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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF ORANGE

LAW OFFICES OF MARK B.  
PLUMMER, PC,

Plaintiff,

vs.

Case No.  
30-2011 00524331

SLOBODAN CUK, MERRITT L.  
McKEON, and DOES 1 through  
20, Inclusive,

Defendants.

MERRITT McKEON,

Cross-Complainant,

vs.

LAW OFFICES OF MARK B.  
PLUMMER, P.C., MARK B.  
PLUMMER individually and ROES  
1-20, inclusive,

Cross-Defendants.

DEPOSITION OF MARK B. PLUMMER

Irvine, California

November 1, 2013

Cindy Duynstee, CSR  
Certificate No. 12938

1 Pursuant to Notice to Take Deposition, on  
2 Friday, November 1, 2013, commencing at the hour of  
3 9:28 a.m., at 5 Park Plaza, Suite 1600, in the City of  
4 Irvine, County of Orange, State of California, before  
5 me, Cindy Duynstee, Certified Shorthand Reporter in and  
6 for the State of California, personally appeared:  
7 MARK B. PLUMMER,  
8 called by the Defendants, who, being by me first sworn,  
9 was thereupon examined as a witness in said cause.

10 A P P E A R A N C E S  
11 FOR THE PLAINTIFF (In pro per):  
12 LAW OFFICES OF MARK B. PLUMMER, PC  
13 BY: MARK B. PLUMMER, ESQ.  
14 18552 Oriente Drive  
15 Yorba Linda, California 92886  
(714) 970-3131  
Lombp@hotmail.com

16 FOR THE DEFENDANTS:

17 BAYUK & ASSOCIATES, INC.  
18 BY: CHRISTOPHER W. BAYUK, ESQ.  
19 600 West Broadway, Suite 700  
San Diego, California 92101  
(619) 232-7945  
Cbayuk@bayuklaw.com

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I N D E X

DEPOSITION OF MARK B. PLUMMER  
November 1, 2013

EXAMINATION BY PAGE  
MR. BAYUK 4

E X H I B I T S  
(None marked)

Witness Signature Page 156  
Certificate Page 157

1 IRVINE, CALIFORNIA; NOVEMBER 1, 2013; 9:28 A.M.

2  
3 MARK B. PLUMMER,  
4 having been sworn, testified as follows:

5 EXAMINATION

6 BY MR. BAYUK:

7 Q. Can you state your name for the record, please.

8 A. Mark Plummer.

9 Q. Mr. Plummer, how long have you been a  
10 practicing attorney?

11 A. Almost 29 years.

12 Q. And you're, in essence, a civil litigation  
13 attorney?

14 A. Yes.

15 Q. Given and taken numerous depositions?

16 A. Yes.

17 Q. Can we dispense with the preliminary rules  
18 and --

19 A. Yes.

20 Q. -- regulations of a depo?

21 We're here about Dr. Cuk and Ms. McKeon. When  
22 did you first meet with Dr. Cuk regarding your  
23 representation or potential representation of him in the  
24 legal malpractice action?  
25

1 And just so we're clear, the legal malpractice  
2 is the suit against Carl Smith and Burch Coulston that  
3 you filed?  
4 **A. I remember meeting with Merritt McKeon probably**  
5 **in about May of, I guess, 2009, but I -- or 2008. I'm**  
6 **not -- I'd have to look at the exact date. I believe**  
7 **that Dr. Cuk may have been around on -- for one or maybe**  
8 **more meetings. I'd actually contacted her about -- I**  
9 **ran into somebody at an event and wanted some pointers**  
10 **on filing a writ.**  
11 **When I went -- I was referred to her, and then**  
12 **some time while we were talking about that, she**  
13 **mentioned the Cuk case. It was not -- it was a**  
14 **tangential thing. So somewhere along the line there, I**  
15 **started to talk to her about it. And I believe I met,**  
16 **possibly, with Cuk at one point, but if I did, he didn't**  
17 **do a lot of talking.**  
18 **Q. If the retainer was signed September 3rd, 2009,**  
19 **does that give you a time frame as to when you first**  
20 **spoke to Ms. McKeon about the legal malpractice --**  
21 **A. I'm guessing sometime in the spring of that**  
22 **year.**  
23 **Q. That's your best estimate?**  
24 **A. Yes, but not all that seriously at that time.**  
25 **Q. Do you recall between spring of 2009 and**

5

1 September 2009 how many times you actually spoke with  
2 Dr. Cuk?  
3 **A. He may have been present with Ms. McKeon. I**  
4 **never interviewed him or spoke to him like a potential**  
5 **client.**  
6 **Q. Even up until the day that he retained you as**  
7 **the attorney?**  
8 **A. Correct.**  
9 **Q. Did you ever have a one-on-one meeting with**  
10 **Dr. Cuk prior to his retaining you?**  
11 **A. Possibly a day or two before. I don't remember**  
12 **whether he signed the retainer the first day he came in**  
13 **or rather he came in, took it, and came back.**  
14 **Q. Do you recall anything about what Dr. Cuk told**  
15 **you about the case -- the legal malpractice case prior**  
16 **to your being retained?**  
17 **A. Like I said, I can't recall clearly whether he**  
18 **was present or not. I mostly remember Ms. McKeon**  
19 **talking about it.**  
20 **Q. Do you have any recollection of what Dr. Cuk**  
21 **told you what is the sum and substance of the legal**  
22 **malpractice action prior to his actually retaining you?**  
23 **A. Not independent of Ms. McKeon's comments.**  
24 **Q. Briefly, can you give me what Ms. McKeon told**  
25 **you about the legal malpractice action?**

6

1 **A. That he had had a relatively brief marriage of,**  
2 **I believe, 18 months, no minor children; that his**  
3 **attorneys had totally taken advantage of him by**  
4 **recommending that he pursue a nullity case, that he did**  
5 **what they said and didn't know what was supposed to**  
6 **happen, and that, then, he not only lost the nullity**  
7 **case but got sanctioned \$100,000.**  
8 **Q. Did Ms. McKeon, at any point prior to your**  
9 **being retained, give you the theories of liability or**  
10 **areas of negligence of the attorneys?**  
11 **A. No. She kind of suggested that it should have**  
12 **been a dissolution, which I knew that. So that was**  
13 **basically what I was running with. I don't know if she**  
14 **said it or I already knew it, but the theory was it**  
15 **should have been a dissolution. It would have been**  
16 **quicker and cheaper.**  
17 **Q. Was there any component of the attorneys'**  
18 **failure to warn about the negative impact of pursuing**  
19 **the nullity case through trial? Did you and she discuss**  
20 **that prior to your being retained?**  
21 **A. Not separate from that nullity was a bad way to**  
22 **go.**  
23 **Q. Did you ever have an understanding at any point**  
24 **during your representation that the legal malpractice**  
25 **attorneys, who had represented Dr. Cuk, had failed to**

7

1 warn him, at least in writing, as to the potential  
2 ramifications of losing the nullity trial?  
3 **A. Not independent of that they should have never**  
4 **gone with the nullity in the first place. When you**  
5 **recommend to do the wrong thing, kind of the failure to**  
6 **warn that you shouldn't do the wrong thing kind of goes**  
7 **hand in hand with it.**  
8 **Q. Prior to September 3rd, 2009, did you ever**  
9 **speak with Connolly, C-o-n-n-o-l-l-y, Oyler, O-y-l-e-r,**  
10 **about the Cuk case?**  
11 **A. He may have called some time in June or**  
12 **something like that.**  
13 **Q. Do you recall the substance of that**  
14 **conversation in what you believe as June of 2009?**  
15 **A. I told him he -- he'd called and said he had**  
16 **been retained by Dr. Cuk to review the file, and I told**  
17 **him that Merritt had showed me, like, 15 boxes, which I**  
18 **had no intention of looking through, on the chance that**  
19 **there might be a case.**  
20 **And I'm not a family law attorney anyway, so I**  
21 **had said that I wouldn't take the case at that point,**  
22 **but if he retained an expert who reviewed it and found**  
23 **that there was negligence and was willing to act as a**  
24 **trial witness, that I would consider taking the case;**  
25 **and that I was not retained and was not involved unless**

8

1 that happened.  
2 And he said that he was the person that Dr. Cuk  
3 was going to ask about that, and he intended to look at  
4 the files for Dr. Cuk.  
5 Q. Okay. Prior to September 3rd, 2009, did you  
6 have any other conversations with Mr. Oyler?  
7 A. He must have called back sometime towards the  
8 end of August, I'm guessing, telling me that he  
9 concluded that there was, in fact, ne- -- he had  
10 reviewed the file, and he concluded that there was  
11 negligence. And he called it tactical negligence on how  
12 to proceed.  
13 Q. And when you say "guessing around the end of  
14 August," is that your best estimate?  
15 A. That's my best estimate. I don't -- I remember  
16 he called and said that what he'd found and, like,  
17 within a day or two or even maybe later that day, Cuk  
18 had called for an appointment. So he had either --  
19 could have been at the beginning of September,  
20 obviously. That's when one appointment was, but  
21 sometimes -- my recollection is there was a statute  
22 running pretty soon, and I was already kind of unhappy  
23 that they hadn't gotten back to me about what they  
24 determined until the statute was getting pretty close.  
25 Q. Do you remember why there was a statutory

9

1 issue?  
2 A. I believe they last represented him in  
3 September of the prior year, and a malpractice case  
4 needs to be brought within a year.  
5 Q. Is there a one year from knew or should have  
6 known for a legal malpractice action?  
7 A. There's -- under -- using that guideline, the  
8 statute had long ago run. There was a stay on the  
9 statute as long as there's continued representation.  
10 Once somebody gets sanctioned \$100,000 for  
11 bringing a frivolous case, they knew or should have  
12 known that they got bad legal advice. The only question  
13 was how long did they actually represent him, which  
14 stayed the running of the statute. He brought in some  
15 bills, but merely billing somebody doesn't mean you're  
16 actively representing him on the matter in question. So  
17 not having good records, my working hypothesis was that  
18 there was a September statute because that was the last  
19 hearing that they'd been at or something like that.  
20 Q. Do you know why the relationship was terminated  
21 in September of 2008 between Cuk and Carl Smith and the  
22 Burch defendants?  
23 A. I know that Dr. Cuk had switched attorneys a  
24 couple of times and ended up with Merritt.  
25 Q. Question was: Do you know why he actually --

10

1 well, let me put it this way --  
2 A. I don't know why, and I don't recall if anyone  
3 gave me a reason. The reason I think I was told was  
4 that he was dissatisfied and finally figured out they  
5 weren't winning the case for him, but I don't really  
6 know. I just -- my -- the subject of my inquiry at that  
7 point was: What was the last time they represented you  
8 in court because that's going to stop the tolling, and  
9 then you've got one year.  
10 Q. Do you know if Dr. Cuk terminated their  
11 services or whether they told him to find new counsel?  
12 A. I don't currently recall. I knew at one point,  
13 but I don't as I sit here. I haven't seen the file in  
14 years.  
15 Q. When you spoke to Mr. Oyler in June of 2009 and  
16 he told you that he had been retained by --  
17 A. It could have been July. I didn't make any  
18 notes because I didn't have anything to do with it.  
19 Q. When you -- let me put it this way, then: When  
20 you spoke to Mr. Oyler one of the first times and he  
21 told you that he had been retained by Dr. Cuk, did you  
22 ask Mr. Oyler whether he had a signed retainer agreement  
23 with Dr. Cuk?  
24 A. No.  
25 Q. Did you ask him whether the issue of fees and

11

1 costs for Mr. Oyler's time and expenses had been agreed  
2 upon?  
3 A. No.  
4 Q. Did you have any discussion as to who was  
5 responsible for Mr. Oyler's fees and costs?  
6 A. No. I wasn't retained, so I never -- it was  
7 not an issue.  
8 Q. Did you understand, or at least assume from the  
9 conversation with Mr. Oyler, that because he had stated  
10 to you that he had been retained by Dr. Cuk, that meant  
11 Dr. Cuk was going to pay his fees and costs?  
12 A. Well, yeah. Dr. Cuk retained him. Dr. Cuk  
13 would be paying his fees and costs, and I had no  
14 retainer. I had no lien. I had no nothing, and,  
15 obviously, I'm not going to have anything to do with  
16 retaining somebody when the client is free to go to  
17 somebody else.  
18 Q. At any point from Sep -- well, did you ever  
19 have a conversation with Mr. Oyler prior to  
20 September 3rd, 2009, wherein you advised him that you  
21 were retaining him as an expert in the Cuk manner?  
22 A. No.  
23 Q. Did you ever retain him as an expert in the Cuk  
24 matter?  
25 A. No.

12

1 Q. Did you ever tell Mr. Oyler that you were, at  
2 some point, going to be paying his fees and/or costs for  
3 the time that he expended in being an expert consultant  
4 for Dr. Cuk?  
5 A. No.  
6 Q. According -- we just had the motion for summary  
7 judgment hearing, right?  
8 A. Right.  
9 Q. In response to that, you filed two invoices  
10 from Mr. Oyler. Do you recall those?  
11 A. Yes.  
12 Q. Do you know why you were sent the invoice from  
13 2009?  
14 A. Apparently, Dr. Cuk told him to send it to me.  
15 Q. Do you know?  
16 A. That's what Dr. Oyler -- that's what Oyler told  
17 me was why he sent it, was that Dr. Cuk wanted him to  
18 send me a copy.  
19 Q. Let me just show you just so we're all on the  
20 same page. This is the September 1st, 2009, invoice  
21 from Mr. Oyler showing a total of \$5,450.  
22 A. Okay. Is it -- no, it says 4,050.  
23 Q. Oh, is it 4,000?  
24 A. Yeah.  
25 Q. Did I say 4,000?

13

1 THE REPORTER: You said 5,450.  
2 BY MR. BAYUK:  
3 Q. My mistake.  
4 The September 1st, 2009, invoice for \$4,050  
5 from Mr. Oyler, was that the only invoice you received  
6 from him in 2009?  
7 A. Yes, I believe so.  
8 Q. That invoice that we're referencing, dated  
9 September 1, 2009, references past due invoices. You  
10 didn't receive any of those, to your recollection?  
11 A. I don't recall receiving anything. I didn't  
12 even have a file.  
13 Q. Did you -- and at the bottom of that page, it  
14 says, "To be paid by plaintiff."  
15 Is that your handwriting?  
16 A. Yes.  
17 Q. Did you forward this invoice on to Dr. Cuk for  
18 payment?  
19 A. Yes, I did.  
20 Q. Did you discuss on September 3rd, when Dr. Cuk  
21 and you entered into the retention agreement, that he  
22 was responsible for the payment of this invoice?  
23 A. Yes.  
24 Q. What was his response?  
25 A. He said that Merritt told him it was on a lien,

14

1 and Merritt told me the same thing.  
2 Q. Had you ever heard of an expert acting on the  
3 basis of a lien?  
4 A. No. You'd have zero credibility as an expert,  
5 so I knew that wasn't the case.  
6 Q. Did you ever call Mr. Oyler to ascertain  
7 whether he -- whether what Ms. McKeon told you was  
8 correct?  
9 A. He told me she was dreaming. I did call.  
10 Q. When did you call, approximately?  
11 A. I'm not sure.  
12 Q. Was it before -- well, was it after  
13 September 1, 2009?  
14 A. I -- probably.  
15 Q. Do you recall how soon after 2001 -- I'm sorry.  
16 Do you recall how soon after September 1, 2009, you  
17 would have called Mr. Oyler?  
18 A. Well, I'm pretty sure I didn't call him. I  
19 think he called me. And it would have been several  
20 months.  
21 Q. Several months. Under six months? Three  
22 months?  
23 A. Probably in November of 2009.  
24 Q. What's -- give me your best recollection of  
25 what happened during that phone call.

15

1 A. I had another case that was a family law legal  
2 malpractice case, and I had not talked to Oyler since  
3 the conversation shortly before I was retained. And I  
4 called Oyler and asked if he -- since I knew he was a  
5 medical malpractice expert, if I could fly by some facts  
6 on the Hack case.  
7 Q. You mean legal malpractice expert?  
8 A. Yeah, to see if he would -- well, first consult  
9 with the potential of becoming an expert. Usually you  
10 don't want to just -- it's not a good idea to have  
11 someone be an expert, they may not say what you want  
12 them to say, so you consult -- well, you have the  
13 privilege, and you don't waive the privilege if they  
14 don't go your way.  
15 So I believe -- so I know in November I'd asked  
16 him to look at the Hack case, and he gave me a --  
17 because as I usually do with an expert -- they'll say,  
18 "What do I have to look at?"  
19 And I try to get a flat fee on a consult just  
20 to tell me whether I've got a case and the gist of it,  
21 which would be separate than going through every page or  
22 paper, because they can figure out and -- so I got a  
23 flat fee of \$900, sent him a check for that on the Hack  
24 case. And I believe, at that time, he indicated that  
25 Dr. Cuk had not paid him.

16

1 **Q.** Your conversation with Mr. Oyler in November of  
2 2009, was that the first time you discussed with him the  
3 Hack case?  
4 **A. Yes, and I think the only time. I later**  
5 **concluded that it was not something that required a**  
6 **family law specialist, that I could use a -- we'll call**  
7 **more of an ethics specialist, which is cheaper.**  
8 **Q.** At any point after November 2009, did Mr. Oyler  
9 ever tell you that he was not going to act as a  
10 consultant in the Cuk matter because he had not been  
11 paid?  
12 **A. Yes.**  
13 **Q.** When was that?  
14 **A. He had -- someone else from his office called**  
15 **me a couple of times and said he hadn't been paid and he**  
16 **told me they were going to sue Cuk in small claims**  
17 **court. And I, at the time, had wanted to -- I mean, he**  
18 **had already looked over the documents. I didn't really**  
19 **want to hire someone else, and so I tried to see if Cuk**  
20 **would pay him; and that never got resolved.**  
21 **And then at a later time, I called him to find**  
22 **out what it would take to be an expert through trial.**  
23 **Q.** Let me back up. When was the approximate date  
24 that someone from Mr. Oyler's office contacted you to  
25 say that he had not been paid and would not be acting as

17

1 **Q.** I know. I know. I'm just asking for your  
2 recollection.  
3 **A. I remember it took a while for the pleadings to**  
4 **get all settled out.**  
5 **Q.** If you recall what -- in the spring of 2010, do  
6 you recall what you told Dr. Cuk about Mr. Oyler acting  
7 or continuing to act as a consultant?  
8 **A. Actually, it could have been the spring of**  
9 **2011. I remember we had already completed some**  
10 **discovery, which probably would have been Dr. Cuk's**  
11 **deposition, which would have been in the spring of 2010.**  
12 **So it's most likely the spring of 2011 or, you know,**  
13 **late 2010.**  
14 **Q.** Let me see if we can put it this way: Would it  
15 be your recollection that the first time you told  
16 Dr. Cuk Mr. Oyler was not going to act as his consultant  
17 on the case because he had not been paid, would have  
18 been after Dr. Cuk had been deposed?  
19 **A. I just don't remember. I remember sending this**  
20 **bill to Dr. Cuk and saying, "You do this. My retainer**  
21 **says I'm not paying anything, and you hired this guy**  
22 **before you even hired me."**  
23 **And, obviously, I -- if I'm investigating a**  
24 **case that I'm not sure is going to pan out, I would get**  
25 **a retainer so that I have a lien if I'm going to expend**

19

1 a consultant?  
2 **A. Well, that's a two-part question. I don't know**  
3 **that he ever said he wouldn't act as a consultant. I do**  
4 **know that he said he hadn't been paid, and he was going**  
5 **to sue Cuk.**  
6 **Q.** Did you ever tell Dr. Cuk that his expert was  
7 not going to -- or his consultant was not going to  
8 testify at the time of trial?  
9 **A. Yes. Said if he didn't get paid, he wasn't**  
10 **going to testify. And if he had to sue him, it would**  
11 **really look bad even if he was later paid.**  
12 **Q.** When did you tell Dr. Cuk those two things?  
13 **A. Would have been the spring of 2010.**  
14 **Q.** At that point, had a trial date been set?  
15 **A. Probably.**  
16 **Q.** Had the demurrers filed by the defendants --  
17 first round of demurrers filed by the defendants were  
18 heard in November of 2009?  
19 **A. Likely.**  
20 **Q.** You filed a first amended complaint?  
21 **A. I'm sure I did.**  
22 **Q.** And then there was a second round of demurrers?  
23 **A. Probably.**  
24 **Q.** Do you know when those hearing dates were?  
25 **A. No. I don't have the file.**

18

1 **anything.**  
2 **This one, I took the chance that he could talk**  
3 **to somebody who thought it was a great case, who would**  
4 **then refer him to his friend to pursue the case, and I'd**  
5 **be left out because I just -- something was always wrong**  
6 **with this picture on this case. And I just didn't feel**  
7 **I was willing to take that chance because, oftentimes,**  
8 **if you ever send somebody to an expert when you don't**  
9 **have a retainer, that expert always has a friend who**  
10 **does that.**  
11 **Q.** At what point did you first start feeling that  
12 something was wrong with the case?  
13 **A. Probably when I got a call from Bellilove's**  
14 **office and they started -- well, they started telling me**  
15 **oh, that it was all far more convoluted. Note: Not**  
16 **that the defense people don't always call and tell you**  
17 **that. But something rung like there were more issues.**  
18 **Like, I did not -- no one told me he hadn't paid his**  
19 **bill.**  
20 **The whole idea of this thing was that he had**  
21 **been fleeced and he'd paid them, and then I hear that**  
22 **there's hundreds of thousands of dollars of unpaid legal**  
23 **fees. And now it's a question of did he really even pay**  
24 **for the parts that he got worked out of. So those kind**  
25 **of issues started surfacing before they even filed a**

20

1 cross-complaint because they told me about them. And  
2 I'm thinking, "Well, that's kind of a big thing to  
3 forget to tell me."  
4 Q. When was that phone call with Mr. Bellilove?  
5 B-e-l-l-i-l-o-v-e.  
6 A. I don't think it was Bellilove. I talked with  
7 Bellilove, I think, and then I talked to someone from  
8 his office at the beginning, who was on the very first  
9 round of things, because I had propounded discovery  
10 right away. Probably before they were able to represent  
11 it, so maybe -- I'm not sure. Somebody from that office  
12 was telling me, "Oh, well, he owes us all that. He  
13 never paid for all that."  
14 And I'm thinking, Well, that's kind of weak.  
15 Q. Question is: When? You filed the suit in --  
16 A. That would have been in, like, November,  
17 December of 2009. Because I filed the complaint within  
18 probably a week of being retained because I was  
19 concerned about a statute, and I would have served it  
20 pretty much right away. And then I would have gotten  
21 the usual phone call where they try to tell you how --  
22 what struck me that is odd about this one was, usually I  
23 get a call from the defense attorney, who I can almost  
24 guarantee you has thoroughly reviewed the file and what  
25 happened, who then plays dumb and wants your theory and

