That is 43.

6 Q. (BY MR. HAYES) Have you ever seen that
7 document before?

8 A. I don't remember.

9 MR. DARNELL: What is 42?

10 MR. HAYES: 42 is the Ninth Amended
11 Original Petition, that bootleg document that got filed
12 after the judgment.

13 MR. DARNELL: That one is already in there
14 too.

15 MR. HAYES: Well, fine. Off the record.

16 (Discussion off the record)

17 A. What is your question?

18 Q. (BY MR. HAYES) My question, sir, what is the
19 theory of liability against Home as pled by Mr. Darnell,
20 unless you say that is a legal question?

21 A. That is a legal question.

22 Q. That's fine.

23 Then the pleading speaks for itself, does
24 it not?

25 A. Yes, sir.

1 Q. Putting legal theories aside, the damages
2 associated with this matter, I would assume -- and you
3 tell me if I'm wrong -- are the -- as claimed by you,
4 are \$117,500 paid by you to settle the Beard case?

5 A. Correct.

6 Q. The amount of money, whatever it is, that you
7 paid Mr. Hudgins to dispose of the Gillespie case?

8 A. Correct -- no. To handle the Gillespie case.

9 Q. When I say "dispose of the Gillespie case," it
10 was disposed of. He handled it through a summary
11 judgment and an appeal.

12 A. Yes, sir. And Baker & Botts as well.

13 Q. Well, let's say this, the attorney's fees
14 associated with handling and disposing of the Gillespie
15 intervention?

16 A. Yes, sir.

17 Q. And Mr. Darnell's attorney's fees in this
18 particular case?

19 A. Yes, sir.

20 Q. Anything else? Any other damages?

21 A. You have to -- that is a legal opinion.

22 Q. No. You are the person who is hurt. I believe
23 even a layperson can discuss whether or not there is
24 another damage. I'm sorry, Mr. Scherr, you can do that.

25 THE WITNESS: I can go ahead and answer

1 that?

2 MR. DARNELL: (No verbal response)

3 Q. (BY MR. HAYES) You can tell me what your
4 damages are. I'm not talking about under the Deceptive
5 Trade Practices Act. I'm asking what are you out as a
6 result of this event, other than the categories that I
7 have given. Your losses? Your damages?

8 A. What about the mental anguish associated with
9 being bare on the appeal on the Gillespie case,
10 recognizing the risk of being sued by 17 parties, and
11 your insurance company, which you relied upon and paid a
12 premium to, not being there with you.

13 Q. Well, you know, considering it was a lay down
14 that they weren't your clients and you took that
15 position in the beginning, I bet you didn't have a whole
16 lot of mental anguish about that, did you?

17 A. I certainly did.

18 Q. Why? From the very beginning, you took the
19 position they weren't your clients.

20 A. In a position that was taken by the plaintiffs
21 in the Gillespie case, having 17 plaintiffs against me
22 for the damages they sought, which they claim were
23 significant, and the potential that could happen if
24 additional plaintiffs were added could financially
25 devastate me.

1 Q. Are you suggesting that you didn't understand
2 that the law at that time was, if they aren't your
3 client, they can't sue you?

4 A. At that point in time, there was a serious
5 question of law on whether there was a breach of some
6 duty to putative class members, and that was the basis
7 of their defense in the case -- or their allegations
8 against me in the case.

9 Q. Well, when you read the opinion, which is an
10 exhibit, they give that short shrift. It's not like
11 they say this is a close case, we are really agonizing
12 over it. The appellate court went "Ho-hum."

13 A. Have you ever had a lawsuit that has been
14 involved -- with lots of money involved, and just tell
15 your clients it is an absolute lay down, you are going
16 to win that case without any question whatsoever, when a
17 lawyer like Mr. Archer and an appellate attorney like
18 Mr. Gunn, who is recognized throughout Houston and at
19 the Supreme Court as a competent appellate lawyer, are
20 coming after you? Frankly, you're a little bit worried.
21 And I was.

22 Q. Okay.

23 A. It wasn't any lay down, by any stretch of the
24 imagination in my mind. I was very worried about it. I
25 would have thought the Beard, Bailey, Petrosky case was

1 a lay down by your evaluation. I learned the hard way.

2 Q. They were your clients, though. They had a
3 right to sue you. These guys can't even get up to bat.
4 They have no standing to bring the lawsuit. That is
5 different than whether or not they can prove it.

6 What I'm suggesting to you is, the 17
7 chiropractors in the intervention, you executed an
8 affidavit and said, "None of them are my clients."

9 Let's get your affidavit out and look at it
10 for a second. I want to make sure that we are not
11 mistaking ourselves here.

