

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. ) NOVEMBER 4, 2013

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TRANSCRIPT OF BENCH TRIAL  
BEFORE THE HONORABLE LEE YEAKEL  
VOLUME 3  
\*\*\*\*\*

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**EXAMINATION INDEX**

1			
2			
3	DARRELL SPINKS		
4	DIRECT BY MR. TODD	5	
5	CROSS BY MR. MANLEY	16	
6	REDIRECT BY MR. TODD		29
7	RECROSS BY MR. MANLEY	31	
8			
9	FLOYD L. JENNINGS		
10	DIRECT BY MR. TODD	33	
11	CROSS BY MR. MANLEY	52	
12			
13	MARY L. SERAFINE		
14	DIRECT BY MR. BORGELT	61	

**EXHIBIT INDEX**

13			OFFD/ADM
14	Plaintiff		
15	16 Excerpts/Oral Deposition of Sherry Lee	3	4
16	17 Excerpts/Oral Deposition of David White	3	4
17	18 Excerpts/Oral Deposition of Tim F. Branaman	3	4
18	Defendant		
19	3 Dr. Jennings' curriculum vitae	35	35

09:02:15 1 (Open Court)

09:02:15 2 THE COURT: As part of your government's continuing  
09:02:17 3 idea on how to get rid of the courts altogether, they decided  
09:02:20 4 to try us without air-conditioning for a while and see if that  
09:02:24 5 will work. So we'll struggle along as best we can. Also,  
09:02:29 6 please note that the clock's an hour off because they didn't  
09:02:33 7 come in and change that either.

09:02:34 8 So I think we were at the point where, Mr. Todd, you  
09:02:39 9 can call your next witness; is that correct?

09:02:42 10 MR. TODD: Yes. If I can confirm, have the  
09:02:44 11 plaintiffs rested -- has the plaintiff rested?

09:02:47 12 MR. MANLEY: Plaintiff has not rested yet,  
09:02:50 13 Your Honor.

09:02:50 14 THE COURT: All right. Pardon me. Do you have  
09:02:51 15 something?

09:02:51 16 MR. MANLEY: The only thing we'd like to do is offer  
09:02:53 17 Exhibits 16, 17, and 18 at this time.

09:03:32 18 MR. TODD: I'll not object at this time. These are  
09:03:40 19 deposition excerpts of three people who testified. But it's a  
09:03:45 20 bench trial, and it's been pointed out it's all going to get in  
09:03:48 21 one way or the other. So I guess I wouldn't object so I might  
09:03:54 22 do the same myself later, offer some deposition excerpts. So  
09:03:58 23 with that understanding, we won't object.

09:04:02 24 THE COURT: Well, I didn't hear anybody say there was  
09:04:07 25 an understanding. Do you have specific objections? And, you

09:04:16 1 know, it doesn't appear those excerpts were -- they weren't  
09:04:20 2 previously provided to me because they don't show up on the  
09:04:22 3 exhibit list. They may be in the notebook.

09:04:25 4 MR. TODD: I was previously provided. I came too  
09:04:29 5 light this morning and left them behind. It's just curious,  
09:04:34 6 since all three people testified. But I don't think there's --  
09:04:38 7 there's nothing in the testimony that's objectionable, so we  
09:04:43 8 just won't object to admitting them.

09:04:46 9 THE COURT: All right. Plaintiff's Exhibits 16, 17,  
09:04:48 10 and 18 are admitted.

09:04:53 11 Anything further, Mr. Manley?

09:04:54 12 MR. MANLEY: No. Plaintiff rests, Your Honor.

09:04:56 13 THE COURT: All right. Now, Mr. Todd.

09:04:58 14 MR. TODD: Yes. Defendants call Darrell Spinks.

09:05:11 15 THE COURT: Let me ask -- as Mr. Spinks comes  
09:05:13 16 forward, let me ask you-all a question. You have previously  
09:05:17 17 indicated that Mr. Spinks is the successor to Ms. Lee as  
09:05:21 18 executive director of the Texas State Board of Examiners of  
09:05:25 19 Psychologists. Ms. Lee was sued only in her official capacity.

09:05:29 20 MR. TODD: Right.

09:05:29 21 THE COURT: I presume that Mr. Spinks is thereby  
09:05:32 22 covered by the federal rule that says he is automatically  
09:05:36 23 substituted as the party for Ms. Lee, and we'll change the  
09:05:41 24 caption accordingly. Is that everyone's understanding?

09:05:43 25 MR. TODD: Yes, Your Honor.

09:05:44 1 MR. MANLEY: Yes, Your Honor.

09:05:44 2 THE COURT: All right. We'll do that. And no one  
09:05:46 3 needs to file a motion to that effect. We just take care of  
09:05:49 4 that.

09:06:09 5 **DARRELL SPINKS,**

09:06:09 6 having been first duly sworn, testified as follows:

09:06:09 7 **DIRECT EXAMINATION**

09:06:09 8 **BY MR. TODD:**

09:06:09 9 Q. Good morning. Would you state your name, please.

09:06:11 10 A. Sure. It's Darrell Spinks.

09:06:13 11 Q. And how are you employed?

09:06:14 12 A. I'm the executive director for the Texas State Board of  
09:06:18 13 Examiners of Psychologists.

09:06:18 14 Q. And do you hold any licensure?

09:06:22 15 A. Yes, sir. I'm a licensed attorney.

09:06:24 16 Q. Okay. Would you briefly outline your responsibilities as  
09:06:29 17 executive director.

09:06:31 18 A. I am the individual that is responsible for the day-to-day  
09:06:34 19 operations of the State Psychology Board, much of the same  
09:06:38 20 things that Ms. Lee -- or all of the same things that Ms. Lee  
09:06:41 21 described in her testimony.

09:06:42 22 Q. Okay. More particularly, what is your role in the -- in  
09:06:51 23 enforcement and disciplinary actions by or on behalf of the  
09:06:54 24 Board?

09:06:55 25 A. As the executive director, I am responsible for signing

09:06:59 1 all complaints that are Board-initiated complaints. I am also  
09:07:02 2 responsible for reviewing basically all complaints that are  
09:07:07 3 filed with the Board as part of our disciplinary review  
09:07:11 4 process.

09:07:12 5 Q. Okay. And do -- do you -- do you have any kind of  
09:07:17 6 responsibilities for keeping track of -- of the process and  
09:07:23 7 reporting to the Board?

09:07:25 8 A. Yes, sir. As the executive director, it's my  
09:07:28 9 responsibility to make sure that we keep track of statistics  
09:07:31 10 that I have to report to the Board on a quarterly and annual  
09:07:34 11 basis, end of our fiscal year. And I'm also responsible for  
09:07:37 12 reporting enforcement statistics to the Texas Legislature.

09:07:41 13 Q. Okay. I want to talk with you a bit about the enforcement  
09:07:45 14 process. First of all, can you tell us if there are any  
09:07:49 15 differences between -- or if -- without -- we'll go into it  
09:07:53 16 more specifically, but is it -- are there any differences or  
09:07:59 17 distinctions between the process that's followed for licensees  
09:08:04 18 and the process that is followed for people who are not  
09:08:07 19 licensed?

09:08:07 20 A. Yes, sir. There are differences.

09:08:10 21 Q. Okay. Let's start with licensees. Do you -- you heard  
09:08:18 22 Dr. Branaman testify that the process is complaint initiated?

09:08:26 23 A. Yes.

09:08:26 24 Q. Would that be your perception also?

09:08:29 25 A. Yes. It's a complaint-driven system.

09:08:31 1 Q. Okay. And then among the complaints that come in, do you  
09:08:34 2 subdivide them into broader categories?

09:08:37 3 A. Yes, we do.

09:08:37 4 Q. What are those?

09:08:39 5 A. We prioritize complaints based on the type of conduct  
09:08:43 6 being complained about. For instance, if it were a case  
09:08:45 7 involving sexual impropriety, that would be bumped up to a  
09:08:49 8 priority two type case or a priority one type case.

09:08:52 9 Q. What about in terms of complaints dealing with continuing  
09:08:55 10 education as opposed to substantive or other kinds.

09:09:00 11 A. Yes. We do distinguish what we call CE complaints, which  
09:09:03 12 are continuing education complaints. Those are not as high a  
09:09:10 13 priority as the other types of complaints.

09:09:13 14 Q. But you do get some complaints involving someone failing  
09:09:16 15 to keep up with continuing education?

09:09:17 16 A. Yes. We receive quite a bit.

09:09:20 17 Q. Okay.

09:09:20 18 A. We receive a lot of complaints dealing with CEs.

09:09:23 19 Q. In the -- let's follow the process for when there's a  
09:09:26 20 compliant dealing with a substantive violation. Upon receiving  
09:09:33 21 a complaint, what does the staff do?

09:09:35 22 A. Upon receiving the complaint, staff will look at the  
09:09:38 23 allegations that are made in the complaint on their face to see  
09:09:42 24 if there is a rule violation. In other words, we take all the  
09:09:46 25 facts in the complaint as if they are true, and we look to see

09:09:49 1 if those facts constitute a rule violation.

09:09:52 2 If not, that complaint is placed on what we call an  
09:09:54 3 SDM, which is a staff dismissal docket, which is basically the  
09:09:58 4 three staff members who review the complaints recommending to  
09:10:01 5 the Board that the case be dismissed.

09:10:02 6 Q. Who are the staff members that review?

09:10:04 7 A. The enforcement manager, which is Ms. Cynthia Barber, then  
09:10:09 8 myself as the executive director, and then the Board's general  
09:10:11 9 counsel.

09:10:11 10 Q. Okay. If on its face a complaint might state a violation,  
09:10:15 11 what's the next step?

09:10:16 12 A. If we determine that it might state a violation, we send  
09:10:23 13 what is called a notice of violation, or NOV, for short. And  
09:10:25 14 the NOV basically asks the licensee to tell us their side of  
09:10:30 15 the story. And then we receive that in and review that.

09:10:32 16 Q. In the licensee's explanation is satisfactory, what  
09:10:36 17 happens?

09:10:37 18 A. It's recommended for dismissal.

09:10:38 19 Q. If not, what would be the next step?

09:10:42 20 A. If -- if we still feel after having received the  
09:10:45 21 licensee's response that there's a possible violation, we  
09:10:49 22 can -- if it's a low-grade violation, like a CE complaint, we  
09:10:53 23 can offer what's called an agreed order by mail in which we'll  
09:10:57 24 mail an order out with the proposed violation and proposed  
09:11:01 25 sanction. And if the licensee agrees to that, that's good. We



09:11:05 1 then present that to the Board at the next board meeting.

09:11:08 2 If it's not a violation -- or if it's not an

09:11:11 3 allegation that's conducive to an agreed order by mail, we

09:11:14 4 place it on the informal settlement conference docket.

09:11:16 5 Q. At what point is an investigation done?

09:11:19 6 A. The investigation is done -- typically once we receive the

09:11:27 7 licensee's response to us, we start -- we start kind of

09:11:31 8 conducting the investigation, subpoenaing any materials that we

09:11:34 9 need. And we do an investigation, actually, throughout the

09:11:36 10 entire length of the disciplinary process.

09:11:41 11 Q. And do you have a feel for about how often a complaint

09:11:46 12 results in an agreed order?

09:11:48 13 A. Yes. Yeah. The -- the vast majority of the complaints

09:11:55 14 that result in disciplinary action are disposed of by agreed

09:11:59 15 order.

09:11:59 16 Q. Okay.

09:11:59 17 A. Very, Very few actually go to a full contested hearing.

09:12:03 18 Q. And the agreed order cites violations?

09:12:06 19 A. Yes, sir. It will cite either the Board rule or the

09:12:09 20 statute. If it was HIPAA, for example, it would cite whatever

09:12:12 21 law was violated. And then it will also go on to state what

09:12:15 22 the disciplinary sanction to be imposed is.

09:12:18 23 Q. And in a majority of cases, the practitioner and the Board

09:12:23 24 are able to agree that there was a violation?

09:12:26 25 A. Yes, sir.

09:12:26 1 Q. The informal settlement conference, who conducts that?

09:12:35 2 A. The informal settlement conference is made up of three of  
09:12:40 3 our board members, one psychologist, one LPA, slash, LSSP, and  
09:12:46 4 then one public member.

09:12:47 5 Q. And what was LPA/LSSP?

09:12:50 6 A. LPA is a Licensed Psychological Associate, and an LSSP is  
09:12:54 7 a Licensed Specialist in School Psychology.

09:12:56 8 Q. Okay. And do cases get settled?

09:13:00 9 A. Yes.

09:13:00 10 Q. And that -- what typically are the elements that are put  
09:13:10 11 into a settlement agreement that results from an informal  
09:13:14 12 settlement conference?

09:13:15 13 A. The same things that we talked about earlier. You have an  
09:13:17 14 agreed order that will show what rule was violated. Then it  
09:13:20 15 will also show the disciplinary sanction to be imposed. And  
09:13:24 16 then it will be signed either by the general counsel or myself  
09:13:26 17 along with the respondent licensee.

09:13:29 18 Q. And, again, the -- in these cases, the practitioner and  
09:13:36 19 the representatives of the Board are able to agree whether or  
09:13:39 20 not -- on the appropriateness of the practice in question and  
09:13:44 21 whether or not it violated a rule?

09:13:46 22 A. Yes, sir.

09:13:47 23 Q. If no agreement is reached at the informal settlement  
09:13:53 24 conference, what is the next step?

09:13:54 25 A. The next step is we file the case with the State Office of

09:13:57 1 Administrative Hearings, or SOAH, for short. Oftentimes we  
09:14:00 2 will -- if it's -- if we think there's a slim chance for  
09:14:04 3 settlement, we may try to mediate the case over there again.  
09:14:10 4 SOAH is very -- they really push us to mediate cases.  
09:14:13 5 Economically it's the better thing to do if you can settle it  
09:14:16 6 that way. But if you cannot settle it, it will be tried in a  
09:14:19 7 bench trial fashion before an ALJ.