21

1 doesn't understand and wants you to tell them all you've  
2 got. These guys did not do that. They called and had a  
3 lot of facts. So that's something that bothered me a  
4 little.  
5 Q. Do you remember what facts they gave you that  
6 you were not aware of?  
7 A. That he hadn't paid his bills.  
8 Q. Any other facts during this first phone call?  
9 A. That's the one that struck me because I'm suing  
10 some attorneys for being paid money based on bad advice,  
11 and now I'm hearing that he never paid them or at least  
12 he didn't pay everything, and I'm concerned that I sued  
13 them over receiving money they didn't even receive.  
14 That looks bad.  
15 Q. Any other issues that were brought up by the  
16 defense counsel regarding their defense to the case?  
17 A. I think they claimed that the nullity was his  
18 idea.  
19 Q. And what difference did that make?  
20 A. Well, if it was his idea, then he didn't just  
21 follow their advice, he was in on it.  
22 Q. What's their -- what is their obligation as his  
23 attorney if he is pursuing a course that they don't  
24 think is in his best interests?  
25 A. Then they should be warning him of the

22

1 ramifications as compared to if they proposed something  
2 out of the blue that he never heard of and he says okay.  
3 That's a little bit different.  
4 Q. To the best of your memory, did they ever warn  
5 him of the potential ramifications of pursuing the  
6 nullity claim?  
7 A. Mullin did and Dishon did.  
8 Q. But did Burch or Carl Smith?  
9 A. Yes and no. Carl Smith, I don't recall seeing  
10 something in writing, though, I believe he said he told  
11 him that it was a long shot. And Burch was with  
12 Dishon's office, so he knew what Dishon had told him,  
13 and, I believe, knew what Mullin had told him.  
14 Q. When Burch went out on his own and opened Burch  
15 Coulston, Dr. Cuk went with him, correct?  
16 A. Yes.  
17 Q. At any point after Dr. Cuk switched the  
18 representation, did Mr. Burch advise Dr. Cuk that the  
19 nullity proceeding should not go forward?  
20 A. I don't recall anybody -- I don't believe the  
21 Burch people or the O'Neil people ever advised him that  
22 it should not go forward. I believe their claim was  
23 they told him that it was a long shot, but possible.  
24 Q. Did they ever warn him or tell him that the  
25 long shot may result in a frivolous sanctions motion

23

1 being brought?  
2 A. I don't recall, but I know that that wasn't in  
3 writing, and I don't recall anybody actually claiming  
4 that they told him about the sanctions. I've got a  
5 pretty good recollection that the sanctions were a solid  
6 damage because no one told him about those, which is  
7 kind of separate than a long shot. A long shot means  
8 you probably won't win it, but you could.  
9 Sanctions, that's a whole separate category,  
10 and I always felt that the sanction claim was probably  
11 the strongest single claim.  
12 Q. At what point did the Cuk's legal malpractice  
13 claim based upon the sanctions being issue arise?  
14 A. That was always part of it from day one.  
15 Q. From the beginning of Burch's representation in  
16 August 2005?  
17 A. Well, the -- right. Once -- Mullin said he  
18 wouldn't pursue nullity, but he would include it as an  
19 alternative because Cuk insisted on it. Cuk then --  
20 Q. Let me stop you there, and I apologize.  
21 Mullin was the very first attorney that Cuk  
22 consulted, correct?  
23 A. Correct.  
24 Q. Cuk then terminated Mullin and went to Law  
25 Offices of Aaron Dishon, correct?

24

1 **A. Mullin filed the complaint and put the nullity**  
2 **action in as an alternative theory on Cuk's insistence.**  
3 **Then Cuk terminated his representation by Mullin and**  
4 **went to Dishon, and Dishon did not want to pursue the**  
5 **nullity either. Then Burch, who was in Dishon's office**  
6 **said, "I'm going out on my own. If you go with me, I'll**  
7 **pursue the nullity." And he did pursue the nullity up**  
8 **to a point, then said, "You know, I really won't try the**  
9 **nullity case," and made a stupid excuse like he can't**  
10 **try a case, "but if you get your own separate attorney**  
11 **to do it, then we'll do it."**

12 **Then on his own, I guess at a party, Cuk finds**  
13 **O'Neil, who he explains the situation. And my feeling**  
14 **was O'Neil was more of a civil attorney that didn't**  
15 **really do family law and didn't understand that nullity**  
16 **in a family law context was not identical to, basically,**  
17 **rescission for fraud. There's a certain similarity, but**  
18 **there's limitations that I got the feeling that O'Neil**  
19 **never really appreciated.**

20 **Q. Fraud in family law is different than fraud in**  
21 **civil court, essentially, for a nullity purpose?**

22 **A. Well, if you were to say that nullity is, in**  
23 **essence, a rescission action, the type of fraud in a**  
24 **civil case that would support a rescission action is**  
25 **much broader than would support a nullity in a family**

25

1 you talking about Mr. O'Neil, or are you talking about  
2 Dr. Cuk?

3 **A. Dr. Cuk wanted vindication, and he really**  
4 **wanted to put her down. And O'Neil testified -- I don't**  
5 **recall exactly what word he used. He used a couple of**  
6 **them -- that that's one of the things they were giving**  
7 **him. And I recall when I was taking his deposition and**  
8 **asked him that, that was not the right thing to be**  
9 **doing, and he never should have said that. And my**  
10 **conclusion from his deposition was, this is a civil**  
11 **attorney who's out of his league and thought he was**  
12 **being guided by somebody who wasn't guiding him.**

13 **Q. That person who was supposed to be guiding him**  
14 **was Mr. Burch?**

15 **A. Right. He was the specialist. He knew -- see,**  
16 **that's where it was there was a disconnect. Sometimes,**  
17 **you know, you can see somebody doing something you don't**  
18 **agree with, but you can understand why; and sometimes it**  
19 **just doesn't make any sense at all.**

20 **I think -- I could see why -- I think that**  
21 **O'Neil was out of his league. He didn't understand the**  
22 **nuances. He thought he was being guided, and he wasn't;**  
23 **and that's how it happened. I understand how he got**  
24 **into that bad spot that he should have never been in.**

25 **Burch -- I never understood why Burch went**

27

1 **law case, if you know what I mean. And I'm not sure**  
2 **that O'Neil, at least at the beginning, or even in**  
3 **trial, realized that.**

4 **Q. Do you know if O'Neil, based on your deposition**  
5 **of him and reviewing of their discovery responses,**  
6 **understood that clear and convincing evidence was**  
7 **required for pursuing a nullity claim in family law**  
8 **court?**

9 **A. I don't think he knew what he was doing. My**  
10 **feeling was O'Neil was a civil attorney, he did not**  
11 **understand the nuances of family law, and he relied on**  
12 **Burch, the family law specialist, in that regard, but**  
13 **was willing to go and try it, assuming he was getting**  
14 **paid enough. And that's kind of how it came out. He**  
15 **also said vengeance was a good reason to sue somebody.**

16 **Q. That was O'Neil's words?**

17 **A. It either was "vengeance" or something that was**  
18 **totally inappropriate. Yes, O'Neil testified to that.**  
19 **And that -- or vindication -- it was something like --**  
20 **it was a word that was totally -- shouldn't have been**  
21 **used. It was -- he wanted vindication. He wanted -- it**  
22 **wasn't vengeance, but it was something that was**  
23 **inappropriate as a basis. But he, "Yeah, that's what we**  
24 **gave him." And I'm thinking, You're crazy.**

25 **Q. When you're saying "he wanted vindication," are**

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1 **along with it because he should have known. They both**  
2 **should have.**

3 **Q. Do you know who was pushing the fraud claim for**  
4 **rescission based upon the civil fraud, was that Burch or**  
5 **was that O'Neil?**

6 **A. It was Cuk. You saw in the opposition to the**  
7 **motion for summary judgment the memo by Dr. Cuk laying**  
8 **out all of these fraud claims, and Dr. Cuk was not aware**  
9 **of the nuances of fraud in family law because he laid**  
10 **out a fraud claim, which O'Neil bought.**

11 **Q. But whose responsibility would it have been to**  
12 **rein in Dr. Cuk to point out that the facts or scenarios**  
13 **that he set forth were civil fraud, not family law**  
14 **fraud?**

15 **A. Both O'Neil and Burch. I mean, O'Neil took the**  
16 **case. He was responsible for giving proper advice. He**  
17 **deferred to somebody. He didn't officially, but kind of**  
18 **it looks like he did defer to Burch. Burch knew. Burch**  
19 **had to know what was wrong and just went with it anyway.**  
20 **O'Neil was responsible for warning him because he took**  
21 **the representation.**

22 **He had, probably, a claim -- a tacit claim that**  
23 **he was -- if you're an attorney and you have a case that**  
24 **you're not familiar with the nuances of that law, you**  
25 **have an obligation, just like a doctor does, to refer to**

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1 a specialist.  
2 O'Neil had a tacit claim that he had relied on  
3 a specialist and the specialist let him down. That was  
4 kind of a mitigating factor because I don't think he --  
5 he shouldn't have done it. He had the responsibility to  
6 Cuk, and he screwed it up. But Burch always thought  
7 there was more of a -- there was a stronger malfeasance.  
8 Q. For failing to advise Cuk and O'Neil that they  
9 were on the wrong fraudulent basis?  
10 A. He's a family law specialist. He knew for a  
11 fact that they were going down the wrong road.  
12 Q. And that's based on what?  
13 A. That's based on his specialized license or  
14 whatever.  
15 Q. But --  
16 A. He had to know just by default.  
17 Q. Well, do you know of any testimony or evidence  
18 that you reviewed that says he knew that O'Neil and Cuk  
19 were pursuing the wrong basis of fraud for the nullity  
20 case?  
21 A. Yeah, the judgment.  
22 Q. The judgment for the nullity?  
23 A. Yeah. The judge slammed him and slammed him  
24 with the sanctions. I mean, that, unfortunately,  
25 wouldn't -- you couldn't get collateral estoppel on

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1 that, though, against the attorneys.  
2 Q. Before the nullity trial, are you aware of any  
3 evidence or testimony from Burch that he was aware and  
4 warned either Mr. O'Neil or Dr. Cuk that they were  
5 pursuing the wrong basis of fraud?  
6 A. I was only at one session of the Burch  
7 deposition, and Connolly never asked that or much of  
8 anything relevant. I had requested that I could go  
9 first at the second session so I could get to the stuff  
10 that counted, but then I got subbed out, so I didn't get  
11 to go to the second session. So I couldn't know  
12 testimony because we didn't have it.  
13 To the extent that -- to the extent that  
14 somebody holds them out as a specialist, they have  
15 constructive knowledge of what a specialist should know.  
16 So while I didn't ever find a memo from Burch saying, "I  
17 know this is wrong, but I need the money so I'm doing it  
18 anyway," he constructively knew it. That's probably the  
19 best way to say it.  
20 Q. But did he ever advise either O'Neil or Cuk  
21 that they were wrong?  
22 A. No. He made a -- I found that he -- implicit  
23 in his claim that he couldn't try the case, which he  
24 obviously could, was that he knew it was wrong and  
25 didn't want to do it but didn't want to flat out tell

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1 Cuk that he had then taken his money to prepare a case  
2 he knew he shouldn't be bringing. That's why he told  
3 him he had to go hire a separate attorney, and then I  
4 think he was probably surprised that Cuk did it. And  
5 there were also multiple e-mails by Burch saying, "You  
6 know, you really could do dissolution."  
7 Q. As well as the nullity?  
8 A. Well, the --  
9 Q. Well, let me put it this way: Did Burch ever  
10 tell Dr. Cuk after August of 2005 that he should not  
11 pursue the nullity claim?  
12 A. I -- the date you mentioned, I don't recall  
13 where it fits into the fact pattern. I do not recall  
14 Cuk -- I mean Burch ever saying he couldn't do it.  
15 Yeah, and I'm pretty sure he never did. He started  
16 getting kind of squirrely about actually doing it, but  
17 he never said "don't."  
18 Q. I'm using August 2005 because that's the date  
19 that Burch left Dishon and opened up Burch Coulston.  
20 A. Right.  
21 Q. So that's that break point.  
22 A. My feeling of what was in it for Burch, when  
23 you go out on your own and you leave a good salary, you  
24 need money. And Dr. Cuk paid like a slot machine, and  
25 he would probably tell Dr. Cuk anything Dr. Cuk wanted

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1 to hear to get a first client like that. And I think  
2 that's exactly what he did. I think he told Dr. Cuk,  
3 "Yeah, nullity's great." But then a year down the road,  
4 when he had other clients and didn't need Dr. Cuk so  
5 much, he didn't want to say, "Oh, I've been lying to you  
6 all this time," but he made squirrely excuses to try to  
7 get out of the nullity case. And pretty soon -- that's  
8 what I think was it, but he never actually said, "I was  
9 wrong," which probably wouldn't have gone over so well.  
10 Q. Do you recall any, because you weren't present  
11 during any testimony that said that, but do you recall  
12 any physical evidence, written e-mails, letters, where  
13 Burch advised Cuk that he should not have pursued the  
14 nullity?  
15 A. No. What I'm kind of going on, because I  
16 haven't seen the file in years, is I was pretty much  
17 ready to try the case, and when you try a case, you're  
18 telling a story. And I remember the story, if you know  
19 what I mean.  
20 Q. Right. I got you.  
21 A. That's why I kind of, like, had it to explain  
22 why they did what they did. Because if you just state  
23 facts and you don't give a why, which is often not clear  
24 anyway, you just don't tell a good story.  
25 Q. O'Neil was the trial counsel for the nullity

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1 portion of the case, correct?  
2 **A. With Burch as second chair, they were both**  
3 **there.**  
4 **Q.** Right. But as far as you know, who was making  
5 the actual trial tactical decisions with regard to the  
6 nullity trial?  
7 **A. According to O'Neil, Burch was because O'Neil**  
8 **said that while he was trial counsel, he never actually**  
9 **had the entire file and only had what he needed to do**  
10 **what he needed, which I believe was to, like, put on the**  
11 **case -- which is a really lame way to do things. But**  
12 **that's what he testified to, and apparently that part's**  
13 **probably true, that he never had the entire file.**  
14 **I would -- I'm not sure who made the tactical**  
15 **decisions. I'm sure O'Neil was in charge of what**  
16 **questions to ask, what issues to present, and how to**  
17 **present them, but who was responsible for them being**  
18 **there and made that tactical decision, I couldn't say**  
19 **for sure it was O'Neil.**  
20 **Q.** As far as responding to the judge's comments  
21 during the nullity hearing, was it O'Neil generally the  
22 one responding to how evidence or what evidence was  
23 going to be presented?  
24 **A. That's my recollection, although, I was shocked**  
25 **that Linda Marks let anyone get away with those lousy**

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1 answers. I think he -- it was all going to work out. I  
2 mean, yeah, try to tell that to a federal judge. But,  
3 yeah, I was shocked that she let him get away with those  
4 answers.

5 **I remember O'Neil was lead trial counsel, so by**  
6 **default, she would have addressed him. And I believe he**  
7 **was the one who was respon- -- like I said, that was**  
8 **years ago. I haven't seen the file.**

9 **I remember -- I remember the story I was going**  
10 **to tell and why I was -- how I was going to say it**  
11 **happened. And at the time when we were -- at the time,**  
12 **a partial settlement was in progress so part of that**  
13 **story was, if I had to take out of one of the**  
14 **characters, how would that work. And I could see taking**  
15 **out O'Neil by saying he was relying on the specialist**  
16 **because he was going to say that anyway, and -- but I**  
17 **couldn't see taking the specialist out. So that was a**  
18 **major consideration, too.**

19 **Q.** Do you recall any e-mails specific between  
20 O'Neil and Burch where O'Neil's asking Burch for  
21 information or advice on what needs to be done relative  
22 to the nullity trial?

23 **A. No.**

24 **Q.** Do you recall an e-mail from O'Neil telling  
25 Burch and Cuk that they can get around the primary fraud

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1 case relied on for nullity by arguing other facts?  
2 **A. I recall something like that. Didn't seem to**  
3 **be a particularly good analysis. But family law, they**  
4 **just don't have any solid rules. You can always -- you**  
5 **can't ever be sure.**

6 **Q.** But at least from your recollection, O'Neil was  
7 putting forth an argument for at least a tactical basis  
8 for not relying or -- what's the word I want -- just  
9 not --

10 **A. O'Neil's position was that if you threw in**  
11 **additional facts, you could get over the bar with a**  
12 **totality of the circumstances, even if you were weak on**  
13 **the one you really needed to prove, of which I saw no**  
14 **actual authority that supported that position, other**  
15 **than in family law, courts can do whatever they feel**  
16 **like and sometimes you can get away with that.**

17 **Q.** During the trial, did Mr. O'Neil present any  
18 evidence as to the sexual relations, or lack thereof,  
19 between Mr. and Mrs. Cuk as the basis for the nullity?

20 **A. I don't clearly recall. I recall that when it**  
21 **came to that, Cuk was blown out by his own doctor, who**  
22 **he had taken her to and asked about fertility and all**  
23 **that. That kind of offset any claim he made regardless.**

24 **Q.** Well, that goes to the issue of childbearing,  
25 not sexual relations, correct?

35

1 **A. Well, if she knew she was infertile, that would**  
2 **have been a basis for nullity. The fact that he took**  
3 **her to the doctor to check out her fertility seems to**  
4 **support that they were having sex, unless he -- it would**  
5 **be kind of futile if he wasn't.**

6 **Q.** The original question was: Did Mr. O'Neil  
7 present any evidence relative to their sexual relations  
8 or lack thereof?

9 **A. I'd have to look at the transcript.**

10 **Q.** You don't have any recollection as you sit here  
11 today?

12 **A. I believe he hit just about every possible**  
13 **thing you could hit in one way or another. Whether it**  
14 **seemed meaningful, you know, I'd have to see it.**

15 **Q.** As you sit here today, do you recall what the  
16 standard for obtaining a nullity based on fraud is for  
17 family law?

18 **A. It has to go to the essence of the**  
19 **relationship, and my recollection is, it primarily is,**  
20 **"You say you wanted to get married to have children, but**  
21 **you know that you're infertile." The primary basis -- a**  
22 **fake marriage for immigration would be a basis, but**  
23 **personal habits don't count.**

24 **Q.** Do you recall at what point you knew that  
25 Dr. Cuk was not going to pay the consultant costs?

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1 **A. Oh, I think probably in mid-August of 2011. At**  
2 **some point -- I never felt that he couldn't pay them. I**  
3 **believe he didn't want to pay them. But when it got to**  
4 **the point where we're simply not going to have an**  
5 **expert, we can't win without an expert, and on that**  
6 **basis, he gave me authority to enter negotiations to**  
7 **finance the balance of the case with a partial**  
8 **settlement, it was pretty clear, pretty much as of the**  
9 **day he actually gave me the authority, that he wasn't**  
10 **going to pay it. Before that, I was basically under the**  
11 **impression he just didn't want to pay it. And I don't**  
12 **know for sure that he hadn't paid Oyler something.**  
13 **Q. And that would have been as of August 2011 you**  
14 **came to the conclusion that Dr. Cuk was not going to pay**  
15 **the consultant's bills?**  
16 **A. Right. Or expert. By that time, he had to be**  
17 **an expert, but --**  
18 **Q. I'm going to interrupt you. He's not an expert**  
19 **until he's designated as such, correct?**  
20 **A. Yes.**  
21 **Q. And the expert designation was set for**  
22 **September 2011?**  
23 **A. Well, that's probably true, but the -- I want**  
24 **to correct what you said there. At that -- if Dr. Cuk**  
25 **hired Connolly Oyler as a consultant and never paid him,**

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1 **it wouldn't be a problem. The problem wasn't the**  
2 **consultant Connolly Oyler; the problem was the expert**  
3 **witness. We had an exchange coming up, and we didn't**  
4 **have one; and the only person who was really set to walk**  
5 **into that was Oyler. So I wasn't concerned about Oyler**  
6 **as a consultant because that didn't have anything to do**  
7 **with me anyway. I was concerned with Oyler as an**  
8 **expert. So I was concerned about what Dr. Cuk would**  
9 **need to pay him to designate him.**  
10 **Q. At what point did Dr. -- I'm sorry. At what**  
11 **point did Mr. Oyler communicate to you that he was not**  
12 **going to be permitted to be designated as an expert**  
13 **because no one had paid his prior bills?**  
14 **A. I don't recall having such a discussion. I**  
15 **recall asking him what it would take to be an expert**  
16 **witness and getting quotes and discussing with him**  
17 **whether we were shooting ourselves in the foot if we did**  
18 **a partial settlement with one of the defendants, and him**  
19 **saying that if we had to do that, get rid of the O'Neil**  
20 **defendants because Burch was dead in the water as a**  
21 **specialist.**  
22 **Q. When was the conversation between you and**  
23 **Mr. Oyler where you asked him for an estimate of his**  
24 **fees through trial? When did that conversation take**  
25 **place?**

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1 **A. I don't recall exactly, but on my normal**  
2 **pretrial way of preparing cases, that would have been on**  
3 **the calendar for six months before the trial date, which**  
4 **means that probably over the next month I would have**  
5 **gotten around to it. So I'm guessing between six and**  
6 **four months before the trial date I would have had the**  
7 **conversation about the total cost through trial of his**  
8 **expert services. And then at some subsequent date, a**  
9 **discussion of what if we settled out with one of the**  
10 **defendants, which one would be the right one to settle**  
11 **out with and would that reduce our expert fees.**  
12 **Q. As of August 2011, the trial date for Cuk**  
13 **versus the legal malpractice defendants was set for**  
14 **either October or early November 2011, correct?**  
15 **A. Right.**  
16 **Q. So based upon your normal custom and practice,**  
17 **you would have contacted Mr. Oyler approximately July?**  
18 **A. Maybe as early as May.**  
19 **Q. May through July to find out what his projected**  
20 **estimated cost through trial would be, correct?**  
21 **A. Correct because I never --**  
22 **Q. No, no, let me --**  
23 **A. Okay.**  
24 **Q. If Dr. Cuk was responsible for paying**  
25 **Mr. Oyler's invoices, did you tell Dr. Cuk to contact**