12 Did you not file an affidavit which you
13 said, on a date certain, "These individuals are not my
14 clients"?

15 A. Here is my affidavit, marked --

16 Q. You have three of them.

17 A. -- 32, Exhibit 31. This is exactly --

18 Q. Pardon?

19 A. Exhibits 30, 31, and 32 are my affidavits, and
20 they are true.

21 Q. Did you have any question about whether they
22 were your clients or not? It doesn't seem so by your
23 affidavit.

24 A. The affidavit is true.

25 Q. And it doesn't sound like, "I just suddenly

1 realized this." I mean, what was the date that you
2 filed that affidavit, the first one, saying they weren't
3 your client?

4 A. May 3rd, '96. The second one was filed on June
5 7th, 1996. The third one was filed on August 29th,
6 1996.

7 Q. May I see those affidavits for a second?

8 You've read them here today, have you not?

9 A. I have.

10 Q. They are all correct, as you sit here today?

11 A. Yes, sir.

12 Q. It says: As an attorney licensed to practice
13 law in the State of Texas, I'm familiar with the duties
14 owed by lawyers to their clients under Texas law.

15 That was true then, wasn't it?

16 A. I guess I was giving a legal opinion.

17 Q. (Reading) Because the Rhodes class was never
18 certified as a class action, I never represented any
19 putative class member with no written contract of
20 employment with me. Until certification of the class
21 occurred, I did not represent unnamed members of a
22 putative class in the Rhodes class who never executed a
23 contract with me.

24 You and I discussed that earlier, and you
25 had known that all the way back on the 7th day of June,

1 1996, hadn't you, Mr. Scherr?

2 A. Yes, sir. That's what I believed.

3 Q. Have you sought any counseling for this mental
4 anguish or emotional distress that you suffered as a
5 result of the --

6 A. No.

7 Q. Taken any medicine?

8 A. No.

9 Q. Do you think that the emotional turmoil
10 associated with some of those other issues in that
11 lawsuit when you had to testify in the Beard case
12 contributed to the disquietude and upset that you have
13 described, or are you able to separate and segregate
14 those?

15 A. They had absolutely nothing to do with the
16 Gillespie lawsuit. My mental anguish on the Gillespie
17 lawsuit was liability, the financial disaster that would
18 result if I was found to be legally responsible to
19 putative class members.

20 Q. I understand that.

21 A. That was the only issue in my mind.

22 Q. Well, but you had gone through a very
23 unpleasant trial in Beard, hadn't you?

24 A. Yes, sir. But that had nothing to do with the
25 putative class member lawsuit that was brought against

1 me.

2 Q. I understand that. But that occurred prior to
3 the arising of this upset associated with the Gillespie
4 lawsuit; isn't that correct?

5 A. The --

6 Q. Strike that.

7 Let me say it this way: If one is to
8 evaluate the sum total of Mr. Scherr at the time that he
9 is undergoing the angst associated with the Gillespie
10 case, you will have to agree that we are dealing with a
11 man who has been through a trial in which he has been
12 found to have done the things contained in the charge by
13 a jury -- is that correct? -- and has also had to
14 testify about the issues referred to in Oscar Allen's
15 memorandum during that trial. Isn't that correct?

16 A. No. I think that they are different. The
17 issue, getting into some personal matters, that really
18 had nothing to do at all with the putative class member
19 lawsuit. In -- and if you want to go into them --

20 Q. Mr. Scherr, I don't want to go into them. I
21 just want to get an admission out of you that they were
22 a part of your psychological make-up prior to the time
23 that you dealt with the issues, whatever they are,
24 associated with the Gillespie case.

25 MR. DARNELL: Object to the sidebar.

1 Q. (BY MR. HAYES) Factually, they occurred in
2 your life within two years of and prior to your having
3 to deal with the Gillespie lawsuit?

4 A. No.

5 Q. They didn't?

6 A. The issue about the secretary had occurred many
7 years prior to the Gillespie lawsuit being brought at a
8 time -- my divorce was final in 1992.

9 MR. DARNELL: Wait.

10 Q. (BY MR. HAYES) We are misperceiving each
11 other. I have no interest at all in going through those
12 issues with you. I want a simple acknowledgement from
13 you that the trial of the Beard case occurred -- your
14 affidavits are in '96. The Beard trial was in '95.
15 Whatever happened to you in the Beard trial, happened to
16 you within 18 months of when you were filing those
17 affidavits in the Gillespie case; isn't that correct?

18 A. The Beard trial went to trial in October
19 of '95. The affidavits were filed in '96.

20 Q. The summer of '96?

21 A. Whatever period of time.

22 Q. Less than a year later?

23 A. Right.

24 Q. Okay. And whatever emotional turmoil you went
25 through in the Beard case, be it large, be it small,

1 occurred within a year of when you executed those
2 affidavits in the Gillespie case?