09:14:22 8 Q. And have you been able to settle cases through mediation?  
09:14:25 9 A. Yes, sir, we have.

09:14:26 10 Q. And, again, does the mediated settlement include a  
09:14:29 11 recitation of the violation?  
09:14:30 12 A. Yes, sir.

09:14:31 13 Q. If that doesn't succeed, what's the next step?  
09:14:36 14 A. Then you try the case before the administrative law judge.

09:14:39 15 Q. Okay. What -- then what disposition does the  
09:14:43 16 administrative law judge make?  
09:14:45 17 A. The administrative law judge, they issue what's called a  
09:14:49 18 proposal for decision, and it is -- it's basically a  
09:14:52 19 recommendation of what the findings of fact are in the case.  
09:14:56 20 They don't -- they don't actually impose any sanction. They  
09:14:59 21 can make a recommendation. But the main thing is the proposed  
09:15:03 22 findings of fact.

09:15:03 23 Q. And what discretion does the Board have to change the  
09:15:11 24 findings of fact?  
09:15:12 25 A. We have very little discretion to change findings of

09:15:15 1 fact. We can change minor grammatical things, but we don't  
09:15:19 2 have much discretion there.

09:15:20 3 Q. So what decision, then, does the Board make when it  
09:15:23 4 receives a proposal for decision?

09:15:25 5 A. If the ALJ recommends or finds that there was a rule  
09:15:29 6 violation, then it's up to the Board to decide what sanction to  
09:15:33 7 impose. But if the ALJ finds there was no rule violation, then  
09:15:36 8 the Board has no choice but to dismiss it, basically.

09:15:39 9 Q. Among the cases that are not dismissed *sua sponte* by the  
09:15:43 10 staff as lacking merit and that go forward, could you give us  
09:15:49 11 an idea of the kinds of violations that are dealt with in this  
09:15:53 12 process?

09:15:54 13 A. Sure. Some of the best examples I can think of off the  
09:16:00 14 top of my head are cases involving sexual impropriety or  
09:16:04 15 inappropriate relationships. Those are probably some of the  
09:16:07 16 biggest cases that we deal with. We have a lot of forensic --  
09:16:11 17 cases involving forensic rule violations. For example, child  
09:16:16 18 custody opinions are rendered in a court without the licensee  
09:16:20 19 having conducted an actual evaluation of one of the parties or  
09:16:23 20 of any of the parties.

09:16:24 21 We also have cases involving practitioners using  
09:16:28 22 outdated instruments -- test instruments or they'll use them  
09:16:31 23 inappropriately or apply them inappropriately. And then we  
09:16:34 24 also, as another example, we have stuff like Medicaid and  
09:16:38 25 Medicare fraud, insurance fraud.

09:16:40 1 Q. And who brings -- who can file a complaint with the Board?

09:16:44 2 A. Anybody can really file a complaint. Most what you see  
09:16:48 3 are either the patients or, if it's a minor, the parent of the  
09:16:52 4 patient. But we also have quite a few complaints filed by  
09:16:55 5 other practitioners.

09:17:04 6 Q. Now, let's go through the process for people who are not  
09:17:06 7 licensed by the Board but you receive a complaint about their  
09:17:09 8 conduct. What is the first step in that process?

09:17:11 9 A. The first step in that process is we take a look at  
09:17:15 10 whatever is being alleged and see, is that something that would  
09:17:19 11 require a psychology license to do? First, actually, we check  
09:17:25 12 to make sure they're not a licensee of ours, and then we  
09:17:28 13 usually check to see if they're licensed in any other  
09:17:31 14 profession that would allow them to do whatever it is that  
09:17:34 15 they're being complained of.

09:17:36 16 But if none of that checks out, then we will send  
09:17:39 17 them a cease and desist and ask them oftentimes for an  
09:17:43 18 explanation for, you know, what authority are you acting under  
09:17:45 19 whenever you're doing this.

09:17:46 20 Q. Does this occur simultaneously, or could those occur in  
09:17:51 21 two different steps, requesting an explanation and then a cease  
09:17:55 22 and desist, or do you do it both ways?

09:17:58 23 A. You can do it both ways.

09:18:00 24 Q. Okay. And when -- when you issue a cease and desist  
09:18:05 25 order, what kind of response are you looking for?

09:18:07 1 A. What I have -- when I served as the general counsel and  
09:18:13 2 even continuing now as the executive director, I send out an  
09:18:16 3 unsworn declaration form that I ask them to sign  
09:18:19 4 acknowledging -- it's a simple form that says, I acknowledge  
09:18:22 5 receipt of the cease and desist order and I agree to comply  
09:18:25 6 with its terms and conditions. Because since they're not a  
09:18:28 7 licensee with us, I don't have any jurisdiction over their  
09:18:31 8 person and I want an agreement with them that they will at  
09:18:34 9 least abide by the Psychologist Licensing Act.

09:18:37 10 Q. So if the practitioner simply stops the conduct that's the  
09:18:43 11 subject of the cease and desist order but doesn't provide any  
09:18:47 12 sort of assurances for the future, is that a satisfactory  
09:18:51 13 response?

09:18:51 14 A. Typically, no, because we have no guarantee that it won't  
09:18:56 15 happen again.

09:18:57 16 Q. And if you don't get a satisfactory response or a response  
09:19:03 17 that you consider -- the staff of the Board considers  
09:19:07 18 satisfactory, what is the next step?

09:19:09 19 A. The next step is we have to decide whether or not we want  
09:19:12 20 to send it over to the Office for the Attorney General to seek  
09:19:15 21 a civil injunction and possible civil penalty. And we also  
09:19:19 22 have the option of sending it to the county attorney's office  
09:19:23 23 in whatever county the alleged activities occurred in for  
09:19:28 24 criminal prosecution of practicing without a license.

09:19:30 25 Q. So we've heard references to prosecution. What sort of

09:19:35 1 prosecution does the Office of Attorney General do on your  
09:19:38 2 behalf?

09:19:38 3 A. It's just a plain-Jane civil lawsuit where you seek a  
09:19:45 4 civil injunction.

09:19:46 5 Q. Okay. And if -- if you want criminal prosecution, you  
09:19:50 6 send that to the county attorney?

09:19:53 7 A. Yes. I would have to figure out what county the offense  
09:19:56 8 occurred in and then contact law enforcement or the county  
09:19:59 9 attorney in that county.

09:20:00 10 Q. When you send a matter to the Office of the Attorney  
09:20:02 11 General, what discretion does that office have as to whether or  
09:20:05 12 not to proceed?

09:20:07 13 A. They have 100 percent discretion over what cases they  
09:20:10 14 choose to take. I cannot make them take the case.

09:20:13 15 Q. What about a county attorney for a misdemeanor?

09:20:17 16 A. Same thing. They have complete prosecutorial discretion.

09:20:20 17 Q. Okay. You were here for testimony to the effect that the  
09:20:27 18 Board maintains a register that's available over the Internet  
09:20:37 19 of licensees?

09:20:38 20 A. Yes, sir. We're required by law to do that.

09:20:40 21 Q. Approximately how many people are licensed in Texas to  
09:20:43 22 practice psychology?

09:20:44 23 A. When I looked a couple of weeks ago, I think we had a  
09:20:49 24 little over 8700 licensees.

09:20:51 25 MR. TODD: Pass the witness.

09:20:54 1 THE COURT: Mr. Manley?

09:21:01 2 **CROSS-EXAMINATION**

09:21:01 3 **BY MR. MANLEY:**

09:21:01 4 Q. Good morning.

09:21:02 5 A. Good morning.

09:21:02 6 Q. Mr. Spinks, you're not a psychologist?

09:21:12 7 A. No, sir.

09:21:12 8 Q. You're not licensed by the Board as a psychologist?

09:21:16 9 A. No, sir.

09:21:16 10 Q. Or by the Board in any other way?

09:21:18 11 A. No, sir.

09:21:19 12 Q. Okay. You mentioned sexual impropriety as one of the  
09:21:27 13 major things that the Board is concerned about regulating?

09:21:30 14 A. Yes, sir.

09:21:31 15 Q. Does the Board exercise any oversight over individuals who  
09:21:36 16 are exempt under the Act with regard to sexual impropriety?

09:21:42 17 A. If they are licensed with us, yes, we would have  
09:21:44 18 jurisdiction over those individuals if they engaged in sexually  
09:21:47 19 inappropriate activity.

09:21:48 20 Q. But, clergy, for example, are exempt under the Act. The  
09:21:54 21 Board doesn't police their sexual improprieties, correct?

09:21:57 22 A. If they're not a licensee with us, and I -- to be honest  
09:22:01 23 with you, Mr. Manley, I can't remember the exact wording on  
09:22:06 24 that clergy exemption.

09:22:07 25 Q. If it would be helpful, I can show you a copy of the



09:22:10 1 statute.

09:22:11 2 A. If you would, yes. Okay. I'm looking at it now.

09:22:35 3 Q. So my question is: For example, clergy are exempt under  
09:22:39 4 the Act. Does the Board police the sexual improprieties of  
09:22:42 5 members of the clergy?

09:22:42 6 A. In they were a licensee, I think we could police those  
09:22:46 7 activities because the exception extends only so far as -- or  
09:22:50 8 only so far as long as they're acting within their ministerial  
09:22:54 9 capabilities. And the Board oftentimes -- well, we always  
09:22:57 10 view, if you're engaging in sexually inappropriate activity,  
09:23:00 11 that's going to be outside of the scope of your employment at  
09:23:04 12 an exempt facility and it would certainly be outside the scope  
09:23:06 13 of your ministerial capabilities if you're having inappropriate  
09:23:11 14 sexual relationships with individuals.

09:23:12 15 Q. But my question is: For an individual who is exempt under  
09:23:16 16 the Act, who does not have a license, does not need a license  
09:23:19 17 because they're a member of the clergy, the Board does not  
09:23:22 18 police their sexual improprieties?

09:23:22 19 A. Well, the problem is the Act exempts the activity or  
09:23:25 20 service, not the individual themselves. So if a clergyman is  
09:23:30 21 engaged in inappropriate sexual activity, that's obviously not  
09:23:33 22 part of their ministerial capability. And if they were a  
09:23:38 23 licensee of us, we could go after them for that, because we do  
09:23:41 24 go after people who are employed in exempt facilities who  
09:23:42 25 engaged in sexually inappropriate conduct. We go after them as

09:23:46 1 long as they're a licensee, because there's no way that can be  
09:23:49 2 within the scope or your employment.

09:23:50 3 Q. But if they're not a licensee, you don't go after them?

09:23:54 4 A. Correct. We have no jurisdiction over them without a  
09:23:56 5 license.

09:23:56 6 Q. And that would apply to all the individuals who are exempt  
09:23:58 7 under the Act. If they don't have license, you guys don't  
09:24:01 8 regulate their activities?

09:24:03 9 A. That's correct.

09:24:04 10 Q. You said you get complaints about continuing education  
09:24:19 11 compliance?

09:24:20 12 A. Yes, sir.

09:24:20 13 Q. Who submits those complaints?

09:24:23 14 A. Those are Board-initiated complaints. Well, most of the  
09:24:26 15 time. I can think of maybe one instance where we had somebody  
09:24:29 16 actually complain on somebody for a CE violation.

09:24:32 17 Q. And you said the vast majority of the complaints the Board  
09:24:39 18 receives are resolved by voluntary compliance?

09:24:41 19 A. For those -- when you say "voluntary compliance," you're  
09:24:45 20 talking about like an agreed order?

09:24:48 21 Q. (Nods)

09:24:49 22 A. The vast majority of complaints we receive are dismissed,  
09:24:54 23 but the complaints where disciplinary action is imposed, the  
09:24:58 24 vast majority of those are resolved by agreed order.

09:25:02 25 Q. Okay. So yeah. That was my next question. You said the

09:25:06 1 vast majority of complaints the Board receives are dismissed?

09:25:09 2 A. Yes.

09:25:10 3 Q. Because they're not meritorious?

09:25:13 4 A. No. Our CE rules are very forgiving in that we allow

09:25:20 5 people -- there's a grace period. If you don't timely meet

09:25:23 6 your CE requirements, we have a grace period where a complaint

09:25:27 7 might have been opened. But if you correct or rectify your CE

09:25:31 8 violation within that grace period, we have a one-time kind of

09:25:35 9 freebie -- a mulligan we can call it -- where we'll let you go

09:25:39 10 that one time.

09:25:40 11 There is an administrative fee involved, but

09:25:42 12 that's -- that's why most of our complaints are dismissed,

09:25:46 13 because most of our complaints are continuing education

09:25:48 14 complaints.

09:25:49 15 Q. So excluding the CE complaints, what percentage of

09:25:53 16 complaints are dismissed by the staff?

09:25:56 17 A. By the staff? Well, technically, the staff don't dismiss

09:26:01 18 any complaints. We just recommend dismissal to the Board.

09:26:04 19 Q. Sure.

09:26:05 20 A. But what I call substantive complaints, which are the

09:26:09 21 non-CE complaints, I really can't tell you off the top of my

09:26:14 22 head. I'd be telling a fib if I threw any figure out there.

09:26:18 23 Q. Well, we wouldn't want you to do that.

09:26:20 24 A. Yeah.

09:26:21 25 Q. What percentage of all the complaints that come in are

09:26:23 1 dismissed, if you know?

