

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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MARY LOUISE SERAFINE,) AU:11-CV-01018-LY
Plaintiff,)
VS.) AUSTIN, TEXAS
TIM F. BRANAMAN, SHERRY L. LEE,)
Defendants.) OCTOBER 29, 2013

TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE LEE YEAKEL
VOLUME 2

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08:53:37 1 (Open Court)

09:01:14 2 THE COURT: Ms. Penn, you may continue your
09:01:16 3 cross-examination of the plaintiff.

09:01:33 4 MS. PENN: May I proceed, Your Honor?

09:01:34 5 THE COURT: You may.

09:01:35 6 MS. PENN: Thank you.

09:01:36 7 **MARY L. SERAFINE,**

09:01:36 8 having been first duly sworn, testified as follows:

09:01:36 9 **CROSS-EXAMINATION**

09:01:36 10 **BY MS. PENN:**

09:01:37 11 Q. Good morning, Dr. Serafine.

09:01:38 12 A. Good morning.

09:01:39 13 Q. Yesterday in your direct examination you discussed an
09:01:42 14 article published by Christensen and Jacobson. Do you remember
09:01:46 15 that?

09:01:46 16 A. Yes, I did.

09:01:47 17 Q. And that article was published in 1994, correct?

09:01:50 18 A. That's right.

09:01:50 19 Q. Okay. That article actually is a collection or analysis
09:01:57 20 of meta-analyses; is that correct?

09:01:58 21 A. It's review of meta-analyses, yes.

09:02:01 22 Q. Thank you. A review of meta-analyses.

09:02:05 23 And those meta-analyses looked at the efficacy of
09:02:08 24 psychotherapy provided by professionals versus nonprofessionals
09:02:12 25 in the field of psychology; is that correct?

09:02:14 1 A. The meta-analysis was for comparing trained against
09:02:21 2 untrained and also self-help measures against psychotherapy.
09:02:25 3 Q. Okay. And in Christensen and Jacobson's article, in the
09:02:30 4 review which they published this analysis, they don't provide a
09:02:39 5 description of the patient population looked at in those
09:02:42 6 meta-analyses, do they?
09:02:44 7 A. I don't know. I'd like to look at the article.
09:02:47 8 Q. Okay.
09:03:54 9 A. (Reviews document)
09:03:54 10 They describe three meta-analyses. In the first one
09:03:58 11 they don't identify the patient population. In the second one
09:04:02 12 they identify the second meta-analysis only had to do with
09:04:06 13 social adjustment, obesity, phobias, and psychosis.
09:04:12 14 Q. Yes, ma'am. Okay. That was my next question, actually,
09:04:15 15 was that --
09:04:16 16 A. Yeah.
09:04:16 17 Q. -- of the population that we identified, all we know about
09:04:20 18 them is that they self-identified as suffering from these four
09:04:23 19 issues that you just named for us; is that right?
09:04:27 20 A. I think there is no evidence that they self-identified at
09:04:31 21 all.
09:04:31 22 Q. Okay.
09:04:32 23 A. The 40 studies that were meta-analyzed there could have
09:04:37 24 been based on the therapist's observation, it could have been
09:04:40 25 based on an independent panel's observation, it could have been

09:04:45 1 based on any other records. We don't know.

09:04:47 2 Q. Okay. But the subjects themselves suffered from social
09:04:51 3 adjustment issues, phobias, psychosis, and obesity; is that
09:04:54 4 right?

09:04:55 5 A. That's what that meta-analysis was limited to, which was
09:04:58 6 other studies where the people were identified in that way.

09:05:04 7 Q. Right. And we don't know anything else about the patient
09:05:07 8 populations in any of these meta-analyses, do we?

09:05:11 9 A. Let me take a look. I don't -- I don't see in this review
09:05:19 10 of meta-analyses a list of when -- when meta-analyses are done.
09:05:28 11 And in this particular case, I don't see a list of what each
09:05:37 12 study included. In one case there were 40 studies that could
09:05:40 13 have been, you know, slightly different. In other cases they
09:05:43 14 say at the top of page 9, "An analysis of 475 studies that did
09:05:50 15 not find a correlation between years of training and successful
09:05:54 16 outcome."

09:05:55 17 Q. But we simply don't know; isn't that right?

09:05:58 18 A. Well, I can't tell from this article.

09:06:00 19 Q. Thank you. That was my question.

09:06:02 20 And what we -- we also don't know, then, is the
09:06:06 21 degree of severity that the subjects suffered from any of these
09:06:11 22 disorders or issues that they've identified; isn't that right?

09:06:14 23 A. I'm not able to determine that from this report -- this
09:06:19 24 review.

09:06:19 25 Q. Thank you. So then we don't know what treatments were

09:06:21 1 used with what patients or what subjects suffering from each of
09:06:25 2 these disorders; is that correct?

09:06:27 3 A. In a meta-analysis we wouldn't be able to do that because
09:06:31 4 we're combining data sets from independent primary studies.

09:06:38 5 Q. Okay. And this study was looking at psychotherapy
09:06:42 6 broadly; is that correct?

09:06:43 7 A. I don't know what you mean by "psychotherapy broadly."

09:06:46 8 Q. Okay. Would you agree with me that cognitive behavioral
09:06:51 9 therapy, dialectical behavioral therapy, these are types of
09:06:55 10 psychotherapies; is that right?

09:06:57 11 A. Yes. These are two types, yes, commonly used.

09:07:00 12 Q. And from the Christensen and Jacobson review, we don't
09:07:05 13 know which of these forms of psychotherapy were used with which
09:07:08 14 of the subjects; is that right?

09:07:10 15 A. That's right. Because the purpose of the meta-analysis
09:07:13 16 was to compare trained against completely untrained therapists.

09:07:16 17 Q. Right. So it's possible that certain forms of
09:07:19 18 psychotherapy have greater efficacy with certain types of
09:07:23 19 issues or disorders than with others. Is that fair to say?

09:07:26 20 A. It's theoretically possible, but except in very rare
09:07:35 21 situations. Only in phobias has that actually been borne out.

09:07:39 22 Q. And this is just based on your review?

09:07:42 23 A. This is based on my review of the literature altogether,
09:07:45 24 yes.

09:07:45 25 Q. Okay. Thank you. And the study, as we identified, it

09:07:50 1 looks only at psychotherapy, correct?

09:07:52 2 A. No. The Christensen and -- no. These same results have

09:07:58 3 not only been in that particular article and in others

09:08:02 4 confirmed about psychotherapists versus completely untrained

09:08:06 5 people, but also, I said yesterday, in this article and in many

09:08:10 6 others, self-help methods such as joining a group such as AA,

09:08:15 7 other kinds of support groups, and reading a book.

09:08:19 8 Q. But what we're talking about here is the efficacy of

09:08:22 9 psychotherapy. That was your point, wasn't it?

09:08:25 10 A. It's -- no. Not exactly. It's about whether -- the point

09:08:35 11 on this is about whether trained psychotherapists, regardless

09:08:39 12 of what method they're using, perform any better than -- than

09:08:44 13 untrained people or than books.

09:08:47 14 Q. Yes, ma'am.

09:08:47 15 A. But both could be efficacious. Both could help people.

09:08:52 16 Q. I understand. But we're talking about the treatment of

09:08:54 17 psychotherapy, however, when we're discussing professionals

09:08:57 18 versus nonprofessional sources of health, correct?

09:09:00 19 A. That's right. But that does not address efficacy. There

09:09:03 20 are --

09:09:03 21 Q. Thank you. I'll let your counsel address the rest of

09:09:05 22 this. I just wanted to identify that we're just talking about

09:09:09 23 the realm of psychotherapy here. We're not talking about

09:09:12 24 anything else that a psychologist does in the

09:09:16 25 Christensen-Jacobson?

09:09:16 1 A. This was about psychotherapists, yes. That's correct.

09:09:18 2 Q. And you would agree with me that there are other things

09:09:20 3 that psychologists do in their practice outside of

09:09:23 4 psychotherapy, correct?

09:09:25 5 A. Psychologists do a great multitude of things.

09:09:29 6 Q. Okay. And one of the other articles I believe you

09:09:34 7 identified was a Norcross study; is that right?

09:09:36 8 A. Yes. He has several. Do you mean the Delphi polls?

09:09:40 9 Q. Yes, ma'am. The Delphi polls. And the Delphi polls were

09:09:42 10 intended to identify treatments that had been discredited in

09:09:46 11 the profession; is that right?

09:09:47 12 A. That's right.

09:09:48 13 Q. And Norcross in that study identified a number of

09:09:51 14 treatments and surveyed a number of psychologists in the

09:09:55 15 profession to determine which of those treatments that he had

09:10:01 16 identified had been discredited among the people that he asked;

09:10:04 17 is that correct?

09:10:04 18 A. That's correct.

09:10:05 19 Q. Okay. And of those studies -- or excuse me. Of those

09:10:10 20 treatments that Norcross identified to the psychologists, isn't

09:10:14 21 it true that with regard to at least -- well, excuse me. Let

09:10:18 22 me back up.

09:10:18 23 With regard to the treatments that he identified,

09:10:22 24 most of the participants had not heard of those treatments; is

09:10:27 25 that right?

09:10:28 1 A. And he also asked them to identify whether they were
09:10:33 2 familiar with the treatment or not. In my review of his data,
09:10:37 3 I excluded those where a third of the experts or more said they
09:10:44 4 were not -- 33 percent or more said that they were not familiar
09:10:49 5 with the treatment, then I disregarded those. But it is not
09:10:53 6 the case that most of the people were unfamiliar with most of
09:10:56 7 the treatments.

09:10:57 8 Q. Okay. The treatments that he identifies he's trying --
09:11:01 9 the purpose of Norcross's study is to identify treatments that
09:11:05 10 are discredited in the profession, correct?

09:11:11 11 A. Yes. By consensus. He was looking for consensus and
09:11:16 12 consistency.

09:11:16 13 Q. Norcross, more generally, though, does identify that there
09:11:20 14 are treatments that are efficacious and are more useful to
09:11:28 15 patients; isn't that right?

09:11:29 16 A. Not in that article. He was doing just the opposite. He
09:11:33 17 himself and his research group identified what they expected to
09:11:36 18 be discredited treatments, which they called in their second
09:11:40 19 article "quackery." So they selected, I'll call it a
09:11:44 20 population, of treatments that they thought were discredited.
09:11:47 21 And they sought opinion on that from a panel of a 101 experts.

09:11:53 22 Q. And you're familiar with Dr. Norcross's work more
09:11:56 23 generally, aren't you?

09:11:58 24 A. I don't -- I'm not sure what you mean by "familiar." I
09:12:04 25 have read some other articles of his and seen a video, but I'm

09:12:09 1 certainly not -- I certainly am not an expert on his work.

09:12:13 2 That's for sure.

09:12:14 3 Q. Okay. So would you agree with me if I said that he has

09:12:17 4 written, at least in some volume, on his opinion that

09:12:24 5 psychologists use empirical data analysis to determine

09:12:29 6 treatments that are useful, that should be credited within the

09:12:32 7 profession? Would you agree with that statement?

09:12:38 8 A. Would you state that again?

09:12:39 9 Q. Okay. Dr. Norcross has more generally written on his

09:12:43 10 opinion that the field of psychology use empirical data

09:12:49 11 analysis to identify treatments that are useful and should be

09:12:53 12 credited within the profession?

09:12:54 13 A. Yes. It's his opinion personally that psychologists

09:12:59 14 should use empirical studies to determine treatments. I don't

09:13:05 15 believe it is his opinion that they in fact do.

09:13:07 16 Q. Okay. Dr. Norcross himself is a licensed psychologist,

09:13:12 17 isn't he?

09:13:12 18 A. I don't know.

09:13:13 19 Q. Okay. We talked yesterday about your use of the term

09:13:18 20 "psychologist" on your campaign Web site. Do you remember

09:13:21 21 that?

09:13:21 22 A. Yes.

09:13:22 23 Q. And we talked a little bit about the importance of the

09:13:26 24 public's understanding of the term "psychologist" for your use

09:13:29 25 of term to be meaningful; is that right? Do you remember that?

09:13:33 1 A. Yes. We ...

09:13:35 2 Q. Okay.

09:13:36 3 A. You discussed that with me.

09:13:37 4 Q. Okay. I asked you if it was possible that a member of the
09:13:43 5 public could read your Web site and see the term "psychologist"
09:13:47 6 and make the assumption from the use of the term "psychologist"
09:13:50 7 that you were licensed. Do you remember me asking you that
09:13:53 8 question?

09:13:53 9 A. Yes.

09:13:54 10 Q. And you told me that it would be unreasonable for anyone
09:13:56 11 to see that term psychologist and automatically assume that
09:14:00 12 meant that you were a licensed psychologist. Do you remember
09:14:03 13 that?

09:14:03 14 A. Yes. And I said in the entire time that I've been using
09:14:06 15 that term and among everybody that I knew who uses that term, I
09:14:10 16 have never heard of someone assuming licensure from the use of
09:14:16 17 that term. And, in addition, every dictionary and every
09:14:21 18 textbook in psychology that I know of does not connect the term
09:14:24 19 "psychologist" or "psychology" with licensure in any way or
09:14:28 20 even treatment.

09:14:30 21 Q. Okay. And I just wanted to clarify. I believe yesterday
09:14:33 22 you said no one has ever thought of you as a psychologist -- as
09:14:37 23 a licensed psychologist, correct?

09:14:40 24 A. Not that I'm aware of.

09:14:42 25 Q. Okay. And I just wanted to clarify that that meant no one

09:14:45 1 had ever made you aware of their misunderstanding?

09:14:49 2 A. No.

09:14:49 3 Q. Okay.

09:14:49 4 A. But if they --

09:14:50 5 Q. That's fine. I just needed the "no" answer. Thank you.

09:14:53 6 A. If they had, I certainly would have explained to them that

09:14:55 7 I'm not licensed.

09:14:56 8 Q. I understand.

09:14:57 9 A. One would only need to ask me.

09:14:59 10 Q. I understand. If you are writing on your Web site,

09:15:04 11 though, that you are a psychologist, certainly, you can't

09:15:07 12 expect the entire public who is reading your Web site to ask

09:15:10 13 you whether or not you're licensed. That would be a very

09:15:16 14 cumbersome endeavor, would it not?

09:15:18 15 A. If everybody reading the Web site had to determine in

09:15:22 16 advance whether I was licensed, it would be cumbersome for all

09:15:27 17 of them to E-mail me and ask that question.

09:15:29 18 Q. Okay. And yesterday we talked a little bit about your

09:15:32 19 definition of the term "psychology" and the use of the term

09:15:39 20 psychologist, and we talked a little bit about the study versus

09:15:41 21 the practice of various sciences. Do you remember that

09:15:43 22 conversation?

09:15:43 23 A. What I talked about yesterday was not my opinion -- only

09:15:46 24 my opinion about psychology. It is the way that it's used in

09:15:49 25 the field and the way it is generally defined by others as

09:15:52 1 well.

09:15:52 2 Q. Right. And I believe you mentioned that at least with
09:15:57 3 regard to psychology, the use of these endings, "ologies" and
09:16:02 4 "ologist," implied that they were studies -- studies of certain
09:16:05 5 fields and, therefore, didn't take that extra step to identify
09:16:09 6 a profession, as in practice or an applied profession. Would
09:16:12 7 that be correct?

09:16:13 8 A. I don't remember saying that it -- I don't remember
09:16:20 9 talking about a profession, per se. I consider psychology to
09:16:23 10 be a discipline, and a psychologist is someone who specializes
09:16:30 11 in and knows about psychology.

09:16:32 12 Q. Okay. So you would agree with me or you do at least
09:16:36 13 identify that it's possible that, in Texas, there are many
09:16:39 14 other professions that are "ologies" or "ologists" that are
09:16:44 15 licensed and required to be licensed in Texas to practice?

09:16:48 16 A. You said I'm -- you'll have to give me the question
09:16:53 17 again. I don't know of any other discipline similar to
09:16:59 18 psychology, such as sociologists, anthropologists. I don't
09:17:03 19 know of any other general -- economists aren't licensed and so
09:17:07 20 forth -- that are licensed in the way that "psychologist" is
09:17:11 21 used in this statute. I'm just unfamiliar with it.

09:17:13 22 Q. Okay. So it's not a matter of the term "ology" or
09:17:17 23 "ologist" that gives you pause. Is that fair to say?

09:17:21 24 A. What do you mean "gives me pause"?

09:17:24 25 Q. For instance, the State regulates audiologists and

09:17:30 1 cosmetology and speech and language pathology. Those are
09:17:34 2 "ologies" that are licensed by the State. And so the
09:17:37 3 distinction that you're trying to make with psychology doesn't
09:17:40 4 rely purely on the definition or the use of "ologies" and
09:17:45 5 "ologists" to indicate that it is a study and not a practice;
09:17:48 6 is that right?

09:17:49 7 A. Well, in my opinion, the word "psychology" does not
09:17:55 8 inherently or necessarily refer to a practice.

09:17:58 9 Q. Okay.

09:17:58 10 A. I have no opinion about audiology or cosmetology.

09:18:01 11 Q. Okay. You've provided on your Web site details about your
09:18:05 12 background in psychology, haven't you?

09:18:08 13 A. Yes, I have.

09:18:08 14 Q. You've identified your training and your teaching and your
09:18:12 15 publications, correct?

09:18:13 16 A. Yes.

09:18:14 17 Q. Okay.

09:18:14 18 A. And my research.

09:18:15 19 Q. And it's not your position that the statute or the Board's
09:18:19 20 action in this case prevents you from providing that
09:18:21 21 information, is it?

09:18:23 22 A. I don't believe that it does.

09:18:28 23 Q. Okay.

09:18:28 24 A. I'm not certain, but I don't believe so right now.

09:18:31 25 Q. Okay. So certainly by providing that information on your

09:18:34 1 Web site, you've been able to inform the voters that you do
09:18:37 2 have this depth of knowledge and experience in the field of
09:18:40 3 psychology, haven't you?

09:18:42 4 A. Yes, I have.

09:18:46 5 Q. Okay.

09:18:46 6 A. I have, as a result, a great deal of information about my
09:18:50 7 background in psychology. And I believe that it is confusing
09:18:54 8 to the voters and misleading to not refer to myself as a
09:18:57 9 psychologist after explaining all of my contribution to it and
09:19:02 10 my training in it and my teaching in it.

09:19:04 11 Q. So you believe that voters would be misled by reading
09:19:08 12 about your experience and background because they weren't able
09:19:11 13 to identify you with the term "psychologist"?

09:19:14 14 A. I think it looks very odd to describe a great deal of work
09:19:18 15 in psychology and not refer to oneself as a psychologist.

09:19:21 16 Q. But it's not necessarily misleading, is it?

09:19:24 17 A. I don't know if it's misleading or not, but it -- it has a
09:19:29 18 bad flavor to it.

09:19:30 19 Q. Okay. It's certainly not your position that the removal
09:19:34 20 of the term psychologist prevented you from winning the 2010
09:19:38 21 election, is it?

09:19:42 22 A. I don't think the removal of the word "psychologist" was
09:19:45 23 the cause of my losing the election.

09:19:47 24 Q. Okay. And you also identify yourself as a lawyer on your
09:19:50 25 Web site, don't you?

09:19:51 1 A. I did.

09:19:51 2 Q. And you have in fact become licensed in the State of Texas
09:19:55 3 as a lawyer?

09:19:56 4 A. Yes, I have.

09:19:56 5 Q. So it's not your position here that the State of Texas
09:19:59 6 should not be able to require you to become licensed as an
09:20:02 7 attorney?

09:20:03 8 A. Not at all.

09:20:03 9 Q. Only as a psychologist?

09:20:05 10 A. That's -- well, I'm not saying that the State completely
09:20:11 11 can't regulate anything in psychology at all. I'm not saying
09:20:15 12 that. But I'm not challenging the lawyer statute.

09:20:18 13 Q. Okay. So if I'm clear, what you just said was that you do
09:20:23 14 believe the State has some right to regulate some aspects of
09:20:27 15 psychology?

09:20:28 16 A. Yes, they may. I think that's a legal question, and they
09:20:31 17 certainly may.

09:20:32 18 Q. Okay.

09:20:33 19 A. You know, in my opinion.

09:20:34 20 Q. Okay. Such as the practice of psychology with actual
09:20:38 21 patients or clients? Would the State be allowed to regulate
09:20:41 22 that?

09:20:41 23 A. I'm not prepared to speak on that. I think it's a legal
09:20:45 24 question.

09:20:46 25 Q. Okay. We're here to talk about the legal question, and

09:20:49 1 you're an attorney, as we've talk about a little bit in your
09:20:53 2 direct.

09:20:54 3 MR. HAYS: Your Honor, we're going to object. We
09:20:56 4 have not tendered Dr. Serafine as a legal expert. I'm not sure
09:21:01 5 that would be appropriate testimony anyway.

09:21:03 6 THE COURT: Well, I'm not either. I'm certainly not
09:21:05 7 going to take it as expert legal testimony. But the witness is
09:21:08 8 on cross-examination. I'm going to allow Ms. Penn to pursue
09:21:12 9 this line of questioning, so the objection is overruled.

09:21:16 10 MS. PENN: Thank you, Your Honor.

09:21:17 11 Q. (BY MS. PENN) Dr. Serafine, what is your position on the
09:21:20 12 State's right to regulate the practice of psychology?

09:21:22 13 A. I think that the State could regulate the use of the term
09:21:28 14 "certified psychologist," "certified applied psychologist,"
09:21:32 15 "certified child psychologist," and that the State may put its
09:21:40 16 perimeter on some group of psychologist that it chooses however
09:21:44 17 it wants. I also think that school systems, court systems,
09:21:47 18 agencies could decide that they will only make use of certified
09:21:55 19 psychologists or, if preferable, the term "licensed."

09:22:00 20 But what I'm objecting to about the statute is not
09:22:04 21 the part that is about putting in a perimeter on some people;
09:22:09 22 but, rather, that the statute is prohibitive of everyone else
09:22:14 23 engaging in an enormously broad definition of practice of
09:22:19 24 psychology, including describing and explaining behavior which
09:22:23 25 is itself the definition of science. Describing and explaining

09:22:29 1 phenomena is the definition of any science in any area of
09:22:32 2 study, and doing so, describing and explaining, which are
09:22:37 3 speech activities in connection with normal people.

09:22:42 4 Q. Thank you. So if I can try to summarize what you've just
09:22:45 5 testified to, you do actually take the position that the State
09:22:48 6 should be able to regulate certain aspects of the practice of
09:22:51 7 psychology; is that right?

09:22:53 8 A. The State may be able to -- you use the word "practice"
09:22:58 9 which is a completely undefined term. But I am not here
09:23:02 10 arguing that the State couldn't regulate anything that
09:23:08 11 professionals do. I'm simply not making that broad an article.
09:23:12 12 I'm talking about the breadth of this particular statute and
09:23:15 13 what it is preventing me from doing.

09:23:18 14 Q. Okay. And you do understand that the statute at issue
09:23:20 15 here does define the practice of psychology, correct?

09:23:24 16 A. Yes. It defines --

09:23:25 17 Q. Thank you very much, Dr. Serafine. I'm done with my
09:23:29 18 questions. I'll let your counsel address the rest of this on
09:23:32 19 redirect.

09:23:35 20 MS. PENN: May I have just a minute?

09:23:37 21 THE COURT: You may.

09:23:45 22 MS. PENN: Thank you very much for your time,
09:23:47 23 Dr. Serafine. I pass the witness.

09:23:48 24 THE COURT: Mr. Hays, redirect?

09:23:52 25 MR. HAYS: Thank you, Your Honor.

REDIRECT EXAMINATION

09:23:52 1

09:23:52 2 **BY MR. HAYS:**

09:23:52 3 Q. We have just a few questions for you, Dr. Serafine. Right
09:24:03 4 at the end there, you were asked about defining or regulating
09:24:08 5 the practice of psychology, and you were fixing to explain
09:24:12 6 something. Would you please explain what you were fixing to
09:24:16 7 say.

09:24:16 8 A. Yes. There is a definition of the practice of psychology
09:24:19 9 in the statute, but it is enormously broad, covering
09:24:26 10 conversations with normal people. Describing and explaining
09:24:29 11 are clearly speech acts even with normal people. And if the
09:24:38 12 State could define in a different way what is prohibited, you
09:24:42 13 know, I believe such a prohibition, if it were limited, would
09:24:46 14 be constitutional.

09:24:52 15 Q. But, in your opinion, you think it's too broad the way it
09:24:55 16 is now?

09:24:55 17 A. It certainly is, because it prevents me from having and
09:24:59 18 providing the service of an ordinary one-to-one conversation
09:25:01 19 with individuals or groups.

09:25:05 20 Q. Okay. And in your experience and review of this issue, do
09:25:08 21 you have other examples of the types of services that you
09:25:14 22 believe would be prohibited by the statute?

09:25:16 23 A. Yes. If the --

09:25:16 24 MS. PENN: Objection, Your Honor. Relevance.

09:25:20 25 MR. HAYS: It's directly relevant to the overbroad

09:25:21 1 issue and the question she was asking her about the definition
09:25:24 2 of the statute.

09:25:25 3 THE COURT: I'll allow the question. The objection
09:25:28 4 is overruled.

09:25:28 5 A. Yes. If an agency elected to prosecute others as they
09:25:36 6 have prosecuted me -- or threatened prosecution and issued a
09:25:42 7 cease and desist order, I think they certainly could do the
09:25:45 8 same thing to people who provide management consulting. That's
09:25:49 9 certainly -- the statute covers organizational structures.
09:25:54 10 That's certainly businesses and business entities. They could
09:25:58 11 certainly prohibit executive coaching and life coaching. A
09:26:03 12 great deal of executive coaching goes on inside corporations.
09:26:08 13 They often have inside corporate coaches. Most of those people
09:26:12 14 are business professionals with no psychological training. So
09:26:17 15 the statute covers all of those, and this agency could
09:26:22 16 easily -- could easily prosecute or issue cease and desist
09:26:27 17 orders as they have with me.