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1 Mr. Oyler to find out what his estimated fees would be  
2 since Dr. Cuk was responsible for them?  
3 **A. No.**  
4 **Q. Did you, in the May to July 2011 time frame,**  
5 **provide Dr. Cuk of that estimate of what it's going to**  
6 **take Mr. Oyler to be an expert through trial?**  
7 **A. Yes. And let me explain how that was working.**  
8 **I never really gave much thought or spent much time on**  
9 **the consulting fee that Dr. Cuk incurred prior to**  
10 **retaining me. That really didn't have anything to do**  
11 **with me. If Dr. -- I mean, if Mr. Oyler was going to be**  
12 **an expert, he would want me to retain him, and I would**  
13 **be responsible, and he was not willing to count on**  
14 **Dr. Cuk paying him.**  
15 **So part of the deal was that if he was going to**  
16 **be an expert, he would need a written retainer, and it**  
17 **wasn't going to just be signed Dr. Cuk. He wanted me to**  
18 **sign it. And, therefore, unlike the consultant, where I**  
19 **never even asked or knew what he was charging, that**  
20 **involved me directly because I would, in essence, have**  
21 **to be a guarantor, notwithstanding my agreement with**  
22 **Dr. Cuk that he would pay the fees. If I had to**  
23 **guarantee that if Mr. Oyler was being paid, I needed to**  
24 **know what the costs were through trial and make sure**  
25 **that Dr. Cuk could pay that.**

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1 Q. Did Mr. Oyler provide you a written retainer  
2 agreement for signature?  
3 A. I know I never signed one. I believe he did  
4 send one at some point when I asked him what the costs  
5 were and he said he needed it.  
6 Q. Do you remember when you received it?  
7 A. No. It would have been about the time when he  
8 said that if he was going to be an expert, I would need  
9 to be retaining him, not Dr. Cuk.  
10 Q. And this would be in that May to July 2011 time  
11 frame?  
12 A. That area, yeah. About that time because that  
13 would have been -- now we had him -- we had the expert  
14 so it wasn't like I was looking for an expert, per se,  
15 and I wanted to see what he was doing, and I also needed  
16 to know what he would charge to see if I could get the  
17 interveners to contribute.  
18 Q. And the interveners were Conway and Tomich,  
19 correct?  
20 A. Yes.  
21 Q. And they came into the case in January 2011?  
22 A. I believe so.  
23 Q. And one of the reasons that you let them  
24 intervene, or at least spoke to the judge about letting  
25 them intervene, is so that they could share in the costs

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1 because Dr. Cuk wasn't paying costs, correct?  
2 A. Yes. I know he had not paid Conway -- I mean,  
3 he had not paid Oyler, he had not paid me, and he was  
4 crying broke, which I didn't necessarily believe, but if  
5 he's not paying the bills, he's not paying the bills. I  
6 needed to take depositions, and he wasn't financing those.  
7 Q. At -- and I'm still just talking about  
8 Mr. Oyler. At what point did you start speaking with  
9 Conway and Tomich about their contributing to paying  
10 Oyler's expert fees?  
11 A. Without mentioning Oyler specifically, prior to  
12 allowing them to intervene, they had agreed to  
13 contribute to the costs because that was a condition of  
14 it.  
15 Q. Including experts?  
16 A. Right. Everything. I mean, the experts are a  
17 big cost.  
18 Q. Do you know if they knew who the potential  
19 expert was?  
20 A. They did not at that point.  
21 Q. When did they find out?  
22 A. I believe probably at about the same time that  
23 I was checking to see what it would take, trying to get  
24 Dr. Cuk to pay it. Dr. Cuk didn't want to pay it. I --  
25 if I had a -- because if I had a choice, I'd rather have

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1 Dr. Cuk pay it and then have Conway and Tomich  
2 contribute, such that we still have complete control, as  
3 opposed to getting them in, like, signing a retainer  
4 with him. Now, while we're still the plaintiff running  
5 the case, they have more access and control, which I was  
6 trying to keep their control limited.  
7 So first choice would be Cuk pays it all and  
8 then they contribute, like they agreed to do. But that  
9 doesn't really -- that puts us entirely in control.  
10 Second would be, they contribute, but they sign the  
11 retainer and stuff, which was less desirable. Or in a  
12 worst case situation, we do a partial settlement and  
13 finance it with that, which does put us back in complete  
14 control.  
15 Q. When you're -- when you're discussing about  
16 them, being Conway and Tomich, signing the retainer,  
17 that's in the May to July 2011 time frame, correct?  
18 A. No. That was my considerations. And the other  
19 consideration I had that was -- was another reason that  
20 I wanted them in as an intervener, was I was afraid they  
21 were going to sell their claim to the defense as a  
22 credit because logic tells me that if they've got a  
23 \$500,000 credit, the defense could buy it for 250, and  
24 then they've got a \$500,000 credit that we'd have to  
25 beat before we got anything. And you throw in their

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1 fees, that -- I was always scared to death that Conway  
2 and Tomich would sell their claim to the defendants as a  
3 credit.  
4 Q. Did you ever talk to Conway and Tomich about  
5 whether they had any intention or whether they had  
6 discussions with either of the legal malpractice defense  
7 groups about assigning their rights to the sanctions and  
8 attorney's fees ordered?  
9 A. Only at the very end because I was afraid to  
10 mention it if they hadn't thought of it. I didn't want  
11 to mention it. Might be the one that mentioned it, and  
12 then the light bulb goes on, but -- so I didn't talk  
13 about that until the end. I'd asked -- I had gotten the  
14 feeling without probably specifically mentioning it to  
15 anybody that they hadn't been discussing it. But I  
16 didn't bring it up to either the defense or Conway and  
17 Tomich because if no one had thought of it, I would hate  
18 to be the one to mention it. But on the other hand, it  
19 scared me to death that I would have to beat a \$500,000  
20 credit.  
21 Q. When you say "500,000," you're saying 425,000  
22 from the court's order, plus interest?  
23 A. Yes. It came out to around 5-. That's an  
24 estimate.  
25 Q. That's fine.

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1 **A. I mean, but can you -- who wants to go and try**  
2 **a case with a \$500,000 credit on the table? They**  
3 **probably would have still done better to do that.**  
4 **Q.** In your evaluation of the case, you have, at  
5 least in various e-mails, stated that the case value was  
6 400- to 600,000. Do you recall that?  
7 **A. Yes.**  
8 **Q.** And was that verdict or settlement?  
9 **A. Settlement. You never know what can happen on**  
10 **a verdict.**  
11 **Q.** The 400- would be joint and several, low end,  
12 strictly fees and sanctions payable to Conway and  
13 Tomich?  
14 **A. No.**  
15 **Q.** What composed the \$400,000 low end settlement  
16 value? And that's assuming that there was a qualified  
17 expert to testify, correct?  
18 **A. The -- yeah, I believe -- no. If there's a**  
19 **qualified expert to testify and you want to settle, you**  
20 **probably have to give away a third of the value you're**  
21 **pretty much hoping for. So if you had a value of, say,**  
22 **6- to 9-, settlement would be 4- to 6- or something or**  
23 **whatever it comes out to. That's basically the**  
24 **thinking.**  
25 **Q.** But if you had -- if you didn't have an expert,

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1 settlement range is zero to whatever you could get,  
2 correct?  
3 **A. If you don't have an expert, you're looking at**  
4 **a 127.8 motion and paying for everything for them.**  
5 **Q.** Yeah. But --  
6 **A. You cannot proceed with a medical malpractice**  
7 **case of that nature without an expert.**  
8 **Q.** Legal malpractice case?  
9 **A. Yeah, legal malpractice. I mean, you can go --**  
10 **you can proceed with a conflict of interest legal**  
11 **malpractice case because you've got a -- the code**  
12 **requires a written, you know, waiver. But you couldn't**  
13 **proceed with a tactical advice malpractice case without**  
14 **an expert. The value is zero with a high likely**  
15 **negative number attached.**  
16 **Q.** With the 400- to 600-, what was your basis for  
17 coming up with that range?  
18 **A. My -- the way I wanted to try the case and one**  
19 **of the problems I had with Cuk, once I saw all of the**  
20 **e-mails and memos from him about pursuing the nullity**  
21 **action, was to say, "Cuk wanted to pursue the nullity**  
22 **action, and it was not below the standard of care for**  
23 **them to investigate it and do discovery to try to deal**  
24 **with it, but it was malpractice when you didn't have the**  
25 **evidence and you went to trial anyway." That would take**

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1 **his desire and what he wanted completely off the table**  
2 **as a defense, and then I believe that the damages, if**  
3 **you throw in the additional amounts he paid, all that he**  
4 **owed to Conway and Tomich, and all of that, it came out**  
5 **to about 800- to 1.2 million. The numbers came out in**  
6 **that area.**  
7 **And so when I recommended a settlement value of**  
8 **between 4- and 6-, I probably was half or -- or maybe,**  
9 **yeah, maybe it was like 600- to a million. Whatever the**  
10 **numbers came out. I don't think it was double, but I**  
11 **usually give a settlement value of two-thirds of the**  
12 **range of what something like that should come out to.**  
13 **Q.** Verdict-wise?  
14 **A. Yeah. I mean, if you've got a contract or a**  
15 **specials damages, you pretty much know where you should**  
16 **be.**  
17 **Q.** And there was no emotional distress component  
18 to his legal malpractice claim, correct?  
19 **A. Correct.**  
20 **Q.** It was strictly a numbers, what he paid, what  
21 he shouldn't have paid, versus what he was sanctioned?  
22 **A. Right. There was what he owed them for fees,**  
23 **what he owed them for sanctions, what he overpaid his**  
24 **attorneys, and all of the interest on that. And as time**  
25 **went by, we were hurting because they never resolved the**

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1 **dissolution case because part of that whole idea was,**  
2 **Gee, a dissolution would have been quick, easy, and**  
3 **cheap. And then it still hadn't been resolved and that**  
4 **started making it look like it wasn't such a quick, easy**  
5 **thing if three years after the nullity was open, they**  
6 **still hadn't finished the dissolution.**  
7 **I think it probably was a half again. So I**  
8 **probably thought that it was worth between 600- and 900-**  
9 **or probably what the specials came out to, his fees, his**  
10 **ex's fees, and the sanctions, and the interest was**  
11 **probably between 6- and 9-.**  
12 **I don't think I would have doubled it for this**  
13 **because it's a contract type thing. You don't have gray**  
14 **area damages. So I believe I calculated -- because part**  
15 **of the problem was that he hadn't paid a chunk of them,**  
16 **which I had originally thought were damages because they**  
17 **showed me bills, but then it turns out he hadn't paid**  
18 **some of them. So I believe that the recoverable award**  
19 **was between 6- and 9-, so I recommended a settlement of**  
20 **between 4- and 6-, which I think was pretty dead on.**  
21 **Q.** And when you started negotiations with Suter,  
22 had you -- and Suter was representing Carl Smith  
23 defendants, correct?  
24 **A. Yes.**  
25 **Q.** Prior to August, had you had any preliminary

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1 negotiations with Mr. Suter regarding settlement  
2 value -- or settlement? Sorry.  
3 **A. We had had discussions where I had said that my**  
4 **theory -- because they go -- it's one of these things**  
5 **you're standing in the hall after something, and he was**  
6 **talking about how clearly Cuk was the motivating factor**  
7 **and -- and was pushing this, and I said, "It doesn't**  
8 **matter. You're in a divorce. You're emotional. You're**  
9 **upset. You're pissed off. So he wanted it. And I'll**  
10 **even give you that it was reasonable for them to**  
11 **investigate it because that's what he wanted, and they**  
12 **had no reason to know that it wasn't going to go**  
13 **anywhere. But once it didn't go anywhere, then you're**  
14 **dead to right it's malpractice."**  
15 **And he had said, "Well" -- he could see that**  
16 **argument selling because up to that time, he thought we**  
17 **were going in with it was all their idea and he was a**  
18 **naive and innocent guy and had no clue and just did what**  
19 **they said.**  
20 **And he said, "Well, if you're going with that,**  
21 **what do you think we owe you?" And I probably told him**  
22 **about the 900-, the high end. And he had the look -- I**  
23 **don't recall what his comment was. My feeling was that**  
24 **he, of course, knew that that was the high end but that**  
25 **he thought that we could do that.**

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1 **Q. On the 900-, though, that would have included**  
2 **what Cuk had paid to Burch as well, correct?**  
3 **A. That's correct.**  
4 **Q. And Carl Smith would not have been liable for**  
5 **payments made to Burch for attorney's fees, correct?**  
6 **A. Well, I'm not so sure about that. I'd**  
7 **originally -- in fact, I'm sure I pled it as a joint**  
8 **venture. I think I had originally pled it was a civil**  
9 **RICO. They worked together. They were both liable for**  
10 **both.**  
11 **Q. But the civil RICO was thrown out, correct?**  
12 **A. Yeah, it was.**  
13 **Q. And Burch had told Cuk that he needed to hire**  
14 **trial counsel for whatever reason, but Burch couldn't**  
15 **try this case, correct?**  
16 **A. Well, that's what he said.**  
17 **Q. That's what he said. Whether it's true or not,**  
18 **that's what he said, correct?**  
19 **A. I didn't buy that it was true. I think he was**  
20 **trying to get out of -- he'd led him down the road,**  
21 **billed all he could, and he was trying to get out of it.**  
22 **It was a lame excuse, is what I saw it.**  
23 **Q. But best case scenario, Carl Smith might have**  
24 **been liable for the fees paid to Burch, but --**  
25 **A. I think they were jointly and severally liable**

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1 **as joint venturers.**  
2 **Q. That was your theory?**  
3 **A. Yes. And I think it would have held up. It's**  
4 **hard to say those guys weren't joint venturers on this**  
5 **case.**  
6 **Q. Did you have --**  
7 **A. And it means if you settle with one, you can**  
8 **get the rest from the other guy.**  
9 **Q. Correct. But did you have any evidence where**  
10 **they had agreed to participate in the joint venture for**  
11 **this trial?**  
12 **A. Yeah. They were co-counsel.**  
13 **Q. Well, they were co-counsel because Dr. Cuk had**  
14 **hired Carl Smith, correct?**  
15 **A. Yeah, but you can infer a joint venture from**  
16 **the facts and circumstances and motivations of the**  
17 **parties.**  
18 **Q. And your inference would have come from their**  
19 **actions after Dr. Cuk brought on Carl Smith?**  
20 **A. Yeah, they were -- if either one of them had**  
21 **said, "Wait. I think this is going down the wrong**  
22 **path," then you could maybe break it down. But as long**  
23 **as they were both pushing him down the path that he was**  
24 **paying for without really disclosing the extent of his**  
25 **exposure, that was both of them working together. You**

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1 **can prove conspiracy on that too, which I probably also**  
2 **pled. Because that can be inferred from the facts and**  
3 **the position of the parties, too.**  
4 **Q. In mid-August, you made a written demand on**  
5 **Carl Smith for 200,000?**  
6 **A. Right, but that wasn't what I thought it should**  
7 **settle for originally.**  
8 **Q. But you made a demand?**  
9 **A. Because we needed an offer, yes. At some**  
10 **point, we had concluded -- or I had concluded that**  
11 **Dr. Cuk's protestations that he couldn't pay it, whether**  
12 **they were true or not, he wasn't going to pay it. And**  
13 **at that point, we had -- and meanwhile, the interveners**  
14 **weren't paying it either.**  
15 **Q. But they had agreed to pay 50 percent in**  
16 **July --**  
17 **A. Probably.**  
18 **Q. Had you spoken to Mr. Oyler about whether he'd**  
19 **proceed to trial if you had an agreement from the**  
20 **plaintiffs, in intervention, that they would pay**  
21 **50 percent of his fee?**  
22 **A. I don't believe so.**  
23 **Q. Prior -- and the \$200,000 offer you made to**  
24 **Carl Smith -- Carl Smith had no knowledge as to what the**  
25 **status of any expert for Dr. Cuk was, correct?**

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1 **A. I don't know that.**  
2 **Q.** Had you had any discussions with anyone  
3 representing Carl Smith about Dr. Cuk possibly not  
4 having an expert?  
5 **A. No, no. I told him we did. They knew we -- I**  
6 **always told them we had an expert, and he was chomping**  
7 **at the bit and ready to go, not that we had talked to**  
8 **somebody who wasn't paid and wasn't going to do it.**  
9 **Q.** So from their standpoint, based on your  
10 discussions with them, Carl Smith knew you had a  
11 qualified expert, correct?  
12 **A. Right. Or at least they knew I said we did.**  
13 **Q.** They knew, based on your conversations with  
14 them, that you were looking at a verdict against them?  
15 **A. Jointly and severally.**  
16 **Q.** Jointly and severally for 900,000, correct?  
17 **A. Well, that's what I told them I thought we**  
18 **could get.**  
19 **Q.** Okay. But that's -- they were aware of what  
20 you told them the verdict might be against them if it  
21 was rendered?  
22 **A. And my guess is they felt it probably would be**  
23 **more on -- my guess is they probably, in their own**  
24 **minds, saw the same range I did, only where I'm saying**  
25 **9-, they would be saying 6-.**

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1 **Q.** Did Suter ever give you his opinion as to what  
2 their potential verdict might be?  
3 **A. 4-.**  
4 **Q.** And that would be 4- payable to Cuk?  
5 **A. No, he thought the total verdict against Burch**  
6 **and him would be 4-, just like I said the total verdict**  
7 **against both would -- when we were originally talking,**  
8 **we were talking about the total thing. I never really**  
9 **wanted -- my preference was not to break them apart.**  
10 **Only when I realized that that might be the**  
11 **only way to finance the case, was a partial settlement,**  
12 **then I had to consider breaking them apart. And if I**  
13 **did -- which way to go, which was somewhat easy because**  
14 **Connolly Oyler and I both agreed that O'Neil defendants**  
15 **were the people who would prefer to be settled out.**  
16 **Q.** When had you had that conversation with  
17 Mr. Oyler?  
18 **A. I'm guessing July.**  
19 **Q.** Is that your best estimate?  
20 **A. Yeah, because he gave me kind of a two part**  
21 **thing on if we settled out and had half the trial, and**  
22 **the other thing was -- and he had specifically said that**  
23 **if we have to go for one or the other, we want to go**  
24 **after the family law specialist because he would be --**  
25 **have a great -- a much harder time looking sympathetic.**

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1 **He knew what was going on. And the other guy could say**  
2 **he was relying on the more knowledgeable person, and he**  
3 **was a trial attorney, and he didn't really do a bad job**  
4 **on the trial. He had just been misguided by the expert,**  
5 **by the professional family law guy on what was probable**  
6 **to win. That was always -- and Suter was saying the**  
7 **same thing.**  
8 **Q.** The 900,000 number that you gave Suter, was  
9 that after deducting what Cuk might owe either defense  
10 firm?  
11 **A. I kind of ignored that. The --**  
12 **Q.** That's fine.  
13 **A. I mean -- and I think it was 900-. I don't**  
14 **remember the exact numbers, but I know it must have been**  
15 **something like -- I remember thinking that if I told**  
16 **Suter a number a million or higher, it would act like**  
17 **I'm just making up a number. So I know I asked -- I**  
18 **said I thought we would get something under a million**  
19 **because it made it look like it was considered and**  
20 **factual based, as opposed to saying, "I'm going to win a**  
21 **million dollars."**  
22 **It just -- by asking for another 100- you lose**  
23 **credibility far more than, Oh, so he's got an idea here,**  
24 **and, of course, I've got the moon shining from the right**  
25 **angle and all that stuff, and he's, of course, thinking**

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1 **the exact opposite. Meanwhile, I'm thinking don't buy**  
2 **the credit. That would just tube the case.**  
3 **Q.** But the 900- from your standpoint was money  
4 that would be payable to Cuk?  
5 **A. That's what I told him. It's all payable to**  
6 **Cuk. Then there's liens against --**  
7 **Q.** Right.  
8 **A. -- and intervention stuff.**  
9 **Q.** Conway and Tomich didn't have a separate claim  
10 or separate right to sue either of the legal malpractice  
11 defendants, correct?  
12 **A. None.**  
13 **Q.** They were simply along for the ride?  
14 **A. And the financing.**  
15 **Q.** Well, from their standpoint, any money that Cuk  
16 garnered from either settlement or verdict, they would  
17 attach pursuant to their lien?  
18 **A. Any net recovery.**  
19 **Q.** Correct.  
20 **A. They don't get anything until -- they,**  
21 **basically, are just judgment creditors. The advantage**  
22 **of having them was to get financing. Cuk had told me he**  
23 **wouldn't pay. And by giving them some skin in the game**  
24 **on the plaintiff's side to help motivate them not to**  
25 **sell their credit, which was a scary thought.**

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1 Q. Okay. Suter had come back with you and said,  
2 "Well, we think you're going to get 400- to Cuk's  
3 pocket," correct?  
4 A. Right. Of course he's talking about all the  
5 credit and so forth.  
6 Q. Right. He's looking at a 400,000 joint and  
7 several on his best day?  
8 A. Well, not on his best day. He was saying,  
9 "We're going to win, but if you were to win, I don't see  
10 you getting above 400-." I mean, this is ballpark  
11 negotiating.  
12 Q. I know.  
13 A. I want to give him a number that makes him  
14 think that we've given it some thought and we have a  
15 plan. That's why I wanted to come in under a million.  
16 Because if I said a million or more, it doesn't sound  
17 like we have a plan. It sounds like we just want to  
18 throw it up and see what sticks. He wants to tell me,  
19 like he did, that they were going to win outright, but  
20 if everything went our way, we would get 400- because  
21 he's telling me they understand that they have exposure  
22 by making a comment like that.  
23 That tells me, if they think they've got  
24 exposure, that we could possibly settle with them.  
25 Which when I've got Cuk not paying his costs, no expert

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1 on a case that needs an expert, I'm sweating the  
2 intervenor selling their credit, and I need to get  
3 something done, then I'll -- you know, something that's  
4 another option in your quiver, but I didn't really  
5 pursue that until I had to.  
6 Q. Okay. But up until August 31st, Carl Smith  
7 knew, or at least was told, you had a qualified expert  
8 ready to testify?  
9 A. I always told him that.  
10 Q. And prior to August 31st, you had not  
11 approached Conway and Tomich about kicking in for the  
12 expert, correct?  
13 A. It was something we discussed that they could  
14 do, but I hadn't -- my preference was that Cuk paid it,  
15 and he's our expert; and then they contribute.  
16 Q. But you knew in --  
17 A. I didn't really want them being able to talk to  
18 Oyler directly. I was hoping they would get their own  
19 expert.  
20 Q. But you knew in May to July that Cuk hadn't  
21 paid his bills to Mr. Oyler, correct?  
22 A. I don't recall actually talking about the bills  
23 from before I was retained. That was never an issue  
24 with me. I was concerned about having an expert at  
25 trial.