09:26:25 2 A. I think in -- like fiscal year 2012, I want to say roughly  
09:26:30 3 one quarter of the complaints that were disposed of in that  
09:26:34 4 year were -- resulted in some kind of disciplinary sanction.  
09:26:37 5 So 75 percent, say, in fiscal year 2012. And then I think in  
09:26:42 6 fiscal year 2013 it dropped to something like 20 percent were  
09:26:46 7 actually disposed of by disciplinary sanction. And that  
09:26:56 8 includes CE complaints.

09:26:58 9 Q. Now, you mentioned that the administrative law judge makes  
09:27:01 10 conclusions of fact about the case if it gets to him or her.

09:27:05 11 A. Yes, sir.

09:27:06 12 Q. And then does the administrative law judge also make  
09:27:10 13 conclusions of law?

09:27:12 14 A. Yes. Yes, they do. Yeah.

09:27:15 15 Q. Now, you mentioned that there is -- you referenced the  
09:27:31 16 exemptions in your complaint intake procedure for someone who  
09:27:34 17 is not licensed. What's the process that the Board goes  
09:27:39 18 through to determine if an exception applies?

09:27:45 19 A. For example, we'll receive quite a few complaints from  
09:27:50 20 people who are being, say, soldiers or sailors returning from  
09:27:53 21 Afghanistan or Iraq being treated by someone at the VA  
09:27:56 22 hospital. If what they're complaining of is something that the  
09:27:59 23 doctor did that amounts to -- I hate to say malpractice -- but  
09:28:03 24 just negligence in the delivery of services, oftentimes that'll  
09:28:07 25 make it on the SDM docket because they were obviously acting

09:28:11 1 within the scope of their employment and providing services.

09:28:13 2 So that gets dismissed.

09:28:14 3 Q. Which docket?

09:28:16 4 A. The -- I'm sorry.

09:28:18 5 Q. Which docket?

09:28:19 6 A. The SDM docket.

09:28:21 7 Q. And that stands for?

09:28:23 8 A. Oh, I'm sorry. Staff Dismissal Meeting.

09:28:26 9 Q. Okay.

09:28:27 10 A. So let's say we get a compliant on somebody, a licensee

09:28:30 11 who's providing services at the VA, that -- most of the time

09:28:34 12 those go to the SDM docket.

09:28:36 13 Q. And that means the staff is recommending dismissal?

09:28:40 14 A. Yes, sir. Yeah.

09:28:41 15 Q. Okay. And can you elaborate on that process to determine

09:28:46 16 if an exception allows the activity that's being complained

09:28:50 17 about.

09:28:51 18 A. We just look at it. It would be myself, the enforcement

09:28:54 19 manager, and then the general counsel. If we all look at it

09:28:57 20 and agree, you know, based off what is in the compliant, it's

09:29:01 21 clear that this guy is acting within an exempt facility and the

09:29:04 22 activities or services he's providing are exempt, we don't have

09:29:08 23 any jurisdiction over it. If the three of us all agree to

09:29:11 24 that, it's put on the SDM and it's recommended to the Board for

09:29:14 25 full dismissal -- or for dismissal at the next board meeting.

09:29:16 1 Q. What standards are the three of you applying?

09:29:19 2 A. We just look to see if the -- if the activity or service  
09:29:27 3 is within -- is it something a licensee would be doing as an  
09:29:30 4 employee of the VA or TDCJ, whatever governmental entity or  
09:29:35 5 university they work for.

09:29:36 6 Q. So you're just kind of spitballing based on your sense of  
09:29:43 7 what they're doing and what they're -- what the exemption  
09:29:45 8 allows?

09:29:47 9 A. Well, no. I mean, we look at what is alleged in the  
09:29:50 10 complaint. If what the complainant is describing is an  
09:29:56 11 activity that a licensee would be providing as an employee of  
09:29:59 12 the VA, then on its face, just from the sheer allegations of  
09:30:03 13 the complaint, we have no jurisdiction. The licensee is  
09:30:09 14 exempt, so we have to dismiss that.

09:30:12 15 Q. And what about for some of the other exemptions? What's  
09:30:19 16 the process for determining if an exemption applies for the  
09:30:22 17 clergy?

09:30:23 18 A. It would be the same thing. We would look and see -- I  
09:30:29 19 mean, you just have to look at what is alleged in the complaint  
09:30:32 20 and make your determination based off that. And you've got to  
09:30:38 21 remember, it's not just us when we do it. All nine members of  
09:30:41 22 the Board get to look at it. And so you've got that second --  
09:30:43 23 you've got that backstop there.

09:30:45 24 Q. Yeah. And my question is: You've got the facts as  
09:30:48 25 alleged in the complaint.

09:30:49 1 A. Uh-huh.

09:30:50 2 Q. And that's just the say-so of whoever's submitted the

09:30:54 3 complaint, correct?

09:30:55 4 A. Correct.

09:30:55 5 Q. And then what's the yardstick that you're measuring those

09:30:59 6 facts against? What's the yardstick that you're measuring

09:31:03 7 those facts against?

09:31:03 8 A. Well, you look at the law, and you just see.

09:31:06 9 Q. The Psychologist Licensing Act?

09:31:08 10 A. Yes, sir. You look at that. And if those facts fit

09:31:11 11 within one of those exemptions, then we recommend it for

09:31:14 12 dismissal.

09:31:15 13 Q. And there's no other guidelines that you're applying.

09:31:19 14 It's just what's written in the Texas code?

09:31:23 15 A. Yes. And sometimes we will refer -- there's a John Cornyn

09:31:28 16 Attorney General opinion that I'll use a lot of times,

09:31:31 17 especially on the sexual improprieties cases. John Cornyn -- I

09:31:37 18 don't remember the opinion number, but his opinion talks about

09:31:41 19 acting within the scope of your employment. So we rely on that

09:31:44 20 sometimes as well.

09:31:45 21 Q. Are there any other guidelines that you follow other than

09:31:50 22 the attorney general opinion you referenced and section

09:31:53 23 501.004?

09:31:55 24 A. No, sir. Not that I can think of.

09:31:57 25 Q. Okay. You said the Board has no jurisdiction over

09:32:09 1 non-licensees?

09:32:11 2 A. Correct.

09:32:11 3 Q. So you're just expecting them to comply with the Act

09:32:26 4 without being -- without a complaint being filed or without any

09:32:29 5 action being taken against them?

09:32:31 6 A. Yes.

09:32:32 7 Q. But the Board does have authority do recommend a criminal

09:32:38 8 and civil prosecution to the appropriate authorities?

09:32:41 9 A. Yes, sir.

09:32:42 10 Q. So what I'm confused about still is, if the licensing is

09:33:01 11 necessary to protect the public, why is enforcement simply

09:33:07 12 complaint driven? Why is there no active enforcement of the

09:33:10 13 statute?

09:33:11 14 A. Money. It comes down to money. We do not have the funds

09:33:19 15 or really the personnel to actually engage in proactive

09:33:22 16 policing. We have to rely on a complaint-driven system.

09:33:26 17 You've also -- I cannot remember the case or if it was an AG

09:33:32 18 opinion. You also bump up against some Fourth Amendment search

09:33:37 19 and seizure type issues. I recall one agency tried to do an

09:33:39 20 on-site inspection of a licensee they had, and there were some

09:33:43 21 Fourth Amendment issues that came into play because they didn't

09:33:46 22 have statutory authority or something like that to go out and

09:33:51 23 actually do that.

09:33:52 24 But the main thing is just money. We don't have the

09:33:55 25 money to conduct -- to hire the investigators or conduct the



09:33:59 1 type of operations out on in the field.

09:34:01 2 Q. So does the Board have the statutory authority to conduct  
09:34:08 3 field investigations?

09:34:12 4 A. I don't know. We've never really done it.

09:34:15 5 Q. Have you asked the Legislature for funding to carry out  
09:34:19 6 proactive enforcement?

09:34:24 7 A. Not the last time. I mean, not in the last legislative  
09:34:27 8 request, which is the only one I'm aware of. I don't know what  
09:34:31 9 they've asked for in the past, though.

09:34:32 10 Q. You weren't involved in that at all as general counsel?

09:34:38 11 A. No, sir. As the GC I was not involved in that.

09:34:42 12 Q. And you also mentioned that compliance with the law is not  
09:34:51 13 a satisfactory response to a cease and desist letter; is that  
09:34:55 14 correct?

09:34:55 15 A. Well, that's not what I said. What we're looking for is  
09:34:58 16 some acknowledgment from the individual who is engaging in the  
09:35:02 17 practice of psychology, that -- basically an enforceable  
09:35:07 18 agreement from them that I won't do that anymore. Because  
09:35:10 19 without that, I mean, we could -- we could close out the  
09:35:14 20 complaint and they could turn right around and do the same  
09:35:17 21 thing again the very next day and we're just caught in that  
09:35:21 22 cycle all the time. So we like to bring some finality to it.

09:35:24 23 Q. How does the agreement bring finality?

09:35:26 24 A. Well, at least then we would have something with their  
09:35:32 25 signature on it saying that they agreed to comply with the law.

09:35:41 1 Q. But what does that give the Board in terms of enforcement  
09:35:44 2 authority?

09:35:45 3 A. Well, I guess it would give the attorney general a little  
09:35:48 4 more -- a little more factual support if they had to go into  
09:35:52 5 court and file a lawsuit.

09:35:53 6 Q. So I am hearing you correctly when you say compliance with  
09:36:03 7 the law is not enough. There has to be an affirmative  
09:36:09 8 agreement that I promise not to do this again?

09:36:11 9 A. That's what I have sought -- when I was the general  
09:36:13 10 counsel, that's what I always sought. And that's what I've  
09:36:16 11 continued to do as the executive director.

09:36:22 12 Q. Now, are you familiar with the facts surrounding  
09:36:30 13 Dr. Serafine's case, the complaints that were filed against her  
09:36:33 14 with the Board?

09:36:34 15 A. Yes, sir.

09:36:35 16 Q. Are you aware when the complaints were filed?

09:36:41 17 A. I want to say, I think, in 2010, if I'm remembering right.

09:36:44 18 Q. In?

09:36:45 19 A. 2010.

09:36:46 20 Q. Do you remember how many complaints were filed?

09:36:49 21 A. I know -- I think David or TPA filed one. David White was  
09:36:54 22 the signatory to that. And I think Ms. Lee signed one as well,  
09:36:58 23 if I'm remembering right.

09:36:59 24 Q. And the TPA's complaint, was that filed with the Board  
09:37:16 25 after cease and desist letter had gone out?

09:37:21 1 A. I don't remember.

09:37:22 2 Q. Okay.

09:37:23 3 A. I don't know.

09:37:37 4 MR. MANLEY: May I have just a moment, Your Honor?

09:38:50 5 Q. (BY MR. MANLEY) Just a couple more. So you said that the  
09:39:09 6 majority of the CE complaints are filed by the staff, correct?

09:39:15 7 A. Yes, sir.

09:39:16 8 Q. And what about non-CE complaints? Where do those come  
09:39:21 9 from?

09:39:21 10 A. They will come from patients, other professionals, other  
09:39:30 11 psychologists, parents of minor patients, and then sometimes  
09:39:34 12 just members of the public who really -- that, you know,  
09:39:39 13 they're not a patient of the licensee or anything. You just  
09:39:44 14 kind of get -- it's just a varying spectrum of people that  
09:39:51 15 file.

09:39:51 16 Q. Now, you said -- I think you used the word "allow" with  
09:39:57 17 regard to the exemptions in the sense that you look at whether  
09:40:01 18 the activity that they're doing is allowed under whatever other  
09:40:04 19 license the person might have.

09:40:06 20 A. Uh-huh.

09:40:07 21 Q. So we're both attorneys. I mean, our law license allows  
09:40:19 22 us to do any number of things -- counsel people on legal  
09:40:23 23 issues, teach golf. It allows us to do all sorts of stuff. Is  
09:40:32 24 that your understanding of what the law license allows?

09:40:35 25 A. I don't know how your law license could allow you to teach

09:40:39 1 golf. I mean, it allows me to do a lot of things, but I don't  
09:40:45 2 know that I would say it would allow me to teach golf.

09:40:48 3 Q. What does it allow you to do?

09:40:50 4 A. Practice law.

09:40:50 5 Q. And what does that mean?

09:40:52 6 A. Advise people on what their legal rights are, what their  
09:40:56 7 legal options are, and what I think the best route to take is  
09:40:59 8 on achieving whatever objective they're trying to achieve  
09:41:03 9 within the confines of the law.

09:41:05 10 Q. And how does that creep into the practice of psychology,  
09:41:19 11 as is defined by the Act?

09:41:22 12 A. I don't know that I've ever seen it creep into the -- to  
09:41:30 13 the practice of psychology. I have -- I'm trying to think. I  
09:41:44 14 don't think -- I don't think your law license allows you to  
09:41:48 15 practice psychology.

09:41:55 16 Q. Have you ever practiced family law?

09:41:57 17 A. Yes, sir.

09:41:58 18 Q. In what capacity?

09:41:59 19 A. I guess in every capacity you could imagine. I've  
09:42:04 20 represented both children in divorces, SAPCRs, termination  
09:42:08 21 suits. You name it, I've probably done it.

09:42:14 22 Q. And you never found yourself describing or explaining  
09:42:18 23 behavior?

09:42:20 24 A. Well, yes.

09:42:22 25 Q. Counseling people about nonlegal issues that come up in

09:42:33 1 the course of a messy family dispute?

09:42:35 2 A. Sure.

09:42:36 3 Q. So it's not just counseling people about legal issues.

09:42:39 4 It's broader than that?

09:42:40 5 A. It is, but it was always ancillary to my function and role

09:42:45 6 as a lawyer. It was never separate from that.

09:43:04 7 MR. MANLEY: Just one more moment, please.

