

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF: ) )

Philip William Merrill ) DOCKET NO.  
3788 N. 156th Drive ) S-03450A-02-0000  
Goodyear, AZ 85338 )  
CRD #2436444, )

Respondent. )

Arizona Corporation Commission  
**DOCKETED**

**FEB 10 2003**

DOCKETED BY

At: Phoenix, Arizona

Date: January 21, 2003

**FEB 10 2003**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

VOLUME VIII  
(Pages 1533 through 1760)

ARIZONA REPORTING SERVICE, INC.  
Court Reporting  
Suite Three  
2627 North Third Street  
Phoenix, Arizona 85004-1103

BY: CECELIA BROOKMAN, RPR  
Certified Court Reporter  
Certificate No. 50154

Prepared for:

ACC

**CERTIFIED COPY**

(When in red)

ARIZONA REPORTING SERVICE, INC. (602) 274-9944  
Phoenix, AZ  
Realtime Specialists

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF: ) )

Philip William Merrill ) DOCKET NO.  
3788 N. 156th Drive ) S-03450A-02-0000  
Goodyear, AZ 85338 )  
CRD #2436444, )

Respondent. )

At: Phoenix, Arizona

Date: January 21, 2003

**FEB 10 2003**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

VOLUME VIII  
(Pages 1533 through 1760)

ARIZONA REPORTING SERVICE, INC.  
Court Reporting  
Suite Three  
2627 North Third Street  
Phoenix, Arizona 85004-1103

BY: CECELIA BROOKMAN, RPR  
Certified Court Reporter  
Certificate No. 50154

Prepared for:

ACC

**ORIGINAL**

ARIZONA REPORTING SERVICE, INC. (602) 274-9944  
Phoenix, AZ  
Realtime Specialists



0000103009

276 000 0002

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF: )  
 )  
 Philip William Merrill ) DOCKET NO.  
 3788 N. 156th Drive ) S-03450A-02-0000  
 Goodyear, AZ 85338 )  
 CRD #2436444, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

At: Phoenix, Arizona

Date: January 21, 2003

Filed: **FEB 10 2003**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

VOLUME VIII  
(Pages 1533 through 1760)

**ARIZONA REPORTING SERVICE, INC.**  
 Court Reporting  
 Suite Three  
 2627 North Third Street  
 Phoenix, Arizona 85004-1103

Prepared for: ACC  
 By: CECELIA BROOKMAN, RPR  
 Certified Court Reporter  
 Certificate No. 50154

**ORIGINAL**

**FOR  
INTERNAL  
&  
INTERAGENCY  
USE  
ONLY**

Pursuant to the contract with Arizona Reporting Service all transcripts are available electronically for internal agency use only.

Do not copy, forward or transmit outside the Arizona Corporation Commission.

## INDEX TO EXAMINATIONS

WITNESSES

PAGE

PHILIP WILLIAM MERRILL

Direct Examination by Mr. Lewis

1544

## INDEX TO EXHIBITS

NO.	DESCRIPTION	IDENTIFIED	ADMITTED
11	R-9 Investment Pyramid	1606	1606
12	R-10 Application for variable annuity contract	1606	1609
13	ACC00784-ACC00788,		
14	plus 2 attachments		
15	R-11 DuChene documents from Edward Jones	1623	--
16	ACC01621-ACC01626		
17	R-12 DuChene documents from Edward Jones	1623	--
18	ACC01627-ACC01635		
19	R-13 DuChene documents from Edward Jones	1623	--
20	ACC01087-ACC01094		
21	R-14 Documents pertaining to Hays	1702	1702
22	ACC04436-ACC04438		
23	R-15 Documents pertaining to Mayfield	1713	1713
24	ACC04734-ACC04739		
25			

INDEX TO EXHIBITS

900266002  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

NO.	DESCRIPTION	IDENTIFIED	ADMITTED
R-16	Documents pertaining to Mayfield	1725	1729
R-17	12-31-2000 account statement for Janet Mayfield ACC04799-ACC04801	1730	--

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BE IT REMEMBERED that the above-entitled and numbered matter came on regularly to be heard before the Arizona Corporation Commission, in the hearing room of said Commission, 1200 West Washington Street, Phoenix, Arizona, commencing at 9:00 a.m., on the 21st of January, 2003.

BEFORE: PHILIP J. DION, III, Administrative Law Judge

APPEARANCES:

For the Arizona Corporation Commission Securities Division:

OFFICE OF THE ATTORNEY GENERAL  
By Mr. Anthony B. Bingham,  
Special Assistant Attorney General  
1275 West Washington Street  
Phoenix, Arizona 85007-2997

For the Respondent:

BEGAM, LEWIS, MARKS & WOLFE, P.A.  
By Mr. Frank Lewis  
111 West Monroe, Suite 1400  
Phoenix, Arizona 85007-1787

CECELIA BROOKMAN, RPR  
Certified Court Reporter  
Certificate No. 50154

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ALJ DION: Good morning, everyone, and welcome to the Arizona Corporation Commission. My name is Phil Dion, and I'll be presiding over the continuing hearing in the matter of Philip William Merrill. The docket number is S-03450A-02-0000.

6 This is the time set for the continuation of  
7 this hearing. The last date of hearing, the Division  
8 had concluded and rested its case, and at this point  
9 it is the defense's turn to call any witnesses if they  
10 choose to do so. I understand, Mr. Lewis, you have a  
11 couple of issues before we get to that.

12 MR. LEWIS: Yes. The first has to do -- I  
13 went on line yesterday to make sure I had the time  
14 correct for the commencement of this hearing, and I'd  
15 like to show you a printout from the Commission's  
16 thing. I just wanted to check with you and make  
17 sure -- they've got the dates all wrong. If you'll  
18 notice, I just -- they called today the 21st and  
19 tomorrow the 23rd, and Friday the 24th.

20 ALJ DION: 25th, yes.

21 MR. LEWIS: I just wanted to make sure that  
22 despite the errors on that, we're going -- today is  
23 Tuesday, the 21st, we're going the 22nd and the 23rd,  
24 and possibly the 24th, if we need.

25 ALJ DION: Yes, I scheduled this for three

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

days.

MR. LEWIS: Tuesday, Wednesday, Thursday.

ALJ DION: Tuesday, Wednesday, Thursday.

MR. LEWIS: I just wanted to make sure.

We're at 9:00 and we're in this room tomorrow, but on Thursday you don't know where we're going to be. Is that it?

ALJ DION: Thursday, it says we'll be in the second floor conference room, which is just upstairs.

MR. LEWIS: It's got the wrong date on it. I just wanted to make sure.

ALJ DION: I'm confident that's it, because they're having an open meeting on Thursday and generally the Commissioners like to be in this room and not in that meeting room.

MR. LEWIS: Just wanted to make sure.

This is a letter that I received from Mr. Bingham with the materials that he delivered to my office on October 31st. And the reason for showing you that letter is I want the materials that he says are attorney-client privileged, and I'll address that issue.

First of all, if they've given them to him, they're no longer attorney-client privilege. He's not the attorney for these people, and he has no standing

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

to raise the attorney-client privilege. And they're documents I'd like to have, that he's saying he didn't give to me.

The deal with Beatrice DuChene --

ALJ DION: Mr. Bingham, I've read the letter. Do you have a response to Mr. Lewis?

MR. BINGHAM: Yes, Your Honor, I do have a response. If Mr. Lewis had any objection, this should have been brought up earlier, before the hearing was about to begin. This was sent to him back -- he received it either last day of October or very first part of November. He received it October 31st. It was hand-delivered to him.

If there was an objection, I certainly would have liked to have known back then. That's one of the reasons that I put this in writing, so that if he had an objection, he could communicate that to me and/or to the Commission.

ALJ DION: I'm reviewing the record for something.

MR. BINGHAM: Your Honor, I do believe that -- let me think for a second about this.

(Brief pause.)

ALJ DION: I can't find it now, and I'm not going to waste time searching through the record.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Mr. Lewis, I think Mr. Bingham raises a very good point. I remember having a discussion about records. I remember asking how long it would take the Division to get those records. It appears they were able to get them to you by the end of the month. Our hearing ended October 3rd, so they were able to get them to you at the end of October.

Two and a half months have passed since the writing of this letter, and nothing was filed with me, nothing was filed with the Commission, rather. Or am I mistaken, did I miss something?

MR. LEWIS: I presume what Mr. Bingham is saying is that he wasn't right, it's just that he's prejudiced because I didn't call his error to his attention before this. I don't need the documents at this moment. If he can collect them during the noon hour and give them to me, Mr. Merrill will still be on the witness stand, I'm sure I'm not going to finish the direct examination this morning.

If you want to know the process and the reason why this happened, I can tell you. I'm not making an excuse. I was involved in other matters. Mr. Merrill came to my office and picked up the boxes that were delivered to review them, and I was almost continuing in a trial and hearings until Thursday of

1 last week.

2 We got together, he brought the boxes to my  
3 office, and I saw this letter for the first time.  
4 That's not an excuse. I mean, I'm not saying he  
5 didn't deliver it to me.

6 The question is, is he prejudiced. He did  
7 something he shouldn't have done. He didn't give me  
8 the documents that he was ordered to give me, and he's  
9 saying well, he's prejudiced because I didn't call it  
10 to his attention before this. He should have known  
11 what the attorney-client privilege is, and that he  
12 didn't have the power or the position or the standing  
13 to raise the attorney-client privilege, and there is  
14 no attorney-client privilege if they give the  
15 documents to someone outside the attorney-client  
16 relationship. They should have been given to me back  
17 at the time.

18 And if because of the delay I'm not entitled  
19 to do the things that are necessary to represent my  
20 client in this matter, okay. I don't think that's  
21 fair. I think he's raising an issue of fairness, and  
22 I think the fairness is he should have produced them,  
23 and he's not prejudiced by producing them now.

24 ALJ DION: Okay.

25 MR. BINGHAM: Your Honor, can I comment to

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

that?

ALJ DION: Go ahead, Mr. Bingham.

MR. BINGHAM: First of all, if I thought that I should have provided that information, those documents, that is, to Mr. Merrill's counsel, I certainly would have done that. I didn't think -- and I'm not saying I may not have been mistaken, but I did not believe that that was something that under the requirements that you gave us, and the obligations, I didn't think that it was something that had been ordered or should be delivered to Mr. Merrill's counsel, or I certainly would have done so.

Because I thought there may be an issue as to it, I included it in the letter to give Mr. Merrill's counsel plenty of time to raise the issue if he felt that I was incorrect. So that is a reason that I specifically included that language in this letter to Mr. Lewis dated October 31st.

Again, I felt that it did not need to be and should not be disclosed to Mr. Lewis. But because I wanted to be cautious, I included that information in the letter to give him notice.

ALJ DION: Okay. I'll deal with this after our first break so we can figure out exactly what I said as far as the discovery.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

And just for the record, I can appreciate Mr. Bingham's hesitancy about releasing information about another lawyer's client. However, absent something to the contrary, generally, when information is revealed to other sources, that does, at that point, I'm not going to say break, but the attorney-client privilege at that point generally is not asserted. And so I'm leaning towards Mr. Lewis and his analysis.

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

However, and I certainly understand the busy trial schedule, but being given two and a half months to raise the issue certainly seems to be an appropriate time period, and especially since Mr. Bingham says in his letter he alerted Mr. Lewis to that issue. Whether or not, even, he ordered the documents and those documents can be combed through and be used in the short time period that we really have left in this hearing, that's another entirely different matter.

20  
21  
22  
23  
24  
25

But in any event, I will deal with that after our first break so I can review the record to see what I said about the discovery. So that's when I'll rule on it.

24  
25

The first break will be somewhere around 10:30 or so. So if I require that of the Division,

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

then they will have some time, I will certainly give them time to do that. But I do recognize having them do that over the noon hour is certainly an inconvenience, especially at this point.

Let's go ahead and start with the witness, then.

Mr. Lewis.

MR. LEWIS: Mr. Philip William Merrill.

PHILIP WILLIAM MERRILL,

called as a witness, having been first duly sworn by the Certified Court Reporter to speak the truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

Q. (BY MR. LEWIS) Would you state your full name for the record, please.

A. Philip William Merrill.

Q. What's your birth date?

A. 27 February 1938.

Q. Mr. Merrill, Phil, did you go to college?

A. Yes, I did.

Q. Where did you go?

1 A. I have a bachelor's degree from the United  
2 States Naval Academy and two master's degrees from the  
3 University of Washington, and University of Southern  
4 California.

5 Q. In what subjects are the master's degrees?

6 A. The master's degrees are in aeronautical and  
7 astronautical engineering from the University of  
8 Washington, and it's systems management MBA type  
9 degree from the University of Southern California.

10 Q. Mr. Merrill, you said the United States Naval  
11 Academy. Is that Annapolis?

12 A. Yes, it is.

13 Q. You were a midshipman and you graduated from  
14 there?

15 A. Yes, sir.

16 Q. Did you serve in the Armed Forces after you  
17 graduated?

18 A. Yes, I did.

19 Q. Where, when and for how long?

20 A. Well, it was 20 years. I took my commission  
21 in the United States Air Force. I was entered into  
22 basically the space program. I had assignments in  
23 California, in Germany, Alabama, and back in  
24 California, and finally in the State of Washington.

25 Q. When did you start your military service?

1 A. It was the 1st of July -- I'm sorry, 1st of  
2 June, 1961.

3 Q. When did you complete your military service?

4 A. 1st of July, 1981.

5 Q. Were you honorably discharged?

6 A. Yes, I was.

7 Q. Could you explain to the judge, please, a  
8 little bit more about the type of service that you  
9 rendered, 20 years in the Navy?

10 A. I initially got a master's degree under an  
11 Air Force program at the University of Washington. I  
12 was then assigned to Los Angeles Air Force Station,  
13 where I was a staff development engineer on classified  
14 programs, classified surveillance programs.

15 Q. What do you mean by classified?

16 A. Well, they were classified surveillance  
17 programs, and I don't think --

18 Q. I know you can't tell us about them, I just  
19 want to know generally what they are.

20 A. Satellite surveillance.

21 Q. What else did you do?

22 A. I had an assignment as, in charge of an  
23 engineering office in Wiesbaden, West Germany, at the  
24 time. I was in charge of what they refer to as an  
25 engineering compatibility office, responsible for

1 ensuring the compatibility of U.S. nuclear weapons  
2 with NATO aircraft, F-4s, 104s, Jaguars, et cetera.

3 Q. Is that somewhat classified also, that type  
4 of work?

5 A. Yes, it was. Highly classified.

6 Q. When you left the service in 1981, what did  
7 you do after that?

8 A. I initially went to work for Boeing, and I  
9 was there a short time. And I got an opportunity to  
10 go to work for an electronics company, John Fluke  
11 Manufacturing Company, which is now part of the  
12 Phillips Corporation of the Netherlands.

13 Q. What type of work did you do for them?

14 A. I was the in-house government sales manager.

15 Q. For how long did you hold that position?

16 A. Approximately eight years.

17 Q. Does that take us up to around 1990?

18 A. A little bit before that.

19 Q. What did you do after that position?

20 A. I worked for three years as the training  
21 manager for all maintenance and engineering personnel  
22 at Alaska Airlines in Seattle.

23 Q. What did you do after that?

24 A. I moved down here to Arizona, and went to  
25 work for Dean Witter. Went initially in November of

1993 into their training program, received my Series 7 license, went through training at their office in the World Trade Center building, Tower 2.

Q. How long was that training?

A. Approximately a month.

Q. What did the training consist of?

A. It consisted of salesmanship, it consisted of understanding relationships with client. It consisted of learning about all of the Dean Witter products, mutual funds, investment trust bonds, et cetera.

Q. Did you have to learn about the securities laws at the same time?

A. Absolutely.

Q. After you completed that training, did you come back to Arizona?

A. Yes, I did.

Q. Did you take the examination to become a registered representative, I think you referred to it as the Series 7?

A. I had completed that before going to New York.

Q. Had you taken the exam and passed it?

A. Yes.

Q. All right. So how long after you started at Dean Witter did you go to the training program in New

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

York?

A. I started the training program the 15th of November, '93, and I went to New York first part of March of '94, came back early part of April of '94, and started my business as a financial advisor.

Q. What did you do between November and March, when you went to New York?

A. I studied for the Series 7, and took the Series 7 and Series 63, and passed them.

Q. Were you actually working for Dean Witter at that time?

A. No, we were not -- we were just basically in training. We were not brokers, we were not financial advisors. We were in a training capacity.

Q. Where was that located?

A. At the Dean Witter Sun City office, Bell Road and 99th Avenue.

Q. When you came back from New York in April of 1994, that's when you started work as a broker for Dean Witter?

A. Yes, sir.

Q. When was it that your employment at Dean Witter ended?

A. 2nd of April, 2001.

Q. And when your employment there ended, did you

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

go somewhere else?

A. Yes, I got a position with the Acacia Group on Camelback Road.

Q. How long were you with them?

A. Approximately eight months.

Q. Since you worked for Acacia, have you done any other work in the securities industry?

A. No, I have not. I've been forbidden.

Q. Have you had any other gainful employment?

A. No.

Q. Are you married?

A. Yes, sir, I am.

Q. What's your wife's name?

A. Janet.

Q. How long have you been married?

A. 40 years.

Q. Do you have any children?

A. I have two sons.

Q. Is your wife in good health?

A. No, she's not.

MR. BINGHAM: Objection, Your Honor; irrelevant. I understand background information is par for the course, but I'm going to object on the basis of relevancy.

MR. LEWIS: Sir, I think you have to know who

1 you're dealing with, and some of the things that were  
2 going on in his life at the time when these things  
3 were happening.

4 ALJ DION: If you can quantify that then --  
5 today is a different day than 2000 or 2001, when some  
6 of these events were going on. There might be  
7 something ongoing that I don't know about; just tell  
8 me that, Mr. Lewis.

9 Q. (BY MR. LEWIS) Does your wife have a health  
10 problem that goes back a number of years?

11 A. Yes, sir.

12 Q. How many years?

13 A. Three and a half.

14 Q. What is the health problem?

15 A. Rheumatoid arthritis and breast cancer.

16 Q. Three and a half years would take it back  
17 into what, 1999?

18 A. Yes, sir.

19 Q. Does one of your sons have a serious health  
20 problem?

21 A. Yes, sir, he does.

22 Q. How long has he had that problem?

23 A. Approximately seven years.

24 Q. What is the problem?

25 First of all, what's his name?

1  
2  
3  
4  
5  
A. Jeffrey R. Merrill. He has had non-Hodgkin's lymphoma cancer diagnosed initially during his first year of residency as a doctor. He's had three operations since then, and is scheduled in two weeks to have a gallbladder operation.

6 Q. Mr. Merrill, which office of Dean Witter did  
7 you start working at?

8 A. The Sun City office at 99th and Bell.

9 Q. All the time you were with Dean Witter, were  
10 you at the Sun City office?

11 A. No. In 1997, I believe it was October, that  
12 office moved into a new building it had built down the  
13 road apiece, west on Bell Road, right near Bell and  
14 El Mirage.

15 Q. It was the same office, it just moved its  
16 location?

17 A. Correct. We just moved in the new  
18 facilities.

19 Q. The thing I want Judge Dion to know, all the  
20 time you were at Dean Witter were you at the Sun City  
21 office of Dean Witter, no matter where it was located?

22 A. Correct.

23 Q. Being at the Sun City office of Dean Witter,  
24 how far were you from where you were living?

25 A. Approximately -- it took me 22 minutes. No

1 matter which way I went, it always took me 22 minutes.

2 Q. It was convenient?

3 A. It was 15 miles, maybe. I was living south  
4 of Luke Air Force Base.

5 Q. Being in the Sun City office, did you have  
6 clients who lived in the Sun City area?

7 A. Yes.

8 Q. Clients who were retired?

9 A. Yes.

10 Q. Was that a large percentage of the number of  
11 customers for all of the brokers in the Sun City  
12 office?

13 A. Yes, sir.

14 Q. Did you have meetings, internal meetings at  
15 Dean Witter with the manager of the office and other  
16 people in managerial positions at Dean Witter about  
17 how to handle dealing with customers in Sun City?

18 A. Quite frequently, yes, sir.

19 Q. Did you talk about the types of products that  
20 were available for retired people?

21 A. Yes, sir.

22 Q. Did you go to seminars where the types of  
23 products that you were using were discussed and  
24 explained?

25 A. Yes, sir. After coming back from the

1 training in New York, initially for a period of about,  
2 oh, I'd say eight months to a year, about every other  
3 month we went to, if you want to call it postgraduate  
4 training, which was held at our regional office in  
5 Dallas, Texas. And at that time we were brought up to  
6 speed on perhaps new products. We were given  
7 additional sales training, and this was very, very  
8 helpful in my business.

9 Q. Were the products that you sold to all of  
10 your customers, including the customers that testified  
11 here, were they products that were discussed in these  
12 meetings?

13 A. Yes, sir.

14 Q. In the procedures that Dean Witter used --  
15 well, I guess I need to do a little something else  
16 first.

17 In your office, did you have available to you  
18 computerized information sources?

19 A. Yes, sir.

20 Q. Did they change over the period of time that  
21 you were there, or were they staying essentially the  
22 same throughout the time you were there?

23 A. They were constantly. The system is referred  
24 to as the Dean Witter advantage system. And the Dean  
25 Witter advantage system encompassed a great deal of

1 information about products and also information about  
2 the economy, up-to-date daily reports on market  
3 conditions, economic conditions, what the Fed was  
4 doing in terms of interest rates.

5 And this system was constantly being updated  
6 and improved, and after a time, the system even  
7 incorporated the capability for brokers themselves to  
8 enter orders. Initially, we were entering orders  
9 simply by writing out an order ticket and giving it to  
10 our operations manager, and he or one of his  
11 assistants would enter the order. Later on, the  
12 brokers were entering the orders.

13 Q. Through the computerized system?

14 A. Through the computerized system.

15 Q. Do you have a recollection as to  
16 approximately when that changeover took place?

17 A. I'd say sometime during -- it was after we  
18 had moved our office. And we moved I think in  
19 October, '97, so I think it was sometime during '98  
20 that we had that capability.

21 Q. Were all of the products that you sold to  
22 your customers, including the five customers that  
23 testified in this hearing, products that you were able  
24 to research on the system?

25 A. Yes, sir.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Q. Were they products that you did research on the system?

A. I researched all the products. I consulted with, for example, our system branch manager who was one of the top 10 financial advisors in all of Dean Witter. I consulted with other senior financial advisors in our office, one of which is now an Arizona state senator. I consulted with people in New York, for example, mutual fund managers, bond income personnel, which was a separate office or separate branch or division of Dean Witter.

Q. In all of the recommendations that you made to your customers, including the five that testified here, did you follow those procedures about looking into what it was you were recommending?

A. Yes. It was required. It was what we call due diligence. You had to satisfy the requirement that you investigated and analyzed every recommendation to ensure it was consistent with Dean Witter policy.

Many of my clients, for example, that came to me -- I shouldn't say many, but a number, came to me with things like limited partnerships in their portfolios, and they had lost a considerable amount of money. And I early on became sort of a limited

1 partnership expert in the office, because I had a  
2 number of clients who wanted to get out of the limited  
3 partnerships, and the only way to do it was to sell  
4 their units through a secondary market, one of which  
5 is in Scottsdale.

6 So I was aware of not only what was  
7 recommended, but also what was certainly not  
8 recommended for clients.

9 Q. I want to talk to you about placing orders.  
10 We've got two different systems we have to talk about.  
11 Let's first talk about when you had to write out a  
12 hard ticket. Was that a multiple pieces of paper  
13 ticket?

14 A. Yes, it was -- I'm trying to think. It was  
15 three copies. Three copies.

16 Q. When you would make out that ticket, where  
17 would you get the information to put on the ticket?

18 A. By talking to the client.

19 Q. If an order was placed by your client or a  
20 recommendation was accepted, what would you do with  
21 the order ticket?

22 A. I would fill it out, number of shares,  
23 identify the investment by ticker symbol.

24 Q. You have to put the account number down?

25 A. Definitely the account number, the choice,

205 because that was our branch number, the account  
number, then I gave it to our operations office to  
implement.

Q. Then would you be advised if -- when and if  
the order was executed?

6 A. Right. I would get back the pink copy that  
7 was put in our mailbox.

8 Q. And that would show you what?

9 A. That would be initialed to the effect that  
10 the order had been entered.

11 Q. Then did it tell you what price the order was  
12 entered?

13 A. That came later. That was a confirmation.  
14 The confirmation was a white carbon, if you will,  
15 white carbon that the operations manager also put in  
16 our mailbox after the order was confirmed.

17 Q. Are you aware one copy of the order ticket  
18 was given to the manager from all of the trades that  
19 took place every day in the office to review?

20 A. Yes. The operations manager did that with  
21 the manager of the office.

22 Q. And in accordance with the Dean Witter manual  
23 and procedures, what did the manager do with all of  
24 the order tickets? Did he review them?

25 A. He reviewed them, and if there was any

question about anything, he would come to see you.

Q. And otherwise, would he approve or initial off on the order ticket?

A. That's right.

Q. Now, in connection with any of the orders that you placed, in connection with any of the five customers who testified here today, did the manager ever tell you you couldn't place that order or you shouldn't have placed that order?

A. No, sir.

Q. Now, let's talk about the computerized system. You've talked with a customer, and you have an order. What's the procedure with the computer as opposed to the hard order?

A. Well, you call up the order, what they call the order entry screen, and that would ask for the essential information, account number and number of shares, the ticker symbol.

Q. All of the same information that was on the hard ticket?

A. Exactly, only it was computerized now.

Q. Do you know what happened when you've completed filling out the order ticket, what would happen with the computerized order ticket?

A. Well, the order was entered on the computer,

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

and then you would wait a while to see if it was executed, and --

Q. How would you find out it was executed?

A. You had another screen to go to, to see if it was executed. And in some cases, it would, for some reason, you were queued up and it might take a little while for the orders to be executed. In other words, it was not necessarily instantaneous, although for a common stock order, that was generally the case.

Q. Now, if you know, sir, did your manager, when you went to the computerized system, still have the obligation to review order tickets of all registered representatives?