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1 Q. But Mr. Oyler had been working on the file and  
2 sending invoices from September 2009 all the way until  
3 August 2009, correct?  
4 A. I don't think so.  
5 Q. You've never seen a bill where he's billing  
6 consistently on the file over those two years?  
7 A. This is the only bill I recall, and then I  
8 recall seeing one when Conway and Tomich hired him. He  
9 was never -- other than knowing that we had a potential  
10 expert in reserve, he was never my concern.  
11 Q. And you never spoke to him after September 2009  
12 to ascertain what his bills were, correct?  
13 A. No, I never asked him to do anything. I never  
14 gave him any documents. I talked to him probably  
15 briefly when I asked him to look at the Hack case, and  
16 then I would have talked to him when trial was  
17 approaching and I needed to line up an expert, in which  
18 case, he would want me to sign on.  
19 Q. And that was the May to July 2011 time period?  
20 A. That period, correct.  
21 Q. In 2010, you had been contacted by his office  
22 and advised that his invoices had not been paid,  
23 correct?  
24 A. I'm not sure if it was 2010.  
25 Q. Do you recall when you were contacted by his

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1 office to advise you that Dr. Cuk or that Mr. Oyler  
2 invoices had not been paid?  
3 A. Could have been 2011. I don't know. It wasn't  
4 my issue.  
5 Q. But they contacted you, correct?  
6 A. On maybe one occasion, or two, and it wasn't  
7 even Oyler.  
8 Q. It was someone from his office, correct?  
9 A. I don't even know if it was from his office.  
10 Some guy called and said he hadn't been paid and gave me  
11 the song and dance about how he was going to sue him,  
12 and I said, "Well, you need to talk to him about it."  
13 Q. "Him" being Dr. Cuk?  
14 A. Yeah. And he said, "Well, I thought maybe you  
15 would be interested because we might" -- "we wouldn't be  
16 an expert if you" -- "something doesn't get done."  
17 And I said, "Well, if it comes to an expert,  
18 I'm interested in that," but this was before I was even  
19 retained.  
20 Q. Did this -- and you don't know who the person  
21 was or is or where they were from, correct?  
22 A. And I don't even think they sent me an e-mail  
23 or anything. I can't be sure.  
24 Q. Did they tell you how much was outstanding?  
25 A. They may have.

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1 Q. You don't recall?  
2 A. No.  
3 Q. In the May to July 2011 time frame, when you  
4 contacted Mr. Oyler about being an expert and he told  
5 you that he'd want you to sign the retainer in addition  
6 to Dr. Cuk, did you discuss with him, at that point, his  
7 prior bill?  
8 A. I don't think so. If I did, it was in passing.  
9 Q. But there was never a discussion that -- from  
10 him to you saying, "This prior amount needs to be  
11 brought current"?  
12 A. I don't recall that, and I didn't ask him about  
13 it. I asked him, "Okay. If we were to hire you as an  
14 expert, what would that take and what would you want?"  
15 And he wanted me to sign a written retainer  
16 agreement, and he gave me the 25- to 50-, depending on  
17 how many witnesses -- on how many defendants were still  
18 in.  
19 Q. And was he demanding that the 25,000 be paid up  
20 front?  
21 A. No.  
22 Q. How was he expecting the 25,000 to be paid?  
23 A. I presume by me as he incurred --  
24 Q. At what point was he expecting the 25,000 to be  
25 paid.

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1 A. Well, that calls for speculation as to what he  
2 was thinking.  
3 We didn't discuss that. I said, you know, "If  
4 we were to hire you" -- "hypothetically, if we were to  
5 hire you as an expert on this case, what would it cost  
6 us if we just had the Burch defendants or we just -- or  
7 we had both? In total, I want a ballpark estimate for  
8 your total fees on the case," and that's what he told  
9 me.  
10 He didn't say how he expected to be paid, when  
11 he expected to be paid. He did tell me he wanted me to  
12 sign on to be responsible, so my guess is he'd bill me  
13 and expected me to pay it.  
14 Q. But did he ever tell you that he was expecting  
15 or demanding that the 25,000 be paid before he was  
16 designated as an expert?  
17 A. No.  
18 Q. Did he ever tell you that he was expecting that  
19 in the event the case went to trial against both groups  
20 of defendants, that his anticipated fee would be  
21 \$50,000?  
22 A. He did tell me that that's what he anticipated.  
23 Q. Did he tell you that he wanted that money paid  
24 up front?  
25 A. No.

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1 Q. Did he tell you --  
2 A. But I would want it paid up front if I'm  
3 responsible for it from Cuk, because that's what my  
4 retainer says.  
5 Q. The negotiations with Mr. Suter, you make a  
6 written \$200,000 offer. Why was that number not higher?  
7 A. Sorry.  
8 Q. You need a break?  
9 A. I just wanted to check. I have that thing  
10 that's supposed to be filed by noon.  
11 MR. BAYUK: Why don't we take a break.  
12 (Recess was held from 10:56 a.m. to  
13 11:02 a.m.)  
14 BY MR. BAYUK:  
15 Q. Last question was you made a written demand to  
16 Mr. Suter, who was representing Carl Smith defendants  
17 for \$200,000. Why was that number selected as opposed  
18 to going higher?  
19 A. Because I wanted to solicit a counteroffer.  
20 Q. Based on your discussions with Mr. Suter, did  
21 he tell you that anything above 200- would not solicit a  
22 counteroffer?  
23 A. No.  
24 Q. Could you have submitted a higher offer and  
25 say, "Hey, we're looking for a counter"?

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1 A. No. My gamble was they would counter. My  
2 concern was that they might accept it, but if we had to  
3 do it to finance the case, that was doable.  
4 Q. But the -- but the 200-, at least from Suter's  
5 standpoint was with knowledge that you felt the case was  
6 worth 900,000 and you had a qualified expert, correct?  
7 A. Well, at the time I made the 200,000, we did  
8 not have any expert at all, and we were a month from  
9 designating nobody.  
10 Q. But he didn't know that, correct?  
11 A. That would be speculation. My experience with  
12 people -- with firms like Keesal Young, they probably  
13 have a list of your top 100 most likely experts, and  
14 they may very well have called and found out that we had  
15 Oyler because Oyler is a common expert. The defense  
16 firms do that a lot. So I don't know whether he knew  
17 who it was or what the circumstances were, but I  
18 wouldn't rule it out.  
19 Q. But from your discussions with him, you had  
20 been telling him all along that you had a expert ready  
21 to go, and that, from your standpoint, there was a  
22 \$900,000 potential hit looking at --  
23 A. Right. I'm sure I told him that. Now, if I  
24 had no expert at all, I would have told him that.  
25 Q. And at the point you had made the \$200,000

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1 demand to Carl Smith, had you had any discussions with  
2 Conway and Tomich about contributing to the cost of  
3 Oyler, so that you could designate him as an expert?

4 **A. I believe they weren't willing to do that or  
5 they were willing to contribute, but we would --  
6 still didn't have enough money.**

7 **Q. Do you recall who you -- which one of the two  
8 interveners you spoke with?**

9 **A. I think I almost entirely spoke to Conway.  
10 Tomich would call me every once in a while, but she  
11 would ramble on. Conway is the one I talked to the  
12 most.**

13 **I know I had discussed with Conway that -- at  
14 some point I think I'd asked them to pay for the whole  
15 thing because the half wasn't going to cut it, and Cuk  
16 wasn't going to pay half. And I'm sure that that was  
17 before I made the \$200,000 offer, and he kept saying,  
18 "Well, we're not going to pay more than half."**

19 **Then I said, "Well, then we may just have to  
20 settle to fin- -- do a partial settlement to finance  
21 it," and right now Burch is riding on O'Neil's coat  
22 strings as far as who's moving the defense, so  
23 once they -- O'Neil people were out, then Burch would  
24 come up with money and act differently.**

25 **So in any case, Conway was not -- wanted to**

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1 Conway and Tomich about which expert or consultant they  
2 were considering hiring?

3 **A. They had originally considered hiring their  
4 own, which was my first choice, but that's when Cuk was  
5 going to pay for ours by himself.**

6 **Q. Did they tell you who they were considering  
7 hiring?**

8 **A. They may have, but I don't know if they did.**

9 **Q. Do you recall when that conversation was?**

10 **A. Probably would have been about the same time I  
11 was contacting Oyler, trying to find out what his total  
12 co- -- ballpark total costs would be to be an expert. I  
13 probably talked to them about who their expert was, and  
14 something in the back of my mind tells me it was going  
15 to be somebody who was 80-plus, like Conway, and I  
16 wasn't all that -- it was somebody they knew.**

17 **Q. But that --**

18 **A. I think they had somebody, but they decided not  
19 to use them or whatever.**

20 **Q. That would be in the May to July time frame,  
21 2011?**

22 **A. Yes. I think they had somebody. I don't know  
23 if they told me who he was, but I don't recall -- I  
24 figure, well, if we can get two experts, that would be  
25 better than one, but then Cuk wasn't paying for ours,**

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1 **have everyone in there, but wasn't willing to do more  
2 than split it, I think, was the highest he ever got up  
3 to.**

4 **Q. Do you remember when that conversation was?**

5 **A. There were several of them.**

6 **Q. Do you remember when the first conversation was  
7 with Mr. Conway where --**

8 **A. No, but I knew that they weren't going to pay  
9 more than half, but the fact they were willing to pay  
10 more than half and had -- and I hadn't heard anything  
11 from anybody about selling the credit caused me to think  
12 that if push came to shove, they would have more than  
13 half. And at some point, I decided to play the "we'll  
14 settle if you don't pay" gambit.**

15 **So I had to make a -- knowing there was almost  
16 zero chance, and that's why I didn't use a 998 offer,  
17 that they would just accept to say, "Oh, okay," to a  
18 \$200,000 offer but wanting to make an offer that would  
19 elicit at least a six-digit counteroffer, which would  
20 then be credible to use on Conway and Tomich. I  
21 concluded that the 200,000 was the right number. High  
22 enough that they wouldn't just say, "Oh, okay," but low  
23 enough that they would say, "Wow, I think we can do this  
24 and come back with a decent counteroffer.**

25 **Q. Did you ever have a discussion with either**

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1 **and I'm sure Oyler was better than theirs.**

2 **Q. But would Judge Miller have permitted two  
3 experts to testify on the same issues of malpractice?**

4 **A. It depends on if they ran in and made a motion  
5 to designate sides.**

6 **Q. Their claim was still derivative of anything  
7 that Dr. Cuk was going to recover, correct?**

8 **A. Correct.**

9 **Q. And the defendants had committed no malpractice  
10 against the interveners, correct?**

11 **A. The defendants had no duty to the interveners,  
12 is more an accurate way to put it. They actually might  
13 have. The interveners should have made a 127.8 motion,  
14 but they wouldn't have a chance. It was too late.**

15 **Q. Did Jack Conway ever talk to you about using  
16 Merritt McKeon as an expert?**

17 **A. Yes.**

18 **Q. When was that conversation?**

19 **A. It came up at some point when I told him that  
20 Cuk couldn't even pay half of Oyler. At first, we were  
21 going to get Oyler, they were going to get their own  
22 person. Then we were going to potentially split on  
23 Oyler. Then Cuk couldn't pay his half of Oyler, and we  
24 were thinking of other things.**

25 **And see, Merritt was kind of a freebee expert**

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1 because she could be -- testify as a percipient witness  
2 as a subsequent handling attorney, throw in some useful  
3 standard of care information without actually even being  
4 an expert that would kind of bolster everyone else. She  
5 was too -- she couldn't really realistically be an  
6 expert because you couldn't have a total waiver of  
7 attorney-client privilege because she was acting as an  
8 attorney on the same case. You couldn't have her -- she  
9 had an interest in the outcome. She really couldn't  
10 have been an expert, but she had mentioned -- well,  
11 maybe she can say what we need at some point.

12 Q. Was that conversation with Mr. Conway before  
13 you made the \$200,000 offer?

14 A. I don't recall whether -- it must have been.  
15 Once I made the 200,000 and we got a credible  
16 counteroffer that I could say, "Hey, if you don't pay,  
17 we're going to go for it," then there was no more talk  
18 of using Merritt.

19 Q. Did you ever tell Mr. Conway that Merritt had  
20 been investigated by the State Bar?

21 A. Yes.

22 Q. Do you know if Merritt had been investigated by  
23 the State Bar?

24 A. She told me she had. She told me that Ron  
25 Lais, who I knew and had been disbarred, that she had

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1 about what his practice was doing. And I'd given him  
2 some advise on a couple cases but decided that he was  
3 probably way in over his head on a bunch of stuff, and  
4 he was doing more than he knew how to do; and I didn't  
5 want to get involved.

6 Sometime after that, he had called me again,  
7 and he was already being investigated by the State Bar.  
8 Then years later, when I talked to Merritt, she had,  
9 apparently, taken the position that he had once talked  
10 to me about, or something. And -- even though I didn't  
11 know who she was. And I knew that there had been issues  
12 about him seeing clients when he was suspended, and  
13 that's one reason I didn't want to have anything to do  
14 with him, because I knew he was the kind of person that  
15 would do that.

16 But I don't know how it got started. I just  
17 know that was the issue. And I only remember it because  
18 I could have been in that position.

19 Q. When did Merritt tell you that she was under  
20 investigation by the State Bar for whatever she had to  
21 do with Lais?

22 A. The first time she met me.

23 Q. Which was back in 2009, spring?

24 A. Probably, yeah.

25 Q. So when she tells you about Dr. Cuk's case, she

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1 been operating his office while he was suspended, and  
2 there were some issues about him seeing clients while he  
3 was suspended while she was supposed to be running the  
4 office.

5 Q. Did she tell you, or are you aware, that she is  
6 the one that reported him to the State Bar?

7 A. I just know that the State Bar investigated her  
8 role in his seeing clients.

9 Q. And that's based solely upon a statement that  
10 she made to you?

11 A. And my -- Ron Lais had actually called me  
12 during that time regarding some of his problems, which I  
13 had stayed clear of. So I knew about them independent  
14 from -- of her.

15 Q. When did Mr. Lais call you to talk about --

16 A. About the time when all of this stuff was  
17 coming down. He was in the papers quite a bit there.

18 Q. When was that?

19 A. I don't know. Whenever all of the stuff was --  
20 he was being suspended and stuff.

21 He had represented me on a divorce and been my  
22 attorney. After that was over, he had called me and  
23 asked for advice on how to handle a settlement value of  
24 some medical malpractice cases, and I had come down and  
25 talked to him at his office in Anaheim Hills kind of

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1 then tells you that she's under investigate or was under  
2 investigation by the State Bar --

3 A. Yeah, that she was -- for some reason, we  
4 talked about -- some reason Lais came up, and it turns  
5 out we both knew him, and we both knew him at the same  
6 time kind of thing. I don't know how that -- I don't  
7 know, really, how it even came up.

8 Q. Was she ever disciplined?

9 A. I don't know. I just know there was a State  
10 Bar investigation. He was suspended. He had been  
11 seeing clients anyway, and she was running his office.  
12 So I'm assuming -- and she said that they were  
13 interested in what she knew and when she knew it, that  
14 kind of stuff.

15 Q. Was that as part of their investigation into  
16 Mr. Lais, or were they investigating Ms. McKeon, or do  
17 you know?

18 A. They were investigating whether she was  
19 complicit and him practicing law when he was suspended.

20 Q. What were her exact words?

21 A. Something along those lines. Either she was  
22 accused or suspected of having known he was doing it.  
23 Again, my understanding that she wasn't disciplined, but  
24 I don't really know what the outcome was. My thought  
25 was why would you put yourself in that position? You

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1 **know it's going to happen.**  
2 **Q.** Getting back to Carl Smith, you make the  
3 \$100,000 demand --  
4 **A. I made the \$200,000 --**  
5 **Q.** Sorry. You make the \$200,000 demand. They  
6 send you a letter giving their explanation. But what  
7 was their counteroffer?  
8 **A. I think 100,000.**  
9 **Q.** And that would wipe out Dr. Cuk's debt to Carl  
10 Smith, and they would pay Dr. Cuk 100,000, correct?  
11 **A. Correct.**  
12 **Q.** Out of that 100,000, had you talked with Conway  
13 and Tomich about how the split would occur?  
14 **A. No. I conveyed the offer to them and suggested**  
15 **that we would take it if they weren't willing to finance**  
16 **the case.**  
17 **Q.** But at least under their lien rights that they  
18 had, they could have attached a significant portion of  
19 that 100,000?  
20 **A. They could have attached the entire net**  
21 **recovery.**  
22 **Q.** The entire net recovery would have been 60,000,  
23 correct?  
24 **A. There were costs and things like that, but**  
25 **yeah.**

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1 **Q.** Round numbers --  
2 **A. Because I think he only had 2- or \$3,000 in**  
3 **costs at that point.**  
4 **Q.** What did you advise Dr. Cuk as far as the  
5 100,000?  
6 **A. Well, first of all --**  
7 **Q.** Well, strike that. Hold on. I'm sorry.  
8 Did you have any discussions with Mr. Suter or  
9 his office about what the 100,000 was based on?  
10 **A. I think they probably explained how they**  
11 **figured it out. I don't recall what they said. It's**  
12 **just numbers. The 200- was low enough that they gave a**  
13 **high counteroffer, which is what I was looking for.**  
14 **Because we didn't have time to go make a ridiculously**  
15 **high offer, get a ridiculously low counteroffer because**  
16 **we didn't have any time at that point.**  
17 **So I made an offer designed to get a good**  
18 **counteroffer. They probably explained how they figured**  
19 **it out, and I probably explained how I figured it out,**  
20 **not that I believe what I said or what they said. And**  
21 **they -- we got the offer. Now, I told Conway that he**  
22 **wouldn't get any of the 100- because I was going to hold**  
23 **it all for costs, which I have a right to do.**  
24 **Q.** When did you tell Jack Conway that?  
25 **A. About the same time that I got the**

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1 **counteroffer, probably at the same time. I know I had a**  
2 **couple phone conversations, and I know I wrote a letter**  
3 **at some point, but I told them that if we were going to**  
4 **settle -- he wanted everybody to be in. And I said**  
5 **"Yeah, great, in a perfect world. But if we can't**  
6 **finance this case, we've got no case."**  
7 **So I'd be better off taking my hundred and**  
8 **trying the case against Burch, and that hundred isn't**  
9 **going to be disbursed now. That hundred is going to go**  
10 **towards costs. And that's what, you know -- and -- and**  
11 **then it's -- and then he had agreed -- at some point, he**  
12 **agreed to pay the whole thing, and they were going to go**  
13 **meet -- he didn't agree in advance of meeting Oyler, but**  
14 **he must have agreed. They went -- he asked for my**  
15 **permission to talk to Oyler. Because at that point, he**  
16 **was our guy, and I said that they could talk to Oyler**  
17 **because I guess they wanted to find out how strong a**  
18 **witness Oyler was and how strong the potential expert**  
19 **thought the case was. They then called me back and said**  
20 **that they had talked to him, and he had convinced them**  
21 **that it was a great case, and they were there if they**  
22 **were willing to pay for it.**  
23 **And then they, at some point, shortly**  
24 **thereafter paid him 10 grand and signed a written**  
25 **agreement.**

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1 **Q.** Did you ever see the written agreement signed?  
2 **A. I don't recall. I'm pretty sure I didn't see**  
3 **the signed one. I assumed it was probably the same**  
4 **written agreement that he had talked to about with me,**  
5 **which I don't know if I saw that. But he probably had**  
6 **sent it to me when he was trying to get me to sign it.**  
7 **Q.** At the point where you were having these  
8 conversations with Jack Conway, Mr. Oyler had not agreed  
9 to be an expert because he hadn't been paid, correct?  
10 **A. No.**  
11 **Q.** What's wrong with that statement?  
12 **A. Whether he had been paid by Cuk was kind of**  
13 **chump change relative to the expert thing, and they were**  
14 **two separate things.**  
15 **Q.** But the -- as far as his retainer agreement  
16 that he had asked you to sign to be acting as an expert  
17 and to be designated as an expert, that had not been  
18 signed, correct?  
19 **A. Correct. And it wasn't a condition that**  
20 **whatever Cuk -- fees Cuk had incurred before I**  
21 **represented him would be paid as part of being an**  
22 **expert. That would have been a separate deal.**  
23 **Q.** We're talking just acting as an expert at  
24 trial. Mr. Oyler gave you a written retainer agreement,  
25 advised you that his anticipated fees would be 25- to

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1 \$50,000 through trial and that, at some point, he was  
2 going to be expected to be paid, correct?  
3 **A. Right. I do not know if he gave me the written**  
4 **retainer agreement or said he would require me to sign**  
5 **one or both. Obviously, he told me he would require me**  
6 **to sign one. Whether he actually sent it to me, I don't**  
7 **recall.**

8 **Q.** But at the point where you're having these  
9 discussions with Mr. Conway and you tell Mr. Conway that  
10 Oyler is your expert and you give him authority to  
11 contact him, Mr. Oyler, there was no specific agreement  
12 in place by you or Cuk with Oyler to designate Oyler as  
13 an expert, correct?

14 **A. Right. I couldn't have designated Oyler**  
15 **without a written agreement being signed. The only**  
16 **thing I could have done as far as Oyler and anyone else**  
17 **is, I could have kept anyone else from designating him.**  
18 **And since he'd already reviewed the file, that was a big**  
19 **plus. Because I know Conway had talked to somebody, and**  
20 **he indicated that the cost of revealing all that file**  
21 **was prohibitive.**

22 **Q.** Why -- prior to all of the negotiations taking  
23 place, had there been any discussions with Conway about  
24 sharing in an expert?

25 **A. They were -- there had been discussions at some**

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1 **point about them contributing, but I wasn't particularly**  
2 **inclined to have a friend of Conway be our expert,**  
3 **especially since we already had a well-qualified expert**  
4 **who'd already reviewed the file.**

5 **Q.** Why didn't you broach the subject with Conway  
6 and say, "Hey, we already have a qualified expert, and  
7 he's already reviewed the file" --

8 **A. We did at some point.**

9 **Q.** When was that early -- when was the earliest  
10 point you had that conversation with Mr. Conway?

11 **A. May to July area where I'm trying to -- once I**  
12 **find out what Conway is going to charge for all of this,**  
13 **now I have to find the money.**

14 **Q.** You mean Oyler?

15 **A. Oyler. I had checked with some other experts,**  
16 **who might be cheaper, but Conway had a leg up on all of**  
17 **them because he had already reviewed the file, and just**  
18 **reviewing the file, especially since none of my experts**  
19 **appeared to be stronger than him, that just didn't**  
20 **really make sense. So I -- because I know I had talked**  
21 **to a couple people about being an expert.**

22 **Conway had apparently talked to a couple people**  
23 **about being an expert, but he apparently had reached the**  
24 **same conclusion I did. Oyler was already halfway there**  
25 **compared to anybody else.**

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1 **Q.** But in May to July of 2011 time frame, had you  
2 told Conway who the expert was?