09:43:48 8 Q. (BY MR. MANLEY) So your law license allows you to give

09:43:51 9 people legal advice. It doesn't -- you're permitted under your

09:43:58 10 law license to do other things other than give legal advice,

09:44:01 11 right. Your law license doesn't prohibit you from talking to

09:44:05 12 people about their family problems?

09:44:09 13 A. No. It doesn't prohibit me from doing so.

09:44:24 14 MR. MANLEY: Okay. Pass the witness.

09:44:26 15 THE COURT: Mr. Todd, redirect?

09:44:27 16 **REDIRECT EXAMINATION**

09:44:27 17 **BY MR. TODD:**

09:44:27 18 Q. First of all, Mr. Spinks, as you understand it, if you and

09:44:31 19 your staff receive a complaint from someone and they're

09:44:34 20 complaining about the conduct of one of the licensed

09:44:40 21 professionals who's listed in the Act as exempt from the

09:44:44 22 definition of the practice of psychology, and if the Board

09:44:51 23 determines it doesn't have jurisdiction because they fall

09:44:54 24 within these others, do you know whether or not that

09:44:57 25 complainant can take that same complaint to the licensing

09:45:01 1 authority for that professional?

09:45:03 2 A. Yes, sir. They can, and in fact we oftentimes recommend  
09:45:06 3 that.

09:45:06 4 Q. Okay. So you on occasion provide information to the  
09:45:12 5 complainant about where they can go to actually take their  
09:45:15 6 complaint?

09:45:15 7 A. Yes, sir. And I think we're even required to forward  
09:45:18 8 certain complaints -- forward complaints on to the appropriate  
09:45:23 9 licensing authority if somebody mistakenly files one with us.

09:45:29 10 Q. Okay. And when you talk about what a -- in enforcing or  
09:45:34 11 implementing the provisions of 501.004, which talks -- in  
09:45:41 12 talking about the applicability of the Act, when you use the  
09:45:45 13 term what a law license "allows," do you mean that do be I --  
09:45:50 14 "allow" as synonymous with "doesn't prohibit"?

09:45:56 15 A. Say it again.

09:46:02 16 Q. Yes. Okay. Do you interpret that or when you're applying  
09:46:06 17 the statute, do you take that to mean anything that the  
09:46:11 18 standards of the bar don't expressly disallow or mention is  
09:46:16 19 therefore encompassed within what a law license allows?

09:46:20 20 A. Oh. No, sir.

09:46:21 21 Q. Okay. And how do you use the term, what is "allowed" by  
09:46:25 22 your law license?

09:46:26 23 A. What is permitted by our rules of professional conduct.  
09:46:31 24 Whatever is provided for I think in the government code is  
09:46:34 25 where it talks about lawyers. Whatever is set out in the law.

09:46:39 1 Q. And you mentioned "ancillary to the practice of law." Is  
09:46:42 2 it your understanding that what the law licensee is doing  
09:46:49 3 pursuant to his or her license must be connected in some way to  
09:46:54 4 doing the job of a lawyer, even if it involves what some other  
09:46:58 5 professions do?

09:46:59 6 A. Yes, sir.

09:47:00 7 MR. TODD: Okay. Pass the witness.

09:47:02 8 **RECROSS-EXAMINATION**

09:47:02 9 **BY MR. MANLEY:**

09:47:02 10 Q. You said you forwarded complaints on -- about attorneys to  
09:47:25 11 the Bar Association?

09:47:26 12 A. Yeah. I believe we do. I believe we forward complaints  
09:47:31 13 on.

09:47:31 14 Q. Or at least direct the public to where they can complain  
09:47:35 15 about another licensee?

09:47:36 16 A. Yes. I know we do that.

09:47:38 17 Q. Where do you send the public to complain about members of  
09:47:41 18 the clergy?

09:47:43 19 A. Well, I don't believe there is a place.

09:47:45 20 Q. What about folks who are operating under 501.004(a)(5),  
09:47:50 21 doing voluntary activity or service employed by a charitable  
09:47:56 22 nonprofit organization? Who do they complain to?

09:47:59 23 A. If they were a licensed individual doing it, whatever  
09:48:04 24 board, you know, promulgated or issued the license. But if  
09:48:07 25 it's just an unlicensed individual, there's nobody to report

09:48:14 1 that to.

09:48:14 2 Q. What about 501.004(a)(6) for people working for any  
09:48:19 3 government agency who are exempt under the Act? Who do they  
09:48:24 4 complain to?

09:48:24 5 A. Oftentimes we will tell them to report to the governmental  
09:48:27 6 agency employing that individual, and they'll have in-house  
09:48:30 7 ways of dealing with those types of issues.

09:48:40 8 MR. MANLEY: Thank you. Pass the witness.

09:48:43 9 MR. TODD: I have nothing further, Your Honor.

09:48:44 10 THE COURT: You may step down.

09:49:10 11 Mr. Todd?

09:49:10 12 MR. TODD: We received a call from Dr. Jennings this  
09:49:13 13 morning a little before 8:00 that he was setting out early from  
09:49:17 14 Houston, and he estimates that he'll get to Austin around  
09:49:23 15 11:00-ish. I have no other witness besides him.

09:49:27 16 THE COURT: And what does the defendant have left?  
09:49:29 17 Any rebuttal or do you know yet?

09:49:32 18 MR. MANLEY: Plaintiff does anticipate some rebuttal,  
09:49:34 19 Your Honor.

09:49:34 20 THE COURT: Pardon me?

09:49:35 21 MR. MANLEY: The plaintiff does anticipate some  
09:49:37 22 rebuttal.

09:49:38 23 THE COURT: All right. How long do you think that  
09:49:39 24 will be?

09:49:40 25 MR. MANLEY: I think we have -- how much time do we



09:49:43 1 have left, if I might ask?

09:49:45 2 THE COURT: Is this the vacuum thing you're trying to  
09:49:48 3 expand into it? You've got half an hour, I think.

09:49:54 4 MR. MANLEY: We may take that -- all that time.

09:49:57 5 THE COURT: All right. Then what I'm going to do is  
09:50:00 6 we will be in recess, and you-all will just have to mill around  
09:50:09 7 and somebody come around the chambers and let us know when  
09:50:13 8 Dr. Jennings gets here. So at this time the Court is in  
09:50:22 9 recess.

09:50:22 10 (Recess)

09:50:23 11 (Open Court)

10:58:01 12 MR. TODD: We call Dr. Floyd Jennings.

10:58:37 13 (Witness sworn)

10:58:37 14 **FLOYD L. JENNINGS,**

10:58:37 15 having been first duly sworn, testified as follows:

10:58:37 16 **DIRECT EXAMINATION**

10:58:37 17 **BY MR. TODD:**

10:58:37 18 Q. Good morning. Would you please state your name.

10:58:40 19 A. If I can get my breath, my name is Floyd, middle initial  
10:58:46 20 L., Jennings.

10:58:47 21 Q. Okay. And, briefly, how would you describe your  
10:58:51 22 profession and occupation.

10:58:53 23 A. I have two.

10:58:55 24 Q. All right.

10:58:56 25 A. Where would you like for me to start?

10:58:58 1 Q. Start with private.

10:59:01 2 A. In my private endeavors I'm a clinical psychologist. I  
10:59:06 3 engage exclusively now in the practice of forensic psychology,  
10:59:12 4 and that is on a part-time basis.

10:59:15 5 Q. Okay. And the public sector side of that?

10:59:20 6 A. In the public sector I am chief of the Misdemeanor Mental  
10:59:23 7 Health Division of the Public Defender's Office in Harris  
10:59:28 8 County.

10:59:29 9 Q. Okay. In front of you there's a big envelope or pouch  
10:59:36 10 that is labeled Defendants' Original Exhibits. Do you see  
10:59:39 11 that?

10:59:39 12 A. I do.

10:59:40 13 Q. Okay. If you would turn to tab 3 and just pull that out  
10:59:48 14 and take a look at that particular document.

11:00:01 15 A. It is in front of me.

11:00:03 16 Q. Okay. Do you recognize this document?

11:00:07 17 A. I do.

11:00:09 18 Q. What is it?

11:00:10 19 A. It is my CV that I submitted to you.

11:00:13 20 Q. Okay. Does it accurately summarize your education and  
11:00:19 21 experience and publications?

11:00:27 22 A. It appears so to do save for a couple of publications that  
11:00:31 23 have been added.

11:00:32 24 Q. And we'll come to that in just a moment.

11:00:35 25 MR. TODD: Your Honor, Defendants move to admit

11:00:37 1 Exhibit D-3 into evidence.

11:00:40 2 MR. MANLEY: No objection.

11:00:41 3 THE COURT: Defendant's Exhibit 3 is admitted.

11:00:49 4 Q. (BY MR. TODD) Okay. Now that it's admitted, we won't go  
11:00:51 5 into detail. I just want to call your attention to a couple  
11:00:52 6 of -- well more than a couple -- just a few things.

11:00:55 7 You'll see at the top it indicates that you have a  
11:00:58 8 Ph.D. from University of Texas Southwestern Medical School in  
11:01:05 9 clinical psychology. How does your degree and training within  
11:01:11 10 this medical school compare to the training and courses of a  
11:01:18 11 physician seeking an M.D. degree?

11:01:24 12 A. Similar slightly, and different significantly.

11:01:27 13 Q. Okay. And what would that be?

11:01:30 14 A. It was similar in that I took the same seminars that the  
11:01:39 15 psychiatric residents took in their tenure doing a psychiatric  
11:01:44 16 residency and, as well, a series of technical core courses as  
11:01:50 17 well as clinical courses in clinical psychology.

11:01:55 18 It was significantly different in that I did not take  
11:01:58 19 gross anatomy, microbiology, or many of the core courses for a  
11:02:04 20 medical degree, and it is not an M.D. Degree.

11:02:07 21 Q. Right. A Ph.D.?

11:02:09 22 A. That is correct.

11:02:10 23 Q. Right. And you have a law degree from the University of  
11:02:15 24 Houston. You've indicated major in health law. What does that  
11:02:19 25 mean to majored in law school?

11:02:22 1 A. That meant essentially that I took a concentration of  
11:02:26 2 courses in health law, both transactional and policy related  
11:02:32 3 around mental health and other issues in health law.

11:02:38 4 Q. All right. And then it indicates under board  
11:02:43 5 certification a diplomate in clinical psychology from the  
11:02:47 6 American Board of Professional Psychology. What sort of  
11:02:53 7 certification is that, and who bestows it?

11:02:58 8 A. The American board of Professional Psychology is an  
11:03:03 9 omnibus board established in 1947 and that has many  
11:03:06 10 subspecialty boards in it, among the most prominent of which  
11:03:10 11 and the eldest of which is in clinical psychology.

11:03:13 12 Q. Okay. What did you have to do to -- to achieve that  
11:03:22 13 certification.

11:03:22 14 A. There are three elements. There is a written examination.  
11:03:24 15 There is a submission of a work product which is the example of  
11:03:31 16 the kind of work that the -- that the applicant ordinarily  
11:03:36 17 engages. And then there is an oral examination by a panel of  
11:03:41 18 examiners, all of whom are diplomates.

11:03:48 19 Q. And you were present for the testimony of Dr. Branaman,  
11:03:52 20 were you not?

11:03:53 21 A. I was.

11:03:54 22 Q. And do you recall him testifying that he is certified in  
11:03:58 23 forensic psychology from this same board?

11:04:02 24 A. I do.

11:04:02 25 Q. Okay. And so that would be another subspecialty?

11:04:08 1 A. It is.

11:04:08 2 Q. Okay. Then it indicates that from January 2011 you've  
11:04:14 3 been the chief of the Misdemeanor Mental Health Division of the  
11:04:17 4 Harris County Public Defender's Office, and your  
11:04:20 5 responsibilities in that regard are accurately summarized in  
11:04:24 6 the CV?

11:04:26 7 A. They are.

11:04:27 8 Q. Okay. But prior to that, from April 2008 to 2011, you  
11:04:34 9 held another position with Harris County Office of County Court  
11:04:38 10 Management. Are the duties and responsibilities of that  
11:04:44 11 position accurately summarized here?

11:04:46 12 A. They are.

11:04:47 13 Q. All right. I'd like to -- and you mentioned that, since  
11:04:52 14 2008, your private practice has specialized in forensic  
11:04:57 15 psychology. I'd like to call your attention to the entry from  
11:05:06 16 May 1989 to 2008, private practice of clinical and forensic  
11:05:10 17 psychology. And so your practice during -- and then it also  
11:05:13 18 indicates 1978 to 1987, correct?

11:05:16 19 A. That's correct.

11:05:16 20 Q. And the interim there, between '87 and '89, what was that  
11:05:21 21 devoted to?

11:05:22 22 A. Well, one year with the Department of the Army in Europe  
11:05:26 23 and one year or slightly more than a year as director of mental  
11:05:31 24 health services for the United States Public Health Service,  
11:05:34 25 Indian Health Service in Santa Fe, New Mexico.

11:05:40 1 Q. And your practice in clinical psychology included  
11:05:43 2 individual and group psychotherapy with adults and children,  
11:05:46 3 correct?

11:05:46 4 A. Correct.

11:05:47 5 Q. And family therapy?

11:05:49 6 A. That's correct.

11:05:49 7 Q. And psychological evaluations and the other things you  
11:05:54 8 have listed here.

11:05:56 9 How long have you been practicing psychology as a  
11:05:59 10 licensed practitioner?

11:06:01 11 A. Approximately 40 years.

11:06:04 12 Q. Okay. And in that time can you estimate approximately how  
11:06:08 13 many individuals have received your services as a licensed  
11:06:13 14 practitioner of psychology?

11:06:15 15 A. Conservatively, 8,000.