09:26:29 18 Q. What about sports coaches?

09:26:31 19 A. Yes. The same thing. The statute refers to describing
09:26:36 20 and explaining an ameliorating behavior. It could be sports
09:26:42 21 coaches if -- especially if a person is holding himself or
09:26:46 22 herself out as somebody who can help you become a better weight
09:26:51 23 lifter or a better football player on a one-to-one basis -- or
09:26:58 24 a better golfer. That certainly is describing or explaining
09:27:03 25 behavior, uses psychological principles -- especially in golf,

09:27:09 1 using mental principles, as is sometimes recommended. And it's
09:27:14 2 definitely providing a service to normal people.

09:27:17 3 Q. You were asked about the Christensen and Jacobson studies
09:27:22 4 and meta-analysis. Would you please briefly describe again
09:27:28 5 what a meta-analysis is and whether it's considered an
09:27:34 6 important and legitimate tool and part of research for drawing
09:27:39 7 conclusions about empirical matters in the field of psychology.

09:27:47 8 A. Yes. I consider a meta-analysis to be virtually the only
09:27:51 9 legitimate way of coming to a conclusion about -- about
09:28:01 10 psychological matters such as these, as the ones I'm talking
09:28:04 11 about -- I'm not speaking for any other field -- because we
09:28:07 12 don't do a one-shot experiment. We don't compare therapists
09:28:10 13 and non-therapists and just do one experiment. I don't care
09:28:14 14 how many subjects there are. We have to look at a large sample
09:28:18 15 of studies across a broad area, handled in different parts of
09:28:22 16 the country, conducted at different universities by different
09:28:27 17 researchers.

09:28:27 18 A meta-analysis is a statistical method of combining
09:28:31 19 data on some question that you want to ask the data. So by
09:28:37 20 just taking out the data for trained and untrained people, for
09:28:41 21 example, you can get a larger sample. And regardless of
09:28:45 22 what -- regardless of what techniques are being used, you have
09:28:49 23 a much higher probability of detecting some difference. It's
09:28:52 24 called the power -- a statistical power, the power of the test.
09:28:57 25 You get a much higher power, and you are much more likely to

09:29:01 1 detect differences between the two if you were using a
09:29:05 2 meta-analysis.

09:29:05 3 The point that Christensen and Jacobson point out is
09:29:10 4 that three separate meta-analyses, trying to reanalyze the data
09:29:18 5 that I just mentioned, trying to determine whether untrained
09:29:23 6 therapists did as well or better, many of the times they did
09:29:30 7 better. The point of it is that has been meta-analyzed three
09:29:35 8 different times by three different research groups and came to
09:29:39 9 the same conclusions or even stronger in the second case -- was
09:29:42 10 stronger in the second case.

09:29:44 11 Q. Okay. Now, in your experience in the field of psychology
09:29:50 12 and your academic work and other work, have you found that
09:29:55 13 meta-analyses are commonly used by experts in the field as a
09:30:00 14 valid tool?

09:30:01 15 A. Yes. It is -- it is used by people to address the
09:30:08 16 question -- the question I just raised, the question of
09:30:10 17 comparison between self-help and psychotherapy. It is also
09:30:14 18 used to address the question that I mentioned before: Are
09:30:19 19 therapists trained on opposite assumptions getting exactly the
09:30:22 20 same results?

09:30:23 21 And that has been meta-analyzed completely by many
09:30:30 22 different experts, and they come to the same conclusion: That
09:30:33 23 there are -- there are no differences between therapists who
09:30:38 24 operate on assumption that the unconscious mind drives
09:30:44 25 behavior, therapists who operate on the opposite assumption,

09:30:48 1 that there is no such thing as the unconscious and we deal with
09:30:51 2 reinforcement from the environment instead, or what are called
09:30:55 3 humanistic therapies. I don't need to describe these in
09:30:58 4 detail, but if there were some detectable differences, they
09:31:00 5 would be known by now after 40 years of research.

09:31:06 6 Q. One more question. You were asked questions about your
09:31:13 7 Web site and the issue of whether people seeing on your Web
09:31:15 8 site a description of yourself as a psychologist, whether folks
09:31:21 9 might be fooled into thinking that you are a licensed
09:31:27 10 psychologist.

09:31:28 11 While you had that on your Web site, were you ever
09:31:30 12 approached by anyone seeking psychotherapy as a result of their
09:31:37 13 seeing your description on your Web site?

09:31:40 14 A. I was never approached by anyone who assumed that I was a
09:31:50 15 licensed psychologist from my Web site, from many years of
09:31:53 16 being listed in Who's Who, nor have I ever heard or known of
09:31:57 17 any other unlicensed psychologist who was assumed to be a
09:32:03 18 licensed psychologist because of the use of that word. I've
09:32:06 19 never even heard of such an example.

09:32:09 20 And people who are looking, let's say, for a licensed
09:32:12 21 psychologist I don't think would be anywhere near likely to
09:32:15 22 say, I'd like to find a licensed psychologist. Maybe somebody
09:32:19 23 is running for senate that's a licensed psychologist. So let's
09:32:24 24 see if they're there. It certainly did not happen in my case.

09:32:29 25 Q. Okay. Thank you, Dr. Serafine. That's all the questions

09:32:31 1 I have.

09:32:32 2 MR. HAYS: Your Honor, in passing the witness, we
09:32:34 3 explicitly reserve the right to recall her for rebuttal
09:32:38 4 testimony if necessary.

09:32:42 5 THE COURT: No problem.

09:32:45 6 Ms. Penn, recross?

09:32:46 7 **RECROSS-EXAMINATION**

09:32:46 8 **BY MS. PENN:**

09:32:51 9 Q. Dr. Serafine, we just discussed the Christensen and
09:32:55 10 Jacobson review. That was published in 1994, wasn't it?

09:32:58 11 A. Yes, it was.

09:32:59 12 Q. It was 20 years ago, wasn't it?

09:33:01 13 A. Yes. That's correct.

09:33:02 14 Q. Thank you. You also talked about the threat of
09:33:05 15 prosecution that other people, such as management consultants
09:33:11 16 and sports coaches, may fear based on the State's statute. Do
09:33:16 17 you remember that?

09:33:18 18 A. I said that the government could potentially prosecute
09:33:26 19 others based on this statute.

09:33:28 20 Q. The cease and desist order that you received addressed
09:33:31 21 solely your use of the term "psychologist," didn't it?

09:33:35 22 A. No. I don't believe so. I don't have it right in front
09:33:38 23 of me, but I believe that it had the statute attached to it --
09:33:42 24 the statute defining what practices I couldn't engage in.

09:33:49 25 MS. PENN: I'm going to object as nonresponsive.

09:33:51 1 Q. (BY MS. PENN) My question was whether the cease and desist
09:33:54 2 order addressed your use of the term "psychologist" only.
09:33:58 3 A. Online?
09:33:58 4 Q. Yes, ma'am. Or your use of the term "psychologist." Did
09:34:04 5 it address your practice of psychology?
09:34:06 6 A. Yes, it did.
09:34:07 7 Q. The cease and desist order accused you of practicing
09:34:11 8 psychology, other than the use of the term "psychologist"?
09:34:17 9 A. I don't know that it accused me of practicing psychology,
09:34:21 10 but it prohibited me from doing so.
09:34:22 11 Q. Through the use of your term "psychologist," correct?
09:34:30 12 A. I certainly did not and still don't understand it that
09:34:33 13 way. I interpreted the Web site -- I'm sorry -- the cease and
09:34:37 14 desist order to prohibit me from violating any part of the
09:34:46 15 statute, and I have complied with that.
09:34:47 16 Q. So it's your position that the case that we're here
09:34:49 17 talking about is about your use of the term "psychologist" as
09:34:54 18 well as your activities practicing psychology?
09:34:57 19 A. Yes.
09:34:58 20 Q. Okay.
09:34:58 21 A. In the practice part of the Act, describing and explaining
09:35:01 22 behavior, in conversations and addressing normal behavior, yes.
09:35:06 23 Q. So you don't understand that there's been no enforcement
09:35:09 24 action against you for anything other than your use of the term
09:35:12 25 "psychologist"? You don't understand that to be the truth; is

09:35:15 1 that right?

09:35:16 2 A. I don't. The prohibition in the cease and desist order
09:35:24 3 was much broader than that.

09:35:25 4 Q. Okay. You're not a management consultant, are you?

09:35:28 5 A. It greatly depends on what you mean by a management
09:35:30 6 consultant, but I have been -- I have received inquiries to
09:35:40 7 potentially do management consulting involving large law firms.

09:35:42 8 Q. Okay. Presently do you have any plans to be a management
09:35:45 9 consultant?

09:35:46 10 A. I don't.

09:35:46 11 Q. And you're not a sports coach, are you?

09:35:48 12 A. I am not.

09:35:49 13 Q. Okay. So any fear of a sports coach or a management
09:35:55 14 consultant being prosecuted under the Act would not be
09:35:58 15 something that would be a fear that you personally have, would
09:36:01 16 it?

09:36:01 17 A. I personally do not have a fear about that.

09:36:06 18 Q. Right. We're here because of your use of the term
09:36:09 19 "psychologist" on your Web site, correct?

09:36:10 20 A. That's one of the reasons.

09:36:12 21 Q. Okay. Thank you very much.

09:36:13 22 MS. PENN: No further questions, Your Honor.

09:36:14 23 THE COURT: Mr. Hays?

09:36:19 24 *****

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FURTHER DIRECT EXAMINATION

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BY MR. HAYS:

Q. Dr. Serafine, would you please open the exhibit notebook and turn to tab 2, being Plaintiff's Exhibit 2.

A. (Complies)

Q. And, again --

A. Oh, yes.

Q. -- is this the --

A. Yes.

Q. -- cease and desist order that you were referring to?

A. Yes.

Q. Would you please read the fourth paragraph of that order.

A. Yes.

Q. Read it aloud.

A. This is the part that I was referring to. It says,

"Therefore, you are ordered to immediately cease and desist from using the title 'psychologist' or offering or providing psychological services in the State of Texas."

Q. Okay. And is that what you were referring to when you said you understood that you were being ordered not just to take the term "psychologist" off the Web site and cease using it, but not to provide psychological services as defined in the statute?

A. Yes. That's correct. With a copy of the statute attached to it.

09:37:25 1 MR. HAYS: Okay. Thank you.

09:37:28 2 MS. PENN: Nothing further, Your Honor.

09:37:30 3 THE COURT: All right. You may step down.

09:37:55 4 Plaintiff may call their next witness.

09:37:58 5 MR. HAYS: I'll retrieve the witness from the hall.

09:39:15 6 MR. MANLEY: Plaintiff calls James Hasik.

09:39:44 7 (Witness sworn)

09:39:45 8 **JIM HASIK,**

09:39:45 9 having been first duly sworn, testified as follows:

09:39:45 10 **DIRECT EXAMINATION**

09:39:45 11 **BY MR. MANLEY:**

09:39:45 12 Q. Good morning.

09:39:45 13 A. Good morning.

09:39:46 14 Q. Would you state your name for the record, please.

09:39:49 15 A. Jim Hasik.

09:39:49 16 Q. And, Mr. Hasik, did you work on Dr. Serafine's 2010 State

09:39:54 17 Senate campaign?

09:39:55 18 A. I did.

09:39:55 19 Q. What was your role on the 2010 campaign?

09:39:58 20 A. I was at one point the social media director, and the

09:40:02 21 largest single aspect of that was I built the Web site.

09:40:06 22 Q. And about how much time did you spend on the campaign each

09:40:13 23 week while the campaign was going on?

09:40:17 24 A. Well, it's hard to remember. It was some time ago. But I

09:40:20 25 think that I was spending 10 or maybe 15 hours a week at one

09:40:23 1 point.

09:40:23 2 Q. And you said you were the social media director, and the
09:40:30 3 largest part of your responsibilities was the Web site. Were
09:40:33 4 there other aspects of your job?

09:40:37 5 A. Well, at various points we had talked about the use of
09:40:40 6 other media such as Facebook, Twitter, and things like that.
09:40:48 7 But this is all Internet access, so it's largely what I did.

09:40:54 8 Q. Okay.

09:40:55 9 A. I attended meetings as well and events, but that was the
09:40:59 10 core of my job.

09:41:00 11 Q. What do you do for a living?

09:41:03 12 A. I'm -- I do two things. I'm a business consultant largely
09:41:08 13 in marketing strategy for defense contractors. And I'm also a
09:41:13 14 senior fellow at the Atlantic Council of the United States, a
09:41:17 15 think tank in D.C., although that's a non-resident appointment,
09:41:22 16 so I spend most of my time here in Texas.

09:41:25 17 Q. And what do you do as senior fellow for the Atlantic
09:41:29 18 Council?

09:41:29 19 A. I research and I write largely on questions of defense
09:41:35 20 technology and industrial affairs across -- across the globe,
09:41:40 21 but with a focus on the NATO alliance.

09:41:45 22 Q. And you said your other job right now is a business
09:41:48 23 consultant addressing marketing issues?

09:41:50 24 A. Yes. Largely for defense contractors, occasionally doing
09:41:54 25 work for defense ministries overseas. And that occupies a good

09:42:02 1 bit of my time when I'm not actually actively in school, which
09:42:07 2 is a whole other life, too.

09:42:08 3 Q. Well, let's talk about your educational background. Where
09:42:12 4 did you go to college?

09:42:13 5 A. I went to Duke. I did a bachelor's there in history with
09:42:16 6 a double major in physics. And then I went to the University
09:42:20 7 of Chicago and did a master's in business with a concentration
09:42:24 8 in business economics. And now I'm a third-year Ph.D. student
09:42:29 9 here at the LBJ School for Public Affairs. I'm studying public
09:42:33 10 policy.

09:42:34 11 Q. And did you go straight from Duke to Chicago?

09:42:37 12 A. No. In between I spend just -- just about four years as
09:42:42 13 an officer in the U.S. Navy. I spent about two years as a
09:42:49 14 defense contractor myself in D.C. -- or outside D.C. doing
09:42:54 15 studies and analysis work for the Air Force Department. And
09:42:56 16 then I went to Chicago, and afterwards I spent -- or I have
09:43:00 17 spent something going on 15 years as a business consultant.

09:43:04 18 Q. How many folks were working on Dr. Serafine's campaign
09:43:09 19 along with you?

09:43:10 20 A. Well, I mean, it's hard to remember. But when we started,
09:43:16 21 there were just a handful. I couldn't tell you all the names,
09:43:20 22 although I see some people, certainly. But three or four. At
09:43:24 23 one point we had a dozen. I think by election night I remember
09:43:28 24 running to at least a dozen people.

09:43:30 25 Q. Did you have student volunteers?

09:43:33 1 A. Yes. I think the largest contingent of volunteers, if you
09:43:40 2 want to talk about it demographically, was undergraduates from
09:43:43 3 the University of Texas.

09:43:49 4 Q. Did the campaign have the support of the Travis County
09:43:52 5 Republican Party?

09:43:54 6 A. Well, we had the moral support, certainly. I didn't
09:43:57 7 actually get too into the finances. But I don't think they
09:44:01 8 were writing us large checks.

09:44:05 9 Q. But they supported that campaign?

09:44:06 10 A. Yes. Ours was the candidate of the party, yes.

09:44:10 11 Q. Guess that sort of leads to my next question. Did you
09:44:16 12 regard Dr. Serafine's campaign as a serious political campaign?

09:44:20 13 A. Yes, I would. I would put it this way. I wouldn't have
09:44:25 14 worked on it if I didn't think it was serious. I have plenty
09:44:29 15 of other stuff I could -- I'm a pretty busy guy, so I would
09:44:31 16 have done something else if I didn't think it was a good idea.

09:44:34 17 Q. Did you think that Dr. Serafine had a chance to win in
09:44:39 18 Travis County?

09:44:40 19 A. Well, I think somebody always has a chance to win. I did
09:44:44 20 regard our chances of winning as low. But I also say that's
09:44:49 21 not, at least for me, the only reason to run a political
09:44:54 22 campaign. I knew that we were running a candidate in a Texas
09:45:00 23 Senate District that was majority democrat by a good margin.
09:45:03 24 But I also saw, you know, some flaws in the other candidate
09:45:08 25 that I thought we could exploit. And I knew that even if we

09:45:12 1 had a low chance of winning, I wanted to get involved in making
09:45:15 2 a statement about a long-term project to run competitive
09:45:23 3 candidates for the GOP in as many districts as we could.

09:45:26 4 I've been alarmed, actually, looking at the recent
09:45:32 5 history of noncompetitive, both house and senate districts, and
09:45:36 6 I thought that the party as a whole to be as competitive as it
09:45:41 7 could be across the State needed to have as many good
09:45:44 8 candidates as it could. Our running a candidate would have a
09:45:48 9 positive wash-over effect on those in other districts.

09:45:52 10 Q. Do you think running a campaign in a place like Travis
09:46:00 11 County has any implications for the concept of representative
09:46:05 12 democracy more generally?

09:46:07 13 A. Oh, yes. If you -- if we're not -- you know, something --
09:46:12 14 there's something not particularly democratic about a
09:46:16 15 representative -- about a system in which, for whatever reason,
09:46:21 16 we've fallen into where, you know, a third of the seats go
09:46:25 17 unopposed. I think that was the figure I remember seeing at
09:46:29 18 one point. Certainly there are a lot of unopposed elections in
09:46:33 19 Texas, and I -- I wonder why the democrats sometimes don't run
09:46:38 20 people, too.

09:46:40 21 Q. Do you recall how Dr. Serafine described herself on her
09:46:45 22 campaign Web site?

09:46:46 23 A. Well, I remember more or less. And I should say I
09:46:56 24 remember because I'm actually the fellow who did the typing of
09:46:58 25 that description at one point.

09:47:01 1 And we described her a number of ways. We described
09:47:05 2 her as an attorney. We described her as a musician. We
09:47:10 3 described her as an educator at one point. We described her as
09:47:15 4 a psychologist. We used a number of single words in some tight
09:47:24 5 copy up at the top of page so that whomever came to the page
09:47:27 6 would look at it and grasp that we had a multifaceted candidate
09:47:33 7 and you get it just like that (snaps fingers).

09:47:35 8 Q. And so we're here about that word "psychologist." Why --
09:47:40 9 why did you type that word?

09:47:42 10 A. Well, our -- when you run a campaign, you want to be
09:47:47 11 competitive against the other candidate. And the other
09:47:50 12 candidate had a storied record, but he was basically a
09:47:55 13 politician and a lawyer. And with a lot of folks -- pardon
09:47:58 14 me -- neither is necessarily an unvarnished good thing.

09:48:06 15 So we wanted to humanize our candidate and to show
09:48:10 16 that, yes, she's an attorney just like the other guy, but she
09:48:14 17 has a -- she has a breadth of experience that will help her as
09:48:22 18 a legislature understand people in this particular senate
09:48:25 19 district and across Texas. And so showing she had a whole --
09:48:29 20 you know, a whole separate other educational background both in
09:48:33 21 music and in psychology, this was very important.

09:48:36 22 Q. And elaborate on why -- why describing her as a
09:48:42 23 psychologist was important to achieve that goal.

09:48:45 24 A. Well, psychology, I don't know that there's a social
09:48:48 25 science discipline that gets more at the understanding of

09:48:53 1 people as people. And if you want to show that your -- your
09:48:59 2 candidate gets people, I can't think of a better way than to
09:49:07 3 say, ah, she's -- she's a psychologist. She understands
09:49:11 4 psychology. She must. She's got a doctorate in the subject.
09:49:16 5 She taught the subject.

09:49:18 6 Q. Was there anything else?

09:49:19 7 A. No, no. I was saying, and she taught the subject, so it's
09:49:22 8 logical that she has some good grasp of it.

09:49:25 9 Q. Was there anything in particular about that word,
09:49:32 10 "psychologist," that made you choose that word in particular,
09:49:35 11 "psychologist," as opposed to some other description of that
09:49:39 12 background?

09:49:39 13 A. Well, I wanted to show that she understood some other
09:49:49 14 discipline. That was a great one. And she understood it at --
09:49:51 15 there's no higher level of educational attainment than Ph.D.,
09:49:56 16 so that -- that had to be something that we needed to showcase.

09:50:01 17 Q. I believe when Dr. Serafine eventually deleted the word
09:50:12 18 from her Web site, she substituted the word "educator"?

09:50:17 19 A. That's my recollection.

09:50:18 20 Q. And given what we've talked about, is that -- does that
09:50:24 21 word accomplish the same things that we've been discussing?

09:50:27 22 A. Well, it's another good word. But it's like calling her
09:50:31 23 an attorney or a musician. In other words, there is in this
09:50:33 24 case some overlap in that she taught psychology. But these are
09:50:38 25 two -- two separable issues.

09:50:43 1 She has a grasp of the discipline. That's why we
09:50:46 2 called her a psychologist. We wanted to make that clear. And
09:50:50 3 she also taught school at the university level at at least two
09:50:57 4 different universities that I recall. And that indicates that
09:51:00 5 she has a background as an educator, and we wanted to -- you
09:51:03 6 know, we wanted to, I suppose, curry favor with people who are
09:51:07 7 educators or who appreciate educators, who have had good
09:51:11 8 experience with a kindergarten teacher, whatever it is. But
09:51:15 9 those are separate matters.

09:51:16 10 She could have had a doctorate in psychology and
09:51:18 11 never actually taught at a university, and I'd still call her a
09:51:22 12 psychologist. I wouldn't probably be able to call her an
09:51:26 13 educator. If she taught mechanical engineering, I couldn't
09:51:30 14 call her a psychologist, but I could call her an educator.

09:51:33 15 Q. Now, could you have called her a professor of psychology,
09:51:37 16 or a doctorate in psychology?

09:51:39 17 A. Sure. I supposed we could have written -- I could have
09:51:42 18 typed in that she has a doctorate in psychology, she has a
09:51:46 19 Ph.D. in psychology, she was a professor of psychology. And if
09:51:58 20 one is taking the time to read that, to think about it, you'd
09:52:01 21 see professor of psychology. But I think there are a few
09:52:05 22 problems with this.

09:52:05 23 The first is that voters are arguably rationally
09:52:11 24 disinterested about elections. And so in trying to actually
09:52:14 25 make elections matter and representative government work and

09:52:18 1 all that, you need to capture their attention. And so we had
09:52:21 2 above the fold, so to speak, a minimum amount -- you know, a
09:52:26 3 certain amount of copy space. I'm talking like I'm in
09:52:29 4 advertising here, but that's effectively what you're doing when
09:52:33 5 you're putting up a Web site for a political campaign.

09:52:37 6 So to use one word where I could use three, that's
09:52:40 7 better, all things being equal. But also to say "professor of
09:52:45 8 psychology," that is a touch laden with the academic baggage of
09:52:52 9 being a professor of something. I know this because I'm a
09:52:56 10 doctoral student who gets ribbed about this periodically -- you
09:53:01 11 know, What do you actually know? Do you do anything?

09:53:04 12 So I wanted to make clear that she understood that
09:53:07 13 the discipline, she lived in it, but without necessarily
09:53:12 14 saying -- you know, we could have described her as a college
09:53:16 15 professor, but we didn't. We said -- at one point we said
09:53:19 16 psychologist, and at one point we said educator.

09:53:23 17 Q. Did you ever -- did the Web site ever suggest that she was
09:53:29 18 a licensed psychologist?

09:53:31 19 A. Well, I certainly didn't write that. I don't have any
09:53:34 20 recollection of that being up there.

09:53:36 21 Q. Was it an advertisement for psychological services?

09:53:41 22 A. It certainly wasn't. I was part of a political campaign.
09:53:47 23 I wasn't trying to sell psychological services.

09:53:51 24 Q. So Dr. Serafine's Ph.D. was in education, correct?

09:54:14 25 A. In education.

09:54:15 1 Q. And she taught and researched in psychology. Is that your
09:54:19 2 understanding?

09:54:19 3 A. Actually, I don't recall. I think she went to Florida.

09:54:23 4 Q. Okay.

09:54:24 5 A. And I don't recall actually the specific details, but I
09:54:29 6 recall that she taught psychology at the -- you know, at the
09:54:36 7 university level. I was under the understanding the doctorate
09:54:38 8 was in psychology. But if it was in education psychology, I
09:54:41 9 couldn't tell you.

09:54:45 10 MR. MANLEY: Okay. Pass the witness.

09:54:46 11 THE COURT: Cross-examination?

09:54:48 12 MR. TODD: Yes.

09:54:49 13 THE COURT: Mr. Todd.

09:54:50 14 **CROSS-EXAMINATION**

09:54:50 15 **BY MR. TODD:**

09:54:54 16 Q. Good morning. I just have a few questions. Have -- have
09:54:59 17 you recently looked back at the Web sites that you prepared for
09:55:05 18 the 2010 campaign for Dr. Serafine?

09:55:08 19 A. I probably haven't looked at that Web site in a year.

09:55:12 20 Q. Okay. Up there on the witness stand, you have a white
09:55:18 21 binder.

09:55:19 22 A. Sure.

09:55:19 23 Q. Would you turn and look at the tabs that are called P-8
09:55:23 24 and P-9. First look at P-8. Take a moment to look at it.

09:55:27 25 A. Uh-huh.

09:55:28 1 Q. Do you recognize that?

09:55:30 2 A. That looks pretty familiar.

09:55:32 3 Q. Yes. Well, we've -- tell me if you disagree. We've been
09:55:36 4 told that this is the Web site as it appeared before the word
09:55:41 5 "psychology" was removed. Now, looking at it at the moment,
09:55:45 6 does that seem accurate?

09:55:47 7 A. Well, it looks familiar. But --

09:55:50 8 MR. MANLEY: Objection. Assumes facts not in
09:55:53 9 evidence.