3 **A. I'm sure I did. So by that time, we both had**  
4 **been discussing other experts; we both had been**  
5 **discussing Oyler; Oyler had one steep estimate for what**  
6 **it would cost and wanted me to be personally**  
7 **responsible, and Conway was like pulling teeth to even**  
8 **say he would pay half. But in the long run, Conway and**  
9 **I concluded the same thing: Oyler was the guy because**  
10 **he was halfway there.**

11 **Q.** And when you and Conway concluded that Oyler  
12 was the guy, this was after Dr. Cuk had told you to  
13 reject the Carl Smith offer of 100,000, correct?

14 **A. No. All that happened way before then.**  
15 **Until -- until Cuk actually gave me written authority to**  
16 **make the \$200,000 offer, I always thought that a guy who**  
17 **owns multiple houses and businesses could scrape up 25**  
18 **grand if he really wanted to. And I thought he was just**  
19 **playing hardball and not wanting to pay.**

20 **Q.** Did he ever tell -- did Dr. Cuk ever tell you  
21 that you were responsible for the expert costs?

22 **A. No.**

23 **Q.** The --

24 **A. Because I wasn't. That was never disputed.**

25 **MR. BAYUK:** Well, move to strike.

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1 **BY MR. BAYUK:**

2 **Q.** The May to July 2011 time frame, you've had  
3 discussions with Conway; you've now been advised by  
4 Oyler what his anticipated fees will be through trial.  
5 Did you discuss with Oyler in the May to July time frame  
6 of him also acting as an expert on behalf of the  
7 interveners and there being a splitting of the cost?

8 **A. Probably not.**

9 **Q.** Why not?

10 **A. I wanted to be in control. I can split the**  
11 **cost with him and still be the controlling guy. Once I**  
12 **invite them in and waived my privilege, then they are --**  
13 **they -- well, they're not necessarily in control, but**  
14 **then they are mucking things up. Like they took two and**  
15 **a half days to accomplish nothing at a deposition. They**  
16 **were not -- they weren't focusing where I wanted to**  
17 **focus on the case anyway. They were focusing on the**  
18 **discovery prior to the nullity trial, and I didn't want**  
19 **to focus there. I wanted to focus on, "Okay. You did**  
20 **your due diligence. You got what you could, and it just**  
21 **wasn't enough; but you went to trial anyway."**

22 **Because that was a solid -- that was a solid**  
23 **winnable case. Other than that, we were just blown into**  
24 **the wind making stuff -- claims that could be proven**  
25 **wrong and mucking it all up. And if you read the O'Neil**

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1 deposition, saw what Conway asked, he was not -- you  
2 wouldn't have ever seen the forest through the trees,  
3 and I didn't want him to do that.  
4 Q. They were focusing on the, I guess, expense put  
5 on discovery of Dragna's records.  
6 A. All that stuff. That was a big thing for them,  
7 and I'm sure the attorneys involved -- it was very  
8 aggravating to them.  
9 Q. Did you tell Dr. Cuk after the \$200,000 offer  
10 had been made and the \$100,000 counter was made to you  
11 by Carl Smith, that it was your opinion that was the  
12 highest number they would go to settle the case?  
13 A. Probably.  
14 Q. Why?  
15 A. Because I wanted him to consider -- I wanted to  
16 not -- I was concerned that Cuk was talking to Conway.  
17 I know he was talking to Conway, even though I told him  
18 not to, and I was afraid that if I told Cuk one -- that  
19 we could -- wanted to keep negotiating or something,  
20 he'd tell Conway that, and Conway would, therefore, not  
21 cover the costs, and I have no reason to know that they  
22 would have -- well, I figured they would settle for  
23 more, but at that point, I wasn't looking for a  
24 settlement. There was no acceptable offer on the table,  
25 but I wanted to -- but I knew that as soon as I told

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1 Conway we were considering settling it, they would call  
2 up Merritt and/or Cuk. Cuk and Merritt, if I told them  
3 I thought we would -- could get more -- and I think I  
4 said we probably could get a little more or something,  
5 but if they would say, "Oh, no, we're holding out. He  
6 doesn't really think that," then suddenly the whole  
7 gamut is gone. So the only possible -- given that  
8 Merritt and Cuk were talking directly to Conway and  
9 Tomich, against my directions, the only way to play the,  
10 "Well, I think we'll take the 100-," is to tell  
11 everybody that we think that's what they're going to  
12 offer. That's as good as it gets.  
13 Q. What evidence or information do you have that  
14 they were actually talking behind your back?  
15 A. They said they were.  
16 Q. When?  
17 A. They sent e-mails saying, "This is what Tomich  
18 said. This is what Conway said." And they wanted these  
19 guys to actually show up at meetings to talk strategy,  
20 which was not very effective because they had their own  
21 little petty grievances, which really weren't where the  
22 case was at.  
23 Q. Did Conway and Tomich assist in the deposition  
24 preparation of Dr. Cuk when he was deposed in February  
25 of 2011?

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1 A. No.  
2 Q. Did they participate in the meeting where he  
3 was prepped for the deposition?  
4 A. No.  
5 Q. After the depositions were taken, did they  
6 obtain copies of the transcripts and provide you with  
7 analysis and areas of testimony that they would  
8 recommend be changed because it was inconsistent with  
9 Dr. Cuk's prior testimony?  
10 A. Yes.  
11 Q. Did you ever invoice --  
12 A. And I might add that after the first portion of  
13 his deposition, when it was pretty clear that Dr. Cuk  
14 was not doing well, I had Dr. Cuk sit with me, and I had  
15 them go through the timeline, so that maybe he could  
16 listen and try to get it a little bit better. I  
17 wouldn't -- if you wanted to call that participating in  
18 prep, you might be able to.  
19 When they asked what we were talking about --  
20 because it was at their lunchroom -- we said, "Look, I  
21 was just asking Conway what the timeline was," and --  
22 but as a practical matter, the reason I was asking him  
23 what was the timeline was maybe Cuk wouldn't screw it up  
24 so bad.  
25 But yeah, they had made recommendations. I had

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1 reviewed the deposition transcript on my own, and my  
2 recommendation was that he not sign it and -- because I  
3 didn't want to make any recommendation making the  
4 changes they wanted.  
5 Q. Didn't you -- also, didn't you suggest that  
6 maybe if Conway and Tomich have other additions or  
7 changes, that might be something to be looked at? In  
8 the very same e-mail where you said my recommendation is  
9 you don't -- is he doesn't sign it, but maybe Conway and  
10 Tomich know more about the case than I do?  
11 A. Well, I always want to know what they know,  
12 because by that time, I realized neither Merritt nor Cuk  
13 were good historians. But I wasn't sure Conway -- and I  
14 wanted to know what they had to say. I don't ever -- I  
15 don't believe I ever adopted anything they said, but  
16 knowledge is power, and they are -- they were there, and  
17 they were much better historians than Cuk was.  
18 So I'm sure I had every opportunity for them to  
19 give me comments and what they were thinking. I don't  
20 recall, but I never adopted it.  
21 Q. By February 2011, had you reviewed any of the  
22 underlying file materials?  
23 A. Yes.  
24 Q. Had you reviewed the e-mails that had been  
25 exchanged between Cuk and Burch and O'Neil and Burch?

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1 **A. Yes.**  
2 **Q.** Had you reviewed the discovery responses and  
3 developed your own timeline for your theory of the case  
4 about the nullity shouldn't have been pursued, and at  
5 the point where they proceeded to trial, that was the  
6 malpractice. Had you developed a timeline for that?  
7 **A. Yes, I decided where I wanted to call the**  
8 **malpractice point -- was that we were going to shoot**  
9 **ourselves in the foot if we took the position that they**  
10 **were driving the discovery process. Cuk would show up**  
11 **every other week with some thing he wanted them to**  
12 **investigate, and it just wasn't -- that wasn't going to**  
13 **fly. So I decided where we would start the malpractice.**  
14 **Once you don't have it, you just can't go to**  
15 **trial. When a client says, "Look, I found this new**  
16 **incident. You've got to go talk to this witness," it**  
17 **could be malpractice not to. You want clean lines.**  
18 **Q.** In the underlying case, Cuk was actively  
19 involved in providing Burch and O'Neil information,  
20 correct?  
21 **A. That was part of their problem. They took his**  
22 **information as word, especially on translations of**  
23 **whatever -- Hungarian or whatever he speaks.**  
24 **Q.** Do you recall at what point during your  
25 representation of Dr. Cuk that he had lied to you about

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1 his involvement in the underlying legal malpractice case  
2 and who wanted to pursue the nullity?  
3 **A. He maintained that it was their idea the entire**  
4 **time I represented him, even when it became obvious that**  
5 **it wasn't true.**  
6 **Q.** But at some point, you came to the conclusion  
7 that he had been lying to you, correct?  
8 **A. Right.**  
9 **Q.** When was that?  
10 **A. Probably by the time of his deposition.**  
11 **Q.** So February 2011?  
12 **A. Right.**  
13 **Q.** Why didn't you withdraw?  
14 **A. Because he still had a valid case. The fact**  
15 **that he wasn't telling me the truth doesn't exactly**  
16 **differentiate him from most clients, especially wrongful**  
17 **termination clients. You just don't know.**  
18 **Now, my job is to see what the facts are, and**  
19 **after the wishful recollection of the plaintiff is**  
20 **straightened out, is there still something left? And**  
21 **that's why I said we should take out the claim that it**  
22 **was their idea, since it wasn't, and say it was okay to**  
23 **investigate that and conduct discovery because that was**  
24 **diligent representation and that start the malpractice**  
25 **from when they went to trial anyway. Because there was**

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1 **a significant chunk of, like, pretrial work, and I guess**  
2 **the trial was spread out over six months; a day here and**  
3 **a day there, and they billed them like crazy.**  
4 **But if you start the trial prep, not counting**  
5 **the discovery, which was legitimate, you still had huge**  
6 **amounts of fees that were charged. And they knew or**  
7 **should have known there was no case at that time.**  
8 **So yeah, it's not -- if he had no case, I**  
9 **wouldn't have stayed on. If I realized that if you take**  
10 **out one time period, he's still got a great case, then**  
11 **that's fine; and that's what I concluded.**  
12 **And then pretty much everything after the**  
13 **nullity trial was snowing him with trying to cover up**  
14 **the fact that they should have never done the nullity**  
15 **trial, and, you know, the motion to be relieved of**  
16 **other -- all that was pretty stupid. But until that --**  
17 **there's no way to get around the fact that it was his**  
18 **idea. And his insistence that it wasn't was really**  
19 **aggravating.**  
20 **Q.** Did Dr. Cuk ever tell you to reject the Carl  
21 Smith offer of 100,000?  
22 **A. Probably. I never was going to accept it.**  
23 **Q.** But it's his authority to either accept or  
24 reject it, correct?  
25 **A. Of course. I mean if he said accept it, I**

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1 **would have said, "Wait, wait, wait. I don't want to,"**  
2 **because I knew that they would have more money.**  
3 **I just wanted if Conway calls Cuk and says,**  
4 **"What do you think about that offer?"**  
5 **And he says, "Yeah, I just got an e-mail that**  
6 **we should accept it. That's as high as it gets," then**  
7 **Conway is going to take it a lot more seriously. And**  
8 **the fact that he had 50 percent, Oyler had done a good**  
9 **sell job on Conway and Tomich, that they were going to**  
10 **win big. I knew that they could do it. I didn't know**  
11 **he was stealing from his clients to get the money,**  
12 **though.**  
13 **Q.** Is this the initial -- there were -- were there  
14 two \$100,000 offers?  
15 **A. No. I believe there was just one that sat**  
16 **there for a while because we never rejected it. Because**  
17 **I never wanted to make a counteroffer. I wanted to use**  
18 **that 100,000 to -- because that's a big enough number**  
19 **that we would finance the case without any Conway or**  
20 **Tomich cooperation, which is what we needed to be**  
21 **viable.**  
22 **Q.** You make the \$200,000 offer August 17th. You  
23 receive a written response from Suter, that, according  
24 to your recollection, is a \$100,000 counteroffer,  
25 correct?

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1 **A. I recall, yeah. I don't know if he did**  
2 **anything before that. I know there was 100- on the**  
3 **table from them.**  
4 **Q.** Do you -- and if I asked this, I apologize.  
5 Did you tell Cuk that, in your opinion, that's the best  
6 offer you're ever going to get out of Carl Smith and he  
7 should accept it?  
8 **A. Probably.**  
9 **Q.** After you're telling him that, did you have an  
10 e-mail exchange with Dr. Cuk, wherein he told you to  
11 reject that \$100,000 offer?  
12 **A. Well, I never had authority to accept it**  
13 **anyway, so I don't know whether he told me a second time**  
14 **to not do it. I recall him not coming off the two, but**  
15 **I would have never accepted the hundred anyway.**  
16 **Q.** But do you recall receiving from him a specific  
17 e-mail telling you to reject the \$100,000 offer without  
18 a counter?  
19 **A. That's what I did. I don't know if he wanted**  
20 **me to.**  
21 **Q.** Well, did you tell him in an e-mail that you  
22 were going to -- per his authority, you were going to  
23 reject the 100,000 without a counteroffer?  
24 **A. I don't think I ever actually even rejected the**  
25 **100-.**

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1 **Q.** Even though he told you to reject the 100-?  
2 **A. I don't remember. I don't recall ever**  
3 **responding to it one way or the other, but I may have**  
4 **rejected it. But if I rejected it, that would put me in**  
5 **a position of making a counteroffer, and I wasn't going**  
6 **to make a counteroffer. So I probably wouldn't have**  
7 **rejected it. I wanted everybody to think that we might**  
8 **just accept it and would not have been conducive to**  
9 **that, to reject it. It would have been conducive to**  
10 **tell Cuk, "Oh, don't worry. They're going to come up**  
11 **higher, and it certainly wouldn't have been conducive to**  
12 **say anything about we'll probably accept it if you won't**  
13 **pay to Conway and Tomich. So the whole idea was it's on**  
14 **the table, and we were thinking awful seriously about**  
15 **it. That's what we had to have everybody think.**  
16 **Q.** But --  
17 **A. And it worked out that way.**  
18 **Q.** And you don't recall, as you sit here today,  
19 receiving a specific e-mail from Dr. Cuk telling you to  
20 reject that \$100,000 offer, correct?  
21 **A. I don't recall what he said. I know that he --**  
22 **he had never given me authority to accept it, so I would**  
23 **need that. As far as accepting something I was going to**  
24 **accept any -- rejecting something I wasn't going to**  
25 **accept anyway, maybe did, maybe didn't.**

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1 **Q.** But you had told him that was, in your opinion,  
2 the best offer you were going to get out of the Carl  
3 Smith defendants, correct?  
4 **A. Of course. Otherwise we couldn't have used it**  
5 **in Conway.**  
6 **Q.** If -- as you sit here today, do you recall on  
7 what date Conway and Tomich sat down or met with or  
8 spoke to Mr. Oyler?  
9 **A. I know that I got a phone call when they were**  
10 **leaving saying that Mr. Oyler had convinced them he was**  
11 **God's gift to expert witnesses, and that they were going**  
12 **to win big, and that they were willing to finance this**  
13 **thing and don't take the hundred.**  
14 **And I said, "Gladly. We're all on the same**  
15 **team other than I've kind of given up my leadership**  
16 **position to Conway because now they retained the**  
17 **expert."**  
18 **Q.** How long had you been negotiating with Conway  
19 and Tomich to assume 100 percent of the cost through  
20 trial?  
21 **A. Probably since July. Once we both concluded --**  
22 **at first, you know, we were both looking into other**  
23 **experts besides Oyler, then we, at some point, compared**  
24 **notes and concluded that Oyler was really the only game**  
25 **in town because he was already ahead of the game having**

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1 **reviewed the file, and then they had stuck at 50**  
2 **percent, and I must have asked them for more than that**  
3 **and said Cuk can't afford it and given whatever sad**  
4 **story Cuk was giving me as to why he couldn't.**  
5 **But they were stuck at the 50 percent saying,**  
6 **"Hey, this is" -- and then I was saying, "Look, you're**  
7 **getting 100 percent of the net. Why should he be**  
8 **financing that?" Because we're arguing that part, too,**  
9 **that Cuk probably wouldn't even be getting anything --**  
10 **any net recovery.**  
11 **And I think I asked Conway to agree to give him**  
12 **a portion of the net recovery, was also something we**  
13 **were discussing.**  
14 **Q.** And this was all the July through September  
15 time frame?  
16 **A. Yeah, and then by the time we got into August,**  
17 **the kind of -- people kind of painted themselves into**  
18 **the corner. They weren't going over 50 percent, though.**  
19 **I had a -- my gut feeling was they would if they had to.**  
20 **Cuk was in a position where he was finally convincing me**  
21 **that he really wasn't going to pay for it because I**  
22 **always thought that he was just seeing if he could get**  
23 **everyone else to. And I told him he probably wasn't**  
24 **going to get any of the net recovery. So it didn't make**  
25 **him any likely to either. So finally, we decide to make**

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1 an offer, that if they did say yes, we could live with,  
2 even though it was less than I thought they would pay  
3 for a good faith settlement.  
4 But we were getting too close to the expert  
5 exchange, and we were sitting there walking on eggs with  
6 no case. So we made the offer. We got the  
7 counteroffer, and then I was able to convince them to  
8 pay for the entire thing, which then allowed us to go  
9 forward and took everything off. I think I actually,  
10 even though I didn't have to, withdrew the 200- at some  
11 point.

12 Q. Did you know in January/February of 2011 that  
13 Cuk was probably not going to get anything from the --  
14 any sort of net recovery?

15 A. No.

16 Q. When did you conclude that he was not going to  
17 receive any of the net recovery?

18 A. Probably in about May, because then I had his  
19 depositions, then I could look at the -- until his  
20 deposition, I thought that he could recover for what  
21 they charged him before the nullity trial, and that --  
22 if he could recover damages for that time period, he  
23 would get a portion of the net recovery.

24 But once he had his deposition and I saw that  
25 he paid all the bills before the nullity trial, and he

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1 hadn't paid bills after the nullity trial, I started  
2 adding up the math and realizing that if the interveners  
3 had a \$500,000 claim against the net, we'd pretty much  
4 have to get 800-, depending on what the -- 900-  
5 depending on how much our total costs ended up being for  
6 him to break even or before he really was going to get  
7 something. And the whole value of the case was pretty  
8 much in that range. So -- was really below that.

9 So by the time -- yeah, I'd say after his  
10 deposition, it took me a month of going through more  
11 documents, adding up the bills and figuring out that he  
12 was not looking at a net recovery.

13 Q. Had you, prior to August 2011, gone through the  
14 bills to make a determination as to -- at least on your  
15 theory of liability -- determine what fees had been paid  
16 to the malpractice defendants were legitimate versus  
17 those that should not have been charged and not pursued?

18 A. I had gone through his bills, but I had not --  
19 I was presuming that, basically, none of them were  
20 legitimate other than -- I presume that Mullin's fees  
21 and Dishon's fees were probably the end of the  
22 legitimate fees.

23 Until after the deposition, I assumed that once  
24 Burch said, "Hey, you go with me, I'll do the nullity  
25 case," nothing after that was legitimate. So once when

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1 I was thinking of it that way, none of it is legitimate.  
2 If you induce somebody by fraud or misrepresentation, if  
3 you're a fiduciary, to come with you, et al., you really  
4 don't get credit for even legitimate stuff.

5 Once I realized that Burch was saying he would  
6 do what Cuk was insisting on and that, therefore, a lot  
7 of the pretrial stuff was legitimate, that was a  
8 different calculation and draws a line in a different  
9 place, but I didn't do that until after his deposition.

10 Q. Cuk's deposition?

11 A. Right. Because until then, Cuk was insisting  
12 that it was all their idea, and it wasn't really clear  
13 how everything came down, and I was going his way until  
14 I had to not go his way.

15 Q. After you had reviewed Dr. Cuk's deposition and  
16 your opinion was that the malpractice really occurred  
17 because the defendants decided to take the nullity case  
18 to trial when they shouldn't have, correct?

19 A. Right.

20 Q. So that the fees incurred before the date of  
21 trial, give or take a month or two, were legitimate, and  
22 they had been paid by Cuk?

23 A. That wasn't the actual analysis. They gouged  
24 him on those earlier fees too. But they didn't -- that  
25 did not seem like a good fight to fight because a clean

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1 line -- everything after this point was wrong and  
2 everything before that -- well, yeah, look at the way  
3 these guys gouged him, but you just don't -- all of  
4 Cuk's exposure for being complicit and knowing what  
5 was -- was all before that. All of the early stuff is  
6 where he looked bad. He didn't really look like a bad  
7 guy after the nullity case, and then they were covering  
8 our own butts on that.

9 Q. But he hadn't paid any of those fees, correct?

10 A. Oh, no, he paid a chunk. He paid probably over  
11 50 percent. At some point he stopped paying.

12 Q. Post-trial fees?

13 A. Right, but he paid through the trial. I think  
14 he paid through the appeal. I think he paid -- he paid  
15 for the motion to try to disqualify. He paid for a lot  
16 after that point. He -- they -- but --

17 Q. Did you make a determination as to how much he  
18 had paid was recoverable in the malpractice action?

19 A. Yes.

20 Q. What number was that?

21 A. I don't remember. I remember drawing the line,  
22 looking at the other earlier costs, thinking, Well, he  
23 kind of got gouged, but that's a fight that's going to  
24 hurt us more than help us because it's going to be  
25 focusing on him and what he wanted, and we'd rather say,

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1 "Hey, he was a hurtin' guy, and he wanted to come on  
2 strong, and they took advantage of him."  
3 And it didn't seem like in the big scheme of  
4 things that was a good fight to fight. I never could  
5 agree that all those were legitimate fee. I wanted a  
6 bright line, clear issue line.  
7 Q. So as of May 1st, 2011, had you come to a  
8 conclusion as to what the value of Cuk's case was?  
9 A. Probably by the end of May.  
10 Q. Okay. So --  
11 A. Because I had to go through everything after  
12 the deposition once I -- and what I was trying to do was  
13 find a clean line to make a cohesive straightforward  
14 argument that got rid of the bulk of his baggage.  
15 Q. And as you sit here today, you don't remember  
16 how much attorney's fees were recoverable based on your  
17 analysis for the malpractice commencing a month or two  
18 before the nullity trial through the nullity trial and  
19 after, correct?  
20 A. No, because I tried drawing a line in various  
21 places, and I kind of said, "Well, if we draw" -- I kind  
22 of looked at the timeline as it came out in the depositions  
23 and looked at the timeline as it came out on the bills  
24 and tried to figure out where we could draw the line  
25 that made -- the things that made Cuk look bad,

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1 irrelevant, and left us with as much damages as we could  
2 get.  
3 And I think I relied -- finally said, "Well, we  
4 can draw the line in kind of the trial prep because the  
5 facts just weren't there."  
6 And there was so much stuff before that,  
7 including, if I recall, Cuk giving some questionable  
8 translations that nobody questioned on foreign language  
9 declarations and stuff.  
10 Q. Do you know if Cuk did the translation or did  
11 he pay to have them done?  
12 A. I think he did them himself.  
13 Q. Do you know?  
14 A. I think that's how it came out at the depo.  
15 I mean, this was several years ago, and that  
16 was -- so we're talking four or five years ago. I just  
17 remember after the depo I needed to cut back on what --  
18 I needed to cut back his exposure in such a way to  
19 maximize what he could recover by cutting his exposure  
20 as much as possible over being a he said, she said, no  
21 one -- everyone's confused, and we don't get anything,  
22 kind of thing.  
23 Q. At \$900,000 -- had the case settled for  
24 900,000, he would not have had a net recovery?  
25 A. He would have.