11:06:18 16 Q. Okay. Now, then, it also indicates that since 1996 when  
11:06:24 17 you got your law degree, you've been in the private practice of  
11:06:28 18 law. And I noticed health law. One thing I want to ask you  
11:06:31 19 about is this entry: "Continuing education presentations in  
11:06:37 20 numerous states on legal and ethical duties of mental health  
11:06:41 21 practitioners." And in that connection, I would like to ask  
11:06:45 22 you to skip over to page 7 of your vitae.

11:06:59 23 A. (Complies)

11:06:59 24 Q. Are you there?

11:06:59 25 A. I am there, sir.

11:07:00 1 Q. Okay. And you notice a little before midway down, we  
11:07:06 2 start -- we've got a paper -- this is among your publications,  
11:07:11 3 *Legal and Ethical Issues for Mental Health Practitioners in*  
11:07:15 4 *South Carolina*. Do you see that?

11:07:16 5 A. That is correct.

11:07:17 6 Q. And do you see that it continues on to the next page  
11:07:22 7 through listing basically the same title but with other states.  
11:07:27 8 Do you see that?

11:07:28 9 A. That is correct.

11:07:29 10 Q. Are these papers written in conjunction with this  
11:07:33 11 continuing education that you're talking about?

11:07:35 12 A. They were.

11:07:36 13 Q. Okay. And about how many states have you -- whether or  
11:07:41 14 not there was a paper that accompanied it, in about how many  
11:07:45 15 states have you provided continuing education presentations on  
11:07:50 16 the legal and ethical duties of mental health practitioners?

11:07:54 17 A. Fifteen to 20.

11:07:55 18 Q. Okay. And was this part of something authorized for  
11:08:06 19 practitioners to take to satisfy their continuing education  
11:08:09 20 requirements?

11:08:10 21 A. It was.

11:08:10 22 Q. Okay. And then that was taken from -- your list of  
11:08:19 23 publications, you indicated that there were some additional  
11:08:25 24 publications since this list was made. What are those?

11:08:29 25 A. One major, one minor. The major is a lengthy article on

11:08:35 1 the insanity standard and the history of the insanity standard,  
11:08:40 2 published in the -- a peer-reviewed article of the Open Access  
11:08:43 3 Journal of Psychology. And the other was a minor note on  
11:08:51 4 psychologists' response to disaster circumstances and the  
11:08:56 5 burdens upon psychologists who assist in such occasions.

11:09:01 6 Q. Okay. And I believe we've -- just to make sure that we  
11:09:05 7 get this on the record, what professional licensures do you  
11:09:10 8 hold?

11:09:11 9 A. I am licensed as a psychologist in this state, and I am a  
11:09:18 10 member of the State Bar of Texas.

11:09:20 11 Q. Okay. In your practice of psychology, both in the past  
11:09:30 12 and in its present form, to what extent, if you could give us  
11:09:37 13 an idea, are you called upon to draw from a body of knowledge  
11:09:45 14 and principles in the field of psychology and apply that to  
11:09:50 15 specific -- the situations of particular individuals in their  
11:09:54 16 lives?

11:09:55 17 A. I would answer routinely.

11:10:01 18 Q. And how successful do you find you've been or does it seem  
11:10:04 19 to you when searching for a coherent body of knowledge and  
11:10:08 20 principles in the area of psychology are you able to find such  
11:10:13 21 to guide you?

11:10:17 22 A. I am.

11:10:17 23 Q. Okay. And you were present -- you've been present in the  
11:10:24 24 courtroom up until today. And you heard the -- prior to today,  
11:10:29 25 you heard the examination of prior witnesses, did you not?



11:10:33 1 A. I did.

11:10:33 2 Q. And do you recall questions related to whether -- how much  
11:10:42 3 unanimity or consensus there is in the field of psychology in  
11:10:46 4 the diagnosis and treatment of disorders?

11:10:49 5 A. I do recall.

11:10:50 6 Q. All right. And let me -- let me ask you this before I ask  
11:10:54 7 you the next question. You recall Dr. Branaman testifying that  
11:10:59 8 there is a continuing education requirement for licensed  
11:11:04 9 psychologists?

11:11:04 10 A. I do.

11:11:04 11 Q. Have you maintained your continuing education requirement?

11:11:09 12 A. I have.

11:11:09 13 Q. All right. And so from what you've found in your practice  
11:11:16 14 and in keeping up with the field, what has been your  
11:11:31 15 observation as to consensus or the agreement or not in the  
11:11:33 16 field of psychology as to diagnosis and treatment of disorders?

11:11:35 17 A. I would differentiate between diagnosis and treatment.

11:11:38 18 But the answer is that there is considerable unanimity.

11:11:41 19 Q. All right. First with respect to diagnosis, what have you  
11:11:46 20 noted?

11:11:47 21 A. I would argue that the more severe the diagnosis, the  
11:11:53 22 greater the degree of unanimity across, not only psychology,  
11:11:59 23 but other disciplines.

11:12:05 24 Q. When you mentioned that, let me ask you this: To what  
11:12:08 25 extent has your work caused you to come in contact with other

11:12:13 1 disciplines and professionals, in particular, psychiatry?

11:12:15 2 A. Rather routinely, in fact.

11:12:20 3 Q. And in psychiatry as compared to psychology, have you

11:12:29 4 noted whether there is any greater or lesser degree of

11:12:32 5 consensus as to diagnosis?

11:12:35 6 A. I would argue that the bulk of mental health practitioners

11:12:39 7 share a common basis of knowledge with regard to diagnosis,

11:12:47 8 particularly of the severe mental illnesses, such as

11:12:51 9 schizophrenia or bipolar disorder or major depression, and that

11:12:56 10 there is an enormous degree of unanimity in recognizing those

11:13:01 11 disorders when we talk about the most severe cases.

11:13:09 12 Q. Let me digress on something briefly that's sort of

11:13:13 13 related. When you were taking seminars in medical school, many

11:13:18 14 of the same seminars that the psychiatric residents took, were

11:13:21 15 you aware of any faculty who were not licensed to practice

11:13:27 16 medicine?

11:13:27 17 A. There are a large number of the faculty at Southwestern

11:13:32 18 who are not licensed to practice medicine.

11:13:34 19 Q. And when you went to the University of Houston Law School,

11:13:41 20 were you aware of any law professors who are not licensed to

11:13:45 21 practice law?

11:13:45 22 A. Some of whom I was aware.

11:13:48 23 Q. And do you draw a distinction between a field like

11:13:54 24 psychology as an academic discipline and psychology as a

11:14:00 25 professional practice?

11:14:02 1 A. Absolutely.

11:14:04 2 Q. And what is -- as you understand it, those who are

11:14:11 3 psychologists within academia, what are they allowed to do in

11:14:17 4 the way of representing themselves as psychologists and

11:14:21 5 delivering psychological services?

11:14:22 6 A. Within the State of Texas, a person who is employed in an

11:14:26 7 educational institution may use the title "psychologist" and

11:14:28 8 may engage in those activities which would be a part of the

11:14:32 9 scope practiced as identified by the institution in which they

11:14:35 10 are serving. And even more narrowly speaking, persons who have

11:14:44 11 degrees in a variety of areas teach in departments of

11:14:47 12 psychology.

11:14:52 13 Q. Returning to the subject of consensus, do you recall

11:14:59 14 discussion in Dr. Serafine's testimony about studies by a

11:15:08 15 researcher named Christensen?

11:15:10 16 A. I do.

11:15:11 17 Q. And also Norcross and Wampold?

11:15:15 18 A. I do.

11:15:16 19 Q. Do you have any familiarity with Dr. Christensen's body of

11:15:26 20 research and these other researchers?

11:15:28 21 A. I have some familiarity with that.

11:15:30 22 Q. And from your viewpoint, how -- what do you glean from

11:15:33 23 their research as to whether or not there's -- whether or not

11:15:39 24 how trained clinicians compared to untrained clinicians and

11:15:43 25 whether or not there are any coherent standards of practice

11:15:46 1 within the field of psychology?

11:15:48 2 A. Paul Harvey used to say, "And now for the rest of the  
11:15:55 3 story."

11:15:55 4 Q. Okay.

11:15:55 5 A. Much of the conversation about that area was not  
11:15:58 6 discussed. In 2012 the Council of the American Psychological  
11:16:01 7 Association published a resolution that represented the efforts  
11:16:07 8 of numerous psychologists across the country looking at the  
11:16:10 9 effectiveness of psychotherapy, and they identified enormous  
11:16:16 10 degrees of effectiveness in the areas in which that is  
11:16:19 11 applicable.

11:16:19 12 What was not clear about the studies that were done  
11:16:22 13 by Christensen in the '90s -- or the studies that were  
11:16:28 14 summarized by Christensen in '90s. They didn't conduct the  
11:16:32 15 research themselves -- was the manner in which the studies were  
11:16:36 16 conducted and the populations that they addressed.

11:16:39 17 First they addressed a population that was not a  
11:16:46 18 mental health population in the ordinary sense of the word.  
11:16:50 19 They didn't go to a community mental health center and say, We  
11:16:53 20 want to take your most seriously disturbed folks and treat half  
11:16:58 21 of them with persons that have no training in the area and the  
11:17:01 22 other half we'll treat by experienced therapists. That's not  
11:17:04 23 how it was done.

11:17:05 24 Q. Let me stop you right there. As one who is provided  
11:17:09 25 continuing education in ethics of mental health practitioners,

11:17:19 1 would you see any ethical problems of doing something like  
11:17:22 2 that?

11:17:22 3 A. Well, yes. They would not get by in the modern world any  
11:17:27 4 review committee -- human subjects review committee because it  
11:17:31 5 would be improper.

11:17:32 6 Q. And I'm sorry to interrupt. Please continue with what you  
11:17:33 7 were saying.

11:17:34 8 A. Now, when those were done and what they did -- and this is  
11:17:36 9 done in every major university in the country. We took all the  
11:17:41 10 students who are taking sophomore psychology -- and at UT there  
11:17:46 11 maybe 500 or 1,000 at one time -- and ask how many are willing  
11:17:50 12 to participate in a research protocol to get some extra points?  
11:17:57 13 And of that group, let's say for illustrative purposes we have  
11:18:01 14 500. We give them all a questionnaire, and we ask them to  
11:18:03 15 identify what areas -- in what areas they're most anxious.  
11:18:09 16 They might have test anxiety, and that might be something we're  
11:18:12 17 really interested in looking at, is test anxiety and how it can  
11:18:16 18 be modified.

11:18:17 19 We divide that large group of students into two  
11:18:21 20 smaller groups. One of those would be persons who have high  
11:18:23 21 degrees of test anxiety and other group would be people who  
11:18:27 22 have low degrees of test anxiety. And we will give each of  
11:18:31 23 them two groups of interventionists, one of whom are graduate  
11:18:37 24 students in psychology who have no particular training but  
11:18:39 25 they're kindly kids and they're interested in providing

11:18:42 1 counseling to youngsters who -- other undergraduate students  
11:18:46 2 that have some test anxiety. And the other treatment condition  
11:18:50 3 would be satisfied by persons who are employed in the  
11:18:53 4 counseling center.

11:18:55 5           Now, on the face of it, that sounds very legitimate.  
11:18:58 6 The problem is that we've already selected a problem, a  
11:19:02 7 population that is not a terribly severe issue, and then the  
11:19:06 8 duration of the study is very, very brief. We will treat them  
11:19:09 9 all for six sessions. And at the end of six sessions, we'll  
11:19:14 10 retest them. And at the end of that six sessions, the  
11:19:17 11 likelihood of change, the magnitude of change for anybody is  
11:19:20 12 not very high, and there may be very little difference between  
11:19:24 13 the group -- the categories.

11:19:27 14           So in the 2012 publication by the American  
11:19:32 15 Psychological Association, what they did was say that the  
11:19:35 16 efficacy of psychotherapy is very strong but that there needs  
11:19:40 17 to be some careful attention to the population that is being  
11:19:45 18 utilized in research protocols and duration of those treatment  
11:19:49 19 efforts.

11:19:50 20           Otherwise, it would be as if I took Mr. Manley when  
11:19:53 21 he was a ski instructor at Telluride and I had all of the  
11:19:59 22 first -- all the people who came out on their first day of  
11:20:03 23 skiing and we had Mr. Manley's ski instructors take one group  
11:20:06 24 and we had a group of kindly elderly people like me take the  
11:20:11 25 other group and it's their first day of skiing and we did pre-

11:20:13 1 and post-examination.

11:20:14 2           At the end of the day, well, we might have about  
11:20:17 3 equal results. But I could assure you that if the duration of  
11:20:22 4 that were much longer, Mr. Manley's group would have done far  
11:20:25 5 better than mine.

11:20:26 6 Q.    Okay.

11:20:28 7           THE COURT: Let me stop you just a minute here. This  
11:20:30 8 is getting me closer to deciding the issues in this case how?

11:20:35 9           MR. TODD: I'm dealing with the issue of whether or  
11:20:40 10 not there is -- there is a reliable body of knowledge and  
11:20:46 11 principles on which practitioners can make judgments in  
11:20:49 12 psychology as to good practice and bad practice.

11:20:52 13           I'm responding to the plaintiff's thesis that because  
11:20:59 14 the field is essentially standardless, the State has no basis  
11:21:02 15 for regulating and requiring licensure and, therefore, cannot  
11:21:07 16 justify the restrictions that it has imposed on Dr. Serafine's  
11:21:13 17 use of the term "psychologist" to describe herself. And I'm  
11:21:16 18 trying to show that there is -- there is something there in  
11:21:18 19 this field. And I am also responding to -- having him respond  
11:21:22 20 to the studies that the plaintiff relied on in her testimony.

11:21:29 21           THE COURT: Okay. You may proceed.

11:21:30 22 Q.    (BY MR. TODD) Okay. Let me move on, then. Have you had  
11:21:39 23 occasion to, other than as a examinee, to participate in the  
11:21:44 24 process by which applicants for licensure have to take an oral  
11:21:51 25 examination?