09:55:53 10 MR. TODD: Oh, but it is. When it was admitted into
09:55:56 11 evidence, that's exactly what they said this was and elicited
09:56:01 12 testimony from Dr. Serafine that that's what it is.

09:56:03 13 THE COURT: What exhibit are we referring to?

09:56:06 14 MR. TODD: P-8.

09:56:07 15 MR. HAYS: Your Honor, Dr. Serafine testified that
09:56:09 16 that was the Web site after it had been changed in response to
09:56:12 17 a letter from the Board.

09:56:13 18 THE COURT: Well, let me tell you all, hard though it
09:56:16 19 may be for you to understand it: I am capable of keeping the
09:56:20 20 evidence straight and compartmentalized and I know what is in
09:56:24 21 evidence and what is not. And, Mr. Todd, may proceed with his
09:56:28 22 cross-examination.

09:56:30 23 Q. (BY MR. TODD) Well look at P-9?

09:56:31 24 A. P-9. Okay.

09:56:32 25 Q. All right. Now, at the very top -- first of all, does

09:56:37 1 that at least appear to you to resemble a printout of what was
09:56:43 2 probably the Web site back then?

09:56:44 3 A. I'm not trying be difficult. I'll say it looks like it.
09:56:50 4 I couldn't verify it's the same thing, but it looks very
09:56:52 5 familiar.

09:56:53 6 Q. All right. Now, and above the fold, as you referred to it
09:56:58 7 at the top, that describes her as attorney, educator,
09:57:01 8 et cetera, correct?

09:57:02 9 A. Uh-huh.

09:57:02 10 Q. And it doesn't have the word "psychology" in it?

09:57:04 11 A. I don't see it there.

09:57:06 12 Q. Okay. So is it possible that this is how the Web site
09:57:11 13 appeared after the word "psychologist" was removed?

09:57:15 14 A. Is it possible? It's possible.

09:57:19 15 Q. Okay. Now, that Web site, if you go down further, if you
09:57:23 16 remember it, it still gives at least a couple of paragraphs
09:57:28 17 describing her background, correct?

09:57:31 18 A. Uh-huh. It looks like that's what it does, yeah.

09:57:35 19 Q. And you testified that one of the things you wanted to do
09:57:37 20 was showcase her Ph.D.; is that correct?

09:57:40 21 A. Yes.

09:57:42 22 Q. And does it?

09:57:47 23 A. It says that she earned a Ph.D. in education at the
09:57:51 24 University of Florida.

09:57:52 25 Q. Right. Well, you never meant at any time to imply that

09:57:55 1 she had a Ph.D. in psychology, did you?

09:57:58 2 A. Back then?

09:58:00 3 Q. Yes. At any time did you want anybody from the public to

09:58:03 4 think she had a Ph.D. in psychology?

09:58:06 5 A. I actually don't recall. I think that what I wanted

09:58:12 6 people to know was that she had a doctorate and that she had an

09:58:19 7 academic background in psychology.

09:58:21 8 Q. Well, does P-9 show that she does?

09:58:24 9 A. P-9 says that she has a Ph.D. in education.

09:58:28 10 Q. Okay. And before the word "psychology" was taken off the

09:58:33 11 Web site, did it say she had a Ph.D. in education?

09:58:37 12 A. You mean at P-8?

09:58:41 13 Q. Yes.

09:58:41 14 A. Okay. Lets's see. At P-8 it says that she served on the

09:58:52 15 psychology faculties at Yale and Vassar.

09:58:56 16 Q. Okay. And does -- does P-9 not say that?

09:58:59 17 A. P-9 says that she served on the psychology faculties at

09:59:05 18 Yale and Vassar.

09:59:06 19 Q. Okay. You said that -- did I understand you correctly

09:59:10 20 that you wanted to show she had a grasp of the discipline and

09:59:15 21 understood the discipline --

09:59:16 22 A. Uh-huh.

09:59:16 23 Q. -- by showing that she had a Ph.D.?

09:59:20 24 A. That would be one way to show it.

09:59:22 25 Q. All right. Does the later Web site still show that she

09:59:27 1 has a grasp of the discipline?

09:59:29 2 A. The later Web site says that she served on the psychology
09:59:34 3 faculty at Yale and at Vassar. So if you serve in the
09:59:40 4 psychology department -- and I know this because -- I have some
09:59:45 5 understanding of this because I am a student -- a doctoral
09:59:49 6 student at a school which is multidisciplinary school. I study
09:59:52 7 policy and I take courses and work under the supervision of
09:59:55 8 people who have doctorates in history, but they also understand
10:00:00 9 a good bit about policy.

10:00:02 10 Her doctorate is in education, but she served on the
10:00:05 11 psychology faculty. I think actually looking back at it, for
10:00:09 12 the folks who take the trouble to read the whole thing, I think
10:00:12 13 we would get it across.

10:00:14 14 Q. Okay. And is the problem that you were concerned that
10:00:20 15 most voters are not going to read below the fold? A voter who
10:00:23 16 is interested enough to go to the Web site will just stop at
10:00:27 17 the first line description and not look further down to see
10:00:31 18 what's behind it.

10:00:33 19 A. Well, I don't -- I didn't actually have statistics of how
10:00:37 20 many people were looking above and below because I couldn't
10:00:39 21 capture the scrolling.

10:00:43 22 Q. All right. That answers the question.

10:00:45 23 After -- do you recall approximately when you took
10:00:50 24 "psychology" itself off the Web site?

10:00:52 25 A. Well, there are two parts about that. First I don't

10:00:54 1 recall precisely when it was taken off. And I apologize. This
10:01:00 2 is some -- this was some years ago. I don't recall whether it
10:01:04 3 was actually I who took it off. It may have been. I
10:01:08 4 controlled the Web site for quite some time. It -- to be fair,
10:01:13 5 it probably was.

10:01:14 6 Q. Okay.

10:01:14 7 A. But I don't remember having retyped it.

10:01:16 8 Q. If you don't recall whether or not you did it, do you
10:01:19 9 recall that at some point in the campaign, the Web site was
10:01:22 10 changed so it no longer had the word "psychologist" in it?

10:01:26 11 A. Actually, I don't.

10:01:29 12 Q. You don't?

10:01:29 13 A. And this is because I stopped working on the campaign in
10:01:33 14 the late summer/early fall. I had -- as I say, I'm a very busy
10:01:40 15 person, and I was getting to the point where I was
10:01:42 16 over-committed.

10:01:42 17 Q. Okay. And so if you don't recall that, then would it be
10:01:46 18 fair to say that you can't recall getting -- getting any
10:01:49 19 feedback once the word was removed reflecting any kind of
10:01:54 20 confusion or perplexity on the part of any voter as to, gosh,
10:02:00 21 it used to say "psychologist" and today it doesn't. What's
10:02:04 22 going on?

10:02:05 23 A. I never heard about that one way or the other.

10:02:08 24 MR. TODD: Pass the witness, Your Honor.

10:02:10 25 *****

REDIRECT EXAMINATION

10:02:10 1

10:02:10 2 **BY MR. MANLEY:**

10:02:10 3 Q. If you would, Mr. Hasik, turn to tab 1 in that binder.

10:02:21 4 A. Uh-huh.

10:02:21 5 Q. And last two pages of Plaintiff's Exhibit 1 -- or three

10:02:26 6 pages. I'm sorry.

10:02:28 7 A. The last two pages of Exhibit 1?

10:02:30 8 Q. The last three pages.

10:02:31 9 A. The last three pages. Okay. I've got those pages.

10:02:38 10 Q. And there's a picture of Dr. Serafine there right in front

10:02:43 11 of you?

10:02:43 12 A. Oh, yes.

10:02:44 13 Q. Okay. And what's the date stamp on the bottom of this

10:02:52 14 page?

10:02:52 15 A. That says the 30th of August.

10:02:54 16 Q. And what year?

10:02:58 17 A. 2010.

10:02:59 18 Q. And under "Occupation" at the top of the page there, what

10:03:04 19 does it say?

10:03:05 20 A. "Attorney and psychologist."

10:03:06 21 Q. So does this look familiar to you?

10:03:08 22 A. Oh, yes. I made this Web site. Yeah.

10:03:11 23 Q. And then if we turn to tab 8, what's the -- the date stamp

10:03:22 24 on that page -- at the bottom of that page?

10:03:25 25 A. That is stamped the 20th of October 2010.

10:03:31 1 Q. And the first line there, is the word "psychologist"
10:03:37 2 included?
10:03:38 3 A. It's not in that.
10:03:39 4 Q. Okay. And, actually, if you wouldn't mind flipping back
10:03:47 5 to tab 1, we can see that -- is that same sentence repeated
10:03:50 6 under "About Mary Lou" toward the bottom of the box there?
10:03:55 7 A. Well, the sentence is different.
10:04:03 8 Q. How is it different on the first page?
10:04:05 9 A. The one on the first page, the one from late August, it
10:04:07 10 says: "Mary Lou Serafine is an Austin attorney and
10:04:10 11 psychologist and a former UT San Antonio and UT Austin faculty
10:04:15 12 member." And then the one from October says: Mary Lou
10:04:20 13 Serafine is an Austin attorney, educator, and a former
10:04:23 14 UT San Antonio and UT Austin faculty member."
10:04:27 15 And, actually, that's -- that copy the second time is
10:04:35 16 awkward because "educator" and "faculty member" is a little
10:04:39 17 redundant. There's a word missing, basically, and it's
10:04:43 18 "psychologist."
10:04:43 19 Q. And so I guess my question -- you've sort of answered it.
10:04:49 20 Does the October Web page convey the same information as the
10:04:52 21 August Web page?
10:04:53 22 A. Not the first line. It definitely doesn't, you know.
10:05:02 23 MR. MANLEY: Pass the witness.
10:05:03 24 MR. TODD: I've got nothing further.
10:05:05 25 THE COURT: All right. You may step down.

10:05:07 1 THE WITNESS: Thank you.

10:06:53 2 MR. MANLEY: Plaintiff calls David Nalle.

10:06:55 3 (Witness sworn)

10:07:11 4 THE COURT: You may proceed, Mr. Manley.

10:07:14 5 **DAVID NALLE,**

10:07:14 6 having been first duly sworn, testified as follows:

10:07:14 7 **DIRECT EXAMINATION**

10:07:14 8 **BY MR. MANLEY:**

10:07:15 9 Q. Good morning.

10:07:17 10 A. Good morning.

10:07:17 11 Q. Would you state your name for the record, please.

10:07:19 12 A. David Nalle.

10:07:21 13 Q. And did you work on Dr. Serafine's 2010 State Senate
10:07:27 14 campaign?

10:07:27 15 A. I did.

10:07:28 16 Q. What was your role in the 2010 campaign?

10:07:30 17 A. I had no official title. I helped with various things. I
10:07:35 18 mostly did work on her Web site and messaging type stuff. I
10:07:41 19 took the Web site from its original design and adapted it to be
10:07:43 20 more dynamic so you could update content online and make it
10:07:47 21 more accessible to people.

10:07:49 22 Q. About how much time did you spend redesigning the Web
10:07:53 23 site?

10:07:54 24 A. Forty, 50 hours, something like that -- working on
10:07:59 25 different aspects of it and then updating it periodically.

10:08:02 1 Q. And what other roles did you have in that campaign?

10:08:08 2 A. Well, mostly just kind of supportive -- advising her and
10:08:12 3 she bounced ideas off of me from time to time, and I helped
10:08:16 4 organize a couple of events and things like that.

10:08:19 5 Q. Were there any particular issues that you remember
10:08:21 6 advising her on or topics?

10:08:24 7 A. We talked about all sorts of things. It was a while ago,
10:08:27 8 so I don't remember everything in great detail. But I guess
10:08:30 9 the nature of my advice was maybe to take advantage of my
10:08:34 10 experience in local Republican party politics and help her
10:08:39 11 with, you know, making some of her ideas more appealing to a
10:08:43 12 local political climate. That's in general what I was doing.
10:08:47 13 I can't remember -- we talked about, you know abortion, and we
10:08:51 14 talked about some of the business issues she was concerned
10:08:54 15 with. But I can't remember any of the specifics.

10:08:59 16 Q. So it sounds like the advice was sort of marketing advice?
10:09:02 17 Was that --

10:09:03 18 A. Well, yeah. That's basically what I do for politicians,
10:09:07 19 is helping with messaging and marketing. So yeah. A lot of it
10:09:10 20 has to with how you present yourself to the voter and making
10:09:14 21 yourself, you know, appear to be well qualified and make your
10:09:18 22 ideas sound good to the voter you're trying to appeal to.

10:09:21 23 Q. And let's talk about what you do for a living. You said
10:09:23 24 that you're a political consultant?

10:09:25 25 A. That's part of what I do for a living yes. I've consulted

10:09:29 1 on various campaigns starting in 2008. I've been an advisor or
10:09:32 2 a consultant. I worked on Ted Cruz's campaign, for example, in
10:09:36 3 the early phases, and I worked on a normal of local candidate
10:09:40 4 campaigns, not just in Texas but also other parts of the
10:09:43 5 country. I've done some fundraising.

10:09:44 6 But what I mostly do is write position statements and
10:09:48 7 advise candidates on what will appeal to the audience they're
10:09:53 8 trying to reach or where to go with their views in order to
10:09:57 9 reach certain audiences.

10:09:58 10 Q. What else do you do for a living, if anything?

10:10:06 11 A. I design typefaces.

10:10:08 12 Q. What does that mean?

10:10:09 13 A. You know, everybody has computers, and they have fonts on
10:10:11 14 their computer. And those fonts are basically typefaces which
10:10:13 15 are different styles of lettering made into computer data
10:10:16 16 files. And I design those. It was a secondary career that I
10:10:20 17 developed while I was a -- while I was teaching college, and
10:10:26 18 then I decided to go into that full-time as a profession some
10:10:29 19 years ago.

10:10:30 20 Q. Does that -- how does that fit with your marketing?

10:10:35 21 A. Well, it gave me a lot of experience working with
10:10:38 22 computers, which is an increasingly important part. You know,
10:10:41 23 social media, working in Web sites, and presenting campaigns
10:10:46 24 fits right in with that -- doing graphic design and things like
10:10:51 25 that. And I've been quoted in the *New York Times* as an expert

10:10:53 1 on typography for campaign signs, for example. It's a very
10:10:58 2 specialized thing to be known for. But I've been in the *Times*
10:11:01 3 twice with my observations on what campaign signs were like in
10:11:04 4 the particular campaign years, in 2008 and 2010.

10:11:09 5 Q. Is there anything else that you do for a living?

10:11:12 6 A. Well, anything that gives me money, but no. That pretty
10:11:15 7 much does the job. I used to be -- I used to teach college. I
10:11:19 8 used to teach history. But that -- I got out of that because
10:11:24 9 it became tedious after a while.

10:11:25 10 Q. Now, you said that you redesigned Dr. Serafine's Web site.
10:11:32 11 Have you designed Web sites for other political campaigns?

10:11:35 12 A. Yeah. Like Sheriff Mack's Web site in the 2012 campaign.
10:11:40 13 I've done work on designing Web sites for campaigns in other
10:11:45 14 parts of the country, too. Just a number of them. And also a
10:11:48 15 lot of critiquing of Web sites -- making suggestions and sort
10:11:52 16 of giving input particularly on the way they present the Web
10:11:55 17 site. Not so much the technical aspect, but more of the
10:12:00 18 perceptual aspect of it.

10:12:01 19 Q. And you suggested this a little bit, but what is your
10:12:05 20 educational background? Where did you go to college?

10:12:08 21 A. I went to Franklin & Marshall College in Pennsylvania for
10:12:10 22 undergraduate and got degrees in English and history. Then I
10:12:11 23 went to the University of Texas for graduate school in history,
10:12:15 24 got a master's degree in history, and then worked on my Ph.D.
10:12:20 25 And I got all the way to my dissertation and got tired of it.

10:12:23 1 And so I went up and taught college with just a master's degree
10:12:26 2 for 20 years while developing my business. And then I went
10:12:30 3 into business.

10:12:31 4 Q. Do you consider yourself a historian?

10:12:36 5 A. Yeah. Of course. I mean, I've had journal articles
10:12:39 6 published, I presented at conferences, and I taught history for
10:12:44 7 20 years. So I think I could be a historian. Yeah.

10:12:47 8 Q. You said you've worked on quite a few campaigns. Did you
10:12:57 9 regard Dr. Serafine's campaign as serious political campaign?

10:13:01 10 A. Oh, absolutely. I mean, it was a difficult situation
10:13:04 11 being in Austin, which is not a very republican friendly city.
10:13:08 12 But I was very interested in the campaign because
10:13:11 13 Mary Lou Serafine is not the typical republican candidate. She
10:13:14 14 stood out from what would be a typical republican candidate
10:13:18 15 statewide. So it seemed like a much more viable campaign to
10:13:21 16 have in the Austin area because her message was more appealing
10:13:26 17 to independent voters and democrats than you'd normally
10:13:26 18 expect.

10:13:26 19 I mean, most campaigns that are run in the Austin
10:13:27 20 area by republicans are -- I mean, they're serious, but they're
10:13:29 21 not viable in most cases. Hers was different, I think, that it
10:13:34 22 had the potential for viability. If there had been more money
10:13:37 23 there, if it would have been possible to convince more people
10:13:39 24 to come on board to support her, I think it could have been
10:13:42 25 transformative in some ways to run a republican who I think

10:13:45 1 actually had an appeal to the Austin market.

10:13:47 2 Q. Do you remember how Dr. Serafine described herself on the
10:14:00 3 campaign Web site?

10:14:01 4 A. This was several years ago. Do you mean -- you mean -- I
10:14:04 5 mean, there's a section on the campaign Web site where she
10:14:07 6 described her background and experience. Is that what you're
10:14:10 7 looking for?

10:14:11 8 Q. Well, maybe it would be helpful to open the white notebook
10:14:14 9 in front of you and turn to tab 1?

10:14:16 10 A. Oh. That would help.

10:14:24 11 Q. And the last three pages of that exhibit, Plaintiff's
10:14:26 12 Exhibit 1, may be helpful in refreshing your memory.

10:14:30 13 A. I think I found the section you're talking about. You're
10:14:40 14 talking about the bad Xeroxes from the Web site?

10:14:44 15 Q. That's right. Does that look familiar to you as
10:14:46 16 Dr. Serafine's political Web site?

10:14:48 17 A. Yeah. Yeah. Right. This is stuff about her background
10:14:53 18 which I was talking about. Yeah. And we went over that some.
10:14:58 19 I mean, it's descriptive and it's accurate and it lays out what
10:15:01 20 she did over the past years of her education and for a living.

10:15:06 21 And I think it's -- I mean, you have to have this
10:15:10 22 kind of material on a Web site or on any, you know, campaign
10:15:12 23 resource that's going to be comprehensive in at least some
10:15:16 24 degree. If you have a Web site, you have more room to go into
10:15:19 25 detail than you would on a push card or something like that.

10:15:22 1 But you need to let people know who the candidate is, what
10:15:24 2 they've done, what their qualifications are, and, you know, why
10:15:27 3 they should take them seriously as a person.

10:15:30 4 Anyone can put up a campaign Web site, but not anyone
10:15:34 5 can say, I have these degrees. I have this experience. I have
10:15:36 6 this background. I work with people. I've, you know, been in
10:15:39 7 an academic setting. I've been in a professional setting. I'm
10:15:41 8 somebody you should vote for. You need to have it on there.
10:15:44 9 If you don't have it on there, people look at your Web site and
10:15:47 10 your campaign with suspicion.

10:15:49 11 So yeah. I remember this section of the site, and I
10:15:52 12 think it lays out pretty effectively what her background is,
10:15:55 13 like a resume, essentially. So yeah.

10:15:58 14 Q. So the first piece of biographical information is her
10:16:04 15 occupation, correct?

10:16:05 16 A. It looks like -- right. I've got it here. What's the
10:16:17 17 question about it?

10:16:18 18 Q. It says "attorney and psychologist."

10:16:21 19 A. Yeah.

10:16:22 20 Q. Why is that important in a political Web site?

10:16:27 21 A. You want to -- always when you're writing things like
10:16:30 22 this, you want to put in the first paragraph the boiled-down
10:16:32 23 essence of what are the most important background and
10:16:35 24 qualifications a person has.

10:16:37 25 Like if you were to do it for me, I have a thing like

10:16:38 1 this that I've done on a personal Web site, and it says
10:16:42 2 "Historian and Type Designer," for example. Or "Historian and
10:16:45 3 Type Designer and Political Consultant," depending on what I'm
10:16:48 4 doing it for.

10:16:49 5 So her background and experience is as an attorney
10:16:51 6 and a psychologist, teaching psychology with degrees. What
10:16:56 7 else should you put there?

10:16:57 8 Q. So why was it important to use the word "psychologist"?

10:17:02 9 A. Because -- because that's who she is. That's -- I mean,
10:17:07 10 when you've -- when that's what you study, when that's what
10:17:11 11 you've done, and if you have, in her case, years and years and
10:17:14 12 years of experience in that field and you don't put it up front
10:17:17 13 in presenting your qualifications, then people immediately say,
10:17:20 14 Why is she -- they would say, Why is she not saying she's a
10:17:24 15 psychologist when her background is in psychology? They would
10:17:27 16 suspect there was something wrong there if you didn't put it up
10:17:30 17 front. And it's what she does. You've got to put up front
10:17:33 18 what you are and who you are and what you've done.

10:17:36 19 So it's important, if she was -- I mean, since she
10:17:36 20 had been a psychologist or taught as a psychologist, saying
10:17:39 21 "psychologist" has to go there. You can't just ignore it. You
10:17:43 22 know, if she had been involved in psychology for, you know, 15
10:17:47 23 minutes, you would leave it out. But since she was involved
10:17:50 24 for a good portion of her life, you've got to put it in there.

10:17:52 25 Q. And why that word in particular, "psychologist"?

10:17:56 1 A. Because when you're involved in psychology, you're a
10:18:05 2 psychologist. I don't know of any other word that could be
10:18:07 3 used in its place. I'd be like saying -- since I'm a
10:18:09 4 historian, it would be like saying I'm an "old times dude" to
10:18:13 5 use another word. You know, there's one word that represents
10:18:16 6 each profession.

10:18:20 7 Q. Now, if you would, flip to tab 8 in your binder there.

10:18:28 8 A. Yep. Okay.

10:18:31 9 Q. And -- and I'm sorry. Under tab 1 on that first page we
10:18:38 10 were looking at.

10:18:38 11 A. On the first page of that last section of tab 1?

10:18:41 12 Q. Yeah. That great picture of Mary Lou there. The sentence
10:18:47 13 underneath "About Mary Lou," if I could just draw your
10:18:53 14 attention to that.

10:18:55 15 A. Are we talking about the page that's labeled TSBEP,
10:19:00 16 whatever that is, 00083?

10:19:03 17 Q. It's 00105.

10:19:11 18 A. This is in tab 2?

10:19:13 19 Q. Tab 1?

10:19:24 20 A. I don't find such a page.

10:19:25 21 Q. Under tab 1.

10:19:27 22 A. Right. Oh, I'm under tab 2. Never mind. Tab 1. Okay.
10:19:34 23 Okay. Got it. Yes.

10:19:37 24 Q. And the word "psychologist" is repeated there in the
10:19:41 25 "About Mary Lou" -- the first sentence of "About Mary Lou"; is

10:19:44 1 that correct?

10:19:44 2 A. Uh-huh.

10:19:45 3 Q. And now looking back to tab 8, that sentence has been
10:19:53 4 changed on this page, correct?

10:19:57 5 A. Yes.

10:19:58 6 Q. And so does this page convey the same information?

10:20:01 7 A. No. Obviously not. It is not inaccurate, but it is less
10:20:07 8 specific. Specificity is always good when communicating with
10:20:11 9 people. You want to keep your message simple, direct, and as
10:20:14 10 specific as possible.

10:20:15 11 Q. Looking at -- at tab 8.

10:20:18 12 A. Uh-huh. You said you had some concerns about basically
10:20:23 13 being honest with the voters.

10:20:25 14 Q. Right. And do you have concerns about whether this
10:20:27 15 description is frank and honest compared to the description in
10:20:33 16 tab 1?

10:20:34 17 A. It's not deliberately deceptive. But it's vague, and
10:20:38 18 vague can be perceived as being an attempt to avoid saying
10:20:45 19 something. So it's -- it's not as good. It's just not as
10:20:50 20 effective a way to communicate background.

10:20:52 21 You want to use harder, more specific words whenever
10:20:55 22 you can. And a word like "educator" is extremely vague. It
10:20:58 23 could cover anything from a kindergarten teacher to somebody
10:21:03 24 who teaches adult education or English as a foreign language.
10:21:07 25 It could be anything. There are people who are out there that

10:21:08 1 write blogs who think they're educators because they're
10:21:13 2 educating the public about their pet peeves. So, you know,
10:21:15 3 it's not as good.

10:21:16 4 Q. When you were working on the Web site, was there any
10:21:19 5 suggestion on there that Dr. Serafine was a licensed
10:21:22 6 psychologist?

10:21:23 7 A. No.

10:21:23 8 Q. Was the political Web site an advertisement for
10:21:28 9 psychological services?

10:21:29 10 A. No. Obviously not.

10:21:31 11 Q. Okay. Were there any issues that came up in the
10:21:35 12 campaign -- you know, policy issues that were relevant to her
10:21:42 13 background as a psychologist?

10:21:44 14 A. Of course. Psychology is a field that underlies a lot of
10:21:49 15 human dynamics, right? And politics is all about how people
10:21:54 16 relate to each other, how you can satisfy their needs and take
10:21:56 17 care of their wants and so psychology is a -- I think it's an
10:22:01 18 excellent background field to come out of to become involved in
10:22:05 19 politics because you have a good idea of what's good for people
10:22:08 20 and what people are looking for maybe in someone who is going
10:22:11 21 to help them out politically or however.

