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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

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WILLIAM UPTON, a minor, by and
through his next friends and
natural parents, WILLIAM UPTON
and JANET UPTON; WILLIAM UPTON
and JANE UPTON, individually,

Plaintiffs,

vs.

} NO. CV 95-06333
} NO. CV 96-19938
} (Consolidated)

MARICOPA COUNTY, political
subdivision; MARICOPA BOARD OF
SUPERVISORS AS A BODY; DOES I
through XXX,

Defendants.

AND RELATED MATTERS,

COPY

DEPOSITION OF JOHN P. ELLIOTT, M.D.

Phoenix, Arizona
July 2, 1998
5:10 o'clock p.m.

Prepared for:
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(COPY)

*Write to
Leonard
Pamela J.*

auto

I N D E X

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QUESTIONS INSTRUCTED NOT TO ANSWER

(None.)

CONFIDENTIAL PORTIONS OF THE RECORD

{None.}

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1 DEPOSITION OF JOHN P. ELLIOTT, M.D.,
2 commenced at 5:10 o'clock p.m. on July 2, 1998, at the law
3 offices of Leonard & Clancy, P.C., 1700 North Seventh
4 Street, Suite 3, Phoenix, Arizona, before JANE M. DOYLE, a
5 Notary Public in and for the County of Maricopa, State of
6 Arizona.

7
8 * * *

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STIPULATION

IT IS STIPULATED **by** and between counsel for the
respective parties hereto that the deposition of
JOHN P. ELLIOTT, M.D.,
may **be** taken on oral interrogatories before JANE M. DOYLE,
a court reporter **and** Notary Public in and *for* the County of
Maricopa, State of Arizona.

IT IS FURTHER STIPULATED that the deposition is
taken pursuant to the Rules of Civil Procedure relating to
the taking and returning of depositions for use in the
Superior Court of Arizona, County of Maricopa; that the
witness will read and sign said deposition; and that notice
of Filing and other formalities required by law for the
taking and returning of **said** deposition are waived.

Phoenix, Arizona
July 2, 1998
5:10 o'clock p.m.

JOHN P. ELLIOTT, M.D.,
called as a witness herein, having been first duly
sworn, was examined and testified as follows:

* + *

E X A M I N A T I O N

BY MR. LEONARD:

Q. Dr. Elliott, are you familiar with a business
concern by the name of Expert Medical Opinion, L.L.C.?

A. I am.

Q. What is the telephone number 1-800-313-6875?
Are you familiar with that?

A. No, I'm not.

Q. The address of 10645 Tatum Boulevard in
Paradise Valley, what is that?

A. That's a mailbox,

Q. Are you familiar with a gentleman by the name
of Jordan Perlow?

A. He's one of my partners, yes.

Q. And Thomas Strong?

A. He's one of my partners.

Q. And you and Drs. Perlow and Strong feel so
strongly about providing medical opinions for plaintiffs in

1 malpractice cases that you've formed this Expert Medical
2 Opinion, L.L.C., company; correct?

3 A. No.

4 Q. Well, if one were to call this 1-800 number
5 from here in Arizona, what happens?

6 A. I don't know what would happen,

7 Q. I'm told it doesn't connect. I tried it.

8 A. I would imagine it wouldn't connect. It no
9 longer exists.

10 Q. Why -- what is Expert Medical Opinion, L.L.C.?

11 A. That was a company that was started and -
12 existed for about five or six months and has been closed.

13 Q. What was the purpose of Expert Medical
14 Opinion, L.L.C.?

15 A. It was to provide medical/legal opinion to
16 attorneys that wished to seek our opinions.

17 Q. Who incorporated -- was it a corporation?

18 A. I believe it was. It was an L.L.C.

19 Q. Pardon me?

20 A. A limited liability corporation, but a
21 corporation nonetheless, yes.

22 Q. Who incorporated this group?

23 A. I don't know specifically who did it.

24 Q. And the purpose was to provide opinions in
25 medical/legal claims?

1 A. Yes.

2 Q. How did you go about -- I guess advertising
3 would be the word.

4 A. We really didn't advertise.

5 Q. Well, how **did** you get the word out, then, as
6 it were, that this service was available?

7 A. We really didn't get any word out.

8 Q. Why did you form the corporation then?

9 A. To be available at some point in time, We
10 have not gotten to the point of any communication with any
11 attorneys.

12 Q. Did you line up some doctors, such as
13 Dr. Eitelberg (phonetic) back in Baltimore, to serve as
14 experts?

15 A. I don't know who Dr. Eitelberg is, so, no.

16 Q. Well, what was the project, as you understood
17 it, to be?

18 A. I don't know what you mean by "project."

19 Q. What were you going to do with -- apparently
20 you expended the time, money and effort to put together
21 Expert Medical Opinion, L.L.C. --

22 A. Yes, we did.

23 Q. -- you and Drs. Perlow and Strong?

24 A. Yes.

25 Q. Okay. To what end?

1 A. To provide expert medical/legal opinions on
2 obstetrical cases.

3 Q. Did you have an attorney draw up corporation
4 papers?

5 A. **Yes**, we did.

6 Q. Who would have a copy of those papers?

7 A. I honestly don't know. I was not involved in
8 that. I don't have a copy of them.

9 Q. Who was the lawyer who drew up the papers?

10 A. I don't know the answer to that either.

11 Q. How would you go about getting that answer?
12 Is there someone at your office who would probably know?

13 A. Dr. Perlow would know.

14 Q. Well, how were you going to provide such
15 opinions, just you three, or did you foresee it as a
16 more -- a larger group?

17 A. That was -- that was our intent was the three
18 of us.

19 Q. And was it your intent to provide opinions **in**
20 other **states**?

21 A. If asked, yes.

22 Q. I understand that you take the position that
23 you will not testify on behalf of a plaintiff in the state
24 of Arizona; **is** that correct?

25 A. I will not provide **expert** testimony. I will

1 review **cases** for plaintiff attorneys, but I will not
2 **provide testimony** for them in the state of Arizona, that's
3 correct.

4 Q. It is a correct statement that you will not
5 testify --

6 A. Correct,

7 Q. -- that there --

8 A. I'm sorry.

9 Q. -- that there was a deviation from an
10 appropriate standard of care, at least as you view it, for
11 a plaintiff within the state of Arizona?

12 A. Correct.

13 Q. Why **is** that?

14 A. I am a perinatologist. I receive patients
15 from other physicians and nurse midwives in the state of
16 Arizona, and my prime purpose is to provide medical care to
17 these individuals, and testimony in medical/legal matters
18 would affect the referral of patients.

19 Q. So it's an economic decision, at least in part?

20 A. Absolutely not. It's purely for patient care
21 issues, not economic at all.

22 Q. I see.

23 Your perception **is** even if you testified, the
24 same number of referrals would come to your PPA group?

25 A. Absolutely not, that's why I wouldn't testify.

1 Q. What happened to Expert Medical Opinion,
2 L.L.C.?

3 A. It was closed.

4 Q. By whom?

5 A. By the three of us.

6 Q. Why?

7 A. **Because** we felt that that was -- that would
8 probably be perceived by people incorrectly, and that we
9 **didn't** want that kind of perception, and so we **closed** it.

10 Q. What was the perception that you felt that
11 people would have?

12 A. That the -- that there would be advertising or
13 soliciting of cases, and that was not our intent, but to
14 provide a warehouse, a clearinghouse for those things, and
15 so we felt that that was not an avenue that we would pursue
16 collectively.

17 Q. Well, what was your perception as to how the
18 word was going to get out so that people would know that
19 this warehouse was available?

20 A. We were going to provide educational seminars
21 for lawyers.

22 Q. Okay. In what fashion, or had it gone that
23 far that you had developed a thought process?

24 A. We had -- we had provided -- we had provided
25 one seminar in Atlanta, and that was as far as we got.

1 Q. Who actually put together the seminar, the
2 three of you, or did you engage the services of someone to
3 do that for you?

4 A. It **was** the three of us.

5 Q. Where did you have this seminar in Atlanta?

6 A. It was at one of the hotels. I don't remember
7 exactly which one.

8 Q. Were there handouts presented?

9 A. I believe there were, yes.

10 Q. Who would have copies of those?

11 A. I don't know that any of them still exist. I
12 could look and see, but I don't know that any exist. Once
13 we finished the seminar, I think they were --

14 Q. Will you please let Ms. Brandon know if you
15 have copies of those?

16 A. I will look.

17 Q. What would be a reasonable time turnaround
18 when I might start to bother her, has Dr. Elliott gotten
19 back in touch with you?

20 A. I would think two weeks would be reasonable.

21 Q. What type of a seminar did you put on?

22 A. It was basically fetal heart rate monitoring.

23 Q. Was it primed toward lawyers or presented more
24 as an educational effort available to lawyers **and** others,
25 such as nurses or nurse midwives?

1 **A.** It was primarily -- it was directed toward
2 **lawyers.**

3 **Q.** How did you advertise?

4 **A.** We sent brochures to southeastern lawyers in
5 adjoining states.

6 **Q.** What did you do, get Dr. John Morrison's list,
7 or something like that?

8 **A.** No. I have no idea what you're talking
9 about. I got a list from the state bar of each of the
10 states,

11 **Q.** How many states?

12 **A.** Probably seven or eight surrounding Georgia.

13 **Q.** How heavily attended was the seminar, as best
14 you recall?

15 **A.** About 15 people, I believe, came, something
16 around there.

17 **Q.** Were there any cases generated out of that?

18 **A.** I don't know for sure. I did not have any
19 cases generated out of that. I can't tell you whether
20 either Dr. Strong or Dr. Perlow did.

21 **Q.** How was the -- the division of work going to
22 be as between the three of you, if I may term it a division
23 of work?

24 **A.** Basically, if an attorney requested an
25 individual physician, that physician would respond; if they

1 just wanted one of **us**, then we would look at it and see who
2 was **most** appropriate.

3 Q. Were there any particular areas of expertise;
4 by way of example, if it were a problem in monitoring, you
5 would take it as opposed to it **being** some other type of
6 problem that Dr. Perlow might address?

7 A. I don't know that we got down that far *to* say,
8 well, you're going to take these, **and** you'll take this, and
9 I'll **take** this. It had never gotten that far.

10 Q. Do you have any plans for seminars in the
11 future or have you **just** given up that idea?

12 A. Sort of gave **up** that idea, yes.

13 Q. Are any other members of your group pursuing
14 the **idea**?

15 A. No.

16 Q. It's your understanding that Dr. Perlow has
17 also given up on --

18 A. I believe so, yes.

19 Q. Do you regularly -- at least your group --
20 regularly participate in a program known as the Hocus-Pocus
21 Program, in short form it's called, I guess?

22 A. We have spoken at that program in -- in
23 several years, yes.

24 Q. You **were** one of the prime moving factors
25 behind putting the program together, were you not; "you"

1 being your group?

2 A. I think Dr. Foley participated in -- in
3 helping to plan the meeting, yes.

4 Q. And **it's** an annual meeting, is it *not*?

5 A. **Yes, it is.**

6 Q. And there frequently are speakers from your
7 group as well as a few outstanding physicians from other
8 areas of the country whom I gather you invite in to **speak**?

9 A. **That** would be correct, yes.

10 Q. **Did** you speak this past year specifically an
11 preterm labor and preterm delivery?

12 A. Yes, I did.

13 Q. Let me see if this is an accurate quote as to
14 what you said. Firstly, you have -- you have become a
15 proponent of the contingent fee system, have you not?

16 A. I don't know what you mean.

17 Q. Payment based upon result, just like
18 plaintiffs work.

19 A, I -- I would not complain about that. I don't
20 know -- I think that -- I don't know that it's -- I would
21 call it that, but I would not -- I would not think that
22 that would be -- I have no problem with it, let's put it
23 that way.

24 Q. Have you found that other doctors have just
25 really patted you on the back and said, what a terrific

1 idea?

2 A. I haven't asked anybody else.

3 Q. Has anyone said to you, that's a lousy idea?

4 A. No.

5 Q. Let **me** see if this is a relatively accurate
6 quote of what you **said** in front of those assembled at the
7 Hocus-Pocus group meeting, I believe it was in 1998,
8 April 16 to 18: We -- being physicians -- do not care
9 enough to make a difference. We do not want to. I --
10 you -- accept **some** of **the** blame **for** that. I'm frustrated
11 and see a solution, but it involves change. We **are** not
12 willing to make this change. We're comfortable. If it
13 takes change to make a difference, then, damn it, we need
14 to make a difference. Education is not working --
15 specifically talking about preterm labor and preterm
16 delivery now, let's keep that in mind,
17 Education is not working. I have been trying
18 to educate for years, and it has not done anything.
19 Outcome-based reimbursement for the OB will bring about
20 change. Financial motivation will bring about change. Do
21 not pay a physician for just showing up. There is no
22 motivation to change their practice. Provide a better
23 outcome and a financial reward will be given. To monitor
24 patients for **PML** and **PTD**, it will require extra time, extra
25 work from the physician, but the reward will **be** a better

1 outcome if more work *is* involved to achieve the better
2 outcome.

3 Do you remember saying something to that
4 **effect?**

5 **A.** Very, very close to that, yes, not the exact
6 words.

7 **Q.** Do you have the exact words somewhere so I
8 will very accurately quote you, or as accurately as I am
9 **capable?**

10 **A.** I don't have the exact words **anywhere**, no.

11 **Q.** Have you tried to in your own group bring **that**
12 about; and I call it contingent fee, if you don't do a good
13 job, you don't get **paid?**

14 **A.** No, not within our group. No.

15 **Q.** How large is your group at this point?

16 **A.** We have nine perinatologists and one
17 radiologist ultrasonographer.

18 **Q.** How many of your group trained at the Long
19 Beach Women's Hospital?

20 **A.** Of the current group, three.

21 **Q.** Those being Dr. O'Keeffe?

22 **A.** Well, he's not currently in on the group, so --

23 **Q.** I'm sorry, perhaps you could give me the names.

24 **A.** Dr. Milts, Dr. Perlow and myself.

25 **Q.** Do you know a gentleman, by any chance, by

1 the name of **Dr.** John Yeast?

2 A. Yeast.

3 Q. I thought he pronounced *it* Yeast?

4 A. Yeast.

5 Q. **Is** the proper way to pronounce it. Okay.

6 Dr. Nageotte, do you know him?

7 A. Yes.

8 Q. **Do** you hold Dr. Nageotte in high regard as a
9 perinatologistfobstetrician?

10 A. I do.

11 Q. Dr. Yeast, or Yeast, similarly?

12 A. Yes.

13 Q. Have you been advised in this **spe** ific case
14 that both of those men feel that it was below an
15 appropriate standard of care to discharge Janet Upton --

16 A. I've been -- excuse me.

17 Q. Excuse me. Go ahead.

18 A. No, finish.

19 Q. -- that it was below an appropriate standard
20 of care to discharge Janet Upton from Maricopa Medical
21 Center on April 24?

22 A. I've been advised of that, yes.

23 Q. What was the charge you anticipated charging
24 lawyers who would engage the services of **Expert** Medical
25 Opinion, L.L.C.?

1 A. The charges would be very similar to -- to
2 what I charge for medical/legal consultation and service,

3 Q. Might I inquire as to what that *is*, please.

4 A. It's a thousand dollars to initially review
5 the case, \$350 an hour to --

6 Q. I'm sorry?

7 A. Thousand dollars to initially review the case
8 and **discuss** it with the attorney; \$350 an hour for any
9 further review of depositions or preparation for trial,
10 et cetera; \$400 an hour for deposition testimony; and
11 \$5,000 a day for testimony at trial.