A. Yeah. He had a display that he could look at daily.

Q. Did he approve the order tickets or disapprove them?

A. He never approached me with a question about disapproving it or challenging it in any way.

Q. As far as you know, were all the order tickets that you entered on the computerized system for all the customers who testified here today approved by your manager?

A. Yes, sir.

Q. Mr. Merrill, did you have a procedure or

1 method that you followed when you obtained a new  
2 customer or someone who might be a new customer?

3 A. Yes, sir.

4 Q. What was that procedure?

5 A. Well, I had a three-ring binder, and I had in  
6 it those plastic covers that included a lot of  
7 information that I was -- thought was essential to  
8 discuss with the client, and not only information  
9 related to the, to products, but information related  
10 to the basic investment pyramid, which we used  
11 extensively in our company to discuss the subject of  
12 risk. What's the difference between investing in a  
13 small company, a start-up company versus investing 100  
14 shares in Proctor & Gamble, the difference between  
15 income and growth, and I had that binder.

16 I would go through it as appropriate with  
17 each client. In some cases, clients were totally  
18 unfamiliar with investing. In other cases, clients  
19 had a reasonable amount of expertise, and I would  
20 discuss what I thought was appropriate, and certainly  
21 answer any questions that the client had about  
22 anything.

23 I was always concerned about the client being  
24 well informed. I understood that there were a number  
25 of clients, senior clients who might have had an



1 different categories of risk.

2           The bottom of the pyramid, yellow, shows  
3 relatively conservative investments, money markets,  
4 simple bank accounts, CDs, et cetera.

5           As you go up the pyramid, you increase your  
6 level of risk. The income category incorporates, as  
7 you will see, both tax-free investments such as  
8 municipal bonds, tax-deferred investments, including  
9 fixed annuities and taxable investments, that includes  
10 high-yield corporate bonds, treasury bonds, preferred  
11 stocks or preferred issues.

12           And of course, as you go up to the red  
13 category, you're talking about stocks, stocks that are  
14 in the category of blue chip.

15           And then at the very top, in the green area,  
16 you're talking about perhaps companies that are  
17 start-ups, IPOs, initial public offerings.

18           Q.    Mr. Merrill, where did you get these  
19 documents from?

20           A.    I got this from the Dean Witter training  
21 department.

22           Q.    And are these the documents that you referred  
23 to that it was your practice to discuss with new  
24 customers or potential new customers?

25           A.    Yes.

1  
2  
3  
4  
5

Q. Did you do that with the customers that testified here?

A. Yes, sir.

Q. In terms of high-yield corporate bonds, where did Dean Witter place them on this pyramid, as the most aggressive or most speculative, or less?

A. No, sir. They're in the blue category, generally referred to as income.

Q. And that's just about cash and cash equivalents?

A. Yes, sir.

Q. Was that your understanding when you recommended high-yield bond funds to your customers, that's where they stood on the risk category?

A. Yes. And again, I did do a lot of due diligence to find out from many sources to verify that that was an appropriate investment for these clients.

The assistant branch manager, as I said, used the high-yield bond fund extensively for providing income that was a steady, predictable monthly income for senior clients.

Q. When you visited people who were prospective new customers or had just become new customers, did you attempt to find out what they wanted to do with their investment portfolio?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. Well, I wanted to find out, first of all, what they had in their portfolio.

All these clients, by the way, were clients that were transferred to me with the exception of the Mayfields, and they came to me by referral. But regardless of where they came from, I would go over their existing portfolio with them, and we would talk about what they thought was something they wanted to keep or something they wanted to sell. In other words, what their feelings were about their current investment.

For one reason or another they all fell in the category of, well, I think I need to change something and I want you to tell me what it is.

Q. Would you make recommendations?

A. After reviewing their portfolio, yes, sir.

Q. Would you discuss those recommendations with the customers?

A. Absolutely.

Q. And if the customers approved the recommendations, would you execute them with the customers?

A. For those that were approved, I would execute them, yes.

Q. Now, after someone had become a customer, and

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

you were handling their account, how would buys and sells in those accounts take place? How would they occur?

A. Well, depending on where I or how I contacted the client, whether it was over the phone or in their house, I would go back, and for those agreements that we made as to what to do, I would institute those right away, or perhaps we wanted to wait till Monday, wait until the stock falls to a certain price level. There might be different reasons for delaying the action.

But the important thing was that we had to talk about it, and I made notes accordingly. But if they wanted to make a change, the change was made right away.

Q. Mr. Merrill, when you had conversations with clients about your recommendations, about buying or selling securities, did you make notes of those conversations?

A. I did.

Q. Where did you keep those notes?

A. It changed over time, but I found that just using a daytimer was not sufficient, because it just didn't provide enough space to write down everything that I wanted to remember. My memory was not getting

1 any better, and I wanted to make sure that I made  
2 notations about everything.

3 So I used a spiral notebook, if you will, and  
4 I dated the first page, but there might have been four  
5 or five pages that were not dated because they were  
6 all part of the same date as the first page.

7 So I would write down not only discussions I  
8 had with my clients, but I would recommend -- I would  
9 write down just for my own information things that  
10 crossed my mind or were brought to my attention, or  
11 discussions I might have had with someone in New York.  
12 Something that I wanted to remember. But they were  
13 all written down in these spiral notebooks.

14 Q. Did you also, if you were dealing with a  
15 specific client about specific recommendations, did  
16 you do something with their specific account  
17 information that you had on your computer?

18 A. Yes. Oftentimes when I went to see a client,  
19 or if they came into my office, I would print out  
20 their account statement.

21 Q. Did you have that capability any day of the  
22 week?

23 A. Yes. Of course, clients received monthly  
24 statements, but if they came in in the middle of the  
25 month, I would print out in a different format, but

1 basically their account statement that was correct and  
2 up to date as of the preceding day, and then I would  
3 sit down with them and discuss what it had to say,  
4 anything of significance that was going on in their  
5 accounts since the last time we met or since the last  
6 time they received a monthly statement.

7 Q. Did you place any notes on that document  
8 about things that you had discussed, specific items?

9 A. The notes I put on that document were  
10 primarily specifically related to buys and sells. In  
11 other words, transactions, buy so many shares of this,  
12 and so on. If it was anything else, I would put it in  
13 the spiral notebook.

14 Q. Where did you keep those records?

15 A. Those records went into hanging folders I  
16 had. I have two four-drawer oak file cabinets in my  
17 garage at the present and they were filled with client  
18 records. I had meticulous records. I kept  
19 documentation.

20 My background is in engineering, so we tend  
21 to keep a lot of documents, and I had, as I say, two  
22 very large file cabinets filled with client folders,  
23 each green hanging folder associated with a particular  
24 client. And they kind of gave me a chronology of what  
25 went on.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

In putting together a spiral notebook, it's hard to go back in time and pick out something. So you have to relate it to the client. Everything was related to a client and it was reflected in that record in the oak cabinet.

Q. When you left Dean Witter, what happened with all those records?

A. They were left there. I took them out of my file cabinets, and they said you can't have any of these, these are Dean Witter records, and I left them there.

Q. You were directed -- all of these records that you kept over all the years you worked at Dean Witter --

A. Yes.

Q. -- you were directed to leave them with Dean Witter?

A. Yes.

Q. Now, when this matter came up and I first started helping you, were we advised that those records had been destroyed in the 9-11 at the World Trade Center?

A. Yes, sir.

MR. BINGHAM: Objection.

MR. LEWIS: It's in a letter you wrote.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MR. BINGHAM: I disagree with that, and if you can show it to me, certainly I'll reconsider my objection.

MR. LEWIS: However it came about.

ALJ DION: Hold on a second.

Mr. Merrill, did anyone ever tell you that? Did anyone from Dean Witter ever tell you that?

THE WITNESS: Yes, sir, I do believe that Charlie Cajero, our branch manager, told me.

ALJ DION: Okay.

Q. (BY MR. LEWIS) Did there come a time shortly before the first part of this hearing started that we were told that some of your records were available at the Dean Witter office in Sun City?

A. Yes.

Q. Did you and I go there to look at them?

A. Yes, sir.

Q. Were all of your records there?

A. No, sir.

Q. Were records concerning these five clients that testified here missing?

A. Yes, many of the records.

Q. Did we find some of the records concerning these clients?

A. Some of the records from the spiral notebooks

1 were available.

2 Q. But the notes that you had kept over the  
3 years on each of these clients, essentially most of  
4 those were missing; is that correct?

5 A. Yes, sir. My note that it was required of  
6 each office at the end of the year for our head  
7 secretary or sales assistant in the branch would  
8 gather up daytimers, would gather up calendars,  
9 et cetera, from each financial advisor, and my  
10 understanding, they were all shipped off to New York  
11 for archiving.

12 Q. At the World Trade Center?

13 A. Right. And my daytimer, if you will, were  
14 these spiral notebooks. So I didn't hand her a  
15 calendar, I handed her five or six spiral notebooks,  
16 which included not only notations about phone calls,  
17 but other information as well.

18 Q. Let's talk about specific people who  
19 testified here today -- during the course of these  
20 proceedings.

21 Mr. Merrill, I'm going to read you, we're  
22 going to start with Ms. DuChene, since she was the  
23 first one to testify. I'm going to read a portion of  
24 her testimony from the record. It starts on Page 55.

25 ALJ DION: Mr. Lewis, there's a couple of

1 volumes in this particular case. Do you want to give  
2 me, just for the record, the day?

3 MR. LEWIS: Volume I. The pages are all  
4 serial; they start Page 1 and go to 1500 or --

5 ALJ DION: I missed the volume.

6 MR. LEWIS: I don't know if my volumes are  
7 the same as yours because I didn't order them the same  
8 as yours. I'm going to start reading on Page 55 --  
9 pardon me, Page 56.

10 Q. (BY MR. LEWIS) Page 56, Line 10. I'm going  
11 to read the testimony. Have you ever heard of Dean  
12 Witter dividend growth fund?

13 No.

14 What about --

15 Pardon?

16 Have you ever heard of Dean Witter high-yield  
17 bond fund?

18 No.

19 Have you ever heard of Dean Witter dividend  
20 growth fund?

21 No.

22 What about Microsoft?

23 No.

24 Dell Computer?

25 No.

0004733001

Cisco?

No.

America Online?

No.

Did you ever talk to Mr. Merrill about buying  
6 or selling any of these securities and mutual funds  
7 before they were bought or sold?

8 No.

9 Did Mr. Merrill ever notify you perhaps  
10 subsequent to the trades that something had been  
11 bought or sold?

12 No.

13 Mr. Merrill, what was your reaction when you  
14 heard that testimony?

15 A. I was totally surprised, indeed shocked over  
16 her statements.

17 Q. Let's go through why that is, sir.

18 She first -- first one she said is the  
19 high-yield fund. Mr. Merrill, do you remember  
20 approximately when it was when you first discussed  
21 with Ms. DuChene the Dean Witter high-yield fund or  
22 high-income fund?

23 A. 1995, May.

24 Q. Before she bought it, did you give her  
25 anything?

1 A. Yes, sir. I -- Ms. DuChene's home on Prairie  
2 Hills Drive in Sun City is about three stoplights from  
3 our office. Her account was transferred to me, I went  
4 to see her on numerous occasions, because her home was  
5 so close. She was not in the best of health, she had  
6 just lost her mother, and I wanted to help her.

7 I might add, sir, that I was essentially  
8 raised by my grandparents. I didn't have a father, my  
9 mother worked all the time in order to put food on the  
10 table, and we lived in a one-bedroom apartment in  
11 San Francisco. I had a tremendous, loving  
12 relationship and fond relationship with my  
13 grandparents, and I've always felt a kindness to  
14 seniors.

15 In the case of Beatrice DuChene, I felt for  
16 her because she had just lost her mother, she was  
17 grieving over it, and I went to see her and discussed  
18 her assets, her existing portfolio, and what she  
19 wanted to do about it. And I understand right away  
20 that she did not have a lot of expertise, although she  
21 had an account dating back quite a few years.

22 So I helped her.

23 Q. Ms. DuChene, when you first talked to her,  
24 what did you discuss with her, what she wanted to do  
25 with her account?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. Well, based on the existing new account form that was available to me, she wanted capital appreciation, she wanted aggressive income. That's what was reflected on the new account form. And I talked to her, I showed her the pyramid, I talked to her about her existing assets, and she definitely wanted to increase her estate value.

8 She had three children, two sons and a  
9 daughter, and I think she wanted to improve on the  
10 return that she was getting, which was approximately  
11 5 percent from her fixed annuities.

12 Q. She said she never heard of Morgan Stanley  
13 high yield. Do you say that was one of the first  
14 things you recommended?

15 A. Yes, sir. I had a prospectus, I gave her the  
16 prospectus, and talked to her about providing income  
17 for her. And this was in the same time period that I  
18 was also discussing what I thought was appropriate as  
19 far as her annuities were concerned. I wanted to  
20 provide her the proper asset allocation and balance  
21 her portfolio.

22 Q. Let's talk about the high yield that she said  
23 she never heard of either before or after. On how  
24 many different occasions did she add -- buy the  
25 high-yield fund? She bought it in January of '96?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. Three or four different times.

Q. Did she buy it in January of '96 or August of '96, and June of '97?

A. Yes.

Q. Would she have received a prospectus from Dean Witter on each of those occasions?

A. I gave her the initial prospectus, and then on subsequent transactions, we had an office, I think in Florida that would send out the prospectus.

Q. On every purchase?

A. On every purchase, plus she would get from New York --

Q. Just talk about the -- listen to my questions, okay? Did she get a prospectus every time she had a new purchase?

A. Yes, sir.

Q. Did she get a confirmation of those purchases each time?

A. Absolutely, yes, sir.

Q. Was the fact that she had the high yield on her monthly statements every month starting in January of 1996?

A. Yes.

Q. Did she get a year-end 1099 showing the dividends and capital gains from the high-yield fund?

1  
2  
3  
4  
5

A. Absolutely. This was a taxable investment.

Q. She got it every year?

A. Yes, sir.

Q. Did she get quarterly reports from the high yield?

6 A. Every mutual fund sends out quarterly  
7 reports.

8 Q. Did she get monthly checks starting in  
9 February or March of 1996?

10 A. Every month she got a check. There was one  
11 exception. We did some wrong coding and the check  
12 was, or the money was essentially reinvested, and then  
13 we corrected it and then she was getting her checks.

14 Q. And the checks were for the income on the  
15 high-yield fund?

16 A. Yes.

17 Q. She was getting that from the high-yield  
18 fund?

19 A. She was getting that initially to the tune of  
20 about \$152.

21 Q. Did that increase when she bought more?

22 A. She bought more and it got up to about \$512  
23 per month.

24 Q. Do you have any explanation as to how she can  
25 say she never heard of it?

1 A. None whatsoever.

2 Q. She said: Have you ever heard of Dean Witter  
3 dividend growth fund?

4 No.

5 Mr. Merrill, there's -- I forgot we had given  
6 the exhibit, but we duplicated one he's got. Would  
7 you look at our exhibits and I want to call your  
8 attention to some of them.

9 Mr. Merrill, did you recommend that  
10 Ms. DuChene purchase some annuities?

11 A. I recommended, yes, that she purchase  
12 annuities.

13 Q. What type of annuities were they?

14 A. Variable annuities. She expressed to me the  
15 desire. She was dissatisfied with the fixed  
16 annuities. The interest rates have gone down, she was  
17 not getting more than about 5 percent, and she wanted  
18 the opportunity to not only gain in net worth and her  
19 estate value, which she also wanted to, well,  
20 essentially improve on the 5 percent.

21 Q. How would you do that with an annuity?

22 A. Well, a variable annuity is a very  
23 appropriate investment. A lot of people in the Sun  
24 City area invest in variable annuities because they  
25 have a number of features that are very well liked by

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

the senior people.

Q. Would you tell the judge what they are?

A. The primary feature is that they guarantee the principal. They guarantee the principal as the death benefit. The investment, if it's \$100,000, regardless of the fluctuation in the market, if something happens to the owner of that variable annuity, the beneficiary will get \$100,000 back.

Or another feature is as the value goes up of the annuity based on the performance, based on the market value of mutual funds, if that goes up, and it's say \$150,000, then the beneficiary will receive \$150,000. In other words, it's the greater of the two.

Q. Is it what's referred to as an estate planning tool?

A. Yes.

Q. You use this for your estate?

A. Yes.

Q. Now, would you look at Exhibit 1035 in Tab 2 of our exhibits. I guess we ought to start on 1034 first.

Is that a letter to Ms. DuChene? We got a copy of it from the Corporation Commission files.

A. Yes.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Q. And it was sent to her June 27th, 1996, is that the date on it?

A. That's right.

Q. Is this when she became a customer of Northbrook in connection with one of the variable annuities?

A. Right.

Q. Would you turn to page to 1035. In the variable annuity, did she select certain mutual funds to invest in?

A. I sat down, talked to her about the options available as far as what she could invest inside the annuity. And in order to gain some appreciable, appropriate growth, we selected funds that I had recommended to her that I thought were appropriate based on their performance, based on recommendations from New York.

Q. And in the middle of the page, does it show the dividend growth?

A. Dividend growth, capital growth, European growth, and equity.

Q. Does it show that dividend growth was one of the funds?

A. Yes, sir.

Q. This is a letter that she received in June of

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1996?

A. Yes, sir. The letter went to the client, and a copy to me.

Q. All right. Would you turn the page to 1036. Is that another similar letter?

A. Yes. This is a statement that was received monthly by the client, direct from the insurance company, Northbrook.

Q. It's a monthly statement?

A. Monthly statement.

Q. Does it show dividend growth on it in April of 1996?

A. Yes.

Q. Would you turn the page to 1037. Is that a statement for January of 1996?

A. That's correct.

Q. Does it show dividend growth?

A. Yes.

Q. Was this sent to her by the annuity company?

A. Yes, sir.

Q. 1039. Is this another one that was sent to her in January of 1996?

A. Yes.

Q. Does it show dividend growth?

A. Yes.

1 Q. Page 1040. Does it show a purchase payment  
2 in December of 1999 for dividend growth?

3 A. Yes, sir.

4 Q. Did she receive a copy of this?

5 A. Yes, sir.

6 Q. 1041. Another statement from December of  
7 1995. Does it show dividend growth?

8 A. Yes, sir.

9 Q. 1042, there's a reference to dividend growth  
10 also from the annuity company; is that correct?

11 A. Yes, sir.

12 Q. 1043, also, these all went to Ms. DuChene; is  
13 that correct?

14 A. Yes, sir, all statements sent to her.

15 Q. Would you turn to 1065. Now, the others were  
16 Northbrook annuity, this is Hartford. Is that a  
17 different annuity?

18 A. Yes. All these annuities were 1035  
19 transfers.

20 Q. Sir, is this another annuity?

21 A. This is another annuity, yes.

22 Q. Does it show in that Hartford annuity, she  
23 purchased dividend growth?

24 A. Yes, it does.

25 Q. Page 1065?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. Yes.

Q. Would you turn to Page 1066. Does that show in the column dividend growth, it shows the contribution and how it was progressing?

A. Yes, sir.

Q. And then turn to Page 1067. Is this another statement from Hartford and Dean Witter? This is dated March, 1997.

A. That's correct.

Q. And did this go to Beatrice DuChene?

A. Yes, sir.

Q. Does it show dividend growth?

A. Yes.

Q. On Page 1068, does it show the progress of that?

A. Yes, sir.

I might add, too, that dividend growth is the largest mutual fund at that time in the Dean Witter family of funds. And they did a lot to advertise it, and they would give us, as financial advisors, a blown-up graph of performance over time, and I would often take that to the client along with the prospectus to show what it was all about and its performance over time.

Q. Mr. Merrill, would you look at Page 1084.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. Yes, sir.

Q. What is that document?

A. This is a document that needs to be signed, and was signed by the client to take money out of one of her annuities. In this case, one with Northbrook.

Northbrook had many features in annuities, one of which was a free withdrawal of 15 percent per year. They could withdraw 15 percent of the principal per year without any cost or charge whatsoever. And in this case, the client withdrew \$4,000.

Q. From what?

A. Okay. It was withdrawn from, it has to be withdrawn from a particular fund, in this case it was dividend growth. I probably picked dividend growth because it had appreciated the most.

Q. Did she sign this document with that information on it?

A. That's correct, yes, sir.

Q. This was in, date of request was October, is that 30th?

A. 20th.

Q. October 20th, 1998?

A. That's right.

Q. Is the next page, it's got a different Corporation Commission number on it, but is it

1 essentially the same document?

2 A. Yes, it is. The client also, with the  
3 notation down below, has to indicate whether or not  
4 they want any tax withheld, and in most cases they  
5 don't.

6 Q. On Page 56, the next thing she said, she had  
7 never heard about Microsoft.

8 Now, I want you to turn to Page 1087. Is  
9 that one of the records that we got from the Dean  
10 Witter office in Sun City, when we went out there to  
11 look at documents?

12 A. Yes, sir.

13 Q. What is the date of this document?

14 A. 14 September '98.

15 Q. What is the information, is that DuChene?  
16 Does that refer to Beatrice DuChene?

17 A. Yes, it does, with her account number.

18 Q. When did you make these notes on this piece  
19 of paper?

20 A. On the 14th of September of '98.

21 Q. And in her testimony, she said what about  
22 Microsoft, no; Dell Computer, no; Cisco, no. She had  
23 never heard of them. What -- how were these notes  
24 made? What was the purpose of making these notes on  
25 here?

1 A. I remember sitting down with her to discuss  
2 these, and my notation involved a check, which is to  
3 the left there, indicating an action to be performed.  
4 Once approval was granted, once the order was entered,  
5 then I cross checked it. And so this would indicate  
6 approval from the client.

7 This would indicate the order was entered,  
8 and this shows what the order was in terms of how many  
9 shares, the symbol for the stock, the price that it  
10 was purchased at and my commission, and in  
11 parentheses, 19 percent, 10 percent, 19 percent, that  
12 would indicate discount. I discounted my commissions  
13 all the time.

14 Q. Are these notes of a conversation that you  
15 had with Ms. Beatrice DuChene?

16 A. Yes, sir.

17 Q. Did you make these records at or about the  
18 time the conversation took place?

19 A. Yes, sir.

20 Q. Did you execute the orders based on that  
21 conversation shortly after you had the conversation  
22 with her?

23 A. Yes. You'll see the notation about after  
24 split, the order was entered for Dell and Microsoft,  
25 then I think it was a few days later, we were waiting

1 for a split in the Cisco stock, and the order was  
2 entered then.

3 Q. What day was that?

4 A. It was either -- the 14th, I think was a  
5 Saturday. It was the following Monday or Tuesday that  
6 we had entered.

7 Q. Under Cisco you've got 9-17.

8 A. I'm sorry, I didn't see -- yeah, 9-17.

9 Q. Is there any question in your mind that you  
10 discussed these things with Ms. DuChene before she  
11 purchased them?

12 A. No, sir.

13 Q. Did she get confirmations of these trades?

14 A. Yes, sir.

15 Q. By the way, how did these purchases do in the  
16 following few months?

17 A. Back in those good days of the market, they  
18 did extremely well. They were probably the three most  
19 highly capitalized stocks in the NASDAQ market.  
20 Microsoft was the most highly capitalized stock in the  
21 world.

22 Q. Do you have any way to explain how  
23 Ms. DuChene would say in testimony here under oath  
24 that she had never heard of these stocks?

25 A. No, sir. I considered my relationship with

1 Ms. DuChene, considering the time I spent with her in  
2 her home, I could describe it in detail. All the  
3 times that I went there, I consider our relationship  
4 to be very close. I communicated with her  
5 extensively. I provided her documentation, whatever  
6 was required. I have no explanation as to, and I was  
7 shocked when she initially submitted a complaint  
8 considering the service I provided, and the  
9 significant increase in value in her account.

10 Q. Did you ever go to Ms. DuChene's home to  
11 discuss with her a monthly account statement?

12 A. Yes, sir, quite frequently.

13 Q. Tell me what you would do when you made those  
14 trips.

15 A. I would usually take a copy of her statement  
16 that I would print out. When I went to the house,  
17 then, if she had, for example, statements that she had  
18 received directly from Dean Witter, we would go over  
19 that. But she had a little bit of trouble seeing, so  
20 I had to point things out to her, which I did.

21 She also wanted to track things like mutual  
22 funds, and so I would print out from The Arizona  
23 Republic, maybe from The Wall Street Journal, I would  
24 print out a mutual fund page, I would blow it up so  
25 that she could readily see what particular fund that

1 she was in, including dividend growth, and so that she  
2 could track it. She wanted to know that information.  
3 And I gave it to her.

4 I thought, consistent with my business  
5 philosophy, I thought I provided her excellent  
6 service, based on honesty, trust, and a high level of  
7 energy, I think, on my part. I felt very satisfied in  
8 1998 when we had a meeting in my office --

9 Q. We'll ask the questions.

10 A. Okay.

11 Q. Ms. DuChene testified that you asked her for  
12 a power of attorney so that you could control her  
13 account. Did you ever do that, Mr. Merrill?

14 A. No, sir.

15 Q. Do you have some explanation as to how she  
16 might have misunderstood what it was that you might  
17 have asked her to do?

18 A. After we had --

19 Q. Yes or no, sir. Do you have an understanding  
20 as to how she might have misunderstood?

21 A. Yes, I do.

22 Q. What is that understanding?

23 A. The understanding is that I had talked to her  
24 from time to time about managed money, which was kind  
25 of a hot topic in our office at that time, and also,

1 we had talked about the fact that she did not have a  
2 trust.

3 And I mentioned to her, well, I have a  
4 professional acquaintance, we relied on people outside  
5 of our office, CPAs, et cetera, and one of the people  
6 that I relied on was a trust attorney. His name is  
7 Philip DiMatteo, and his office is in Sun City West.  
8 What he had done for a number of my other clients was  
9 to put together a trust, and appropriate documents  
10 related thereto, wills, if necessary, living wills,  
11 et cetera.

12 Well, I suggested to her that she contact  
13 him, which she did. Eventually, not initially. We  
14 talked about it for a while, and she finally got  
15 around to doing it.