10:22:13 22 So having that underlying background in psychology is
10:22:17 23 fairly important, I think. If you have that background, it's
10:22:20 24 not a disadvantage in going into politics, not only in what the
10:22:25 25 skills that it may have given her as someone who can relate to

10:22:27 1 other people but also in dealing with certain key issues, such
10:22:30 2 as education or such as social services type issues. It's a
10:22:34 3 great background to have.

10:22:38 4 MR. MANLEY: Pass the witness.

10:22:40 5 THE COURT: Cross-examination?

10:22:44 6 **CROSS-EXAMINATION**

10:22:44 7 **BY MR. TODD:**

10:22:46 8 Q. Mr. Nalle -- and that's N-a-l-l?

10:22:50 9 A. E. With a silent E.

10:22:52 10 Q. With an E. But you pronounce it like I'm saying it?

10:22:54 11 Nalle?

10:22:54 12 A. Right.

10:22:55 13 Q. Okay. Were you -- were you involved in, actually, the
10:23:03 14 change from -- the last -- what Mr. Manley showed you, the last
10:23:06 15 three changes of P-1 to the Web site as it appeared in P-8?

10:23:11 16 A. Yes. I was aware of that and helped with it.

10:23:13 17 Q. Okay.

10:23:14 18 A. The reason I was originally brought in --

10:23:17 19 MR. TODD: I object as nonresponsive.

10:23:18 20 Q. (BY MR. TODD) The answer is, yes, you were?

10:23:20 21 A. Yes.

10:23:20 22 Q. All right. Good. You also said that one of the tasks you
10:23:29 23 performed was to make the Web site more accessible?

10:23:32 24 A. Yes.

10:23:32 25 Q. As part of that, did you make it interactive?

10:23:35 1 A. Well, in a limited sense, yes.

10:23:37 2 Q. Well, what's the limited sense?

10:23:40 3 A. I enabled comments and social media.

10:23:44 4 Q. Okay. Comments and social media, but not on the Web site?

10:23:47 5 A. Comments on the Web site.

10:23:48 6 Q. On the Web site?

10:23:49 7 A. Right. Right.

10:23:50 8 Q. Okay. And I'll come back to that in a moment.

10:24:02 9 When you changed it from "psychologist" to

10:24:04 10 "educator," you didn't change it to say "educator in

10:24:09 11 psychology," correct?

10:24:10 12 A. Correct.

10:24:11 13 Q. Because that would be three words instead of one?

10:24:13 14 A. It didn't sound as good.

10:24:16 15 Q. Okay. But it would have communicated accurate information

10:24:20 16 to the voters, wouldn't it?

10:24:22 17 A. Yes.

10:24:31 18 Q. You kept in there the fact that she's an attorney, correct?

10:24:34 19 A. Yes.

10:24:34 20 Q. When you tell the voters she's an attorney, do you expect

10:24:37 21 the voters to presume that she's licensed to be an attorney?

10:24:45 22 A. No.

10:24:45 23 Q. Okay. So as far as -- so as far as you're concerned, it's

10:24:49 24 okay for voters to think she's engaged in the unlicensed

10:24:52 25 practice of law?

10:24:53 1 A. No. She has a juris doctorate and, therefore, she's an
10:24:57 2 attorney.

10:24:57 3 Q. Oh, really?

10:24:58 4 A. In the view of the public.

10:24:59 5 Q. So the mere fact that one has a law degree entitles one to
10:25:08 6 represent oneself as an attorney to the public in your view?

10:25:15 7 A. Yes.

10:25:15 8 Q. Okay. And by the same notion, the fact that she has
10:25:22 9 taught courses in psychology, in your view, would entitle her
10:25:26 10 to represent herself to the public as a psychologist?

10:25:31 11 A. As an academic field, yes. Correct.

10:25:34 12 Q. Okay. Now, after -- do you know -- do you remember
10:25:40 13 approximately when you changed it from "psychologist" to
10:25:43 14 "educator"?

10:25:44 15 A. I don't know the date specifically.

10:25:48 16 Q. Well, do you have a feel for there was a -- there was a
10:25:53 17 point in time before which it said "psychologist" and after
10:25:57 18 which it no longer said "psychologist"?

10:26:00 19 A. Well, yes. Of course.

10:26:01 20 Q. All right. So after that time, did you get any feedback
10:26:06 21 through the interactive feature of the Web site raising
10:26:10 22 questions about why was that done or what does this say about
10:26:13 23 her or why isn't it there anymore?

10:26:17 24 A. I don't recall specifically. There were questions about
10:26:20 25 various things, but I don't know that that came up.

10:26:23 1 Q. Okay. And what was the message, if you can characterize
10:26:31 2 it in some sort of concise fashion, that made her more
10:26:39 3 appealing to independents and not the typical republican
10:26:43 4 candidate?

10:26:44 5 A. She was relatively socially moderate and also involved
10:26:50 6 in -- had a background, which I think is appealing to people in
10:26:53 7 Austin who are from the university background.

10:26:57 8 Q. Was there some language on another part of the Web site
10:27:00 9 describing her as a "New Wave Republican"?

10:27:03 10 A. I don't remember that, but that's not a bad idea.

10:27:06 11 Q. Okay. And talking about emphasis on free market?

10:27:09 12 A. There was discussion of free market.

10:27:11 13 Q. Okay. And as far as you know, was that message still
10:27:15 14 being conveyed after the word "psychologist" was taken off the
10:27:19 15 Web site?

10:27:20 16 A. As far as I know, yes.

10:27:22 17 MR. TODD: Pass the witness.

10:27:33 18 **REDIRECT EXAMINATION**

10:27:33 19 **BY MR. MANLEY:**

10:27:34 20 Q. Assuming that describing Dr. Serafine as an educator in
10:27:38 21 psychology would not violate this act that we're discussing
10:27:42 22 here, does that convey information about her as a researcher of
10:27:47 23 psychology?

10:27:48 24 A. No. Not necessarily.

10:27:49 25 Q. Does it convey information about her teaching seminars

10:27:57 1 about psychology to -- outside of the university context?

10:28:03 2 A. Not with people who are not intimately familiar with the

10:28:14 3 details of her background, no.

10:28:16 4 MR. MANLEY: Thank you. Pass the witness.

10:28:20 5 MR. TODD: I have nothing further.

10:28:21 6 THE COURT: All right. You may step down. At this

10:28:23 7 time we will take our morning recess, and we'll be in recess

10:28:27 8 for 15 minutes.

10:28:29 9 (Recess)

10:47:33 10 (Open Court)

10:47:33 11 THE COURT: Plaintiff may call its next witness.

10:47:34 12 MR. MANLEY: Plaintiff calls David White.

10:48:02 13 (Witness sworn)

10:48:02 14 THE COURT: You may proceed.

10:48:05 15 **DAVID WHITE,**

10:48:05 16 having been first duly sworn, testified as follows:

10:48:05 17 **DIRECT EXAMINATION**

10:48:05 18 **BY MR. MANLEY:**

10:48:05 19 Q. Good morning.

10:48:06 20 A. Good morning.

10:48:07 21 Q. Would you state your name for the record, please?

10:48:09 22 A. David White.

10:48:09 23 Q. And who is your employer, Mr. White?

10:48:12 24 A. Texas Psychological Association.

10:48:14 25 Q. And what is your position with the TPA?

10:48:17 1 A. I am the executive director.

10:48:19 2 Q. How long have you been executive director?

10:48:25 3 A. About 22 years.

10:48:26 4 Q. And what are your responsibilities?

10:48:28 5 A. I oversee all the operations of the association and mainly

10:48:32 6 do the lobbying for the association.

10:48:39 7 Q. And do you have any other responsibilities?

10:48:42 8 A. No.

10:48:45 9 Q. Okay. And just like when we met back in June of your

10:48:57 10 deposition, it's important that all of your answers are verbal

10:48:59 11 so that the court reporter can take them down. And speak

10:49:01 12 loudly and clearly so everyone can hear you, including her.

10:49:05 13 A. Yes, sir.

10:49:05 14 Q. Is a psychology license a requirement of membership in the

10:49:12 15 TPA?

10:49:13 16 A. No, sir, it's not.

10:49:14 17 Q. And how many members does the TPA have?

10:49:21 18 A. Approximately about 1400. A little over 1400 at this

10:49:25 19 point.

10:49:25 20 Q. And of those 1400, how many have a psychology license from

10:49:31 21 the State or Texas?

10:49:39 22 A. The majority of the members have a license. I don't know

10:49:42 23 the exact amount. I would say probably 90 percent.

10:49:54 24 Q. How did you first learn Dr. Serafine had referred to

10:49:58 25 herself as a psychologist?

10:49:59 1 A. I received a phone call from one of my members.

10:50:02 2 MR. TODD: At this point, Your Honor, I'd like to
10:50:06 3 object as irrelevant the line of questioning as to the events
10:50:12 4 that led to the TPA filing a complaint about Dr. Serafine.

10:50:18 5 The facts about that that are material to the case
10:50:20 6 have all been stipulated to. They sent -- the Board initiated
10:50:26 7 a complaint and sent a cease and desist order. And what led
10:50:33 8 any individual to make that complaint to the Board doesn't have
10:50:37 9 any bearing on the issues that we're litigating.

10:50:42 10 THE COURT: Mr. Manley?

10:50:43 11 MR. MANLEY: Well, Your Honor, this case is in part
10:50:45 12 about political speech, and so the motivations and the context
10:50:49 13 of the complaints is material and has not been stipulated to.

10:50:55 14 THE COURT: Well, here's the point. The stipulations
10:50:58 15 don't say who originally initiated the action with the Board
10:51:05 16 that led to the formal complaint that was signed by Ms. Lee.
10:51:12 17 This may or may not have relevance to the political speech
10:51:16 18 issue. But, Mr. Todd, the situation, of course, is the
10:51:21 19 evidence gets in the record either as part of a bill or as part
10:51:24 20 of the record. So I'm going to overrule the objection, but
10:51:29 21 that is without prejudice. And I will hear the testimony, and
10:51:33 22 then I will either consider the testimony or not consider the
10:51:36 23 testimony, and it's in the record for purposes of the
10:51:40 24 plaintiff's bill.

10:51:41 25 MR. TODD: That's fine.

10:51:42 1 THE COURT: So you may proceed.

10:51:43 2 MR. MANLEY: Thank you, Your Honor.

10:51:44 3 Q. (BY MR. MANLEY) So you said you received a call from one
10:51:51 4 of your members?

10:51:52 5 A. Yes, sir.

10:51:52 6 Q. And that member informed you what?

10:51:54 7 A. That there was a psychologist that was running for the
10:51:58 8 Texas Senate.

10:52:02 9 Q. And do you recall your discussion with the member?

10:52:04 10 A. Not exactly, but I was excited because I always wanted one
10:52:12 11 of a -- one of our members or a psychologist to be in the State
10:52:17 12 Legislature. I thought it would help our cause. So,
10:52:20 13 initially, I was very excited to learn more about this.

10:52:23 14 Q. And why do you want a psychologist to be a member of the
10:52:28 15 Legislature?

10:52:28 16 A. Because I think there's a lot of issues in the Texas
10:52:30 17 Legislature that deal with mental health, and I think it would
10:52:34 18 be very beneficial if we had a psychologist in the State
10:52:46 19 Legislature.

10:52:46 20 Q. So when you're looking at candidates, if you see one
10:52:53 21 that's a psychologist, that's important to you as part of that
10:52:57 22 candidate's biography?

10:52:59 23 A. Very much so.

10:53:00 24 Q. Now, does that -- that person, that psychologist that can
10:53:02 25 inform the Legislature about those psychological issues, does

10:53:06 1 that person need to be licensed in order to do that
10:53:10 2 effectively?
10:53:11 3 A. If you are a psychologist in the State of Texas, you have
10:53:17 4 to be licensed.
10:53:18 5 Q. Okay. Well, let me ask this: Are you a licensed
10:53:21 6 psychologist?
10:53:22 7 A. No, sir, I'm not.
10:53:23 8 Q. Are you able to inform the Legislature about psychological
10:53:27 9 issues?
10:53:27 10 A. Yes, I am.
10:53:28 11 Q. So do you think a member of the Legislature who is versed
10:53:33 12 in psychological issues would achieve the purpose that you
10:53:36 13 described earlier about informing the Legislature about
10:53:39 14 psychology?
10:53:40 15 A. Oh, yes.
10:53:43 16 Q. Regardless of whether that person had a license or not?
10:53:50 17 A. Correct.
10:53:50 18 Q. I'd like to refer to you -- refer you to the white binder
10:53:54 19 in front of you. And if you could flip it open to tab 4 and
10:54:02 20 take a look at that, what's been marked as P-4. And when you
10:54:10 21 get a chance to look that over, let me know.
10:54:35 22 A. Okay.
10:54:36 23 Q. Do you recognize that document?
10:54:39 24 A. Yes, I do.
10:54:39 25 Q. And what is that?

10:54:40 1 A. That is the official E-mail letter that I sent to the
10:54:44 2 Texas State Board of Examiners of Psychology, filing a
10:54:49 3 complaint against Dr. Serafine.

10:54:51 4 Q. Okay.

10:54:55 5 MR. MANLEY: Plaintiff would like to tender what's
10:54:56 6 been marked as P-4 for the record.

10:55:01 7 THE COURT: Objection?

10:55:02 8 MR. TODD: No, Your Honor.

10:55:03 9 THE COURT: All right. Plaintiff's Exhibit Number 4
10:55:05 10 is admitted.

10:55:15 11 Q. (BY MR. MANLEY) Now, if you would flip to the second to
10:55:17 12 last page of that exhibit, Plaintiff's Exhibit 4.

10:55:27 13 A. (Complies)

10:55:27 14 Q. What is it that you were complaining about?

10:55:29 15 A. That Dr. Serafine had portrayed herself as a psychologist
10:55:36 16 on her Web site and in the newspaper article that I attached to
10:55:41 17 the letter. And that we had tried to contact Dr. Serafine to
10:55:47 18 let her know that she was in violation of the State statute,
10:55:54 19 and that's what the letter indicated.

10:55:57 20 Q. So it was her -- her political Web site --

10:55:59 21 A. Correct.

10:56:00 22 Q. -- was the one violation that you perceived?

10:56:03 23 A. That's correct.

10:56:03 24 Q. And then the other one was newspaper articles,
10:56:07 25 specifically this candidate profile that appeared in the *Austin*

10:56:13 1 *American Statesman*, correct?

10:56:15 2 A. Yes, sir.

10:56:15 3 Q. Did Dr. Serafine write the article that you were

10:56:19 4 complaining about?

10:56:20 5 A. I do not know that.

10:56:22 6 Q. Now, you filed -- or this letter is dated October 24th,

10:56:30 7 2010, correct?

10:56:33 8 A. Yes, sir.

10:56:33 9 Q. Had you, prior to October 24th, 2010, gone to

10:56:40 10 Dr. Serafine's Web site to see it?

10:56:43 11 A. Yes, I had.

10:56:44 12 Q. And on October 24th, 2010, was the word "psychologist"

10:56:50 13 still on her Web site?

10:56:51 14 A. I do not recall if I actually looked at Dr. Serafine's Web

10:56:56 15 site on October 24th, on that particular day. I cannot

10:57:05 16 remember if I did that.

10:57:06 17 Q. Okay. Did you look at her Web site more than once before

10:57:16 18 submitting the complaint?

10:57:17 19 A. Yes, sir, I did. And my staff did as well.

10:57:19 20 Q. And so when you submitted this complaint, were you under

10:57:24 21 the impression that the Web site was still in violation?

10:57:27 22 A. Yes, sir, I was.

10:57:28 23 Q. But you didn't confirm that before submitting the

10:57:30 24 complaint?

10:57:31 25 A. Not on October -- I cannot remember. I don't recall the

10:57:35 1 last day that I actually viewed her Web site.

10:57:40 2 Q. Okay. It was a few years ago, so that's okay. I guess

10:57:43 3 what I'm getting at is that you didn't confirm that it was

10:57:46 4 still in violation before submitting the complaint?

10:57:48 5 A. Yes.

10:57:50 6 Q. Okay. And you said you've been with the TPA as executive

10:57:55 7 director for about 22 years?

10:57:57 8 A. Yes, sir.

10:57:57 9 Q. And in that time how many complaints have you filed with

10:58:00 10 the Psychologist Licensing Board?

10:58:03 11 A. I don't know. I'm not sure.

10:58:10 12 Q. Do you have a ballpark estimate?

10:58:15 13 A. It's not that many, but we -- we have filed some.

10:58:18 14 Q. I think when we met before, you estimated three to four.

10:58:22 15 Does that sound right?

10:58:23 16 A. That's probably a reasonable number.

10:58:26 17 Q. And do you remember the substance of those complaints?

10:58:30 18 A. No, sir, I don't.

10:58:31 19 Q. Can you recall submitting -- pardon me. Can you recall

10:58:37 20 submitting another complaint to the Board regarding the use of

10:58:41 21 the word "psychologist"?

10:58:45 22 A. I'm sorry, but I'm not able to recall the other -- the

10:58:48 23 reasons why. It's been a while.

10:58:56 24 Q. That's okay. Now, after you submitted the complaint to

10:59:00 25 the Board, did you contact the *Austin American Statesman* about

10:59:05 1 the complaint?

10:59:06 2 A. Yes. I recall making a phone call to the *Austin American*
10:59:17 3 *Statesman*, letting them know that she was not a licensed
10:59:20 4 psychologist. But I cannot recall who I talked to.

10:59:25 5 Q. That's okay. Why did you make that call?

10:59:29 6 A. To let them know that their information was inaccurate.

10:59:35 7 Q. Do you recall ever contacting the press on another
10:59:43 8 occasion to correct a reference to someone as a psychologist?

10:59:53 9 A. No.

10:59:54 10 Q. Since making that call in 2010 to the *Austin American*
10:59:58 11 *Statesman*, have you contacted the press about anyone else using
11:00:02 12 the term psychologist in the press?

11:00:04 13 A. No, sir.

11:00:04 14 Q. So why did you think it was important to correct that
11:00:11 15 information?

11:00:13 16 A. Because the article mentioned that she was a psychologist,
11:00:19 17 and she was not. And, plus, I wanted to let her --

11:00:28 18 Senator Watson know that it was not -- we were not supporting
11:00:31 19 this individual, because they normally assume that the
11:00:35 20 professional association is behind some of these candidates.

11:00:39 21 And I wanted to let him know that this was not the case.

11:00:42 22 Q. So you also contacted the Watson campaign?

11:00:48 23 A. Yes, I did.

11:00:49 24 Q. Okay. Let's focus on the *Austin American Statesman* just
11:00:52 25 for a moment. It sounds like what you're saying is one of the

11:00:55 1 reasons you contacted them was because --

11:00:58 2 A. The information --

11:00:59 3 Q. -- this information --

11:01:00 4 A. The information was inaccurate.

11:01:02 5 Q. And the information was presented in the context of a

11:01:05 6 political campaign?

11:01:06 7 A. Yes, sir.

11:01:07 8 Q. And that was one of the reasons you contacted them?

11:01:11 9 A. Yes.

11:01:11 10 Q. Okay. Now, when you contacted the Watson campaign, were

11:01:20 11 they under the assumption that the TPA was supporting

11:01:22 12 Dr. Serafine when you initially contacted them?

11:01:25 13 MR. TODD: Objection. Calls for speculation as to

11:01:28 14 what someone else thinks.

11:01:29 15 THE COURT: Sustained.

11:01:30 16 Q. (BY MR. MANLEY) When you spoke to the Watson campaign, did

11:01:33 17 they inform you that they were under the impression that the

11:01:36 18 TPA was supporting Dr. Serafine?

11:01:38 19 A. No, sir.

11:01:48 20 Q. You said you viewed Dr. Serafine's political Web site on

11:01:51 21 at least one occasion, maybe more?

11:01:53 22 A. Uh-huh.

11:01:54 23 Q. Did you think it was an advertisement for psychological

11:01:57 24 services?

11:01:58 25 A. I don't recall.

11:02:03 1 Q. You don't recall thinking that?

11:02:07 2 A. I do not recall -- I do not exactly remember what her Web

11:02:15 3 site said other than it said she was a psychologist. I don't

11:02:18 4 remember if there was psychological services mentioned or not.

11:02:20 5 Q. Okay. Go ahead and flip to tab 1 for me, if you would?

11:02:24 6 A. I'm sorry. Tab ...

11:02:25 7 Q. Tab 1. And if you take a look at the last three pages of

11:02:38 8 that document which is Plaintiff's Exhibit 1, the first page

11:02:41 9 being a picture of Dr. Serafine. And that's marked

11:02:47 10 TSBEP000105. Are we on the same Page?

11:02:54 11 A. Yes, sir.

11:02:55 12 Q. Does this look familiar to you as Dr. Serafine's Web site,

11:02:58 13 or at least a printout of it?

11:03:00 14 A. One page of it, yes.

11:03:04 15 Q. And looking at this page, does this refresh your memory

11:03:12 16 about whether or not you thought the Web site was an

11:03:14 17 advertisement -- sorry.

11:03:16 18 Does this refresh your memory as to whether you

11:03:18 19 thought the Web site was advertisement for psychological

11:03:22 20 services?

11:03:23 21 A. No, it does not.

11:03:24 22 Q. You're still not sure?

11:03:26 23 A. I'm still not sure.

11:03:28 24 Q. Okay. Well, that's all right.

11:03:45 25 MR. MANLEY: Thank you. Pass the witness.

CROSS-EXAMINATION

11:03:52 1

11:03:52 2 **BY MR. TODD:**

11:03:52 3 Q. Good morning?

11:03:53 4 A. Good morning.

11:03:55 5 Q. When you -- as part of your job as executive director, do
11:04:00 6 you -- of the Texas Psychological Association, do you talk to
11:04:03 7 the Legislature or give testimony at committees or anything
11:04:07 8 like that?

11:04:07 9 A. Oh, yes, sir.

11:04:08 10 Q. Okay. And when you do that, do you represent yourself to
11:04:12 11 them as a psychologist?

11:04:14 12 A. No, sir.

11:04:14 13 Q. What do you tell them you are?

11:04:16 14 A. I'm the executive director for the Texas Psychological
11:04:18 15 Association.

11:04:20 16 Q. And do you feel like that gives them the information they
11:04:23 17 need to assess what you have to tell them?

11:04:25 18 A. Yes, sir.

11:04:26 19 Q. Okay. When -- when you found out that Dr. Serafine was
11:04:33 20 running for Senate and that she was called a psychologist, did
11:04:40 21 you make any assumptions or conclusions at that point about
11:04:44 22 whether or not she would be licensed?

11:04:46 23 A. I thought that if anybody portrayed themselves as a
11:04:54 24 psychologist, with my understanding that in the State of Texas
11:05:00 25 we have a Title Act and a Practice Act, that if she was a

11:05:03 1 psychologist, then she would be licensed by the State Board.

11:05:06 2 Q. And from your dealings with others, do you have an

11:05:10 3 impression as to whether there are any other people out there

11:05:13 4 who would draw that conclusion upon hearing that she is a,

11:05:17 5 quote, psychologist?

11:05:19 6 MR. MANLEY: Objection. Calls for speculation.

11:05:21 7 THE COURT: Why don't you restate your question.

11:05:23 8 MR. TODD: Okay.

11:05:23 9 Q. (BY MR. TODD) Do you have any impression -- based on your

11:05:29 10 experience communicating with others and talking with others

11:05:35 11 about the practice of psychologists and knowing the people you

11:05:38 12 do, do you have any impression as to whether this is just an

11:05:42 13 assumption unique to David White or whether or not there are

11:05:46 14 others out there who could draw the conclusion from the word

11:05:50 15 "psychologist" that she is in fact licensed?

11:05:57 16 A. I would hope that everybody that I contact in the State

11:06:01 17 Legislature realizes that when I refer to an individual as a

11:06:04 18 psychologist, that they're actually licensed by the State.

11:06:08 19 MR. TODD: Okay. Pass the witness.

11:06:20 20 **REDIRECT EXAMINATION**

11:06:20 21 **BY MR. MANLEY:**

11:06:20 22 Q. Mr. White, your title is director of Texas Psychological

11:06:24 23 Association, correct?

11:06:29 24 A. Official title is executive director. Yes, sir.

11:06:32 25 Q. So the word "psychological" is part of your title?

11:06:38 1 A. No, sir. My title is executive director.

11:06:41 2 Q. Of the Texas Psychological Association?

11:06:44 3 A. That is my employer, yes.

11:06:46 4 Q. Okay. So -- and if I heard you correctly, you said in
11:06:51 5 response to Mr. Todd's question, when you appear before the
11:06:53 6 Legislature --

11:06:54 7 A. Uh-huh.

11:06:55 8 Q. -- you tell them that your title is executive director of
11:06:59 9 the Texas Psychological Association, correct?

11:07:02 10 A. Yes, sir. That's correct.

11:07:03 11 Q. Okay. Now, when you saw Dr. Serafine's political Web site
11:07:12 12 and saw that it used the word "psychologist," did you have any
11:07:19 13 means to determine whether or not she was licensed?

11:07:24 14 A. Yes, sir, I do. I can check the State Board records.

11:07:27 15 Q. Is that information available to the public?

11:07:30 16 A. Yes, it is.

11:07:34 17 MR. MANLEY: Thank you. Pass the witness.

11:07:36 18 MR. TODD: I have nothing further.

11:07:37 19 THE COURT: All right. You may step down.

11:07:39 20 MR. TODD: Your Honor, may this witness be excused?

11:07:42 21 THE COURT: Do you have any objection to excusing
11:07:43 22 this witness?

11:07:45 23 MR. MANLEY: No, Your Honor.

11:07:46 24 THE COURT: All right. You are excused.

11:07:55 25 THE WITNESS: Thank you, sir.

11:07:56 1 MR. MANLEY: Your Honor, I'm going to retrieve our
11:07:58 2 next witness.

11:07:58 3 THE COURT: All right.