12 Q. When you go down, for example, for -- I gather
13 this case where you testified for a gentleman by the name
14 of Phil Malcomb was down in Arkansas?

15 A. I would -- I believe so, yes.

16 Q. My recollection is just outside of -- I may
17 need your help here, Harding, but I think it's just outside
18 of Fort Smith, isn't it?

19 MR. CURE: Which town?

20 THE WITNESS: I did not go to Arkansas, **so** I
21 don't know.

22 MR. CURE: I do know Phil Malcomb, if I can
23 help you out.

24 MR. LEONARD: So do I. He does not **speak**
25 highly of me.

1 Q. Let's check one of these 30 cases.

2 Have you actually gone to Wichita, Kansas, and
3 testified?

4 A. No,

5 Q. How about Pueblo, Colorado?

6 A. **Yes.**

7 Q. Did you testify for a gentleman by the name of
8 Lee Sternal, S-T-E-R-N-A-L?

9 A. Yes,

10 Q. How many days were you out of your office?

11 A. One.

12 Q. Did you charge \$5,000 for that one day?

13 A. Yes, I did.

14 Q. If you were outside of your office for two or
15 three days, would it be an additional charge for the days
16 outside of office?

17 A. Yes.

18 Q. So may we fairly conclude that you have at
19 least run some type of a study that fair compensation for
20 time outside of your office is approximately \$5,000 per day?

21 A. Yes.

22 Q. Is that about the way it is for the rest of
23 the members of your office?

24 A. I believe that was -- that was what that group
25 of people would be, yes.

1 Q. I noticed -- well, have you ever personally
2 been a defendant in a medical negligence claim?

3 A. Yes, I have.

4 Q. On how many occasions has that --

5 A. Two.

6 Q. Could you give me the names of the cases,
7 please.

8 A. I'm not sure I can give you the names of the
9 cases **at** all. I can tell you, in general, about them, but --

10 Q. Well, let me try **and** help you out.

11 How about Parsons, does that ring a bell,
12 \$5.5 million result?

13 A. That was -- I was not a named defendant in
14 that.

15 Q. I see.

16 Do you remember any of the cases in which you
17 were a named defendant?

18 A. I said I can tell you what they're about. I
19 don't remember the names.

20 Q. **I'm** looking for names.

21 Do you have some source where you could go
22 and get that information and get it to Ms. Brandon?

23 A. I probably could, yes.

24 Q. Would you do so?

25 A. I will,

1 Q. And, again, would two weeks be a reasonable
2 **period** of time to start to bug her for those names?

3 A. It would be.

4 Q. What were the nature of the medical problems
5 involved? Let's talk about **case** number one.

6 A. Case number one was an amniocentesis that I
7 did on a diabetic patient. It was 37 weeks and trying to
8 determine pulmonary maturity to effect a delivery,

9 Q. What was the LS ratio?

10 A. We never got it. The amnio was done through
11 an anterior placenta, and in inserting the needle, we got
12 fluid, and then the baby hit the needle and later we
13 determined that the movement of the needle lacerated an
14 umbilical artery, and the baby started to exsanguinate.

15 Q. Probably died?

16 A. The baby ended up dying, yes,

17 We rushed her from radiology at Good Sam up to
18 labor and delivery, and in the time it took to get from
19 point A to point B and start the cesarean section and
20 deliver the baby, the baby had essentially **bled** out.

21 Q. Not essentially, the baby had bled out?

22 A. Well, it still had some --

23 Q. She or he?

24 A. Well, it still had some blood left, **but** not:
25 enough to sustain life.

1 Q. Who was the lawyer who represented you, do
2 you **happen** to recall that?

3 A. **It was** from Snell & Wilmer.

4 Q. Barry Halpern, by any chance?

5 A. **Yes**, Barry Halpern.

6 Q. Was the matter tried?

7 A. **We settled it** the day before trial for a very
8 **small** amount.

9 Q. Okay. Let's take case number two, if we
10 might -- or I wanted to ask you: Was that case done with
11 the **amnio** being under ultrasound control?

12 A. **Yes**.

13 Q. You nonetheless stuck the needle -- or someone
14 stuck the needle through an anterior placenta?

15 A. **We do that** all the time.

16 Q. Case number two, could you tell us what that
17 was about, **please**.

18 A. Case number two involved a patient that had a
19 **placental** abruption during labor. We took her back and did
20 a cesarean section, had a baby that eventually was
21 developmentally slow, and suit was filed.

22 Q. Who was the lawyer who appeared on behalf of
23 the plaintiff, if you recall, where Barry Halpern was the
24 defense lawyer?

25 A. **I don't remember**.

1 Q. In the second case, who was the lawyer who
2 represented you --

3 A. I --

4 Q. -- the placental abruption case?

5 A. Yeah. I'm trying to think who it was.

6 I believe it was Frank Parks, but I can't be
7 absolutely sure.

8 Q. Well, I have Mr. Parks representing you in a
9 case **called** Parsons versus PCH. Could that, by any chance,
10 be the case?

11 A. No, that was -- I was an expert witness for
12 Mr. Parks. He was not representing me.

13 Q. Okay. And then the Teilborg, Sanders firm, in
14 a **list** of cases that we were able to put together, in a
15 case called Boynton, B-O-Y-N-T-O-N, versus Eckern,
16 E-C-K-E-R-N. Could that be the case?

17 A. No, none of those are cases involving me.

18 Q. Okay. So you simply don't remember the name
19 of this lady and her baby?

20 A. No, I do not.

21 Q. How badly was the baby damaged?

22 A. Baby wasn't damaged very badly at all, and
23 that's why the suit was dropped.

24 Q. Okay. Case number three -- or is there a case
25 number three?

1 A. No, there **is** not.

2 Q. You say you were represented by Mr. Parks, you
3 believe, on one occasion?

4 A. On the second of those cases that we **just**
5 talked about, **yes**.

6 Q. Have you also testified on several occasions
7 where Mt. Parks was the lawyer representing the defendant
8 in the case --

9 A. Yes, **I** have.

10 Q. -- although you were not the defendant
11 personally?

12 A. Yes.

13 Q. Are you aware that Mr. Parks' wife enjoys a
14 business relationship with your firm?

15 A. I don't believe she does right now, no,

16 Q. Are you familiar with the company called
17 Matria?

18 A. Yes.

19 Q. What **is** Matria?

20 A. Matria is a home health service that deals
21 **mainly** in monitoring of high risk pregnancies.

22 a. Was there a period of time when, through
23 Dr. O'Keeffe, I believe it was, **and** Sue Piccinati-Parks,
24 you put together a program where, as for example, a doctor
25 in the community would refer a lot of cases to you, you

1 would be willing to send them out to his office and help
2 him **set** up the office in what you felt would be the best
3 **possible** fashion to provide high quality care?

4 A. That had nothing to do with PPA.

5 Q. What did that have to do with, to leave a
6 dangling participle?

7 A. That was a -- Dr. O'Keeffe was working at that
8 time half time for PPA and half time for what was at the
9 time **the** Tocos Medical Corporation, and it has now become
10 Matria. **As** part of what he was working with Tocos for, I
11 think there was something like that: that was developed. It
12 really had nothing to do with the PPA **and** nothing to do
13 with me.

14 Q. Well, it was -- we took a deposition of a
15 fellow in a case called Ramos out on the west side by the
16 name of -- not Dr. Cazares, but the other one in the
17 case -- and it was his perception that this program was
18 made available to his *office* because he referred his
19 **patients** of higher risk status in to PPA. Are you telling
20 me that's **just** never been the case?

21 A. That's never been the case ever.

22 Q. I'm sorry, run this by me again now. You
23 charge 1,000 per initial review of a case?

24 A. Yes, sir.

25 Q. And that includes what?

1 A. Review of the records that are sent to me --

2 Q. What do you usually --

3 A. -- and discussion with the attorney.

4 Q. I'm sorry. Go ahead.

5 A. And **discussion** with the attorney of my
6 findings.

7 Q. What do you usually say to yourself, it's
8 going to probably take **me** about X number of hours, or
9 whatever units of time?

10 A. **As** an average, it's usually in the range of
11 two and a half to three hours.

12 Q. And then after that initial look-through **plus**
13 conference with lawyer, you start to charge at what rate?

14 A. Three fifty an hour.

15 Q. As for example, Ms. Brandon was kind enough to
16 send us today some material that she has sent to you, or a
17 list of the material. When you review a deposition -- have
18 you looked at Dr. Nageotte's deposition, by any chance?

19 A. **Yes**, I have.

20 Q. When you review that, you'll charge at 350 per
21 hour?

22 A. That would be something that would be charged
23 at 350 per hour, yes.

24 Q. Would there be some other charge for some
25 other type of service?

1 A. No, not to the attorney that's retaining me.

2 NO.

3 Q. How about deposition, **do** you charge my client --

4 A. \$400 an hour.

5 Q. And then the next step **is** \$5,000 a day for
6 testimony?

7 A. If an entire day is required out of the
8 office, yes.

9 Q. At the present time how many **cases** do you
10 believe you are actively looking at, medical/legal cases?

11 A. Oh, I don't have any idea of how to estimate
12 that. These things lie dormant for years sometimes.

13 Q. Surely.

14 A. Active cases --

15 Q. Your best reasoned estimate.

16 A. Let me have you define "active" for me so I
17 can give you an accurate answer.

18 Q. Cases still ongoing, so far as you are aware.

19 A. Again, all of these things are ongoing until I
20 hear from an attorney saying, we've settled this, I don't
21 need your services.

22 Q. Sure,

23 A. I would say records that I have are
24 probably -- I would say probably 35 or 40 cases.

25 Q. Over the past number of years, do you think

1 you would have a comparable number of active files,
2 recognizing that some of these cases will go on for a few
3 years?

4 A. I would -- I would think so. It's gotten a
5 little **bit** busier recently, but not dramatically so. I
6 would say it's fairly similar.

7 Q. Over the years, could you give us a reasoned
8 estimate as to approximately how many depositions you've
9 given in the past ten years?

10 A. I give about somewhere between **six** and eight
11 depositions a year; some years a little less. That's
12 probably been pretty steady for the last five years. The
13 previous five years it would probably be in the five to
14 seven range, so --

15 Q. Talking to somewhere in a range of 70 to a
16 hundred, plus minus?

17 A. Maybe more like 60 to 75 maybe.

18 Q. How many times have you been called upon to
19 testify in a trial?

20 A. My best guess is about eight, I believe.

21 Q. On how many occasions have you testified that
22 you believe that there was a deviation from an appropriate
23 standard of medical practice by one of your colleagues?

24 A. In deposition or in trial?

25 Q. Let's take deposition first, I guess.

1 A. My -- my case mix generally has been very
2 constant at 35 percent for plaintiffs' attorneys **and**
3 65 percent for **defense** attorneys.

4 Q. You **believe** that fully 35 percent of the
5 depositions you've given have been on behalf of plaintiff
6 where you've testified that there was some deviation from a
7 proper standard **of** care?

8 A. There's no question that that's the
9 percentage, yes.

10 Q. Why do you say "there's no question"?

11 A. Because you asked me to provide a list of
12 cases, so I've looked at it. That's -- that's what it **is**.
13 You seem to question that that's an accurate statement, so
14 I'm telling you it **is** accurate.

15 Q. Well, let's look at some of these. The case
16 of Barlow from Wichita, Kansas, a gentleman by the name of
17 Turner, B-O-I-S-S-E-A-U. **Is** that a plaintiff's claim?

18 A. That would be a defense claim.

19 Q. What **is** the medical issue involved, in a
20 paragraph or so?

21 A. I don't remember that specifically.

22 Q. Boynton versus Eckern here **in** Maricopa County,
23 the Teilborg, Sanders firm. I gather that would be a
24 defense claim?

25 A. Yes.

1 Q. Coffee versus Howard, Steve Schonberg, I
2 believe a Dr. Lear over in Albuquerque?

3 A. Yes.

4 Q. Is that on behalf of plaintiff?

5 A. Yes.

6 Q. What is the medical issue involved, at least
7 as you perceive it?

8 A. That was a case that the physician induced
9 labor inappropriately in a preterm baby and then was not
10 available in the hospital, and the baby developed
11 significant fetal intolerance of labor and was delivered by
12 a nurse midwife and went on to have significant hypoxic
13 ischemic encephalopathy, was acidotic, and ended up with
14 significant injuries.

15 Q. Were cord blood gases taken --

16 A. I can't --

17 Q. -- as you recall the case?

18 A. I can't tell you exactly. I believe -- I
19 believe they were taken. I'm not -- I can't -- I'm not
20 going to absolutely swear to that, so --

21 Q. Sure.

22 Has your deposition been taken in that claim?

23 A. It was, yes.

24 Q. Approximately how long ago?

25 A. It's been probably four -- four or five years

1 ago, it would have been.

2 Q. What was the cord pH?

3 A. Again, I don't remember **exactly**. I can't tell
4 you. It was -- **as** I recall, it was --

5 Q. Excuse me.

6 A. -- below 7.0, but I can't recall exactly what
7 it was.

8 Q. Do you buy into this Technical Bulletin 163?

9 A. I don't know what you mean by "buy into."

10 Q. Say unless all four of those segments or
11 elements are present, this can't be an HIE damaged child? .

12 A. I think the purpose of that technical bulletin
13 is to put some objectivity to what was before a very vague
14 area that any child that ended up with neurologic damage,
15 that the claim was made that it happened during the labor
16 and delivery process, and that frequently that **was** not the
17 area where injury **did** occur. And I think that the intent
18 of the -- of the technical bulletin was to try to establish
19 that hypoxic ischemic encephalopathy is a global injury;
20 that it requires -- if acidosis is the mechanism of causing
21 the injury, that it requires certain global injury patterns
22 to be seen in the child, including neurologic injury and,
23 importantly, other organ injury. It also requires that the
24 **child** demonstrate significant acidosis at birth so that you
25 have documentation of acidosis and global injury and

1 neurologic damage and eventual hypoxic ischemic
2 encephalopathy in the neonate or child.

3 From that standpoint, I believe that that is
4 a -- a very meaningful statement,

5 Q. I have read **Technical Bulletin 163**, and **are**
6 you familiar with the term "junk science"?

7 A. I'm not sure what you mean by it.

8 Q. Well, **Technical Bulletin 163** did no
9 independent research, did it?

10 A. None of the technical bulletins **do** any
11 independent research, no.

12 Q. All they do is take -- at least in this
13 specific instance, they took a series of 28 articles and
14 attempted to establish these four criteria, or ended up
15 establishing these four criteria; correct?

16 A. I don't know the number of references, but I
17 would say that that's what they did. They compiled what
18 was available in the literature --

19 Q. It was 28.

20 A. I'll trust you on that.

21 Q. Have you ever read all 28 of them?

22 A. I don't know if I have or not.

23 Q. They try and establish a specific pH number,
24 do they not, and they say, unless the pH was below this
25 number, can't be HIE?

1 A. That **is** one of the things that it -- it
2 states, yes.

3 Q. Have you ever gone through all 28 **articles** and
4 **seen if one single article supports that, says that?**

5 A. I told you I have **not** gone through all 28
6 articles, so I can't tell you that I have. I've gone
7 through the literature on acidosis to try to determine
8 **whether that is** a reasonable part of -- of this process,
9 **and I can** tell you that the literature supports that
10 significant acidosis **is** below 7.0.