16 Well, she eventually put together a trust,  
17 and the trust requires completion of a trust  
18 certification document on the part of Dean Witter in  
19 order to transfer all her assets into that trust.

20 And the -- on the trust certification  
21 document there's a line that says successor trustee.  
22 She's the trustee while she's alive. If she passes on  
23 to glory then who's going to take over her account?  
24 Who's going to manage her trust? And she, from day  
25 one, she was very reluctant for me to ever communicate

1 anything about her account to her children. She  
2 grabbed my arm, I remember on one occasion. She did  
3 not want anything revealed about her accounts and  
4 assets to her children. It seemed that they had an  
5 estranged relationship.

6 So she wrestled with who could be the  
7 successor trustee. And I said Dean Witter has a trust  
8 department, it's located in New Jersey, and some of my  
9 clients who for one reason or another don't trust  
10 their children with all their money and their estate,  
11 would appoint a bank, would appoint a brokerage trust  
12 department to manage their affairs after they go on to  
13 glory. And I offered up Dean Witter, and I told her  
14 at that time that they would manage it, they would  
15 have discretion, if you will, over how the money was  
16 to be invested in order to meet the objectives of the  
17 trust.

18 And she might have confused it at that time,  
19 but there is no document whatsoever that exists that  
20 would give me power of attorney over her affairs.

21 Q. Mr. Merrill, if you had taken power of  
22 attorney from Ms. DuChene, what are Dean Witter  
23 regulations concerning --

24 A. I would be immediately forbidden to be the  
25 financial advisor for her account.

1 Q. So you could have the power of attorney, but  
2 someone else would have to take over the account?

3 A. Right.

4 Q. And you would gain no further commissions or  
5 anything from representing her?

6 A. That's correct.

7 ALJ DION: Mr. Lewis, do you have a couple  
8 more questions on this subject, or is this a good  
9 point for us to stop? We're coming towards the  
10 morning break.

11 MR. LEWIS: I've got lots of questions, but I  
12 can stop here.

13 ALJ DION: Why don't we do that, and we'll  
14 take a 15-minute break. We'll be back here at 10:35.

15 (A recess ensued.)

16 ALJ DION: We are back on the record on the  
17 Merrill matter after our morning break.

18 I just want to address the letter and the  
19 discovery issue really quick before we continue with  
20 Mr. Merrill.

21 Mr. Bingham, basically your response to  
22 Mr. Lewis was that you had written this letter back in  
23 October to alert him to the situation. Is the  
24 Division -- what is the Division's stance on this? Is  
25 the Division stating that this information is subject

1 to the attorney-client privilege or isn't?

2 MR. BINGHAM: Your Honor, I did not first of  
3 all feel comfortable releasing that information.

4 ALJ DION: Did you ever contact Ms. DuChene  
5 or their attorney?

6 MR. BINGHAM: Concerning releasing these  
7 documents?

8 ALJ DION: Yes.

9 MR. BINGHAM: No, I did not.

10 ALJ DION: Is there an investigative tool  
11 that I don't know about? I think I alluded to this  
12 earlier. I'll phrase it better. Is there a tool or  
13 something that I'm unaware of in which clients and  
14 their attorney can turn over information to the  
15 Division under some sort of confidentiality agreement,  
16 basically stating we're releasing this to you,  
17 however, that information is not to be released to any  
18 other parties, et cetera, et cetera, that I'm unaware  
19 of? Is there anything like that, Mr. Bingham?

20 MR. BINGHAM: Your Honor, that is done  
21 sometimes, especially with documents from NASD, SEC,  
22 that they're released upon the stipulation that they  
23 not -- I should say they're delivered to the  
24 Securities Division on the stipulation that they not  
25 be released to anyone else without consent or

1 authorization from the party who is delivering them to  
2 us.

3 I think these documents, and this gets back  
4 to the argument we wrangled with for quite a while  
5 previously, and that is, we feel that we have an  
6 investigative privilege. We also feel that many of  
7 these documents are confidential by statute, and we've  
8 gone over that ad nauseam.

9 Again, I did not feel comfortable releasing  
10 those. I felt that they were probably privileged,  
11 though they may not be. I understand there is an  
12 argument that they're not. So that's the reason that  
13 I brought it to Mr. Lewis' attention, to contact me,  
14 to discuss, to file something with the Commission, to  
15 take whatever action that he felt appropriate, rather  
16 than just not mention the fact that we had those  
17 documents in our possession.

18 ALJ DION: What I want you to do,  
19 Mr. Bingham, is -- and we'll take this up first thing  
20 in the morning -- I want you to contact the DuChenes  
21 and their attorney, and I want the Division to tell me  
22 if there is or is not a privilege. If there is a  
23 privilege, then it is a privilege. I side with  
24 Mr. Lewis, it is a privilege of the client and the  
25 attorney, the privilege is between them, it's

1  
2  
3  
4  
5

essentially the client's, and if that attorney-client privilege is going to be asserted, it needs to be done by them. And that's where I'm coming down on this, is that I don't think that this attorney nor the DuChenes are aware of this procedure or that anything is going on. I'd like to hear from them as to whether or not, just basically want to get their opinion on this.

8           But I also want the Securities Division's  
9 opinion as to is this information privileged or not.  
10 That's kind of what I'm seeking from you. It sounds  
11 to me like it would help if you contacted the  
12 DuChenes' attorney to find out. I don't know what  
13 this information is. I don't know what this  
14 information is about. I don't know how relevant it is  
15 to the proceeding. The only attorney that I've ever  
16 heard talked about with the DuChenes is the one that  
17 Mr. Merrill just mentioned five minutes ago. If  
18 that's the individual, the trust attorney that was  
19 talked about -- no, that's not the person. I don't  
20 know who this person is, is the sum and substance of  
21 that. In any event, that's what I want.

22           If the DuChenes and their attorneys say that  
23 it's not privileged and we released it to you knowing  
24 that that information would be out in the world, then  
25 those documents should be given to Mr. Lewis at 9:00

in the morning.

On the other hand, if the DuChenes or their attorney are going to assert something, I would certainly, because of the late hour and scheduling, I would certainly let them do it telephonically, that's number one. But they need to weigh in at that point, because I don't believe that the Division can assert that on their behalf. I am just wondering what their understanding was when that information was turned over. I think that that's important for me to consider.

Mr. Lewis.

MR. LEWIS: Yes, sir. I certainly -- I know you've given this careful consideration and I'm certainly, by what I'm about to say, I'm not meaning to stomp on what your conclusions are.

I'm a little bit familiar with the attorney-client privilege. I've lectured the State Bar on the subject matter.

If -- let's assume that there is an attorney, it's the person turning documents over to Mr. Bingham. That attorney says, on behalf of my client, we assert the attorney-client privilege. My response would be, so what? You can't take documents that you claim are subject to the attorney-client privilege and turn them

1 over to a third party, and in any way, shape or form  
2 continue to assert the privilege. Once you waive the  
3 privilege, it's gone, it's no longer there as to those  
4 documents. Once they gave the documents to  
5 Mr. Bingham, it was no longer an attorney-client  
6 privilege.

7           So I'm not suggesting that you change what  
8 you're saying. What I'm saying is Mr. Bingham is  
9 going to do all that. You've already told him if they  
10 say they waive it, he's got to give me the documents.  
11 But if they don't waive it, what I'm saying is, so  
12 what? Under the law of the attorney-client privilege,  
13 it no longer exists for those documents.

14           ALJ DION: And that might be so, and you can  
15 tell me that. But there might have been -- I don't  
16 know if there was a confidentiality agreement with the  
17 Securities Division.

18           They might not be asserting, quote-unquote,  
19 the attorney-client privilege but perhaps a  
20 confidentiality agreement. In other words, I don't  
21 know what these people did and they're not here to  
22 tell me what they did. So I just want to hear from  
23 them.

24           MR. LEWIS: Can I ask one other question? I  
25 have heard Mr. Bingham assert on numerous occasions

1 the documents are confidential. I have been unable to  
2 find any statute or rule that says that, and maybe  
3 it's just the deficit in my research. I'd like to,  
4 during the noon hour, in order to be prepared for this  
5 discussion after the noon hour, know what statute or  
6 rule he's referring to that makes things given to them  
7 confidential.

8 ALJ DION: I'm sure he'll point that out to  
9 you prior to the noon hour. But so that you're not  
10 mistaken, I don't for one second think I'm going to  
11 get the DuChenes or her attorney on the line at 1:00  
12 in the afternoon. I don't think that's going to  
13 happen. What I hope to obtain is them, or either them  
14 or through Mr. Bingham, who will avow after talking to  
15 them, some information that will help me decide this,  
16 I'm getting at 9:00 tomorrow morning is the first time  
17 you're going to do that.

18 Again, what I'd like over the noon hour is  
19 for Mr. Bingham to try to contact the DuChenes and the  
20 attorney to figure out whether or not they believe  
21 it's privileged information, or if they are simply --  
22 or that they have waived or are willing to waive the  
23 attorney-client privilege. If that's the case, then  
24 we have no issue. We'll turn the documents over to  
25 Mr. Lewis.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

If, however, they need to weigh in, then I think 9:00 tomorrow morning is the first time we could review that.

If you get that information sooner than that, Mr. Bingham, obviously I'd like the documents to get to Mr. Lewis. But we're not -- we may not resolve this until 9:00 a.m. tomorrow morning or shortly thereafter. And quite frankly, that's just a product of where we are. If I'm handed something at 9:00 in the morning, I'm not going to make a ruling on it if I'm unsure about anything at 11:00 in the morning. So that's what's going to happen.

MR. BINGHAM: Your Honor, then if I understand what you're saying correctly, if they do not waive the attorney-client privilege and they do not say these are confidential, then we will turn them over to Mr. Lewis, but if they do raise one of those privileges, whatever we want to call it, then would you like to speak to at least one of them on the telephone tomorrow morning at 9:00, preferably both?

ALJ DION: They have to raise it.

MR. BINGHAM: Right.

ALJ DION: I agree with Mr. Lewis, his analysis. I don't believe you have the standing to do it. But yes, I need to hear from them, you know,

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

preferably the attorney, as to why Mr. Lewis should not get that information.

If, like I said, if they state they have already waived or are willing to waive, then we don't have an issue, we'll just get him that information.

On the other hand, if they feel that they are privileged, I will certainly listen to them, I won't preclude anyone from making an argument, especially in light of the fact that they don't know that their documents or things that they perceive as their property are being discussed. Okay?

All right. With that, let's move on with Mr. Merrill. And Mr. Lewis, continue your direct, please, sir.

MR. LEWIS: Thank you.

Q. (BY MR. LEWIS) Mr. Merrill, I'm going to read you another portion of Ms. DuChene's testimony. It starts on Page 105, Line 24, and I was asking Ms. DuChene these questions.

Did he -- referring to you -- discuss the fact that you were buying annuities, investing in annuities with you?

Answer: Not to my knowledge, no.

Question: Not at all?

Answer: No.

2  
3  
4  
5

Question: At no time?

Answer: Not the annuity, no.

Question: At no time?

Not to my knowledge.

Question: Didn't you have to sign papers to  
6 buy the annuity?

7 Answer: I signed a lot of papers with Phil  
8 that I never knew what I was signing.

9 Question: You didn't sign papers that  
10 indicated they were annuity purchases and you were  
11 purchasing annuities?

12 Answer: Phil stopped over and gave me papers  
13 to sign, and I signed them and gave them to him. He  
14 would stop into my home, gave me these papers to sign,  
15 which I did.

16 And he didn't discuss them with you?

17 No. He'd just breeze in and say I need your  
18 signature, and I gave it to him.

19 What was your reaction to that testimony?

20 A. Again, I was totally shocked.

21 Q. There were four annuities that she purchased,  
22 is that correct, on your recommendation?

23 A. Yes.

24 Q. Did you discuss each one of them with her?

25 A. Yes, sir.

Q. Did you explain to her what the annuities you were recommending, how they compared with what she was using her funds for previously?

A. Yes.

Q. And did she accept those recommendations?

A. Yes.

Q. Did you have discussions concerning those things with her in her home?

A. Yes.

Q. Did you just breeze in and give her papers and run out?

A. No, I did not.

Q. We agree there were four annuities. Was the first one a Hartford annuity? Is that the first one that you recommended?

A. No, I believe it was Northbrook. Northbrook came first because it was the only company that Dean Witter had a relationship with.

Q. Well, the Hartford ones are in the book first, so let's discuss that. Would you turn to our exhibit, Tab 2, Page 1024.

A. Okay.

Q. Sir, Mr. Lowe helped me with this, he made some extra copies which I greatly appreciate. These are documents that were in the box, I think that we

1 got from Mr. -- that's why they hadn't previously been  
2 marked. I needed five copies, not four. Let me use  
3 it and I'll give it to her whenever I'm finished.

4 I've just handed you a number of documents.  
5 Can you tell, starting with the one on top, which is  
6 marked ACC 007784, can you explain to Judge Dion what  
7 these papers are?

8 A. These are documents that need to be completed  
9 and signed by the client in order to execute a 1035  
10 transfer.

11 Q. Does 1035 refer to a section of the Internal  
12 Revenue Code?

13 A. Yes, it does.

14 Q. What do you mean when you say a 1035  
15 exchange?

16 A. It means that you are exchanging assets in  
17 one annuity for assets in another annuity without any  
18 cost or charge to the client.

19 Q. Is it a taxable event?

20 A. It's not a taxable event.

21 Q. In the Internal Revenue Code Section 1035?

22 A. Correct.

23 Q. So in the business it's called a 1035  
24 exchange?

25 A. Yes.

1  
2  
3  
4  
5

Q. Was this a 1035 exchange, the Hartford?

A. Yes.

Q. Did you explain to her what that meant?

A. Yes.

Q. Did you explain to her the advantage to her?

6 A. Yes. She was very concerned about charges  
7 and costs and all that, and as I did with every  
8 client, I'd tell them three things, risk, reward, and  
9 cost, and there's no cost.

10 Q. Let's talk about what you told Ms. DuChene.  
11 Okay? You explained to her what the process was and  
12 what the advantages were to her?

13 A. Yes, sir.

14 Q. Did she sign this 00784 document?

15 A. Yes, she did.

16 Q. And was that on July 25th, 1996?

17 A. Yes, it was.

18 Q. Did you have her sign this after you  
19 explained the situation to her?

20 A. Yes.

21 MR. BINGHAM: I'm going to object at this  
22 point, and let me just state as briefly as I can. I'm  
23 going to object as to all the testimony concerning the  
24 variable annuities, because number one, it was not  
25 alleged as an allegation in the notice. Number two,

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

the only reason that came up in the Division's case in chief was on cross-examination by Mr. Lewis, and I objected to the content of the testimony and the question previously in the Division's case in chief.

And I realize I've allowed a fair amount of testimony already concerning these variable contracts, but I'm going to lodge my objection; irrelevant. Again, it goes to no allegations in the notice that the Division has made.

ALJ DION: Okay, I'm going to overrule it, because it goes to Ms. DuChene's memory as to what she recalled, what she could recall, what she can't recall, and it goes to just a lot of things, not necessarily her veracity as a witness, but her ability to recall things.

But with that said, I think that -- I also think that the point has been made regarding what she said about Microsoft and variable annuities and things like that. We've had a lot of exhibits about her receiving statements from 1995 through '98. I imagine this is going to tell me the same sort of thing that she has signed for these annuity contracts. So I think the point has been made. Is there something else?

MR. LEWIS: Yes, there is something else,

1 sir. I'll get to it in just a moment.

2 ALJ DION: Why don't we mark this, by the  
3 way, as R-9, this packet that has been given to me.

4 Did you want the investment pyramid, did you  
5 want that in the record, Mr. Lewis?

6 MR. LEWIS: Yes.

7 ALJ DION: Then I'm going to take that back.  
8 Let's mark the investment pyramid as R-9 and this one  
9 as R-10.

10 While we're on R-9, any objection to that  
11 being admitted into the record, Mr. Bingham?

12 MR. BINGHAM: That's the investment pyramid?

13 ALJ DION: Yes, and the following pages.

14 MR. BINGHAM: No. Even though this is the  
15 first I've seen this, or even been aware that it was  
16 going to be introduced, no.

17 ALJ DION: Okay. And I will admit it into  
18 the record as R-9.

19 So why don't we continue with R-10. I  
20 believe the question was regarding Ms. DuChene and her  
21 signature. Mr. Merrill said that she had signed it.  
22 Is that while you were present, Mr. Merrill, when she  
23 signed this piece of paper?

24 THE WITNESS: Yes, sir.

25 ALJ DION: So if there's more information

1 about that, otherwise I think Mr. Lewis has made his  
2 point.

3 But, Mr. Lewis, you said you had something  
4 else.

5 Q. (BY MR. LEWIS) Before we talked about the  
6 dividend growth, that was in the Northbrook annuity.  
7 Does this also show in the Hartford annuity dividend  
8 growth fund selection?

9 A. Yes. It's checked there. Fund selection.

10 Q. And the next page, 0785, that requires the  
11 client's signature for the fund exchange to change  
12 from one fund to another?

13 A. One annuity to another.

14 Q. One annuity to another?

15 A. That's correct.

16 Q. All of these documents in this package, with  
17 the exception of the last one, is signed by her; is  
18 that correct?

19 A. Yes, sir.

20 Q. Now, if you'll turn to Page 1024 in Tab 2 of  
21 our exhibits. Do you have it there, sir?

22 A. 1024, yes.

23 Q. She said that you would breeze in with  
24 documents, she would sign them, and leave her home.

25 Sir, was this document 1024 signed in her

home or was it signed in your office?

A. It was signed in the office because --

Q. How can you tell that?

A. -- it has a signature guarantee that's signed by one of two people. Well, actually, we have three people authorized to provide signature guarantees in the office.

Q. And do they have to see the person sign it before they can affix that signature guarantee?

A. Yes, sir.

Q. They wouldn't go with you to her home?

A. No.

Q. She would come into the office to sign; is that correct?

A. Yes, sir.

Q. Without going through each document, although there's a fair number of them that have the signature guarantee, would the same be true, like 1025, would she have to come into the office to sign that?

A. Yes. These are all documents basically going outside of Dean Witter to another company. Banks, for example, and insurance companies.

Q. And 1026, would she have signed that in the office?

A. Yes.

1 Q. All of the documents that show signature  
2 guarantee would have been signed in the office?

3 A. In our office, yes.

4 Q. Another one is 1031. I won't go through any  
5 more, but that's another one?

6 A. Yes, sir.

7 ALJ DION: Before you move any further,  
8 Mr. Bingham, do you have an objection to R-10 being  
9 admitted?

10 MR. BINGHAM: No.

11 ALJ DION: We'll move in R-10 into the  
12 record.

13 Q. (BY MR. LEWIS) In June of 1996, did you  
14 recommend to Ms. DuChene the purchase of an annuity?

15 A. Yes.

16 Q. Do you remember what annuity that was?

17 A. It was another exchange from Keyport Life  
18 Insurance Company to Northbrook.

19 Q. Did you have discussions with her concerning  
20 that before she did it?

21 A. Yes. The reason, the difference in dates is  
22 because all of a sudden I would realize, or she would  
23 realize that she had another annuity. She kept  
24 pulling these annuities out that she wasn't totally  
25 aware of when I first encountered her.

1 Q. Did she -- I think we've already gone over  
2 that. She had dividend growth, and in that --

3 A. Yes.

4 Q. And then in -- did she have a second Keyport  
5 annuity that you found out about?

6 A. Yes. There were two Keyport annuities.

7 Q. Did you recommend that that be exchanged for  
8 a Northbrook annuity?

9 A. Yes. In fact, she recommended it to me. I  
10 mean, she said we did one, let's do the other.

11 Q. Was that in November of 1996?

12 A. I believe that's right.

13 Q. Was there an annuity that was purchased in  
14 December of 1995 for a total of \$85,000?

15 A. That was not a 1035 transfer. That was an  
16 initial purchase of a Northbrook -- yes, Northbrook  
17 annuity.

18 Q. Did you recommend that to her?

19 A. Yes.

20 Q. And was that for estate planning purposes?

21 A. Yes. The money came from a tax-free fund,  
22 and she was in the low 15 percent tax bracket, and a  
23 client in a low tax bracket does not receive very much  
24 in the way of a benefit.

25 So I recommended, because it was tax free, to

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

move over into an annuity, because annuity, although it's not tax free, is tax deferred. And she would gain not only the tax deferred status, but she'd also gain the opportunity for capital appreciation.

And I might add, too, she would gain that ability she didn't have before to pass on the principal as a guarantee to her beneficiaries.

MR. LEWIS: May the witness see the volume of the Division's exhibit containing Tab 7.

Q. (BY MR. LEWIS) I'm putting in front of you the Division book that has Tab 7 in it. Would you turn to Tab 7 and would you find the document Bates stamped ACC 00255.

A. I have it.

Q. What is that document?

A. It's a monthly statement from her regular account. She also had an IRA account.

Q. For what month?

A. It's for the month of December, 1995.

Q. Does that monthly statement show the purchase of the annuity that we were just talking about?

A. Yes.

Q. I see on 12-08, on the first page, bought, DW variable ANN. What does that mean? What does DW variable ANN mean?

1  
2  
3  
4  
5

A. That's the Dean Witter variable annuity.

Q. How much does it show was put into it?

A. \$60,000.

Q. Then on 12-12, bought Dean Witter variable or  
VAR. What does that mean?

6 A. It's the same variable annuity with  
7 Northbrook. An additional \$25,000 was added.

8 Q. So a total of \$85,000 was placed in that in  
9 December of 1995?

10 A. Right. Any subsequent statement shows the  
11 \$85,000.

12 Q. Or what its value was at that time?

13 A. Right, that was the original principal  
14 invested.

15 Q. Did that variable annuity go up in value?

16 A. Yes, it did, considerably.

17 Q. That would have been on her monthly  
18 statement. She would have seen the value?

19 A. She would have seen it not only on the Dean  
20 Witter monthly statement, she would have seen it also  
21 on the monthly statement provided by Northbrook.

22 Q. And she would have seen that the value is  
23 going up?

24 A. Yes.

25 Q. The numbers would be there?

1  
2  
3  
4  
5

A. The numbers would be there.

Q. Is that a correct statement when she testified that you did not discuss variable annuities with her, or annuities with her?

A. Absolutely not.

6 Q. Could you have obtained the variable  
7 annuities for her account without her being involved?

8 A. Absolutely not.

9 Q. Why not?

10 A. She had to sign documents that initiated  
11 those variable annuities.

12 Q. Not just one document, multiple documents?

13 A. Multiple documents each time. As I said,  
14 there was a time when she just pulled out an annuity  
15 and said here, do the same thing, transfer it, get the  
16 paperwork, because they certainly weren't all done at  
17 one time.

18 She made the remark to me once that after we  
19 had started these annuities and that she had seen, as  
20 I discussed with her at her kitchen table, she had  
21 seen month by month the value going up. And she said  
22 jokingly, she said gee, I want to be a millionaire. I  
23 certainly never guaranteed anything, but I did my  
24 best.

25 Q. Did there come a time when Ms. DuChene moved

her accounts from Dean Witter to other -- pardon me,  
from your control at Dean Witter to other brokers?

A. Yes, as of --

Q. Sir, what's the answer to my question?

A. Yes.

6 Q. Did she move the accounts to more than one  
7 place?

8 A. Yes, sir.

9 Q. Did she move some of the accounts to another  
10 Dean Witter office?

11 A. Yes.

12 Q. Did she move some of the accounts to an  
13 Edward Jones office?

14 A. Yes.

15 Q. Did you find among the papers that we  
16 recently got statements from Edward Jones?

17 A. Yes.

18 Q. Mr. Merrill, I've placed in front of you  
19 documents that bear ACC numbers, the lowest of which  
20 is ACC 01621.

21 A. Yes.

22 Q. Would you start with looking at that packet  
23 first, please.

24 A. Okay.

25 Q. I want you to look at the first page there.

01  
02  
03  
04  
05

Can you tell from reading it what it is?

A. It's a statement from Edward Jones dated the 13th of January that identifies a new account that Beatrice DuChene has with Edward Jones, and the new account is a IRA retirement account.

6 Q. Was that an account that she had had with  
7 you?

8 A. Yes.

9 Q. Through most -- till the end of 1998?

10 A. Correct.

11 Q. And she transferred it to Edward Jones?

12 A. Correct.

13 Q. Would you turn to Page ACC 01622.

14 A. Okay, yes.

15 Q. Do you see the pyramid there?

16 A. Yes.

17 Q. Is that something similar to the Dean Witter  
18 pyramid that we talked about earlier?

19 A. Yes, just not in living color.

20 Q. Do you see they have the cash and the cash  
21 equivalents at the bottom of the pyramid?

22 A. Yes.

23 Q. And then in the second, they have income?

24 A. Yes.

25 Q. And what do they describe as the types of

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

investments that would be at that level of the pyramid?

A. They have the selection of investments including CDs, fixed annuities, bonds, high-yield bond funds and convertible bonds.

Q. Would high-yield bond funds include the bond fund that you recommended to Ms. DuChene and to others?

A. Yes.

Q. Does this pyramid comport with what Dean Witter's position was concerning the high-yield bond funds as to where it would be on the pyramid?

A. Yes.

Q. Does this show it to be high risk or high something, that you have to be really worried about your investment?

MR. BINGHAM: Objection. The Dean Witter material never showed that it is not high risk. It only shows it has income, which it is. If you'll look at the material, it does say that these investments in this category are not categorized by risk.

MR. LEWIS: Sir, if you look at the pyramid, the blue part on the living color one is just above cash and cash equivalents, and near the bottom of the pyramid. Within that, there are different levels, of

1 course, because they're a different thing.

2  
3 The point is that you had a witness here  
4 testify that these were a speculative investment, and  
5 we're trying to show that that witness didn't know  
6 what he was talking about, and that is not commonly  
7 accepted in the industry, what he testified to. But  
8 just the opposite is commonly accepted in the  
9 industry, that these high-yield bond funds, especially  
10 one with the character and quality of the Dean Witter,  
11 are not speculative investments. That's where I'm  
12 going with this.

