

BEFORE THE ARIZONA CORPORATION COMMISSION

1)
 2)
 3) IN THE MATTER OF:)
 4) Phillip William Merrill) DOCKET NO.
 5) 3788 N. 156th Drive) S-03450A-02-0000
 6) Goodyear, AZ 85338)
 7) CRD #2436444,)
 8) Respondent.)

9)
 10) At: Phoenix, Arizona
 11) Date: January 22, 2003
 12) Filed: FEB 10 2003

REPORTER'S TRANSCRIPT OF PROCEEDINGS

VOLUME IX
 (Pages 1761 through 1976)



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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

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

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1 BE IT REMEMBERED that the above-entitled and
 2 numbered matter came on regularly to be heard before
 3 the Arizona Corporation Commission, in a hearing room
 4 of said Commission, 1200 West Washington Street,
 5 Phoenix, Arizona, commencing at 9:30 a.m. on the 22nd
 6 of January, 2003.

7

8

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

9

10 APPEARANCES:

11

For the Arizona Corporation Commission
 12 Securities Division:

13

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

16

For the Respondent:

17

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

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CECELIA BROOKMAN, RPR
 Certified Court Reporter
 Certificate No. 50154

24

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1 ALJ DION: We are back on the record in the
2 Merrill matter.

3 Good morning, everyone. Mr. Merrill was on
4 the stand and Mr. Lewis had just finished up, I
5 believe, with the issues regarding Janet Mayfield.

6 So Mr. Lewis, your witness, sir.

7 And Mr. Merrill, you remember you're still
8 under oath; is that correct?

9 THE WITNESS: Yes, sir.

10

11 PHILIP WILLIAM MERRILL,
12 called as a witness, having been previously duly sworn
13 by the Certified Court Reporter to speak the truth and
14 nothing but the truth, was examined and testified as
15 follows:

16

17 DIRECT EXAMINATION CONTINUED

18

19 Q. (BY MR. LEWIS) Mr. Merrill, when did you
20 first meet Lori Mayfield?

21 A. On Saturday the 25th of November, the year
22 2000.

23 Q. Was that after Thanksgiving?

24 A. That was just right after Thanksgiving.

25 Q. Where did you meet her?

1 A. I met her in her mother's home in Pebble
2 Creek, Goodyear, Arizona.

3 Q. Who had suggested this meeting?

4 A. The mother.

5 Q. Janet Mayfield?

6 A. Yes.

7 Q. At that time, when you went to Janet
8 Mayfield's house, did you discuss with her anything
9 about her account?

10 A. Yes, I did.

11 Q. What discussion did you have that you
12 remember with her?

13 A. Well, one of the trades that had recently
14 taken place was the buy and sell of Triquent and the
15 gain that had been made. She was very pleased with
16 that. And then I went over a number of her other
17 investments that she had received confirmations for
18 that had been entered into within the last previous
19 two weeks.

20 Q. Did she say at that time, "I didn't authorize
21 these trades," you didn't discuss these with her, or
22 anything like that?

23 A. No. At that time, that's the reason she
24 invited me over, was because she was satisfied with
25 what I had done for her.

1 MR. BINGHAM: Objection.

2 ALJ DION: What's your objection,
3 Mr. Bingham?

4 MR. BINGHAM: I think it calls for
5 speculation, unless he can clarify it further.

6 ALJ DION: Okay. I'll sustain that.

7 Mr. Lewis, I want to get to this point.

8 Mr. Merrill, go ahead and let Mr. Lewis
9 finish, because the court reporter is typing, and if
10 he's finishing his question and you're kind of quick
11 to answer it, she has a hard time discerning that.
12 She can do it, but it's easier on her and the record
13 will be clearer, and that's a benefit to everybody.

14 THE WITNESS: Yes.

15 ALJ DION: Mr. Lewis, your questions.

16 Q. (BY MR. LEWIS) Did you talk to Janet
17 Mayfield about her daughter before you actually met
18 her on Saturday?

19 A. Yes, sir.

20 Q. What was the conversation you had with Janet
21 Mayfield?

22 A. Janet Mayfield called me on the telephone at
23 least once and she talked about getting together with
24 her daughter, who was coming over for the Thanksgiving
25 weekend. And I said fine, you know, sometime that

1 weekend after Thanksgiving, you let me know what time
2 you'd like me over, and I'll come over.

3 Q. Did you have many customers who didn't live
4 in the Sun City area?

5 A. Who didn't.

6 Q. Who did not?

7 A. Did not. I had a number of them, yes.

8 Q. Did Janet Mayfield say anything to you about
9 why she wanted you to meet with her daughter? What
10 had happened that caused her to be asking you to see
11 her daughter?