11 Q. No, **my** question was: Have you ever looked at
12 the articles that supposedly support this conclusion that
13 they make to see if one single article says, yes, that's
14 correct?

15 A. I have looked at articles, not the ones
16 necessarily limited to what was in the bibliography of that
17 bulletin.

18 Q. Do you know Dr. Jeffrey Phalen?

19 A. I know Jeff Phalen very well, yes.

20 Q. And you know what his attitude about
21 medical/legal matters **is**, don't you?

22 A. I don't know that I've ever asked him what
23 that **is**.

24 Q. You haven't gone to his program that he **puts**
25 on yearly **up** in Las Vegas?

1 A. No.

2 Q. Do you know that he's repudiated Technical
3 Bulletin 163?

4 A. I don't know what Jeff has **said** or hasn't said.

5 Q. In terms of involvement of other organs, have
6 you ever looked at **these** 28 articles, or at least some of
7 them, and seen, yes, they do support that conclusion, or,
8 no, they **do** not?

9 A. I have not looked at them specifically to see
10 whether they support that or not.

11 Q. Well, to be fair, then, you would certainly
12 recognize, as someone who has been involved ~~in~~ the
13 medical/legal context, that if you were going to utilize
14 that to try and say, this supports an opinion, that you
15 should at the very least read the bases for the opinion;
16 correct? Wouldn't you?

17 A. I have read other articles. I have not
18 necessarily looked at what's in there. The literature that
19 I have read is very supportive of what is in there.

20 Q. Good. Tell us exactly what literature you've
21 read, then, please.

22 A. I've read basically every article that's been
23 written on cord blood gases and outcome.

24 Q. Did you read the deposition of Dr. Jeff
25 Pomerance in this case?

1 A. I did, yes.

2 Q. Do you know Dr. Pomerance?

3 A. Don't know him at all.

4 Q. Do you know anything about his reputation as a
5 neonatologist?

6 A. I don't know anything about his reputation as
7 a neonatologist, no.

8 Q. In this specific case, do you believe that the
9 cord blood **gas** drawn at St. Joseph's Hospital was an
10 accurate reflection of the child's status as of the time of
11 birth?

12 A. I believe it was an accurate reflection *of* the
13 child's acid base status at the time of birth, yes.

14 Q. Have you seen what Dr. Sills has to say about
15 that?

16 A. I've read his deposition, yes.

17 Q. I gather, then, you disagree with Dr. Sills
18 about that?

19 A. I don't remember specifically what he had *to*
20 **say** about it.

21 Q. Have you read the deposition of Dr. William
22 J.R. Daily?

23 A. I've read Dr. Daily's deposition, yes.

24 Q. How long have you been **in** practice here **in**
25 Arizona?

1 A. Since 1983.

2 Q. I gather you've known Dr. Daily, then,
3 essentially for **all** the years you've been in practice here?

4 A. I have known him that long, yes.

5 Q. Are you **advised** through his deposition **or** some
6 other source that he categorically says, this cord blood
7 gas could not have been an accurate reflection of the child
8 that was handed to **me**, little Bill Upton?

9 A. I don't doubt that he felt that the baby was
10 depressed, because I think the baby was depressed. I don't
11 think the baby was acidotic, and I don't doubt that his
12 deposition said that -- essentially what you said it said.

13 Q. Where in the disclosure statements that you
14 prepared **did** you set forth your opinion about this acidosis?

15 A. I don't know what's in my disclosure statement.

16 Q. Surely you wouldn't let them file a disclosure
17 statement without reading it first, I gather?

18 A. I did read it at the time.

19 Q. Look, if you would, then, please, and show us
20 where you address this issue.

21 A. I don't know that I addressed it at all.

22 (Witness reviewing.)

23 It's not listed in the disclosure statement.

24 Q. Did you ever tell Ms. Brandon that you held
25 this opinion?

1 A. Yes.

2 Q. When?

3 A. We've discussed it on several occasions that
4 I've talked with her.

5 Q. Well, the first disclosure statement I have
6 from the defendant Maricopa County is June 28, 1996. Do
7 you have a copy of that?

8 A, Where are these dated?

9 MS. BRANDON: It should be dated at the end.
10 September 24th -- September 23rd.

11 THE WITNESS: I've got September 23rd, '97. I
12 don't know if I have --

13 BY MR. LEONARD:

14 Q. No, sir, June 28th, 1996 was the question.

15 A. (Witness reviewing.)

16 I do not have a copy of that.

17 Q. Do you have a copy of the disclosure statement
18 filed by the County on August 26, 1996?

19 A. The only one that I have in my possession
20 right now is dated the 23rd of September, '97.

21 Q. So you do not have the one of 10/10/96 filed
22 by Dr. Sills -- I should say filed, including the specific
23 report of Dr. Sills?

24 A. I thought you **asked** me about my -- about
25 myself, not Dr. Sills.

1 Q. No. I say, do you have a copy of the third
2 supplemental disclosure statement, 10/10196, and happen to
3 have a copy of the report of Dr. Sills?

4 A. I don't believe I have that, no.

5 Q. June 17, 1997, do you have a copy of that
6 disclosure statement?

7 A. No.

8 Q. Be about number four, that I'm counting at
9 least.

10 The next one we have is November 21, 1997,
11 Do you have a copy of that?

12 A. I've got one you don't have, I guess. The
13 only one I have is the 23rd of September.

14 Q. May I see it, please.

15 A. (Witness complied.)

16 Q. Thank you.

17 So the only copy of any disclosure statement
18 ever made available to you was this one of September 23,
19 1997, insofar as it related to your testimony?

20 A. I don't know that. I obviously approved the
21 first one, so I don't know that I have a copy of it.
22 That's why I'm telling you I don't have that necessarily
23 right here.

24 Q. Okay. When do you think, reconstructing -- I
25 understand you haven't sent a bill yet in **this** case!

1 A. I **billed** for a thousand **dollars**, yes.

2 Q. Okay. Any time spent since then?

3 A. I've not billed for that, no.

4 Q. Where do you **have** a record *of* that?

5 A. I've **got** that: at home.

6 Q. Do you have a fax machine at home, by any
7 chance?

8 A. No, I don't.

9 Q. How many hours do you believe you've probably
10 spent since the original records were provided?

11 A. I don't know. I would say probably 15 to 18 .
12 hours, I would imagine, given the number of depositions and
13 *stuff*, so --

14 Q. You mean you've been able to read all of these
15 depositions, such as those of Dr. Nageotte, Dr. Pomerance,
16 Dr. Yeast, all of those -- Mr. and Mrs. Upton I believe
17 were given to you, Christine Cambridge, Dean Coonrod,
18 William Daily, Pam Duckett, Julie Mickelson, Jeff
19 Pomerance, Robin Teters, Terry Yates Zinkl, and you did all
20 of that in 18 hours?

21 A. I don't know. I'm -- I'm guessing, so I **could**
22 be wrong. I'm not --

23 Q. Would you please make a copy of your bill
24 available to **Ms.** Brandon --

25 A. I don't have a bill at this point in time --

1 Q. -- and get it to her in the next two **weeks**?

2 A. -- but I would be happy to prepare one.

3 Q. You keep billings in what form, please?

4 A. I keep a record of my time spent in reviewing
5 things and **keep** that on a scratch paper until I submit a
6 bill.

7 Q. Do you keep any notes or things that indicate
8 your time spent on a computer?

9 A. NO.

10 Q. So it's all handwritten?

11 A. I'm unfortunately computer illiterate.

12 Q. I join you in that illiteracy.

13 I'm gathering, then, that any times that you
14 have will be **on** time scratch paper of some type?

15 A. Yes.

16 Q. Will you please not just send a number, then,
17 send the actual time notes to Ms. Brandon?

18 A. I'll be happy to do that.

19 Q. Can we, again, expect that within two weeks
20 without unnecessarily imposing upon your time?

21 A. I Would --

22 Q. **As** you went through the -- well, when **did** you
23 first arrive at this opinion about the acidosis, or lack
24 thereof?

25 A. You know, I don't know. I **don't** --

1 originally, I was **asked** to look at the -- the care provided
2 by Maricopa County. It was sometime later that it became
3 an **issue of** -- of the delivery and beyond that, so I don't
4 know exactly when I looked at that specifically and
5 **discussed my** opinions with **Ms.** Brandon about that.

6 Q. Well, when did it first become your perception
7 that you were going to serve as an expert witness beyond
8 the point in time of County --

9 A. I always --

10 Q. -- presuming that the court allows you to do
11 so?

12 A. I was retained by the County. I was not -- I
13 was retained to **provide** expert testimony about the events
14 that occurred, and so it was an extension, I believe, of
15 that that got into, well, what happened then in this case.
16 So initially I looked at the care provided by County, and
17 that was the overall extent of things.

18 Q. If I utilize the name Dr. Arellano, does that
19 have meaning to you?

20 A. I know -- I know Dr. Arellano, yes.

21 Q. Do you recognize that he also participated in
22 this case?

23 A. Yes, I do.

24 Q. And at the time of his participation with
25 Janet Upton, what was his level of training, as you

1 understand it?

2 A. I believe he was a PGY-2, second-year resident.

3 Q. Dr. Kathy Norman, do you know her?

4 A. Yes, I do.

5 Q. Do you know her still as a colleague
6 **practicing** here in the community?

7 A. Yes, she **is**.

8 Q. Do you know Dr. Arellano as someone who
9 practices ~~in~~ the community?

10 A. Yes, I do.

11 Q. And I gather, given your status as someone.
12 that -- **do** you **still** practice primarily out of Good
13 Samaritan Regional Medical Center or some place else?

14 A. We practice primarily out of Good Sam, yes.

15 Q. And **is** that a training program? Does it have
16 a training program?

17 A. Yes.

18 Q. Of what magnitude at the present time!

19 A. There's six residents at each year of
20 training, so a total of 24 residents in the program.

21 Q. So it's PGY-1 through 4?

22 A. Yes.

23 Q. **Are** there any fifth-year residents --

24 A. **no**.

25 Q. -- who, if they choose to do so, can become a

1 fifth-year resident?

2 A. No.

3 Q. Have there ever been such at Good Sam since
4 you've been there?

5 A. No.

6 Q. Would you agree with the proposition, Doctor,
7 that if you're going to have a residency program, that
8 communication between the residents when they're signing
9 off on one patient, or a group of patients, to another is
10 quite important?

11 A. Yes, I would.

12 Q. What is your understanding in this specific
13 case as to Dr. Arellano's belief on the 24th of April as to
14 who was going to make the decision, either go or no go, we
15 either let this lady go home or we don't, we keep her here?

16 A. The note that he wrote and -- and from his
17 deposition, it was my understanding that if the social
18 situation, ability to find a place to go, was resolved,
19 that because of this patient's wishes, that she could be
20 discharged. He was leaving for the day and Dr. Norman was
21 coming on, and he communicated that to Dr. Norman.

22 Q. No. What is your understanding, based upon
23 Dr. Arellano's specific testimony in his deposition, whose
24 decision was it supposed to be as amongst the physicians?

25 A. It would be the next physician coming on, so

1 *it would* be Dr. Norman's.

2 Q. And what did Dr. Norman have to **say** about that?
3 What **was** her belief?

4 A. She's the one who discharged the patient, **so**
5 that was her responsibility,

6 Q. Did she know anything about the patient when
7 she discharged her, anything, based upon your reading of
8 her testimony?

9 A. At this time she says that she doesn't
10 remember what she knew or didn't know, I'm sure she **knew** a
11 lot more at the time than she knows in her deposition.

12 Q. What causes you to say that, if I might ask?

13 A. Because there's -- there's no way that a
14 physician would discharge a patient totally unseen,
15 unknowing -- not knowing anything about her, just sign a
16 discharge order. That's just something I've never seen
17 before in my career as a physician.

18 Q. You would find that absolutely below the
19 standard of care, wouldn't you?

20 A. No, I would tell you that it couldn't happen.

21 Q. Could not happen?

22 A. Correct.

23 Q. No how, no way?

24 A. Correct.

25 Q. And if the physician **did** it, she or he would

1 be acting outside of the realm of anything you could even
2 perceive being done. Am I capturing you correctly?

3 A. I would say that no physician would discharge
4 a patient from the hospital that he or **she** knew nothing
5 about, correct.

6 Q. You agree from reading Dr. Norman's deposition
3 that she is at least saying at this point in time, my sole
8 task in this case was to come over and sign over, that's
9 it? I didn't know anything about this lady, period, end of
10 discussion, Dr. Elliott?

11 A. If she was told -- if you're told that they've.
12 got a social situation, that it's okay, let her go home,
13 that's all she needs to know.

14 Q. Well, what was your understanding as to the
15 improvement in the social situation, as you put it!

16 A. I believe that there was a place for them to
17 go, at least for the rest of the month, and that either his
18 mother or her mother had arrived in town from Oklahoma.

19 Q. Now, back to my question: Do you remember
20 Dr. Norman's deposition where she specifically says she
21 didn't know anything about this lady when **she** discharged
22 her, all she knew was she was supposed to come over -- one
23 of the nurses asked her to sign, and she signed the dotted
24 line?

25 A. Again, I'm saying if she has absolutely no

1 information whatsoever, if she was told in checkouts, which
2 Dr. Arellano states in his deposition that he told her,
3 that if the social situation is improved, that this woman
4 can go home, if the nurse comes and **says**, I want you to
5 come and discharge this patient, everything **is** ready to go,
6 **she -- the** social situation has improved, and mom **is** here
7 now, or mother-in-law, then that **is** not discharging a
8 patient **in** a vacuum, that's basically doing what had been
9 set up for her to do.

10 Q. Well, if we're going to give a damn, as you
11 put it, about trying to make a difference, would you think
12 that it would **be** incumbent upon the resident physician to
13 at least go and ask the lady, what is **this** situation here
14 now? Do you have a telephone there? Is your mother
15 there? What other children are there? What's up?

16 A. I -- I object to you taking out of context my
17 comments **and** applying them to something else.

18 Q. Were these comments not made about preterm
19 **labor** and preterm delivery?

20 A. They were not made about premature ruptured
21 membranes or taking somebody out of the -- discharging
22 somebody from the hospital.

23 Q. Okay. They didn't deal with providing a
24 better outcome?

25 A. Very generally they did, correct.

1 Q. What is your understanding as to the amount of
2 amniotic fluid when Mrs. Upton was discharged?

3 A. The **last** assessment showed that she had a
4 **normal** amount of amniotic **fluid**.

5 Q. I know when the last assessment was, some two
6 **plus** days before she was discharged. What **is** your
7 understanding as to how much there was on the day of
8 discharge --

9 A. There's no mention --

10 Q. -- April 24?

11 A. There's no mention of an assessment of that..

12 Q. How long would it have taken to do an
13 ultrasound?

14 A. Ten minutes.

15 Q. Would that fall within your category of giving
16 a damn about providing better care?

17 A. I don't think it relates.

18 Q. Okay. What is your understanding as to the
19 baby's position at the time of discharge, little Bill?

20 A. Again, the baby was vertex.

21 Q. Butt down, head down?

22 A. It was vertex at the fast assessment.

23 Q. Which was how long before discharge?

24 A. About two days.

25 Q. Can a baby change from vertex to breech within

1 two **days**?

2 A. Yes, it can.

3 Q. And this baby clearly changed to a breech
4 **presentation** at some point before arrival at St. Joseph's
5 Hospital some 31 to 32 hours post-discharge, didn't he?