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1 Q. 500,000 to --  
2 A. Well --  
3 Q. -- Conway and Tomich, correct?  
4 A. I don't know if he would have had a -- well,  
5 you got to --  
6 Q. Your fees would have been \$360,000?  
7 A. Probably, yeah.  
8 Q. Costs, at least according to Oyler, had both  
9 people gone to trial, you're looking at 25- or 50-.  
10 A. And another, probably, 20- by the time everyone  
11 is deposed and you pay reporter fees. So you're  
12 probably -- so let's say it's 75,000 in total costs if  
13 everyone went to trial.  
14 Q. So that's 4- -- on your fee and cost bill -- if  
15 we just assign all the cost to your side for now --  
16 A. That's 425- total. If you got 900-, you get  
17 another 475-. Yeah, it would have been pretty close to  
18 a wash. Now, he would have gotten out of debt.  
19 Q. But his net recovery would have been zero?  
20 A. Pretty close. Points, I talked to Conway about  
21 that. Like, if we could make this work -- if we wanted  
22 Cuk to sign off on it, he's going to need to get some  
23 money on it. And Conway said he kind of understood  
24 that, but we never came up with some kind of figure.  
25 But we had been trying to get that out of him.

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1 Because my leverage on Conway was negative. "Hey, if  
2 Cuk's not going to get any cash out of this, he won't  
3 sign off on it."  
4 And he, of course, said, "Well, we'll just  
5 haunt him forever."  
6 "You're 80. How long could that be?"  
7 It was kind of one of those things. But we  
8 never made any definitive thing, but it was something we  
9 discussed. And Conway kind of said, "Yeah, he  
10 understands." Like when the money comes to get put on  
11 the table, then maybe they'll figure out what they are  
12 willing to cut loose for Cuk.  
13 Q. Did you make a \$950,000 joint demand to the  
14 defendants?  
15 A. I didn't.  
16 Q. Did you authorize Mr. Conway to make a joint  
17 demand?  
18 A. Probably.  
19 Q. And at the time that authorization was made,  
20 did you expect it to be accepted?  
21 A. Of course not.  
22 Q. What did you expect their counter to be in the  
23 range of, if any?  
24 A. I didn't expect they'd give a counter because  
25 it's too high. I expected them to -- Conway wanted to

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1 **make it, and it was well above anything that I had**  
2 **authority to anyway. I didn't want to make it**  
3 **because -- and Conway may have had the same logic that I**  
4 **did: You have to come under million to have any**  
5 **credibility.**  
6 **He wanted to make a huge demand officially.**  
7 **Whereas, when Suter and I were talking, we were just**  
8 **kind of throwing out some numbers to kind of get a feel**  
9 **for where we were at.**  
10 **Q.** But that was between you and Carl Smith,  
11 correct?  
12 **A. Right, on our analysis of what would happen.**  
13 **Conway wanted to make the 950-; I said okay. I didn't**  
14 **want to sign on to it because I really didn't think that**  
15 **it would be understood to be in good faith, and it**  
16 **probably wouldn't elicit any response. And we were**  
17 **looking -- and I believe we had already agreed to a**  
18 **mediation. So at that point I thought, Well, it won't**  
19 **hurt to see what they do when he makes it, but I don't**  
20 **really want to sign on to it, and I -- and it might be**  
21 **helpful to know in mediation if they come back with**  
22 **something, and that's different than if they don't.**  
23 **But, yeah, that was joint for everybody.**  
24 **Q.** Did you ever tell Dr. Cuk that Conway and  
25 Tomich were a separate entity and they would get a

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1 tell Cuk in an e-mail where you've had ongoing  
2 negotiations with Conway and Tomich, that they would  
3 share in the costs that essentially says, "Look, Oyler  
4 wants 25- to \$50,000 to testify at trial. You need to  
5 come up with this much. Conway and Tomich have agreed  
6 to fund this much, but I'm working on it."  
7 **A. I doubt that I would have ever put it that way**  
8 **because my discussions with Conway were -- not Conway --**  
9 **with Oyler. He wanted me to be on the hook for the**  
10 **entire amount.**  
11 **Q.** I understand that. We've gone through that,  
12 but I'm just -- at some point, you told Cuk that he  
13 needed to pay Oyler to be the expert, correct?  
14 **A. He needed to come up with the money.**  
15 **Q.** Did you --  
16 **A. Either pay it to Oyler, or he could put it --**  
17 **give it to me in trust so I could pay it when Oyler**  
18 **wanted it.**  
19 **Q.** Did you tell him -- this being Dr. Cuk -- that  
20 you had been talking with Conway and Tomich, that they  
21 were willing to contribute costs as well?  
22 **A. I told him they were willing to contribute**  
23 **costs. I didn't trust them to pay them. The problem I**  
24 **had was I already had a written promise from Cuk to pay**  
25 **the costs, and he wasn't paying the costs. Oyler wanted**

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1 separate award?  
2 **A. I doubt it. I probably told them that they**  
3 **would be able to segregate their claim out.**  
4 **Q.** That would be everything over the net  
5 recovery --  
6 **A. Right.**  
7 **Q.** -- after taking your fees and costs?  
8 **A. They would never get a separate award, but they**  
9 **could walk away with a separate check, if you call that**  
10 **being a separate entity. And they would.**  
11 **He wasn't -- the question may have come up**  
12 **whether he gets the money and they -- they have to chase**  
13 **him for it. And they wouldn't have to chase him for it;**  
14 **they would get a separate check.**  
15 **Q.** At the point where you and Suter are discussing  
16 the 200,000 and the 100,000, did you tell Cuk at that  
17 point that he needs to come up with \$25,000 to pay for  
18 Oyler's --  
19 **A. For half of Oyler, yeah.**  
20 **Q.** -- testimony?  
21 **A. I probably would have told him that even if**  
22 **Conway pays half, he still needs 25- for the other half**  
23 **if we're going to proceed to trial against both**  
24 **defendants -- both groups of defendants.**  
25 **Q.** Would it have been your custom and practice to

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1 **me to sign on to be responsible for the entire thing,**  
2 **and I was very dis -- I was concerned that Conway and**  
3 **Tomich might very well sell their interest to the**  
4 **defendants for a credit, which would basically tube our**  
5 **case completely, and I was not all that -- Conway and**  
6 **Tomich were driving around in like a 25-year-old car,**  
7 **and it was some blue Cutlass or something. And it**  
8 **occurred to me that I couldn't be sure that if these**  
9 **guys signed on for half, I could enforce it. And Oyler**  
10 **didn't seem to think that he could enforce it against**  
11 **them. He wanted me on the hook. So I never got to the**  
12 **point where I think I told Cuk I'd need 25-, which would**  
13 **have been his half, and he better have another 30-,**  
14 **which would have covered other costs and the other half**  
15 **available, like sequestered, so that -- because I was**  
16 **very concerned about signing on and being the only**  
17 **collectible guy out of the group.**  
18 **Q.** Did you have any concerns that Conway and/or  
19 Tomich were talking to Cuk and McKeon directly about  
20 their willingness to pay the 50 percent?  
21 **A. I knew they were. They -- every time I talked**  
22 **to Cuk or McKeon, they were talking about, "Oh, I just**  
23 **got off the phone with Conway."**  
24 **And I'm sitting there, this is screwy. That's**  
25 **why I had to tell Cuk that the most they probably would**

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1 **pay was the 100-, because anything you tell Cuk goes**  
2 **straight to Conway.**  
3 **Q.** Did McKeon or Cuk ever tell you that they had  
4 been contacted by Conway or Tomich and told that they  
5 were going to pay 50 percent?  
6 **A. I believe they did.**  
7 **Q.** When was that?  
8 **A. When we were going back and forth probably in**  
9 **the summer before we finally had to make the offer for**  
10 **partial settlement.**  
11 **Q.** And was it Cuk or McKeon that told you they had  
12 spoken to Conway or Tomich?  
13 **A. Probably McKeon because she knew they were**  
14 **willing -- she kept telling me that they were rich.**  
15 **Q.** Well, you told her that they had offered to pay  
16 50 percent in July, correct?  
17 **A. Whenever they offered, I would have said that's**  
18 **50 percent that they said they'll pay, but that's --**  
19 **basically, if Conway -- if Oyler wants 25,000 to try it**  
20 **against one person and 50,000 to try it against two**  
21 **persons, their 50 percent on condition that we try it**  
22 **against two persons is basically for the purpose of**  
23 **keeping 'em both in, and we still need 25,000. And I**  
24 **did not share McKeon's belief that these guys were**  
25 **rolling in cash, and since then, I saw that Conway, at**

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1 **Q.** She did do work on the file?  
2 **A. She covered one appearance, I think.**  
3 **Q.** And at least according to your answers to  
4 interrogatories, she -- she was the one that suggested a  
5 motion for summary judgment, correct?  
6 **A. Right. She told me that the finding by the**  
7 **family law court had collateral estoppel on the**  
8 **attorneys, and when I checked it out, it did not.**  
9 **Q.** So you never did any independent research -- or  
10 you never told Mr. Conway that your plan was to pursue a  
11 motion for summary judgment based upon race judicata  
12 collateral estoppel?  
13 **A. I probably told them that originally, and then**  
14 **when I researched it, I found it wouldn't hold against**  
15 **the attorneys.**  
16 **She told me -- it took me a while to realize**  
17 **that when she -- Merritt told me something, that it**  
18 **wasn't necessarily true, and I had to go and check it**  
19 **out myself.**  
20 **Q.** When did you come to that realization?  
21 **A. Probably August or September.**  
22 **Q.** Of?  
23 **A. 2011, but beginning she'd say, "Oh, this is**  
24 **great. There's collateral estoppel on this. It's**  
25 **binding against the attorneys."**

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1 **that very time we were having these negotiations, was**  
2 **stealing from his clients and has subsequently been**  
3 **suspended. Which kind of confirms my belief that these**  
4 **guys can promise a lot, but that doesn't mean they're**  
5 **going to pay.**  
6 **Q.** At least as to Mr. Oyler, in September 2011,  
7 Conway and Tomich met with Mr. Oyler, correct?  
8 **A. Right, and, I believe, signed a written**  
9 **retainer agreement, gave him 10 grand, and he was, then,**  
10 **on board.**  
11 **Q.** Do you know who else was present in the  
12 meeting?  
13 **A. No, they just told me it was them. They told**  
14 **me it was Conway, Tomich, and Oyler. And I hadn't**  
15 **authorized anyone else to be present, which they needed**  
16 **my authorization.**  
17 **Q.** Well, Dr. Cuk could go, couldn't he?  
18 **A. Dr. Cuk could go.**  
19 **Q.** Or Ms. McKeon could go.  
20 **A. She couldn't. She didn't have my authority.**  
21 **Q.** Well, if Dr. Cuk invited her to go along, could  
22 she have gone?  
23 **A. She's not an attorney on that case.**  
24 **Q.** She wasn't associated in, correct?  
25 **A. She was never associated in.**

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1 **And I said, "Well, if that's true, we should do**  
2 **this," and laid out what we would do. And it turns out**  
3 **that what we would do would work out fine, but it wasn't**  
4 **going to fly for a summary judgment. She didn't seem to**  
5 **have a good understanding of the summary judgment burden**  
6 **of proof or of the collateral estoppel either.**  
7 **Q.** Did you ever get an e-mail from Dr. Cuk  
8 confirming that you were going to higher Conway Oyler,  
9 retain him?  
10 **A. Not that I recall. I could have said -- he**  
11 **could have asked me to retain him, but if he didn't give**  
12 **me the money that I was exposed to, to have in trust, I**  
13 **wouldn't do it.**  
14 **Q.** Is the retainer agreement that Dr. Cuk signed  
15 your standard firm retainer agreement for a PI case?  
16 **A. Yes.**  
17 **Q.** So even though you were aware that Dr. Cuk  
18 had -- at least according to your testimony -- Mr. Oyler  
19 had advised you that Dr. Cuk had retained Mr. Oyler, you  
20 did not include or change your retainer agreement to  
21 make it specific that Dr. Cuk was responsible for the  
22 payment of all those costs, correct?  
23 **A. It is specific as to that.**  
24 **Q.** Well, you did not include in this agreement  
25 that Dr. Cuk has agreed and has retained Mr. Oyler, even

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1 though you're aware of that fact, correct?  
2 **A. Well, I didn't know what he had done.**  
3 **Q.** Well, Mr. Oyler had told you that Dr. Cuk had  
4 retained him prior to Dr. Cuk signing your retainer  
5 agreement, correct?  
6 **A. Yes.**  
7 **Q.** And you haven't seen anything from Mr. Oyler  
8 confirming that Dr. Cuk had retained him to act as a  
9 consultant or review the legal malpractice action,  
10 correct?  
11 **A. I just know that Dr. Cuk had told me he had**  
12 **retained Mr. Oyler. Mr. Oyler told me that Dr. Cuk had**  
13 **retained Mr. Oyler. I didn't know the terms or anything**  
14 **else. I was not representing him.**  
15 **Q.** But when Dr. Cuk came in to sign your  
16 agreement -- your retainer agreement on -- in  
17 September 2009, you were aware that Mr. Oyler had told  
18 you Cuk had retained him, correct?  
19 **A. Yes.**  
20 **Q.** And is your retainer agreement on a word  
21 processor?  
22 **A. Yes.**  
23 **Q.** So you could have made specific changes noting  
24 that Dr. Cuk had previously retained and acknowledges  
25 that he's responsible for the payment of Mr. Oyler's

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1 consultant costs?  
2 **A. No, I couldn't, because I didn't know what the**  
3 **terms were or anything about it. It had nothing to do**  
4 **with me. Dr. Cuk came in to retain me.**  
5 **Q.** Did you and Dr. Cuk, on September 3, talk about  
6 costs?  
7 **A. Yes.**  
8 **Q.** Did you talk about -- and you did -- did you  
9 review the agreement with him as to who was responsible  
10 for expert costs?  
11 **A. Yes.**  
12 **Q.** What did you tell him?  
13 **A. He's responsible for paying all expert costs at**  
14 **or before the time they are incurred. And I'm not**  
15 **obligated to pay for any such costs.**  
16 **Q.** Because you had already had the discussion with  
17 Mr. Oyler, telling you that he had been retained by  
18 Dr. Cuk, did you discuss with Dr. Cuk, at all, what his  
19 arrangement with Mr. Oyler was?  
20 **A. No, I didn't.**  
21 **Q.** Why not?  
22 **A. Because it had nothing to do with me.**  
23 **Q.** Well, you understood that Mr. Oyler was being  
24 retained to act as a consultant on the case, correct?  
25 **A. Yeah, by Dr. Cuk.**

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1 **Q.** Okay. But you also understood that it was your  
2 intention to contact Mr. Oyler to find out, because it's  
3 your custom and practice to put the client with the  
4 consultant first to go over the facts so the client is  
5 telling the consultant the facts, not you --  
6 **A. Correct.**  
7 **Q.** -- that Mr. Oyler said or opined or would  
8 conclude that there was a case of legal malpractice  
9 against the defendants, correct?  
10 **A. Right.**  
11 **Q.** So you understood that to some extent whatever  
12 agreement Dr. Cuk may have had with Mr. Oyler, you were  
13 going to, at some point, be the potential beneficiary of  
14 it because you could, then, use him as an expert?  
15 **A. No.**  
16 **Q.** What were you going to do if Dr. Cuk refused to  
17 permit Mr. Oyler to testify?  
18 **A. Then he wouldn't be called, and I wouldn't have**  
19 **to take the case. After all, Dr. Cuk could have hired**  
20 **any attorney.**  
21 **Q.** At what point did you start consulting with  
22 other attorneys to potentially act as an expert?  
23 **A. Probably the May period.**  
24 **Q.** May of 2011?  
25 **A. Probably, yeah. Same time because I talked to**

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1 **Oyler to see what he would be interested for an expert,**  
2 **talk to other people too.**  
3 **Q.** And you gave these other experts facts as you  
4 understood them, correct?  
5 **A. Right. And by that time, I had depositions. I**  
6 **knew what the facts were.**  
7 **Q.** So at least --  
8 **A. So I could --**  
9 **Q.** In that instance, you went away from your  
10 normal custom and practice of having the client speak  
11 with potential expert, and you gave the expert the facts  
12 as you believed them to be, correct?  
13 **A. In, like, a brief telephone conversation, I**  
14 **said, "Hypothetically, this is the situation." If I**  
15 **wanted to retain one of them, I still would have had**  
16 **them get their information directly from Dr. Cuk rather**  
17 **than me because it's not good to have the attorney be**  
18 **the witness.**  
19 **Q.** Did you give Dr. Cuk any of these names?  
20 **A. No, because none of them -- all of them wanted**  
21 **a ridiculous amount just to review the file.**  
22 **Q.** So you never had another attorney in the wings  
23 to act as an expert or potential expert?  
24 **A. No, I talked to a couple, and they --**  
25 **basically, it was cost prohibitive to start at that**

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1 **point. Then I pretty much knew that Dr. -- I mean that**  
2 **Mr. Oyler was the only game in town because he was at**  
3 **least already on it.**  
4 **Q.** But as of May 2011, you knew that Mr. Oyler --  
5 or someone representing Mr. Oyler -- was threatening to  
6 sue Dr. Cuk, correct?  
7 **A. Yes.**  
8 **Q.** Did you ever get a -- strike that.  
9 August, September 2011, did you recall  
10 receiving a 998 from the Carl Smith defendants?  
11 **A. Not specifically.**  
12 **Q.** Do you recall whether the initial offer that  
13 they communicated to you in August was by letter or by  
14 way of 998?  
15 **A. I thought it was probably by telephone call.**  
16 **Q.** And as you sit here today, you don't have a  
17 recollection of receiving a separate 998 from Carl  
18 Smith?  
19 **A. I probably did because I would have passed it**  
20 **on to Cuk and told him the ramifications.**  
21 **Q.** Do you know when you received it?  
22 **A. No. Whenever I received it, I would have sent**  
23 **it out the same day or next day to Cuk.**  
24 **Q.** Do you recall if it was before or after Conway  
25 and Tomich had met with Oyler?

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1 **A. Probably before. I don't really recall. Could**  
2 **have been after.**  
3 **Q.** What's your best recollection?  
4 **A. I think it was about the time when we started**  
5 **some negotiations.**  
6 **Q.** Well, you started negotiations with Carl Smith  
7 in August of 2011, correct?  
8 **A. Right.**  
9 **Q.** Are you speaking about negotiations with Carl  
10 Smith or negotiations with Conway and Tomich?  
11 **A. Oh, with Carl Smith.**  
12 **Q.** So you sent a \$200,000 demand to the Carl Smith  
13 attorney in -- on August 17th. Do recall, using that  
14 date as a start point, how long after that you received  
15 a 998?  
16 **A. I don't recall.**  
17 **Q.** Do you actually recall, other than me asking  
18 about it, receiving a 998?  
19 **A. Vaguely. I could have. Mostly you asking**  
20 **about it. It's like you mention it, and I'm thinking I**  
21 **could have. Something tells me that I wrote a cover**  
22 **letter and sent it to Cuk.**  
23 **Q.** When was that cover letter written?  
24 **A. Whenever I got the 998.**  
25 **Q.** Prior to -- well, at any point, did you have

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1 any settlement discussions with the Burch defendants?  
2 **A. Yes.**  
3 **Q.** When were those?  
4 **A. When I appeared at a demurrer. On -- they**  
5 **demurred to Cuk's answer.**  
6 **Q.** And that was in January 2011?  
7 **A. Could have been. It could have been April.**  
8 **I'm not sure when it was exactly. Whenever it was --**  
9 **Q.** First quarter of 2011?  
10 **A. Maybe.**  
11 **Q.** Who did --  
12 **A. When was Cuk deposed?**  
13 **Q.** February, March.  
14 **A. Okay. It would have been about that time. I**  
15 **was thinking he was deposed in April, so that kind of,**  
16 **maybe, moves everything back a month or something.**  
17 **Q.** There were four sessions, so I may be going --  
18 **A. I think there were three and then one letter,**  
19 **but I remember it was during that time, and they**  
20 **demurred, and we went down on the elevator together.**  
21 **Q.** Who is we?  
22 **A. Someone. I think it was Burch, who is at**  
23 **Carlson or Croutcher [phonetic], one of those two.**  
24 **Q.** Coulston?  
25 **A. Yeah, it was one of the other named people, and**

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1 **he was the one who appeared for them, and as I often do,**  
2 **I say, "Hey, why don't you put some money on this**  
3 **thing," and that's when he gave me the long story about**  
4 **how they couldn't put any money on it because they were**  
5 **in a fight with their insurance company.**  
6 **Q.** What did he tell you?  
7 **A. He just said they were in a fight with the**  
8 **insurance company, and the insurance company wasn't**  
9 **giving him -- was disputing coverage or something.**  
10 **Q.** Did they tell you why?  
11 **A. No. I don't know that he knew specifically,**  
12 **and that's when I said, "Well, if that's true and**  
13 **it's" -- I don't see how they could not -- what the**  
14 **basis is. Maybe we can take an assignment.**  
15 **And I said that what I needed is, like, the**  
16 **letter denying coverage. I need a copy of the policy.**  
17 **I need to evaluate what the situation is.**  
18 **And he said, "Okay. Well, I'll go talk to my**  
19 **partners about it," and then he never got back to me.**  
20 **Q.** And that was either Coulston or Burch?  
21 **A. No, it wasn't Burch. It was one of the two Cs.**  
22 **Q.** It was Burch, Coulston, or Buncher. Those are  
23 the named partners?  
24 **A. Maybe it was Coulston.**  
25 **Q.** How long did the conversation last?