11:08:56 4 MR. MANLEY: Plaintiff calls Sherry Lee.

11:09:02 5 MR. TODD: Just to preserve it for the record, I have
11:09:05 6 basically the same objection. There's nothing she'd have to
11:09:08 7 testify to that would be materially beyond what is stipulated.
11:09:12 8 But that's just to keep my objection on the record.

11:09:14 9 THE COURT: No. Your objection is duly noted. Your
11:09:16 10 record is protected. I'm going to overrule the objection
11:09:19 11 without prejudice to the fact that I may choose not to consider
11:09:23 12 the evidence, but it would come into the record anyway, if not
11:09:27 13 as direct evidence, but as any bill Mr. Manley would want to
11:09:31 14 make. So you may proceed, Mr. Manley.

11:10:02 15 (Witness sworn)

11:10:02 16 **SHERRY LEE,**
11:10:02 17 having been first duly sworn, testified as follows:

11:10:02 18 **DIRECT EXAMINATION**

11:10:02 19 **BY MR. MANLEY:**

11:10:02 20 Q. Good morning.

11:10:04 21 A. Good morning.

11:10:04 22 Q. Would you state your name for the record, please?

11:10:06 23 A. Sherry Lee.

11:10:07 24 Q. And, Ms. Lee, were you employed by the Texas State Board
11:10:12 25 of Examiners and Psychologists?

11:10:14 1 A. Yes.

11:10:14 2 Q. What was your position with the Board?

11:10:17 3 A. I was the executive director.

11:10:19 4 Q. And how long were you employed by the Board?

11:10:23 5 A. Sixteen years.

11:10:24 6 Q. From what date did you start?

11:10:28 7 A. August 12th, 1996 to August 31st, 2012.

11:10:34 8 Q. And so you were executive director during the time that

11:10:42 9 the complaints arose against Dr. Serafine?

11:10:46 10 A. Yes.

11:10:46 11 Q. And what were your responsibilities as executive director?

11:10:51 12 A. Well, there were a myriad responsibilities. I was the
11:10:58 13 basic liaison to the Legislature and reviewed, drafted, and
11:11:06 14 proposed legislation for the Board. And I prepared financial
11:11:12 15 statements for proposed legislation and occasionally had to
11:11:19 16 go -- if the author of the bill wanted me to be there to be a
11:11:23 17 resource for the bill, I had to be there. I had budget
11:11:26 18 hearings before the Legislature.

11:11:28 19 We had four board meetings a year, so I had to
11:11:31 20 prepare for the Board meetings. And that would be compiling
11:11:34 21 the Board packet which included opinion letters and complaints
11:11:41 22 or cases which had agreed orders to be approved by the Board,
11:11:45 23 among other things.

11:11:47 24 I had to hire and occasionally fire the staff. I had
11:11:51 25 to do annual evaluations of the staff. I had to draft

11:11:55 1 correspondence for the Board. I had to talk to various
11:12:04 2 licensees on the telephone if they had inquiries about
11:12:06 3 something or other. That was part of it. And I didn't mention
11:12:13 4 the enforcement. So yes. I did, of course -- I participated
11:12:19 5 in the staff dismissal meetings, and I sat in on the informal
11:12:25 6 settlement conferences.

11:12:27 7 Q. And did you have general responsibility for overseeing the
11:12:31 8 enforcement of the Act?

11:12:32 9 A. Yes. Yes, I did.

11:12:33 10 Q. Including complaints received by the public or submitted
11:12:37 11 by the public?

11:12:39 12 A. Yes.

11:12:39 13 Q. Now, it's been stipulated to that the Board, after
11:12:48 14 receiving complaints about Dr. Serafine -- or at least one
11:12:56 15 complaint, contacted the *Austin American Statesman* and the
11:12:58 16 *Texas Tribune* to request corrections to articles that it
11:13:03 17 described Dr. Serafine as a psychologist?

11:13:06 18 A. I understand from the deposition that our general counsel
11:13:09 19 contacted those two newspapers.

11:13:12 20 Q. And, now, had the Board in the past sought such
11:13:17 21 corrections when someone used the term "psychologist" in the
11:13:22 22 press?

11:13:22 23 A. Not specifically that I recall.

11:13:24 24 Q. Are you aware of the Board ever requesting such
11:13:30 25 corrections in the press regarding the use of the term

11:13:33 1 "psychologist"?

11:13:34 2 A. Well, this was an unusual case. I can't think of another
11:13:39 3 situation like this.

11:13:40 4 Q. Why was it unusual?

11:13:41 5 A. Unusual because I can't remember anybody in a newspaper
11:13:45 6 article calling themselves a psychologist. It might have
11:13:49 7 happened, but it was an unusual event.

11:13:52 8 Q. Did the fact that Dr. Serafine was running for office make
11:13:58 9 it particularly unusual?

11:14:00 10 A. Well, again, I can't remember every time -- any time when
11:14:05 11 somebody was running for office there was a newspaper article.

11:14:08 12 No, I can't. That's probably the only time I can remember.

11:14:11 13 Q. So did the fact that she was running for office make this
11:14:15 14 case particularly unusual?

11:14:16 15 A. Well, I don't think that's what -- I don't think so. I
11:14:22 16 don't think that's what you're getting at. It was just unusual
11:14:25 17 that somebody would call themselves a psychologist, and there
11:14:28 18 would be some kind of article in a paper where they would do
11:14:31 19 that.

11:14:31 20 Q. If I could direct you to tab 5 in the note -- the white
11:14:44 21 notebook in front of you. If you could take a look at that
11:14:52 22 document that's been marked P-5, and let me know when you've
11:14:56 23 had a chance to familiarize yourself with it?

11:15:05 24 A. Yes. You presented this to me during the deposition.

11:15:32 25 Q. And this is a letter that you signed transmitting

11:15:36 1 Dr. Serafine's case from the Psychologist Board to the Attorney
11:15:42 2 General's Office?
11:15:43 3 A. Yes.
11:15:46 4 MR. MANLEY: Plaintiff would move admission of what's
11:15:49 5 been marked as P-5.
11:15:51 6 MR. TODD: No objection.
11:15:52 7 THE COURT: Plaintiff's Exhibit Number 5 is admitted.
11:16:03 8 Q. (BY MR. MANLEY) So flipping to the second page of this
11:16:06 9 letter that's referring Dr. Serafine's case to the Attorney
11:16:09 10 General's Office for prosecution -- well, let me ask you this
11:16:13 11 first: In your time at the Board, how many cases did you refer
11:16:17 12 to the Attorney General's Office?
11:16:18 13 A. Very few. Because it was unusual that when it was a cease
11:16:24 14 and desist situation, that the person didn't send us a
11:16:29 15 satisfactory reply correcting the error which was against the
11:16:31 16 Act or the rules that the Board notified them of.
11:16:34 17 Q. And, now, this letter is dated November 18th, 2010,
11:16:40 18 correct?
11:16:40 19 A. Yes.
11:16:40 20 Q. And before sending this letter asking the Attorney General
11:16:44 21 to prosecute Dr. Serafine, did you check to see if -- if the --
11:16:50 22 if her political Web site still used the word "psychologist"?
11:16:59 23 A. I did not do that.
11:17:00 24 Q. Prior to sending this letter, had you viewed
11:17:02 25 Dr. Serafine's political Web site?

11:17:04 1 A. No. I would rely on the -- our attorney at the time to
11:17:08 2 have done the investigation for the cease and desist.

11:17:17 3 Q. Now, on the second page of this letter -- or I'm sorry.
11:17:30 4 In the last paragraph of the first page, you say that the
11:17:35 5 statement, "Mary Lou Serafine, attorney and psychologist,"
11:17:41 6 continues to be posted on various Web sites. Are those Web
11:17:48 7 sites included in this letter?

11:17:50 8 A. Again, I'm not sure. I'll just try to read this
11:17:54 9 information here, but I'm -- I certainly don't remember.

11:18:22 10 Q. If you flip towards the middle of Exhibit 5, there's a
11:18:26 11 page that's marked TSBEP000130.

11:18:42 12 A. Okay.

11:18:42 13 Q. Are those examples of the Web sites that you were
11:18:47 14 referring to in your letter?

11:18:50 15 A. Again, I'm not sure. It looks like it might be, but I
11:18:56 16 can't say for sure since the letter doesn't specifically list
11:18:59 17 the Web sites. I'm not sure, but it looks like it would
11:19:03 18 probably be.

11:19:09 19 Q. Now, the second page of the letter in the paragraph that's
11:19:13 20 numbered 10, you also refer to hits, quote/unquote, that
11:19:21 21 include "psychologist" with name Mary Lou Serafine?

11:19:26 22 A. That's what it says there.

11:19:28 23 Q. And is this page 130, is that -- are these the hits that
11:19:38 24 are referred to in that paragraph?

11:19:40 25 A. I can't say for sure. At the top of the page it says "Web

11:19:45 1 search results for Mary Lou Serafine," but I can't read
11:19:48 2 anything else there.

11:19:49 3 Q. Now, you testified that you are -- that when you were the
11:19:59 4 executive director, you were responsible for enforcement of the
11:20:04 5 Psychologist Licensing Act?

11:20:06 6 A. Yes, I was. But, of course, I had to depend on the staff
11:20:10 7 to do the investigations.

11:20:11 8 Q. Absolutely. But you're familiar with the Act that you
11:20:14 9 were charged with enforcing?

11:20:16 10 A. I certainly was at that time. I'm still somewhat familiar
11:20:20 11 with it.

11:20:21 12 Q. Now, these search results that are on page 130 that were
11:20:29 13 included in the letter as evidence supporting your request for
11:20:32 14 the Attorney General to prosecute, take a look at these and let
11:20:37 15 us know: Do these search results violate the Act?

11:20:40 16 A. You know, I'm trying to do this in retrospect, so it's
11:20:53 17 kind of difficult. But it says, "Mary Lou Serafine, *The Texas*
11:20:57 18 *Tribune*. Full name: Mary Lou Serafine. Occupation: Attorney
11:20:58 19 and psychologist."

11:21:02 20 Q. And so that's problematic?

11:21:04 21 A. Well, yes.

11:21:05 22 Q. It violates the Act for her to --

11:21:07 23 A. Well, you can't call yourself a psychologist in Texas
11:21:11 24 unless you're licensed by the Board. It's a protected title.

11:21:14 25 Q. Okay. And are there any other hits on page 130 that

11:21:19 1 violate the Act?

11:21:20 2 A. Let's see. A little further down the page, "Mary Lou

11:21:39 3 Serafine for Texas, for Travis, for the senate in district ...

11:21:42 4 Mary Lou Serafine is an Austin attorney and psychologist and a

11:21:46 5 former UT San Antonio, blah, blah, blah."

11:21:49 6 Q. And what Web site is that referring to?

11:21:51 7 A. I'm not sure.

11:22:02 8 Q. Is it the -- is that *The Texas Tribune*.

11:22:05 9 A. It doesn't say *Texas Tribune* there. So I don't -- it

11:22:09 10 says, "Found exclusively on Ask.com" I believe the dot follows

11:22:14 11 the reference line there.

11:22:27 12 Q. Which hit are you referring to?

11:22:29 13 A. I believe it's the third from the bottom of the page.

11:22:41 14 Q. I guess just looking at this, you don't know what Web site

11:22:44 15 that appears on. It might be Ask.com?

11:22:50 16 A. Again, I'm trying to make sense of this page, but it seems

11:22:53 17 like after every one of these references, there's an asterisk

11:22:57 18 or a colon or something and it says "Found on Google" or "Found

11:23:00 19 exclusively on Yahoo" or "Found on Google."

11:23:04 20 Q. Was there any reason to include this list in your letter

11:23:07 21 transmitting Dr. Serafine's case to the Texas Attorney

11:23:11 22 General --

11:23:11 23 A. Well, I'm --

11:23:12 24 Q. -- other than -- other than it reflects violations of the

11:23:15 25 Psychologist Licensing Act? Is that the only reason that it

11:23:19 1 would have been included?

11:23:20 2 A. Well, yes. That was what was provided to the Attorney
11:23:23 3 General's Office just as proof that -- that Dr. Serafine was
11:23:27 4 violating the Act.

11:23:29 5 Q. And what about the pages that begin at what's marked 132
11:23:39 6 through 134, immediately following -- I'm sorry -- 132 to 135
11:23:46 7 immediately following what we've been discussing. Why were
11:23:50 8 those pages included? Is this -- is this evidence of a
11:23:58 9 potential violation of the Act?

11:24:00 10 A. I'm assuming that it had some bearing on the Board's claim
11:24:03 11 that Dr. Serafine was violating the Act. That's why it would
11:24:06 12 have been, you know, forwarded to the Attorney General's Office
11:24:10 13 as evidence.

11:24:11 14 Q. And looking at this, can you tell us why this is evidence
11:24:22 15 of a violation of the Act?

11:24:25 16 A. I don't see anything specifically on those three pages.
11:25:18 17 It's not specifically, certainly not standalone.

11:25:25 18 Q. I suppose that's why on the second page of the letter you
11:25:27 19 indicate that this may or may not indicate practice of
11:25:30 20 psychology?

11:25:30 21 A. I guess so. And, again, I just don't know. Maybe there
11:25:40 22 was other information on the Web site, and this was just to,
11:25:45 23 you know, that needed further research on the Web site. I
11:25:48 24 don't know specifically other than that.

11:25:55 25 Q. Let me direct you to tab -- tabs 14 and 15 in your book.

11:26:29 1 You may recognize these documents from your deposition.

11:26:33 2 A. I think so.

11:26:34 3 Q. Have you had a chance to familiarize yourself with them?

11:26:38 4 A. Let's see. It's from 2008, and it's a complaint filed

11:26:48 5 with the Board.

11:26:58 6 Q. And that's true in both 14 and 15?

11:27:01 7 A. You're talking about, like, the business card about the

11:27:17 8 certified hypnotist?

11:27:20 9 Q. Yeah. I believe that's part of the complaint.

11:27:23 10 A. Okay.

11:27:25 11 Q. So these documents 14 and 15, these are records of

11:27:30 12 complaints received by the Board, correct?

11:27:32 13 A. Scratched out, but that's what it looks like, yes.

11:27:37 14 Q. "Scratched out," meaning the identifying information is

11:27:40 15 removed?

11:27:41 16 A. Yes.

11:27:42 17 Q. And the Board regularly received complaints on this form?

11:27:48 18 A. Yes.

11:27:49 19 Q. The Board keeps these records in the regular course of its

11:27:55 20 activities, correct?

11:27:56 21 A. It does.

11:27:56 22 Q. It's actually a large part of what the Board does,

11:27:59 23 correct?

11:28:01 24 A. Well, enforcement is an important duty of the Board.

11:28:06 25 MR. MANLEY: Plaintiff would move admission of P-14

11:28:08 1 and P-15 at this time.

11:28:10 2 MR. TODD: I object to them as irrelevant, but I

11:28:14 3 don't have any other objection to them.

11:28:19 4 THE COURT: Well, I'll allow the exhibits. The
11:28:22 5 objection is overruled. Plaintiff's Exhibits 14 and 15 are
11:28:24 6 admitted.

11:28:30 7 Q. (BY MR. MANLEY) Now, Ms. Lee, if you would turn to -- flip
11:28:34 8 through Exhibit 14 with me until we get to page 417. And let
11:28:46 9 me know when you're there.

11:28:47 10 A. Yes.

11:28:47 11 Q. So this is an advisory on Board stationary regarding
11:28:57 12 hypnotherapy?

11:28:57 13 A. Yes.

11:28:58 14 Q. Correct?

11:28:59 15 A. Yes. It doesn't have a date on it, so I really don't
11:29:02 16 known when it was done. But it's definitely on Board
11:29:06 17 stationary, and I seem to remember something about it.

11:29:10 18 Q. And, now, this is an advisory regarding a disclaimer that
11:29:23 19 the Board is suggesting to avoid a violation of the Act. Is
11:29:26 20 that accurate?

11:29:27 21 A. Specifically for hypnotherapy and hypnosis for health care
11:29:32 22 purposes.

11:29:32 23 Q. And so the view that is represented here is that this
11:29:35 24 disclaimer allows hydrotherapists to avoid confusion and avoid
11:29:41 25 prosecution under the Act; is that correct?

11:29:43 1 A. If it was a very straightforward situation, that seems to
11:29:56 2 be what it would do.

11:29:57 3 Q. Okay. Do you know if a disclaimer like this was employed
11:30:05 4 regarding any other potential violations of the Act other than
11:30:09 5 hypnotherapy?

11:30:11 6 A. I really -- I don't think it was very commonly used. It
11:30:14 7 might have been used sometime in the past, but I don't remember
11:30:18 8 any recent cases at all about it.

11:30:19 9 Q. Okay. Let's flip through Exhibit 15, if you would, until
11:30:31 10 we get to page 424. And is that the same disclaimer?

11:30:53 11 A. Yes.

11:30:54 12 Q. Okay. And this is --

11:31:00 13 A. Again, I'm not sure exactly what this is. Is this
11:31:04 14 information that the complainant sent in, or is this -- it's
11:31:07 15 just not -- I mean, or what?

11:31:11 16 Q. So the disclaimer that we've been discussing, that's --
11:31:15 17 that's on Board stationary; is that correct?

11:31:19 18 A. Yes. Yes, it is.

11:31:20 19 Q. Okay. And is this information that the Board transmitted
11:31:29 20 to the public or at least to this person?

11:31:34 21 A. Again, I'm not -- I'm not sure, you know, if it came in
11:31:40 22 with a complaint, if it was sent to the Board, or if -- or if
11:31:47 23 the Board used it in dealing with the complaint. I just -- I'm
11:31:52 24 not sure. I don't know what happened to this complaint.

11:31:55 25 Q. The disclaimer was written by the Board, correct?

11:32:03 1 A. Yes.

11:32:03 2 Q. Okay. Now, when you were with the Board, did the Board

11:32:08 3 maintain a database of licensed psychologists?

11:32:11 4 A. Yes.

11:32:11 5 Q. And is that database available to the public?

11:32:15 6 A. Yes.

11:32:17 7 Q. How is it available?

11:32:19 8 A. Well, let's see. It changed over time, but the -- you

11:32:23 9 could get a -- at one time you could get a paper list. I think

11:32:28 10 now you can just get a disc. That's all I can remember.

11:32:31 11 Q. That's okay. Could a member of the public call the Board

11:32:39 12 and ask if someone's licensed?

11:32:41 13 A. Absolutely. Yes.

11:32:44 14 Q. Is the database accessible on the Internet?

11:32:48 15 A. Well, I can't remember. I think -- yes. I think now that

11:32:53 16 the Board can see -- we have a new computer system, or we had

11:32:59 17 just a brand new computer system while I was there, the last

11:33:02 18 year and so, and you can type in a person's name and you can

11:33:05 19 see if a person is currently licensed.

11:33:10 20 Q. So it sounds like the Board has an interest in making this

11:33:15 21 information available to the public?

11:33:18 22 A. If a person is licensed with the Board? Absolutely.

11:33:21 23 Q. And in your experience with the Board, the Board has

11:33:25 24 attempted in various ways to make the information easily

11:33:28 25 accessible to the public?

11:33:29 1 A. Yes.

11:33:47 2 MR. MANLEY: Okay. May I have a moment, Your Honor?

11:33:48 3 THE COURT: You may.

11:33:49 4 MR. MANLEY: Thank you.

11:34:16 5 Q. (BY MR. MANLEY) I think we're almost done. Thank you for
11:34:18 6 your patience.

11:34:19 7 A. Sure.

11:34:19 8 Q. If you would flip to Exhibit 14 for me.

11:34:30 9 A. (Complies)

11:34:30 10 Q. And take a moment if you need to, but what is the harm to
11:34:34 11 the public that's being reported in this complaint?

11:34:49 12 A. Let's see. It claims that this person, a woman, speaks
11:34:59 13 weekly advising everyone how she can help them deal with
11:35:04 14 addictive issues and emotional issues using hypnosis and
11:35:09 15 cognitive behavioral therapy. She is not licensed. She quotes
11:35:24 16 the chapter of the Act, using projective techniques,
11:35:28 17 neurological testing, counseling, career counseling,
11:35:32 18 psychotherapy, hypnosis for health care purposes, hypnotherapy,
11:35:37 19 and biofeedback. She is willfully defying the Texas laws.

11:35:45 20 Q. So what was the harm to the public?

11:35:48 21 A. That she's claiming to provide information about advising
11:36:02 22 everyone how she can help them deal with addictive issues and
11:36:07 23 emotional issues using hypnosis and cognitive behavioral
11:36:12 24 therapy.

11:36:17 25 Q. That's the harm to the public?

11:36:18 1 A. She's willfully and wantonly defying the Texas laws, blah,
11:36:43 2 blah, blah, as well as the interpretation of these codes.
11:36:46 3 State Representative office and the Texas Attorney General's
11:36:49 4 clarification of the matter as of February 19 -- referring to
11:36:54 5 an open records opinion, and she ignores it all. There was an
11:36:59 6 open records opinion on hypnosis and health care purpose.
11:37:06 7 Q. And so -- and the harm to the public was?
11:37:09 8 A. Well, he was claiming that she was breaking the Act and
11:37:13 9 the rules.
11:37:13 10 Q. Okay. And who -- was this complaint submitted by a
11:37:20 11 licensed professional counselor?
11:37:28 12 A. The person says they are a licensed professional
11:37:35 13 counselor.
11:37:36 14 Q. And flipping to Plaintiff's Exhibit 15, can you identify
11:37:59 15 for us the harm to the public being addressed by this
11:38:03 16 complaint?
11:38:04 17 A. This one person again claims that this person is violating
11:38:16 18 the Act.
11:38:20 19 Q. And that's the only harm to the public?
11:38:22 20 A. You know, the Board is charged to enforce the Act and the
11:38:28 21 rules.
11:38:29 22 Q. Absolutely.
11:38:31 23 A. So when you say "harm to the public," I just want to fall
11:38:34 24 back on the fact that if somebody is violating a rule or the
11:38:37 25 Act, that's when the Board has to take action.

11:38:40 1 Q. And I just want to be clear that that's the harm to the
11:38:45 2 public that we're talking about here, was the violation of the
11:38:49 3 rules?

11:38:49 4 A. I guess you could say that, yeah, because that's what the
11:38:55 5 Board is charged by the Legislature to do, to, you know,
11:38:59 6 regulate the practice of psychology and protect the public.

11:39:03 7 MR. MANLEY: Okay. Thank you. Pass the witness.

11:39:05 8 THE COURT: Mr. Todd, cross-examination?

11:39:08 9 MR. TODD: Yes.

11:39:08 10 **CROSS-EXAMINATION**

11:39:08 11 **BY MR. TODD:**

11:39:08 12 Q. Sitting here today, do you know what the outcome or the
11:39:17 13 disposition was of the complaints that are represented as P-14
11:39:23 14 and P-15?

11:39:25 15 A. No.

11:39:25 16 Q. Okay. You met -- did you refer earlier to informal
11:39:30 17 settlements?

11:39:31 18 A. Yes.

11:39:32 19 Q. Is that part of the process?

11:39:34 20 A. Yes.

11:39:34 21 Q. And if the person complained about here and the Board
11:39:40 22 reach some sort of agreement in an informal settlement, is it
11:39:45 23 possible that we may not have a record today of what that
11:39:48 24 settlement was?

11:39:49 25 A. If it resulted in disciplinary action, you would have a

11:39:53 1 record of it.

11:39:54 2 Q. Okay. And if it didn't result in disciplinary action, is

11:39:58 3 it possible that we might not have a record?

11:39:59 4 A. No, sir.

11:40:00 5 Q. Do you specifically remember those two complaints?

11:40:03 6 A. No.

11:40:03 7 Q. Okay. And so you don't know whether there was any kind of

11:40:08 8 finding or decision by anybody on the Board as to whether or

11:40:12 9 not any law had actually been violated after investigation?

11:40:16 10 A. No, I don't.

11:40:17 11 Q. Okay. And, again, the -- that advisory that's listed in

11:40:24 12 there and shown there on board stationary, did you say that you

11:40:27 13 don't know whether that was something that was included with

11:40:31 14 the complaint or --

11:40:34 15 A. Yeah. I'm sorry. But, no, it wasn't clear from just

11:40:38 16 these copies.

11:40:39 17 Q. Okay. So if it -- if the complainant was including that

11:40:43 18 as an attachment to the complaint, that would suggest that

11:40:46 19 that's something that was issued much earlier in time, right?

11:40:52 20 A. Yes.

11:40:52 21 Q. Okay. Now, the -- did you notice that the -- that

11:40:56 22 advisory has on it the address of 333 Guadalupe, et cetera?

11:41:02 23 A. I didn't notice that.

11:41:04 24 Q. Okay. Is that the Hobby Building?

11:41:07 25 A. Yes.

11:41:07 1 Q. And has the Board been in the Hobby Building since
11:41:11 2 approximately 1995?

11:41:13 3 A. I believe that's correct, yes.

11:41:15 4 Q. Okay. So all we know is that sometime between 1995 and
11:41:22 5 January 2008, which is the date of the complaint, this advisory
11:41:26 6 was composed on stationary of the Board?

11:41:29 7 A. That would make sense.

11:41:29 8 Q. Do you note whether that -- this is something that was
11:41:33 9 issued to the public or something that might have been issued
11:41:35 10 to just one particular licensee in one particular case?

11:41:39 11 A. I really -- it could be either. I just don't know.

11:41:42 12 Q. And you don't remember -- you yourself personally don't
11:41:46 13 remember that that particular advisory -- don't remember
11:41:50 14 anything about the composing or issuing of that advisory?

11:41:54 15 A. No. We did have cases about, you know, hypnosis and
11:41:58 16 health care purposes, but I don't remember that advisory.

11:42:00 17 MR. TODD: Pass the witness, Your Honor.

11:42:02 18 THE COURT: Anything further, Mr. Manley?

11:42:04 19 MR. MANLEY: Nothing further, Your Honor.