6 A. It did, yes.

7 Q. Do you think, given the level of training of a
8 Dr. Norman, that **if** she came over **and did** a Leopold's
9 maneuver, that **she** probably could have determined whether
10 the baby was vertex or not before discharging her, or would
11 that have also necessitated an ultrasound, in your view?

12 A. I think you can get an idea of the position of
13 the baby **by** doing Leopold's maneuvers. it's not
14 100 percent, but, yes, you can.

15 Q. How long would that have taken?

16 A. Probably a minute.

17 Q. Does that fall within your category of giving
18 a **darn**?

19 A. I would object to that, and **I'm** not going to
20 answer it.

21 Q. Well, would you agree with the proposition
22 that before this little bay **and** his mother were discharged
23 with PPROM from Maricopa Medical Center, some physician
24 should have made a careful assessment of the situation?

25 A. I would agree with that, yes.

I Q. Did you read that portion of Dr. **Arellano's**
2 deposition where he **said** the only circumstance under which
3 he would discharge would be a, quote, ideal, close quote,
4 situation?

5 A. I don't remember the context that that was in,
6 but I remember the words being used, correct.

7 Q. Not even my word, he happened to adopt the
8 word first, and I, of course, then as lawyers sometimes **do**,
9 used the word afterwards.

10 A. I'm sure you did.

11 Q. With respect to these other claims in which--
12 you've been involved, we've got down as far as the Cs, and
13 Mr. Schonberg case. Then Colby, C-O-L-B-Y, versus Morgan
14 in Pueblo, Colorado, a gentleman by the name of Lee
15 Sternal, S-T-E-R-N-A-L.

16 And that's a plaintiff's case, is it not?

17 A. It is, yes.

18 Q. What's the medical issue involved?

19 A. That was a -- I believe that was an
20 amniocentesis that was done for -- to rule out infection.
21 It ended **up** with --

22 Q. Excuse me for not watching you, but I'm trying
23 to save time here.

24 A. -- ended up with a fetal distress and emergent
25 C-section.

1 Q. Your deposition I thought had been taken in
2 that case, and I again apologize for speaking while not
3 looking at you, but am I incorrect?

4 A. It was taken, correct.

5 Q. Approximately when was that?

6 A. Three or four years ago.

7 Q. Next case is that of Colucci, C-O-L-U-C-C-I,
8 versus Lovelace in Albuquerque, New Mexico, the firm of
9 Miller, Stratvert, S-T-R-A-T-V-E-R-T. Was that a
10 plaintiff's claim?

11 A. No, that was a defense.

12 Q. Do you recall the name of the lawyer with whom
13 you specifically worked, the law firm of Miller, Stratvert,
14 et al.?

15 A. No, I don't.

16 Q. What type of a problem was involved, as best
17 you recall it?

18 A. It was a baby that was delivered by forceps.

19 Q. Crushed skull or some other type of injury?

20 A. It was not a crushed skull, it was -- I think
21 there was an intraventricular hemorrhage and neonatal
22 neurologic damage.

23 Q. Castro is the name of that other doctor I've
24 been trying to remember who said that he had this program
25 come out and do a -- what's called a review of the office,

1 or something like that, by Ms. Piccinati and Dr. O'Keeffe,
2 because he referred cases down to your -- any connection?

3 A. It had nothing to **do** with referring cases to
4 us at all. You're totally mistaken in that.

5 Q. No, I'm not, Dr. Castro is, because he said
6 it.

7 A. Then the both of you are, so --

8 Q. Well, don't blame me, please. I'm **just**
9 reporting what he said to me,

10 A. Well, if you feel that that *is* true, then
11 you're mistaken, so certainly Dr. Castro is mistaken.

12 Q. I'll let Dr. Castro know that --

13 A. Please do.

14 Q. -- that you vote for a mistake on his part.

15 The case of Crook, C-R-O-O-K, versus TMC. **Is**
16 this the person who practices down in Tucson?

17 A. Yes.

18 Q. What type of problem was involved there?

19 A. It was a baby that the mother felt lack of
20 fetal movement, and she came into the hospital -- hold it,
21 let me think.

22 Crook --

23 Q. It's not Cook now, it's Crook, at least the
24 way we spelled it here.

25 A. It is Crook.

1 I kind of commented on the name and what they
2 were trying to do.

3 I don't remember exactly what that one
4 involved.

5 Q. Do you recall the name of the plaintiff's
6 counsel, by any chance?

7 A. No.

8 Q. I gather since, again, that was an Arizona
9 case, you declined to -- or would decline to participate on
10 behalf of the plaintiff?

11 A. I wasn't asked to participate on behalf of the
12 plaintiff.

13 Q. I understand that, but even if you had been,
14 you would have refused to do so?

15 A. I would have anyway, because the plaintiff
16 didn't have a valid claim, so even if I was asked to, in
17 this case I wouldn't.

18 Q. Approximately how many cases have you been
19 asked to review by lawyers here in the state of Arizona
20 where at least it was your perception that they were
21 representing a plaintiff?

22 A. Probably four.

23 Q. How many times have you told them that, yes, I
24 do believe there was a deviation from an appropriate
25 standard of care?

1 A. Two out of the four.

2 Q. Lawyers' names, **please**.

3 A. Carter Motey and -- a guy here in Phoenix, and
4 I can't **remember his** name.

5 Q. What was involved in Carter's case?

6 A. It was a case where a woman got a transfusion
7 and apparently developed AIDS.

8 Q. Had the case been in California as **opposed** to
9 being in Arizona, would you have been willing to have
10 **served** as an expert witness --

11 A. **Nu.**

12 Q. -- if asked to do so?

13 A. NO.

14 Q. Why is that?

15 A. It wasn't a case. There was no --

16 Q. Ob, I'm sorry, I thought I asked --

17 A. Nothing below standard.

18 Q. I thought I had asked you for those cases
19 where you had felt that there was a deviation from a proper
20 standard of care.

21 A. Oh, if you did, I'm sorry.

22 Q. Of the four cases you have looked at, how many
23 have you said to the lawyer, yes, I believe there was in
24 fact a deviation from a proper standard of care?

25 A. Two,

1 Q. Now, who are the lawyers in those cases?

2 A. it's the other guy that I can't remember up
3 here in **Phoenix**.

4 Q. Well, in those cases, then, **case number one**
5 and number two, we'll call it -- is there some way you can
6 come **up** with that name?

7 A. No, not that I know of anyway.

8 Q. You **just** accepted the thousand **dollars**, took a
9 look, chatted, and that's -- that's sort of it, you haven't
10 kept records --

11 A. It's been five or *six* years, and I don't keep
12 records on that.

13 Q. Sure.

14 If those cases had been in Pueblo, Colorado,
15 by way of example, would you have said, yeah, I'd testify
16 in these cases?

17 A. No.

18 Q. Why is that?

19 A. I told you before, they had no merit, They
20 have no merit in Arizona, they have no merit in Pueblo,
21 Colorado.

22 Q. I'm sorry, I'm not making myself clear,
23 Doctor. I'm asking you of the four cases that you have
24 looked at where at least it was your perception --

25 A. Oh, where you said they were -- okay. I'm

1 sorry. I keep going back to the other thing.

2 Would I have testified in those case.
3 would have.

4 Q. If they were in another state?

5 A. Yes.

7 Arizona are not entitled to be represented by someone with
8 your qualifications by way of testifying if there has been
9 a deviation from a proper standard of care?

10 A. I don't think anybody *is* necessarily entitled
11 to have someone of my qualifications be an expert witness.-
12 I have suggested to the attorney some very excellent people
13 that would -- he could contact and that have qualifications
14 as -- perhaps as good as mine. As a matter of fact, one of
15 the expert witnesses in this case I refer cases to.

16 Q. Who is that?

17 A. Dr. Nageotte.

18 So I make sure that they have good, qualified
19 **experts** that can come in and testify.

20 Q. Do you perceive that your opinions differ from
21 those of Dr. Nageotte in this case?

22 A. Yes, they do.

23 MS. BRANDON: Could we take just a
24 two-minute break here.

25 MR. LEONARD: Sure.

1 MS. BRANDON: Okay. Thank you.

2 (WHEREUPON, a brief recess was taken from
3 6:31 to 6:34 p.m.)

4 BY MR. LEONARD:

5 Q. To try and sum up, then, we were, I guess not
6 communicating appropriately.

7 On four occasions over the years, lawyers
8 here -- in Arizona -- presented cases to you. On each one
9 of those four occasions, you've said to yourself, I believe
10 there was not appropriate medical care, and had it been in
11 a state other than Arizona, you would have said, yeah, I'll
12 testify?

13 A. No, two out of the four.

14 Q. Okay, A case called Ellman, E-L-L-M-A-N,
15 versus Weinberger, W-E-I-N-B-E-R-G-E-R, Los Angeles,
16 California, Vince McCallan. Was that a plaintiff's case or
17 a defendant's case?

18 A. Plaintiff's case,

19 Q. What was the nature of the problem, as you
20 perceived it?

21 A. I don't remember that case.

22 Q. Do you remember approximately when it was?

23 A. Again, it's on the range of three to four
24 years ago.

25 Q. Golden versus Quirk, Q-U-I-R-K. This is Phil

1 Malcomb's case down in Arkansas. What was the nature of
2 the problem **there**?

3 **A.** The plaintiff was a physician on the staff at
4 **the** University of Arkansas. She had premature rupture of
5 membranes. They observed her and she labored, and
6 Dr. Quirk was the head of maternal-fetal medicine at the
7 University of Arkansas. He was caring for her during her
8 labor.

9 She delivered, the baby had an
10 intraventricular hemorrhage on day two of life and **ended** up
11 with neurologic abnormalities, and they decided to sue.

12 **Q.** Did they have to shunt the youngster?

13 **A.** I believe -- I don't remember exactly.

14 **Q.** Was the delivery in Fayetteville? I know I
15 mispronounce that.

16 **MR. CURE:** That was pretty good.

17 **MR. LEONARD:** I could never quite get it
18 there.

19 **THE WITNESS:** It was at the university
20 hospital. I don't know if that was in Fayetteville or not.

21 **BY MR. LEONARD:**

22 **Q.** I believe it's down in Little Rock.

23 **A.** Then it would be in Little Rock.

24 **Q.** Gebhardt, G-E-B-H-A-R-D-T, versus Sloop,
25 McKelvie & Associates in the state of Washington.

1 Plaintiff's **case** or defense claim?

2 A. That would be a plaintiff's case.

3 Q. What was the nature of the problem **there**?

4 A. I don't remember.

5 Q. Do you recall if your deposition was taken?

6 A. I don't believe it was.

7 Q. Do you recall who in the McKelvie firm
8 actually retained your services?

9 A. No, I don't, offhand. No.

10 Q. Another case from the state of Washington.
11 Gillihan, G-I-L-L-I-H-A-N, versus the University of
12 Washington, Art Swanson. Do you remember when that case
13 took place?

14 A. Again, that would probably be ~~in~~ the three to
15 four years ago.

16 Q. Gonzales versus **Bondoc**, B-O-N-D-O-C, the
17 Bonne, Bridges firm over in Los Angeles. I gather that was
18 a defense claim?

19 A. That was a defense claim, yes.

20 Q. Do you recall who in the firm asked you to
21 participate?

22 A. No.

23 Q. Claim called Hernandez versus Maricopa County,
24 who **asked** you to participate in that case?

25 A. I don't know if that was -- was that your

1 case?

2 Maria.

3 Q. What was the nature of the problem involved,
4 please?

5 A. Oh, I don't even remember that. These are not
6 things that I **keep** in the front of my memory.

7 Q. Was your deposition taken?

8 A. I don't remember.

9 Q. Approximately how long ago?

10 A. Two to three years.

11 a. Hopf, H-O-P-F, in Houston, Texas, a lawyer-by
12 the name of Scott Wilshire. Does that ring a bell?

13 A. Yes.

14 Q. Do you remember taking part in that case?

15 A. Yes.

16 Q. What was the nature of the problem?

17 A. I don't remember the nature of the case.

18 Q. Deposition taken?

19 A. NO.

20 Q. Hubbel, H-U-B-B-E-L, versus Eastern New Mexico
21 Center, Albuquerque, Terry Wood. Plaintiff's claim or
22 something else?

23 A. I don't even remember. Is it not listed down
24 there as plaintiff or defense?

25 Q. No, it isn't.

1 A. Okay. I don't remember,

2 Q. Karout, K-A-R-O-U-T, versus Memorial Hospital
3 of Las Cruces. Thomas S-A-N-D-E-N-A-W, Jr. Do you recall
4 that case?

5 A. Yes.

6 Q. What was the nature of the problem involved?

7 A. That was a defense case that involved a fetal
8 monitor strip and the interpretation of the fetal monitor
9 strip, and the outcome being a baby that had been **damaged**.

10 Q. What was your theory **as** to what **caused** the
11 damage to the child?

12 A. I don't recall specifically, A fetal monitor
13 did not show any evidence of hypoxia or acidosis.

14 Q. You do accept the proposition, do you not,
15 that electronic fetal monitoring can demonstrate hypoxia
16 and acidosis?

17 A. Yes.

18 Q. You also have a little bit different take, if
19 you will, or definition of what is prematurity, do you not,
20 than that of what ACOG puts out?

21 A. I think that the definition of 37 -- less than
22 37 weeks is not a **terribly** functional definition. it
23 doesn't help those of us trying to do something about it.

24 Q. You go down to about 35 weeks, don't you?

25 A. I think that would be a much more practical

1 definition, yes.

2 Q. One of the factors being that most people who
3 work with children substantially know that once you get
4 beyond 35 weeks, you can be reasonably confident that: you
5 have mature **lungs**?

6 A. Certainly beyond 36 weeks you can; 35 weeks,
7 probably, yes.

8 Q. Do you know the figures, or statistics, if you
9 will?

10 A. At 35 and zero-sevenths weeks, if you -- if
11 you look at the statistics, it's about 65 percent will be
12 mature.

13 Q. If we take 36.0, it would be about?

14 A. Probably in the range of 80 to 85 percent.

15 Q. Kreidler, K-R-E-I-T-L-A-R, versus Goodman,
16 Maricopa County, Gallagher & Kennedy. Do you recall who in
17 the firm asked you to be a witness?

18 A. Bob Milligan.

19 Q. What type of a claim was that?

20 A. It was a patient that was -- that had a
21 previous cesarean section and was attempting a V back, and
22 there was a bradycardia and a repeat C-section.

23 Q. You testified for the defense, I gather?

24 A. Yes, I did,

25 Q. Who was the plaintiff's expert?

1 A. I don't remember.

2 Q. Well, what is your position on V backs? We
3 have a movement throughout the country to get away from it,
4 do **we** not?

5 A. What's my position on it?

6 Q. Yes.

7 A. I don't know what you mean by that.

8 Q. Too many of them, just right, not enough?

9 A. I feel that each case needs to be looked at,
10 each patient needs to be looked at as their own separate
11 entity and a decision made with the patient as to whether
12 she wants to attempt a vaginal birth. And informed consent
13 should be given, and if the patient wishes to undergo a
14 trial of labor, that that's a very adequate way to care for
15 a patient that has had a previous cesarean section.

16 Q. They're gathering statistics together right
17 now that demonstrate that there are a tremendous amount of
18 horrible results from V backs, aren't they?