3 A. No. Emotional issues had taken place years
4 before.

5 Q. When did the trial judge grant the summary
6 judgment in Gillespie?

7 A. I don't remember.

8 Q. Do you know when the opinion was -- the
9 appellate court opinion in Gillespie was?

10 A. No, but it's here.

11 Q. Why don't you look?

12 A. December 30th of 1998.

13 Q. Would you assume that the summary judgment was
14 probably within six months of when your affidavits were
15 filed?

16 A. I don't remember the dates. Here it shows that
17 the summary judgment was granted April of 1997. I'm
18 reading from the opinion.

19 Q. Okay. Any other damages other than the ones we
20 have discussed so far?

21 A. Not that I can remember at this time.

22 Q. You signed some responses to requests for
23 production, correct?

24 A. I don't know if I did or didn't.

25 Q. Let's just get them out and let you look at

1 them.

2 A. In which case are you talking about?

3 Q. This case?

4 A. I don't think we signed a request for
5 production. I may have signed some interrogatories. If
6 I did, I did.

7 Q. Let's just pull out the interrogatories. We'll
8 pull out what you signed.

9 A. Whatever I signed, I signed.

10 Q. We will just find them. They're here
11 somewhere.

12 Plaintiff's Answers to Interrogatories,
13 Exhibit Number 44.

14 (Exhibit marked, 44)

15 A. You are pounding that table to smithereens,
16 man.

17 Q. You bet.

18 That is your signature, Mr. Scherr, at the
19 last page?

20 A. Yes, sir.

21 Q. I'd like you to skim those answers and see if
22 they are still correct today?

23 A. Yes, sir.

24 Q. I'd like you to skim them first unless you have
25 already reread them within the last 24 hours.

1 A. I haven't, but --

2 Q. Pardon?

3 A. I haven't -- they appear to be correct.

4 Q. Okay.

5 MR. DARNELL: There it is. I thought we
6 had given you the numbers, right there.

7 MR. HAYES: Where are they? Would you
8 point them out to me?

9 MR. DARNELL: Number 7.

10 Q. (BY MR. HAYES) May I see that?

11 Number 7, Question: Are you seeking an
12 award of money -- of any sum of money whether by damage
13 or otherwise? State the full amount.

14 Answer: 1, Attorney's fees are not fully
15 determined. They are based upon 150 to 250 an hour.
16 150,000 paid on October 24, 1995.

17 What 150,000 did you pay?

18 A. I thought it was, like I said, 125-, and I put
19 150-. I was thinking it was that. Whatever the check
20 shows is whatever we paid. The settlement shows, it was
21 117,500, so whatever we paid to settle the claim --

22 Q. You certainly wouldn't pay more money than you
23 were obligated by the settlement documents to pay, would
24 you, Mr. Scherr?

25 A. The money was sent to Mr. Hudgins.

1 Q. The amount paid to Hudgins & Hudgins was
2 \$46,341.21; is that correct?

3 A. That's what the answer says.

4 Q. The amount paid to Baker & Botts was 17.5; is
5 that correct?

6 A. Yes.

7 Q. My question is, I want to reconcile the 150-
8 paid on October 24th versus the 117.5. How do we
9 reconcile the two, Mr. Scherr?

10 A. Apparently, the release was 117.5, so I think
11 that is the correct number.

12 Q. Would you please make a correction on that?

13 A. I think the way to do it is go back and get the
14 actual check.

15 MR. DARNELL: We will get you the checks.

16 MR. HAYES: I want to take the next 45,
17 which will be the next exhibit, and I will hand it to
18 counsel. Counsel will get the check or checks, stick
19 that sticker on it, and turn it over to the court
20 reporter. Take the whole piece of paper with you.

21 MR. DARNELL: I'll give her the deals.
22 What we will do is -- the number -- this way she will
23 have the number and I'll have the check.

24 (Requested item, 2)

25 Q. (BY MR. HAYES) When you were asked to testify

1 on attorney's fees as an expert, what do you intend to
2 say?

3 A. Whatever may be asked of me in terms of my
4 opinions.

5 Q. Well, I understand. The problem is, we agreed
6 not to make you write a report. So tell me what you are
7 going to say, so I can just get on down the road.

8 A. I have not looked at the cumulative number of
9 hours spent by Mr. Darnell on this case. However, I
10 would be testifying that his reasonable and necessary
11 attorney's fees would be between 150 to 250 dollars an
12 hour in the prosecution of this claim.

13 And I would be, if need be, proving up that
14 the charges of Hudgins and Baker & Botts were reasonable
15 and necessary for the defense of the claim on Gillespie.

16 Q. Have you reviewed the charges of Hudgins and
17 Baker Botts?

18 A. Yes, sir, I have.

19 Q. Do you have those documents?

20 A. I think we have provided to you.

21 MR. DARNELL: I thought we had it. If all
22 we did is give you the number, we will get them again,
23 in any case.

24 MR. HAYES: Because all I have got is a
25 number.