12 MR. BINGHAM: Objection; hearsay.

13 ALJ DION: As to -- no, I'll allow it. I
14 think it goes to his --

15 MR. LEWIS: We've got two customers here.
16 She's a customer, Janet Mayfield.

17 ALJ DION: I understand. But I think the
18 question as far as if it's going towards why Janet
19 Mayfield called Mr. Merrill for either her own reasons
20 or her daughter had asked Janet Mayfield, basically,
21 whatever reasons doesn't really matter to me.
22 Although it's hearsay, it's going to go to the intent,
23 whether it's true or not, truth of the matter, that it
24 doesn't go to the matter. It goes to the reason
25 Mr. Merrill went over there, so I'm going to allow it.

1 Why did you go over there, Mr. Merrill?

2 THE WITNESS: The mother expressed to me the
3 fact that her daughter was dissatisfied with the
4 performance of her existing brokerage account which
5 she had with Charles Schwab, and basically wanted a
6 new broker.

7 Q. (BY MR. LEWIS) Did you have a conversation
8 with Lori Mayfield at her mother's home on the
9 Saturday after Thanksgiving?

10 A. Yes.

11 Q. Tell us as best you can remember what the
12 conversation was with Lori Mayfield.

13 A. Well, she had copies of her statements,
14 recent statements from Charles Schwab. And we went
15 over them as to what she had in those statements, and
16 she -- I basically listened to what her concerns were
17 about her existing account, and what she wanted to do
18 in terms of a relationship with me.

19 Q. Did you fill out -- were any papers filled
20 out to open an account at that time?

21 A. Yes.

22 Q. Did you get information from her concerning
23 her investment objectives?

24 A. Yes.

25 Q. Did you put those on the new account?

1 A. Yes.

2 Q. Did you discuss with her any specific ideas
3 that you had that she might be interested in?

4 A. Yes.

5 Q. Do you remember what they were?

6 A. Well, I didn't see that she was very well
7 diversified, and I suggested a couple of mutual funds,
8 and I also suggested to her certain stocks that I
9 thought at that time were in line with her financial
10 objectives.

11 She was relatively young and looking forward
12 to gaining some capital appreciation in her account,
13 and she expressed that she -- she tried doing it kind
14 of on her own, I remember her saying that, and hadn't
15 done very well.

16 Q. Were any decisions made on that first
17 Saturday about any specific purchases?

18 A. No.

19 Q. Did you proceed to do the things that were
20 necessary to transfer the account?

21 A. Yes. I had the transfer forms and the new
22 accounts form, the W-9, the standard forms that I
23 would carry with me in my car whenever I visited
24 someone outside of our office.

25 Q. Did it take a while for the transfer to be

1 completed?

2 A. Yes.

3 Q. Did you speak with her after the transfer was
4 completed?

5 A. Yes.

6 Q. Could you make trades in the account before
7 the transfer was completed?

8 A. No, no.

9 Q. Do you have any recollection as to when you
10 talked with her after the transfer was completed?

11 A. Around the latter part of the first week in
12 December, is my best recollection.

13 Q. Did you learn that she was going on a trip?

14 A. Yes, she made me aware of that when I first
15 met her.

16 Q. Did you talk with her about any investments
17 at that time in December, when you talked to her in
18 December, after the transfer was completed?

19 A. I talked to her again about things that I
20 previously talked to her about, plus perhaps another
21 discussion about a mutual fund or stock.

22 Q. After that conversation, did you place any
23 trades in her account?

24 A. I did place trades in her account. She had
25 at that time authorized, as I recall, Oracle to be

1 purchased, and she wanted to research on her computer
2 the other stock recommendations, mutual fund
3 recommendations, and she said that she would get back
4 with me.

5 Q. Have you ever denied that there were trades
6 that you placed in her account in December of the year
7 2000 that were not authorized?

8 A. That were not explicitly authorized, no.

9 Q. When was the first time you talked with her
10 after she got back?

11 A. After she got back was like the first week in
12 January, and I talked to her within a few days after
13 that, but I can't recall the exact date.

14 Q. Was there any discussion about the trades
15 that had been placed in her account?

16 A. Yes, she was aware of them. And I told her
17 she had an option as to I was aware of that, and this
18 was after the holidays, after my son had an operation,
19 and I apologized and told her if you would like, we
20 can reverse the trades.

21 Q. What about, were there any losses in any of
22 the trades?

23 A. Yes, there were.

24 Q. Did you say anything about that?

25 A. I said that we would -- I would accept the

1 losses in our error account in our branch office.

2 Q. What did she say?

3 A. Well, at that time I said even though there
4 are losses in your account, I still think these are
5 good investments. From all indications I had, these
6 were good investments.