19 A, Most of the statistics that are published do
20 not demonstrate that.

21 Q. I say they're gathering them right now. If
22 you read, for example, what is it, USA Today, I guess.

23 A, I don't think I put a whole lot of stock in
24 what USA Today has to say about medicine.

25 Q. Lorenz, L-O-R-E-N-Z, versus Boatright and

1 Bean. Doesn't say where, but the lawyer is Lance Cooper.
2 Do you remember that case?

3 A. It was in Atlanta, Georgia. It was a
4 plaintiff **case**.

5 Q. What was the nature of the problem?

6 A. ~~It~~ was a woman that had repeated episodes of
7 preterm labor, and with her last one the physician
8 **basically** told her to stay at home, and she delivered the
9 **baby** in a bathtub.

10 Q. Was your deposition taken?

11 A. Yes.

12 Q. Did you appear at a trial?

13 A. Yes.

14 Q. What was the result?

15 A. It was a hung jury.

16 Q. Ortega, O-R-T-E-G-A, versus Kernmer,
17 K-E-M-M-E-R. Again, we don't have a venue, but the
18 lawyer's name is Lynn Sharp, S-H-A-R-P. Do you remember
19 that claim?

20 A. That was a defense claim, and I don't remember
21 it, no. It was in New Mexico.

22

23 A. Albuquerque.

24 Q. Parsons versus **PCH**, Mr. Parks. What was the
25 nature of that case?

1 A. It **was** a group E **strep** case in an infant.

2 Q. Who was the plaintiff's expert?

3 A. I don't know.

4 Q. Each one of these **cases** that you **appear in**,
5 there **is** invariably someone on the other side who sees
6 things a bit differently than you; correct?

7 A. Invariably.

8 Q. What was the outcome in the Parsons case?

9 A. I think they ended up settling it for a small
10 amount. I don't remember exactly. ~~It~~ did not go *to* trial.

11 Q. I thought --

12 A. My deposition was taken.

13 Q. It was a \$5.5 million verdict. Do I have
14 that --

15 A. No, it never went to trial.

16 Q. Povalk, P-O-V-A-L-K, versus J-O-C-H-I-M,
17 Mitten, Goodwin firm. Who in that firm actually was the
18 lawyer?

19 A. Roger Mitten.

20 Q. Approximately how long ago?

21 A. Four years,

22 Q. Nature of claim?

23 A. That Dr. Jochirn had missed on an ultrasound
24 that he had done a significant cardiac anomaly that the
25 baby was eventually found to have at delivery.

1 Q. Who represented the plaintiffs?

2 A. I don't know,

3 Q. Was your deposition taken?

4 A. Deposition and trial, yes.

5 Q. Approximately how many years ago was that?

6 A. Probably also in the three to four range.

7 Q. Perez, P-E-R-E-Z, versus Wolcott,

8 W-O-L-C-O-T-T, Albuquerque, Greg Kauffman. Do you recall
9 that case?

10 A. That would have been a plaintiff's case.

11 Q. What was the nature of the problem?

12 A. It involved preeclampsia, I don't remember
13 the exact issues.

14 Q. Deposition taken?

15 A. Yes.

16 Q. Steve Durkovich's claim of a Plant versus
17 V-A-S-S-A-L, in Albuquerque?

18 A. That would be a plaintiff case, and I don't
19 remember the issues in that.

20 Q. Is that an ongoing claim?

21 A. No.

22 Q. Was your deposition taken?

23 A. I believe it was, yes.

24 Q. What percentage of your income at the present
25 time comes from your medical/legal efforts?

1 A. I've never thought of it that way.

2 Probably -- probably 8, 9 percent, something
3 like that.

4 Q. What percentage of your time do you spend on
5 your medical/legal efforts?

6 A. Well, I have a full-time clinical practice and
7 job, so whatever I do medical/legally is done on my own
8 time, **such** as right now, so it's -- I have more than a
9 full-time job; and then I do this extra, so I won't -- I
10 can't say there's a percentage of time. It's -- it's a
11 second block of time that I take out of other interests and
12 spend it in this fashion.

13 Q. Give us your best estimate, if you would,
14 please, as to approximately how many hours per month you
15 think you probably expend on medical/legal efforts, *or* any
16 other time period, if you want to break it down in some
17 other fashion.

18 A. I would say probably in the range of maybe 15
19 to 20 hours a month, something like that.

20 Q. How long has that held true?

21 A. Oh, probably past couple years for sure. I
22 don't know about before that. I can't estimate that.

23 Q. Has this been a business type that has sort of
24 been evolving over time?

25 A. Yes.

1 Q. You've been doing more of this type of work as
2 time **passes on?**

3 A. I keep getting more people calling me, so it
4 would **be -- yes, I** would say that would **be** true.

5 Q. Have you made your name available on any
6 **medical lists** of physicians willing to review cases?

7 A. No.

8 Q. Did you perceive that anyone who wanted to
9 contact the members of the Expert Medical Opinion, L.L.C.,
10 group would come solely through putting on these seminars?

11 A. That was basically our intent, yes, and then..
12 word of mouth.

13 Q. P-O-T-E-S-T-I-O versus Birner in Pueblo,
14 Colorado, Lee Sternham. Do you recall that name?

15 A. That was a ptaintiff claim, yes.

16 Q. Was your deposition taken?

17 A. Yes. .

18 Q. Nature of the problem?

19 A. I don't remember,

20 Q. Approximately how long ago? .

21 A. **A** few years ago.

22 Q. Rice versus Athens Regional in Georgia,
23 Blasingame, Birch, et cetera, et al. Do you remember the
24 lawyer with whom you actually worked with?

25 A. Gary Blasingame.

1 Q. What was the nature of the problem there?

2 A. It **was** a defense case, and I don't recall the
3 nature of the problem.

4 Q. Deposition taken?

5 A. Yes.

6 Q. Trial testimony?

7 A. No.

8 Q. Roybal, R-O-Y-B-A-L, versus Fleetwood in
9 Albuquerque, Greg Kauffman.

10 A. That would be a plaintiff claim again, and I
11 don't remember the nature of that case.

12 Q. Approximately how long ago?

13 A. That was a while ago.

14 Q. A deposition?

15 A. Yes.

16 Q. Trial testimony?

17 A. No.

18 Q. Seitzburg, S-E-I-T-Z-5-E-R -- B-U-R-G, versus
19 MMC, where apparently you had the opportunity to work with
20 Ms. Brandon. Do you recall that case?

21 A. I think -- yes, that was --

22 Q. What was the nature of that problem?

23 A. Oh, I don't remember exactly.

24 Q. Do you have a sense **as** to how long ago that
25 was?

1 A. Probably four or five years ago.

2 Q. Deposition?

3 A. I don't remember.

4 Q. T-A-S-S-I versus TMMC, Phil Grant **down** in
5 Tucson. Do you recall that case?

6 A. Yes.

7 Q. Nature of the problem was?

8 A. Defense case. That was a woman who -- that
9 was the case that I mixed up. This was the woman who
10 had -- felt the baby stop moving the day before, called in
11 **and** was told to come to the hospital. She **did** several
12 errands first and arrived, and the patient was put on the
13 monitor by the nurses, and it was basically a flat heart
14 rate. And they watched the baby for about an hour and
15 tried to get the attending physician in, and the attending
16 got in and the baby started to have a few decels, and so
17 they did an emergency C-section.

18 Q. And you defended that case?

19 A. Yes. I thought that was one of the most
20 defensible cases I'd ever seen.

21 Q. I gather your position was the damage had
22 already occurred before the baby got to the hospital?

23 A. Yes.

24 Q. Did you blame the mother for not coming in?

25 A. I don't blame the mother for anything. I felt

1 sorry for the mother,

2 Q. Well, was it your position that she should
3 have **come** in immediately as opposed to doing these errands
4 that you suggested that she **did**?

5 A. I -- that was certainly one of the things that
6 I felt was important in the case, yes.

7 Q. You felt that the time frame in between --
8 what **was** the time frame of failure to feel movements, mom
9 went **and did** some errands, and then she got to the hospital?

10 A. The lack of movement was from the day before,
11 so it was over 24 hours.

12 Q. Now, are -- are you of a mind where if there
13 is a lack of fetal movement for 30 minutes or more that you
14 should in fact start to question why?

15 A. No.

16 Q. How long must it be before you say to
17 yourself, if you're reasonably close to term, we better
18 question this?

19 A. Well, if a mother calls and says, I haven't
20 felt the baby move, then you should question it right
21 then. If we -- we ask our patients to keep track of fetal
22 movements for one hour a day, and if they don't get four
23 movements in that hour, to keep track for the next hour,
24 and if they don't get four movements in the next hour to
25 call.

1 Q. Now, Maricopa Medical Center is
2 level facility?

3 A. Yes.

4 Q. Was as of 1994?

5 A. Yes.

6 Q. Highest **degree** of care should be provided?

7 A. Yes.

8 Q. That's your view, is it not?

9 A. I would -- let me go back.

10 When you say the "highest degree of care," a
11 tertiary facility provides the services that would be
12 necessary to provide all care to both low and high risk
13 patients, I think every hospital should provide the
14 highest level of care to their patients.

15 Q. Okay. And when you're speaking to a tertiary
16 level facility, they should have the state of the art type
17 medicine, should they not?

18 A. State of the art what? I'm sorry.

19 Q. Medicine; if they're going to hold themselves
20 out as a tertiary level facility.

21 A. I think all hospitals should have state of the
22 art medicine.

23 Q. So then tertiary level facilities should have
24 that?

25 A. I agree,

1 Q. Now, if in fact you're in a teaching hospital
2 and the mother reports a lack of movement for a period of
3 time, that **is** something that the attending staff should be
4 on in a heartbeat, should they not, if we followed through
5 with your thinking?

6 A. Not if they -- if they -- if the mother said,
7 well, gee, the baby moved this morning and I just haven't
8 felt it now, that's not something that's significant,

9 Q. How long?

10 A. I'm sorry?

11 Q. How long?

12 A. If she says she has felt no fetal movement for
13 a period of several hours, that would be -- more than two
14 hours, that would be abnormal.

15 Q. **Did** you see in this specific case where
16 Mrs. Upton complained of a lack of fetal movement for a
17 **period** of time no one did anything about?

18 A. I **did** not see that, no.

19 Q. Would you consider that to be below an
20 acceptable standard of care if that went on beyond two
21 hours?

22 A. No,

23 Q. How long would it have had to have gone in her
24 case?

25 A. If she had -- if she had said, I felt no fetal

1 movement at **all** for more than three hours, then they should
2 have done something about it, listened with a Doppler.

3 Q. Not two hours, but three?

4 A. I would **say** -- I mean, we -- we don't -- we
5 don't practice medicine like that. Basically, you don't
6 have the patient **constantly** trying to figure out whether
7 there's movement or not. Basically, if she says, I haven't
8 **felt** movement, you question her about, have you felt any
9 movement, and when was the last movement you felt. We're
10 not **constantly** asking them every minute of the day, have
11 you felt the baby move.

12 So there is no standard of care. If she says,
13 I haven't felt the baby move for one, two, three, or four
14 hours, you -- there's no particular standard of care
15 whether she's in the hospital or out.

16 Q. Well, in this specific -- down in the case in
17 Tucson, **did** you render an opinion that the mother failed to
18 **meet** the standard of care, as you perceived it, by going on
19 these errands?

20 A. Absolutely not. There's no standard of care
21 for a mother.

22 Q. Okay. Did you say it made no difference that
23 she! did or did not come in?

24 A. To me, that was a shame that she didn't come
25 in. It had nothing to do with the fact that the baby **was**

1 damaged the **day** before.

2 Q. Did you feel that that made a difference
3 then? **Did you express** that to the jury?

4 A. It **didn't** go to trial, **so** I didn't **express** it
5 to the **jury**.

6 Q. Was the claim settled or --

7 A. The claim was settled, correct.

8 Q. Who **was** the expert on the other side in the
9 Tassi **case**?

10 A. I don't remember.

11 Q. Trueblood versus Flagstaff Medical Center, the
12 Mitten, Goodwin firm. Who was the lawyer with whom you
13 worked?

14 A. Roger Mitten.

15 Q. What was the nature of the problem?

16 A. It was a woman who came in postdates, and she
17 was put on a monitor and observed, and the -- she was
18 contracting in an early labor, they ruptured her membranes,
19 thick meconium, attached a scalp electrode, the fetal heart
20 tones suddenly dropped, and they did a emergent cesarean
21 section without -- under local anesthesia and got a baby
22 that ended up with a meconium aspiration, and the baby
23 eventually died.

24 Q. Okay. You were willing to defend that case?

25 A. Yes.

1 Q. Do you remember being retained as an expert
2 witness on behalf of a Dr. George Davidson in the Holdaway
3 case?

4 A. Yes.

5 Q. And as I understand it, you've now spent some
6 14, plus minus, hours never even sending a bill; correct?

7 In this case.

8 A. In this case, correct.

9 Q. And in the Holdaway case, when I wanted to
10 take your deposition in a case where the doctor wouldn't
11 even come in to see a patient who is having a positive OCT-
12 and late decelerations, you said, I quit, I won't come in
13 because I haven't been paid, didn't you?

14 A. I did not say that, no.

15 Q. You don't remember that?

16 A. I didn't say that.

17 Q. Just last year?

18 A. I did not say that.

19 Q. Why would you not come in for the deposition?

20 A. I wasn't retained by anybody. I was not an
21 expert witness on anybody's part.

22 Q. You weren't advised that you had been named as
23 an expert by Dr. Davidson --

24 A. I was --

25 Q. -- and he was presenting to the Court that you

1 were an expert witness?

2 A. I was -- I was an **expert** witness for --
3 behalf of a law firm that was representing Dr. Davidson.
4 They told me that my services were no longer **needed**, and so
5 I sent a final bill to them. **And** when you served me with
6 notice of a deposition, I had no reason to come to a
7 deposition.

8 Q. You refused to come, didn't you?

9 A. I had no reason to come. I was not an expert
10 **witness** for anybody. I didn't see a purpose in it.

11 Q. And the reason you quit that case was because
12 you weren't being paid, wasn't it?

13 A. Absolutely not. I was told my services were
14 no longer needed.

15 Q. If the law firm had said to you, we still want
16 you involved in the case but we can't pay you, you would
17 have said, that's fine, I'll still go forward?

18 A. I don't know what I would have done. Probably
19 I would have, yeah.

20 Q. Do you support that type of care amongst your
21 residents, if they hear -- they're at home and they hear
22 there's a positive OCT and the nurses call him five
23 separate times to get him in there and they don't come, you
24 say, that's okay?

25 A. I don't think I'm going to answer that

1 question.

2 Q. Why not?

3 A. I don't think it's

4 talking about here.

5 Q. Well, what's

6 appropriate practice of obstetrics.

7 A. I don't think that's -- you

8 out of context as you saw the other case, and

9 Q. Well, how do you expect an expert physician

10 respond in a situation such as that? He has a positive

11 OCT, he just leaves the hospital, and then there are four

12 telephone calls, four nurses asking, please come, and he

13 won't do it?

14 A. That's not the case,

15 Q. Are you going to defend that?

16 A. That's not what happened in that case, so if

17 you're asking me --

18 Q. What happened!

19 A. I'm not going to get into this. I'm sorry,

20 I'm just not going to answer anything --

21 Q. What happened in the Moldaway case, as you

22 recall it?

23 A. I am not going to answer it.

24 Q. Why?

25 A. Because I don't think it's relevant. And

1 you're misstating the facts, and you're not going to get me
2 into an argument with you. It's not going to happen.