13 ALJ DION: And I understood that, Mr. Lewis.  
14 And I understand that as that risk and reward are  
15 synonymous, both can go up and both can go down. As  
16 risk increases, then your reward can, but obviously,  
17 subject to losing everything.

18 And I understand that as far as trying to  
19 compare -- the somewhat difficult portion of this is  
20 that the Jones pyramid is five as opposed to four in  
21 the Dean Witter.

22 But I understand where you're going and you  
23 can continue with that line of questioning, but I just  
24 want to let you know that the bench is familiar with  
25 it, understands it, and we can kind of move on from  
this.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MR. LEWIS: I have no more questions about this.

ALJ DION: Just to let you know, Mr. Bingham, I overruled your objection because this does go towards whether or not the high-yield bond, not the annuities, but the high-yield bond were considered a speculative and/or risky investment.

MR. LEWIS: High-yield bond fund.

ALJ DION: High-yield bond fund.

Q. (BY MR. LEWIS) Would you look at the next page, ACC 0123. Were those items that are listed on there that had been purchased when the account was with you at Dean Witter?

A. The three stocks, America Online, Cisco, or Oracle were purchased by me. The other investments were not.

Q. As far as this is concerned, they listed those as aggressive stocks; is that correct? They do?

A. Yes.

Q. Then you go back to the previous page, how do they define aggressive stocks on the left-hand side of the pyramid?

A. Smaller growth companies, emerging markets, mutual funds, mutual funds without dividends, and that's --

1 Q. Hold on. Are the things listed, America  
2 Online, Cisco and Oracle, do they fit any of the  
3 descriptions of the aggressive growth?

4 A. No.

5 Q. What type of companies were they? Were they  
6 small, growing companies?

7 A. These are extremely large, well established  
8 companies, well known throughout the country. They're  
9 considered the blue chips of the NASDAQ exchange.

10 Q. Would you turn to the next group, which  
11 starts with ACC 01627. Is this for the same account  
12 as the previous packet?

13 A. This is for a --

14 Q. Is it for the same account as the previous  
15 packet?

16 A. No, it's a different account.

17 Q. Isn't the account number the same?

18 A. No, it's a different account.

19 Q. ACC 01627?

20 A. I'm sorry. I'm looking at the wrong ACC  
21 number. This is for the same account, yes, sir.

22 Q. Simply would you look at the third page. Is  
23 the AOL there any longer?

24 A. No, it's not.

25 Q. Go back to the previous one. It says the AOL

1  
2  
3  
4  
5

was at 153.625?

A. That's right.

Q. Do you remember what it was at when you recommended she buy it? Do you need to look at the monthly statement?

6 A. I want to -- I might be guessing, about 85.

7 Q. It went up very substantially in a short  
8 period of time?

9 A. Significantly. It almost doubled.

10 Q. About two and a half months?

11 A. Yes.

12 MR. BINGHAM: Objection; leading.

13 ALJ DION: It is, but it's not necessarily --  
14 hold on a second, Mr. Lewis.

15 MR. LEWIS: I apologize.

16 ALJ DION: That's fine. It is, but I think  
17 the answer is within, you know, what did she sell it  
18 for, what did you buy it for. I got the point. So  
19 I'll go ahead and instead of an answer all over, I'll  
20 overrule it. But I understand it tended to be  
21 leading, but it certainly wasn't leading me anywhere.

22 Mr. Lewis.

23 MR. LEWIS: Thank you.

24 Q. (BY MR. LEWIS) Would you look at the one  
25 that's entitled ACC 01087?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. Okay.

Q. That's for a different account?

A. Yes, sir.

Q. Would you look at what is in the funds and tell me if any of those were items that you had recommended she buy?

A. The Cisco, Dell, and Microsoft, I had purchased for her. The Dean Witter select equity is a mutual fund. It's just a residual amount. There are only 23 shares, so it -- we might have sold it. They sold all the Dean Witter funds before the accounts were transferred, but there might have been a residual dividend that transferred over.

And the John Hancock Regional Bank fund was definitely a, an investment that I bought for her that did very well, and they evidently did not sell that at that time.

Q. What type of a security is that, the John Hancock?

A. John Hancock, that's a mutual fund managed by a well-known gentleman who is quite often on the television. It's with John Hancock, and it's funded investment in regional banks. It did extremely well for a period of time. It went down, and I think now it's starting to do better.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Q. The three stock, the Cisco, Dell and Microsoft, did you recommended the purchase in her regular account?

A. Yes, sir.

Q. Did she follow your recommendation?

A. Yes, sir.

Q. Approximately when was it that you recommended she buy them? I think we went over this. It was in September, wasn't it? I think that was on --

A. Yeah, of 1998, and they did extremely well, up until the time that I -- she transferred the account.

MR. BINGHAM: Objection. This is not about how well these funds did or these stocks did. My objection, to be brief, irrelevant.

MR. LEWIS: She also testified, and I'll get into that, that she said she lost money on all of his investments, and that is certainly not true. And it's a question of also credibility and what she can remember. And that's where I'm going with these things into that issue.

ALJ DION: Let's get there. So I'll overrule, but I'll kind of keep it as a standing objection in the back of my mind, Mr. Bingham, because

1 if it doesn't, we're going to move on.

2 MR. LEWIS: That's fair.

3 Q. (BY MR. LEWIS) Would you turn to, in our  
4 exhibits, Tab 2, Page 10887.

5 ALJ DION: Before we move on, Mr. Lewis, do  
6 you want these things from Edward Jones marked?

7 MR. LEWIS: Please. And I think it makes  
8 sense to put them in the ACC number order, which is  
9 not the order I discussed them with Mr. Merrill.

10 ALJ DION: For purposes of discussion, I  
11 think we are on 11, so with the Bates stamp 1651,  
12 let's make that R-11.

13 MR. BINGHAM: Sorry to interrupt, but there's  
14 a 1087. Are we going to take that first?

15 MR. LEWIS: I'm not going to argue with the  
16 judge.

17 MR. BINGHAM: I'm sorry, never mind.

18 ALJ DION: I think we talked about them  
19 sequentially in this order. We'll do 1627, that's  
20 R-12, then the last one, ACC 10087, is R-13, if we can  
21 get a copy of those three to the court reporter.

22 ALJ DION: While she's doing that --

23 (A brief recess ensued.)

24 ALJ DION: Let's get back on the record.

25 You're looking at, it's respondent's,

1 actually marked as 2-A, this packet, begins on 1086  
2 and you're looking at 1087.

3 Mr. Lewis.

4 Q. (BY MR. LEWIS) Cisco Systems on January  
5 13th, 1999, was at 98 and an eighth. What did you  
6 recommend she buy it at?

7 A. At the -- well the market price I bought it  
8 at was 106 and 16.

9 Q. We're talking about the Cisco.

10 A. I'm sorry, Cisco. I recommended that.

11 Q. Are you looking at Exhibit 1087?

12 A. 1087, yes. And I recommended that after the  
13 split, that she buy it at the market price, which  
14 turned out to be 62 and an eighth.

15 Q. Then did you also later recommend purchase of  
16 additional shares to get it up to 126?

17 A. Yes.

18 Q. And on the Dell, what did you recommend it  
19 at?

20 A. Market price. I discussed with her on the  
21 14th, and I bought it at 58 and 15/16ths. I bought it  
22 that day.

23 Q. On January 13th it was at 80.438; is that  
24 correct?

25 A. Yes.

1 Q. On the Microsoft, what was your  
2 recommendation? What was the price that you bought  
3 it?

4 A. The market price, we bought it at 106 and a  
5 16th.

6 Q. On January 13th, '99, was it at 142?

7 A. Yes. What I was doing was if you add up the  
8 total value, total investment value is approximately  
9 \$10,000. So I was trying to buy, stay within that  
10 number, and buy appropriate number of shares of each.  
11 That's why Cisco has an odd number of 76, which isn't  
12 odd, but it's odd for investing.

13 Q. Mr. Merrill, I'm going to read you from  
14 Ms. DuChene's testimony, Page 107. I was asking the  
15 questions of her. I'm reading the letter that you  
16 said you looked at, and everything was correct then.  
17 I want to know if this statement, the second line in  
18 the paragraph entitled annuity, it says: It is my  
19 understanding that I lost a lot of money when he  
20 switched my account. Is that a true statement?

21 Answer: Went from tax free to what he did  
22 from there, there was limitations, yes.

23 Question: You lost money investing in these  
24 things?

25 Answer: In annuities, yes. I lost

1 considerably from investing in annuities.

2 Question: You lost over -- how much did you  
3 lose?

4 I would say 100 some thousand dollars.

5 Question: You lost over \$107,000?

6 Answer: Over 100 some thousand dollars from  
7 what he did with my annuities.

8 Question: Simply by investing in annuities?

9 Answer: In the Northbrook annuities, yes.

10 Question: Did you lose that immediately or  
11 did you lose that over a period of time?

12 I lost it over a period of time. And when I  
13 tried to get out of it, I couldn't, and I had to have  
14 a penalty and finally paid a penalty to get out of it  
15 last year. I was stuck in Northbrook.

16 What was your reaction?

17 A. I was shocked, because she did not lose  
18 money, and she left the -- took her accounts away in  
19 December of 1998. It was approximately \$107,000 of  
20 gain in the four annuities.

21 Q. Would you turn to Exhibit 1094.

22 A. I have it.

23 Q. Did you prepare that exhibit, sir?

24 A. Yes, I did.

25 Q. Did you prepare it from information that we

1 had available at the time of the first hearing?

2 A. Yes.

3 Q. At the bottom you've got source, Bates, and  
4 then you have Bates numbers and Division Tab 4. Is  
5 that where you got the information from?

6 A. Yes.

7 Q. What was the date of that information, the  
8 last date that you use for valuation?

9 A. 16th of July, 1998.

10 Q. As a result of the materials that we obtained  
11 on October 31st, did you have a later date?

12 A. Yes. Instead of using a July, '98 statement,  
13 I used a December, '98 statement, because that's the  
14 last statement before she left me.

15 Q. Does that result in some modest change in the  
16 numbers?

17 A. Yes.

18 Q. Have we prepared a revised Exhibit 1094 to  
19 take into consideration the later date of the  
20 information we got since the time of the continued  
21 hearing?

22 A. That's correct.

23 MR. LEWIS: I have not put a number on this,  
24 but I'd like it to be 1094 revised, if I may, Your  
25 Honor.



1 hearing commenced in August?

2 A. That's correct.

3 Q. So the values under dollar value/date on the  
4 revised exhibit, starting with 138,081, are the  
5 revised values.

6 Now, for instance, the first one, it's  
7 actually gone down a little bit; is that correct?

8 A. Yes.

9 Q. The second one went down a little bit; is  
10 that correct?

11 A. Yes.

12 Q. Now, the third one, there's a big change?

13 A. Right.

14 Q. Can you explain to the judge, please, why it  
15 went from \$15,116 to \$51,635?

16 A. Initially, sir, I used the value \$10,225.  
17 That had been the total contribution up to July of  
18 '98. Then subsequent to that, in July '98, in fact,  
19 the same month, but later on in the month, there was  
20 \$37,000 added. So that brought the total contribution  
21 up to 47,225, which, as of the end of the year, had  
22 appreciated 51,365. Which doesn't appear to look like  
23 much of a gain, but it was, considering the 37,000 had  
24 just been added a few months before.

25 Q. And the Bankers United Life actually went up

1 a little bit between July and December; is that  
2 correct?

3 A. Right, 47,489 to 58,403.

4 Q. So the number on the dollars contributed on  
5 the revised exhibit is 232,370; is that correct?

6 A. Correct.

7 Q. On the dollar value/date, you have 339,390;  
8 is that correct?

9 A. Correct.

10 Q. That's the valuation from the December 1998  
11 statement for all four of those annuities; is that  
12 correct?

13 A. That's correct.

14 Q. The total gain, then, is the difference  
15 between 232,370 and 339,390?

16 A. Correct.

17 Q. And that's 107,020?

18 A. Correct.

19 Q. You have under that 46 percent. What does  
20 that represent?

21 A. That's the total appreciation over a  
22 three-year period.

23 Q. I want to ask you about this \$37,000. Where  
24 did that come from?

25 A. Beatrice DuChene had invested in a unit

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

investment trust known as the dogs of the Dow, or the Dow Select 10.

Q. First of all, would you explain to the judge what a unit investment trust is?

A. Unit investment trust is somewhat similar to a mutual fund. The primary differences are the stocks that the trust is in, or that they invest in, are fixed. They're not selected by me, they're not selected by the client, they're selected by analysts in New York.

And the other difference is every unit trust has an end date, has a maturity, if you will. And that particular series associated with that particular trust has a life of a year, maybe a year and a half, then it ends, and then it rolls over. When one ends, a new one begins. And Ms. DuChene had the Dow Select 10.

Q. Did you recommend that to her?

A. Initially, yes.

Q. What year did you initially recommend it?

A. That would be '96.

Q. You refer to it as the dogs of the Dow. Can you explain that, please.

A. There are books written about it. It's a very conservative and easy way to invest in the market

1 without agonizing over what stocks to pick.

2           The way it's picked, no individual picks the  
3 stock. It's picked by a computer based on what 10  
4 stocks in the Dow 30 industrials are paying the  
5 highest dividend. And they -- they're selected, and  
6 it's stocks like Phillip Morris and so on that  
7 constitutes the trust. The 10 stocks with the highest  
8 dividend.

9           Q.    That could change each year?

10          A.    It can change from one series to the next,  
11 but while you own it, it doesn't change.

12          Q.    She owned that first in 1996?

13          A.    Right.

14          Q.    Did her first purchase --

15          A.    Actually it's '95, and it ended in '96.

16          Q.    All right. Did her first purchase of this  
17 unit trust end in 1996?

18          A.    Yes.

19          Q.    What happened with it?

20          A.    It automatically rolled over because we had  
21 talked about it. And it had gained, as I thought it  
22 would, it had gained considerably, about \$6,000.

23          Q.    Do you remember how much was invested?

24          A.    I think about 30,000.

25          Q.    30,000, or less than that?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. I'd have to look. It was 25 --

Q. What would you have to look at?

A. Well, that piece of paper I gave you with all three of them on it.

Q. Would the monthly statement for the month that that was purchased help?

A. Yes.

Q. Will you need the 1995 monthly statement?

A. Yes.

Q. I don't know if we have those.

MR. BINGHAM: '95 monthly statement for which account?

Q. (BY MR. LEWIS) Which account would this have been in? The regular account?

A. Yes, 29,773.

MR. BINGHAM: I think we only have December 4, because that's all I could obtain.

THE WITNESS: You don't have that spreadsheet I gave you on those three?

MR. LEWIS: If you tell me you gave me something, I've got to look for it.

MR. BINGHAM: S-6 lists all the transactions in the account.

THE WITNESS: Can I look in one of my folders?

1 MR. BINGHAM: S-7 starts December '95 for  
2 that particular account. Purchase date is what you're  
3 looking for; correct?

4 MR. LEWIS: And the amount, DW select.

5 MR. BINGHAM: I can show you a purchase in  
6 January, '96 of unit Dean Witter select industrial  
7 9-6-1. S-6.

8 THE WITNESS: Right.

9 MR. LEWIS: Is that about right, Phil?

10 THE WITNESS: That's about right.

11 Q. (BY MR. LEWIS) Mr. Merrill, are you now able  
12 to tell the judge approximately what was paid for the  
13 first purchase?

14 A. \$24,000.

15 Q. It was almost 25?

16 A. Almost 25.

17 Q. 24,900; is that correct?

18 A. Yes.

19 MR. BINGHAM: I won't object to leading.

20 ALJ DION: You were able to review some of  
21 the records and that's how you were able to remember  
22 that exact number; is that correct, Mr. Merrill?

23 THE WITNESS: Yes.

24 Q. (BY MR. LEWIS) The records showed that the  
25 trade settled in January of 1996?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. Yes, that's right.

Q. You describe it would have rolled over in 1997?

A. That's right.

Q. Did it roll over then?

A. Yes, it did.

Q. Now, did you recommend the sale of that, of that unit trust?

A. I recommended early on to let it roll over. By letting it roll over, you're buying the same thing.

Q. Did it roll over again in '98?

A. Yes, it did.

Q. In 1998, did you recommend the sale?

A. I recommended the sale of the '98 one.

Q. When?

A. July.

ALJ DION: Would it be more accurate to say not necessarily the sale, because it stops, it's just to roll over those funds?

MR. LEWIS: No, it rolled over in January.

ALJ DION: I understand that. But these things have, I've been told these things have a life, they end at a certain point; is that correct, Mr. Merrill?

THE WITNESS: That's right.

1 ALJ DION: You have the ability to roll those  
2 funds back into the next account, which is basically  
3 the same thing. It might include a couple of  
4 different shares, but essentially the same thing  
5 you're looking for; is that right?

6 THE WITNESS: That's right.

7 ALJ DION: So it's not necessarily that you  
8 told her to sell her interests, because those  
9 interests ended at a certain date; it's just that you  
10 advised her not to roll those over anymore.

11 MR. LEWIS: Incorrect, sir.

12 ALJ DION: I'm asking Mr. Merrill. Okay?

13 MR. LEWIS: We just testified to what  
14 happened. I apologize, sir.

15 THE WITNESS: Two unit trusts were rolled  
16 over, the '96 and the '97. When it came to '98, the  
17 recommendation was, before it reached maturity, to  
18 sell it.

19 ALJ DION: Okay. And otherwise, it would be  
20 automatically rolled over; is that correct?

21 THE WITNESS: That's right.

22 ALJ DION: I just --

23 THE WITNESS: My reason for recommending that  
24 was the fact that it is a value type investment,  
25 invest in value companies paying dividends.

1  
2  
3  
4  
5  
ALJ DION: I guess my point is that it's not necessarily that you sell it, you don't sell it on that date, it's just that when the maturity arises, it does not get reinvested.

THE WITNESS: That's right.

6 Q. (BY MR. LEWIS) Mr. Merrill, with the DW  
7 Select 10, did it roll over in 1998, in January? Was  
8 it allowed to roll over?

9 A. Yeah, it was allowed to roll over in January.

10 Q. When was it sold?

11 A. It was sold in July.

12 Q. During the year?

13 A. Yes. It's a liquid investment; you could  
14 sell it at anytime.

15 ALJ DION: Okay. Now I understand what  
16 Mr. Lewis is saying.

17 MR. BINGHAM: I understand July of '98 is  
18 when he's testifying it was sold; is that correct?

19 THE WITNESS: That's right.

20 Q. (BY MR. LEWIS) Is that where the \$37,000  
21 came to put into the annuity, the Northbrook annuity  
22 that has on, Exhibit 1094 revised, shows a \$37,000  
23 deposit, and then in the next comment says sale of Dow  
24 trust 98-1, July '98?

25 A. That's right.

Q. Is that your attempt there in short order to explain where the 37,000 --

A. The source of the funds that were added to the annuity.

ALJ DION: Just to clarify my understanding, Mr. Merrill, the investments in these, in those contracts are fixed, meaning you can't select them anymore?

THE WITNESS: That's right.

ALJ DION: However, your investment isn't fixed in that you have -- fixed is a bad word, but you are not necessarily tied in like a CD to stay in the fund for the life of that fund, whether it's a year or six months or a year?

THE WITNESS: That's right.

ALJ DION: You can sell, unlike a CD, to realize the gains or some of the gains you have to hold it for a specific period of time or your penalties, et cetera; is that correct?

THE WITNESS: That's correct.

ALJ DION: That was my misunderstanding.

Okay, Mr. Lewis.

Q. (BY MR. LEWIS) Mr. Merrill, have you also prepared other documents showing the investment results in the DuChene account?

2003-02-04 13:00:00

A. Yes, I have.

Q. And do they start on Page 1088?

A. Yes.

Q. You have this 1088 marked IRA account performance. She had an IRA account that you call an IRA account; is that correct?

A. Yes, that's correct.

Q. I think she had an account you called a regular account?

A. Regular account, right.

Q. Did the regular account change its name at some point?

A. Yes. In October, 1998, she finally got around to creating a trust, and so the regular account, she signed the necessary paperwork and we just rolled over all her assets in the regular account into the new trust account.

Q. Everything was moved from -- just changed the name, essentially?

A. That's right. You have to -- you don't change the name of the existing account, you create a new account. You create a new trust account.

Q. But the trust account was essentially a continuation of everything that happened before?

A. Yes, yes.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Q. She still had the power to make all of the investments?

A. Absolutely.

Q. Now, on Pages 1088 and 1089, you have set down information concerning the IRA account; is that correct?

A. Yes, sir.

Q. And it started in February of 1996?

A. Yes, sir. That was the earliest statement I had.

Q. Is it your recollection that the account may have commenced earlier than that?

A. Yes, it might have commenced in '95.

Q. But the earliest monthly statement you were able to find was for February of 1996?

A. That's correct.

Q. And you have start value 25,670; is that correct?

A. Correct.

Q. And then you list additions if there were any, distributions or withdrawals if there were any, and the assets. By that do you mean the securities that were in the account?

A. Yes, sir.

Q. So this moves all the way from February of

1  
2  
3  
4  
5

'96, when we get down to December of '96, you show a withdrawal or distribution of \$2,127. Do you have any recollection as to what that was for? Was it a required minimum distribution?

A. Right. It was required minimum distribution.

6

Q. Would you explain to his honor, I'm sure he may know, for the record tell him what that means.

7

8

A. When a client has an IRA account and they get to seven and a half years old, Uncle Sam wants to start taking money out of the IRA account so he can get paid taxes. So the IRS has devised a table that computes or allows you to compute the required minimum distribution based on two things, based on the value of the account the preceding December, and based on an age factor.

9  
10  
11  
12  
13  
14  
15

16

Q. Is that called a minimum required distribution?

17

18

A. Required RMD, required minimum distribution.

19

Q. Required minimum distribution?

20

A. Yes.

21

Q. February of '97, you indicate she made another withdrawal; is that correct?

22

23

A. \$1,500. I can't tell you what it was for.

24

Q. At the bottom, you indicated the source of this information from the Division, Tabs 13 and 14; is

25

1 that correct?

2 A. Those are all monthly statements.

3 Q. And that's where you got this information  
4 from?

5 A. Yes, sir.

6 Q. And all of this information, account  
7 valuation, the additions, withdrawals and the assets,  
8 are all on the monthly statement?

9 A. That's correct.

10 Q. And you just put it all together in this one  
11 exhibit; is that correct?

12 A. Yes, sir.

13 Q. Let's turn the page. And you show this all  
14 the way through December of '98, and you have end  
15 value, \$42,255. What do you mean by end value?

16 A. As of the end of December statement for the  
17 IRA account, she had a value of \$42,255.

18 Q. What happened with the account? Did you  
19 continue to service it?

20 A. No. That evidently was the account transfer  
21 to Edward Jones.

22 Q. I notice you've placed under assets number,  
23 for instance, at the top, in February, '98, under  
24 assets, you have ORCL BOT at 26. Could you explain  
25 what that is?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. Oracle stock, one of the top four stocks in the NASDAQ. We bought it at \$26. I don't show there the number of shares, but it was bought at \$26 a share.

Q. Did you talk with her about that purchase?

A. Yes, I did.

Q. Down in November you show bought. Is that BOT, bought?

A. Yes.

Q. Would you read that, what it says there, what it means?

A. In November '98 bought AOL at 81.

Q. And bought Cisco?

A. And Cisco at 72.

Q. And then you show the prices as of the end of December. On the Oracle it's at 43; is that correct?

A. Oracle is 43, AOL is 155, and Cisco is 92. Gone are the good days.

Q. Then you have the summary of stock gains and losses at the bottom there?

A. Yes, sir.

Q. And then you show over a period of 35 months the gain was 84.7 percent. What are the two numbers that you used to reach that number? How did you -- what is the arithmetic as to how you got there?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. I took the end value sold Dean Witter at 50 and bought it at 34, so the difference is 16 points or 47 percent realized gain.

Q. Pardon me, you got -- how do you get this 84.7? What is the arithmetic? I want the judge and the record to understand what you did.

A. I'm sorry. The 84.7, I took the end value of the account, which is 42,255 as of December, 1998, and I added to it the withdrawals that she took out of the account for whatever reason, required minimum distribution, so on, and that totals \$5,127. I added those and subtract the original value for the account dating back at least to December -- February of 1996, and the difference is \$21,712, which represents over 35 months of gain of 84.7 percent.

Q. That's in her IRA account?

A. Yes, sir.

MR. LEWIS: Your Honor, I'm going to go on, but if we want to break, this might be a good place to break.

ALJ DION: It is, it's getting, getting -- it is the noon hour. Why don't we do that.

But before we go, Mr. Bingham, back to my earlier discussion. I'd like you, over the noon hour, to contact the DuChenes and their attorney, and find

1 out whether or not they are asserting the  
2 attorney-client privilege, or another privilege that  
3 I'm unaware of, and if so, that they have to be  
4 available for 9:00 in the morning. If not, then  
5 please proceed with that. And if the Division is not  
6 making a confidentiality argument, then get those  
7 documents and we'll get them to Mr. Lewis, and I'll  
8 expect to hear something from you on the record.

9 If they're not asserting it and there's  
10 really no assertion of the privilege, then that's what  
11 I would expect to hear from you, if the documents are  
12 forthcoming; otherwise, that you contacted them and  
13 they'll be here at 9:00 or appear by phone or  
14 something like that.

15 MR. BINGHAM: Your Honor, I'll at least  
16 attempt to get ahold of Beatrice DuChene. I don't  
17 know that I'll be able to get ahold of her daughter,  
18 and I don't know that I really need to since really  
19 it's Beatrice who would have to assert any privilege,  
20 not her daughter.

21 ALJ DION: Okay. In any event I'd like the  
22 parties, you know, I obviously understand it's the  
23 noon hour and you'll have some difficulty getting  
24 ahold of people, but if we could do that, and/or if we  
25 could have a secretary or somebody over at the

1 Division to kind of keep trying throughout the course  
2 of the day, because you can anticipate we'll probably  
3 have a break somewhere between 2:30, 3:00 so that they  
4 can make themselves available. Why don't we come back  
5 here.