7 Q. What did she say with respect to that?

8 A. She said she wanted -- at that time she did
9 not tell me to go ahead and reverse the trade. She
10 told me I'll get back with you, I want to look over, I
11 want to, you know, I haven't had time, I just got
12 back, and I want to review these trades. She was
13 upset, but I tried to convince her that these are good
14 investments, they were, at that time, very good
15 recommendations.

16 Q. After you had that conversation to her, did
17 you report the situation to your manager?

18 A. Yes, I did.

19 Q. Who was your manager?

20 A. Charlie Cajero.

21 Q. Did you tell him what had happened?

22 A. Yes.

23 Q. Did you tell him that there were trades that
24 had not been authorized?

25 A. Yes.

1 Q. After that point, did Mr. Cajero take over
2 the contacts with Lori Mayfield?

3 A. Yes. We didn't hear from her for a few days,
4 and Charlie said well, let me know when she gets back
5 in contact with you. And days went by, and then as I
6 recall, a multi-page fax came into the office machine,
7 and Charlie got a hold of it, and she obviously spent
8 a lot of time and effort.

9 Q. My question to you is did Mr. Cajero, the
10 manager, take over the contacts with Lori Mayfield
11 after that?

12 A. Yes. I didn't --

13 Q. From that point on?

14 A. -- talk to her, that's right.

15 ALJ DION: Mr. Merrill, say that again. You
16 guys are kind of talking over each other, so let him
17 finish.

18 Q. (BY MR. LEWIS) Did you have any further
19 conversations with Lori Mayfield after Mr. Cajero took
20 over the contacts with her?

21 A. No.

22 Q. Did you receive any written communications
23 from her after Mr. Cajero took over handling the
24 matter?

25 A. He made me aware of the faxes that had come

1 into the office machine, but that was not direct
2 communication with her.

3 Q. Did you discuss the information with
4 Mr. Cajero?

5 A. Yes.

6 Q. At anytime -- what was your last day of work
7 at Morgan Stanley?

8 A. 2nd of April, year 2001.

9 Q. Were you discharged?

10 A. Yes.

11 Q. As of that date, had there been any, as far
12 as you know, had there been any resolution of the
13 situation with Lori Mayfield? As of April 2nd, 2001,
14 had the problem with Lori Mayfield been resolved?

15 A. No.

16 Q. Were you aware of what was happening in the
17 communications between Lori Mayfield and Mr. Cajero?

18 A. Yes.

19 Q. What were you aware of?

20 A. I was aware that Mr. Cajero was trying to
21 resolve the matter, and he wanted to correct the
22 error, he wanted to reverse the trades as of the date
23 back in January.

24 Q. What date was that? I don't mean the exact
25 date. Was there an event that happened that he wanted

1 to use as the date?

2 A. The date that I initially spoke to her and
3 offered the opportunity to reverse the trades.

4 Q. And told her you agreed that they had not
5 been authorized?

6 A. That's right.

7 Q. And that's the date he wanted to use?

8 A. Yes.

9 Q. As of April 2nd, 2001, had she accepted that?

10 A. No, she...

11 Q. Were you aware that she was taking a position
12 that she wanted something different than that?

13 A. Yes.

14 Q. What was it that she wanted?

15 A. Well, she wanted to be made whole based on a
16 date in February, and that was not acceptable to the
17 branch manager. And this went on for quite a while,
18 and to my knowledge, it was not resolved by the time I
19 left the company.

20 MR. LEWIS: I did give Mr. Bingham a copy of
21 this. Shall we give it an identification number?

22 ALJ DION: That's a grand idea.

23 Q. (BY MR. LEWIS) Did you find this document
24 among the things that we received from Mr. Bingham
25 October 31st?

000276000

1 A. Yes, sir.

2 Q. Had you ever seen this before you found it in
3 that box?

4 A. No, I had not.

5 Q. There are a number of dates on here. The
6 original message, do you see the words original
7 message?

8 A. Yes.

9 Q. It says from Lori Mayfield, and it says sent
10 Thursday, February 8th, 2001?

11 A. Yes.

12 Q. Did you receive this e-mail?

13 A. No, I did not. I couldn't receive e-mails.

14 Q. Did it go to Mr. Cajero? Did he get it
15 eventually?

16 A. I believe he did.

17 Q. Mr. Merrill, if you had wanted to cover up
18 the fact that there had been some unauthorized trades
19 in Lori Mayfield's account, could you have done that?
20 Just yes or no.