11:21:51 1 A. I have.

11:21:52 2 Q. In what capacity was your role?

11:21:54 3 A. I was and remain on the panel of examiners who conduct

11:21:59 4 oral examinations of licensees.

11:22:02 5 Q. Okay. And how many -- how many examiners to a panel?

11:22:08 6 A. There are on the --

11:22:11 7 Q. Or per applicant.

11:22:13 8 A. There are a pool of examiners.

11:22:16 9 Q. Okay.

11:22:16 10 A. But in any given examination, there are two examiners per

11:22:19 11 licensee or per person who is coming up for licensure.

11:22:22 12 Q. And how long have you been doing that?

11:22:25 13 A. Fifteen or more years.

11:22:29 14 Q. And so the -- you and another licensed psychologist

11:22:36 15 jointly give an oral examination to an applicant who has passed

11:22:40 16 a written exam; is that right?

11:22:42 17 A. We do.

11:22:43 18 Q. Okay. And what have you found as far as the inter-rater

11:22:48 19 agreement between yourself and the other examiner in terms of

11:22:53 20 making a judgment as to whether or not the applicant has shown

11:22:57 21 himself or herself competent to go on to the next level?

11:23:04 22 A. In my personal experience, there have probably been no

11:23:08 23 more than one or two occasions in the last well more than a

11:23:11 24 decade where there was disagreement.

11:23:14 25 Q. So then from your vantage point, what purpose do you see



11:23:22 1 being served by the requirement that one have a license before  
11:23:27 2 one is permitted by law to practice psychology?  
11:23:30 3 A. The fundamental basis is to protect the public.  
11:23:36 4 Q. And in what way does it do that?  
11:23:38 5 A. Two. One is both direct and indirect, and the other is  
11:23:42 6 individual and corporate.  
11:23:42 7 Q. All right. If you could take each in turn and explain.  
11:23:46 8 A. Let's talk about direct.  
11:23:49 9 Q. All right.  
11:23:50 10 A. And I can do that by illustrating cases I have personally  
11:23:58 11 seen.  
11:23:58 12 Q. All right.  
11:23:59 13 A. I have in mind a young man who was 21 years of age or  
11:24:07 14 thereabouts -- 20 or 21 -- and who was in his first or second  
11:24:13 15 year in college begin not to attend classes. He seemed to be  
11:24:23 16 depressed. He was interviewed by one of the counselors in the  
11:24:32 17 college, who's not a psychologist but largely an educator, and  
11:24:38 18 who was concerned that maybe have you been drinking? Have you  
11:24:42 19 been smoking marijuana? What is happening that you're having  
11:24:45 20 difficulty in school? And he continued to miss classes. And  
11:24:55 21 as a result, it was suggested that he should terminate the  
11:24:58 22 semester and return home.  
11:25:00 23 When he did so, he was brought to me by his parents.  
11:25:06 24 His father is an attorney. And it was clear to me on  
11:25:08 25 examination that he was not having difficulty in school. It

11:25:11 1 was not that he had been drinking too much or that he had been  
11:25:16 2 using -- misusing drugs. But, in fact, he was beginning to  
11:25:21 3 decompensate because he had a psychotic disorder.

11:25:28 4           And the failure of the counselor to be competent  
11:25:30 5 enough to recognize that incipient disorder in its  
11:25:34 6 developmental stages meant that the disorder erupted into full  
11:25:43 7 flower and it was necessary to medicate him and he missed well  
11:25:45 8 more than a year of school because of that failure to properly  
11:25:51 9 diagnose.

11:25:51 10 Q.   And how does an insistence on licensing help to reduce the  
11:25:58 11 incidents of that type of failure?

11:26:00 12 A.   Would there be absolute surety that it assists? No. But  
11:26:06 13 licensure provides an occasion for me to submit my credentials  
11:26:11 14 to my peers, for me to be questioned about my ability to  
11:26:16 15 develop a treatment plan, and to adequately identify a serious  
11:26:22 16 mental disorder.

11:26:24 17           That is part and parcel of the training, it's part  
11:26:28 18 and parcel of the clinical training, and the two years of  
11:26:33 19 experience which are necessary prior to licensure. And it is  
11:26:36 20 part and parcel of the licensing examination itself.

11:26:42 21 Q.   And from your standpoint, is there -- what value, if any,  
11:26:48 22 does licensure have for one who has received services from a  
11:26:53 23 psychologist and is aggrieved or feels that he or she has been  
11:26:58 24 injured as far as recourse?

11:27:00 25 A.   In my opinion, the case about which I spoke would have

11:27:09 1 been one where there would have been a -- certainly a basis to  
11:27:14 2 raise a question about the competence of the examiner had the  
11:27:20 3 person been licensed.

11:27:24 4 Q. Okay.

11:27:24 5 A. But there are -- I could provide other examples for where  
11:27:28 6 the failure of licensure had left no recourse to the aggrieved  
11:27:34 7 party.

11:27:35 8 Q. Well, then let's take the flip side. What disadvantages  
11:27:41 9 or potential harms do you see from allowing the practice of  
11:27:48 10 psychology without requiring a license to do so?

11:27:56 11 A. Well, first it would increase the likelihood of  
11:28:03 12 circumstances such as that which I described. We have enough  
11:28:07 13 difficulty in our culture trying to manage persons who do have  
11:28:10 14 licenses but make mistakes so that there is no justification  
11:28:17 15 for failure to have some regulations by self-sustaining boards  
11:28:21 16 that don't cost anybody anything.

11:28:27 17 Q. And from your standpoint, what purpose, if any, is served  
11:28:31 18 by requiring that only licensees use the term "psychologist" as  
11:28:38 19 their title and describe their services as psychological  
11:28:48 20 services?

11:28:48 21 A. I believe there is a reasonable expectation created in the  
11:28:56 22 eye of the public when a person uses a title to which they  
11:28:59 23 are -- for which they have not submitted themselves for review.  
11:29:06 24 And that expectation is common across fields.

11:29:19 25 Q. From your interaction with licensed practitioners, do you

11:29:22 1 have a sense of what incentive there would be to seek licensure  
11:29:29 2 at all and go through this process that we've talked about if  
11:29:32 3 there were no requirement that you have a license in order to  
11:29:36 4 practice psychology and call yourself a psychologist?

11:29:40 5 A. There would be very little in my -- in my impression.

11:29:44 6 Q. Now, are you aware that people who hold certain licenses  
11:29:52 7 in other professions are exempt from the definition of the  
11:30:03 8 application of psychological services so that they could do  
11:30:08 9 some things that fall within the parameter of psychological  
11:30:11 10 services and yet they're not subject to --

11:30:13 11 A. I am aware of that.

11:30:14 12 Q. All right. Do you find to any extent that this undermines  
11:30:24 13 or disservices the purposes that you've just described?

11:30:28 14 A. Not at all, because it does ensure that -- that persons  
11:30:32 15 who engage in similar activities, although not using that  
11:30:36 16 title, are nonetheless subject to public scrutiny. And there  
11:30:42 17 is legal recourse if they violate the principles of their own  
11:30:47 18 licensing act so that the public is nonetheless protected.

11:31:03 19 MR. TODD: Okay. Your Honor, I need to confer with  
11:31:04 20 my colleague one moment.

11:31:14 21 I pass the witness, Your Honor.

11:31:15 22 THE COURT: All right. Mr. Manley?

11:31:48 23 **CROSS-EXAMINATION**

11:31:48 24 **BY MR. MANLEY:**

11:31:48 25 Q. Hello, Dr. Jennings.

11:31:50 1 A. How are you, sir?

11:31:51 2 Q. Fine. How are you?

11:31:52 3 A. Well, I'm still talking.

11:31:55 4 Q. Dr. Jennings, I want to talk to you about the report that

11:32:00 5 you produced in this case. It's in front of you there I

11:32:04 6 believe in that stack of papers somewhere that Mr. Todd -- not

11:32:08 7 there. In the other stack there.

11:32:14 8 A. Yes. I have it in front of me.

11:32:16 9 Q. Great. And when we spoke earlier this year at your

11:32:27 10 deposition, you said that this report reflects the entirety of

11:32:31 11 your opinion in this case.

11:32:32 12 A. I'm sorry. I didn't hear you, sir.

11:32:35 13 Q. When we spoke earlier this year at your deposition, you

11:32:38 14 said that this report reflects the entirety of your opinion in

11:32:41 15 this case.

11:32:42 16 A. It does.

11:32:42 17 Q. Okay. And you looked at -- at four complaints that the

11:32:47 18 Board had received; is that correct? They're referenced at the

11:32:56 19 top of page 3.

11:32:57 20 A. Excuse me just a moment. That information was presented

11:33:18 21 to me. That's correct.

11:33:19 22 Q. And you looked at those -- at four complaints, correct?

11:33:23 23 A. I did.

11:33:24 24 Q. Okay. And you've -- as you suggested, those complaints

11:33:29 25 were supplied to you by the Board?

11:33:31 1 A. It was.

11:33:34 2 Q. Did they supply you any other complaints?

11:33:36 3 A. Not to my knowledge.

11:33:38 4 Q. And the substance of the information upon which you based

11:33:44 5 your conclusions is reflected on page 3 of your report there

11:33:49 6 where each complaint is summarized?

11:33:55 7 A. The substance as regards the number -- these numbered

11:33:59 8 complaints. That would not reflect the total substance upon

11:34:03 9 which I base my report, no.

11:34:13 10 Q. I think when we spoke before, I asked you if there was any

11:34:18 11 other relevant information other than what's reproduced in your

11:34:23 12 report.

11:34:23 13 A. And I believe I responded that, based on my experience and

11:34:31 14 my training, save that, no.

11:34:32 15 Q. Okay. Now, did you make any inquiry into the facts of

11:34:46 16 these complaints?

11:34:47 17 A. I did not, sir.

11:34:50 18 Q. How were the complaints resolved?

11:34:52 19 A. I'm not privy to that information.

11:34:54 20 Q. Who submitted the complaints?

11:34:59 21 A. These were blinded, so I do not know who submitted them.

11:35:07 22 Q. Were the allegations in the complaints true?

11:35:09 23 A. I have no way of ascertaining that. These are in the

11:35:13 24 nature of the charging instrument. They're not -- they don't

11:35:16 25 reflect the disposition of the case.

11:35:24 1 Q. So you don't have any information about specific  
11:35:26 2 complaints that the Board has received other than these four?

11:35:32 3 A. No, I do not.

11:35:33 4 Q. So you don't have any basis for concluding that these  
11:35:38 5 complaints are typical?

11:35:47 6 A. I have no basis to conclude -- to make any -- offer any  
11:35:51 7 opinion as to the frequency with which these events may or may  
11:35:58 8 not occur.

11:36:05 9 Q. Do you know how many complaints the Board receives in a  
11:36:07 10 given year?

11:36:08 11 A. I do not, sir.

11:36:09 12 Q. What scientific principles or procedures are you applying  
11:36:13 13 in your report?

11:36:14 14 A. Would -- say that again, sir.

11:36:15 15 Q. What scientific principles and procedures are you applying  
11:36:20 16 in your report?

11:36:28 17 A. That's an exceptionally broad question that requires a  
11:36:31 18 rather broad response because you're asking about multiple  
11:36:43 19 issues. One has to do with logic. One has to do with my  
11:36:47 20 experience and training over the last 40 years of having seen  
11:36:51 21 persons with a variety of problems. One has to do with the  
11:36:57 22 factual presentation of these charges from the Board. One  
11:37:03 23 would have to do with my knowledge of the expectations created  
11:37:09 24 by the law. And each of those areas would require some  
11:37:12 25 explication that I -- of some length.

11:37:19 1 Q. Well, we can circle back to that if necessary.

11:37:25 2           You talk in your report about public perception about  
11:37:31 3 the term "psychologist," and I think you and Mr. Todd discussed  
11:37:35 4 that just now.

11:37:35 5 A. I did.

11:37:36 6 Q. Did you conduct any surveys to measure public opinion or  
11:37:43 7 perception about the word "psychologist"?

11:37:46 8 A. No, I didn't.

11:37:49 9 Q. Did you review any such surveys?

11:37:54 10 A. Yes, I did. Actually, not with regard to psychology.

11:37:59 11 What I reviewed were some textbooks in marketing and the  
11:38:03 12 effects of branding and the effects on the general public of  
11:38:07 13 trying to introduce a name or a title to increase public  
11:38:12 14 perception or awareness of the presence of that, including how  
11:38:17 15 much corporations pay to have their products appear in  
11:38:22 16 movies -- not advertising the product, but because it increases  
11:38:26 17 the likelihood that people will purchase their product merely  
11:38:30 18 because they see the name present.

11:38:32 19           And I argue that it's analogous to use the word  
11:38:37 20 "psychologist" because that implies to the public how it raises  
11:38:44 21 the likelihood there would be expectations of provision of  
11:38:47 22 services.

11:38:47 23 Q. And where do those citations appear in your report?

11:38:50 24 A. Where do those citations appear in my report? I did not  
11:38:56 25 cite them. *Principles of Marketing* by Kotler would be one.



11:39:03 1 Q. I don't see any research papers or any studies whatsoever  
11:39:15 2 cited in your report. Is that accurate?

11:39:18 3 A. Research protocols, no.

11:39:24 4 Q. Or any papers -- academic papers?

11:39:30 5 A. Well, I cite only the code of ethics of the American  
11:39:33 6 Psychological Association and -- let's see here. There are two  
11:39:39 7 other footnotes -- and the Texas Occupation Code. And then a  
11:39:45 8 communication from a senior research officer with APA.

11:39:51 9 Q. Did you review Dr. Serafine's campaign Web site before  
11:39:57 10 preparing your report?