6 I know, Mr. Lewis, I remember you usually go  
7 back to your office and things like that.

8 MR. LEWIS: There's really no place to eat  
9 around here. I don't think I have to tell you that.

10 ALJ DION: No, you don't. Is an hour and 15  
11 minutes sufficient?

12 MR. LEWIS: That's fine.

13 ALJ DION: Why don't we do that. Why don't  
14 we get back here at 1:20. Like I said, if somebody  
15 over at the Division can kind of keep trying, if you  
16 will, so that I can have an answer by 5:00 that would  
17 be great. But I certainly understand the situation  
18 that you're in and I appreciate it. So try what you  
19 can do over the noon hour personally, and then if we  
20 could continue it on through the afternoon so we can  
21 get an answer later, that will be great. So we'll be  
22 back in an hour and 15.

23 (The lunch recess ensued from 12:02 p.m. to  
24 1:20 p.m.)

25 ALJ DION: We're back on the record in the

1 Merrill matter.

2 I, off the record, asked Mr. Bingham if he  
3 was able to get in contact with Ms. DuChene or her  
4 attorney, and evidently he was unable to, but left  
5 messages with either voice mail or answering machine,  
6 and his investigator, Mr. Lowe, will try periodically  
7 through the afternoon to get in contact with those  
8 individuals. So that takes care of that matter.

9 Is that basically the sum and substance of  
10 what you told me, Mr. Bingham?

11 MR. BINGHAM: Yes.

12 ALJ DION: And you agree with that?

13 MR. BINGHAM: Yes, I do.

14 ALJ DION: Mr. Lewis, is what we talked about  
15 within your presence?

16 MR. LEWIS: That's fine.

17 ALJ DION: With that, hopefully we'll hear  
18 something later on this afternoon.

19 Mr. Merrill has retaken the stand.

20 You're still under oath, sir, so why don't we  
21 go ahead and continue with the direct examination.  
22 You remember you're still under oath, right,  
23 Mr. Merrill?

24 THE WITNESS: Yes, sir.

25 Q. (BY MR. LEWIS) Mr. Merrill, before any trade

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

was made in any of Beatrice DuChene's accounts, did you talk to her about those trades?

A. Yes, sir.

Q. Did you make notes on them?

A. Yes, sir.

Q. Have you been able to find all of the notes?

A. No, sir.

Q. On the DW select 10, the dogs of the Dow, as you called it, when it rolled over, is that automatic, or do you have to say I want to roll it over?

A. It's automatic and it rolls over unless you say no; but you say nothing, it rolls over.

Q. So the only time you had talked to her when it came time to roll over, there was some reason she wasn't going to renew it?

A. That's right.

Q. Would you open up exhibits to Tab 2, and I want to go through the investment results with you on the DuChene account.

We've already done 1088 and 1089?

A. Right.

Q. Let's start with 1090. Which account does this deal with?

A. This is her regular account, the nonIRA account.

1 Q. Where did you get the information to put on  
2 these documents?

3 A. Well, the ACC numbers down below reference  
4 the monthly account reports, statements.

5 Q. And you had the Division Tab 7 to 9?

6 A. Yes.

7 Q. The date column, is that the date of the  
8 monthly statement?

9 A. Yes. Specifically it's the last day of the  
10 month.

11 Q. Total account valuation, where does that  
12 information come from?

13 A. That comes right off the front page of that  
14 statement.

15 Q. Additions, where would that information come  
16 from?

17 A. That would be also included in the statement.

18 Q. Is that where you got the information from?

19 A. Yes.

20 Q. Withdrawals, where did you get that  
21 information?

22 A. Same place. It would show any checks that  
23 were issued or any withdrawals from the account.

24 Q. Then you have, the last column is client net  
25 monthly benefit. Is that a calculation you made or

1 was it on the statement?

2 A. No. That's what I made, is just basically  
3 what had happened, one month versus where the account  
4 value total was the preceding month, the difference  
5 between the two.

6 Q. On these monthly statements is there  
7 something different than account valuation since last  
8 statement?

9 A. There is on some statements, but not all  
10 statements.

11 Q. December, 1995, you show account valuation,  
12 \$225,560?

13 A. Right.

14 Q. Then you show she made a \$15,000 withdrawal?

15 A. Yes.

16 Q. This information is all on the monthly  
17 statements. We go down to the next page, we show she  
18 was making withdrawals from the account; is that  
19 correct. How would she make those withdrawals? Would  
20 she write a check or did she have a Visa card or  
21 something?

22 A. The account was not a AAA or active asset  
23 account that involved checking. So if she wanted a  
24 check, she would phone me, contact me, and we would  
25 issue a check.

1  
2  
3 Q. So on each occasion here, where it shows a  
4 withdrawal, she had to call you in order to get it; is  
5 that correct?

6 A. That's correct.

7 Q. Would you take authority to send her a check  
8 from anybody but her?

9 A. Absolutely not.

10 Q. So on all of these occasions -- and some of  
11 these are multiple checks in a month, weren't they?  
12 Or were these all just one check a month?

13 A. No. Like March, '97, I have two numbers  
14 there, so that represents two withdrawals, two  
15 separate withdrawals.

16 Q. When she called you to ask for a check, would  
17 you have any other discussions with her?

18 A. I might have talked to her about something  
19 else going on in her account.

20 Q. So there were -- looks like there were  
21 contacts on a fairly regular basis?

22 A. Yes.

23 Q. Now let's turn to Page 1092. October, '98  
24 you say see trust account. Would you explain to the  
25 judge, please, what that means.

A. I mentioned before, sir, that we moved from a  
regular account to a trust account, and that took

1 place in October of '98.

2 Q. As of the end of October, '98, is that what  
3 these totals are in bold type?

4 A. Yes.

5 Q. And the account valuation was \$497,557?

6 A. That's right.

7 Q. She added 176,964?

8 A. Yes.

9 Q. And she had withdrawn 35,398?

10 A. That's correct.

11 Q. And the one 35,441 is the first column, minus  
12 176 plus 35?

13 A. That's correct.

14 Q. So the result of this regular account was a  
15 plus over the period of time that you helped her with  
16 it, was a plus \$135,441?

17 A. Right.

18 Q. This is all from the documents that are in  
19 the record?

20 A. That's correct.

21 Q. Would you turn to page, please, to 1093.

22 Now, this starts with October of '98, and the number  
23 is somewhat different. 495,700. Can you explain the  
24 difference between that and the 497,557?

25 A. The regular account number of 497 came off of

1 the end of the September statement, whereas the  
2 495,700 came off of the trust account as of the end of  
3 October. That was its first month essentially in  
4 being.

5 Q. And then the account actually did quite well  
6 during the month of November, didn't it? It went up  
7 significantly?

8 A. Yes.

9 Q. And that wasn't a result of any additions,  
10 was it?

11 A. No.

12 Q. And she withdrew \$5,000?

13 A. That's right.

14 Q. So in that month, you have client net monthly  
15 benefit of \$43,198?

16 A. That's right.

17 Q. And then the next month it went up again till  
18 the end of December?

19 A. Yes.

20 Q. And she withdrew \$3,000?

21 A. Yes.

22 Q. And your net monthly benefit was \$7,449?

23 A. Yes.

24 Q. And then you show the total of 50,647.

25 That's the benefit just in those three months, the

1 increase in value?

2 A. That's right.

3 Q. That's when she took the account away from  
4 you?

5 A. Right. During that month she sold mutual  
6 funds, mutual funds that I had put her in.  
7 Unbeknownst to me she sold them, but the money was  
8 still in the account. That's why you still have an  
9 account value. It just came out of the mutual funds  
10 and rolled over into the money market. But the money  
11 hadn't figuratively left the account until the  
12 following month in January.

13 Q. I think the next page, 1094 we've already  
14 discussed. Can we go to 1095, please.

15 A. Okay.

16 Q. Is this a summary of all of her accounts that  
17 you helped her with?

18 A. Yes, sir.

19 Q. Account type, you've got the IRA account?

20 A. Yes.

21 Q. You have the regular brokerage account ended  
22 October, 1998?

23 A. Right.

24 Q. The trust account started October, 1998?

25 A. That's right.

1 Q. These numbers, the total dollar gain are the  
2 same numbers that we've already just discussed; is  
3 that correct?

4 A. That's correct.

5 Q. And the total result through the end of  
6 December, 1998, is this number 207,824?

7 A. That's correct.

8 Q. She started with \$246,230?

9 A. That's correct.

10 Q. And you've shown that this is a percentage  
11 gain of 84.4 percent?

12 A. For the total period of time, yes.

13 Q. And then annualized that starting when, the  
14 28.1?

15 A. I probably just divided by three years; three  
16 times 28 is 84.

17 Q. What was your reaction when Ms. DuChene said  
18 that she had lost money when you were handling her  
19 account?

20 A. I was absolutely blown away, dumbfounded,  
21 shocked.

22 Q. Would you turn to 1099. This goes on for  
23 four or five pages. What is this set of documents?

24 A. Well, I guess to explain these two, first two  
25 pages, 1099 and 1100, I went --

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Q. Wait a minute, 1096? Are you reading them upside down? 1096?

A. I'm sorry. Okay, 1096, I'm sorry.

ALJ DION: You said 1099.

MR. LEWIS: I did, I apologize. I was reading them upside down.

Q. (BY MR. LEWIS) 1096, please.

A. 1096 through 1099 and actually 1100, so 96 through 100, all those figures come about simply by taking the numbers from the following two pages, 1101 and 1102 -- and this was the reported dividends reported by Dean Witter, strictly for the high income securities fund, and high yield, there's actually two of them -- and putting them in this tabulation that begins on 1096. What money was added on what date, the income paid to the client as of those dates, and the total fund value?

And then the portfolio value in the last column just represents what percent of the total portfolio value was the contributions or the value of the high-yield bond fund. And it varied from the beginning of 6.8 percent, and wound up at 14.69 percent.

Q. Mr. Merrill, when you figured that percentage, were you figuring all of the funds that

1 she had, that you were helping her with?

2 A. Yes, the total portfolio. And the total  
3 portfolio consisted of her IRA account plus her  
4 regular account or a trust account.

5 Q. And the annuities were reported in the  
6 regular account or the trust account?

7 A. That's correct.

8 Q. Were those funds that you were helping her  
9 with the annuities?

10 A. In the annuities?

11 Q. Yes.

12 A. Yes, absolutely.

13 Q. Were you the financial advisor or registered  
14 representative who was responsible for helping her  
15 with those accounts, including all of those funds?

16 A. Yes, sir.

17 Q. What was the total amount of dividends that  
18 she received from the high yield and high-income fund?

19 A. It's reported \$19,768.93.

20 Q. And that's over a period of what, three  
21 years?

22 A. That's over a period of three years,  
23 essentially from the end of January, is the 22nd of  
24 '96 through the 20th of November, '98.

25 Q. And the Pages 1101 and 1102, this is a

statement concerning the shares in the high-income securities; is that correct?

A. That's correct.

Q. And that's where you got the information for that, those shares?

A. Totally.

Q. There's also 1103; right? That would be for the trust account?

A. That's right.

Q. Mr. Merrill, would you turn, please, to Tab 1 of Page 1001 of our documents?

A. Okay.

Q. Mr. Merrill, one of the complaints made against you is that when you recommended the high income or the high-yield fund, you were recommending an unsuitable investment to the customers that you recommended it to who testified. Do you understand that, sir?

A. Yes, sir.

Q. Did you feel that the investment was unsuitable?

A. No, I did not.

Q. Would you explain why to the judge, please?

A. I consulted several individuals and I did a lot of research of many different sources in order to

1 complete the due diligence required for this  
2 recommendation. I consulted, as I think I mentioned  
3 before, the assistant branch manager, we used  
4 extensively, and I consulted two senior brokers, one  
5 of which I mentioned is an Arizona State senator. And  
6 they use this fund and had used it for quite a long  
7 time to provide monthly income to their clients.

8 In the area of research, I went to the  
9 computer system at that time, the advantage system,  
10 and it told me that the dividend to be received by  
11 these clients had been, since inception of the fund,  
12 which was 1979, had been five and a half cents, 5.47  
13 cents exactly. This is per share, per month, that's  
14 paid out to the client. Now, the client could get the  
15 check directly or just put it in their account. They  
16 had that choice.

17 I also found out that the management of this  
18 fund is very highly regarded within this company, then  
19 I went on to research Forbes, Business Week  
20 information, Lipper Analytic Services, which is an  
21 independent rating agency, Morningstar, and the Bond  
22 Markets Association, which is an industry association.  
23 And I found at that time that Forbes recommended the  
24 high-yield bond funds as being less risky than  
25 long-term government securities, there's less

volatility because of their shorter duration.

For the return, the yield on the high-yield bond fund for '95 was 11.9 percent, in '96 it was 11.7, in '97 it was 12.2, and in '98 it was 10.4. It was about the only high-yield bond fund that had double-digit returns or yields, actually, for those four years.

And there was in 1001, this Business Week article. This Business Week article has an extensive rundown and discussion about high-yield bond funds, and it has a list called the jewels of the junk bond funds, and the Dean Witter fund was rated number two. It was rated number two because of the second best return over five years. It was rated number two because of the second lowest expense ratio associated with that fund for that period of time.

Q. Mr. Merrill, was there any internal -- did you attend the seminar where the high-yield fund was discussed?

A. Yes. There was a seminar that was put on annually in the month of January by the mutual fund department of Dean Witter, called Intercapital at that time.

Q. Are there documents starting at 1007-A that you've taken out of the book that you received in

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

connection with that seminar?

A. Yes.

Q. I know you don't want to put this in the record, but I just want it to be shown. Where was this seminar that you attended?

A. It was at Disney World in Florida.

Q. I'm handing you a three-ring binder. Is that yours?

A. Yes.

Q. Where did you get it?

A. I got it at the conference referred to as Insights, in January, 1997, in Florida.

Q. Have we copied the pages out of that book that's 1007-A, 1007, 1008, and 1009, that deal with the high-yield fund?

A. Yes.

Q. So would you now turn to those pages in the book. Have you got them?

A. Yes.

Q. Could you just open up the blue three-ring binder you got to the same page, and just hold it up so everybody could see it.

A. The first one is 1007. That's 1007.

Q. Have you got the first page of that, too, marked 1007-A in your three-ring binder.

1 MR. BINGHAM: Did you say 1007-A?

2 MR. LEWIS: Yes, it's a page before 1007.

3 THE WITNESS: That's the beginning tab, if  
4 you will, for a discussion about the high-yield bond  
5 fund by its manager, Pete Avelar.

6 Q. (BY MR. LEWIS) Did you know who Mr. Avelar  
7 was before you went to the seminar?

8 A. Yes.

9 Q. Could you describe what you knew about him?

10 A. He has been the manager of the high-yield  
11 bond fund and another fund for diversified income for  
12 quite some time. He was the senior vice-president at  
13 Dean Witter.

14 Q. Would you turn to Page 1007?

15 A. Okay.

16 Q. This is a part of the presentation in your  
17 book?

18 A. Yes.

19 Q. Can you explain to the judge, please, what  
20 this means as far as high yields, what it meant to you  
21 as far as the high-yield securities are concerned?

22 A. Basically, he was reporting numbers and  
23 information that was derived from Lipper Analytic  
24 Services. These are not numbers that he came up with,  
25 they were all -- came from Lipper, which is referred

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

to down at the bottom there, so it's an independent source of information. And the 1007 page identifies the return of 13.27 percent associated with the high-yield securities fund ending 31 December of '96. And it's annualized return since inception of '79 is 9.84 percent.

Q. Is Lipper a service that rates?

A. Yes, it's like Morningstar, an independent rating service.

Q. Would you turn the page to 1008. This is part of the material that you got at the seminar?

A. Yes, it is.

Q. Could you explain to the judge what this means to you?

A. Well, in a graphical way, Pete Avelar was showing a graph showing if you invested since inception in the high-yield securities fund in 1979, your \$10,000 initial investment grew to \$47,703. That's obviously based on the paying out and the reinvestment of the dividends.

Q. Did you consider that a pretty good result?

A. Yes, very good. I might add, besides dividends, the fund also paid capital gains. In the year 1996, it essentially paid four extra dividends. It always paid an extra dividend, a fairly sizable

11  
12  
13  
14  
15

1 dividend in the month of December. So if you look at  
2 those numbers, and you see a larger number in  
3 December, it's because two dividends were paid, the  
4 regular one, plus one more. Then also during the year  
5 it paid two short-term capital gains, and one  
6 long-term.

7 Q. Would you turn to Page 1009. Was this part  
8 of the book that was given to you?

9 A. Yes, it was.

10 Q. Was this discussed by Mr. Avelar at the  
11 seminar?

12 A. Yes.

13 Q. What did you understand all of this meant?

14 A. Well, the composition of the high-yield bond  
15 fund obviously is so-called junk bonds, and bonds of  
16 different ratings, and it identifies 20 percent to be  
17 BB or higher. And the article out of Business Week  
18 magazine, September 30th of '96, identifies the  
19 average fund as being one with BB plus rating or B  
20 plus rating or higher, and this had 20 percent BB,  
21 plus it had 80 percent of primary B issues.

22 One thing it doesn't show here is the fact  
23 that the average high-yield bond fund normally has  
24 about 50 securities, but by definition it's a  
25 diversified investment, and the average number of

1 securities in a high-yield bond fund is around 50.  
2 This fund had 150 to 100 as reflected in its  
3 prospectus.

4 Q. The box at the bottom half of Page 1009, what  
5 does that mean, sir?

6 A. The high-yield bond fund, six-year  
7 performance average, 22.43 percent, where it says  
8 rank, 1 out of 61, Lipper rated the fund number 1 out  
9 of 61 similar high yield funds.

10 Q. At this seminar where this high-yield fund  
11 was discussed, did anybody suggest that it was a  
12 speculative investment?

13 A. No, sir.

14 Q. Would you turn back to the Business Week  
15 article, and I want to direct your attention to Page  
16 1002, which is the second page in the article.

17 I'm going to ask you to look at the paragraph  
18 that starts -- it's the third paragraph from the  
19 bottom, as with any mutual fund. Do you see that  
20 language?

21 A. Yes, yes, sir.

22 Q. Would you read that, please?

23 A. As with any mutual fund, a high-yield fund  
24 should show a reliable return over at least five  
25 years. Look for those that consistently have been in

1 the top half of their category according to rating  
2 agencies such as Morningstar or Value Line. Since a  
3 certain amount of credit selection artistry is  
4 involved, it is a good idea to pick a manager with a  
5 solid track record and high yields.

6 Q. Did you think that the Morgan Stanley Dean  
7 Witter high-yield fund met that criteria?

8 A. Absolutely, yes, sir.

9 Q. Would you read the next paragraph?

10 A. Once you have narrowed the field by return,  
11 you need to assess what the fund owns. The more  
12 diversified, the better to control risk. Look for a  
13 fund with an average rating of at least BB to B.  
14 Esser suggests anything lower is too speculative. An  
15 average credit rating of B plus is considered  
16 conservative for a high-yield fund. The portfolio  
17 should hold a minimum of 50 issues with an average  
18 position of around 2 percent. To find numerous good  
19 issues, a manager needs a strong research staff;  
20 therefore, stick with a fund family that has good  
21 reputation and fixed income and sufficient resources  
22 to assure quality research.

23 Q. Let's go back to Page 1009. Is BB higher  
24 than B?

25 A. Yes.



1  
2  
3  
4  
5 one, the economy was doing well, and because of the  
Michael Milken affair that took place in the late  
'80s, the SEC imposed on the rating agencies, Moody's  
and Standard & Poor's, to tighten up on their ratings,  
and that brought down the defaults.

6 Q. There's been a suggestion in these  
7 proceedings that the Morgan Stanley high-yield bond  
8 fund was speculative. Do you agree with that?

9 A. No, I do not.

10 Q. Would you explain to Judge Dion, please, why  
11 you felt that it was, the high-yield fund was not  
12 speculative?

13 A. Well, as we pointed out, sir, it's a mutual  
14 fund; therefore, it's a diversified investment, by  
15 definition. And in this case, it overly diversified  
16 into many more securities than the Business Week  
17 article recommends. It's always closer to 200  
18 different securities. So if there's a default of 1 to  
19 2 percent, that's not going to have any effect on the  
20 paying out of a dividend. It's just too small of an  
21 impact.

22 Q. So even though there might be defaults within  
23 the fund, the fund would still be able to pay out what  
24 it was agreeing to pay out?

25 A. Changes in the interest rates over the period

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

of time that I was a broker, the value went up and down, but it consistently, all through that time period, paid five and a half cents per share per month to every holder of that fund.

Q. Did you believe that you had a reasonable basis for recommending to customers of yours, including the ladies who testified here, investing in the Morgan Stanley high-yield fund?

A. Yes, sir.

Q. Is one of the features of a mutual fund that it buys many different securities of a similar type? Is that one of the features?

MR. BINGHAM: Leading.

MR. LEWIS: Yes, it is leading.

ALJ DION: Go ahead and rephrase it, Mr. Lewis.

Q. (BY MR. LEWIS) What is one of the advantages of investing in a mutual fund? What are the advantages in investing in a mutual fund -- let me finish the question -- as opposed to buying individual stocks that the mutual fund might have missed?

A. The primary advantage, you're getting professional management.

Q. What are some of the other advantages?

A. You're getting a diversified investment.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

It's not -- the diversification brings about a lower risk, so in spite of market fluctuations and other changes in the Federal Reserve interest rates, there's going to be less impact on a given mutual fund because it is a diversified investment, and it diversifies into different securities, different stocks, different industries, different companies.

Q. Did you take that into consideration, those factors, when you recommended other mutual funds to your customers?

A. Yes.

Q. Did you believe that any of the mutual funds that you recommended to any of the customers who testified here were speculative issues?

A. No, sir.

Q. The next lady who testified was Viola Brotherson.

When you became the registered representative for Viola Brotherson, did she already have an account with Dean Witter?

A. Yes.

Q. Under those circumstances, under Dean Witter's procedure, was it necessary for you to complete a new new account form?

A. No, not unless she wanted to change

1 something.

2 Q. Did you have a meeting with Viola Brotherson?

3 A. Yes, I did.

4 Q. Did you have her existing new account form?

5 A. Yes.

6 Q. Would you turn to Tab 3 in our book, Exhibit  
7 1104.

8 A. Okay.

9 Q. Can you explain to the judge, please, what  
10 that document is.

11 A. This is a form that needs to be filled out  
12 whenever we're transferring internally an account with  
13 a client from one location to another. We're  
14 identifying what the account number is as it currently  
15 exists and what the new account number will be. The  
16 account itself is not being changed, only the number.

17 So in this case, the number 361 represents  
18 the Phoenix office of Dean Witter, and we're  
19 transferring it over to 205, which is the Sun City  
20 office. And we're identifying the new account  
21 executive, which is the terminology we used before we  
22 went to FA, or financial advisor. And it was signed  
23 by the client, and she gave her current address.

24 Q. Did you, after Viola Brotherson signed this  
25 form, did you have a meeting?

1  
2  
3  
4  
5

A. Yes, I did.

Q. Did you have with you, when you had the meeting with her, her new account form from Dean Witter?

A. Yes.

6 MR. LEWIS: I want to ask Mr. Merrill  
7 questions about this. He doesn't have in front of him  
8 the documents, and I'm just remembering now that they  
9 used folders; they didn't have a book for the witness.  
10 They used folders. This would be Tab 19. Do we have  
11 a set of your documents for the witness?

12 MR. BINGHAM: What we were doing was using  
13 the originals from the folders, from my recollection.

14 MR. LEWIS: Do you have Folder 19 for Tab 19?

15 Q. (BY MR. LEWIS) Do you have in front of you  
16 the new account form that has the ACC number 01529 on  
17 it?

18 A. Yes, sir.

19 Q. Did you have that form when you first met  
20 with Viola Brotherson?

21 A. Yes.

22 Q. Sir, would you turn the page to 1105.

23 MR. BINGHAM: I'm sorry, can the last  
24 question and answer be repeated? I'm trying to catch  
25 up here.

1  
2 MR. LEWIS: I asked if he had that Form  
3 ACC 01529 when he first met with Mrs. Brotherson.

4 Q. (BY MR. LEWIS) Now, in our book,  
5 Mr. Merrill, I'm going to have to switch back and  
6 forth here because all the documents we need to talk  
7 about are not in one place.

8 A. Okay.

9 Q. Would you look in our book, Tab 3, Exhibit  
10 1105.

11 A. I have it.

12 Q. Is that in your handwriting?

13 A. Yes.

14 Q. Is there a date on it?

15 A. 5-18-96.

16 Q. And did you and I look at a 1996 calendar and  
17 determine what day of the week that was?

18 A. It was a Saturday.

19 Q. Did you meet with customers, or new potential  
20 customers on weekends?

21 A. Yes.

22 Q. Are these notes that we found at the Dean  
23 Witter office in Sun City shortly after these  
24 proceedings started?

25 A. Yes.

Q. And these were essentially all of the notes

1  
2  
3  
4 that we found on the Brotherson account; is that  
5 correct? What's in here in the book?

6 A. That's right.

7 Q. Going back to the exhibit from the Division,  
8 the new account form, did you discuss with her what  
9 was in this new account form?

10 A. In terms of the financial objectives, yes.

11 Q. All of the information that was in it?

12 A. Yes. What investments that she had approved  
13 back in 1990.

14 Q. And she had put down here her investment  
15 objective as being aggressive income. Did you discuss  
16 with her what that meant?

17 A. Yes.

18 Q. Did she indicate that she wanted to change  
19 it?

20 A. No.

21 Q. Did she indicate to you what she was looking  
22 for in connection with the handling of her account?

23 A. She was basically looking for, for income.

24 Q. Did you determine in that meeting with her,  
25 May 18th, 1996, what she had at that time in her  
portfolio?

A. Yes. After talking over financial.

Q. Would you look at Exhibit 1105.

20030121 09:23:44

A. Right.

Q. Are those notes that you made at that time?

A. Yes.

Q. Does that show the results of your conversation? Did you make those notes while you were talking to her?

A. Yeah, I made those notes and discussed with her the fact that she owned in her portfolio a number of stock equity funds that were, some of which were paying dividends, but they were nevertheless stock equity funds, and weren't necessarily considered -- they're certainly not aggressive income, and --

Q. Are stock equity funds considered income funds?

A. If your stock is in a portfolio of, say, utility companies, you might consider that to be an income fund, but this was not a utility portfolio.