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1 **A. Five minutes, ten.**  
2 **Q.** When was the first time you learned that --  
3 strike that.  
4 Do you know who the Burch, Coulston, Buncher  
5 LLP legal malpractice carrier was?  
6 **A. No.**  
7 **Q.** Did you, at any point during your  
8 representation of Dr. Cuk, learn who that insurance  
9 carrier was?  
10 **A. I'm pretty sure I did.**  
11 **Q.** And you don't recall it as you sit here?  
12 **A. No. I don't think any reservation of rights**  
13 **was disclosed on the interrogatories, I think. It was**  
14 **occurred to me -- I thought Bellilove was being paid by**  
15 **the insurance carrier, so I was kind of surprised. I'm**  
16 **sure they probably were.**  
17 **Q.** Do you know who the Law Offices of Aaron  
18 Dishon's insurance carrier was?  
19 **A. No.**  
20 **Q.** Do you know if that insurance carrier was  
21 providing a defense to Mr. Burch and Mr. Coulston  
22 individually as former employees of Mr. Dishon's office?  
23 **A. Maybe.**  
24 **Q.** What do you mean maybe?  
25 **A. I don't know what I knew exactly.**

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1 **Q.** As you sit here today, do you recall one way or  
2 the other?  
3 **A. No. Remember Dishon got out so fast I don't**  
4 **think he -- his office ever answered any discovery.**  
5 **Q.** Do you remember why he was dismissed?  
6 **A. The court said that the statute of limitations**  
7 **had run on him because -- I guess Cuk had been**  
8 **sanctioned. Well, he was his attorney, too, and that**  
9 **that put him on notice of wrongful conduct. And then**  
10 **Dishon had sub'd out more than a year before we filed.**  
11 **Q.** Dishon had sub'd out in favor of Burch and  
12 Coulston.  
13 **A. Right, and that therefore -- we only got Burch**  
14 **and O'Neil based on the stay and the statute of**  
15 **limitations. Because Dishon had been sub'd out so long**  
16 **before there was no stay. And apparently there were --**  
17 **things happened that I wasn't aware of that put Dr. Cuk**  
18 **on notice.**  
19 **Q.** That Mr. Dishon had committed malpractice?  
20 **A. Yes -- or allegedly. He gave him a new or**  
21 **should have known, such that he was on inquiry notice**  
22 **and started the statute to run.**  
23 **Q.** As to Dishon?  
24 **A. Right.**  
25 **Q.** Was there the same issue with Mullin?

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1 **A. No, we never named Mullin because Mullin had**  
2 **not apparently done anything on the nullity at all and**  
3 **just put it in as the alternative. And even though at**  
4 **the time Dr. Cuk was telling me that it was all the**  
5 **attorney's idea, just putting it in as the alternative**  
6 **isn't really malpractice. So it didn't look to me like**  
7 **he should be there. It always makes your case look bad**  
8 **to have a bunch of people who shouldn't be there in it.**  
9 **Q.** Did you have any conversations -- well, strike  
10 that.  
11 In the first quarter of 2011, Burch Coulston  
12 was representing itself in -- on its claim for fees and  
13 costs, correct?  
14 **A. Correct.**  
15 **Q.** And then on the malpractice action, it was  
16 represented by Yee and Bellilove?  
17 **A. Yes.**  
18 **Q.** Did you have any discussions from anyone from  
19 the Yee and Bellilove office about settlement about the  
20 malpractice claim against the Burch Coulston group?  
21 **A. Yes.**  
22 **Q.** When was that?  
23 **A. I have no idea. It wasn't like a formal**  
24 **discussion. It's the same thing as I had the informal**  
25 **discussion in the hall with Suter. I probably threw out**

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1 **the same number to see if they would do anything. And**  
2 **they kind of said, "Go pound sand. We're fighting this**  
3 **all the way."**  
4 **Whereas, Suter said, "We're going to win this,**  
5 **but if things went really well your way, you might get**  
6 **400-" or whatever. He had some number in that general**  
7 **range. That kind of tells me -- and Suter tells him --**  
8 **that maybe we could do something. Whatever response I**  
9 **got to my, kind of, open-ended, you know -- because it's**  
10 **kind of like a standard thing, "Hey, why don't we settle**  
11 **this and all go to the beach," kind of thing. It's an**  
12 **offhand thing that can be just kind of a flippant remark**  
13 **that doesn't really mean anything. If you want to claim**  
14 **that's what it was, or it can be a prelude to maybe we**  
15 **could talk about this.**  
16 **Suter took it up and gave me the feeling we**  
17 **could do something. Whatever Bellilove's response was,**  
18 **was we're not going to do anything. And then later I**  
19 **found out it's because they don't really have any money**  
20 **on the table because of the carrier.**  
21 **Q.** Suter was working off a self-retention from  
22 Carl Smith, correct?  
23 **A. I believe they -- most of these policies have a**  
24 **pretty big self-retention, yes.**  
25 **Q.** But at least as to the Carl Smith defendants,

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1 you knew or were aware that they were trying to settle  
2 within their self-retained limits?  
3 **A. Right. That was one of his arguments, was that**  
4 **if he could save him some of their self-retention, that**  
5 **would be a motivation to settle it because once they**  
6 **paid all they had to pay, they didn't care, and they'd**  
7 **take it to the mat.**  
8 **Q.** Do you recall what their self-retained limit  
9 was?  
10 **A. No, I don't.**  
11 **Q.** Other than Mr. Bellilove -- my paraphrasing --  
12 telling you to go pound sand because there's no money on  
13 it, at any point before you substituted out, had you  
14 made a demand on the legal malpractice claim to  
15 Bellilove?  
16 **A. I'd had further discussions with someone at**  
17 **Bellilove's office, and they wanted to have a -- and**  
18 **they had agreed to a mediation, so -- but there**  
19 **wasn't -- I never got a feeling that there was any**  
20 **advantage to making a demand prior to the mediation that**  
21 **they were agreeable to. It's like I -- I made other --**  
22 **I made other kind of inquiries -- informal inquiries**  
23 **that might open the door to should we talk, and the**  
24 **response I eventually got -- at first, it was go pound**  
25 **sand.**

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1 **A. Maybe an hour or so.**  
2 **Q.** And was it just you and he?  
3 **A. Yeah, a chunk of it.**  
4 **Q.** Was there any point in time where any other  
5 party or their counsel was in the room with you?  
6 **A. Yes. I mean, for me just talking to Judge**  
7 **Latin, about an hour. For me, there with other people,**  
8 **probably another couple hours after that.**  
9 **Q.** Okay. And this is where you are talking to  
10 Judge Latin and other parties and their counsel are in  
11 the room with you, correct?  
12 **A. Yeah.**  
13 **Q.** Was there more than one party talking?  
14 **A. Yeah, usually. I mean, after a while,**  
15 **everybody broke up, and then I was in with the Cuk**  
16 **group.**  
17 **Q.** At any point, were you in with Judge Latin and  
18 Dr. Cuk and Ms. McKeon?  
19 **A. Yes.**  
20 **Q.** How long was that?  
21 **A. Probably an hour or so.**  
22 **Q.** Were Conway and Tomich in the room with you?  
23 **A. Probably most of the time.**  
24 **Q.** Do you know what evidence or documents Conway  
25 and Tomich -- well, strike that.

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1 **Later I got, "Well, we would be interested in**  
2 **hearing what a mediator has to say," and then we were**  
3 **working on agreeing to a mediator.**  
4 **Q.** When were you told that there was no consent  
5 given on that -- on the policy that was defending the  
6 Burch Coulston people?  
7 **A. Probably -- that could have been with Coulston**  
8 **in the first place. I knew that there was -- somebody**  
9 **was blocking anything. Who it was and why it was, he**  
10 **was kind of unclear about, but I knew that somebody**  
11 **needed to sign off that wasn't signing off on a penny.**  
12 **Q.** At any point prior to the first mediation in  
13 October 2011, did you have any knowledge that there had  
14 been consent given to settle on behalf of the Burch  
15 Coulston defendants?  
16 **A. Only to the extent that we were trying to set**  
17 **up a mediation, and usually that's kind of a condition**  
18 **of having a mediation. A mediation where there's no**  
19 **consent is a waste, usually, depending on who --**  
20 **Q.** Were you advised at the mediation that there  
21 was no consent on the Burch Coulston side?  
22 **A. Yeah, I think at the mediation that there --**  
23 **that I went to, that's what was said.**  
24 **Q.** And how long were you actually in talking with  
25 Judge Latin?

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1 Do you know -- strike that. Sorry.  
2 Prior to the mediation, Carl Smith had made a  
3 \$100,000 demand, correct?  
4 **A. Correct.**  
5 **Q.** And do you know if that demand -- or he made  
6 \$100,000 offer. I'm sorry.  
7 Do you know if that \$100,000 offer was still  
8 pending as of the date of the mediation?  
9 **A. They had always said they'd go higher, but they**  
10 **never -- we never continued the negotiations, so I**  
11 **presume it was.**  
12 **Q.** Who told you they would go higher?  
13 **A. Suter.**  
14 **Q.** Did he ever tell you how much?  
15 **A. No, he wanted me to come back with a**  
16 **counteroffer.**  
17 **Q.** But it would not have been --  
18 **A. So it never got any higher.**  
19 **Q.** Any counter that you would have made would have  
20 been less than 200,000?  
21 **A. I wasn't going to make a counter because I got**  
22 **Conway and Tomich to pay for the whole thing. I just**  
23 **know they had more. His estimate of what they'd pay was**  
24 **of -- I said back in June that they should pay 250- for**  
25 **a good faith settlement. They paid 255-, so my guess is**

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1 not withstanding our posturing with me high and him low,  
2 our understanding was pretty much dead on.  
3 The problem is that we weren't in a position to  
4 do it when I was making an offer to elicit something I  
5 could use to negotiate payment of the expert. And then  
6 once I got that, I didn't continue because I was already  
7 below what he knew he should pay and what I knew he  
8 should pay.

9 Q. In June 2011, who did you make the 255-  
10 recommendation to?

11 A. I made a 250- recommendation to Cuk.

12 Q. In writing or orally?

13 A. In writing.

14 Q. At what point in time did Dr. Cuk stop  
15 communicating with you?

16 A. He never completely stopped, but when he  
17 didn't, he and I started having a disagreement in as  
18 much he wanted to continue maintaining the nullity was  
19 all the attorney's idea, and I was saying, "Get over it.  
20 That's not going to fly. We need to make that part  
21 irrelevant and go after the clean malpractice."

22 And whenever we'd get to that conversation, he  
23 wouldn't talk to me, and he would start talking to  
24 Merritt to talk to me. And she would say, "Oh, but I  
25 believe he him. Just because he has all these documents

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1 The necessary facts weren't there, and we just  
2 couldn't go to trial. And we were going down our  
3 checklist of ways to do it. Best, he would pay for it.  
4 Second best, he'd pay half of it and Conway pay half of  
5 it. Third best, we settle with one to pay against the  
6 other, and then finally we kind of got the best of both  
7 worlds where Conway and Tomich agreed to pay for it.

8 Q. What time did you arrive at the mediation?

9 A. Whatever time it started. Probably a little  
10 bit early.

11 Q. So you were there initially?

12 A. Yes.

13 Q. And then you left at 2:00 p.m.?

14 A. Something like that in the afternoon. They  
15 had -- by the time I left, they had gone through all the  
16 facts. The first couple rounds on a mediation, people  
17 go back arguing facts. I had all the facts, so I needed  
18 to be there. After that, they started going back and  
19 forth on numbers, and they didn't need me because my  
20 numbers were fixed and there wasn't anything to talk  
21 about.

22 Q. When you say your numbers were fixed, you're  
23 saying your claim to the fee amount?

24 A. Yes.

25 Q. Do you know what evidence McKeon presented

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1 doesn't mean he understood it."

2 Now when it comes to numbers and other things,  
3 he'd talk to me. But as we -- as time went by, it  
4 became a bigger and bigger impasse as to whether we were  
5 going to go with the "It was all the attorney's idea,  
6 and he was a helpless naive person" versus the "He was  
7 pissed off, as he had every right to be, and the  
8 attorneys took advantage of it by pursuing something  
9 even after their own discovery" -- which they gouged him  
10 for -- "proved there wasn't anything there."

11 Q. But your first amended complaint says that he  
12 stopped communicating with you --

13 A. Yeah.

14 Q. -- correct?

15 A. Not completely, but yeah. For the part I  
16 needed to get the story down and make sure he was on  
17 board with it, he wouldn't talk to me. As far as  
18 numbers and stuff, I think he was still talking to me.

19 I mean, he said --

20 Q. When did you advise him that Conway and Tomich  
21 had agreed to pay 100 percent of Oyler's cost?

22 A. The day they told me they did because that  
23 changed the whole thing. I was afraid I was going to  
24 have to sub out or I would do exactly what we were  
25 accusing the other people of doing.

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1 after you left to get Carl Smith to 255-?

2 A. Nothing. They were already basically there all  
3 along.

4 Q. Based on what?

5 A. Based on their analysis of the case, based on  
6 what they told me after that.

7 Q. At the mediation, while you were there, what  
8 was the highest number that they had offered?

9 A. I don't recall.

10 Q. After the mediation, who did you speak with?

11 A. I spoke to Suter, and I spoke to the mediator.

12 Q. When did you speak to the mediator?

13 A. They called and confirm how they were going to  
14 do the checks.

15 Q. When did they call?

16 A. Probably 9:00 o'clock.

17 Q. That night?

18 A. Yeah.

19 Q. What did the mediator tell you?

20 A. The mediator said they wanted -- they wanted --  
21 that we needed to figure out how the checks were going  
22 to be done, and I said, "Cut a separate check for the  
23 fees." And then I told -- and then he said, "Will you  
24 tell Suter that."

25 And I said, "Yeah." And I told Suter the same

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1 **thing.**  
2 **Q.** Did either of them tell you how Carl Smith came  
3 up to the 255-?  
4 **A. They --**  
5 **Q.** Or why they came up to the 255-?  
6 **A. Suter said they basically wanted to see how**  
7 **little they could get away with paying and they were**  
8 **always there, that they got away cheap.**  
9 **Q.** And he told you this on the phone or while you  
10 were at the mediation?  
11 **A. On the phone later. Not that day.**  
12 **Q.** When did he tell you that?  
13 **A. Another -- maybe a week later.**  
14 **Q.** He called you?  
15 **A. Yeah, he called me and asked for authority that**  
16 **the interveners couldn't get paid directly as far as**  
17 **independent of the fees, and I gave him the authority**  
18 **and told him that our -- the fees were going into a**  
19 **blocked account, and he had -- said Cuk would have been**  
20 **better off if I was on it.**  
21 **Q.** What were his exact words?  
22 **A. That Merritt's participation devalued the case.**  
23 **Q.** Weren't you giving her direction?  
24 **A. Yeah, but the problem -- once Merritt got on**  
25 **the case, they knew it could not be tried. And I**

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1 **And I rattled off a case, and we talked a**  
2 **couple minutes after that.**  
3 **Q.** Was that discussion -- there was an ex parte  
4 after the mediation --  
5 **A. Correct.**  
6 **Q.** -- that you did not attend, correct?  
7 **A. Correct.**  
8 **Q.** Was the phone call from Mr. Suter asking for  
9 authority and telling you that -- strike that.  
10 The phone call you had with Mr. Suter was a  
11 week after the mediation, correct?  
12 **A. It could have been the next day. I don't know.**  
13 **It was some time after the mediation. I'm not sure when**  
14 **exactly. My recollection was Conway and Tomich were**  
15 **trying to get more than they were entitled to, and he --**  
16 **instead of looking it up himself, he asked me for**  
17 **authority.**  
18 **Q.** And you gave it to him?  
19 **A. And I gave it to him.**  
20 **Q.** And you also told him that it's -- or you  
21 understood it was going to be a joint check for fees and  
22 costs, correct?  
23 **A. I probably had told him just at that time -- I**  
24 **didn't even think about the costs. I think I just told**  
25 **him the 40 percent.**

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1 **believe that she said they were too broke to even pay**  
2 **their share of the mediation fee, which is like a red**  
3 **flag that you cannot try the case. And once you tell**  
4 **somebody you cannot try the case, you just devalued the**  
5 **case.**  
6 **Q.** Well, who did they tell that she couldn't try  
7 the case?  
8 **A. Well, they knew -- they check up on people.**  
9 **They knew she couldn't try the case.**  
10 **Q.** Well, you said that she had said they couldn't  
11 pay the mediator and that was a red flag, so I'm  
12 following up on that.  
13 **A. I think she told me that.**  
14 **Q.** Did Suter or Bellilove ever tell you that they  
15 didn't think she could try the case?  
16 **A. Yes.**  
17 **Q.** Which one?  
18 **A. Suter.**  
19 **Q.** And that was the phone call one week after the  
20 mediation?  
21 **A. Yeah, and I think he called me asking for**  
22 **authority because Conway and Tomich were demanding, I**  
23 **guess, the entire case, or something, fees, saying it**  
24 **was all theirs. And they -- he said, "Do you have any**  
25 **authority saying they don't get it?"**

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1 **Q.** But it was to be a joint check?  
2 **A. Yes.**  
3 **Q.** And it was to be deposited into a blocked joint  
4 account, correct?  
5 **A. Correct.**  
6 **Q.** You understood that the joint blocked account  
7 was going to be in your name, Ms. McKeon's name, and  
8 Dr. Cuk's?  
9 **A. Well, at that point, I don't know if we were at**  
10 **that point. He just wanted to tell -- he just wanted to**  
11 **know what the interveners rights were because they were**  
12 **apparently harassing him.**  
13 **Q.** That's understandable.  
14 **A. So I figure -- I guess he decided, Well, heck,**  
15 **if their argument is really with me, he might as well**  
16 **just call me and then I happen to have that one right on**  
17 **the top of -- because I had already looked it up because**  
18 **I could foresee this one happening.**  
19 **Q.** And they were, essentially, excluding costs  
20 because --  
21 **A. Costs are costs.**  
22 **Q.** Costs are costs, but they would get 60 percent  
23 of the settlement, and the fees would be approximately  
24 40 percent?  
25 **A. Right.**

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1 Q. Fees were 40 percent --  
2 A. Fees were 40 percent. Costs come off that, and  
3 then anything else is -- they're basically judgment  
4 creditors, so --  
5 Q. They get it --  
6 A. -- well, to say they get it, I'm assuming that  
7 they gave Dr. Cuk a satisfaction of judgment for  
8 whatever they received. They certainly owe it to him.  
9 Q. Well, probably partial.  
10 A. Yeah, partial satisfaction, but it's not like  
11 the net isn't Dr. Cuk's. It's just like he never gets  
12 to see it, which -- so yeah, what -- just to be clear.  
13 When I'm saying they get it, Dr. Cuk gets it, and they  
14 get to satisfy their judgment off of it, which I know  
15 feels a lot like -- to Dr. Cuk, like he never had it,  
16 but he does get a satisfaction to the extent that they  
17 got paid.  
18 Q. Other than --  
19 A. -- and I meant that the whole way through.  
20 Q. Other than the settlement proceeds that have  
21 been paid to Conway and Tomich from the legal  
22 malpractice action, do you know of any other money that  
23 Cuk has paid them, Conway and Tomich?  
24 A. When I was originally retained by Dr. Cuk, he  
25 had led me to believe that he had fully paid them.

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1 Q. The question was --  
2 A. And he also lead me to believe that he fully  
3 paid all the attorneys, and he wanted all of this hard  
4 earned money, that these people had all ripped him off  
5 for, back.  
6 Later, it turned out he hadn't paid the  
7 attorneys completely -- although, he paid them more than  
8 they deserved -- and that he had paid some 35,000 or  
9 some -- some amount that divides by that, maybe 70 -- it  
10 was some number he had paid these guys, but not a whole  
11 lot.  
12 Q. Getting back to the settlement, at least the  
13 attorney's fees portion, a check was issued -- or a  
14 joint check was issued --  
15 A. Yes.  
16 Q. -- from Carl Smith defendants, correct?  
17 A. Yes.  
18 Q. And pursuant to your request, that money was to  
19 be placed in a blocked joint account?  
20 A. Yes, which it was.  
21 Q. And then the settlement -- and that -- and the  
22 second settlement with the Burch defendants was paid by  
23 joint check as well, correct?  
24 A. Yes.  
25 Q. And that money went into the blocked account,

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1 correct?  
2 A. Yes.  
3 Q. Which was pursuant to your direction?  
4 A. Yes.  
5 Q. And request?  
6 A. Yes.  
7 Q. What was your understanding of the barter  
8 agreement or the exchange for representation of  
9 Mr. Turkel for Ms. McKeon doing work on your file?  
10 A. Originally, I had run into Mark Hamilton -- and  
11 here's the actual card he gave me -- to have lunch --  
12 to -- I was at Judge Grey's retirement, whatever it  
13 is --  
14 Q. Okay. My question was just: What's the  
15 agreement?  
16 A. The agreement was I would take care of Turkel's  
17 case, and she would help me out on the appeal.  
18 Q. For the Plummer versus Eisenberg?  
19 A. Yes. And I've never -- actually, the only time  
20 in my whole life where I haven't done my own appeal was  
21 that writ because I've never had good luck with writs,  
22 and I thought maybe someone who does a lot of appeals  
23 might know the magic word to get somebody to say they'll  
24 grant it. So I had already written it. Basically,  
25 the --

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1 Q. Okay. Hold on. Question is still: What was  
2 the barter agreement?  
3 A. The barter agreement is that I would represent  
4 Turkel through trial, and everything else, for free, and  
5 she would do the services -- and I think I paid her the  
6 costs on the appeal -- for free, as a trade.  
7 Q. As a trade. Did her agreement to assist you on  
8 the appeal include both the writ and the actual appeal  
9 from the granting of the summary judgment?  
10 A. Yes, because it was really kind of two  
11 different deals at different times. The original writ  
12 was she was just going to put the magic language for why  
13 the writ should be granted and the one that I had  
14 already written, and she has the formats. And I was  
15 just going to kind of help her a little. Later, when  
16 the second motion for summary judgment was granted and I  
17 filed the appeal, they, then, dismissed the writ because  
18 they were going to deal with it on the appeal. And then  
19 she said -- so then she agreed to just take care of the  
20 appeal because now the writ had been dismissed. And I  
21 would -- that's when I actually substituted in and did  
22 the depositions and discovery and all the Turkel stuff. And I  
23 think we settled it a couple days before trial.  
24 Q. Do you remember -- is any of that your  
25 agreement with her on the barter? Did you ever send her