11:39:59 11 A. No.

11:40:01 12 Q. It seems to me that the conclusion that's reflected in  
11:40:18 13 your report is that it is important for the public to be  
11:40:21 14 informed about the qualifications of psychologists,  
11:40:28 15 particularly before they seek psychotherapy services. Is that  
11:40:31 16 accurate?

11:40:32 17 A. Well, that would certainly be one conclusion, yes. I  
11:40:47 18 think I argue that the mere use of the title assists in  
11:40:51 19 providing that information.

11:40:56 20 Q. Have you -- you and Mr. Todd discussed some studies that  
11:41:04 21 Dr. Serafine explained yesterday. Have you read those studies?

11:41:12 22 A. I looked at some of the -- the portions -- I looked at  
11:41:18 23 Christensen study and drilled down to look at one or more of  
11:41:23 24 the studies that were cited in that study, yes.

11:41:26 25 Q. And any of the other studies? Have you read any of the

11:41:30 1 other studies that you discussed?

11:41:32 2 A. Well, I refer to the 2012 summary paper by the American  
11:41:36 3 Psychological Association on the effectiveness of psychotherapy  
11:41:41 4 where it's also a meta-analysis report.

11:41:44 5 Q. So have you read any of the other studies that you  
11:41:51 6 discussed?

11:41:51 7 A. I read that report, yes.

11:41:53 8 Q. Okay. But not -- but not -- you have not read those  
11:41:58 9 studies in particular that you discussed with Mr. Todd other  
11:42:01 10 than what you explained?

11:42:02 11 A. No. No, I have not.

11:42:04 12 Q. When did you last conduct a study of the nature that you  
11:42:09 13 were describing with Mr. Todd?

11:42:11 14 A. Oh. Well, I was describing the way in which studies are  
11:42:20 15 commonly conducted and the way in which some of these studies  
11:42:23 16 that were cited in that early article were conducted. It is  
11:42:29 17 common knowledge in the field about how those are done in the  
11:42:36 18 university setting.

11:42:38 19 Q. And my question is: When was the last time that you did a  
11:42:41 20 study like that?

11:42:42 21 A. The last time I was involved in that would have been my  
11:42:45 22 first year in graduate school.

11:42:46 23 Q. When you were a subject, or you were conducting the study?

11:42:50 24 A. I was participating, yeah.

11:42:51 25 Q. When was that?

11:42:53 1 A. 1968.

11:42:55 2 Q. The oral examinations that you've helped with, what is the  
11:43:05 3 pass rate?

11:43:06 4 A. I cannot cite it precisely.

11:43:13 5 Q. I think --

11:43:13 6 A. I understand that it's quite high.

11:43:16 7 Q. I think when we spoke before, you said something like  
11:43:19 8 90 percent.

11:43:19 9 A. Ninety percent is the figure that comes to mind, that I  
11:43:24 10 have been told.

11:43:28 11 Q. Now, the college student that you cited as an example in  
11:43:35 12 your testimony, that person you said was treated medically.  
11:43:42 13 They were medicated?

11:43:44 14 A. Subsequently, yes. I ensured that that occurred.

11:43:46 15 Q. So -- but you did not administer that treatment as a  
11:43:50 16 psychologist?

11:43:51 17 A. I did not administer that treatment, no. I conducted the  
11:43:54 18 diagnostic evaluation.

11:43:55 19 Q. And then referred the person to a psychiatrist?

11:44:00 20 A. Well, I did. And I continued to follow this young man  
11:44:04 21 over some period of time.

11:44:07 22 Q. Now, you said that the situation had --

11:44:11 23 THE COURT: All right. At this time we're going to  
11:44:13 24 take our noon break. I apologize to you, but I really wasn't  
11:44:17 25 anticipating that we would take an hour break in the middle of

11:44:20 1 the morning. We're going to be in recess until 2 o'clock when  
11:44:23 2 we'll finish up. Mr. Manley, you need to be aware of what your  
11:44:27 3 time is, and we'll be in recess until 2:00.

11:44:30 4 (Recess)

13:58:56 5 (Open Court)

13:58:56 6 THE COURT: Dr. Jennings, you have been previously  
13:59:04 7 sworn and you're still under oath. And I think when we  
13:59:11 8 recessed, Mr. Manley was cross-examining. Mr. Manley, you may  
13:59:15 9 proceed.

13:59:15 10 MR. MANLEY: Thank you, Your Honor.

13:59:16 11 Q. (BY MR. MANLEY) Good afternoon, Dr. Jennings.

13:59:18 12 A. Good afternoon, sir.

13:59:20 13 Q. Would you agree that many people seek treatment from a  
13:59:28 14 psychiatrist without first talking to a psychologist?

13:59:31 15 A. I would agree.

13:59:32 16 MR. MANLEY: No further questions. Pass the witness.

13:59:35 17 MR. TODD: I have no further questions. Could this  
13:59:39 18 witness be excused?

13:59:40 19 THE COURT: All right. You may step down. Any  
13:59:41 20 objection to the witness being excused.

13:59:43 21 MR. MANLEY: No, Your Honor.

13:59:43 22 THE COURT: You may step down, and you are excused,  
13:59:46 23 Dr. Manley *[sic]*.

13:59:48 24 THE WITNESS: Thank you, Your Honor.

13:59:55 25 THE COURT: Mr. Todd, do you have further evidence?

13:59:57 1 MR. TODD: No, Your Honor. The defendants rest.

14:00:01 2 THE COURT: Mr. Manley, rebuttal?

14:00:04 3 MR. MANLEY: Yes, Your Honor. Plaintiff calls  
14:00:09 4 Dr. Serafine.

14:00:22 5 THE COURT: Dr. Serafine you were sworn previously  
14:00:29 6 and you are still under oath.

14:00:32 7 THE WITNESS: Yes Your Honor.

14:00:35 8 **MARY L. SERAFINE,**

14:00:35 9 having been first duly sworn, testified as follows:

14:00:35 10 **DIRECT EXAMINATION**

14:00:35 11 **BY MR. BORGELT:**

14:00:35 12 Q. Dr. Serafine, you heard Dr. Jennings testify that the  
14:00:39 13 study showing no difference between trained and untrained  
14:00:41 14 psychotherapists were largely done not on patients with major  
14:00:47 15 mental illnesses; is that correct?

14:00:48 16 A. Yes, I did.

14:00:49 17 Q. Do you agree with him on that?

14:00:50 18 A. No, I don't. I'd like to point, for example, to a  
14:00:54 19 randomized controlled trial -- I mention it on my list -- by  
14:01:01 20 Titov. It was conducted on people with -- entirely on people  
14:01:06 21 with major depressive disorder, and it showed the untrained  
14:01:13 22 technicians as superior.

14:01:15 23 I'd like to point to the Strupp study that I already  
14:01:18 24 mentioned. It's also on my list. The patients in that case  
14:01:23 25 were neurotic -- had neurotic depression or anxiety reactions,

14:01:29 1 obsessional trends, and borderline personalities.

14:01:32 2 I'd like to also point to the Gould, G-o-u-l-d, and  
14:01:37 3 Clum study that I believe I mentioned last time. The -- this  
14:01:46 4 is a meta-analysis, and the subjects included people with  
14:01:49 5 fears, depression, headache, and sleep disturbances. Those are  
14:01:54 6 the patients that did better on self-help than with  
14:01:57 7 psychotherapy.

14:01:58 8 I'd also like to point to a randomized control trial  
14:02:05 9 done by Stice and his colleagues at the University of Texas.  
14:02:10 10 This was a group of adolescents at risk for depression. They  
14:02:17 11 had elevated levels of depression.

14:02:19 12 And, finally, another randomized controlled trial by  
14:02:25 13 Floyd and Scogin on elderly people showing that there was no  
14:02:30 14 difference between reading a book -- bibliotherapy, it was  
14:02:36 15 called -- and psychotherapy.

14:02:37 16 Q. Do you agree that those studies you relied upon wouldn't  
14:02:41 17 get past a human subjects approval committee?

14:02:44 18 A. No.

14:02:45 19 Q. Dr. Jennings also testified that there is a considerable  
14:02:52 20 unanimity in diagnoses. Is that correct?

14:02:55 21 A. No.

14:02:55 22 Q. Do you have an opinion about whether any psychologist  
14:03:01 23 could testify competently about the State's interest in harm to  
14:03:05 24 the public without doing any research?

14:03:07 25 A. Yes, I do.

14:03:08 1 Q. And what is that opinion?

14:03:09 2 A. It would not be possible to testify on this topic about  
14:03:16 3 the State's interests without doing considerable research in  
14:03:18 4 the literature. Surveying the literature a year ago in  
14:03:21 5 November of 2012, I located over 4,000 studies on the topic of  
14:03:27 6 the efficacy or effectiveness of psychotherapy. That would be  
14:03:36 7 only in the last five years and only in the peer-reviewed  
14:03:39 8 journals.

14:03:40 9 Q. Dr. Serafine, I believe last week you heard Mr. Todd when  
14:03:44 10 he was questioning one of his witnesses say that all states  
14:03:47 11 have passed psychology licensing laws. Is that true?

14:03:51 12 A. Yes. I did hear that.

14:03:52 13 Q. And do you have an opinion as to the origin of those laws?

14:03:57 14 A. Yes, I do. They were --

14:03:59 15 MR. TODD: I'm going to object. This is way outside  
14:04:01 16 the scope of any opinion that she -- agreed she could give.

14:04:07 17 THE COURT: Well, what's the relevance of the origin  
14:04:10 18 of the laws? The states have them.

14:04:14 19 MR. TODD:

14:04:15 20 MR. BORGELT: Well, Your Honor I believe the evidence  
14:04:17 21 will show that there is an issue here as to whether or not we  
14:04:20 22 have some trade protection going on above and beyond the  
14:04:24 23 State's general authority to pass laws.

14:04:27 24 THE COURT: Well, I'm not sure she has been qualified  
14:04:30 25 to testify about trade protection and trade practices and what

14:04:39 1 have you. I'm going to sustain the objection. You'll need to  
14:04:41 2 lay a better predicate.

14:04:44 3 Q. (BY MR. BORGELT) Dr. Serafine, you heard Dr. Branaman last  
14:04:47 4 week, I believe, say that he disagrees with your opinion that  
14:04:49 5 the three major schools of thought in psychology are opposite  
14:04:53 6 or in conflict; is that correct?

14:04:54 7 A. I heard him say that.

14:04:55 8 Q. Do you agree with what he said?

14:04:57 9 A. No, I do not.

14:04:58 10 Q. Is there a coherent theory of how the mind works called  
14:05:03 11 "eclectic"?

14:05:05 12 A. No, there isn't.

14:05:07 13 Q. Do some psychologists believe there are evidence-based  
14:05:11 14 therapies?

14:05:12 15 A. Yes. Some of them do.

14:05:14 16 Q. And has the ABA supported a project on evidence-based  
14:05:19 17 therapies to match specific treatments with specific disorders?

14:05:25 18 A. No, they have not. That's the APA, the American  
14:05:28 19 Psychological Association, is what he testified to.

14:05:32 20 Q. Has there been any project research to match specific  
14:05:36 21 treatments with specific disorders?

14:05:37 22 A. Yes, there has been -- by Division 12, one of the 54  
14:05:43 23 divisions within the American Psychological Association. And  
14:05:47 24 Division 12 did start such a project. However, its final  
14:05:55 25 report -- I'd like to read a note on its final report that was



14:06:00 1 then published by the American Psychological Association in the  
14:06:05 2 journal *The Clinical Psychologist*, Volume 51, Number 1.

14:06:09 3           And it says here, "Although this paper originated as  
14:06:13 4 an effort of the Division 12 task force on psychological  
14:06:19 5 interventions, we are publishing it as individuals rather than  
14:06:23 6 representatives of the Division. This is to make clear that  
14:06:27 7 this report does not constitute nor is it intended to be viewed  
14:06:32 8 as a clinical guideline, standard, or official policy statement  
14:06:37 9 of either the Division of Clinical Psychology or of the  
14:06:41 10 American Psychological Association."

14:06:45 11           And the Web site for the empirically supported  
14:06:51 12 treatments is [www.div12.org](http://www.div12.org), and that is where I'm getting this  
14:06:58 13 information.

14:06:59 14 Q. Do all psychologists agree on which treatments are  
14:07:03 15 supported by research?

14:07:04 16 A. No. And for that I would like to point to the same Web  
14:07:10 17 site where there is an FAQ, frequently asked questions, for the  
14:07:15 18 public. And here's one of the questions:

14:07:18 19           "Do all psychologists agree on which treatments are  
14:07:21 20 supported by research?"

14:07:24 21           "Answer: No. There is healthy debate about what  
14:07:27 22 constitutes research support and which treatments can be  
14:07:31 23 considered to have sufficient research support."

14:07:36 24           And then eight books and articles about the  
14:07:38 25 controversy are listed.

14:07:40 1 Q. Dr. Serafine, do you recall that you testified that the  
14:07:45 2 specific techniques had little effect and that what mattered  
14:07:48 3 was the relationship between therapist and client or the  
14:07:50 4 abilities of the client?

14:07:52 5 A. Yes, I did.

14:07:53 6 Q. And what does this EST Web site say about that?

14:07:58 7 A. Again, from the FAQ section: "Is the method of treatment  
14:08:02 8 the only component that determines the effectiveness of  
14:08:07 9 treatment?"

14:08:08 10 "Answer. No. certainly not. The client, the  
14:08:12 11 therapist, and the therapeutic relationship are among the  
14:08:15 12 factors that also contribute to effective treatment."

14:08:19 13 Q. Do you recall that Dr. Branaman testified to the effect  
14:08:24 14 that licensed psychologists were trained to implement these  
14:08:27 15 ESTs?

14:08:27 16 A. Yes, I do.