Q. Did she have any stock equity funds that were producing a meaningful amount of income for her?

A. Not as much as she wanted, no.

Q. Did you discuss with her what changes might be made in her investment to achieve a greater degree of income?

A. Yes.

Q. What discussion did you have with her?

1 A. Well, she had an Eaton Vance national  
2 municipal fund. And here again, we have an elderly  
3 client who is in a tax-free investment that's not  
4 really paying her all that much. And there's an  
5 equation I could put up on the board there showing how  
6 you come up with a taxable yield that is -- and how  
7 that relates to a non-taxable yield.

8 And I thought that it would be more  
9 appropriate for her and give her more income if she  
10 were in a taxable investment such as a high-yield bond  
11 fund. And I thought that would be more consistent  
12 with her financial objective of income.

13 And in fact, one of these funds, I think it's  
14 the Pioneer capital fund, it's a small cap fund,  
15 therefore it is very volatile. So these stock equity  
16 funds were not necessarily, in my view, consistent  
17 with her financial objective.

18 Q. At that first meeting did you make any  
19 specific recommendations to her as to what should be  
20 done at that time?

21 A. Well, I knew that there might be some  
22 surrender charge, not knowing exactly when she got  
23 into these funds, so I told her let me go back and do  
24 some research, find out what the contingent deferred  
25 sales charge would be, and then I'd get back with her

1  
2  
3  
4  
5

and we'd talk some more.

Q. This was on Saturday, May 18th?

A. Yes.

Q. When was the next time you talked with her?

A. I got back with her, I think on Tuesday.

6 Q. Which would have been the 21st?

7 A. I believe it was the 21st.

8 Q. And what, did you discuss any specific trades  
9 with her at that time?

10 A. I talked to her about initially selling the  
11 Eaton Vance national municipal fund. And she had held  
12 that for quite a long time, so there wasn't going to  
13 be any surrender.

14 Q. On the Eaton Vance you have CED marked on  
15 this Page 1006.

16 A. I talked to her about it, but I circled it  
17 that there wasn't going to be any surrender charge.

18 Q. Are you sure of that, Mr. Merrill?

19 A. Wait a minute.

20 Q. She testified there was a surrender charge.  
21 Did you discuss that with her?

22 A. I discussed the surrender charges associated  
23 with the AIM funds, there are two of those, and the  
24 Pioneer. And we decided, because those charges were  
25 high, she hadn't been in them that long, that we would

1 defer doing anything with them for approximately a  
2 year.

3 Q. Now, did you talk to her about the fact that  
4 there would be a surrender charge on the Eaton Vance?

5 A. Yeah, I think I circled that there would be a  
6 CDSC, but I think it was small because she had held  
7 onto it for a longer period of time.

8 Q. Did you discuss with her the fact that there  
9 would be a surrender charge?

10 A. Yes.

11 Q. Did you discuss with her what you were going  
12 to do with the fund when it was sold?

13 A. I would reinvest the money into the  
14 high-yield fund, which would pay her a greater income  
15 per month.

16 Q. Is that what was done?

17 A. Yes.

18 Q. Was there a purchase made of the Dean Witter  
19 high-yield fund on May 21st?

20 A. Yes.

21 MR. LEWIS: Do we have the monthly  
22 statements? I don't know that we do.

23 MR. BINGHAM: Just the confirmation?

24 THE WITNESS: Yes. This was the initial buy  
25 for Viola Brotherson on the 21st of May, 1996,

1 \$12,000.

2 Q. (BY MR. LEWIS) Where did those funds come  
3 from?

4 A. From the sale of the Eaton Vance national  
5 municipal.

6 Q. Would you turn the page to ACC 4308.

7 A. Right.

8 Q. Is that where the funds came from?

9 A. Yes, sir.

10 Q. She testified that you did not talk to her  
11 about the fact that there would be a CDSC as listed on  
12 here. Do your notes show that that you did talk to  
13 her?

14 A. I show a note there was a CDSC, and it would  
15 be made up within a relatively short time with the  
16 income she was going to continue to get from the  
17 high-yield bond fund.

18 Plus there was a benefit to her in the fact  
19 that some of that money, because I only invested  
20 12,000 and there's 13,471, she had a small margin  
21 loan, and I have a note down here that we paid that  
22 off.

23 Q. You want to turn the page, then, of the  
24 ACC 4309. On May 22nd there was more of the high  
25 income. Where did those funds come from?

50426031

A. That probably came from the money market.

Q. Turn the page again. Did you discuss that purchase with her on May 22nd, before it was made?

A. Yes, I did.

Q. And on -- turn the page -- on November 20th, 1996, there was additional investment in Dean Witter high income. Turn the page. Confirms?

A. You're looking at a confirm.

Q. Tab 23, folder that has the confirms in it.

A. Right. Okay. 11-20-96.

Q. Yes.

A. Yes, there was purchased \$5700 of the high-income fund.

Q. Had she been getting income from the purchases that were made in May?

A. Yes.

Q. Did you have further discussion with her about what she wanted to do?

A. Yes. She definitely appreciated the additional income and wanted the opportunity to buy more of it if I thought that was the appropriate thing for her.

Q. And was that the recommendation that you made?

A. Yes.

1  
2  
3  
4  
5

Q. And you talked with her about it beforehand?

A. Yes, I did.

Q. Were you able to find the notes from November of 1996 on Ms. Brotherson?

6 A. They were not available back in that time  
7 period. Either they weren't available in Sun City, or  
8 they had been destroyed in New York.

8 Q. In our book, would you turn to Page 1110?

9 A. I have it.

10 Q. The date is a little faint. Can you read it  
11 at the top?

12 A. I believe it's 13th of April, '99.

13 Q. Is there anything on that page that has  
14 anything with Viola Brotherson?

15 A. Well, there's an indication that at 8:50 in  
16 the morning I had a phone call message from her.

17 Q. Is this the kind of records you kept?

18 A. Yes. If a message came in, I would jot down  
19 who it was from and approximately maybe when they  
20 called, and put a check mark indicating that I need to  
21 follow up and get back with them.

22 Q. We didn't find any other records of your  
23 notes concerning Viola Brotherson; is that correct?

24 A. No, sir.

25 Q. Would you go back to the folder that's marked

1  
2  
3  
4  
5

19. I know I'm giving you a problem because I've got a whole bunch of things floating around in front of you there.

A. I have it.

6 Q. We've already discussed the first page. The second page, which is ACC 01530, what is that, sir?

7 A. The trust certification form.

8 Q. What is it? Would you explain it to the  
9 judge.

10 A. This is a form that needs to be filled out in  
11 order to convert an account into a trust account. The  
12 client has to identify who the trustee is, the client  
13 has to identify who the successor trustees are, and  
14 the client has to agree as to what types of  
15 investments would be appropriate in this new trust  
16 account. And then they basically have to sign this.

17 And what this did was this replaced the  
18 practice, if you will, from Dean Witter of having to  
19 take the trust and then copy the document and put it  
20 in a file someplace. In other words, this was the  
21 essential information you derived from that trust  
22 document, and that's all we needed to know. We didn't  
23 need to file a copy, a big, thick trust.

24 Q. When you met with Viola Brotherson on May  
25 18th, 1996, did you discuss this document with her?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. Yes. It was in her folder. When the account transfers, the account folder transfers with any background information, including this.

Q. She had not indicated any interest in option trading; is that correct?

A. That's right.

Q. And was there ever any option trading in her account?

A. I never did any option, period.

Q. And there had been check marks on there, transactions, investments permitted, including C corporate bonds; is that correct?

A. That's right. This was completed by the financial advisor for Dean Witter in Council Bluffs, Iowa, when she initially took out her account.

Q. In her testimony she indicated, Page 520 of the record, that she was asking for a change in connection with her portfolio. Do you remember that, sir?

A. Yes, sir.

Q. What was the change that she was asking for?

A. She was seeking more income. And I do recall that in her new account statement, it did not tell me what her total assets were, and I asked her, and she did not want to divulge that information to me, nor

1 did she divulge them to the original broker in Iowa.  
2 And she just, I guess considered that to be personal  
3 information.

4 And I did ask her on another occasion, she  
5 still didn't want to divulge that information. But  
6 she did talk to me about doing what I could to provide  
7 her more income.

8 Q. Do you have in front of you Tab 24, the  
9 folder for Tab 24?

10 A. Now I have it.

11 Q. I want you to look at the December, 1997  
12 monthly statement, which was ACC 02465.

13 A. I have it.

14 Q. Does that show the existence in the account  
15 of the Dean Witter high yield?

16 A. Yes, it does.

17 Q. Does it show the market value at that point?

18 A. \$18,892.

19 Q. Does it show the estimated yearly income for  
20 that?

21 A. \$1,834.

22 Q. What is the -- that's a percentage return  
23 indicated of what?

24 A. 9.71 percent.

25 Q. Now, I'm going to ask you to look at tab, the

1 same tab. I want you to go down to December of the  
2 next year, ACC 02525. Actually, it's the second page  
3 of the December statement.

4 A. I have it.

5 Q. Is that the December, 1998, statement?

6 A. Yes.

7 Q. On Page ACC 02525, does it show the existence  
8 of the high-yield fund?

9 A. Yes.

10 Q. How much is in the account at that point?

11 A. \$54,797.

12 Q. What is the estimate yearly income?

13 A. 11.22 percent.

14 Q. No, the income, the number of dollars.

15 A. \$6,146.

16 Q. What is that indicated as the yield  
17 percentage weight?

18 A. 11.22 percent.

19 Q. The percentage of return went up during the  
20 year?

21 A. Yep. Yes, sir.

22 Q. So, take my calculator out here. If she's  
23 going to get \$6146 a year, divide that by 12, that's  
24 \$512.16 a month; is that correct?

25 A. Yes.

1  
2  
3  
4  
5

Q. Did she have the money put in the account, or did she get a check for it?

A. She was getting a check directly from the fund.

Q. Did you have discussions with her through the 6 year about the fact that she was getting that return 7 on her capital, about how much cash she was getting 8 each month?

A. Yes. Clients were frequently asking me what 9 their income was on either a per-month basis or 10 per-year. And in the case of Beatrice, or Viola 11 Brotherson, I would calculate what her income was per 12 month and give her that information, because not only 13 did she have the high-yield fund, there was a 14 preferred stock, you see above it there, Development 15 Division Realty, that was a good preferred stock 16 paying 9.44 percent. That also paid her income. 17

18 So anything that paid her income, I would 19 total up and tell her what it was.

Q. I note on this December statement that she 20 wrote a check to the Baptist Foundation for \$5,000? 21

A. Yes. 22

Q. Did you know what that was for? Did she tell 23 you? 24

A. She did not tell me. But Ms. Brotherson, at 25

1 one point in time during the time that I had her as a  
2 client, she married another client of mine the name of  
3 Stuart McNickel, and I visited both of them in  
4 Stuart's home in Goodyear, and at that time I became  
5 aware that they had met because they're both members  
6 of the Baptist church.

7           And at that time I already knew that Stuart  
8 was -- had other investments, he was a very nice  
9 client of mine, but he had most of his investments  
10 were with the Baptist Foundation. And Ms. Brotherson  
11 is, seeing that she contributed as well to the Baptist  
12 Foundation, I assume she has her own separate account  
13 with them for investment purposes.

14           Q. Did there come a time when you suggested to  
15 Ms. Brotherson that she change from the Dean Witter  
16 high-yield fund to some other fund?

17           A. Yes.

18           Q. I see on this chart that it says that the --  
19 there was a sale on August 23rd, 2000?

20           A. Yes.

21           Q. Do you have Tab 25 there? I don't think you  
22 do.

23           A. Oh, okay.

24           Q. Can you find the monthly statement for August  
25 of the year 2000?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. This just goes through '99.

MR. BINGHAM: That would be Tab 26.

THE WITNESS: August 2000.

Q. (BY MR. LEWIS) I think it starts with  
ACC 02624.

A. I have it.

Q. Would you look at Page 2625. Does that show  
the -- does the sale of the high-yield fund show on  
here?

A. Yes. Not so much the sale, it's a transfer  
from one fund to another.

Q. Okay. Now, would you explain to the judge,  
please, was that transferred from one Dean Witter  
mutual fund to another Dean Witter mutual fund?

A. Right. There's no cost or charge to transfer  
funds within the Dean Witter family. And what I did  
here, in view of the fact that this was the year 2000,  
this was the first year of our infamous bear market,  
and the high-yield fund was continuing to pay out its  
normal dividend up until the fall of that year, and  
then it announced that it was going to cut its  
dividend, and people felt that at that time, that  
maybe we needed to do something with investments in  
the high-yield fund. Again, it depended on an  
individual client and what they felt that they wanted

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

to do.

And I talked to Ms. Brotherson about it. I told her her monthly income was going to be cut, and that maybe we should think about -- and it had already fallen down in value, the net asset value of the fund had already gone down, and a few months went by, and I thought that some action needed to be taken, so I suggested to her going into another mutual fund that had the opportunity of not only paying her some income, but also the opportunity for appreciation, capital appreciation, to get -- to hopefully pull back to where she was before.

The fixed income high-yield fund was strictly income. It didn't really appreciate in value, and it was going down because the market was going down. And so the income -- the fund that I put her in was the income, Information fund, which is a diversified fund that had done extremely well, and yes, it had gone down, but again, from all indications of our people in New York, it was going to turn around.

And so I wanted to put her in it, and I had the paperwork drawn up to do a systematic withdrawal, that simply on a month-by-month basis, selling off some shares, and converting the shares into income by way of a check to the client. And with the

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

expectation that the increase in price of that fund per share would more than make up for the fact that you are selling off some shares.

And that's known as a systematic withdrawal, and it's a very common thing to do that, and a lot of clients did it through the years '96, '7 and '8. Unfortunately, it didn't work out. We never implemented the systematic withdrawal because I wanted to see whether or not, within a couple of months, the fund would, in fact, come back. Well, it started to go down, so I didn't want money going out of it, and at the same time shares being sold off. So what we did after we bought the Information fund, which is a diversified fund --

Q. You said bought. Exchange?

A. Exchanged. Then we exchanged it again into a Health Science okay, and that did reasonably well.

Q. At the time you recommended to her the exchange from the high-yield fund to the Info fund, did you believe you had a reasonable basis for doing it?

A. Yes, I did.

Q. And would you just explain the basis that you had to the judge?

A. The Information fund, I had researched it, it

1 had a tremendously good track record, and I felt that  
2 some action was necessary in order to preclude the  
3 further eroding of the client's account value if she  
4 had stayed in the high-yield bond fund.

5 And that was borne out. At that time, the  
6 fund, which was trading around \$6, and then it had  
7 gone down to maybe \$5 or so, today that fund value is  
8 down around \$1.80 or so. So it went down.

9 Q. At the time you recommended the exchange from  
10 the Info fund into the Health Science fund, did you  
11 believe you had a reasonable basis for doing it?

12 A. Yes.

13 Q. And I don't know that you've explained that.  
14 What did you know about the Health Science fund?

15 A. It was a fund investing in major  
16 pharmaceutical companies, Pfizer, Merck, Johnson &  
17 Johnson. And everyone knows that health care is  
18 something we can't live without. And it was  
19 professionally managed; had a very good track record  
20 in our Dean Witter family. Although it was  
21 essentially a sector fund, just dealing with health  
22 care, but it dealt not only with very large companies,  
23 as I mentioned, but with some of the smaller biotech  
24 companies, Amgen, and biochem had done reasonably well  
25 over the years.

1 Q. That fund was described here as a narrow  
2 sector fund. Did you consider that a narrow sector  
3 fund?

4 A. The health care?

5 Q. Yes.

6 A. It's a sector fund, health care, but I  
7 wouldn't necessarily call it narrow.

8 Q. You mentioned Pfizer. Is that one?

9 A. Pfizer.

10 Q. Johnson & Johnson?

11 A. Right.

12 Q. Merck?

13 A. Right.

14 Q. Are those small companies?

15 A. No. They're the biggest companies in the  
16 health care field. It's not a small fund or cap fund  
17 by any means.

18 Q. You talked with Ms. Brotherson about these  
19 exchanges before they took place?

20 A. Yes, I did. I might add that any time I  
21 talked to her previously, sir, about the high-yield  
22 bond fund, I always had either a direct conversation  
23 with her son Gaylen, or she talked about something  
24 that I had proposed with Gaylen and then got back with  
25 me. If I had talked directly to Gaylen, and he

1 understood what I was suggesting, then he would  
2 basically give his approval to his mother, and then  
3 I'd call her mother back or she would call me and give  
4 her approval. She was the only name on that account.

5 Q. Now, her son who testified here was not  
6 Gaylon, it was Clarke?

7 A. No, it was Clarke.

8 Q. You didn't have these conversations with  
9 Clarke, you had them with Gaylen?

10 A. I had them primarily with Gaylen, although I  
11 can't say with 100 percent certainty that I didn't  
12 have some conversation at some time with Clarke.

13 Q. Did you explain to Gaylen what was happening  
14 in his mother's account and what you were  
15 recommending?

16 A. Each time, yes.

17 Q. Did he ever say don't do that, to you?

18 A. No.

19 Q. After you talked with him, you talked with  
20 Mrs. Brotherson and she approved of the exchanges each  
21 time?

22 A. Yes, sir.

23 MR. LEWIS: Your Honor, I'm going to go on  
24 to the next customer. If you want to take a break,  
25 this would be a good point to take a break, but I can

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

go on with the next customer, if you want to find out the result of those telephone calls.

ALJ DION: No, I think it's a good point, Mr. Lewis. Why don't we go ahead and do that. We'll take a 15-minute break and we'll be back here at 10 to.

(A recess ensued.)

ALJ DION: We're back on the record in the Merrill matter.

We were having a conversation off the record, and I -- it was off the record but I think it was on the speakers, so I'll kind of go through it.

The Securities Division was able to get in contact with the parties involved, and they don't have an objection to disclosing the information that was written about in the October 31st letter from Mr. Bingham to Mr. Lewis.

So they don't have an objection; is that correct, Mr. Bingham?

MR. BINGHAM: That is correct, Your Honor. Just to make the record clear, not that you are, but I mean for a number of reasons I won't go into, we spoke with the attorney involved and we spoke with, of course, Beatrice DuChene. Both of them gave us authorization to release a copy of those documents to

1 Mr. Merrill and his counsel.

2 ALJ DION: So neither are asserting an  
3 attorney-client privilege or any other privilege at  
4 this point?

5 MR. BINGHAM: That's correct, they're both  
6 waiving it.

7 ALJ DION: And the Division is not asserting  
8 a privilege either?

9 MR. BINGHAM: Your Honor, yes.

10 ALJ DION: Subject to rehashing everything  
11 that we did in October, I'm just asking, there wasn't  
12 a confidentiality agreement between the parties for  
13 them to release things?

14 MR. BINGHAM: No, there wasn't.

15 ALJ DION: Because this is a quasi pseudo --  
16 it's certainly not a criminal proceeding, but there  
17 are enforcement powers that are similar to it, so  
18 sometimes when the government asks for documents,  
19 sometimes they ask for them, sometimes they take them.  
20 And so that's what I was concerned about, is if the  
21 government was involved in a situation where those  
22 documents were obtained in a taking manner, then  
23 perhaps the attorney-client privilege wasn't waived  
24 because they weren't able to be effectively asserted  
25 because they were taken, but they couldn't bring that

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

issue up at this time. I didn't think that was the case, but I wanted to be absolutely sure.

So subsequent to that -- excuse me. So based on our discussion from prior in which I said those documents should be turned over, there's no indication that the client or the -- I don't know why this is arcking. Everybody hears that, don't they?

In any event, what I was saying, the client, Ms. DuChene, nor her attorney are asserting the privilege, so Mr. Bingham will turn over those documents to Mr. Lewis before or at 9:00 a.m. when they've agreed to, outside of hearing.

Is that correct, Mr. Bingham?

MR. BINGHAM: That's correct, subject to our standing objections, as you noted.

ALJ DION: Mr. Lewis.

MR. LEWIS: That's fine.

ALJ DION: Then like I said, I kind of turned on, we were talking and I turned on the speakers, but that's basically the sum and substance of our conversation; is that right, Mr. Bingham?

MR. BINGHAM: Yes.

ALJ DION: And Mr. Lewis.

MR. LEWIS: Yes.

ALJ DION: In any event, we're back on the

1 record, and we were proceeding, I believe Mr. Lewis  
2 was going to begin the questioning of Mr. Merrill  
3 about the third client or at least --

4 MR. LEWIS: Sylvia Hays.

5 Q. (BY MR. LEWIS) Mr. Merrill, when did Sylvia  
6 Hays become a customer of yours, do you know when? Do  
7 you remember when?

8 A. I'd probably have to look at some documents.  
9 I believe it was --

10 Q. I think these came out of the new ones. I  
11 didn't make copies of them. Let me show you this  
12 document and ask you a question. We'll have to get  
13 some copies made.

14 Is the Sylvia Hays new account form in your  
15 book?

16 MR. BINGHAM: No.

17 MR. LEWIS: I think this came out of the  
18 material you gave us.

19 MR. BINGHAM: No, we don't have this, not as  
20 an exhibit.

21 (An off-the-record discussion ensued.)

22 Q. (BY MR. LEWIS) Mr. Merrill, I'm handing you  
23 documents that have an ACC stamp on them 4436, 4437,  
24 and 4438. Did you find those among the documents that  
25 we received from Mr. Bingham in late October?

1 A. Yes, sir.

2 MR. LEWIS: I apologize, I didn't have copies  
3 made. I can go on questioning Mr. Merrill without  
4 Mr. Lowe, unless he needs to be in the room. Thank  
5 you.

6 Q. (BY MR. LEWIS) Would you look at exhibit  
7 Tab 5 of ours, 1122?

8 A. I have it.

9 Q. Is that a page of documents that you found  
10 when we went to the Dean Witter office in Sun City?

11 A. Yes, it is.

12 Q. Is there anything on that page that deals  
13 with Sylvia Hays?

14 A. Yes.

15 Q. What is the date? Is there a date on that  
16 document?

17 A. 5 January '99.

18 Q. Is there anything referencing a call that you  
19 made to Sylvia Hays?

20 A. I made a call to her regarding a stock,  
21 Storage Tech stock EMC. She had it in her portfolio,  
22 and it reached a new high of 95.

23 Q. What were you suggesting to her at that  
24 point?

25 A. We should perhaps put in a stock loss, which

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

is putting in an order if it falls below a certain price, then it automatically triggers the stock to be sold.

Q. Would you look at the next page, 1123. Is there anything concerning Sylvia Hays on that page?

A. Again, we talked on the telephone.

Q. What's the date of that?

A. 9th of -- 9 March of '99, a couple months later.

Q. What is there on this page that leads you to the conclusion that you talked to her on that date?

A. Well, I have her phone number there, and I checked it off twice, indicating that I've completed the action of talking to her.

Q. Would you turn to Page 1124.

A. This is dated 5th of April of '99.

Q. Is there anything concerning Sylvia Hays on that page?

A. Yes. We again talked about selling shares of EMC. And we sold 15 shares at 132 and 13/16ths, and my commission was \$49, discounted 19 percent, and net to the client of \$1,940.

Q. Does the next page, 1125, have anything to do with Sylvia Hays?

A. No.

1 Q. Did we find any other of your notes  
2 concerning Sylvia Hays when we made that visit to the  
3 Witter office in Sun City?

4 A. No, we did not.

5 Q. Mr. Merrill, I'm going to put in front of you  
6 now the documents that bear ACC numbers 4436, 4437,  
7 and 4438. Can you tell the judge what those documents  
8 are?

9 A. There is a new account form filled out by my  
10 predecessor at the Dean Witter office for Sylvia Hays.  
11 His name is Ron Heab, and he left the company and I --  
12 the account was transferred to me. And I received  
13 this document that showed the financial objectives of  
14 Ms. Hays, showed her retired status, and also showed  
15 her assets, income, net worth, liquid assets, and her  
16 tax bracket of 15 percent.

17 Q. Did you meet with her and talk with her about  
18 these things?

19 A. I talked to her, to be honest with you, I  
20 talked to her, I think once in her home, and then a  
21 couple of times on the telephone. I don't recall what  
22 order that was.

23 It also has attached the trust certification  
24 document showing factors related to the fact that it  
25 was a trust, and she had checked off investments in

all categories.

ALJ DION: Where is that, Mr. Merrill?

THE WITNESS: 4437.

ALJ DION: Investments permitted, then all of the above?

6 THE WITNESS: Yes.

7 ALJ DION: Thank you.

8 THE WITNESS: You're welcome.

9 Q. (BY MR. LEWIS) What is the last document in  
10 that?

11 A. That's a W-9, the standard form. This is a  
12 form that is filled out by the client, signed by the  
13 client, and it has to be completed in order for there  
14 to be a record that an account has been established  
15 with Dean Witter for the purposes of the IRS.

16 MR. LEWIS: Can we have folder No. 7 for  
17 Tab 47.

18 ALJ DION: Before we move on, Mr. Lewis, are  
19 we going to mark this?

20 MR. LEWIS: Please.

21 ALJ DION: We'll mark this regarding Sylvia  
22 Hays as R-14.

23 Mr. Bingham, any objection? I know this  
24 wasn't filled out by Mr. Merrill so there's some  
25 foundational issues that might arise, but do you have

1 any objection for the purpose of simply stating that  
2 she had a trust account and any type of vehicles to be  
3 used for that?

4 MR. BINGHAM: No, as far as foundational  
5 basis, no, I don't have any objection. This is the  
6 first I've seen it, but I'll live with that. And I  
7 won't object at this point, even though, when I was in  
8 a similar situation previously there were objections,  
9 but I won't object to this.

10 ALJ DION: All right. Then R-14 will be  
11 admitted. What tab were we looking at, Mr. Lewis?

12 MR. LEWIS: 47, in the second blue book.

13 ALJ DION: Was I looking at a particular  
14 month?

15 MR. LEWIS: I'll get it in a second.

16 Q. (BY MR. LEWIS) Mr. Merrill, it's been  
17 suggested that when the dividend growth shares in  
18 Ms. Sylvia Hays' account were sold, that that was an  
19 unauthorized trade. Was it an unauthorized trade?