3 Q. What are the facts, as you understand them to
4 be?

5 A. I'm not going to answer the question.

6 Q. Do you remember the Moldaway case?

7 A. I am not going to answer any questions about
8 the Holdaway **case**.

9 Q. My question was: Do you remember it, sir?

10 A. I do remember it, yes.

11 Q. Do you remember that you were retained as an
12 **expert** in the case?

13 A. Yes, I do.

14 Q. And you agreed to try and defend that action,
15 didn't you?

16 A, I **did**, yes.

17 Q. Do you recall that there was a positive OCT?

18 A. I'm not answering these questions.

19 Q. Do you recall that: the physician refused to
20 respond to nurses' calls for help?

21 A. He did not.

22 I will not continue to answer any questions
23 regarding this.

24 Q. It's your recollection that Dr. Davidson
25 responded to calls for help?

1 A. Maria --

2 MS. BRANDON: Okay. I think -- we can go to
3 Court and ask the Judge if he thinks it's appropriate for
4 you to discuss the facts of some other case in this case to
5 this extent, but it seems to me that it's getting kind of
6 ridiculous, so can we move on?

7 MR. LEONARD: It isn't to me.

8 MR. CURE: It does to me.

9 MR. LEONARD: I knew it would, Harding. It's
10 perfectly --

11 MS. BRANDON: Apparently, this is an issue
12 that's important to you, but it's like 7:00 at night, and
13 it's not particularly important to the rest of us, unless
14 it has some bearing on this case.

15 MR. LEONARD: It shows just how far this man
16 will go.

17 Let the record reflect that I will charge
18 onward nonetheless and seek the **Judge's** view upon the
19 point.

20 Q. Urban, U-R-B-A-N, versus King, a lawyer by the
21 name of Brian Wright. Where was that located?

22 A. I think that was in Kansas.

23 Q. Okay. What was the nature of the problem?

24 A. I don't remember.

25 Q. Was your deposition taken?

1 A. I think it was, yes.

2 Q. How many years ago was that?

3 A. A number. I don't remember exactly.

4 Q. Webber, W-E-B-B-E-R, versus U.S. Government, a
5 Charles Peifer or Peifer. Do you recall that **case**?

6 A. No, I don't recall it specifically. No. It
7 was a defense case.

8 Q. Located where?

9 A. It was either New Mexico or Arizona.

10 Q. Has Dr. Davidson gotten in touch with you
11 about the next case which involves the exact same set of
12 facts --

13 A. I'm not going to answer this.

14 Q. -- just like the last one?

15 A. I'm not going to answer this.

16 Q. Are you of the view that there are some
17 doctors who really just ought not be practicing out there,
18 even though they may be very nice people?

19 A. I imagine there are some that probably
20 shouldn't be practicing, yes,

21 Q. What is your perception, if we're going to
22 give a damn about all this, as to how we take care of that
23 problem?

24 A. I don't understand what you're saying.

25 Q. What is your perception as to how we are to

1 take care of that problem if there are physicians in our
2 community, here in Phoenix, Arizona, who **are** damaging
3 **babies** and mothers on a continuous basis? Who's going to
4 stop them?

5 A. I think **that's** the job of the board to do that.

6 Q. Now, when were you first contacted **in**
7 connection with this case?

8 A. (Witness reviewing.)

9 I think slightly before February 14th, 1996.

10 Q. In the material we received today, the first
11 letter is one from Ms. Brandon to you enclosing for your
12 review copies of medical records dated 2/14/96. Do you
13 have a copy of that letter, please?

14 A. Yes, I do.

15 Q. Do you -- thank you.

16 Could you do this for us, go through and put
17 together all of your correspondence in connection with this
18 file in order.

19 A. I can do that.

20 Q. Oldest to youngest, if you'd do it in that
21 fashion, please.

22 A. (Witness reviewing.)

23 Q. Thank you.

24 A. You're welcome.

25 Q. You've been kind enough to go through your

1 file and put together a package of some 11 letters running
2 from February 14, 1996 **up** to May 29, 1998; **is** that correct?

3 A. Yes.

4 Q. May I **have** them, please, and we'll have them
5 marked **as** an exhibit to your deposition.

6 A. (Witness complied.)

7 Q. Do those represent all of the correspondence
8 that you have with you today?

9 A. Yes,

10 Q. Is that all the correspondence you have
11 concerning this case, to the best of your ability to pull
12 it together?

13 A. Yes.

14 Q. Thank you.

15 (Exhibit No. 1 was marked for
16 identification.)

17 BY MR. LEONARD: .

18 Q. Exhibit No. 1 will be those 11 letters,
19 Doctor, and the first one is February 14, 1996 from
20 Ms. Brandon. **It** says: "Enclosed for your review are
21 copies of the medical records in the above-referenced
22 matter. Please let me know if you have any questions,"
23 et cetera,

24 Exactly what medical records did you receive
25 initially to arrive at your opinions?

1 A. Can I see the letters?

2 (Witness reviewing.)

3 Q. It's may I. You see, can implies physically
4 can I do it.

5 A. May I.

6 Q. A young vigorous guy tike you certainly can do
7 it.

8 A. It included medical records from Maricopa
9 County Medical Center. I **did** not get the complete medical
10 records from St. Joseph's; I got the delivery records, but
11 not the neonatal records.

12 (Witness reviewing,)

13 And did not include the records from Good
14 Samaritan or Phoenix Fire Department. Those came at a
15 later time.

16 Q. So the only records you obtained originally on
17 February of 1996 -- February 14, 1996 -- would be the
18 records from Maricopa County and a portion of the records
19 from Phoenix St. Joseph's?

20 A. Yes,

21 Q. I gather you went through those?

22 A. Yes.

23 Q. Did you make any notes as you went through
24 them?

25 A. Yes, I did.

1 Q. Where are those, please?

2 A. (Witness reviewing.)

3 Q. Thank you.

4 You've been kind enough to hand me two **pages**
5 of yellow legal pad. Are those all of the records you --
6 or notes, I should say -- that you made?

7 A. **Yes.**

8 Q. At least **on** your first run through the chart?

9 A. Yes.

10 Q. May we mark those, please, as Exhibit 2, and
11 we'll return them to you?

12 A. Thank you.

13 (Exhibit No, 2 was marked for
14 identification.)

15 BY MR. LEONARD:

16 Q. The only records you made concerning the
17 County records that you have consists of some 12 lines;
18 correct?

19 A, (Witness reviewing.)

20 Correct.

21 Q. Did you at any point address the issue of the --

22 A. Actually, on the second page there's another
23 six lines, but --

24 Q. Thank you.

25 You seem to emphasize, at least to my reading

1 of your notes, the fact that the patient wanted to go
2 home. You write that down twice; correct?

3 A. Yes.

4 Q. You don't let patients make that decision, do
5 you? You obviously can't tackle them and tie them to the
6 bed, but on the other hand, if you feel the patient ought
7 to **be** there at the hospital, you make it very clear to
8 them, do you not?

9 A. You can certainly let them know what your
10 opinion **is**, yes.

11 Q. What percentage of your PPRM patients **do you**
12 send home?

13 A. Very small percent; probably less than
14 5 percent.

15 Q. I was rather struck by the fact that at County
16 they **send** home fully 50 percent, at least according to
17 Dr. Arellano, and I believe the others seconded that
18 motion. Do you remember that?

19 A. Yes, I do.

20 Q. Do you find that that's customary in any of
21 the other hospitals here in Maricopa County?

22 A. Actually, it is at St. Joe's.

23 Q. Well, St. Joe's, Doctor -- what's the fellow's
24 name?

25 MS. BRANDON: Welch.

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1 BY MR. LEONARD:

2 Q. Well, what is your understanding how many
3 **times** Dr. **Welch** permitted the resident to try to apply the
4 forcep blade that he apparently couldn't get **applied**?

5 MS. BRANDON: Object to form.

6 BY MR. LEONARD:

7 Q. Not apparently, couldn't.

8 A. I think there were several times, I don't
9 remember the exact **number**.

10 Q. Do you think after once, and at a maximum
11 twice, Dr. Welch should have said, I'm sorry, really, this
12 is a job for me to do --

13 MS. WOODROW: Object to form.

14 BY MR. LEONARD:

15 Q. -- in this instance?

16 A. I think that's Dr. Welch's decision.

17 Q. It surely is. I'm asking your opinion on the
18 subject.

19 A. I was not there, and so I don't know that I
20 would be qualified to comment on that. He felt comfortable
21 letting the resident apply the blades as many times as they
22 did, and then he took over.

23 Q. Did you see Dr. Welch's opinion about the
24 utilization of anesthetic agents and how long they would
25 take to take effect, and there's this clamping down of the

1 lower uterine segment?

2 A. I saw his comment. I don't recall exactly the
3 **time** he felt it **would** take.

4 Q. I believe he said within a minute or so, given
5 the type of agents he was **suggesting** **be** used. Do you
6 recall if you disagreed with that particularly?

7 A. I would -- I would disagree with it, yeah. It
8 takes a little bit longer than that.

9 Q. How much longer?

10 A. It probably takes in the range of two, two and
11 a half minutes.

12 Q. How many double footling breeches have you
13 delivered from below in the history of your career?

14 A, In my life, probably ten to fifteen, somewhere
15 in that range.

16 Q. Okay. With forceps?

17 A. Oh, I don't know that I could remember how
18 many of them had Piper forceps used.

19 Q. Wow many have there been trapped heads?

20 A, I've never had a **trapped** head.

21 Q. Do you at any point in your notes here address
22 this issue of who was the one -- "the one" being the
23 physician -- who was actually making the discharge decision
24 yes or no, go or no go?

25 A. No.

1 Q. Did it occur to you that that's something you
2 really did want to know?

3 A. No.

4 Q. Have you been asked to render any opinions
5 concerning the quality of the resuscitative efforts by
6 Dr. Daily?

7 A. No.

8 4. Have you formed any opinions in that respect?

9 A. Can we go off the record a second?

10 Q. NO.

11 A. Can we take a break, please?

12 MS. BRANDON: Do you want to go outside?

13 Let's go.

14 (WHEREUPON, a brief recess was taken from
15 7:24 to 7:26 p.m.)

16 BY MR. LEONARD:

17 Q. Now, I believe the question, before you took a
18 brief recess to converse with Ms. Brandon -- what was that
19 conversation, please?

20 A. We talked about whether I had an opinion or
21 not.

22 Q. And your reply was?

23 A. I was not hired to form an opinion about
24 Dr. Daily's care.

25 Q. Did you nonetheless form such an opinion?

1 A. I have my opinion, yes.

2 Q. And what is that, sir?

3 A. I think there **are** certainly some questions
4 about the resuscitation that, as a perinatologist, I would
5 raise; as a person having credentials to critique it
6 officially, I certainly don't have those.

7 Q. How many babies have you seen with mean
8 blood gases of five to seven who have lived?

9 A. Say again.

10 Q. How many babies have you seen who have had a
11 mean blood gas in the range of five to seven for a couple
12 of hours and lived to tell about that?

13 MR. CURE: You mean pressure, Jim.

14 MR. LEONARD: Mean blood pressure, I'm sorry,
15 yes.

16 THE WITNESS: I don't follow babies beyond
17 the -- other than cursorily beyond the delivery room, so I
18 can't tell you that I've ever seen any baby like that.

19 **BY MR. LEONARD:**

20 Q. Well, in your cursory review, certainly if a
21 baby is born with very low Apgar scores, that's something
22 you usually will review, will you not --

23 A. Yes, I would.

24 Q. -- to try to figure out why and wherefore?

25 A. Yes, I would.

1 Q. In reviewing those types of charts over the
2 years, could you give us some reasoned estimate, since I
3 believe you **said** 1983 you started practice **here**?

4 A. Yes.

5 Q. Do I have that correct?

6 So we've got '83 to -- about 15 years, give or
7 take?

8 A. *Yes.*

9 Q. In the 15 years, could you give us some
10 reasoned estimate as to how many charts of very low Apgar
11 scores, that we'll define as three or less at one and five
12 minutes, you've reviewed?

13 A. Probably 50.

14 Q. Of those -- again, this is an approximate
15 figure, and I appreciate you giving it to us.

16 Of those approximately 50 or so cases, do you
17 recall any case where, upon looking at the newborn records,
18 if you got to that point, you saw a newborn who had mean
19 blood pressures down in the range of five to seven for two
20 hours of life and lived?

21 A. I don't know that I've ever seen that before.

22 Q. Those are remarkably low figures, are they not?

23 A. They would be, yes.

24 Q. When did you first have occasion to speak with
25 Ms. Brandon, or someone from her office, to let her know

1 what your opinions were after this c
2 2/14/96?

3 A. Probably would hav
4 weeks after that.

5 Q. At that point in tir
6 know your opinions about Dr. Da

7 A. I didn't have tho
8 have.

9 Q. I'm sorry, maybe you didn't.
10 Would you have let them know your opinions
11 about the acidosis or lack thereof?

12 A. I don't know that we even got into that at
13 that point in time, so I don't --

14 Q. Next contact, at least by virtue of letters,
15 was June 4, 1996 when you were sent the medical records
16 from St. Joseph's, a report of a Dr. Karlsson Roth,
17 R-O-T-H, and then depositions of, quote, our doctors, close
18 quote, Drs. Arellano and Chambliss; correct?

19 A. Yes.

20 Q. Do you have any notes from your review of that
21 documentation?

22 A. No, I don't.

23 Q. Is it your usual MO to make notes when you go
24 through depositions or do you tend to just try to infuse
25 the knowledge?

1 A. I just **do** not make notes at all with
2 **depositions.**

3 Q. Okay. How about when you went through the
4 medical **records** from St. Joseph's, any notes for that
5 effort?

6 A. I -- I took some notes. Phose would be on
7 this **page** here.

8 (Exhibit No. 3 was marked for
9 identification.)

10 BY MR. LEONARD:

11 Q. What Ms. Doyle has marked as Exhibit No. 3
12 would be the notes you made in connection with your review
13 of the St. Joseph's Hospital chart!

14 A. Yes.

15 Q. Did you now have the entire chart --

16 A. I believe so.

17 Q. -- from St. Joseph's?

18 A. Yes.

19 Q. Under the timing of 2245, you have down,
20 quote -- amongst other things, quote, could have opted to
21 do a C-section. Even when they -- the head was trapped,
22 they considered a C-section, end of quote; correct?

23 A, Yes.

24 Q. Do you adhere to that opinion today, or those
25 opinions today?

1 A. That was what **was** stated by Dr. Welch in his
2 deposition, and **so** that was kind of recounting that. I --
3 I **would** -- I would have done a C-section on her.

4 Q. Do you feel that the reasonably careful
5 doctor, as they say, would have sectioned this patient?

6 MS. WOODROW: Object to form.

7 THE WITNESS: I think reasonably prudent
8 physicians would go both ways on this. It's a very -- I
9 think it's something that could go either way. I would do
10 a C-section. I would not criticize someone who attempted a
11 vaginal delivery.

12 BY MR. LEONARD:

13 Q. You then had down: "Patient waited one hour
14 and forty minutes to get the ambulance there. Did she have
15 transportation?"

16 Did you satisfy yourself as to that inquiry?

17 A. I -- I still probably don't know whether she
18 had transportation that: she could have gotten to the
19 hospital.

20 Q. Did you understand that as soon as her husband
21 saw this foot, he called 9-1-1?

22 A. Yes. I'm concerned with before that. There's
23 some reference to the fact that she was contracting as
24 early as 2030, although the fire department stated that
25 there was only one contraction, so I'm not sure how many

1 contractions she was having and whether she knew prior to
2 the feet coming out that she was contracting and should
3 have notified somebody sooner.