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1 an e-mail? Did she ever send you an e-mail, a letter,  
2 saying, "Hey, this is what we're doing"?  
3 **A. Neither of us ever wrote that down. I mean, it**  
4 **kind of seems stupid now, but it just is an understood**  
5 **thing and that's what we agreed to do. I paid him the**  
6 **whole check. I never took any -- I didn't even take out**  
7 **costs.**  
8 **Q.** Well, there weren't -- the filing fee and  
9 service costs had already been --  
10 **A. They'd already been paid.**  
11 **Q.** And there weren't any depositions in the case,  
12 were there?  
13 **A. Just his, and I don't know if we did any -- I**  
14 **mean there wasn't -- there wasn't anything big. I**  
15 **didn't take any depositions.**  
16 **Q.** And his depo you could just get the original  
17 of?  
18 **A. Yeah, which we did. But I'm sure there was**  
19 **something, but we never even charged for that. It**  
20 **was --**  
21 **Q.** Do you recall how much that settlement was?  
22 **A. Like \$10,000. I think 2,000 in meds. We did**  
23 **really good.**  
24 **Q.** Your fees would have been 4,000?  
25 **A. Yes.**

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1 **Q.** And it would have been a flat 40 percent,  
2 correct?  
3 **A. Yeah.**  
4 **Q.** Did you and she ever have -- "she" being  
5 Ms. McKeon -- ever have a discussion as to regardless of  
6 the outcome in Turkel's case, she would do more work,  
7 less work, get paid?  
8 **A. No, it was -- as Mark Hamilton, who brokered**  
9 **the deal, put it -- because this was an appeal of a**  
10 **summary judgment, there's not a whole lot to do on the**  
11 **appeal, you know, because it's a de novo of basically**  
12 **the summary judgment all over again, and in this**  
13 **particular case, there simply were no cases as to**  
14 **whether if someone comes in as a trial attorney to try**  
15 **the case and gets the 2-200 thing, whether you can put**  
16 **your own lien on there. There simply was no law.**  
17 **So we had done a really good motion for summary**  
18 **judgment. So all you really had to do is format --**  
19 **reformat the motion for summary judgment and cite to the**  
20 **record, which, in a summary judgment, is the same record**  
21 **as in -- on the -- the appeal is basically the same**  
22 **record because it's the same exhibits. You just have to**  
23 **number them according to however the clerk does. So at**  
24 **this point --**  
25 **Q.** You had -- sorry. You had opposed the summary

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1 judgment, correct?  
2 **A. Yes.**  
3 **Q.** The writ was filed. Day Eisenberg had filed  
4 the motion -- the second motion for summary judgment was  
5 granted and for which you appealed after judgment was --  
6 **A. The original summary judgment was by Bisom, but**  
7 **they left him on other causes of action. I wanted to**  
8 **file a writ because I couldn't have them go to the jury**  
9 **or anyone with a "this is an illegal lien" finding.**  
10 **Then -- so we filed the writ, and it was**  
11 **actually accepted. Then the Day Eisenberg, like three**  
12 **weeks later, had their motion heard only because they**  
13 **weren't in on -- they were only in on fewer causes of**  
14 **action. When theirs was granted on identical grounds**  
15 **that -- see there were no cases on whether an**  
16 **independent trial counsel could get a separate lien from**  
17 **the client.**  
18 **There are cases that say that if you are --**  
19 **associate in as an associate attorney, you don't get a**  
20 **lien. Your case is breach of contract with the attorney**  
21 **who associated you in.**  
22 **They tried to say that I fell under that law,**  
23 **and there was no law that actually applied directly to**  
24 **me. And so --**  
25 **Q.** What you're claiming against Bisom was for

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1 breach of contract because they actually -- you were on  
2 their retainer agreement, correct?  
3 **A. Yes.**  
4 **Q.** As trial counsel and co counsel?  
5 **A. I was on -- I was not -- no. I was not on**  
6 **their retainer agreement. I was as "of counsel." So I**  
7 **signed their retainer agreement with the client as "of**  
8 **counsel." Then, as a separate document, there was a**  
9 **Rule of Professional Conduct 2-200 disclosure of the fee**  
10 **split, and -- this is it the first paragraph.**  
11 **And then the second paragraph was that to**  
12 **protect my share of the fees, they were giving me an**  
13 **independent lien on the recovery. Okay.**  
14 **There was simply no law on that. The judge in**  
15 **the trial court right on the record said, "You know,**  
16 **there's just no law directly on this, so I've got to**  
17 **make a call, so I'm going to say you can't do that."**  
18 **So I wanted to file the writ, but once the**  
19 **second motion for summary judgment on identical grounds,**  
20 **that I didn't have any rights because my lien was**  
21 **invalid, was thrown out, that completely resolved the**  
22 **case.**  
23 **So then I had a right to appeal. So once I**  
24 **filed that on an identical issue, they dismissed the**  
25 **writ to hear it on the appeal. So the issues were**

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1 **identical. It was just a separate thing.**  
2 **Q.** But the claim against Day Eisenberg was for  
3 conversion?  
4 **A. Right. It was for conversion, interference**  
5 **with prospective economic advantage.**  
6 **Q.** There was no claim against Day Eisenberg for  
7 breach of contract?  
8 **A. That's correct because I had no agreement with**  
9 **them. Their claim was, they forged the settlement**  
10 **check, and, therefore, they interfered with my lien**  
11 **rights. And once the judge said I had no lien rights,**  
12 **then they had no duty towards me, unlike Bisom, who did**  
13 **because of the breach of contract.**  
14 **Q.** Correct. Okay. Do you know how much time  
15 Ms. McKeon spent with regard to the writ?  
16 **A. It was my understanding four or five hours,**  
17 **maybe.**  
18 **Q.** And with respect to the appeal, she substituted  
19 in, had the opening brief, had your office previously  
20 filed an opening brief?  
21 **A. No, because she was supposed to do it.**  
22 **Q.** That's fine. She substituted in. Briefing  
23 went forward. How much work, if you know, did she do on  
24 that appellate process?  
25 **A. Maybe two hours. She just reformatted the writ**

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1 **appeals know that the judge's like to hear for writs.**  
2 **So when I looked at both the writ and the brief**  
3 **and the opening brief, they were basically my opposition**  
4 **to the motion for summary judgment that I had written,**  
5 **so she didn't do any of that.**  
6 **Q.** After you were substituted out as counsel for  
7 Dr. Cuk, did you ever tell her you were not going to pay  
8 her for the time on the Day Eisenberg appeal because,  
9 essentially, you were now adversaries because she was  
10 representing Dr. Cuk?  
11 **A. No.**  
12 **Q.** Did you ever offer to pay her at any point,  
13 either before or after your representation of Dr. Cuk,  
14 to pay her for the additional time and effort that she  
15 put into the writ and the appeal because you obtained  
16 the settlement from Turkel -- or for Turkel?  
17 **A. No, it was a straight deal. I probably spent**  
18 **more time than she did, and I spent an all-day**  
19 **deposition, did all the discovery, showed up for court.**  
20 **She didn't put any more time than I did. It's just**  
21 **easier for her to do appellate time because she's got it**  
22 **already on her computer, and it's easier for me to do**  
23 **litigation time because it's what I do, and I don't**  
24 **have -- so Mark Hamilton had it right; it was a perfect**  
25 **trade.**

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1 **to be an opening brief.**  
2 **Q.** What about organizing the appendices, the reply  
3 brief, reviewing the opposition -- or the respondent's  
4 brief, excuse me, and obtaining -- or going to the oral  
5 argument, do you know how much total time she spent?  
6 **A. Couldn't have been much because I did most of**  
7 **it.**  
8 **Q.** Did you go to oral argument?  
9 **A. No, because she didn't tell me when it was.**  
10 **Q.** Okay. So she went to oral argument.  
11 **A. But I wanted to because I wrote the brief.**  
12 **Q.** Are there -- well, do you know if there are any  
13 e-mails between you and she about briefing the writ  
14 issue, as to who did what, when it was done?  
15 **A. No. What I did is I came down, I met her for**  
16 **lunch with Mark Hamilton, and then I came back in the**  
17 **afternoon with my computer, and I loaded my writ, which**  
18 **was basically based on the opposition motion for summary**  
19 **judgment, which were both the same on both cases because**  
20 **they were both based on the lien being void onto her**  
21 **computer or to Mark Hamilton's computer because he was**  
22 **the one that did it. Then gave him a flash drive as a**  
23 **backup because neither of us were 100 percent sure**  
24 **exactly how well everything went through. And then she**  
25 **reformatted and put whatever people who do a lot of**

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1 **Q.** Was Mark Hamilton present during all of this?  
2 **A. Yes.**  
3 **Q.** And is it, for lack of a better term, your  
4 position that whether you recovered 100,000 in fees or  
5 4,000 in fees, it was going to be a straight trade?  
6 **A. Yep. Consideration -- it was consideration**  
7 **when neither of us knew how much time we'd have to**  
8 **spend.**  
9 **Q.** And you don't know how much time she spent --  
10 actual time she spent?  
11 **A. I know from seeing that the finished product**  
12 **was virtually identical to what I gave her, that it was**  
13 **not a whole lot.**  
14 **Q.** Which finished product? Both the writ and  
15 the --  
16 **A. Yeah, they're the same, basically. Your**  
17 **introduction is a little different. You've got to go**  
18 **through the -- basis for appealability is different. I**  
19 **mean, she's probably spent a little more time on the**  
20 **writ. I'm sure she spent more time on the writ because**  
21 **the writ actually has different stuff. I mean to say**  
22 **does this -- you know, we have right to appeal because**  
23 **it finally resolved all claims between parties, I mean,**  
24 **even I have that on my word processor, so that couldn't**  
25 **have taken more than a minute.**

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1 So given that it was exactly the same, she  
2 might have spent a little bit of time on the writ  
3 because that actually takes convincing the judges to  
4 grant a writ.  
5 When it came to appealing a motion for summary  
6 judgment on an issue that the judge, on the record, says  
7 there's no law on the subject, that's a no brainer, and  
8 we ended up with a published case because there was no  
9 law on the subject. So now I get calls two or three  
10 times a month from people who ask me about it.  
11 Q. Even though Merritt had done the briefing?  
12 A. They call me. I don't know if they call her.  
13 Of all the things I've written over the years where I  
14 really rewrote it ten times to get it perfect, I wrote  
15 that little phrase for the lien without even thinking  
16 about it, and then they quoted it in the thing -- in the  
17 published opinion.  
18 Q. Which phrase was that?  
19 A. Oh, where I get the -- to secure my fees, I get  
20 an independent lien against the recovery, the appellate  
21 court quoted in -- with approval, which I had just  
22 sloppily put together.  
23 MR. BAYUK: Why don't we take five minutes  
24 because I think I'm almost done.  
25 /////

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1 (Recess was held from 1:13 p.m. to  
2 1:19 p.m.)  
3 BY MR. BAYUK:  
4 Q. Do you recall when Mr. Oyler told you that he  
5 felt there was a clear negligence causation and damages  
6 and would be willing to testify at trial?  
7 A. Must have been shortly before I was retained by  
8 Dr. Cuk because I wasn't -- I had a bad feeling about  
9 this case.  
10 Q. Okay. Let me --  
11 A. So I didn't take it -- normally, if I tell  
12 someone to go check, like on a med-mal -- to get an  
13 expert, I get retained first, so they have to come back  
14 to me. If you -- most of the time when I tell somebody  
15 to check it out and then come back to me, and I'm not  
16 retained, a friend of the expert ends up taking the  
17 case.  
18 I had a bad enough feeling about this case that  
19 I did not -- I told him what they needed to get -- what  
20 he needed to get for an expert, but I did not take any  
21 benefit from it because he was free to hire someone  
22 else, and I figured he probably would.  
23 Q. Did Mr. Oyler, when he told you that he thought  
24 there was clear negligence and causation -- and this was  
25 before Dr. Cuk had retained you, correct?

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1 A. Yes.  
2 Q. Did he tell you on what elements there was  
3 clear negligence or what areas there were clear  
4 negligence?  
5 A. He told me that it was negligent tactical -- I  
6 remember him using the word "tactical" management, which  
7 is kind of why I thought that Cuk needed a consultant  
8 first because if somebody just doesn't get a written  
9 waiver of a conflict of interest, that's pretty clear  
10 cut. Any time you've got a negligent tactical case  
11 management in a family law case, when I don't do family  
12 law, you better have a strong person saying so before I  
13 would be interested in the case.  
14 Q. And was there a conflict between O'Neil and  
15 Burch or Burch and Cuk? Where was the tactical  
16 conflict?  
17 A. It was tactical management of -- that's  
18 pursuing the nullity. I always took the position that  
19 O'Neil and Burch were joint venturers --  
20 Q. Right. You said that.  
21 A. -- which I believe they were, and, therefore,  
22 they are jointly and severally liable, which basically  
23 gives you the ability to settle with one and get  
24 100 percent from the remainder, and I think Burch was  
25 collectible.

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1 Q. Did Oyler ever tell you that he thought there  
2 was malpractice from the day Burch assumed  
3 representation of Cuk for pursuing nullity, or was Oyler  
4 in line with your theory that the malpractice really  
5 didn't start until a month or two before the actual  
6 nullity trial?  
7 A. We never got into it. I had a very brief  
8 conversation with Oyler just before I was retained,  
9 where he told me that there was negligent tactical  
10 management because there weren't facts to pursue the  
11 nullity. I took that as, okay, this guy is telling me  
12 what I want to hear, but he's got a friend who would be  
13 handling this case if he thought it was a dynamite case.  
14 So if he's on board, I guess I'll go ahead and take it.  
15 And because the statute was about to run, I either had  
16 to take it or not take it, so I filed the complaint.  
17 I never sent Oyler any documents. I never  
18 requested him to do any work, ever. At some point, I  
19 was informed that Cuk hadn't been paying him, but that  
20 was probably way down the road. And then once we got up  
21 to a trial date pending consistent with lining up  
22 experts about six months ahead, I had even checked with  
23 some other experts and checked with him, but he never  
24 gave me any advice on the specifics because he wanted me  
25 to sign on, and I've got Conway driving a 30-year-old

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1 **Cutlass, who didn't look like he was going to pay**  
2 **whatever he promised -- and now I realize was ripping**  
3 **off his own clients at the very time.**

4 **We've got Cuk, who I'm sure has money, but he**  
5 **won't pay it. We have Oyler who won't talk to me if I**  
6 **don't sign up to be personally responsible. I have a**  
7 **client who doesn't see it the way I see it, so he was --**  
8 **he was willing to give me a hypothetical, a cost**  
9 **estimate for if we settled with O'Neil or if we had them**  
10 **both in, and he did say that he faulted the family law**  
11 **specialist more because O'Neil would be able to say**  
12 **that, as a trial attorney without family law experience,**  
13 **he was relying on him to tell him the nuances of family**  
14 **law; so if we had to settle, settle with O'Neil.**

15 **But he never -- we never got to the specifics**  
16 **of what he would say until -- we never -- he was never**  
17 **retained. I never had any relationship with him at all.**  
18 **I never asked him to do anything or take it or sign**  
19 **anything, and I never signed on to hire him as an**  
20 **expert. And I was very depressed when I saw what he**  
21 **sent to Conway and Tomich because he was going along**  
22 **with their minutia and not making a big clear picture.**

23 **Q.** And that's the -- you're referring to the  
24 letter that you attached to your declaration from him,  
25 that you were copied on, correct?

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1 **had some experts that say, "Oh, no, that's my opinion,**  
2 **but I don't go to court." And he said he'd go to court.**

3 **Q.** But other than that conversation --

4 **A. Other than that was the conversation. I had no**  
5 **discussions about him being an expert until about six**  
6 **months before trial when I was trying to line up an**  
7 **expert, and, obviously, he's my first place to look.**  
8 **And then when he wanted me to sign on, and it was so**  
9 **much, I did check on him with some other people.**

10 **Q.** Was your first conversation with him of being  
11 an expert at six months before trial or four to six  
12 month? Because earlier you were using the May to July  
13 time frame. Because I thought you had said its your  
14 custom and practice to contact the expert about four to  
15 six months before trial.

16 **A. If I have somebody waiting in the wings. If I**  
17 **have a medical case, I need to do an expert a lot sooner**  
18 **than that, so I don't spend a lot of time and money on a**  
19 **case that's not going anywhere. So what I'll normally**  
20 **do is, as a consulting basis, I will get an opinion, and**  
21 **then I'll do the discovery without bothering the expert**  
22 **or incurring any costs and see if the facts I get back**  
23 **up the hypothetical that the opinion is based on. Okay.**

24 **In his case, Oyler had already reviewed the**  
25 **files; although, he didn't manage to mention anything of**

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1 **A. I was copied on a letter to Conway and Tomich**  
2 **where they gave him -- I'd seen the list they give him**  
3 **of points, and it was all at the very beginning. And he**  
4 **goes, "Oh, I like it. I'll go for it."**

5 **And I'm thinking, Oh, this guy is just telling**  
6 **everybody what they want to hear as long as he's getting**  
7 **paid.**

8 **Q.** Well, he also wanted to go after the  
9 unconscionable fees. That was another opinion that he  
10 had.

11 **A. Okay. That's probably there.**

12 **Q.** And you never retained him, correct?

13 **A. I never retained him. In fact, I never even**  
14 **discussed the actual terms of retention. He was**  
15 **retained by Cuk and done before I was retained, and when**  
16 **it came to being expert, I never even asked him for an**  
17 **hourly rate. I just said, "I want to know a ballpark**  
18 **figure for trying it against one firm or trying it**  
19 **against two."**

20 **Q.** And the first conversation you would have had  
21 with him about being an expert in the actual trial was  
22 in the May, July 2011 time frame, correct?

23 **A. When he told me there was negligence, I would**  
24 **have asked him -- because I always do -- "Are you**  
25 **willing to say that in front of a jury?" Because I've**

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1 **some of these things. I even told him, "Are you sure?**  
2 **Something is wrong with this picture. Are you sure?"**  
3 **And he was sure.**

4 **And then I never bothered him, and I started**  
5 **collecting discovery, and then when I need him, I knew**  
6 **he was there.**

7 **Q.** Did you ever ask him for specific areas of  
8 inquiry for the defendants to either written discovery  
9 or deposition?

10 **A. No. I never retained him.**

11 **Q.** That wasn't my question. Did you ever contact  
12 him and say, "Hey, do you have any areas that you saw  
13 for your review of the file that I should go into with  
14 Mr. O'Neil, Mr. Burch" --

15 **A. No, because then I would -- he would have -- I**  
16 **would have had to retain him. I would have signed a**  
17 **written agreement making myself responsible, and I**  
18 **wasn't going to do that under those circumstances,**  
19 **especially with a client like Cuk, who I know has money**  
20 **somewhere. If he doesn't want to spend it on his own**  
21 **case, why should I?**

22 **MR. BAYUK:** Move to strike.

23 **BY MR. BAYUK:**

24 **Q.** But you know -- you knew Cuk had retained him.

25 **A. Right.**

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1 Q. And Oyler knew that you had been retained to  
2 represent Cuk, correct?  
3 A. Correct.  
4 Q. My question is -- and I think you said --  
5 A. I may not have known until November, when I  
6 contacted on the Hack case because I was not retained  
7 when he talked to me.  
8 Q. So you first contact him in November of 2009 to  
9 discuss the Hack case, but --  
10 A. I'm sure the Cuk case was mentioned because I  
11 probably had to tell him where I heard him from.  
12 Q. My question was: At any point after September  
13 2009 until May 2011, did you have any interim contacts  
14 with Mr. Oyler at all?  
15 A. No, other than maybe someone somewhere along  
16 there calling me and telling me that Cuk hadn't paid his  
17 bill, but I don't really know when that was.  
18 Q. So other than the fee dispute, you never  
19 contacted Mr. Oyler about acting as a consultant or  
20 trying to get lines of questioning from him until you  
21 were four to six months before trial --  
22 A. Right.  
23 Q. -- for Cuk in October 2011 --  
24 A. And that's when the depositions were happening.  
25 I wanted to line up an expert before O'Neil's depo. I

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1 think O'Neil's depo was the summer of 2011. So I know I  
2 was talking to Oyler about being an expert. I would  
3 have liked to have him actually lined up, but Cuk  
4 wouldn't pay for it.  
5 Q. Okay. But my question was: You never asked  
6 him for lines of inquiry, or did you ever --  
7 A. (Shakes head.)  
8 Q. Did you ever ask him what he had reviewed?  
9 A. He told me he had 16 boxes.  
10 Q. And this was during the first phone call back  
11 in 2009?  
12 A. Correct.  
13 Q. But you don't know what those 16 boxes  
14 contained?  
15 A. Correct.  
16 Q. Did he ever tell you what Cuk told him about  
17 the lawsuit?  
18 A. No.  
19 Q. Did he ever tell you what Ms. McKeon may have  
20 told him about the lawsuit?  
21 A. No. And I assume that they told him what they  
22 told me, but hard to say.  
23 MR. BAYUK: I think that's it.  
24 THE WITNESS: He may have mentioned something  
25 about they over billed him, but I knew that anyway.

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1 MR. BAYUK: Off the record.  
2 (Brief discussion held off the  
3 record.)  
4 MR. BAYUK: I propose that the original be sent  
5 directly to Mr. Plummer at his office;  
6 That he be given 30 days to read, review, make  
7 corrections;  
8 That he will notify my office of any changes to  
9 or corrections to the deposition, and that the  
10 deposition has been signed;  
11 That in the event the original is lost,  
12 destroyed, or otherwise unavailable at any hearing in  
13 this matter, that a certified copy can be used in its  
14 place instead, and -- sorry, but Mr. Plummer --  
15 Mr. Plummer's office will maintain custody of the  
16 original.  
17 THE WITNESS: Fine.  
18 ---o0o---  
19 (The deposition was concluded at  
20 1:33 p.m.)  
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1 DECLARATION UNDER PENALTY OF PERJURY  
2  
3 I, MARK B. PLUMMER, the witness herein, declare  
4 under penalty of perjury that I have read the foregoing  
5 in its entirety; and that the testimony contained  
6 therein, as corrected by me, is a true and accurate  
7 transcription of my testimony elicited at said time and  
8 place.  
9  
10 Executed on this \_\_\_\_\_ day of \_\_\_\_\_, 2013.  
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15 MARK B. PLUMMER  
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REPORTER'S CERTIFICATION

I, Cindy Duynstee, a Certified Shorthand Reporter, in and for the State of California, Certificate No. 12938, do hereby certify:

That the witness in the foregoing deposition was, before the commencement of the deposition, duly administered an oath in accordance with the Code of Civil Procedure Section 2094;

That the testimony and proceedings were reported stenographically by me and later transcribed into typewriting under my direction;

That the foregoing is a true record of the testimony and proceedings taken at that time.

IN WITNESS WHEREOF, I have subscribed my name on this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
CINDY DUYNSTEE, CSR  
Certificate No. 12938