11:42:05 20 MR. TODD: Can this witness be excused?

11:42:07 21 MR. MANLEY: Yes. No objection.

11:42:08 22 THE COURT: All right. You may step down, and you
11:42:10 23 are excused.

11:42:12 24 I think we're going to break a little bit early this
11:42:16 25 morning, but not much. I have a couple of matters to tend to

11:42:20 1 over the noon hour. So at this time we will take our noon
11:42:26 2 recess, and we will be in recess until 2 o'clock.

11:42:35 3 (Recess)

14:01:26 4 (Open Court)

14:01:26 5 THE COURT: Plaintiff may call their next witness.

14:01:27 6 MR. MANLEY: Plaintiff calls Tim Branaman.

14:01:29 7 THE COURT: All right. Please come forward.

14:01:37 8 MR. TODD: Your Honor, before he starts, can I raise
14:01:39 9 one little housekeeping matter.

14:01:41 10 THE COURT: Sure.

14:01:42 11 MR. TODD: I discussed this with Mr. Manley before.
14:01:47 12 I think we have an arrangement. Based on the original schedule
14:01:52 13 for this trial, Dr. Jennings finds himself with commitments
14:01:56 14 tomorrow morning and no place to stay and no change of clothes.
14:02:00 15 So my objective is to finish him today. And so to make that
14:02:05 16 possible without disrupting their -- you know, their order of
14:02:10 17 witnesses, what we've talked about is after Dr. Branaman -- the
14:02:15 18 direct examination of Dr. Branaman, if I could reserve my
14:02:19 19 questions for him until later and then go immediately to
14:02:22 20 Dr. Jennings and get his testimony done. Is that -- would that
14:02:26 21 create a problem?

14:02:27 22 THE COURT: No. The problem is created by something
14:02:32 23 else, and that is we probably don't have a full afternoon
14:02:39 24 today --

14:02:39 25 MR. TODD: Okay.

14:02:40 1 THE COURT: -- that we can go. So this is --
14:02:47 2 everyone just be at ease a minute.

14:02:49 3 MR. TODD: Okay.

14:02:50 4 THE COURT: We need to look at this right now and see
14:02:53 5 what we're going to do with it. And I apologize to you ahead
14:02:56 6 of time. I alerted to you to this a little bit when I put you
14:03:00 7 off the first time. This is -- dockets are just getting crazy
14:03:05 8 around here. Go to Washington and get a third judge for the
14:03:11 9 District Courts of Central Texas and it would solve a lot. But
14:03:22 10 we'll just talk about how we're going to schedule this right
14:03:22 11 now. Good news is we don't have a jury. So if we need to move
14:03:23 12 it around, we're just inconveniencing ourselves and I'm
14:03:27 13 inconveniencing everybody, but we're not having 8 to 12 people.

14:03:32 14 Here is my problem. They need to get in here
14:03:39 15 tomorrow with ladders and get up there inside the ceiling to
14:03:46 16 look at how -- it's cool in here today. It may even be a
14:03:50 17 little cold. But we've had the 1936 courthouse problems in
14:03:54 18 here in that it's been hard to hold a temperature. And so they
14:03:58 19 want to get in here and do that tomorrow. And they were going
14:04:02 20 to do it in the morning, and I moved them to the afternoon so
14:04:06 21 we could finish this. And then we had another matter come up
14:04:11 22 again involving the building, involving some little thing,
14:04:16 23 signage or something, that I need to deal with. And then this
14:04:22 24 afternoon, unfortunately, the reason we get pushed there is I
14:04:29 25 need to have a follow-up appointment with a physician on a

14:04:34 1 matter that won't take very long but I'm afraid if I reset it,
14:04:38 2 I won't -- I'm six months down the line with it.

14:04:41 3 So let's talk about, if we were to go to 4 o'clock
14:04:48 4 today, when could everybody regroup, and how much time do we
14:04:56 5 have left? How long do you think the direct -- or do you want
14:05:00 6 to call a witness out of order or what works for you?

14:05:03 7 MR. TODD: Well, that's another option. I -- it's
14:05:08 8 hard to time, but my -- my best guess is I have 30 to 45
14:05:13 9 minutes worth of direct for Dr. Jennings. That's at my best
14:05:19 10 guess. Its depends on some things. But I'm going to try to
14:05:23 11 look for ways that I could really expedite. We can -- you
14:05:30 12 know, we'll rely on his CV, and I don't have to ask as many
14:05:33 13 questions about background and stuff like that. But there are
14:05:35 14 a few other things that have come up.

14:05:37 15 THE COURT: Well, and how long are we looking at with
14:05:40 16 Mr. Branaman? How long, Mr. Manley, do you think you've got?
14:05:45 17 I'm not going to hold you to this.

14:05:46 18 MR. MANLEY: I'd be surprised if it's an hour. Maybe
14:05:49 19 half an hour, more likely.

14:05:51 20 THE COURT: All right.

14:05:52 21 MR. TODD: And 30 to 45 minutes of my part depending
14:06:00 22 on what's said.

14:06:01 23 THE COURT: Well, then we could get him done by
14:06:04 24 4 o'clock. We could get this witness done.

14:06:05 25 MR. TODD: Dr. Branaman, yes.

14:06:07 1 THE COURT: Yeah.

14:06:08 2 MR. TODD: I think we could.

14:06:10 3 THE COURT: All right. And do you have further
14:06:11 4 witnesses after that except for perhaps rebuttal? Do you have
14:06:14 5 any more witnesses in chief?

14:06:15 6 MR. MANLEY: No, Your Honor.

14:06:16 7 THE COURT: All right. And then you have how many?

14:06:17 8 MR. TODD: I have -- I was going to call
14:06:20 9 Dr. Branaman, to some extent, and then Dr. Jennings. And then
14:06:27 10 depending on the time Mr. Spinks, the executive director. But
14:06:33 11 that one I'm holding kind of in reserve based on what the time
14:06:36 12 looks like.

14:06:37 13 THE COURT: All right. And who is it that's running
14:06:38 14 out of clean clothes?

14:06:40 15 MR. TODD: Dr. Jennings, our expert witness.

14:06:43 16 THE COURT: Okay. All right. So what's everybody's
14:06:46 17 schedule next week? Could we do Dr. Branaman and then come
14:06:52 18 back next week and finish this up?

14:06:54 19 MR. TODD: As far as I know, without my calendar
14:06:57 20 here, I cannot think ...

14:06:59 21 THE COURT: You should never come to court without
14:07:01 22 your calendar because people like me always throw curves at
14:07:06 23 you.

14:07:06 24 MR. TODD: I know. I do not know of a conflict next
14:07:10 25 week that would take precedence over a federal trial.

14:07:15 1 THE COURT: That's refreshing. Mr. Manley?

14:07:20 2 MR. MANLEY: I'm looking, Your Honor. I -- I have an
14:07:26 3 engagement on Friday, but that is not as important as a federal
14:07:30 4 trial. I would ...

14:07:32 5 THE COURT: Friday of next week?

14:07:33 6 MR. MANLEY: Yeah.

14:07:34 7 THE COURT: I'm thinking Monday. Ms. Jones, the
14:07:40 8 conditional plea in that one criminal case is going to go
14:07:45 9 through. See, I have a criminal trial scheduled Monday, but --
14:07:48 10 but it's going away. So that's what gave me a block of time on
14:07:54 11 my calendar for Monday that now opened up.

14:07:57 12 Remember those old ads about the FedEx guy that used
14:08:00 13 to sit there? That's the way I feel, moving his packages
14:08:03 14 around trying to figure out where they're going to go and what
14:08:05 15 I can do.

14:08:05 16 How does Monday sound to everybody?

14:08:11 17 DR. JENNINGS: Your Honor, could we schedule it
14:08:13 18 Monday afternoon, perhaps? I have some docket issues in our
14:08:16 19 courts --

14:08:17 20 THE COURT: Sure. Do you have your other witness
14:08:19 21 that you could put on first if we did it in the morning?

14:08:21 22 MR. TODD: Sure. Sure.

14:08:23 23 THE COURT: That would work for you. We can schedule
14:08:26 24 you in the afternoon. I'm not quite as strict on this when
14:08:29 25 it's my fault. When it's your fault when the docket messes up

14:08:34 1 or -- but this is my doing, so I'm going to try to accommodate
14:08:37 2 you any way I can.

14:08:38 3 MR. TODD: What could happen is that in order to
14:08:41 4 reserve enough time to get the benefit of the expert testimony,
14:08:46 5 depending on what time I have left -- and so far it's a pretty
14:08:49 6 good amount.

14:08:50 7 THE COURT: Y'all are doing fine on your time.

14:08:52 8 MR. TODD: And this -- I mean, I didn't have that
14:08:55 9 many questions for Mr. Spinks, but maybe we can think of more.
14:08:59 10 But I may let him go sooner.

14:09:02 11 THE COURT: That's the danger of letting lawyers out
14:09:05 12 of your sight. They think of more questions.

14:09:09 13 MR. TODD: And maybe Mr. Manley can ruthlessly
14:09:13 14 cross-examine him for a couple of hours Monday morning, and
14:09:16 15 then we'd be ready.

14:09:17 16 THE COURT: Well, you don't have to stretch --

14:09:19 17 MR. TODD: Right. I know.

14:09:20 18 THE COURT: -- if we break a little early Monday. We
14:09:23 19 can do this Monday. We can do Dr. Branaman and then finish
14:09:28 20 this up Monday in whatever order you want to do your witnesses.
14:09:30 21 Will that work?

14:09:33 22 DR. BRANAMAN: I am sure that a federal takes
14:09:36 23 precedent over a military case, except scheduled to be in
14:09:39 24 Sacramento, California on a military courts-martial next week.

14:09:44 25 MR. TODD: Well, that just means once -- he is a

14:09:47 1 defendant as well as a witness, but it just means that you
14:09:51 2 wouldn't be able to be here. But once you've testified, if
14:09:54 3 there's no chance of calling you back, we would --

14:09:56 4 THE COURT: And I will not take it as a lack of
14:09:59 5 interest by you or either of the Board -- or either the Board
14:10:03 6 if you're not here on Monday.

14:10:06 7 DR. BRANAMAN: I appreciate that.

14:10:07 8 MR. TODD: Ms. Penn tells me she's in trial, but I
14:10:10 9 can handle it. She's in trial Monday.

14:10:13 10 THE COURT: Did she give you permission to handle it?

14:10:16 11 MR. TODD: She expressed confidence that I could
14:10:18 12 probably take it from there.

14:10:19 13 THE COURT: All right. Then here's what we're going
14:10:21 14 to do: We're going to start with Dr. Branaman, and we're going
14:10:24 15 to go until about 4:00, maybe even a little before, and get as
14:10:27 16 far as we can with him. Then we'll recess until 9 o'clock
14:10:30 17 Monday.

14:10:30 18 MR. TODD: If he's -- if he's in trial -- I mean,
14:10:35 19 he's got his own witnesses testimony to give in a proceeding in
14:10:41 20 Sacramento, that would mean, if at all possible, we need to
14:10:44 21 finish Dr. Branaman today.

14:10:45 22 THE COURT: Then you have to talk fast because we've
14:10:48 23 just burned up 12 minutes. Because I've got to walk out here
14:10:52 24 hopefully a little bit before 4:00, actually.

14:10:55 25 MR. TODD: Okay. I can be fast.

14:10:56 1 THE COURT: Ms. Jones, did you finish the oath, or
14:10:58 2 have we done that yet?

14:10:58 3 (Witness sworn)

14:11:25 4 THE COURT: All right. Ms. Rodriguez, type fast
14:11:25 5 because Mr. Manley's going to question fast.

14:11:25 6 MR. MANLEY: That's the plan.

14:11:26 7 THE COURT: All right. You may proceed.

14:11:27 8 **TIMOTHY BRANAMAN,**

14:11:27 9 having been first duly sworn, testified as follows:

14:11:27 10 **DIRECT EXAMINATION**

14:11:27 11 **BY MR. MANLEY:**

14:11:27 12 Q. Good afternoon. Would you state your name for the record,
14:11:30 13 please.

14:11:30 14 A. Timothy Branaman.

14:11:32 15 Q. And what is your position with the Texas State Board of
14:11:36 16 Examiners and Psychologists?

14:11:37 17 A. I'm the chairman for the Board.

14:11:38 18 Q. And how long have you been on the Board?

14:11:42 19 A. I have been on the Board since 2008, and I've chaired the
14:11:44 20 Board since March of 2010.

14:11:51 21 Q. So you have been on the Board during the time that the
14:11:54 22 complaints arose against Dr. Serafine?

14:11:58 23 A. Yes.

14:11:58 24 Q. And what are your responsibilities as a member of the
14:12:01 25 Board?

14:12:03 1 A. To represent and fulfill the mission of the agency as far
14:12:11 2 as developing and implementing rules for the regulation of
14:12:16 3 psychology and protecting the public in general.

14:12:21 4 Q. And you developed those rules pursuant to the Psychologist
14:12:26 5 Licensing Act; is that correct?

14:12:27 6 A. Yes.

14:12:28 7 Q. What are your responsibilities as chairman?

14:12:32 8 A. Essentially to oversee an orderly process that the Board
14:12:39 9 carried out its mission, as I described it, as well as I chair
14:12:45 10 the rules committee in looking at issues that are involved in
14:12:50 11 reviewing rules that may need to be revised or rules that may
14:12:56 12 need to be implemented.

14:12:58 13 Q. And so you're familiar with the Psychologist Licensing
14:13:00 14 Act?

14:13:02 15 A. Yes.

14:13:02 16 Q. Does the Board maintain a database of licensed
14:13:09 17 psychologists?

14:13:09 18 A. Yes.

14:13:09 19 Q. And is that database available to the public?

14:13:12 20 A. Yes.

14:13:13 21 Q. How is it made available to the public?

14:13:19 22 A. By way of Internet as well as contacting the Board.

14:13:24 23 Q. So someone can call the Board and ask, Is so and so
14:13:27 24 licensed, and the board will provide a response?

14:13:29 25 A. There's a procedure for that, yes.

14:13:30 1 Q. What is the procedure?

14:13:32 2 A. I don't know what the internal procedure is explicitly,
14:13:36 3 but don't know that it's just as simple as calling and saying,
14:13:38 4 Is so and so licensed? either.

14:13:40 5 Q. But it as simple as visiting the Web site and typing in a
14:13:44 6 name?

14:13:44 7 A. It would be just as simple as going and putting in
14:13:47 8 somebody's name to see if they were licensed.

14:13:50 9 Q. I'd like to ask you to take a look at a portion of the
14:14:05 10 Act. I'll hand it to you here. This is section 501.003 of the
14:14:40 11 Psychologist Licensing Act, correct?

14:14:43 12 A. That's correct.

14:14:44 13 Q. And this section of the Act defines what speech
14:14:46 14 constitutes the practice of psychology?

14:14:48 15 A. Yes.

14:14:49 16 Q. Now, as the Board interprets and enforces the Act, using
14:14:57 17 the terms "psychologist," "psychological," or "psychology,"
14:15:02 18 that constitutes the practice of psychology, correct?

14:15:05 19 A. The title aspect of it, yes.

14:15:07 20 Q. What do you mean by that?

14:15:09 21 A. Those are essentially characterizations of what one is
14:15:15 22 doing. And, certainly, "psychologist" is a title associated
14:15:21 23 with the practice of psychology in Texas.

14:15:23 24 Q. And if someone uses the term psychology -- psychological
14:15:29 25 or psychology in a title, that too would be --

14:15:32 1 A. -- representing themselves as practicing psychology.

14:15:34 2 Q. And prohibited by the Act?

14:15:36 3 A. I'm sorry.

14:15:37 4 Q. And would be prohibited by the Act?

14:15:39 5 A. That's correct.

14:15:40 6 Q. Now, if not using one of those prohibited terms, section

14:15:58 7 501.003(c) at the bottom of our page here, that defines what

14:16:03 8 sort of conversations constitute the practice of psychology,

14:16:07 9 correct?

14:16:07 10 A. The (c) section is that, yes.

14:16:09 11 Q. So let's take a closer look at that. If a person offers a

14:16:33 12 service that applies established principles, methods, or

14:16:37 13 procedures of describing, explaining, or ameliorating behavior,

14:16:42 14 is that the practice of psychology?

14:16:44 15 A. I'm sorry. Where were you referencing?

14:16:46 16 MR. TODD: Excuse me. I want to just put an

14:16:48 17 objection on record that the scope or the definition of

14:16:51 18 psychology is not at issue. This is -- what's left of the case

14:16:55 19 is an as-applied challenge to one particular episode. And the

14:17:04 20 vagueness challenge, which this would be suitable for, is no

14:17:07 21 longer in the case. So I just want my objection in the record

14:17:10 22 to this line of questioning.

14:17:13 23 THE COURT: Mr. Manley?

14:17:14 24 MR. MANLEY: The Supreme Court has said in

14:17:17 25 United States v. Williams that, quote, The first step in

14:17:20 1 overbreadth analysis is to construe the challenged statute.

14:17:23 2 It's impossible to determine whether the statute reaches too

14:17:26 3 far without first knowing what the statute covers.

14:17:28 4 So this is certainly germane to our overbreadth

14:17:30 5 claim.

14:17:30 6 THE COURT: Well, the overbreadth claim is still in

14:17:32 7 the case, so I will overrule the objection. I will say this,

14:17:36 8 though, and I want everybody to know this, I respect

14:17:40 9 Dr. Branaman and whatever he says I will listen to, but I will

14:17:45 10 not consider his testimony as expert testimony on what the law

14:17:48 11 is and what he says about what is the practice of psychology.

14:17:51 12 And however he construes this act will be accepted by the Court

14:17:57 13 only to be his personal opinion on what the Act says and how he

14:18:00 14 follows the Act. The Court will make the decision on what the

14:18:03 15 Act means and whether this is covered.

14:18:06 16 So I don't want anyone to think that we're going to

14:18:10 17 get into any testimony about what the law is. And when we get

14:18:15 18 to argument stage, I don't want you arguing that, well,

14:18:18 19 Dr. Branaman said this or Mr. So and so said this, and so

14:18:21 20 that's what the Act means. It's my job to construe the Act as

14:18:24 21 a matter of law, and that's what I will do.

14:18:27 22 MR. MANLEY: Absolutely, Your Honor.

14:18:28 23 THE COURT: So you may proceed.

14:18:30 24 Q. (BY MR. MANLEY) So, Mr. Branaman, if a person offers a

14:18:36 25 service that applies established principles, methods, or

14:18:39 1 procedures of describing, explaining, or ameliorating behavior,
14:18:43 2 is that the practice of psychology?
14:18:45 3 A. It would be the practice application of psychology, yes.
14:18:49 4 Q. And that would be prohibited by the Act?
14:18:51 5 A. Yes.
14:18:52 6 Q. And that includes unpaid services of those -- that
14:18:56 7 character?
14:18:56 8 A. I'm sorry.
14:18:57 9 Q. That would -- that would include unpaid services of that
14:19:01 10 character?
14:19:02 11 A. Yes, it would.
14:19:04 12 Q. There's no commercial --
14:19:05 13 A. If the individual is holding themselves out as a
14:19:08 14 psychologist or engaging in the practice defined as psychology.
14:19:13 15 Q. Yeah. And I think we -- it's clear that using the term
14:19:18 16 "psychologist" is prohibited by the Act. And so what I'd like
14:19:21 17 to focus on in your testimony is situations where a person is
14:19:26 18 not doing that but, nevertheless, comes within the Act because
14:19:29 19 of the other speech --
14:19:30 20 A. If they're holding these out as psychological services,
14:19:34 21 yes.
14:19:47 22 Q. Okay. And so there's no commercial element to the
14:19:48 23 constitute. It applies services rendered gratuitously and
14:19:51 24 services rendered for a fee, correct?
14:19:53 25 A. That may go to a legal issue that I'm unaware of. I don't

14:19:57 1 believe that there would be a difference.

14:20:01 2 Q. Okay. Yeah. And I'm just asking you, in your position as
14:20:04 3 chairman of the Board, as the Board interprets and enforces the
14:20:08 4 Act. So that's all we're getting at here.

14:20:11 5 A. And we have general counsel also to advise.

14:20:13 6 Q. Okay. Now, subsection C contains four subparts. So is it
14:20:30 7 the Board's position that the Act requires at least one
14:20:34 8 activity from each of subsections 1 through 4 in order for a
14:20:40 9 service to be the practice of psychology as defined by
14:20:43 10 subsection C?

14:20:45 11 A. Yes. It's looked at as a -- holistically.

14:21:01 12 Q. And so if a person is -- is engaging in speech that
14:21:10 13 encompasses subsection 1 subsection, 2, subsection, 3, but not
14:21:17 14 subsection 4, then that would not be the practice of
14:21:20 15 psychology?

14:21:21 16 A. Certainly that -- if that was the case, yes.

14:21:29 17 Q. That would not be the practice of psychology?

14:21:33 18 A. I'm sorry?

14:21:34 19 Q. That would not be the practice of psychology?

14:21:36 20 A. No. If they were not engaging in each one of those? Let
14:21:40 21 me be sure I'm understanding the question. Would you repeat
14:21:42 22 it, please?

14:21:43 23 Q. If a person engages in speech that is encompassed within
14:21:49 24 subsection 1, subsection 2 and subsection 3, but not subsection
14:21:57 25 four, would that be the practice of psychology?

14:22:02 1 A. Yes. I believe that it would be. Subsection 3 basically
14:22:14 2 is inclusive, and I don't see a differentiation there. Any of
14:22:21 3 those constitutes the practice of psychology.

14:22:23 4 Q. And so what I'm wondering is, if a person is not -- if the
14:22:33 5 speech includes providing computerized procedures that
14:22:43 6 addresses normal behavior and includes projective techniques,
14:22:47 7 but is not based on a systematic body of knowledge and
14:22:52 8 principles acquired in an organized program of graduate study,
14:22:57 9 so it hits number 1, it hits number 2, it hits number 3, but it
14:23:00 10 does not -- number 4 does not describe the speech. Is it the
14:23:06 11 practice of psychology?

14:23:07 12 A. In my estimation, yes, it would be the practice of
14:23:10 13 psychology because they're using methodology and they're
14:23:12 14 providing services to the public or to an individual that
14:23:19 15 represents the practice of psychology.

14:23:24 16 Q. So just -- just so we're clear, it is not your position --
14:23:31 17 it is not your interpretation or application of the Act that it
14:23:36 18 requires at least one activity from each of subsections 1
14:23:39 19 through 4 in order for the service to be the practice of
14:23:43 20 psychology?

14:23:44 21 A. The failure to not have had a systematic body of knowledge
14:23:49 22 based on a training program certainly does not exempt them from
14:23:57 23 the Act.

14:23:57 24 Q. Okay. So subsections 1 through 4 are not conjunctive?
14:24:01 25 That is, something can be the practice of psychology without

14:24:05 1 hitting all four elements.

14:24:07 2 A. I think that's probably the example that I just gave.

14:24:09 3 Q. Yeah. And I'm just trying to parse the language, and I
14:24:13 4 appreciate your help with that.

14:24:15 5 A. Yeah.

14:24:15 6 Q. If you would flip to tab 5 in the white binder in front of
14:24:28 7 you. And the last page of Plaintiff's Exhibit 5, if you would
14:24:41 8 take a look at and let me know when you've had a chance to
14:24:45 9 review that. It's labeled at the bottom 135.

14:24:48 10 A. Which page was it?

14:24:49 11 Q. It's the last page of Exhibit 5. And when you've had a
14:24:55 12 chance to review that, let me know.

14:25:01 13 A. Okay.

14:25:13 14 Q. Is the speech that's described there the practice of
14:25:22 15 psychology?

14:25:23 16 A. Possibly. Based on the information, it's unclear what the
14:25:33 17 context of this was being offered in and it's unclear whether
14:25:44 18 this was purely a -- it certainly raises questions whether it
14:25:48 19 was a lecture. "Small group facilitator" suggests it is the
14:25:55 20 practice of psychology because it appears to be a facilitating
14:26:00 21 some process. I'd have to know more about what the
14:26:03 22 circumstances were.

14:26:03 23 Q. Okay. Let's -- is there anything else that you would want
14:26:07 24 to know before drawing a conclusion about whether --

14:26:13 25 A. I might --

14:26:12 1 Q. -- this was the practice of psychology?

14:26:16 2 And I'm sorry. I talked over you.

14:26:16 3 A. It might well represent the practice of psychology. I
14:26:20 4 could not definitively say just based on that by itself.

14:26:25 5 Q. You said that the context was relevant, correct?

14:26:29 6 A. Context would be one aspect of it, yes.

14:26:33 7 Q. And can you help us to understand what you mean by
14:26:35 8 "context"?

14:26:37 9 A. I don't know where that was being done. If it was
14:26:39 10 being -- if it was being done in a practice group -- a
14:26:42 11 psychology practice group or some such, it would seem that it
14:26:46 12 was being delivered in the context that it would be implying
14:26:52 13 that the person was offering a therapeutic service.

14:26:58 14 Q. Is there any other context in which it -- where the
14:27:01 15 context would indicate it was the practice of psychology?

14:27:03 16 A. If this was being done as a workshop in a university, that
14:27:06 17 would be a different context.

14:27:10 18 Q. And I'll try to not talk over you. It's difficult for the
14:27:13 19 court reporter if we're both talking at the same time, and I
14:27:17 20 apologize if I've done that.

14:27:19 21 How does that context change the character of the
14:27:26 22 speech?

14:27:28 23 A. It would -- it has to do with the intent and the purpose
14:27:31 24 of the speech. And certainly in the context of a university,
14:27:38 25 which you asked for an example, that is considered an exempt

14:27:43 1 setting for the purposes of education in that context.

14:27:46 2 Q. And is it the intent of the speaker that matters or the
14:27:53 3 intent of the listener?