4 Q. Well, **did** you understand -- or firstly, you do
5 tend to have the view, do you not, that there's something
6 called the 30-minute rule that has been promulgated by
7 ACOG?

8 A. I don't know where that came from, but, yeah,
9 that's -- it's out there.

10 Q. Your view on that is you should do it as
11 quickly as possible, isn't it?

12 A. Yep.

13 Q. And this 30-minute rule is not a rule, close
14 quote, but rather if you can get the job done in five or
15 ten minutes, you should **do** it in five or ten minutes?

16 A. I would agree with that.

17 Q. And you've in fact seen cesarean sections done
18 in five or ten minutes; correct?

19 A. On occasion, yes.

20 Q. You yourself personally, once you get there by
21 the bedside, have the necessary materials to do the job,
22 can get the baby in, what, one, two, three minutes?

23 A. Well, it depends on whether you're at the
24 bedside or whether you're on the operating table.

25 Q. On the operating table?

1 A. If you're ready to start, you should be able
2 to get the baby out in less than three minutes, yes.

3 Q. How about if you're in a situation where you
4 have a prolapsed cord, a frank prolapsed card, and you're
5 all set, got everything there and you could do the baby by
6 section, and you go ahead and try and do it by a mighty
7 vac. Does that meet the standard of care? It takes you
8 ten minutes, and the baby ends up horribly damaged. And up
9 until that time, they've got a strip that looks dandy; the
10 last ten minutes, the strip is gone, end up with a horribly
11 damaged kid. HIE?

12 A. I think that if you -- if you choose a -- an
13 alternative of delivery, you take certain risks, and
14 whether I would choose that, I probably would not choose
15 that.

16 Q. By golly, if you had a baby there with a
17 prolapsed cord and you weren't very confident in your own
18 mind you were going to get *it* out on one -- one pull with
19 the mighty vac, you'd go to a section, wouldn't you, and
20 have that baby in one or two minutes?

21 A. I probably wouldn't have pulled with the
22 mighty vac, I would go to the section.

23 Q. Is it a true statement, Doctor, as I believe
24 you testified to in the Barlow case in Kansas, that 30
25 minutes is no more than a target, and you do not personally

1 regard **it** as a **standard** of care?

2 A. I would agree with that. Said quite
3 eloquently.

4 Q. That's because you said **it**. Gee whiz.

5 A. I know.

6 Q. With ail due modesty.

7 A. Absolutely.

8 Q. The next contact by way of letter was July 18,
9 1996. It sent along the EMS records, the Good Samaritan
10 records, and some records from the Department of Human
11 Services, O-K-M-U-L-G-E-E, Oklahoma, and then the Arizona
12 AHCCCS records.

13 Did you have an opportunity to get through all
14 of those?

15 A. Yes.

16 Q. Do you have notes on those, please?

17 A. No.

18 Q. Is there anything about those that stands out
19 in your mind specifically? To shorten things up, apropos
20 any opinions you're going to express in this case.

21 A. As far as my opinions, unless I'm asked
22 something that I doubt I'll be asked, no.

23 Q. Up until today, we were advised that your only
24 opinions were that the discharge was within the standard of
25 care, and the status of William Upton post-delivery was not

1 caused by the care or treatment received by his mother at
2 Maricopa Medical Center or by her discharge from County?
3 Is that the **sum** and substance of it, at least as you
4 understand it?

5 A. Yes.

6 Q. October 15, 1996, it says: Enclosed please
7 find a copy of Dr. Kathleen Norman's deposition. Any notes
8 on that?

9 A. No.

10 Q. April 7, 1997, the deposition of Dr. Kenneth
11 Welch. It says "...a copy of a letter by opposing
12 counsel." I guess that would be me.

13 Do you have any notes on either of those?

14 A. No.

15 Q. September 9, 1997, the ACOG Technical
16 Bulletin 115 from April of 1988, and then 163, January
17 1992. Do you not have a copy of the technical bulletins
18 readily available to yourself?

19 A. Oh, I have them, yes.

20 Q. I would presume you do.

21 Do you also keep the committee opinions?

22 A. I -- I have some of them, yes.

23 Q. Do you regard the technical bulletins as
24 establishing standards of care?

25 A. NO.

1 Q. Do you regard committee opinions as
2 establishing **standards** of care?

3 A. NO.

4 Q. Those really aren't the purposes -- even
5 though some people try **and** do that through those, those
6 aren't the purposes of those documents, are they?

7 A. No, they're not.

8 Q. Have you sat on any of the committees that
9 have tried to develop the documents to which I have just
10 made reference?

11 A. Yes, I have.

12 Q. Specifically, which field or fields, or areas
13 of concern perhaps would be another way to put it?

14 A. Committee on obstetric practice.

15 Q. What specifically was that?

16 A. Basically, their concern with the technical
17 bulletins and the educational materials that are sent out
18 by ACOG.

19 Q. Did that come out in the form, then, of a
20 technical bulletin, a committee opinion, or Some other
21 document that I should look for?

22 A. What's that?

23 Q. This -- this fruit of your work, as it were.

24 A. I don't **understand** what you're saying.

25 Q. I thought you -- my question was if you had

1 worked on one of these committees that they get together
2 and form --

3 A. Yes. I was on --

4 Q. -- technical bulletins.

5 A. -- on the committee, correct.

6 For two years I was on the committee.

7 Q. Excuse me.

8 The purpose of the committee was to do what?

9 A. Was to issue educational bulletins on
10 appropriate matters of interest to the college fellows.

11 Q. Was there any specific area in which you were
12 working or were you on several different ones?

13 A. No. The committee -- the committee is a group
14 of -- of general obstetricians. There's a neonatologist on
15 it, there's five or six perinatologists, there's an
16 anesthesiologist, there's a nurse midwife, there's several
17 representatives from the college, and so the committee
18 meets usually in Washington four times a year and goes
19 through an enormous amount of material. Individuals are
20 tasked with -- with putting together the educational
21 materials, and then the committee shapes it and forms it
22 into the final documents which then go through the ACOG
23 hierarchy to be approved.

24 Q. When you said they're tasked with putting it
25 together, let's take, by way of example, the technical

1 bulletin where they specifically mention Dr. Niswander and
2 Karen Nelson, applaud them for their efforts in that
3 respect. Did you participate in that in any way?

4 A. No. I was a member of that committee from '96
5 through this year, so my tenure on that committee was
6 recent.

7 Q. So any technical bulletins or committee
8 opinions that come out from when to when would be the ones
9 in which you might have had some function, or input, I
10 guess, would be a better word?

11 A. I have no idea when they get published in
12 relation to -- there's a delay --

13 Q. I know.

14 A. -- and so I can't -- can't even tell you when
15 the things that we worked on will be published or have been
16 published.

17 Q. That sort of leads me back, then, to **my**
18 specific first question: Were there any areas in which you
19 had a lot of input specifically --

20 A. NO.

21 Q. -- as opposed to whatever issue came up, you
22 gave your thoughts on?

23 A. No, there were no areas of specific inquiries.

24 NO.

25 Q. And they don't usually denominate the people

1 in a specific technical bulletin as being the people who
2 developed the bulletin, do they?

3 A. No, they **do** not.

4 Q. In February of this year, February 26th, 1998,
5 Ms. Brandon **sent** a letter saying, "Please review **and** call
6 **me** to discuss," specifically reviewing the Upton versus
7 Maricopa County, et al., case.

8 Do you have any recollection of the
9 discussion, or any notes?

10 A. Obviously, we discussed the case; and I can't
11 have any notes, and I don't have any specific recollection
12 of what was **discussed**.

13 Q. April 23 of this year you received the
14 depositions of Drs. Pomerance, Daily, Coonrod, Cambridge,
15 Mickelson, Duckett, and Nurses Terry Yates-Zinkl and
16 Robin -- it says Teeman, but I believe it's probably
17 Teters.

18 Do you have any notes from going through
19 those?

20 A. No.

21 Q. And it also says the statement of Dr. Nageotte
22 and a disclosure of Dr. Maupin, our expert witness.

23 **Did** you make any notes in going through any of
24 that material?

25 A. No, I did not.

1 Q. May 12, 1998 you have plaintiffs' corrected
2 supplemental disclosure statement regarding the opinion of
3 Dr. Maupin being sent to you. Did you make any notes as
4 you went through that?

5 A. No.

6 Q. In terms of the last letter, you were sent the
7 deposition transcript of Dr. Nageotte. Do you remember
8 getting that --

9 A. I got that, yes. I was waiting for the rest
10 of what you were going to say.

11 Q. May 29, 1998.

12 Did you make any notes as you went through
13 Dr. Nageotte's deposition?

14 A. No.

15 Q. I notice one other page of notes.

16 A. I know it was killing you, as a matter of fact.

17 Q. It really was.

18 A. These are notes that I made the other night
19 when I was reviewing the case.

20 Q. Thank you.

21 (Exhibit No. 4 was marked for
22 identification.)

23 BY MR. LEONARD:

24 Q. What the court reporter has marked as Exhibit
25 No. 4 are some notes that you made as you were, quote,

1 reviewing the case the other night?

2 A. Yes.

3 Q. Thank you.

4 What specific portions of the **case** did **you**
5 review in order to come up with these notes?

6 A. I basically looked through the whole case.

7 Q. I'm -- forgive me then. I'm having an
8 extremely difficult time reconciling 14 or 15 hours with
9 going through all of this material initially, which **is** a
10 substantial stack of **material**, and then if you went back
11 through it all the other night --

12 A. Oh, I didn't go through all the depositions or
13 anything like that. I just quickly went through the
14 records to refresh **my** memory.

15 Q. Do we now have all of your notes?

16 A. Yes.

17 Q. Thank you,

18 In the part of these notes marked Exhibit
19 No. 4, you say, "The UC" -- I take **t** that's umbilical
20 cord?

21 A. Yes.

22 Q. -- "is not compressed until the head is
23 entrapped six minutes or less," close quote.

24 Is that your view of the situation?

25 A. Yes.

1 Q. "initial blood gas reflects normal acid base
2 status."

3 Do you adhere to that?

4 A. Yes, I do.

5 Q. **Did** you read the opinion of Dr. Pomerance --

6 A. I read his opinion.

7 Q. -- by way of example?

8 A. I did.

9 Q. And Dr. Sills?

10 A. I did.

11 Q. Do you understand how they're arriving at
12 those opinions?

13 A. I don't know that I necessarily understand how
14 they're arriving at it. I disagree with their opinion.

15 Q. Have you done any writing in the field of
16 blood gases, as has Dr. Pomerance?

17 A. No.

18 Q. Do you recognize what he's trying to say as to
19 how you could have these values?

20 A. I disagree with his assessment. **As soon as**
21 the umbilical cord is freed when the head is delivered,
22 there would be immediate circulation, even if the heart
23 rate was down, so by the time they clamped the cord, there
24 would be -- if the baby was -- is acidotic, as he would
25 **like** to believe, the cord would reflect that. **It may** not

1 reflect the true final equilibrated state, but it would be
2 very close to that.

3 The other blood gas at -- at -- I don't have
4 it written on here -- can I see my other notes?

5 (Witness reviewing.)

6 The other blood gas that was obtained from the
7 baby at 2320 would, despite the -- the resuscitation, which
8 **did** not go very well, had a pH of 7.23, which would be
9 virtually impossible if this baby started with a blood gas
10 in the severe acidotic range and then had the neonatal
11 course that it had up until the time of that blood gas
12 being obtained. So I think that the most likely
13 explanation is that those -- those values represent the
14 true state of the baby at the time ~~of~~ delivery.

15 Q. Do you recognize that a base excess of minus
16 18 represents pretty profound acidosis?

17 A. I do.

18 Q. And this, with respect to this gas that you
19 pointed to with a pH of 7.23?

20 A. Yes.

21 Q. And do you recognize that the cord gases are
22 precisely consistent with what you would expect if one was
23 arterial and one was venous?

24 A. Yes.

25 Q. Have you, by any chance, read Dr. Pomerance's

A.

Q.

6 is not met in this instance is a pH of less than 7.0?

7 A, Oh, I believe the other two aren't met
8 either. I don't believe there was generalized damage to
9 this baby, and I don't think there was neurologic damage in
10 the first 24 hours.

11 Q. Okay. Then despite the **depth** and length of -
12 the mean blood pressures, you don't think there was damage
13 taking place?

14 A. Damage to what?

15 Q. To the baby taking place.

16 A. There was not evidence of multi-system damage
17 to this baby, correct.

18 Q. In reviewing the records from Good Samaritan
19 Hospital, did you **find** evidence of multi-system dysfunction?

20 A. I can't say that I recall specifically the
21 records from Good Sam.

22 Q. Did you look at that with that question in
23 your mind?

24 A. I was looking at the records of St. Joseph's
25 looking at the initial response, which is what the -- the

1 technical bulletin **is** referring to, not what happens later
2 on from things that happen in the nursery, so it's not --
3 it's not the things that happen a month down the line that
4 you're looking at, it's the initial response of the **baby**,
5 so I **did** not feel that that was pertinent to -- to the
6 initial definition,

7 Q. Well, you don't have to have involvement of
8 all other organ systems, do you?

9 A. You have to have --

10 Q. You can have ATN, for example, **and** that is the
11 other organ dysfunction --

12 A. You --

13 Q. -- or do you say, I have to have ATN, I've got
14 to have heart dysfunction, I've got to have lung
15 dysfunction, I've got to have everything?

16 A. Well, this baby ended up with -- the
17 creatinine never got above 2.2 or 3. The shutdown of
18 the -- of the kidneys is not solely necessarily due to --
19 to an ischemic event. They're -- usually, if you have that
20 profound an event, you will have certainly other organs
21 that will show it, not just the kidneys.

22 Q. Do you allow for the fact in your mind,
23 Doctor, that there may be neonatologists who are a bit more
24 knowledgeable about these subjects than you?

25 A. I don't know what you're saying **about** that.

1 Q. Well, the fact that they deal primarily with
2 the neonatal **side** of this problem **versus** you -- I'm
3 certainly not down-playing your abilities or capabilities,
4 but you are, by training, a maternal-fetal specialist as
5 opposed to a fetal-maternal specialist?

6 A. I am, yes.

7 Q. Have we now exhausted all of your notes?

8 A. You have.

9 Q. Anything else that you've reviewed in
10 connection with the case?

11 A. I've looked at one piece of literature and the
12 ACOG practice bulletin from June of 1998.

13 Q. I might have them, so I don't have to trouble
14 you for *copies*.

15 The one is an article encaptioned "Preterm
16 Premature Rupture of Membranes, a Randomized Study of Home
17 versus Hospital Management" from OB-GYN, 1993 January --

18 A. Yes.

19 Q. -- correct?

20 Thank you.

21 **And** then an ACOG practice bulletin on PROM
22 from 1998; correct?

23 A. Correct.

24 Q. Did you get the PPRM bulletin relative to
25 this time frame back in 1994?

1 A. I have the **one** from 1998.

2 Q. Yes, **sir**, I appreciate that.

3 A. Excuse me, 1988.

4 Q. Okay. Was that the one **applicable**, then, as
5 of 1994, or was there one in between ninety -- 1988 and
6 1994?

7 A. I don't know if it **was** applicable in any point
8 in time. **As** care evolves, certainly things change, so I
9 was looking at what was sent out in 1998 and comparing that
10 to 1988, and that's why I looked at it.