14:08:28 17 Q. Is that true?

14:08:29 18 A. No.

14:08:29 19 Q. And do you recall that Dr. Branaman testified to the  
14:08:33 20 effect that the ESTs were tested on the state licensing exam?

14:08:38 21 A. I do recall he said that.

14:08:39 22 Q. And is that true?

14:08:40 23 A. No.

14:08:41 24 Q. Do you know of any randomized controlled trials that  
14:08:45 25 Division 12 did not put on that EST list?

14:08:50 1 A. Yes. Not appearing on the EST list are self-help  
14:08:54 2 treatments and book reading, bibliotherapy, including the I  
14:08:58 3 guess five or six studies that I just mentioned. I think I --  
14:09:02 4 I identified which ones were randomized control trials.

14:09:06 5 Q. Do you recall Dr. Branaman testified that there are many  
14:09:10 6 APA accredited programs leading to licensure where you could  
14:09:14 7 have obtained a license to describe yourself as a psychologist?

14:09:17 8 A. I do.

14:09:17 9 Q. And how many programs are accredited in your area of  
14:09:20 10 developmental psychology?

14:09:23 11 A. Zero.

14:09:23 12 Q. And how many in cognitive or experimental psychology?

14:09:27 13 A. Zero.

14:09:28 14 Q. And how are developmental, cognitive, and experimental  
14:09:32 15 psychologists described on the APA Web site?

14:09:34 16 A. As psychologists.

14:09:34 17 Q. And how are they described in the media?

14:09:37 18 A. As psychologists.

14:09:38 19 Q. How many developmental or cognitive or experimental  
14:09:44 20 psychologists are members of the American Psychological  
14:09:46 21 Association?

14:09:46 22 A. 940 developmental psychologists are currently members of  
14:09:50 23 the APA, and many more are members of other organizations. And  
14:09:57 24 experimental psychologists -- experimentalists in the APA, that  
14:10:02 25 is about 740 and -- 750, I believe. And many more around the

14:10:10 1 country belong to other organizations.

14:10:12 2 Q. What about cognitive psychologists?

14:10:16 3 A. Cognitive psychologists within the APA are spread out  
14:10:20 4 among all 54 of the subdivisions of the APA. So I don't --  
14:10:24 5 I -- you can't tell from the membership figures which ones are  
14:10:28 6 cognitive.

14:10:29 7 Q. Did you take any doctoral level courses in graduate school  
14:10:34 8 relevant to your evaluation of the issues in this case?

14:10:37 9 A. Yes. For evaluating research I took statistics and  
14:10:42 10 advanced statistics, research, design, and tests and  
14:10:46 11 measurements. And I believe I produced to Defendants a very  
14:10:51 12 complimentary letter about me about my work for  
14:10:54 13 Dr. William Ware, an applied statistician, during my research  
14:11:00 14 for Dr. Ware in a nationwide database related to Head Start.

14:11:05 15 MR. BORGELT: Your Honor, if I could confer for a  
14:11:07 16 moment?

14:11:07 17 THE COURT: You may.

14:11:23 18 MR. BORGELT: Pass the witness.

14:11:25 19 MR. TODD: I have no questions Your Honor.

14:11:26 20 THE COURT: All right. You may step down.

14:11:40 21 Does plaintiff have further rebuttal?

14:11:42 22 MR. MANLEY: No further rebuttal, Your Honor.

14:11:43 23 THE COURT: Does Plaintiff close?

14:11:44 24 MR. MANLEY: Yes, Your Honor.

14:11:45 25 THE COURT: Do Defendants close?

14:11:47 1 MR. TODD: Defendants close, Your Honor.

14:11:48 2 THE COURT: All right. Now when we left this last  
14:11:59 3 week, we talked about how best to proceed from here, and both  
14:12:02 4 of you indicated you would like some briefing and then closing  
14:12:09 5 argument after the Court has an opportunity to review your  
14:12:11 6 briefs.

14:12:12 7 So let's talk about what would be a reasonable amount  
14:12:22 8 of time. But let me give you -- before we do that, let me give  
14:12:26 9 you kind of what I want to look at. I rendered an order on  
14:12:31 10 June the 26th, 2012 which narrowed down the issues in this  
14:12:38 11 case, and we're down to political speech, commercial speech,  
14:12:41 12 and overbreadth claims. So that's what I am the most  
14:12:45 13 interested in seeing in your briefing and to have you focus in  
14:12:52 14 on that.

14:12:52 15 We've had a wide-ranging amount of evidence here,  
14:12:57 16 some of which arguably does not go to that, but all of which is  
14:13:02 17 in the record. So what I want to see from you in the way of  
14:13:06 18 briefing is, particularly from the plaintiff on the three  
14:13:15 19 issues that survive in the case, specificity and briefing on  
14:13:22 20 those points. And it doesn't have to be a specific, pinpoint  
14:13:29 21 look at the evidence, but generally what evidence you think you  
14:13:33 22 have elicited that supports your position on those points.  
14:13:38 23 From the defense's point of view, I want to know with  
14:13:45 24 specificity why the plaintiffs fail on those points.

14:13:48 25 But we're down to the situation now where I'm going

14:13:50 1 to be looking at final judgment. I suspect that the best way  
14:13:56 2 to proceed is to have the plaintiffs do their briefing, and the  
14:14:04 3 defendant can either answer that or can incorporate to the  
14:14:11 4 extent necessary your previous briefing because you prepared a  
14:14:19 5 trial brief. You don't have to rewrite it all. We're not  
14:14:25 6 doing busy work here. I have it. And then a little rebuttal  
14:14:27 7 time for the plaintiff because the plaintiff bears the burden  
14:14:29 8 on the whole case.

14:14:30 9           So Mr. Manley, Mr. Hays, Mr. Borgelt, how much time  
14:14:34 10 do you think you need realistically -- don't think I want to  
14:14:37 11 start with something and don't try to guess what I want to do  
14:14:40 12 and then bargain it. Tell me realistically how much time you  
14:14:45 13 think it would give you -- what I'm trying to do is I want to  
14:14:48 14 give both sides an adequate opportunity to put their best foot  
14:14:53 15 forward not only because of the judgment I may render but in  
14:15:01 16 order you have your record protected on anything either side  
14:15:04 17 might want to appeal. So whoever wants to speak first.

14:15:08 18           MR. MANLEY: Your Honor, we would like to have time  
14:15:11 19 to review the transcript and prepare a brief as you suggest,  
14:15:15 20 focused on those issues. We think that 30 days would be  
14:15:19 21 adequate for that after we have the transcript.

14:15:26 22           THE COURT: Ms. Rodriguez, how long do you think it  
14:15:35 23 will take to get a transcript out?

14:15:35 24           COURT REPORTER: Two weeks.

14:15:35 25           THE COURT: All right. So if we're looking at two

14:15:36 1 weeks -- see, what you just found out is you're not the only  
14:15:41 2 case I have in my Court. So that would get us to roughly the  
14:15:47 3 18th. And 30 days after that, I'll give you until the 20th of  
14:16:02 4 December. That gets you finished before Christmas.

14:16:04 5 And if something happens because the transcript could  
14:16:09 6 get delayed -- anything can happen -- don't feel intimidated.  
14:16:15 7 You can always file a motion for additional time. You may or  
14:16:18 8 may not get it, but that's free.

14:16:21 9 So, Mr. Todd, if I get briefing from them the 20th --  
14:16:28 10 and I know the attorney general has enough people where you  
14:16:31 11 work over the holidays, so -- no. How much time do you think  
14:16:36 12 you need, knowing I put you right in middle of the holiday?

14:16:39 13 MR. TODD: Right. Okay. Hypothetically I might  
14:16:45 14 start on this January 2nd. I think by mid-January -- I mean,  
14:16:52 15 the Court referred to the fact that there have been previous  
14:16:55 16 briefs.

14:16:56 17 THE COURT: Yeah. And you've got a lot of what  
14:16:58 18 you're going to say in that brief, I think.

14:17:00 19 MR. TODD: That's right.

14:17:01 20 THE COURT: But now that you've heard the evidence, I  
14:17:03 21 recognize you might want to fine-tune that a little bit.

14:17:06 22 MR. TODD: Right. What I'll probably do is since  
14:17:07 23 we'll get the transcript at the same time, start studying the  
14:17:11 24 transcript also, and mainly just talk about how it applies.  
14:17:16 25 I'm not sure what day January 15th falls on.

14:17:20 1 THE COURT: It's a Wednesday.

14:17:21 2 MR. TODD: Okay. How about, then, the 17th, which  
14:17:24 3 would be a Friday?

14:17:25 4 THE COURT: That's fine. And how much time, then,  
14:17:30 5 for the plaintiff for rebuttal? You shouldn't need a whole lot  
14:17:33 6 of time.

14:17:34 7 MR. MANLEY: No, Your Honor. I think by the end of  
14:17:36 8 January. The 31st would be an even two weeks.

14:17:41 9 THE COURT: All right. Now, that would put us  
14:18:00 10 into -- well, I've done it again. I wanted to look at the  
14:18:04 11 other calendar. Harold, could you get that black calendar that  
14:18:07 12 I meant to bring out here with me? I'd look at the fancy  
14:18:19 13 electronic one, but it doesn't really tell me what I want to  
14:18:19 14 know. It's got to be the one that I touch frequently and has  
14:18:21 15 pencil marks on it.

14:18:35 16 Your page limits will be what's provided in the local  
14:18:38 17 rules.

14:19:07 18 How much time do you think you're going to need to  
14:19:09 19 argue the case, knowing that the cross you bear is I come from  
14:19:19 20 court of appeals background where we were under the belief you  
14:19:23 21 could argue an antitrust case in 20 minutes to the side? I  
14:19:26 22 always thought that was maybe a little low, but don't ask for  
14:19:29 23 more than you think is absolutely necessary.

14:19:38 24 MR. MANLEY: I would think 30 minutes would be -- I  
14:19:41 25 would think 30 minutes would be adequate -- more than adequate



14:19:45 1 per side.

14:19:46 2 THE COURT: So would I.

14:19:47 3 MR. MANLEY: Per side.

14:19:48 4 THE COURT: All right. Then I'm going to give you  
14:19:50 5 30 minutes to the side to argue, and the plaintiff can reserve  
14:19:57 6 as much time out of the plaintiff's 30 as you want for  
14:20:01 7 rebuttal.

14:20:18 8 All right. I'm going to schedule you for argument --  
14:20:20 9 it's a propitious day -- on Valentine's day, February the 14th,  
14:20:26 10 30 minutes to the side.

14:20:31 11 MR. BORGELT: Your Honor, if it's possible, I already  
14:20:33 12 know I'm going to be out of town on that day.

14:20:36 13 THE COURT: Well, then we'll find another day. It's  
14:20:43 14 hard. All right. We're going to say March the 7th at  
14:21:22 15 10 o'clock in the morning. Everybody think they're going to be  
14:21:30 16 around then?

14:21:30 17 MR. TODD: Yes, Your Honor.

14:21:31 18 MR. MANLEY: Yes, Your Honor.

14:21:32 19 MR. BORGELT: Yes.

14:21:33 20 THE COURT: All right. So Plaintiff's initial brief,  
14:21:37 21 December 20th; Defendants' brief, January the 17th; Plaintiff's  
14:21:43 22 rebuttal, January the 31st; argument, 30 minutes to the side at  
14:21:49 23 10 o'clock on March the 7th.

14:21:50 24 Now, it is perfectly all right to include an appendix  
14:22:07 25 with your brief, and that doesn't count against your page

14:22:10 1 number. But here is what I find helpful in an appendix, is not  
14:22:15 2 complete documents, not complete excerpts from depositions, but  
14:22:26 3 the specific page where something you think is outcome  
14:22:29 4 determinative of this case is found.

14:22:33 5           Because I'm not likely to take the record home and  
14:22:37 6 review it, but I am likely to take your briefs home and  
14:22:42 7 particularly reread them closer to oral argument. I'll read  
14:22:48 8 them once when you get them in. And so a very short appendix  
14:22:57 9 with just those parts of the record that you think nails the  
14:23:00 10 lid shut, if any -- there might not be any like that. So don't  
14:23:04 11 take this as an opportunity to give me nice, long, lengthy  
14:23:08 12 appendix. But if you have specific items that focus me on  
14:23:14 13 exactly what your argument is, it's helpful to have it in an  
14:23:19 14 appendix.

14:23:19 15           All right. Questions? I'll start with the  
14:23:21 16 plaintiffs. Anything I haven't covered?

14:23:24 17           MR. MANLEY: I don't have any, no.

14:23:26 18           THE COURT: Mr. Todd, anything from the defense?

14:23:28 19           MR. TODD: None, Your Honor.

14:23:28 20           THE COURT: All right. Well, very good. I think you  
14:23:30 21 both presented a good case. You have raised the issues with  
14:23:35 22 the Court that the Court wants to consider. I look forward to  
14:23:40 23 entertaining your briefs. Everybody have a good Thanksgiving  
14:23:45 24 holiday and a good Christmas holiday, and we'll see you back  
14:23:48 25 here after the first of the year. Although Mr. Todd and his

14:23:55 1 crew are over here with some regularity, I might actually see  
14:23:58 2 them before I see you-all. But very good, and have a good day  
14:24:03 3 and thank you-all. Court's in recess.

14:24:04 4 (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  
5 that the foregoing is a correct transcript from the record of  
6 proceedings in the above-entitled matter.

7        I certify that the transcript fees and format comply with  
8 those prescribed by the Court and Judicial Conference of the  
9 United States.

10        WITNESS MY OFFICIAL HAND this the 15th day of  
11 November 2013.

12

13                                        /S/ Arlinda Rodriguez  
14                                        Arlinda Rodriguez, Texas CSR 7753  
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