14:27:55 4 A. The -- I'm not sure whether you can fully separate the two
14:28:02 5 of them, because the intent of the listener may be based on
14:28:07 6 what they believe about the speaker. So I'm not sure that you
14:28:10 7 can separate those two out.

14:28:12 8 Q. And you reference the exception for universities. Is
14:28:20 9 there any other aspect of the Act that you're relying on in
14:28:26 10 your testimony about the Board's interpretation? What aspect
14:28:34 11 of the statute leads you -- leads the Board to conclude that
14:28:38 12 context matters?

14:28:40 13 A. Well, that was a -- you asked for an example, and that was
14:28:45 14 the example that came to mind. It wasn't so much a matter of
14:28:49 15 relying on that for my description. That was just an example
14:28:53 16 that came to mind.

14:28:56 17 Q. So what part of the statute leads the Board to conclude
14:28:59 18 that context matters?

14:29:03 19 A. That was my description. That was my understanding of the
14:29:08 20 way they're -- the Act is constructed, that you have to look at
14:29:12 21 it -- you have to look at -- a case presents itself, and you
14:29:17 22 have to look at it in the context in which it occurred. There
14:29:20 23 are some things that are very clearcut and others that may not
14:29:25 24 be as well defined. I don't know what all of the facts of,
14:29:32 25 say, necessarily that particular circumstance were. We're

14:29:34 1 speaking about hypotheticals.

14:29:36 2 Q. So which -- which aspect of -- of subsection C is relevant
14:29:44 3 to context?

14:29:48 4 A. I think the whole thing is -- the whole thing is relevant
14:29:52 5 to context. If those things were being delivered in a
14:29:59 6 university setting, that would be -- certainly be a separate
14:30:01 7 context just in and of itself. I think all of them are
14:30:04 8 relevant to context.

14:30:07 9 Q. And what I'm wondering is how -- how is this definition of
14:30:14 10 psychology, how does it depend on context?

14:30:16 11 A. I think I just described it to you. A university setting
14:30:20 12 being one context, and say making an offering to the public or
14:30:25 13 to an individual outside of that context would be another
14:30:30 14 setting.

14:30:31 15 Q. But there's nothing specific in the statute that you can
14:30:35 16 point to that allows the Board to reach that conclusion?

14:30:39 17 A. Well, I think it's inherent in the way the Act is written.
14:30:45 18 The Act stipulates that the delivery of such services in a
14:30:52 19 university setting are exempt. Not this particular section,
14:30:56 20 but the Act does.

14:30:58 21 Q. So if it's not in a university setting, does context
14:31:07 22 matter?

14:31:08 23 A. If a person -- if the person were having a conversation at
14:31:16 24 a cocktail party and talking about psychology, I don't believe
14:31:21 25 that would constitute the practice of psychology. If they were

14:31:26 1 offering -- conducting an interview, talking to a person about
14:31:30 2 what their problems were, if they were applying a systematic
14:31:38 3 body of knowledge to the understanding and description of
14:31:46 4 behavior of a particular individual or a group of individuals
14:31:51 5 and talking about how to ameliorate and resolve those problems,
14:31:57 6 then, yes, I think that would be the practice of psychology.

14:32:03 7 Q. And is there a cocktail party exception to the Act?

14:32:06 8 A. No.

14:32:06 9 Q. So if --

14:32:06 10 A. But if they're not -- but I did not -- what I said was,
14:32:13 11 was if they were holding themselves out as offering services as
14:32:18 12 opposed to just talking in the context of a cocktail party
14:32:24 13 about aspects of psychology, there's a totally different --
14:32:33 14 that's a totally different context.

14:32:34 15 Q. Let's talk about the other elements that you mentioned,
14:32:40 16 whether this was a lecture versus a small group. Can you
14:32:44 17 elaborate on why that matters with reference to the statute?

14:32:48 18 A. In a lecture there's not a selective process. "Small
14:32:51 19 group" suggests that those individuals have come there for a
14:32:54 20 particular reason and suggests that there was some kind of
14:32:56 21 intent on the part of whoever is offering the group to solicit
14:33:01 22 or invite those individuals to participate or those persons
14:33:05 23 came to participate because of what they believed about the
14:33:08 24 group. It's a different context.

14:33:18 25 Q. Let's -- let's take a look at the next section of the

14:33:29 1 Act. Now, this is section 501.004. And I think you alluded to
14:34:09 2 this earlier. This section deals with the applicability of the
14:34:15 3 Act to different activities, different speech, different
14:34:22 4 contexts, and also exceptions to the Act, correct?

14:34:24 5 A. That's correct.

14:34:25 6 Q. So that first section there, (a)(1), is the university
14:34:35 7 exception that you were referring to earlier?

14:34:38 8 A. That's correct.

14:34:43 9 Q. Now, Dr. Serafine, you heard, was employed in the
14:34:47 10 psychology departments of Yale and Vassar College -- Yale
14:34:52 11 University and Vassar College. And so when she was so
14:34:55 12 employed, she would have been free to refer to herself as a
14:34:58 13 psychologist pursuant to section (a)(1), correct?

14:35:01 14 A. I couldn't say with regard to the -- that particular
14:35:04 15 jurisdiction in Texas. She would have been if she were
14:35:07 16 employed in a university in Texas.

14:35:09 17 Q. And, in fact, the exception not only applies to the
14:35:19 18 titling aspects of the Act but also the practice aspects. So
14:35:20 19 she would have been free to provide psychotherapy services?

14:35:23 20 A. That's correct.

14:35:32 21 Q. In fact, even a psychologist who studies animal learning
14:35:36 22 would fall under this exception (a)(1) if they were employed by
14:35:39 23 a university as a psychologist, correct?

14:35:41 24 A. In the university setting, I suppose technically. I
14:35:53 25 haven't had occasion to reflect on that. An animal

14:35:58 1 researcher? Is that what you're suggesting.

14:35:59 2 Q. Yes.

14:36:01 3 A. I don't really have an opinion about that. I haven't had
14:36:08 4 occasion to apply the Act to animal studies.

14:36:13 5 Q. Well, I suppose my question more generally is: There's no
14:36:17 6 limitation in subsection (a)(1) to individuals employed as
14:36:29 7 psychologists in a university setting who are studying a
14:36:31 8 particular field. It applies to all psychologists at the
14:36:34 9 university, correct?

14:36:36 10 A. Who are offering services within the confines of the
14:36:45 11 institution, yes.

14:36:46 12 Q. Okay.

14:36:46 13 A. Let me add to that, that are employed by the institution
14:36:48 14 as a psychologist.

14:36:49 15 Q. Sure.

14:36:51 16 A. Or to carry out those services. Such as in a psychology
14:36:57 17 training department would be an example.

14:36:58 18 Q. It's not like a campus is a psychology license-free zone
14:37:04 19 where anyone can go --

14:37:04 20 A. I'm sorry?

14:37:05 21 Q. The campus is not a psychology license-free zone, where
14:37:09 22 anyone can walk onto campus and fall within the exception?

14:37:12 23 A. It might well be broader than just the psychology
14:37:14 24 department.

14:37:14 25 Q. So it's -- so it's beyond -- okay. That's a good

14:37:18 1 clarification.

14:37:19 2 Now, let's focus down on subsection (a)(3). This
14:37:40 3 applies to certain licensed professionals, exempting them from
14:37:44 4 the Act, correct?

14:37:46 5 A. Yes.

14:37:48 6 Q. And attorneys are included in the list of licensed
14:37:58 7 professionals excluded pursuant to this subsection, correct?

14:38:01 8 A. Yes. You're referring to -- I'm sorry. You're referring
14:38:15 9 to the list, which I believe is further down in the -- which
14:38:19 10 portion of that section are you referring to under item 3?

14:38:24 11 Q. Well, under subsection 3, I'm just wondering if attorneys
14:38:28 12 are included in "licensed professionals", as that term is used
14:38:34 13 in subsection 3?

14:38:35 14 A. Under (3)(b), item number 2.

14:38:41 15 Q. Okay. So the answer is yes?

14:38:42 16 A. Yes.

14:38:43 17 Q. Okay. And that exception only applies if the attorney
14:39:00 18 refrains from using the term "psychological" or "psychologist,"
14:39:06 19 correct?

14:39:07 20 A. And that activity or service is permitted under the
14:39:13 21 person's license.

14:39:14 22 Q. Okay. And what does that -- what does that mean?

14:39:18 23 A. I would believe that, in general, it means that, say,
14:39:23 24 using a known psychologist, say, using a lawyer, if the
14:39:27 25 individual's law license permits for the administration of

14:39:34 1 projective psychological tests, then it would be allowed.

14:39:38 2 Q. So a personality test? Is that what you're referring to

14:39:45 3 as an example?

14:39:47 4 A. It's one version, yes.

14:39:48 5 Q. And that would be an activity that is allowed -- an

14:39:52 6 attorney is allowed to undertake?

14:39:54 7 A. Presuming that they -- that their law license permits for

14:39:58 8 that, yes.

14:39:59 9 Q. And so can you give us another example of an opportunity

14:40:05 10 that would be permitted to undertake pursuant to this

14:40:08 11 exception?

14:40:10 12 A. I presume that the -- that what might come closest to it

14:40:14 13 would be the use of the term "counsel" and "counseling" would

14:40:18 14 probably be the thing that I would think of that would come

14:40:23 15 closest to that, since oftentimes they're referred to

14:40:26 16 counselors. So that would be my example.

14:40:31 17 Q. And you may not have one, but do you have any other

14:40:34 18 examples?

14:40:35 19 A. None that just come to mind offhand.

14:40:37 20 Q. And so how does an attorney know that -- where the line is

14:40:43 21 between the practice of law and the practice of psychology?

14:40:46 22 A. I think that they would look to their law license and what

14:40:51 23 the Act says with regard to what they're permitted to do.

14:40:58 24 Q. As a matter of enforcement, though, what is the Board's

14:41:13 25 position with regard to where that line is? When in the

14:41:16 1 Board's view does an attorney cross the line and fall outside
14:41:21 2 this exception?

14:41:22 3 A. Well, I haven't -- I'm not aware of the Board ever having
14:41:25 4 had a complaint about a lawyer engaging in the practice of
14:41:29 5 psychology. So it's -- it's a hypothetical. I don't -- I have
14:41:36 6 no way of responding to that.

14:41:42 7 Q. So we just have to wait and see?

14:41:44 8 A. Pretty much. It would be a matter of investigating the
14:41:47 9 case when the complaint arose.

14:41:51 10 Q. Now, let's -- let's drop down to the next subsection
14:41:58 11 there, subsection 4. And let me know when you've had a chance
14:42:02 12 to review it, and we'll talk about that a little bit.

14:42:16 13 A. (Reviews document)

14:42:16 14 Q. And that's -- that's similar to the exception in
14:42:19 15 subsection 3, except this subsection 4 applies to members of
14:42:24 16 the clergy, correct?

14:42:25 17 A. That's correct.

14:42:27 18 Q. Now, members of the clergy are not licensed in Texas, are
14:42:34 19 they?

14:42:35 20 MR. TODD: Your Honor, I'd like to re-re-stress my
14:42:39 21 relevancy objection to this, since Dr. Serafine has never tried
14:42:48 22 to invoke the clergy exception. And he's putting this witness
14:42:52 23 more and more in a position of having to speculate on cases
14:42:55 24 that haven't yet come before the Board.

14:42:57 25 THE COURT: Mr. Manley, I don't -- it's not helpful

14:43:00 1 to the Court to have him go through the Act line by line. I
14:43:03 2 can read the Act. I have a body of evidence in front of me as
14:43:07 3 to what was done and what Dr. Serafine has done and what the
14:43:12 4 Board has done and have a clear understanding of what's at
14:43:16 5 stake here.

14:43:20 6 I don't find it particularly helpful or getting to
14:43:23 7 the point that this Court's going to ultimately have to decide
14:43:28 8 if we just go through the Act and ask him what his
14:43:31 9 understanding of it is. Because the Act is the Act, and the
14:43:33 10 Act is either constitutional or the Act is not constitutional
14:43:38 11 as it was applied to Dr. Serafine. And what the State says
14:43:42 12 about what the issues left in this case are is correct.

14:43:46 13 Now, there's some breadth here, and I'm trying to
14:43:51 14 give you some breadth to make your record. But tell me why I
14:43:54 15 need to hear this, because I am not finding it helpful.

14:43:57 16 MR. MANLEY: Well, Your Honor, this exception in
14:44:01 17 particular goes to Defendants' argument that the exceptions
14:44:03 18 only apply to other licensed individuals. And, furthermore, it
14:44:09 19 goes to the tailoring burden that they face and the significant
14:44:18 20 interest that they're trying to prove, including some of the
14:44:21 21 questions that were asked yesterday about --

14:44:25 22 THE COURT: No. It really -- it really doesn't. I
14:44:28 23 can read the Act. I can see what it is. And a large amount of
14:44:34 24 what you're eliciting in the way of testimony is something you
14:44:38 25 can argue at argument time. I don't need to hear him tell me

14:44:42 1 what the exceptions are. You can argue that the exceptions are
14:44:48 2 applied evenly, they're not applied evenly, whatever you want
14:44:52 3 to do. But you're getting into the law here, and I don't need
14:44:55 4 to know about the law. And I do not find what Dr. Branaman, as
14:45:00 5 chairman, thinks about the Act is helpful to the Court.

14:45:07 6 Now, Mr. Todd has said he is going to need, what, 45
14:45:13 7 minutes?

14:45:13 8 MR. TODD: It's looking less than that.

14:45:15 9 THE COURT: All right. So at some point I'm going to
14:45:18 10 cut you off so Dr. Branaman can be passed to Mr. Todd because
14:45:29 11 he's not going to be here Monday. So make the best of your
14:45:32 12 time that you can, because I understand -- because I understand
14:45:35 13 lawyers. I was on your side of the bench for 28 and a half
14:45:39 14 years -- want to ask a lot of questions. But I'm telling you
14:45:43 15 as the one who has to decide this case, I'm not finding this
14:45:48 16 line of questions as helpful as perhaps other things you could
14:45:51 17 get into with this witness while you have him on the stand.

14:45:58 18 MR. MANLEY: May I have moment, Your Honor?

14:45:59 19 THE COURT: You may.

14:47:06 20 Q. (BY MR. MANLEY) Dr. Branaman, let's look back at Exhibit 5
14:47:08 21 if you wouldn't mind.

14:47:12 22 A. Tab 5?

14:47:13 23 Q. Right in front of you there. And this page 132 of that
14:47:30 24 exhibit, the first page of that section.

14:47:43 25 A. I've got a page here that's 132, yes.

14:47:46 1 Q. Does that page provide the context that you were looking
14:47:49 2 for earlier to help you determine whether or not this activity
14:47:56 3 of Dr. Serafine is within the practice of psychology?

14:47:59 4 A. It would -- it provides some general context, yes.

14:48:03 5 Q. And what does it provide?

14:48:05 6 A. It would suggest that, provided in that context, it was
14:48:09 7 the practice of psychology.

14:48:14 8 Q. And why does it suggest that to you?

14:48:17 9 A. Well, it talks about -- it talks about a setting in which
14:48:21 10 persons have problems. It talks about recovery. It talks
14:48:25 11 about family resources, which is in a center and it's a
14:48:29 12 professional corporation. So it suggest to me that -- that
14:48:34 13 some type of service is being held out for the purposes of
14:48:39 14 money, perhaps. It's service of some type since it's a
14:48:43 15 professional corporation. I can't tell what the links are on
14:48:48 16 the left-hand side, but that would certainly suggest that it
14:48:52 17 was the practice of psychology.

14:49:18 18 MR. MANLEY: Thank you. Pass the witness.

14:49:20 19 THE COURT: Mr. Todd?

14:49:21 20 **CROSS-EXAMINATION**

14:49:21 21 **BY MR. TODD:**

14:49:21 22 Q. Thank you. Dr. Branaman, let me ask you a few questions
14:49:30 23 about the process by which the Board looks at cases, and then I
14:49:37 24 want to go back and cover some things specifically about you in
14:49:45 25 response to some of the things that have been said earlier.

14:49:47 1 First of all, when the Board is called upon to make a
14:49:52 2 decision about whether or not a -- a person who has been
14:49:59 3 complained against has in some way violated the statute, does
14:50:06 4 that go immediately from complaint to the Board or are there
14:50:11 5 steps in between someone filing a complaint and before it gets
14:50:13 6 to you to look at it?

14:50:15 7 A. Yes. There's a procedure.

14:50:16 8 Q. Okay. And does that -- is one of the early steps of that
14:50:23 9 procedure an investigation by investigators under the Board?

14:50:26 10 A. That's correct.

14:50:26 11 Q. All right. Is there a -- we heard -- you were here
14:50:30 12 earlier when Ms. Lee testified, and you heard reference to
14:50:34 13 informal settlement conference? Or did you?

14:50:37 14 A. Yes.

14:50:38 15 Q. Okay. And is that a step at which a lot of these
14:50:43 16 complaints get resolved? Or some of them?

14:50:47 17 A. There -- actually, yes. But there's procedures that occur
14:50:54 18 before it ever gets to that step.

14:50:56 19 Q. I understand. I'm not taking the whole process. I'm just
14:51:00 20 identifying points in the process in order to get to a question
14:51:07 21 in a moment.

14:51:08 22 A. I wanted to be clear that there are other points in the
14:51:10 23 process before it gets to that particular point.

14:51:12 24 Q. Okay. But between investigation and informal settlement
14:51:15 25 conference, there are steps?

14:51:16 1 A. To determine whether there was reasonable cause to suggest
14:51:20 2 that a violation had occurred.

14:51:21 3 Q. Right. So if -- if the staff does not conclude that
14:51:29 4 there's reason to believe a violation occurred, it doesn't go
14:51:33 5 to informal settlement conference?

14:51:35 6 A. That's correct.

14:51:36 7 Q. All right. Within the informal settlement conference, are
14:51:38 8 some cases resolved at that point?

14:51:41 9 A. Yes.

14:51:41 10 Q. All right. By an agreement between staff of the Board and
14:51:44 11 the licensee or the practitioner as to whether or not there's
14:51:48 12 been a violation or what needs to be done about it?

14:51:50 13 A. That's correct.

14:51:51 14 Q. Okay. And then if it's not resolved at the settlement
14:52:01 15 conference, at some point might it get to a contested case
14:52:03 16 hearing before an administrative law judge?

14:52:05 17 A. That would be correct.

14:52:06 18 Q. So that -- and then the administrative law judge issues
14:52:11 19 proposed findings and conclusions?

14:52:13 20 A. That's correct.

14:52:14 21 Q. And is that the point -- is that what comes to the Board?

14:52:17 22 A. That would come to the Board.

14:52:18 23 Q. And is there a record that comes along with it?

14:52:21 24 A. There would be a record, and there would be a record of
14:52:24 25 what the Board's -- the disposition of the case.

14:52:26 1 Q. And so let me ask you this: Is there ever a case in which
14:52:32 2 the Board is called upon to make a judgment about whether or
14:52:37 3 not the Act has been violated in which you have before you only
14:52:43 4 the amount of information that was shown to you from Exhibit
14:52:47 5 P-5, those little paragraphs?

14:52:49 6 A. No.

14:52:50 7 Q. Okay. How -- give us an idea of how big some of these
14:52:56 8 records can be.

14:52:57 9 A. Well, they can range from a small client-patient file to
14:53:06 10 something that may be a page off of -- possibly off of a Web
14:53:12 11 site. A small -- small quantity of documents to boxes.

14:53:16 12 Q. And so under no circumstances is the Board ever called
14:53:20 13 upon to make a definitive ruling on whether something
14:53:24 14 constitutes the practice of psychology based on no more
14:53:30 15 information than you've been given in the questioning earlier?

14:53:33 16 A. Never, to my knowledge.

14:53:34 17 Q. Okay. Dr. Branaman, do you hold any licenses or
14:53:39 18 certifications?

14:53:40 19 A. I do.

14:53:40 20 Q. Okay. Are you licensed as a psychologist?

14:53:43 21 A. Of course.

14:53:44 22 Q. Since when?

14:53:45 23 A. Since 1982.

14:53:47 24 Q. Do you have any other licenses?

14:53:50 25 A. I'm licensed as -- sublicensed as a sex offender treatment

14:53:54 1 provider in Texas. I'm also a licensed marriage and family
14:53:58 2 therapist.

14:53:58 3 Q. And the legal profession has board certification and
14:54:07 4 certain specializations. Is there anything like that in
14:54:10 5 psychology?

14:54:11 6 A. There is.

14:54:11 7 Q. Okay. Do you have any certification as a specialist?

14:54:14 8 A. I am board certified by the American Board of Professional
14:54:18 9 Psychology in the subspecialty of forensic psychology.

14:54:23 10 Q. And is that a national organization?

14:54:25 11 A. It is.

14:54:25 12 Q. Okay. And outside of serving as the -- chair of the
14:54:33 13 Board, is that a full-time job or a part-time?

14:54:36 14 A. It's come closer to being full-time than I expected it to
14:54:40 15 be, but it's part-time.

14:54:41 16 Q. Okay. And so outside of that, do you have a practice?

14:54:44 17 A. I do.

14:54:45 18 Q. And what is -- what is your practice?

14:54:48 19 A. I have a private practice -- group practice in Richardson,
14:54:54 20 Texas that I have maintained since 1984. My portion of the
14:55:00 21 practice over the years had been the general practice of
14:55:03 22 psychology, working with individuals and couples in general,
14:55:08 23 dealing with broader array of treatment issues. In the last
14:55:13 24 five years, however -- well, throughout my practice, I've -- a
14:55:17 25 portion of it has been forensic. And then in the last five to

14:55:23 1 ten years it's been increasingly forensic, and in the last five
14:55:27 2 it's been totally forensic.

14:55:28 3 Q. In the context of your forensic practice are you ever
14:55:32 4 called upon to provide expert testimony to a court?

14:55:35 5 A. Yes, I am.

14:55:36 6 Q. What would be, generally, the subject matter areas?

14:55:43 7 A. Anywhere from sanity, competency to stand trial, risk
14:55:53 8 assessment, in the past, child custody recommendations, to name
14:55:56 9 a few.

14:55:57 10 Q. Now, in -- also let me ask you, do you -- do you do any
14:56:02 11 teaching?

14:56:03 12 A. I'm sorry?

14:56:04 13 Q. Do you do any teaching?

14:56:08 14 A. Oh, teaching. I'm sorry.

14:56:10 15 Q. Academic?

14:56:11 16 A. Yes. Since 2005 I have been associated with the doctoral
14:56:16 17 training program. I'm a core faculty member and have taught
14:56:24 18 half-time faculty member.

14:56:26 19 Q. Okay. Now, in looking at these various endeavors, you've
14:56:34 20 got your practice, you've got the forensic. To what extent
14:56:43 21 does it -- does your practice call upon you to draw upon
14:56:50 22 principles and a body of knowledge in the field of psychology
14:56:54 23 in order to apply those to specific individuals in situations?

14:56:58 24 A. Yes.

14:57:00 25 Q. And are you able to find a body of systematic knowledge

14:57:09 1 that you can rely upon and use in your practice?

14:57:12 2 A. Certainly. And, of course, that's what the essence of the
14:57:16 3 doctoral training program is as well.

14:57:18 4 Q. Do you -- is there a continuing education requirement for
14:57:24 5 a licensed psychologist?

14:57:26 6 A. There is.

14:57:26 7 Q. Okay. And so have you been able to keep up with or to
14:57:36 8 stay aware of developments in the literature -- the
14:57:39 9 professional literature in the field of psychology as it
14:57:42 10 applies particularly to the delivery of psychological services?

14:57:46 11 A. Yes. I maintain well beyond the number of required hours
14:57:49 12 on an annual basis.

14:57:51 13 Q. Okay. And can -- you were present during the testimony of
14:57:58 14 Dr. Serafine about a lack of consensus about whether or not
14:58:06 15 there are disorders and how to identify them and how to respond
14:58:10 16 to them.

14:58:11 17 From your experience actually practicing psychology
14:58:16 18 and delivering psychological services since at least 1982, have
14:58:21 19 you noted any trends in the literature as far as what it's
14:58:26 20 showing about the consensus?

14:58:27 21 MR. MANLEY: Objection. Mr. -- Dr. Branaman is not
14:58:30 22 testified as an expert witness. His opinion on what the
14:58:33 23 literature says is inappropriate and irrelevant.

14:58:37 24 MR. TODD: Well, if an experience -- to the extent
14:58:39 25 that an experienced practitioner who has a continuing education

14:58:43 1 requirement is able to find from the literature and the body of
14:58:50 2 principles within the -- within the field what he needs to do
14:58:55 3 his job and effectively deliver services and defined ways of
14:59:03 4 accessing the success of his services, that tends to show that
14:59:07 5 there's something here in this field and it's not just this
14:59:13 6 fantasy that no state can regulate.

14:59:14 7 MR. MANLEY: Your Honor, it would still be
14:59:16 8 Dr. Branaman's opinion, and he's not been designated as an
14:59:20 9 expert.

14:59:21 10 THE COURT: Well, that's true, and I'm not going to
14:59:24 11 accept his expert opinion. He also is a psychologist. And I'm
14:59:27 12 going to let him testify as to what his experiences have been
14:59:31 13 and what he thinks he can find in the literature and what he
14:59:34 14 has found in the literature. But I don't take that as expert
14:59:37 15 opinion. I take it and will weigh it as I do all other
14:59:43 16 evidence in this case. I think your objection goes to the
14:59:46 17 weight, not the admissibility. You may proceed.

14:59:49 18 Q. (BY MR. TODD) Okay. So as a practitioner who's required
14:59:51 19 to maintain familiarity with the field, what do you derive from
14:59:57 20 that as far as how much confidence you can have in what the
15:00:02 21 field of psychology provides you in the way of tools to do your
15:00:07 22 job and deliver services?

15:00:10 23 A. Whether we're talking about the general practice of
15:00:13 24 psychology or the specialty practice in forensic area, the
15:00:18 25 field has changed dramatically over the last 25 to 30 years.