11 Q. Did you find any differences that: you deemed
12 particularly significant?

13 A. I think the 1988 educational bulletin is more
14 supportive of home care than the 1988 builetin **was**.

15 Q. I'm sorry, you said --

16 MS. BRANDON: You misspoke You said '88
17 twice.

18 BY MR. LEONARD:

19 Q. I think you said --

20 A. I'm sorry, The '98 bulletin is more
21 supportive of home care with PPRM than the '88 bulletin.

22 Q. Thank you.

23 Anything else that you brought with you in
24 connection with your review of this case?

25 A. No.

1 Q. In terms of reviewing this case, in fairness
2 to everyone involved, did you go through all of the
3 materials presented to you?

4 A. Yes, I did.

5 Q. And take them into consideration in arriving
6 at your opinions in the case?

7 A. Yes, I did.

8 Q. For what little or more they be worth?

9 A. Yes, I did.

10 Q. And have we -- has the County set forth in --
11 I believe it's their last disclosure statement, 11/21/97,
12 the guts of your testimony as I read it to you?

13 A. (Witness reviewing.)

14 Yes.

15 MR. LEONARD: Thank you very much. That's
16 all I have.

17 These other folks may have some questions of
18 you.

19 MR. CURE: I may have a question or two,
20

21 E X A M I N A T I O N

22 BY MR. CURE:

23 Q. My name is Harding Cure. I'm representing
24 Dr. Daily.

25 (WHEREUPON, a discussion was held off the

1 record.)

2 **BY MR. CURE:**

3 Q. Dr. Elliott, you said that you had some -- I
4 **guess** you call it opinions -- about the care post-birth
5 regarding the neonatologist in this case?

6 A. I do.

7 Q. But my impression was that you -- those were
8 opinions that you picked up as you we went along but you
9 were not hired to give in this case; is that accurate?

10 A. Correct.

11 Q. Would you agree that when it comes to giving
12 such opinions, that a neonatologist would be more reliable
13 than someone of your specialty?

14 A. In general, yes.

15 Q. In general, you would yield to a neonatologist
16 on those items?

17 A. Yes.

18 Q. I'm not sure I understood some of the dialogue
19 between you and Jim.

20 A. I'm not sure I did either.

21 MR. LEONARD: Gosh, thanks, Harding.

22 **BY MR. CURE:**

23 Q. Have you been asked to give opinions on
24 causation as to when and how this baby was injured?

25 A. I -- I think indirectly, as it relates to the

1 fact that I'm defending the actions of the County
2 **physicians**, and since some blame is being thrown that way,
3 I probably will have opinions in that area.

4 Q. Opinions that you have not yet **expressed** today
5 in this deposition?

6 A. I don't think I've been asked that.

7 Q. Okay. I thought you were a while ago. That's
8 why -- that's what I was -- I thought you said something
9 like there was no damage in the first two days. **Did I**
10 mishear what you were saying?

11 A. No, I said -- that's correct.

12 Q. Did you mean the first two days from birth?

13 A. Right.

14 Q. This child you think was not harmed or did not
15 suffer any damage during that period of time?

16 A. I don't believe that any damage that was
17 suffered by this child occurred during the delivery period
18 or the period that -- let's start -- let's start with the
19 period from when she was admitted to Maricopa Medical
20 Center until the delivery of the baby.

21 Q. I may have misunderstood you then. I thought
22 you said that there was no damage from the time of birth
23 for two days thereafter.

24 A. No. There **was** no evidence of multi-system
25 damage in the baby in the first couple of days of life.

1 Q. Okay. When do you believe that this child
2 suffered harm or damage?

3 A. This is one of the most perplexing cases that
4 I've looked at in **all** the **years** that I've been doing this,
5 either **medical/legally** or **in peer** review or just to try to
6 figure out what happened. This **is** not a **clear-cut** case, by
7 any means, and anybody who says it is is not being
8 straightforward.

9 There **is** not good evidence that there is
10 hypoxic ischemic acidotic damage to this baby. The
11 potential etiologies are -- are not clear. This -- the
12 type of damage that this **baby** has, the developmental delays
13 fit much more with some inherited syndrome or viral illness
14 or with prematurity in general. They do not fit well with
15 hypoxic ischemic damage.

16 Q. In what way do they not fit with hypoxic
17 ischemic damage?

18 A. I think Mr. Leonard kind of went through that,
19 my opinions. I don't believe there was neurologic
20 manifestations in the first 24 hours; the pH was not in a
21 range of causing damage; there was not multi-organ failure
22 damage early **in** the course of this baby's hospitalization
23 at St. Joe's; and the pattern of injury, although they **did**
24 not get appropriate neurologic studies of the baby, they
25 relied on ultrasound instead of getting MRI or CT scans of

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resuscitation that occurred would ever have a pH of 7.23 at
20 minutes after the hour.

1 If the baby started with a normal pH and had a
2 difficult resuscitation and was partially compensated with
3 bicarb **and** other resuscitative measures, the baby could
4 have a pH that was in that range and have a negative base
5 excess of minus 18 and that would be consistent with a
6 difficult resuscitation, but the -- to start with a bad
7 baby with acidosis and then have the difficult
8 resuscitation and the -- the discontinuation of the
9 resuscitation, you would never get a pH of 7.23 at that
10 point in the neonatal course.

11 Q. You would expect it to be much lower?

12 A. Yes, urn-hum, much lower.

13 Q. What if the baby had been acidotic at birth
14 but the resuscitation had been effective, could you get a
15 7.23?

16 A. That would be what you would hope *for*, yes.

17 Q. But you think that's not consistent with the
18 facts here because of what, because you don't believe the
19 baby was acidotic?

20 A. Well, they abandoned resuscitation thinking
21 the baby wasn't going to make it, so you don't do that on a
22 baby that's vigorous and is being resuscitated.

23 Q. And your opinion that the cord gases were
24 reflective of the baby's condition **is** based on your
25 conclusion that at **the** moment of birth and **before** clamping

1 the blood would immediately circulate in the cord and
2 equalize, so to speak, even if the baby's heart wasn't
3 beating?

4 A. Well, the baby's heart was **beating**, we know
5 that, so the -- the basis of my opinion for that is, number
6 one, the gases that we talked about; number two, the fact
7 that the cord would -- in the time it takes them to get the
8 baby out and as soon as the head *is* released, you would
9 probably have in the range of 20 to 30 seconds by the time
10 they get the cord clamped and the baby fully delivered, and
11 so you'd have in the range of 20 heartbeats that would pump
12 blood through the cord, so you probably -- I don't know
13 whether you would have time to equilibrate the entire
14 circulation of the -- of the baby at that point in time,
15 but you would certainly see something other than a normal
16 pH that was seen in the artery and the vein *of* this baby.

17 Q. Jim asked you about Dr. Pomerance's testimony,
18 and others as well. You've seen the deposition testimony
19 about the manner in which they believe that the trapping of
20 the head and pressure on the cord would, in essence, cause
21 the blood in the cord at birth to reflect the condition of
22 the baby before the cord was clamped -- or excuse me --
23 trapped. You've read that?

24 A. I -- I **did**, yes.

25 Q. Did you think that's a -- a reasonable

1 explanation?

2 A. No, it's baloney.

3 Q. Why is that, sir?

4 A. Physiologically, it doesn't happen. As soon
5 as that head is -- is through there, the baby is going to
6 be -- as long as it's got a heartbeat -- and we know it had
7 a heartbeat at delivery, at one minute anyway. I don't
8 know, I'm assuming it had a heartbeat at delivery. I'm
9 making that assumption. At one minute it certainly had a
10 heartbeat -- that heart is going to be pumping blood
11 through that cord, so it's -- it's going to be
12 equilibrating. And let's just say it was 6.8 or 6.7, a
13 couple of pumps and you're going to have that 7.32 mixing
14 with 6.7, and it isn't going to be 7.32, it will be maybe 7
15 or 7.1 or something, 6.9, depending on how many
16 circulations you get with that. So it's -- there's no way
17 that what they're saying can happen. I've never seen it.
18 Physiologically, it doesn't make any sense.

19 Q. Obviously, these are some individuals who
20 think physiologically it does make sense, and that it would
21 happen?

22 A. They're neonatologists, they're not
23 perinatologists.

24 Q. You think neonatologists are not competent to
25 discuss cord gases?

1 A. I don't think they're competent to tell what
2 happens in a clamped cord while it's still inside the
3 mother. I think ~~I'm~~ a lot more qualified to do that.

4 Q. Okay. Other than your own opinion, have you
5 seen anything or can you cite us to anything that would
6 support this opinion of what would happen physiologically
7 and how this would be impossible?

8 A. I would doubt that there's anything in the
9 literature about that at all.

10 Q. My question actually wasn't -- I understood
11 your opinion about what happens after birth and during that
12 moment or so before the cord is clamped. My question is:
13 During the time of head entrapment: when the cord is
14 compressed, do you agree at that -- that during those
15 minutes before birth that the blood would not circulate and
16 would reflect the condition chemically of the child before
17 entrapment?

18 A. Yes, I would.

19 MS. WOODROW: Object to the form.

20 THE WITNESS: I'm sorry.

21 I would agree with that.

22 BY MR. CURE:

23 Q. So it's just in that last moment or moments
24 between birth and the clamping that this equalization would
25 take place?

1 A. Correct.

2 Q. What opinions -- and reserving all rights to
3 object to **any** such opinions -- what opinions have you
4 reached about the resuscitation, to the extent you've
5 reviewed that?

6 A. I'm very surprised at how quickly the
7 resuscitation was called. I don't think that's standard.
8 And I think that the fact that the tube was never
9 repositioned is certainly not what I was taught about how
10 to resuscitate a baby.

11 Q. Okay. Is the discharge of the mother with the
12 premature rupture of membranes, is that an issue that would
13 primarily be handled by a perinatologist as opposed to an
14 OB?

15 A. "Handled **by**," i don't understand your
16 question.

17 Q. Is that the kind of condition -- or decision
18 that you make **in** your practice?

19 A. I **do** for ~~my~~ practice, yes. I think OBs make
20 it for their practice. I'm not unique to be caring for
21 patients with premature rupture of membranes.

22 Q. What are the factors that you think justified
23 discharge of this mother when she was discharged from
24 Maricopa County Hospital?

25 A. *First of* all, the patient wanted to go home.

1 She was pushing them to do that. She was stable, She had
2 an adequate amniotic fluid index. She was afebrile. She
3 demonstrated everything that you would want to have in
4 order to show **stability** and ability to go home. She was
5 not contracting. She **didn't** have a temperature; white
6 count was not elevated.

7 Q. In your practice, would you have discharged
8 this lady from the hospital?

9 A. I would have counseled her about the risks and
10 benefits of going home, and if she said, I would like to go
11 home, I would have discharged her from my hospital, yes.

12 Q. What would you have told her about the risks?

13 A. I would tell her that the risks are that you
14 can go into labor and not get back to the hospital in time;
15 that you could develop an infection; that you could have a
16 cord accident in utero that would potentially damage or
17 kill the baby.

18 Q. Would you do --

19 A. All of those things can happen in the
20 hospital, too.

21 Q. Would you do an ultrasound prior to discharge?

22 A. Would I?

23 Q. Within 48 hours -- or 24 hours, excuse me.

24 A. If I had done one 48 hours prior, no, I would
25 not.

1 MR. CURE: That's all I have, Thank you.

2

3

E X A M I N A T I O N

4

BY MS. WOODROW:

5

Q. Dr. Elliott, I represent Dr. Welch. **My** name
6 is Susan Woodrow.

7

8

I take it from your testimony earlier that
you've not been asked to comment on Dr. Welch's care of
9 Mrs. Upton in this case; is that correct?

10

A. No, I have not.

11

12

13

14

Q. And I also take it from the few questions that
Mr. Leonard asked you that you were not critical of
Dr. Welch's care of Mrs. Upton in this case; is that
correct?

15

A. No, I was not.

16

Q. You were not critical?

17

A. No.

18

MS. WOODROW: That's all I have.

19

MS. BRANDON: I have nothing further.

20

21

F U R T H E R E X A M I N A T I O N

22

BY MR. LEONARD:

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24

25

Q. Doctor, did you ever at any time in your
disclosure statements as filed by the County express one
single opinion about causation?

1 A. Not in the disclosure statements, no.

2 Q. In January of '96 you estimated that you were
3 **reviewing** about ten to **twelve cases** per year and giving
4 depositions in about one-half of those. Does that still
5 hold true today or has that increased, decreased, gone in
6 which direction?

7 A. I think we established somewhere between six
8 and eight depositions, so I would say that's probably in
9 the ballpark, **yes**.

10 MR. LEONARD: Thank you. That's all I have.

11 MS. BRANDON: I have another one.

12

13 E X A M I N A T I O N

14 BY MS. BRANDON:

15 Q. The -- could you find for me the disclosure
16 statement -- are these all the disclosure statements that
17 you --

18 A. Is there one in there I missed when we were
19 talking about it?

20 Q. That's the one.

21 Dr. Elliott, Mr. Leonard just asked you if in
22 any of your disclosure statements you uttered one comment
23 about causation, and you indicated no. And I recall that
24 earlier in this deposition Mr. Leonard read to you a
25 portion of your disclosure statement which included the

1 statement -- **and** I'm repeating what Mr. Leonard earlier
2 repeated -- quote: "That injuries were not caused by the
3 care and treatment plaintiff received at Maricopa Medical
4 Center."

5 Do you recall --

6 A. Yes.

7 Q. -- that that testimony was in fact during the
8 same deposition read to you by Mr. Leonard?

9 A. Yes.

10 Q. And that would you therefore want to change
11 your answer about whether or not any statements regarding
12 causation were --

13 MR. LEONARD: Object to the form of the
14 question.

15 THE WITNESS: I guess I misunderstood
16 Mr. Leonard's question as I had assumed that we had gone
17 over that already. I thought he was talking about further
18 causation.

19 BY MS. BRANDON:

20 Q. Okay.

21 A. Yeah. I guess I would stick **by** what's there.

22 Q. Okay, And, Doctor, you've reviewed the
23 complete chart of Janet Upton at Maricopa Medical Center
24 from -- I guess it's April 21st, or April 20th, 1993 to
25 April 24th, 1993; ~~is~~ that correct?

1 A. Yes, I have.

2 Q. And did you -- was there anything in that
3 chart that **you felt was** indicative of **care** that was beneath
4 the standard?

5 MR. LEONARD: Object to the form **of** the
6 question.

7 THE WITNESS: No, nothing at all,
8 BY MS. BRANDON:

9 Q. Okay. Did you feel that either Dr. Arellano
10 or Dr. Norman needed to perform a second ultrasound on
11 Janet Upton prior to discharge?

12 A. No.

13 MR. LEONARD: Object to the form of the
14 question,

15 MS. BRANDON: I have nothing further.

16

17 FURTHER EXAMINATION

18 BY MR. LEONARD:

19 Q. Do I understand you correctly, Doctor, that
20 insofar as you were able to review this chart, you find
21 zero indication of maternal infection at Maricopa County
22 Hospital?

23 A. Correct.

24 Q. Insofar as you were able to review whatever
25 information they had about the baby, there was zero

1 indication of any infection of the baby?

2 A. correct.

3 Q. **And** in terms of anything about causation, **did**
4 you get in any of **these** wild and wonderful details that you
5 gave us today or is just the word "causation" used in one
6 of the prior disclosure statements?

7 A. That covered my opinions.

8 MR. LEONARD: Thank you, That's all I have.

9 MR. CURE: Let's go home.

10 (WHEREUPON, the deposition was concluded at
11 8:19 p.m.)

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JOHN P. ELLIOT, M.D.

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