20 A. No. I had talked to her about it, as I did  
21 with many of my clients who were in dividend growth at  
22 the time.

23 As I mentioned before, dividend growth was at  
24 that time the largest fund in the Dean Witter family,  
25 but it's a value fund, and at that time value

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

investing was essentially going out of style.  
Everyone was moving from value oriented, dividend  
oriented investing over to growth.

Q. In her testimony, Page 1490 of the  
transcript, I asked her, starting at Line 3: Do you  
remember a discussion with Mr. Merrill when he called  
to your attention he thought there was a problem with  
the dividend growth with its value?

Answer: I don't recall, no.

Question: Does that mean it didn't happen,  
ma'am, when you say you don't recall?

Answer: No.

Question: You just don't remember whether --

Answer: I don't recall, no. It doesn't mean  
it didn't happen.

Then on the next page, 1491, question on  
Line 11: He may have and you don't remember; is that  
correct?

Yes.

Your testimony is you do remember talking to  
her; is that correct?

A. Yes.

Q. Would you look at Page ACC 4248. This is on  
the September 30th, 2000 monthly statement; is that  
correct?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. Yes, I have it.

Q. There's a legend under there under MSDW dividend growth.

A. The fund's quarterly dividend has been lowered from 14 cents to 16 cents a share. This reflects income earning in the current market environment and an ongoing trend toward some traditional holdings moving to.

Also a recent shift in emphasis towards companies with serious commitments to e-commerce has resulted in the elimination of several high-yielding companies from the funds's portfolio.

Q. She would not have received this statement until sometime in October; is that correct?

A. That's right.

Q. Did you have that information prior to the end of September?

A. Yes, I did.

Q. Do you remember approximately when in the month you received that information?

A. It came over the Dean Witter advantage system, I read it, and then the word got around the office; someone sees it, and pretty soon everyone knows about it in the office.

Q. Would you look up at the top of that same

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

page. You see there was an exchange redemption of MSDW dividend growth, is that September 6th?

A. Yes.

Q. Did you have that information before that date?

A. Yes.

Q. Did you call any of your customers who had dividend growth?

A. Quite a few of them, yes.

Q. Was Ms. Hays one you called?

A. Yes, I did.

Q. And did you explain to her what you perceived as the problem?

A. Yes. It was not only the reduction in the dividend, but the share price over a fairly long period of time, like eight months, had steadily gone down.

Q. Did you have a recommendation for her?

A. Recommending basically what it said here, is that the fund itself, dividend growth, which had historically invested in dividend paying industrial companies now even the portfolio was changing to incorporate more growth oriented companies, and they were reflected in the Information fund, which I recommended to her.

1 Q. That was an exchange from one Dean Witter  
2 fund to another?

3 A. Yes.

4 Q. Was there any charge, fee, or cost to her to  
5 do that?

6 A. None whatsoever.

7 Q. Does the statement that we're looking at,  
8 this Page 4248, reflect the fact that there was no  
9 charge?

10 A. There was none indicated on the statement nor  
11 on the confirmation.

12 Q. The amount of the redemption was \$10,115.13  
13 with a cash balance of 7.60 in the dividend growth; is  
14 that correct?

15 A. Yes.

16 Q. Was the exact same amount credited to the  
17 Information fund?

18 A. Yes.

19 Q. Ms. Hays indicated that she thought that she  
20 had paid a fee for this exchange. Did she ever ask  
21 you whether there had been a fee?

22 A. She never asked me, but I told her there was  
23 no fee.

24 Q. Because it was --

25 A. That was the standard procedure.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Q. When she got her monthly statement, she says that she called you and complained about this exchange. Do you remember any call from her?

A. Yes, I recall. She was getting upset about the performance of the Information fund, and I told her if she wanted to we can switch back, but at that particular time, I suggested to her remaining with the Information fund, because I felt that it would turn around, and the dividend growth fund was continuing to go down. It's my judgment that we were going to hopefully stay with a winner rather than revert back to a loser.

Q. Did she continue to hold the Morgan Stanley Dean Witter Information fund until you left Dean Witter in April of 2001?

A. Yes, I believe she held onto it.

Q. Did you have any control over her account or what she was doing after you left Dean Witter?

A. Did I have any control, no.

Q. Would you have been allowed to make recommendations to her when you were no longer at Dean Witter, when she was a customer of Dean Witter's?

A. No.

Q. I'm going to ask you about your customer Janet Mayfield. Did you find any of your notes

1 concerning Janet Mayfield at the Dean Witter office?

2 A. A limited number of them.

3 Q. Mr. Merrill, I put in front of you documents  
4 that bear Bates numbers ACC 04734 through 4739. Do  
5 you see those, sir?

6 A. Yes, sir.

7 Q. Are those documents you found amongst the  
8 materials that was produced to us by Mr. Bingham in  
9 October of 2002?

10 A. Yes.

11 Q. Do they deal with Janet Mayfield?

12 A. Yes, they do.

13 Q. What is the top document, the 4734?

14 A. This is a document that is initiated in order  
15 to transfer her existing account with Prudential to  
16 Dean Witter. Signed on the 10th of October, year  
17 2000.

18 Q. Is it signed by Janet Mayfield?

19 A. It is.

20 Q. Did you sign it or did you print your name?

21 A. I printed it down at the bottom. I also  
22 printed it receiving organizational contact, I printed  
23 there.

24 Q. This is a form that's used when a customer is  
25 transferring her account from one broker/dealer to

1 another broker/dealer; is that correct?

2 A. Yes.

3 Q. In this instance she was transferring an  
4 account from Prudential Securities to Morgan Stanley  
5 Dean Witter; is that correct?

6 A. That's correct.

7 Q. Is one of the things that you do when you  
8 prepare such a form is you try to attach a copy of the  
9 delivering broker/dealer's last monthly statement?

10 A. That's right.

11 Q. Is that what the document is, the next five  
12 pages?

13 A. Yes, it is.

14 Q. Who did you get that statement from?

15 A. From Janet Mayfield.

16 Q. Did you meet with her at her home?

17 A. Yes. She lives in the same community I live  
18 in.

19 Q. Did you discuss with her this investment  
20 pyramid?

21 A. Yes, I did.

22 Q. And after you had discussions with her, did  
23 she indicate to you she wanted to open an account?

24 A. Yes.

25 Q. And she filled out these transfer papers?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. Yes.

Q. Did you talk with her about what securities she had in the Prudential account?

A. Absolutely, yes.

Q. And did you talk with her about what she wanted to achieve by having an account with you?

A. Yes.

Q. Is there a new account form for her somewhere?

A. I don't know without looking, sir.

Q. Hold on. I was talking to myself. Let's see if I can find it.

Mr. Bingham, do you remember having a new account form for Janet Mayfield in here somewhere? I do not find one.

MR. BINGHAM: No, I don't. We did not have one in any of our exhibits.

MR. LEWIS: So we don't have one here today; is that it? As best I can tell, we don't; am I correct?

MR. BINGHAM: Yes.

MR. LEWIS: Thank you.

Q. (BY MR. LEWIS) What did you discuss with her about what she wanted to achieve with her investment?

A. Well, I know there was a new account form

1 because I had to have a new account form in order to  
2 get a new account number.

3 And what I talked to her about was what she  
4 had in her account, and what she felt she wanted to  
5 keep, and what investments she thought that weren't  
6 doing her any particular good, and perhaps wanting to  
7 sell them at some appropriate time.

8 I also talked to her about what her  
9 objectives were, which seemed to be an investment in  
10 combination of income and capital appreciation, a  
11 balanced portfolio, if you will.

12 Q. The account transfer form is dated October  
13 11, 2000.

14 A. That's right.

15 Q. Do you have any recollection as to how long  
16 it took for the account to actually be transferred?

17 A. I think we have documentation that shows that  
18 it was transferred over about the 25th of October.  
19 Approximately two weeks.

20 Q. Would you look at the Prudential statement  
21 and tell us your recollection as to what you discussed  
22 about the various -- I don't mean give us a discussion  
23 about every item, but the ones that you talked about  
24 with her that you remember.

25 Well, let me ask it this way. Were there

1 things in her account that you didn't think were  
2 appropriate for her after she told you what she wanted  
3 to do?

4 A. Yes. In fact, she told me there were things  
5 that she wanted to sell.

6 Q. Which items did she want to sell?

7 A. Well, the Prudential tax managed small cap  
8 fund, and the municipal, of course, she had things  
9 that didn't amount to very much in money, and we  
10 generally tried to get rid of those to basically,  
11 quote, cleanup the portfolio, unquote, and so she had  
12 no objection to that.

13 She has approximately 9,000, \$10,000 each in  
14 some secure medium term senior notes, in other words,  
15 corporate bonds, and that represented 47.8 percent of  
16 her portfolio. And I saw nothing wrong with holding  
17 onto that, and she agreed.

18 Q. What about the other thing?

19 A. Well, any client, I always want to know for  
20 an account that's not an IRA account, I want to know  
21 how much money she's comfortable with keeping in her  
22 money market, and she indicated about 40 percent. So  
23 I always had that in mind to keep the total value  
24 times 40 percent in her account money market.

25 Q. Would you turn to Tab 4 in our book, please.

1 ALJ DION: I'm going to interject. Do you  
2 want me to consider this one, Mr. Lewis?

3 MR. LEWIS: Yes, please.

4 ALJ DION: Why don't we mark that as R-15,  
5 and Mr. Bingham, besides getting it a minute ago, any  
6 other objections?

7 MR. BINGHAM: No.

8 ALJ DION: We'll admit R-15.

9 Q. (BY MR. LEWIS) Would you turn to Tab 4 in  
10 our book, please.

11 A. 1125.

12 Q. No, Tab 4, 1111.

13 A. 1111.

14 Q. The first item.

15 A. I have it.

16 Q. That document that's 1111, could you please  
17 explain to the judge what that document is, if you  
18 know?

19 A. It's a printout from my computer showing this  
20 account that was at Prudential transferring over to  
21 Dean Witter, given the number you see there at the top  
22 left 205013880. It shows line item, cash balance  
23 number one is \$11,484.

24 Now, in one more day you saw this account,  
25 one more day later, it would move to the -- Line 9,

1 which is the money market. Money comes into cash, and  
2 then it sits for 24 hours, and moves automatically  
3 into money market. So the total value of the account  
4 then represents \$40,695 as of the 25th of October,  
5 which is the date above, and it consists of long  
6 holdings of \$29,480, and money that will be money  
7 market of \$11,484.

8 Q. Does this page state what the securities are  
9 that are held in the account?

10 A. No. This page does not, but the next one  
11 does.

12 Q. We'll get there. I'm asking you about this  
13 page.

14 A. No.

15 Q. Does 1111 tell you what's held in the  
16 account?

17 A. No. And the reason for it is that when we  
18 print these things out, they print a half a page at a  
19 time, they don't print a whole page.

20 Q. Are these documents that we obtained when we  
21 went out to the Sun City office shortly before the  
22 hearing commenced?

23 A. Yes, I believe they are.

24 Q. Did we find all documents of this type that  
25 you had printed out?

1  
2  
3  
4  
5

A. No.

Q. Would you turn to the next page, 1112.

A. Okay.

Q. Is this printed out on the same day as the previous document?

6 A. Yes, 10-25.

7 Q. This gives some indication as the securities  
8 that are in the account?

9 A. Actually, I'll correct myself. It's printed  
10 out on the 26th, reflecting the value of the account  
11 the preceding day, the 25th.

12 Q. Is the handwriting on there your handwriting?

13 A. Yes, it is.

14 Q. Could you explain to the judge, please, how  
15 that handwriting got on there? What was happening  
16 that caused you to write those things down?

17 A. Well, I had discussions with the client, and  
18 as I mentioned before, in her Prudential statement,  
19 she has this Prudential tax management small cap fund,  
20 and we agreed to sell it. So it was sold on the --

21 Q. What is there on the form? I think you got  
22 letters instead of the name. What is it that  
23 indicates that?

24 A. Okay. If you look on the Prudential form, to  
25 the right of it there's a symbol for that investment,

1 and it's PQVBX. So what I wrote down was the symbol.  
2 And the trading symbol for that particular small cap  
3 fund is PQVBX.

4 Q. Are these notes on here notes of discussions  
5 that you had with Janet Mayfield?

6 A. Yes.

7 Q. Let's start with the first one. It says  
8 11500 HV. What does HV stand for?

9 A. I've been trying to wrack my brain to recall  
10 what HV stands for. I can't give you an answer what  
11 HV stands for.

12 Q. Is it one of the things that was in the  
13 Prudential account? Well, does your -- do your notes  
14 indicate any action that's here?

15 A. No, I have no check marks or nothing to buy  
16 or sell.

17 Q. Does this indicate to you that you discussed  
18 it with her and no conclusions were reached?

19 A. Yes.

20 Q. Now, the next one is 11700, it says sell at  
21 PQVBX; right?

22 A. That's right.

23 Q. Did that actually happen?

24 A. Yes, it did.

25 Q. The next item 11600, buy, is that by 10,000?

1  
2  
3  
4  
5

A. \$10,000.

Q. What is it that you're buying?

A. HCRBX is the Dean Witter Health Science trust mutual fund.

6 Q. And you discussed that with her before it was purchased?

7 A. Yes.

8 Q. That's what these notes tell you?

9 A. Yes.

10 Q. And is this the way you kept some of your notes, not in your spiral binder, but using this form?

12 A. Yes. I did it in both places because the spiral binder was a chronology, chronological sequence of actions, whereas if I wanted to pull up something related to a specific client that took place recently, I would go into my hanging green folders and I would see these notes, which would remind me in conjunction with the printout of the statement as to what took place on a given day.

20 Q. How did you keep these documents?

21 A. These were individual pages dropped into my hanging folder for that particular client.

23 Q. When we looked at the documents that were available, were all of the documents that you created for Janet Mayfield there?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. No. There were no green folders, there was nothing, and I kept extensive file folders on these clients.

Q. Is it fair to say, then, that a large number of the documents were missing?

A. Yes.

Q. Is this Page 1112 for the active assets account?

A. Or can't you tell whether it was an active assets. I would say yes, because it evolved from the command account at Prudential, and the command account at Prudential, I believe, was a check oriented; in other words, it was an account that you could write checks against, and so was the active asset account.

Q. In a letter dated May 8th, 2001, Lori Mayfield wrote to Doug Stone claiming that the active -- that the Morgan Stanley Dean Witter Health Science purchase of \$10,000 on November 9th, 2000 was unauthorized. Is that correct, was it unauthorized?

A. No, it was not.

Q. You discussed it with her?

A. Yes.

Q. With Janet Mayfield?

A. Yes.

Q. And these notes reflect that?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. Yes, they do.

Q. Would you turn the page. Could you explain to the judge, please, what that is, 1114?

A. If I wanted a daily up-to-date printout of what a particular investment was selling for, or information related to its price, I would punch in the ticker symbol, in this case PQVBX.

It shows a net asset value as of the 2nd of November to be 9.69, and it changed from the preceding day, was down 8 cents. It paid a very modest dividend of 1 cent, and its annual high -- that's what the AH stands for over to the far right -- is 10.14, and its low was 8.89.

Q. Would this show the securities that were held in that particular account, 013879, as of the end of business on October 25th, 2000?

A. Yes.

Q. There's handwriting at the bottom. Whose handwriting is that?

A. At the bottom?

Q. Page 1114. Whose handwriting is that?

A. That's mine.

ALJ DION: I'm going to clear this up. He was reading from 1113.

The information that Mr. Merrill gave us

1 about PQVBX and the high and the low was from 1113; is  
2 that correct, Mr. Merrill?

3 THE WITNESS: Yes.

4 Q. (BY MR. LEWIS) Would you look at 1114. What  
5 is that?

6 A. This is a printout on the 25th of October, or  
7 actually the 26th, reflecting the value in her other  
8 account. See, this account is 013879, and this is an  
9 IRA account, and this was, I believe, where the  
10 principal amount of her money was, in her IRA account.

11 Q. Mr. Merrill, is this printed out from a  
12 computer?

13 A. Yes, it's printed out from my computer.

14 Q. When you're sitting at your desk you can  
15 bring up on the computer screen all the information  
16 that's on here?

17 A. Yes.

18 Q. You have the lady's date of birth up in the  
19 right-hand corner there?

20 A. Right.

21 Q. You have her home telephone number?

22 A. That's right.

23 Q. So you have on here much of the information  
24 you would need to talk with the client?

25 A. Yes. And what I did, I mentioned before how

1  
2  
3  
4  
5 it prints out a half page at a time, well, I usually  
put two half pages and run them through the copy  
machine so it's one page instead of having to flip  
back and forth. That's why you see a fairly full page  
there.

6 Q. Whose handwriting is that at the bottom?

7 A. This is my handwriting.

8 Q. Are those notes of a telephone conversation  
9 or conversations you had with Janet Mayfield?

10 A. It's very likely that it was a conversation  
11 in her house in Pebble Creek in Goodyear, because she  
12 was a client that lived a few blocks away from me.

13 Q. What does that handwriting on there state?

14 A. It shows I had talked to the client about  
15 buying \$15,000 worth of --

16 Q. 15,000 or 15 -- is that 15,000, another  
17 little zero there? I can't see it.

18 A. Yes, 15,000.

19 Q. Go ahead, 15,000 of what?

20 A. The symbol TEKBX is the Dean Witter  
21 technology fund, and --

22 Q. And you talked with her?

23 A. I talked to her about it. And the money came  
24 from selling the NYVBX. NYVBX is a highly volatile  
25 New York venture capital fund managed by a company

1 called Davis.

2 Q. Had you talked to her about your thoughts  
3 about that particular --

4 A. She didn't like -- I told her that at that  
5 time that the venture capital fund was going down  
6 because it invested in IPOs, it invested in new  
7 start-up companies, and that the IPO business was  
8 going downhill, and consequently, the fund was going  
9 downhill. So...

10 Q. Did you recommend to her that she sell it?

11 A. Yes.

12 Q. And did you recommend that she use the funds  
13 to buy some --

14 A. Yes.

15 Q. And was that this tech fund?

16 A. Yes.

17 Q. Now, in that same letter of May 8th, 2001 to  
18 Doug Stone, Lori Mayfield says that that purchase and  
19 settlement date of November 9th, 2000 was  
20 unauthorized. Was it unauthorized?

21 A. No, it was not.

22 Q. Had you discussed it with Janet Mayfield?

23 A. I had talked to her about it in her house.  
24 She wanted to sell the Davis fund, and I suggested  
25 what to do with the money.

1 Q. And these are notes you made at the time of  
2 that conversation?

3 A. Yes.

4 Q. Did you have these notes before we recovered  
5 them from the office at Dean Witter in Sun City, just  
6 before these proceedings started?

7 A. No.

8 Q. Did you have any way of modifying these  
9 documents? Were these copies made of the documents as  
10 they existed in the Dean Witter office?

11 A. All these notes were left with Dean Witter  
12 when I left the company.

13 Q. And they were not modified by you in any way  
14 after you left the Dean Witter company?

15 A. No, sir.

16 Q. There's another, the last item there, there's  
17 another buy. Would you explain to the judge what that  
18 is, please?

19 A. A buy, I had talked to her about three mutual  
20 funds, the Information fund, and two other funds, the  
21 ACEMX I think it was. Anyway, ACE stands for the  
22 Van Kampen emerging growth fund. Yeah, it's ACEMX,  
23 that's right. And that was a fund that had the best  
24 track record on Wall Street for a 10-year period.

25 Q. The Van Kampen growth fund B?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. That's right, emerging growth.

Q. B shares. And did you --

A. And we agreed to buy the Info fund, and we agreed to buy the emerging growth fund, but not the third one, \$10,000 in American Value. It was somewhat of an overlap. We decided not to do that. American Value was, it's like half industry, dividend fund, and half --

Q. That's the last thing in your handwriting on the page?

A. The AMOBX, yes, sir.

Q. You don't have a check mark next to it or anything indicating that you did any action on it?

A. That's correct.

Q. But you did discuss it with her?

A. Yes.

Q. You bought the Info fund and the Van Kampen growth fund; right?

A. Yes.

Q. In that letter of May 8th, 2001, Lori Mayfield writing to Doug Stone says that the Van Kampen growth fund and the MSDW Information fund were unauthorized trades. Were they unauthorized?

A. No. We talked about them, she received statements, she received confirmations, and she

1 received all this in the month of November, before I  
2 met with her and her daughter on the 25th of November.

3 Q. In other words, these purchases that we've  
4 talked about in November were on her November  
5 statement?

6 A. Yes.

7 Q. Let's see if we can find that in here. Well,  
8 we'll get to that.

9 ALJ DION: R-16, Mr. Lewis.

10 MR. LEWIS: That's a good idea. I wish I  
11 thought about it. It's ACC 04689 and 04690.

12 ALJ DION: We'll mark that as R-16.

13 Q. (BY MR. LEWIS) Do you have that in front of  
14 you Mr. Merrill?

15 A. Yes, I do.

16 Q. They're actually two different documents. I  
17 just happen to have them together; they're  
18 consecutive.

19 Let's talk about the top one first,  
20 ACC 04689. Do you know what that is?

21 A. Yes.

22 Q. Would you tell the judge what it is?

23 A. That would be Page 2 of a printout of Janet  
24 Mayfield's account statement from my computer. It  
25 shows that as of the 2nd of January, she did have the

1 shares that I bought for her of the Information fund,  
2 she does have the shares of TEK BX, which is the tech  
3 fund, and she has shares of the Van Kampen emerging  
4 growth fund, symbol ACE MX.

5 In addition, she has shares of Oracle,  
6 Redback, Inktomi and two stocks that I did not buy for  
7 her. They were bought before the account transferred  
8 over, and they just stayed in the account, namely  
9 Check Point Software and Wells Fargo.

10 Q. Is the handwriting below your handwriting?

11 A. Right. On the 3rd of January I executed a  
12 trade after talking to her, 100 shares of Home Depot  
13 at 50 and five-eighths. Total value, \$5,149.

14 Q. Is this a trade we received from the office  
15 of Dean Witter?

16 A. Yes.

17 Q. Is this a document you kept at the time you  
18 had a conversation with her, you wrote this?

19 A. Yes.

20 Q. Did you put this in your file on Janet  
21 Mayfield in the office there?

22 A. Yes, I did.

23 Q. In the letter of May 8th, 2001, Lori Mayfield  
24 says to Doug Stone that the purchase of the Home Depot  
25 on 1-3-01 was unauthorized. Was it unauthorized?

1 A. No, sir.

2 ALJ DION: Mr. Merrill, I might have missed  
3 it, but did you give me the date above your  
4 handwriting?

5 THE WITNESS: 3rd of January, '01.

6 Q. (BY MR. LEWIS) The next document is  
7 ACC 04690. Can you tell the judge, please, what that  
8 document is.

9 A. This is for the same account with Janet  
10 Mayfield. It's the IRA account, and we bought 200  
11 shares on the 22nd of November of the preceding year,  
12 2000, of Oracle, at 22 and 7/16ths; total value,  
13 \$4,562.

14 Q. Is that as a result of any conversation you  
15 had with Janet?

16 A. I've got to double-check there. That means  
17 that I recommended that to her, and I probably again  
18 talked to her about it, and obtained approval in her  
19 home in Goodyear.

20 Q. Is there any doubt that you talked to her  
21 about it?

22 A. None whatsoever.

23 Q. Is there any doubt that you got her approval?

24 A. None.

25 Q. Again, is this a document that we retrieved

1 from the -- when we made our visit to the Dean Witter  
2 office in Sun City?

3 A. Yes, it is.

4 Q. Was this an entry that you made at about the  
5 time the transaction took place?

6 A. Yes.

7 Q. In her letter of May 8th, 2001, to Doug  
8 Stone, Lori Mayfield says the purchase in November of  
9 2000 of Oracle for this amount of money, that almost  
10 the exact amount, \$4,562 was unauthorized. Was that  
11 unauthorized, sir?

12 A. No, sir, it wasn't.

13 Q. You talked to her about it?

14 A. Yes, sir.

15 ALJ DION: While you do that, do you want me  
16 to consider this one, Mr. Lewis?

17 MR. LEWIS: Yes, please.

18 ALJ DION: Mr. Bingham, do you have any  
19 objection to R-16?

20 MR. BINGHAM: Other than it just being  
21 disclosed to me as an exhibit, no.

22 MR. LEWIS: Excuse me. It was in the box you  
23 sent us.

24 MR. BINGHAM: Right.

25 MR. LEWIS: All right, I'm sorry.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ALJ DION: Okay, I understand what Mr. Bingham -- I understand that he had possession of it and he sent it to you, but that he had just been informed that these documents are going to be used, and one of my procedural orders did say give a list of exhibits and things like that. So I understand where you're coming from, Mr. Bingham, but I'm going to allow it.

Do you have any other -- are there any other pieces of paper like this, Mr. Lewis.

MR. LEWIS: I think we've exhausted everything that we've found.

ALJ DION: Okay. At this point I will admit the exhibit, so R-16 shall be admitted into the record.

MR. LEWIS: The witness, I need to ask that. Before that, Your Honor, I suggest we put the number on this before I ask him any questions.

ALJ DION: Is this because if not, they should have been given to Mr. Bingham at least at the beginning of the day. You're handing them out during the hearing, so at 9:00 in the morning, if you knew you were going to do this, you should have given him the opportunity.

I will give you the opportunity to read these

1 things, by the way, Mr. Bingham. Let's mark this as  
2 R-17. Did you receive a copy, Mr. Bingham?

3 MR. BINGHAM: Yes, I just did.

4 ALJ DION: We're going to mark this as R-17.  
5 This appears to be a printout, account statement from  
6 Morgan Stanley Dean Witter..

7 MR. LEWIS: I'll have him identify it.

8 Q. (BY MR. LEWIS) Mr. Merrill, what I placed in  
9 front of you bears Bates numbers ACC 04799, 4800, and  
10 4801. Do you have those documents in front of you?