15:00:26 1 The emphasis since the mid '90s for the American Psychological
15:00:31 2 Association and across the profession has been empirically
15:00:35 3 based practice. And the amount of information that is
15:00:38 4 available for empirically based practices that are
15:00:47 5 evidence-based that have been demonstrated to work through,
15:00:52 6 say, random controlled trials has just burgeoned over the --
15:00:57 7 over the years.

15:00:59 8 And we also -- I also know from my role with the
15:01:04 9 Board and having looked at changes in our number of hours
15:01:09 10 required for continuing education, raising those from 12 hours
15:01:14 11 a year to 20 hours a year, which I consider still minimal, that
15:01:18 12 the evidence suggests, the survey suggests, that the body of
15:01:23 13 knowledge for psychology changes dramatically about every five
15:01:28 14 years, much as with other fields in our present society.

15:01:33 15 Q. From your perspective as the head of the body that's been
15:01:40 16 given the task by law to implement this statute, what purpose
15:01:47 17 do you see being served by requiring a license to practice
15:01:57 18 psychology?

15:01:57 19 A. Well, one, it establishes a minimum standard that the
15:02:01 20 public can rely on in terms of an individual coming into the
15:02:06 21 field and representing themselves as a psychologist. Two, it
15:02:10 22 suggests that this individual maintains a minimal standard of
15:02:15 23 remaining competent, at least in terms of what -- to the extent
15:02:19 24 that continuing education facilitates that. And, of course, it
15:02:24 25 also provides some recourse for an individual who believes that

15:02:34 1 they have been subject to bad practice by a licensee.

15:02:41 2 Q. And an individual can file a complaint, and then the Board
15:02:47 3 takes on from that point, or the staff, the responsibility to
15:02:50 4 look into it and make a determination, correct?

15:02:52 5 A. That's correct.

15:02:54 6 Q. From your perspective as the head of the body charged by
15:03:03 7 law with implementing this statute, what purpose do you see as
15:03:07 8 being served by requiring that only people who hold the license
15:03:11 9 represent themselves to the public using the title that goes
15:03:15 10 with that license?

15:03:17 11 A. That -- I suppose that the concept that comes to mind is
15:03:31 12 brand name. The concept of psychologists across all of the
15:03:35 13 jurisdictions throughout the United States and Canada, the best
15:03:37 14 of my knowledge, "psychologist" is represented -- they're
15:03:41 15 licensed and it's represented by a systematic training program
15:03:46 16 in psychology at a doctoral level. That's what is represented
15:03:53 17 across, not only Texas, but throughout the U.S. jurisdictions.

15:03:57 18 Q. And you mentioned doctoral. Is -- is that one of the
15:04:02 19 requirements before you can apply for licensure, that you have
15:04:08 20 a doctorate from a particular --

15:04:11 21 A. A Texas accredited university in a psychology training
15:04:18 22 program.

15:04:18 23 Q. Do you agree with the characterization that there's only a
15:04:21 24 small number of programs that offer these doctoral programs?

15:04:24 25 A. No.

15:04:24 1 Q. Okay. And as part of your job overseeing this board, do
15:04:32 2 you receive information about programs that are available for
15:04:38 3 people to take advantage of if they want to pursue this
15:04:42 4 particular field -- doctoral programs of psychology?

15:04:46 5 A. The doctoral programs? Yes. I mean, there are many
15:04:49 6 doctoral programs across the United States. I'm not sure
15:04:52 7 exactly how many specifically.

15:04:54 8 Q. Okay. And once -- or in addition to having a doctoral
15:05:01 9 level degree, before someone can sit for licensure, what other
15:05:09 10 requirements are there?

15:05:10 11 A. That -- in Texas, that they have two years of supervised
15:05:15 12 work, one of -- at least one of which must be postdoctoral, so
15:05:21 13 that they've had hands-on experience under supervision.

15:05:24 14 Q. Okay. And the -- the supervision is by someone with a
15:05:28 15 license?

15:05:29 16 A. That's correct.

15:05:30 17 MR. MANLEY: Objection as to relevance, Your Honor.
15:05:33 18 This is all in the statute. So I don't know what purpose it
15:05:37 19 serves to go over it.

15:05:38 20 THE COURT: Yes, Mr. Todd. You may be going down the
15:05:42 21 same road that I addressed with Mr. Manley.

15:05:44 22 Q. (BY MR. TODD) Okay. I'll shift gears.

15:05:46 23 A. All right.

15:05:51 24 Q. As part of the -- the requirement that one take a written
15:05:56 25 examination, do you know what the writing examination is called

15:05:59 1 that they have to take?

15:06:03 2 A. It's commonly referred to as "EPPP," examination for

15:06:12 3 proficiency in.

15:06:12 4 Q. Practice of psychology?

15:06:13 5 A. -- Professional psychology.

15:06:14 6 Q. Okay. What I want to ask you about that, is that a -- an

15:06:18 7 examination that's been drawn up by the Board just for people

15:06:22 8 in Texas or does it have any relationship to what's done

15:06:25 9 elsewhere?

15:06:26 10 A. No. It is a standardized national examination that is

15:06:32 11 periodically updated and taps core areas of content knowledge.

15:06:37 12 Q. And do you know whether or not there is a wide or narrow

15:06:43 13 range of acceptance among practitioners as to the validity of

15:06:49 14 that test as something that's valuable in determining readiness

15:06:54 15 to go for licensure?

15:06:56 16 A. I would say yes.

15:06:56 17 MR. MANLEY: Objection. Just for the record, we have

15:06:58 18 a continuing objection to Dr. Branaman's opinion testimony.

15:07:01 19 MR. TODD: Well, I'm asking from your familiarity as

15:07:04 20 one in this field who in a position responsibility --

15:07:07 21 THE COURT: The question did not ask for a -- an

15:07:12 22 opinion by an expert. He's talking about his own personal

15:07:17 23 experience, and that's the way I'll accept the answer. So you

15:07:19 24 may proceed, Mr. Todd.

15:07:20 25 Q. (BY MR. TODD) So how well accepted is this examination as

15:07:25 1 an instrument that has some validity in determining what it
15:07:28 2 purports to determine?

15:07:29 3 A. I would say that it's highly accepted considering it's
15:07:32 4 used across all of jurisdictions throughout the United States
15:07:35 5 and Canada.

15:07:36 6 Q. Okay. And then there's a requirement for an oral
15:07:40 7 examination. Basically how is that done? How many people do
15:07:45 8 it -- conduct the examination?

15:07:51 9 A. The oral examination is conducted by two examiners with an
15:07:55 10 examinee. There are many examinations going on at the same
15:07:58 11 time.

15:07:58 12 Q. And are the results of those examinations, does the
15:08:02 13 Board -- is the Board given information about how those turned
15:08:06 14 out in terms of pass and fail?

15:08:11 15 A. That information is available to the Board, yes.

15:08:13 16 Q. Okay. Do you have any information on inter-rater
15:08:17 17 agreement?

15:08:18 18 A. Yes. By direct observation.

15:08:20 19 Q. And what -- what have you seen as far as how the exam --
15:08:27 20 how much agreement there is among examiners as to whether
15:08:32 21 people have passed or failed?

15:08:34 22 A. It's a very high rate of agreement that's based -- I'm
15:08:40 23 the president of the oral examinations. And if there was not
15:08:43 24 agreement, this would be referred to as a split. Oftentimes
15:08:46 25 with have 100 candidates being tested at the same occasion,

15:08:49 1 over the same weekend. And out of that 100 candidates, there
15:08:55 2 might be two to three where there was a split and not
15:08:58 3 agreement.

15:08:58 4 Q. Okay. And from your perspective as head of the body
15:09:05 5 that's been tasked with carrying out the purposes of the Act,
15:09:11 6 what protections or assurances does it provide for the public
15:09:15 7 that, before someone is licensed and can represent themselves
15:09:19 8 as a psychologist, they've gone through these very steps that
15:09:22 9 we've outlined?

15:09:24 10 A. Yes. It establishes a minimum level of competency.

15:09:28 11 Q. Okay. And then from -- as we discussed earlier, the Board
15:09:38 12 does receive complaints that have gone through a whole series
15:09:44 13 so that what comes to you are -- are an issue as to whether or
15:09:49 14 not someone has violated the Act and, if so, what to do with
15:09:52 15 it. Correct?

15:09:53 16 A. I'm sorry. Restate it again, please.

15:09:55 17 Q. Okay. I'll strike that question. I think I can get
15:09:58 18 through -- get to it by another means.

15:10:01 19 As a practitioner keeping up with the field, and
15:10:12 20 noting, as we've heard discussion, there are different theories
15:10:17 21 in the field of psychologist, have you had occasion to notice
15:10:20 22 whether or not those fields are mutually exclusive or whether
15:10:25 23 or not a practitioner can draw from more than one?

15:10:29 24 A. Certainly there is eclecticism within the field.

15:10:34 25 Practitioners often are associated more with one, but certainly

15:10:38 1 they may integrate them as well.

15:10:43 2 Q. Okay.

15:10:48 3 MR. TODD: I need -- Your Honor, if I could confer
15:10:50 4 for just a moment?

15:10:51 5 THE COURT: You may.

15:11:23 6 MR. TODD: Pass the witness, Your Honor.

15:11:25 7 THE COURT: Redirect, Mr. Manley?

15:11:34 8 **REDIRECT EXAMINATION**

15:11:34 9 **BY MR. MANLEY:**

15:11:34 10 Q. You discussed with Mr. Todd the practice of informal
15:11:48 11 settlement conferences, and you said those are quite common?

15:11:51 12 A. I'm sorry.

15:11:52 13 Q. Those are quite common?

15:11:55 14 A. Yes. Reasonably. Yes.

15:11:56 15 Q. And do those settlement conferences result in a change of
15:12:01 16 behavior? The person who is being complained against, a change
15:12:08 17 in their behavior?

15:12:09 18 A. Does it result in a change? I'm sorry.

15:12:10 19 Q. Does it result in a change in the accused's behavior? In
15:12:16 20 other words, is there compliance as a result of the informal
15:12:20 21 settlement conference?

15:12:21 22 A. The informal settlement conference results as matter of a
15:12:25 23 complaint having been filed and one which there was not some
15:12:29 24 kind of agreed order reached beforehand. There was
15:12:33 25 determination that there was reasonable cause to believe that a

15:12:35 1 violation had occurred and the respondent does not agree that,
15:12:45 2 in fact, a violation had occurred, and then it might proceed to
15:12:48 3 an informal settlement conference.

15:12:51 4 Q. And the result of the informal settlement conference is
15:12:54 5 some sort of an agreement for the accused to change their
15:12:57 6 behavior?

15:12:57 7 A. There would be an -- either a determination would be made
15:13:01 8 by that conference that a violation had not occurred. Or if it
15:13:07 9 would determine in the opinion of the -- of that committee that
15:13:12 10 a violation had occurred, then there would be another agreed
15:13:15 11 order offered to the respondent.

15:13:18 12 Q. And how do those informal settlement conferences
15:13:23 13 ordinarily turn out? What's the typical result?

15:13:28 14 A. It depends on what the facts of the case are.

15:13:30 15 Q. Do you know how they turn out, if they ordinarily result
15:13:33 16 in a finding of no violation?

15:13:37 17 A. Oftentimes, yes, and sometimes, no.

15:13:41 18 Q. Do you have any idea what the statistical breakdown is?

15:13:46 19 A. No. Not offhand. I couldn't quote them to you.

15:13:50 20 Q. So how often does the accused have an opportunity to go
15:13:58 21 through a formal -- a formal process of defending their actions
15:14:03 22 or their speech?

15:14:04 23 A. Anytime they do not agree that a violation has occurred,
15:14:08 24 there's a due process procedure. It starts off with the staff
15:14:16 25 dismissal review. And if they believe that a violation has

15:14:18 1 occurred or the respondent, rather -- I believe you used the
15:14:22 2 term "accused." Is that what I was understanding? The
15:14:24 3 respondent believes that, in fact, perhaps they did slip and
15:14:30 4 they did violate the rules, there may be an agreed order up
15:14:34 5 front.

15:14:34 6 If it proceeds on to a formal settlement conference,
15:14:38 7 if they accept the findings of the -- of that conference, then
15:14:43 8 it will be done and there will be an agreed order in place or
15:14:47 9 the case is dismissed. If they don't agree with the findings,
15:14:51 10 then it would proceed on under due process to the State Office
15:14:54 11 of Administrative Hearings.

15:14:56 12 Q. Does the Board do any random inspection in order to
15:15:19 13 enforce the Act?

15:15:20 14 A. Random inspection? I'm not sure that I understand what
15:15:23 15 that means.

15:15:24 16 Q. Well, do they undertake investigations --

15:15:29 17 A. Undercover investigation?

15:15:30 18 Q. -- independently? Independently?

15:15:31 19 A. No.

15:15:32 20 Q. So the Board relies on voluntary compliance?

15:15:39 21 A. Generally the Board, if it had -- if it had the funds I
15:15:44 22 believe is entitled by the Act to more aggressively police.
15:15:48 23 But that's not -- we don't have that capacity. It is complaint
15:15:52 24 driven.

15:16:01 25 Q. Now, when you testify in court as a psychologist, is there

15:16:07 1 another psychologist on the other side opposing you?

15:16:12 2 A. Sometimes.

15:16:12 3 Q. And does that psychologist reach conclusions contrary to

15:16:16 4 yours?

15:16:17 5 A. Sometimes.

15:16:18 6 Q. And in that context, ultimately, who decides which

15:16:26 7 psychologist is right?

15:16:28 8 A. It's -- well, it's an ultimate decision, and that's always

15:16:33 9 a determination of either the judge or the jury.

15:16:35 10 Q. If the same behavior modification technique is being used

15:16:57 11 by a licensee or a person exempt under the Act, does that have

15:17:00 12 any bearing on the efficacy of the behavior modification?

15:17:05 13 A. Does it have any bearing on the efficacy?

15:17:08 14 Q. Yes.

15:17:09 15 A. If what?

15:17:11 16 Q. If a licensee is doing it or a person who is exempt under

15:17:14 17 the Act is doing it.

15:17:16 18 A. I would say that it depends on what each one of their

15:17:21 19 training is.

15:17:21 20 Q. But not necessarily upon their status as a licensee?

15:17:29 21 A. Well, I'm not sure what type of exempt individual you're

15:17:33 22 referring to. As you pointed out, there are several

15:17:36 23 exemptions. And if we're talking about in a university setting

15:17:39 24 versus a licensee, somebody in a psychology department, I

15:17:43 25 expect to be pretty similar.

15:17:45 1 Q. Okay. And the relevant inquiry is into the person's
15:17:51 2 background and understanding and their knowledge?
15:17:54 3 A. I'm not sure I'm understanding your question fully. Would
15:18:02 4 you ask me again so that I'm certain?
15:18:04 5 Q. If two people are undertaking the same behavior
15:18:18 6 modification technique and one is a licensee and one is an
15:18:22 7 exempt individual, does that have any -- does that have any
15:18:25 8 bearing on the efficacy of the speech?
15:18:30 9 A. If they both understand and have been trained in the
15:18:33 10 technique and are delivering in the same way, no, I wouldn't
15:18:36 11 say that has any bearing on the efficacy of the technique.
15:18:40 12 Q. Okay. I think we're on the same page.
15:18:43 13 A. Okay.
15:18:44 14 Q. What materials did you review in preparation for your
15:18:53 15 testimony today?
15:18:54 16 A. The Act.
15:18:54 17 Q. Anything else?
15:18:55 18 A. Not just offhand.
15:18:56 19 Q. You've mentioned continuing education requirements,
15:19:08 20 correct --
15:19:08 21 A. Yes.
15:19:09 22 Q. -- that apply to licensees?
15:19:12 23 A. Yes.
15:19:12 24 Q. And do those same requirements apply to exempt
15:19:15 25 individuals?

15:19:16 1 A. No. If they're exempt, they're not subject to them.

15:19:21 2 Q. I think you referred to "psychologist" as the brand name.

15:19:30 3 Is that the term used?

15:19:32 4 A. It was the term I used that came to mind. I don't know if

15:19:35 5 it's the best characterization but, yes, I used that.

15:19:38 6 Q. So the Act -- the Psychologist Licensing Act in effect

15:19:42 7 trademarks that term for licensees. Is that ...

15:19:49 8 A. I suppose one could think of metaphorically that way.

15:19:53 9 Q. Would a person who has Ph.D. in education qualify to apply

15:20:04 10 for a license under the Act?

15:20:06 11 A. A person with a degree in what? Education?

15:20:12 12 Q. Yes.

15:20:12 13 A. I'm trying to think whether or not there would be a

15:20:23 14 situation in which that degree would specifically be -- if it

15:20:27 15 were specifically out of a psychology training program in an

15:20:31 16 education department, perhaps. So I'd have to go back and look

15:20:37 17 specifically at the rules to determine that.

15:20:39 18 Q. Okay. Well, we can look at the statute.

15:20:42 19 A. But if it were out of a regionally accredited training

15:20:46 20 program and a systematic body of training in psychology and it

15:20:50 21 was in an education department, perhaps. I'd have to go back

15:20:53 22 to look to be certain.

15:20:54 23 Q. You discussed the written exam with Mr. Todd. What is it

15:21:10 24 called?

15:21:10 25 A. Which exam?

15:21:11 1 Q. The written exam.

15:21:13 2 A. The EPPP.

15:21:14 3 Q. And what does that stand for?

15:21:16 4 A. Examination in proficiency for Professional Psychology, I

15:21:25 5 believe, if I remember correctly.

15:21:27 6 Q. And are you aware of any surveys or studies on the

15:21:30 7 acceptance of that exam as a valid tool?

15:21:34 8 A. I know that a number of jurisdictions ran independent

15:21:39 9 tests on it to look at the cutting lines for their

15:21:42 10 jurisdictions, and that -- the cutting line has been consistent

15:21:46 11 over the last many years. Seventy percent is what is

15:21:50 12 considered the cutting line for doctoral level psychologists.

15:21:54 13 Q. And how is that line determined?

15:21:57 14 A. I'm sorry?

15:21:57 15 Q. How is that line determined?

15:21:59 16 A. It was determined to be the best line -- I mean, it's

15:22:09 17 above a 50 percent chance, which I think we want our examinees

15:22:13 18 to be doing better than 50 percent chance. And 70 percent was

15:22:17 19 considered in terms of deviation above the average -- above the

15:22:23 20 mean to be proficient at minimal level.

15:22:30 21 Q. And are you aware of any surveys or studies that show that

15:22:34 22 the written exam is an effective tool for predicting ability to

15:22:42 23 practice psychology?

15:22:43 24 A. It's -- well, the different -- what I'm having difficulty

15:22:51 25 with is your characterization. No, I'm not specifically aware

15:22:55 1 of any studies of that type.

15:22:58 2 But it's not a matter of being predictive of the
15:23:03 3 quality that's -- the minimal quality knowledge base is what's
15:23:09 4 being predicted. The oral examination that we administer is
15:23:14 5 more the applied aspect of it.

15:23:16 6 Q. Other than your say-so, how can we know that the exams
15:23:25 7 relate to competency without actually reviewing the exams?

15:23:29 8 A. Content analysis.

15:23:30 9 Q. Content analysis of the exams?

15:23:33 10 A. Across -- when examinations are generated of that type you
15:23:38 11 have experts in the various content fields review the items.
15:23:43 12 And those are -- there's a selection process. And as new items
15:23:50 13 are incorporated into the test, the consistency and reliability
15:23:55 14 of the internal structure of the test is assessed over a period
15:23:58 15 of time. They're not just stuck in there and used
15:24:01 16 immediately. They are developed.

15:24:02 17 Q. And just to make sure I'm understanding you correctly,
15:24:06 18 you're saying that the way to determine if the exams relate to
15:24:13 19 competency is to review the content of the exams?

15:24:16 20 A. The content of the exams are reviewed by experts at the
15:24:20 21 time it was being developed. And whenever it is revised or new
15:24:24 22 items are added, those are reviewed as well. And they are
15:24:29 23 subject to psychometric methodology before they're actually
15:24:36 24 incorporated into the exam for purposes of assessing.

15:24:39 25 Q. I think you're saying yes to my question, but ...

15:24:43 1 A. I'm sorry. I didn't understand it as a yes-no question.

15:24:46 2 Q. No. And that's okay. But just so I'm clear, the way to

15:24:51 3 determine if the exams relate to competency is to look at their

15:24:55 4 content?

15:24:56 5 A. Those are -- that's what they're measuring, is content

15:24:59 6 knowledge.

15:24:59 7 Q. Okay. I think -- I think we're on the same page.

15:25:03 8 A. Okay.

15:25:05 9 MR. MANLEY: May I have a moment, Your Honor?

15:25:08 10 THE COURT: Yes.

15:25:27 11 Q. (BY MR. MANLEY) And are you aware, Dr. Branaman, that when

15:25:31 12 we asked you and the other defendant to disclose the content of

15:25:35 13 the exams, that that request was denied?

15:25:39 14 A. We don't -- the EPPP is proprietary. It's not our test.

15:25:50 15 Q. But what I'm asking you is, are you aware that --

15:25:53 16 A. I'm not aware of you having asked for the EPPP, no.

15:25:57 17 Q. And what about our request to review the content of the

15:26:00 18 oral exams? Are you aware that that was denied?

15:26:03 19 A. I believe that I had understood that there was a request

15:26:06 20 of that nature.

15:26:12 21 MR. MANLEY: Thank you. Pass the witness.

15:26:13 22 THE COURT: Mr. Todd, recross?

15:26:19 23 MR. TODD: Nothing further at this time, Your Honor.

15:26:22 24 THE COURT: All right. And both sides, then, are

15:26:24 25 comfortable with going ahead and releasing this witness,

15:26:27 1 because he won't be back Monday. Everybody comfortable with
15:26:30 2 that?

15:26:31 3 MR. MANLEY: Yes.

15:26:31 4 THE COURT: All right. Dr. Branaman, you may step
15:26:34 5 down, and you are excused. Have a good trip to Sacramento.

15:26:40 6 All right, then we have for Monday, then, your two
15:26:47 7 witnesses?

15:26:48 8 MR. TODD: Yes, Your Honor.

15:26:48 9 THE COURT: And any rebuttal the plaintiff may have.
15:26:52 10 Now, let me talk to you a little bit on, presuming we're going
15:26:56 11 to finish this on Monday, the State has filed a trial brief.
15:27:08 12 Does the plaintiff want additional briefing?

15:27:14 13 MR. MANLEY: Your Honor, we'd like the opportunity to
15:27:17 14 respond to the trial brief in some fashion. Particularly, we
15:27:21 15 think post-trial briefing would be most useful.

15:27:26 16 THE COURT: All right. Would it be most useful for
15:27:33 17 you -- for the plaintiff to file a brief and then we argue it
15:27:42 18 after I get the brief in? Because I have the State's brief.
15:27:45 19 Mr. Todd, Ms. Penn, do y'all require any additional briefing,
15:27:49 20 or are you satisfied with what you've got.

15:27:51 21 MR. TODD: Well, what we haven't done is respond,
15:27:59 22 other than just questioning, but respond in argument fashion to
15:28:03 23 what's been brought up at trial. That can be done either on
15:28:07 24 paper or us coming back and arguing it orally. There are a few
15:28:11 25 things I'd like to be able to say, here's what the evidence

15:28:15 1 that was put on; however, this is what the law -- what the law
15:28:19 2 would say by it, which of course didn't do in the trial brief.

15:28:23 3 THE COURT: If I let you do that, will you promise me
15:28:25 4 you won't put your citations in footnotes ever again?

15:28:29 5 MR. TODD: It's only because of the 10-page limit.

15:28:33 6 THE COURT: Well, see, but that's a way to get around
15:28:35 7 that.

15:28:36 8 MR. TODD: I know. And I don't like doing it that
15:28:39 9 way. I can make that promise. I make that pledge.

15:28:42 10 THE COURT: At my advanced age, I don't like reading
15:28:45 11 it that way.

15:28:46 12 MR. TODD: I do pledge solemnly, on the record, in
15:28:49 13 front of these witnesses, I won't do that.

15:28:51 14 THE COURT: I'll give you a practice tip. I have an
15:28:54 15 awful lot of State of Texas business over here. I don't
15:28:57 16 believe I have ever turned down a request by the State or any
15:29:00 17 other party for additional pages. I would rather read more
15:29:05 18 page with type I can read than fewer pages with type I can't
15:29:08 19 read. It's also better for the litigants.

15:29:10 20 All right. Does it make more sense to get the
15:29:16 21 remainder of the briefing in after we close the evidence and
15:29:19 22 both sides have heard all of the evidence?

15:29:22 23 MR. MANLEY: Yes.

15:29:23 24 MR. TODD: Yes, Your Honor.

15:29:24 25 THE COURT: All right. Then what we will do Monday

15:29:26 1 is finish the evidence. You will not be required to argue this
15:29:31 2 case Monday. And then when the evidence closes, we will talk
15:29:35 3 about a schedule for the remainder of the briefing and for
15:29:39 4 closing arguments. Does that work for everyone?

15:29:42 5 MR. MANLEY: Yes.

15:29:42 6 MR. TODD: Yes, Your Honor.

15:29:44 7 THE COURT: All right. Well, I want to thank you for
15:29:45 8 what you've done so far. I want to thank you for putting up
15:29:48 9 with the Court's schedule. I wish I could give you some hope
15:29:52 10 that in the future we would have all these problems solved, but
15:29:56 11 I don't see it anytime soon.

15:29:58 12 So the Court's in recess until 9 o'clock Monday
15:30:01 13 morning.

15:30:02 14 (End of transcript)

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1 **UNITED STATES DISTRICT COURT)**

2 **WESTERN DISTRICT OF TEXAS)**

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
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7 I certify that the transcript fees and format comply with
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10 WITNESS MY OFFICIAL HAND this the 15th day of
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