11 A. Yes, sir.

12 Q. Can you tell the judge what these documents  
13 are?

14 A. Well, these are -- the first one, 4799, is  
15 just one page of six that reflects a statement for the  
16 month of December 31st, 2000, and it's for an active  
17 asset account for Janet Mayfield, number 014186 up in  
18 the upper right corner there, reflects a total value  
19 of \$59,586.

20 Q. Would you look at Page 4801, the third page  
21 that's marked at the top, 4 of 4?

22 A. Yes.

23 Q. Does that show any purchase?

24 A. Okay, this is a year -- this is not a  
25 December statement, it's a statement that's usually

1 printed out and mailed to the client reflecting total  
2 activity in an account for the whole year, for the  
3 year-ending December 31st, 2000.

4 Q. Mr. Merrill, does this document I just  
5 directed your attention to, does it show a purchase on  
6 a January 9th trade date?

7 A. Yes, it shows --

8 Q. What does it show?

9 A. It shows a purchase of 100 shares of  
10 DEA Systems.

11 Q. At what price?

12 A. At 49, and we were at decimal system 378.

13 Q. Is this something that you talked to  
14 Mrs. Janet Mayfield about before you purchased?

15 A. Yes.

16 Q. She has a complaint about this being an  
17 unauthorized purchase. It's in Lori Mayfield's  
18 letter. What happened with that security?

19 A. Well, it was sold.

20 Q. Would you look at the previous page?

21 A. Yeah, it was sold on the 11th of January.

22 Q. At what price?

23 A. At 59.125.

24 Q. So that indicated a significant profit?

25 A. Yes.

1  
2  
3  
4  
5

Q. In two days?

A. Of 37 percent.

6  
7  
8  
9

Q. Did you talk to her about selling the security after you talked to her about buying it?

A. Yes.

6 Q. Did she agree with both the buy and the sell?

7 A. Short-term gains are wonderful, and she  
8 received about \$815 in profit over a period of two  
9 days.

10 ALJ DION: I want to follow up, because I  
11 don't think you answered Mr. Lewis' question. You  
12 told me what she gained, and he was kind of asking  
13 about her authorization. Did you talk to her and  
14 authorize the buy?

15 THE WITNESS: Yes, I did.

16 ALJ DION: And authorize the sell?

17 THE WITNESS: Yes, sir. This was the second  
18 of two stocks that I had bought for her and sold for  
19 her at considerable profit. The first one was back in  
20 November, that stock called Triquent.

21 MR. BINGHAM: Objection; this is narrative.

22 ALJ DION: Yeah, there's no question before  
23 you, Mr. Merrill.

24 Q. (BY MR. LEWIS) I need to get a folder or  
25 Tab 11 in front of you.

1  
2  
3  
4  
5

A. Okay.

Q. Would you look at the document starting with the document entitled ACC 03984.

A. I have it.

MR. BINGHAM: I'm sorry.

6 Q. (BY MR. LEWIS) Can you tell the judge what  
7 that document is?

8 MR. BINGHAM: Can you repeat that page number  
9 again?

10 MR. LEWIS: 3984. The November 30th, 2000  
11 statement for the retirement account.

12 THE WITNESS: This is the IRA retirement  
13 account for Janet Mayfield. It's the formal statement  
14 that's mailed out to her, not one that I would print  
15 out. It shows a total asset value of \$209,081.

16 Q. Does it show what securities were in the  
17 account?

18 A. If you go to the next page, 2 of the  
19 statement, 3985 is the ACC number, it shows some  
20 assets she previously owned, and some that I bought  
21 for her.

22 Q. I want to go through with you what's on this  
23 statement that had been purchased in this account in  
24 November of the year 2000. What stock was purchased?

25 A. The stock that was purchased was Inktomi,

1 Microsoft, Oracle. Those were the three stocks. And  
2 the mutual fund.

3 Q. Hold on, let's just do the stock. This is in  
4 the IRA account; is that correct?

5 A. Yes. She already had the other stocks.

6 Q. The Microsoft was purchased on your  
7 recommendation?

8 A. I believe it was, yes.

9 Q. What about the mutual funds that had been  
10 purchased?

11 A. I purchased the technology fund that you see  
12 there, and on the next page, the Information fund --

13 Q. What about --

14 A. -- and the Van Kampen emerging growth fund.  
15 The other fund you see there she already had in her  
16 account, the Seligman Communications and Information  
17 fund.

18 Q. So the various. What about the biotech  
19 pharmacy equity trust?

20 A. Under the category of unit investment trust,  
21 there's a VKS, stands for Van Kampen focus portfolio  
22 Internet Series 24A, and the other unit trust I also  
23 purchased for her, the biotech pharmaceutical series.

24 Q. Would you turn the page. Now, it says in the  
25 middle of the page, it shows activity. It shows

1  
2  
3  
4  
5

things that were sold; is that correct?

A. That's right.

Q. And you referred to the Davis New York venture. That was sold on November 17th. Is that a trade date or a settlement date?

6 A. A settlement date.

7 Q. And it shows on November 21st, 200 Triquent  
8 Semiconductor being sold at \$40 a share; is that  
9 correct?

10 A. That's correct.

11 Q. 40 and a half, 40.5?

12 A. Yes.

13 Q. Now, if you turn the page, you'll see when it  
14 was bought. It was bought on what date?

15 A. It was bought on the, well, the trade --  
16 settlement date was the 16th.

17 Q. 200 shares?

18 A. 200 shares at 29 and a half, approximately.

19 Q. 11 point gain in a few days?

20 A. Yes.

21 Q. She isn't complaining that this was an  
22 unauthorized transaction. Did you talk to her about  
23 that?

24 A. Yes, I talked to her, because it jumped up so  
25 high so quickly, and we talked about maybe putting in

1  
2  
3  
4  
5

a stop or selling it, and I recommended selling it.

Q. Did you talk to her when you bought it?

A. Yes, sir.

Q. We don't have any notes on that purchase, on the Triquent stock. We didn't find any?

6 A. No.

7 Q. Does that mean there weren't any?

8 A. No, there were notes.

9 Q. Just we haven't been able to find them?

10 A. That's right.

11 Q. So everything that she claims that was bought  
12 in November that was unauthorized was on the monthly  
13 statement that she received sometime in early  
14 December; is that correct?

15 A. It was not only on the monthly statement, but  
16 she obviously received confirmations prior to that.

17 Q. I don't think we have any.

18 A. She had confirmations when I went to see her  
19 daughter on the 25th.

20 Q. Turn in that Tab 37 to Page ACC 02934.

21 A. 2904?

22 Q. 2934.

23 A. I have it.

24 Q. Can you tell the judge what that document is?

25 A. Well, this is a typical confirmation document

1 showing the client, showing up in the right corner  
2 what the account number is, showing my name as the  
3 financial advisor, and what action was taken. It was  
4 purchased on the trade date of 6 November of 344  
5 shares and a fraction of the Information fund.

6 Q. Are we looking at the same one? Is that the  
7 Information fund or Van Kampen emerging growth 2934?

8 A. I'm sorry, it must be out of order. Yeah,  
9 they're out of order.

10 Yeah, this is on 2934, it's similar  
11 information for the Van Kampen emerging growth fund.  
12 And in a mutual fund, as opposed to a stock, you could  
13 buy an odd number of shares. In other words, for an  
14 exact amount of money. And in this case, it's 115.141  
15 shares of this particular mutual fund at \$86, \$85 per  
16 share.

17 Q. It shows you bought, it says trade date  
18 November 6th; is that correct?

19 A. That's right.

20 Q. For settlement, November 9?

21 A. Three business days later.

22 Q. Okay. Now, it also in the narrative, under  
23 the Van Kampen emerging growth, the last word is  
24 prospectus. Can you tell the judge what that means?

25 A. Well, before any trade can be made with

1 respect to a mutual fund, you have to give the  
2 prospectus to the client. And the Dean Witter  
3 prospectus consists of essentially a brochure and a  
4 prospectus all in one document, and I would give that  
5 to the client, go over the particular pages in it,  
6 talking about what's in the fund, and I would  
7 usually -- it wasn't reflected in any prospectus  
8 because it changes all the time as far as the stocks  
9 are concerned.

10 MR. BINGHAM: Objection; Your Honor. The  
11 testimony is in general. He is using a word generally  
12 or typically. We're concerned with this particular  
13 customer.

14 Q. (BY MR. LEWIS) Tell the judge what you told  
15 Janet Mayfield.

16 A. I told her what the emerging growth fund  
17 consisted of, and I would print out the top 10  
18 holdings from my computer, it wouldn't be in the  
19 prospectus, and I would give her those 10 holdings  
20 because that's the only information we had available.

21 Q. Would you have a copy of a prospectus in your  
22 office to give to her?

23 A. Absolutely.

24 Q. Additionally, when it says prospectus on the  
25 confirm, what does that mean?

1 A. When the transaction is completed, along with  
2 the confirmation, in a separate mailing you would get  
3 from Florida a prospectus.

4 Q. So she got two prospectuses?

5 A. Right.

6 Q. One from you and one from the company?

7 A. That's right.

8 Q. Do you control sending out of the prospectus  
9 by the company?

10 A. Absolutely not. That's an automatic thing  
11 that is done with respect to a mutual fund.

12 Q. She got those things, the prospectus and the  
13 confirmation, shortly after the trade date; is that  
14 correct?

15 A. That's right.

16 Q. And it was on her monthly statement for  
17 November?

18 A. Right.

19 Q. And she said in May it was an unauthorized  
20 transaction. Do you agree it was an unauthorized  
21 transaction?

22 A. No, sir.

23 Q. The next page, 2933. You're right, they were  
24 out of order, they're out of order in my book, too.

25 What does that indicate, what is it and what

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

does it indicate?

A. Similar confirmation statement, only the asset in this case is another mutual fund, the technology fund, showing an even \$15,000 buying 1,394 shares at 10.76 cents.

Q. Did you give her a printed copy of the prospectus before the transaction?

A. Yes.

Q. Did you get her authority to enter the transaction?

A. Yes, I did.

Q. Did she receive, as far as you know, receive this confirmation?

A. Yes.

Q. This also says prospectus on it, which she received another copy of the prospectus?

A. Yes.

Q. And it would have been on her November, 2000 statement?

A. Yes.

Q. She says this was an unauthorized transaction. Was it an unauthorized transaction?

A. No, it was not.

Q. You talked to her about it before?

A. Yes.

01 Q. Got her authority?

02 A. Yes.

03 Q. Would you turn the page to 2932. Can you  
04 find that?

05 A. Yes.

06 Q. This is also a transaction, confirmation for  
07 what security. What's the trade date and settlement  
08 date?

09 A. Trade date is the 6th of November, settlement  
10 on the 9th; \$10,000, Information fund; 344 and a  
11 fraction shares at 29.04.

12 Q. The questions about the prospectus are the  
13 same. Did you give her one before she bought it?

14 A. Yes, I did.

15 Q. Did she receive one afterwards?

16 A. Yes.

17 Q. So she would have received --

18 MR. BINGHAM: Objection; speculation.

19 ALJ DION: I'm going to sustain that  
20 objection. I'm assuming there's no way you would know  
21 she received the prospectus from Florida; is that  
22 correct? You weren't with the mailman when he  
23 delivered it, so it's going to be tough for you to  
24 answer that question.

25 Would it be fair to say that if I see



01  
02  
03  
04  
05  
06  
07  
08  
09  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

did she live at the address on Amelia Drive?

THE WITNESS: Yes, Amelia Drive.

ALJ DION: To the best of your ability, which is limited in this, that's her address, and it's assumed that these things went out to her at that location and that she received them; is that right?

THE WITNESS: Yes. And in subsequent visits to her house I saw several of these documents on her kitchen counter.

ALJ DION: Can you tell me any of these you know for sure you saw in the kitchen counter?

THE WITNESS: I knew you were going to ask me that. I went over one with her in order that she become familiar with the format and how to read it.

ALJ DION: Do you remember which one that was?

THE WITNESS: As I recall, it was a mutual fund, it was either the emerging growth or the Van Kampen or the technology fund. It was a mutual fund as opposed to one of the stocks.

ALJ DION: Okay. Thank you.

Q. (BY MR. LEWIS) Did you tell or did you talk with Janet Mayfield about what she would be receiving from Dean Witter in the mail? Did you tell her what documents she could expect to receive?

0002760001  
0002760002  
0002760003  
0002760004  
0002760005

1 A. Yes.

2 Q. Did you talk to her about that at about the  
3 time the account was opened?

4 A. Yes, I tried to make her acquainted with our  
5 procedures and to let her know that when the accounts  
6 transferred over and when the assets were for the most  
7 part reflected in her statements, that we would sit  
8 down and go over those documents so she became  
9 familiar with how to read one of our statements. All  
10 brokerage statements are a little bit different.

11 Q. Did you talk with her about the confirmations  
12 that she would receive?

13 A. Yes. There's one confirmation I know I  
14 talked to her about. That was a standard procedure on  
15 my part to make sure they understood.

16 Q. And you let her know she would be receiving  
17 those?

18 A. Yes.

19 Q. The next page is 2935. Do you know what that  
20 is?

21 A. It's a similar confirmation. This time it's  
22 for a unit investment trust. It's the Internet Series  
23 24-A, with Van Kampen.

24 Q. What is this called, VK Focus?

25 A. Yeah, it's unit Van Kampen focus portfolio,



1 Q. The next one is 2938.

2 A. That was Inktomi. So that was a stock,  
3 bought 100 shares, there was a commission. \$2.35 is  
4 the handling fee for the exchange, NASDAQ exchange.

5 There is no prospectus for a stock. However,  
6 I had a standard procedure of giving my clients a  
7 report on the company. Now, the report --

8 MR. BINGHAM: Objection.

9 ALJ DION: I'm going to allow it. If it's a  
10 situation of habit, then I'll listen to testimony.

11 Go ahead, Mr. Merrill.

12 THE WITNESS: It was to make the clients  
13 familiar with the company, I would give them a report  
14 from Value Line or Dean Witter, or perhaps a Standard  
15 & Poor's. Those three sources, there would be a  
16 report on the company. And I'd try to find the one  
17 that was perhaps the most recent.

18 ALJ DION: Did you do that in the case of  
19 Ms. Mayfield?

20 THE WITNESS: Yes, I did.

21 Q. (BY MR. LEWIS) She claims this trade was  
22 unauthorized. Was it unauthorized?

23 A. I had talked to her about it. I remember  
24 this one distinctly, because I talked to her about it  
25 in her home.





1  
2  
3  
4  
5

Q. And it showed up on her December statement?

A. Yes.

Q. The next one is 2943.

A. I think that's a copy of a preceding one.

Q. VK Focus. It's a different date. That's  
6 2939, November 14th. This is 2943, December 13th.

7 A. I think, as I recall this one, well, it went  
8 up in value a little bit, and I thought it was worth  
9 adding to the position.

10 Q. Did you discuss that with her before you --

11 A. I discussed that with her as well.

12 Q. The next one is 2944, Home Depot, I think  
13 we've already discussed that. You had notes on that;  
14 is that correct?

15 A. Yes. This was in early January.

16 Q. What does preferential rate mean?

17 A. It means I give the client a significant  
18 discount on the commission, that's what the  
19 preferential rate means. And because Janet Mayfield  
20 lived in the same community, I was broker for the  
21 investment club at Pebble Creek. I gave everyone  
22 there a significant discount on commission.

23 Q. That's about 1 and a half percent?

24 A. Yes, the commission was never over 2 percent,  
25 and generally around 1 percent.

1  
2  
3  
4  
5

Q. March 9th, the next one is 2946. That's a sale?

A. Yes, it's a sale of Redback. Unfortunately, it didn't do very well.

Q. Is that something that she directed or -- it says unsolicited trade. What does that mean?

A. It's unsolicited. She called in, wanted to sell it.

Q. Inktomi, the next one. Did she direct the sale of that?

A. Yes.

Q. Home Depot, did she direct the sale of that?

A. Yes.

Q. Oracle, did she direct the sale of that?

A. Yes.

Q. And May 15th, 2001, you were no longer at Dean Witter; is that correct?

A. That's correct.

ALJ DION: Just for the record, those last few that we mentioned about the unsolicited sale, we were just following along the Bates stamp for it, I don't think it's necessary, we were just following along through the exhibit, in that Exhibit No. 37.

Mr. Merrill -- I mean, Mr. Lewis, excuse me, what do you have in store for the next 40 minutes or

1 so? I'm just trying to figure out.

2 MR. LEWIS: I was going to do a little tap  
3 dance on the table, but I don't think I'm up to it at  
4 this late in the day. I've got not too many more  
5 questions concerning Janet Mayfield, and the last one  
6 is Lori Mayfield. I think there's a reasonable chance  
7 if we're going to go to 5:00 that I can finish my  
8 direct examination of Mr. Merrill.

9 ALJ DION: I know the court report will need  
10 a break, so that's what I'm trying to do, try to  
11 accommodate that, plus accommodate the Division the  
12 ability to get those documents to you first thing in  
13 the morning. So why don't you finish up.

14 MR. LEWIS: I really don't have many more  
15 questions. The questions concerning Lori Mayfield  
16 won't take more than 15 minutes. There are a few more  
17 questions concerning Janet Mayfield that will take  
18 maybe about 10 minutes or so. But if you want to wait  
19 till the morning to do that, that's fine with me. I  
20 don't have any preference one way or the other.

21 ALJ DION: Why don't we finish up Janet  
22 Mayfield and by that time, giving the court reporter a  
23 break would put us closer to the 5:00 hour than we  
24 need to, and it would allow the Division time to  
25 accomplish the things it's going to need to do in the

1 morning. So why don't we finish up with Janet.

2 MR. LEWIS: That's fine with me.

3 ALJ DION: Which letter is this?

4 MR. LEWIS: It's not dated, ACC 04677. And I  
5 thought it was in the folder, but I guess it isn't.  
6 I've got multiple copies of it. I need one or two  
7 more.

8 MR. LOWE: You have it.

9 MR. LEWIS: I have the letter, I don't have  
10 enough copies of it.

11 MR. LOWE: If you have it, I can make some  
12 copies.

13 MR. LEWIS: I just need two. It's a one-page  
14 letter.

15 MR. BINGHAM: I found it, Tab 39. Actually  
16 it's got a different Bates number in 39.

17 ALJ DION: I'm actually in 39.

18 MR. BINGHAM: It's the sixth page in Exhibit  
19 S-39.

20 MR. LEWIS: 1455. The one I've got is Bates  
21 stamped 46777, but it is the same document.

22 ALJ DION: That's why I was asking if it's  
23 the one dated April 23rd, 2001. At least that's what  
24 it looks like on mine, ACC 1054.

25 MR. LEWIS: I don't see the date.

01  
02  
03  
04  
05

ALJ DION: I've got Ms. Mayfield's address, then underneath it the date. The one to Mr. Cajero.

MR. BINGHAM: It's a two-page letter.

ALJ DION: Two-page letter to Mr. Cajero. At least we've got it.

6 Q. (BY MR. LEWIS) Do you have Tab 39? We're  
7 looking for document ACC 01544.

8 A. I have it.

9 Q. Were you still employed at Morgan Stanley  
10 Dean Witter on April 23rd, 2001?

11 A. No.

12 Q. She's making the same statements in here that  
13 you're not being authorized on all of these  
14 transactions that we've gone over. Would you go to  
15 the second page of the letter, 1455.

16 A. I have it.

17 Q. She says here on January 15th, 2001, after  
18 reviewing my portfolio, and realizing what Phil  
19 Merrill had done, I called him and instructed him not  
20 to touch my account under any circumstances without  
21 authorization from me.

22 Did that telephone call ever take place?

23 A. Not to my knowledge.

24 Q. Did she ever call you and tell you that?

25 A. No.

1 Q. Did she complain to you at anytime about any  
2 unauthorized transactions in either of her accounts  
3 prior to the time you left Morgan Stanley Dean Witter?

4 A. No.

5 Q. When you left Morgan Stanley Dean Witter did  
6 you think you had a complaint from Janet Mayfield?

7 A. No.

8 Q. Now, she says that: On March 9th, 2001, I  
9 called Phil again after receiving my February  
10 statement and noting that his buys were further  
11 plummeting and instructed him to liquidate them to  
12 help cut the losses. He did in fact liquidate some of  
13 them.

14 Did you liquidate the securities? Were you  
15 the one who handled the sales in March of 2000?

16 A. I was still there, but I don't recall  
17 liquidating the --

18 Q. Will you look at some confirms that show  
19 sales.

20 A. There were, I think Redback is one that I  
21 talked to her about and we did liquidate that one.  
22 And I think maybe Inktomi was another one.

23 Q. And you had that conversation with her then?

24 A. Yeah, we talked about them, because they had  
25 gone down and we liquidated them. But it was not in

1 the tone of liquidate everything. It was just those  
2 specific stocks.

3 Q. Did she complain to you that these had been  
4 unauthorized transactions?

5 A. No. She never used the word unauthorized.

6 Q. Did she ever say some other word, that she  
7 hadn't given you permission, she hadn't agreed,  
8 anything to you that indicated that she had not agreed  
9 with those purchases?

10 A. No. In fact, we talked about them. Most of  
11 them were entered into prior to our meeting with her  
12 daughter on the 25th of November. And she had  
13 confirmations at that time, and we talked about a  
14 couple of them because they're related to things I was  
15 talking to her daughter about, and she never took  
16 exception to anything at that time.

17 MR. LEWIS: Your Honor, that's what you asked  
18 me to do and that's where I am.

19 ALJ DION: It's 4:30, so giving the court  
20 reporter her allotted break would put us at a quarter  
21 to 5:00. I don't know if we'll accomplish much in  
22 that time. Why don't we reconvene.

23 Mr. Bingham, do you think you can have those  
24 documents ready by 9:00?

25 MR. BINGHAM: Yes, I do.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ALJ DION: Then I would consider, we have about from, what I understand from Mr. Lewis, about 10 more minutes, depending on the documents that you receive tomorrow, but let's call it a half an hour, then it will be your cross-examination. How long -- fairly lengthy direct. How long do you think your cross-examination would be?

MR. BINGHAM: Not more than two days.

ALJ DION: I can assure you it won't be longer than two days. In any event, what do you anticipate? Two to three hours?

MR. BINGHAM: It will be longer than that, Your Honor. I'm thinking more four to six, Your Honor. I'm going to try and keep it short, but I've got to go into a lot of things now. I've got to perhaps touch on some of these exhibits I was just notified of. So I'll try and keep it short, I'll try and keep it a half a day or roughly half a day, but I can't promise you at this point.

ALJ DION: I'm looking at trying to finish up by tomorrow at 5:00 if we can. If it's a situation where we don't all have to come back, I'm sure we'll go that way.

Then I'm go going to do this, I was going to start at 9:30 just to give everybody enough time, but

1 why don't we start at 9:00 a.m., and then what I'm  
2 going to want, though, is that you be able to get that  
3 information to Mr. Lewis obviously sooner than later,  
4 you guys work it out, but I want the documents and  
5 have them reviewed and we'll start at 9:00.

6 MR. BINGHAM: Your Honor, if we start at  
7 9:30, it might help me on it because, and there's not  
8 a lot of pages as far as exhibits that were just  
9 introduced today that I had been notified of they were  
10 going to be exhibits, I would like to look at them. I  
11 think it will be more efficient for all of us if we  
12 can start at 9:30. That will give me a little more  
13 time to look at everything and hopefully focus on what  
14 it is I want to go into on cross-examination.

15 ALJ DION: I'm all for focus; we'll do that.  
16 It will also give Mr. Lewis the ability to look at the  
17 documents, whenever you work it out, give him at least  
18 a half an hour to review those, and help him focus so  
19 he can ask his clients about the documents that are  
20 going to be produced. I assume he'll finish somewhere  
21 around 10:00 a.m., your cross somewhere in the area of  
22 3:00, 3:30, maybe 4:00, perhaps an hour for redirect.

23 I'll go the third day if we need to, I don't  
24 have a problem with that. Just based on where we sit  
25 today, I think we can accomplish most everything

1 tomorrow based on the fact Mr. Merrill is the only  
2 witness. There may be a need for rebuttal witnesses,  
3 I understand that, but we'll evaluate that at that  
4 time.

5 Okay. I'll see everybody here at 9:30 in the  
6 morning. I believe subject to the Internet and the  
7 dates that are posted on our website, that we are  
8 going to be here again tomorrow morning at --

9 MR. LEWIS: Is it okay to leave our things  
10 here?

11 ALJ DION: Kind of at your peril.

12 MR. LEWIS: Do we have this room for  
13 tomorrow?

14 ALJ DION: We do, but I don't know if we're  
15 splitting the room. If you'll notice behind you  
16 there's another bench, and I'm sure if we are  
17 splitting the room, myself, I'm going to take all my  
18 stuff. Things have walked away before.

19 MR. BINGHAM: There's one thing, too, that I  
20 want to bring up. I have an item on the Securities  
21 open meeting on Thursday, so if we do go into Thursday  
22 I'll need a take a break for a while to handle that  
23 matter. And that could be a long while, because you  
24 know how things go sometimes at the open meeting.

25 ALJ DION: And that's why I was trying to get

1 everything done tomorrow, because I figured you might  
2 be involved in that, and yes, obviously, you would do  
3 that before we would do anything here. I don't think  
4 I could summons you even if I wanted to. But yes,  
5 that's why I wanted to try to get done, if we can,  
6 tomorrow, and then we'll deal with that. Perhaps on  
7 Wednesday we'll start, based on what we know, start at  
8 1:00 because I don't think we'll have too much more.  
9 But any event that's if we get to Thursday. Excuse  
10 me, then we'll reconvene at 9:30. Mr. Merrill will be  
11 again on the stand for finishing up direct.

12 Thank you.

13 (The hearing recessed at 4:37 p.m.)

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5

STATE OF ARIZONA )  
 ) ss.  
COUNTY OF MARICOPA )

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

I, CECELIA BROOKMAN, Certified Court Reporter No. 50154 for the State of Arizona, do hereby certify that the foregoing printed pages constitute a full, true and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

WITNESS my hand this 5th day of February, 2003.

Cecelia Brookman  
CECELIA BROOKMAN, RPR  
Certified Court Reporter  
Certificate No. 50154