21 A. Yes.

22 Q. How would you have done it?

23 A. I would have told my manager that we had a --
24 "we" meaning the client and I -- had a
25 misunderstanding over the telephone. I had -- I would

1 have told him that we had a discussion on the
2 telephone prior to her leaving on her trip, and that
3 she authorized these trades, in my opinion, and
4 subsequent to that, when she returned, we had a
5 discussion, and at that time we could have reversed
6 the trades.

7 I could have said to my operations manager,
8 my branch manager that it was just a misunderstanding
9 on the telephone and that would have been that.

10 Q. What would have happened?

11 A. We would have reversed the trades as of that
12 day that I had talked to her and provided that she
13 gave me the direction to do so.

14 Q. She would have received back the difference
15 in the cost and the fines?

16 A. All the assets that would have been backed
17 out and the moneys reinserted in her account.

18 Q. Mr. Merrill, is a lot of the work done by
19 brokers done on the telephone?

20 A. Yes.

21 Q. Did your office have a procedure for handling
22 things where there was a misunderstanding between a
23 broker and his customer about what was said?

24 A. Yes. I can give you an example.

25 Q. I don't need an example. Was there a

1 procedure?

2 A. Yes.

3 Q. And was that procedure essentially what you
4 just outlined?

5 A. Yes, it was standard procedure.

6 Q. And did you know of that procedure, sir?

7 A. Yes.

8 Q. You didn't do that, though? You didn't tell
9 Mr. Cajero there was a mistake?

10 A. No, I did not.

11 Q. You told him exactly what had happened; is
12 that correct?

13 A. Right. It was an oversight on my part.

14 Q. It was something that should not have
15 happened; right?

16 A. Correct.

17 Q. And you told him that; right?

18 A. Yes.

19 Q. Is there any reason why, if there had been
20 unauthorized trades in other accounts, you wouldn't
21 have told Mr. Cajero, as these other people are
22 saying, there are unauthorized trades, is there any
23 reason why you wouldn't have told him that?

24 A. No.

25 Q. While Mr. Cajero was having these contacts

1 with Lori Mayfield before April 2nd, 2001, did you
2 receive any communication from Janet Mayfield where
3 she said, "there were trades in my account that I did
4 not authorize?"

5 A. No, absolutely not.

6 MR. BINGHAM: You referred to Janet.

7 MR. LEWIS: Yes, I'm talking about Janet.

8 MR. BINGHAM: All right.

9 Q. (BY MR. LEWIS) The correspondence that's in
10 the exhibits here from Janet Mayfield is dated after
11 April 2nd, 2001. Would you have seen that
12 correspondence?

13 A. Absolutely not.

14 ALJ DION: I just want the record to be
15 clear. I've got Lori Mayfield, not Janet Mayfield, as
16 the alleged author of this. You said Janet Mayfield,
17 Mr. Lewis.

18 MR. LEWIS: Absolutely. I'm talking about
19 both of them. Lori Mayfield is the author of the
20 letter.

21 ALJ DION: Right.

22 MR. LEWIS: I'm trying to get into the record
23 that he didn't hear anything from Janet Mayfield, any
24 complaint from Janet Mayfield about her account, and
25 she did not author anything in writing about her

1 account until after Mr. Merrill had left Morgan
2 Stanley Dean Witter. That's the point I'm trying to
3 make. I'm sorry, I realize it may be a little
4 confusing because they're both Mayfields and both
5 customers.

6 ALJ DION: It's just that when you said you
7 talked about the person who wrote this, and you
8 referred to the Exhibit R-14, so -- or excuse me,
9 R-18.

10 MR. LEWIS: That was written by Lori
11 Mayfield.

12 ALJ DION: Right, and you said Janet.

13 MR. LEWIS: Concerning this Exhibit R-18?

14 ALJ DION: Yes.

15 MR. LEWIS: I thought I read Lori Mayfield
16 from the original message at the top.

17 ALJ DION: The two questions you asked, you
18 started out and you said did you receive any
19 information, correspondence from Janet Mayfield after
20 April, 2001 regarding unauthorized trades.
21 Mr. Merrill said no.

22 You then said, referring to the exhibit, did
23 you receive any information about Janet Mayfield, and
24 it's Lori Mayfield who is the author.

25 MR. LEWIS: Maybe I better go back over this

1 very quickly.

2 Q. (BY MR. LEWIS) Lori Mayfield was
3 communicating after January, when you talked with her
4 in January?

5 A. Yes.

6 Q. And told her what had happened?

7 A. Yes.

8 Q. She was communicating with your manager,
9 Charlie Cajero; is that correct?

10 A. That's correct.

11 Q. She was not communicating directly with you?

12 A. No.

13 Q. This e-mail, which is Exhibit R-18, is
14 addressed to you, and you testified you did not
15 receive it; is that correct?

16 A. That's right.

17 Q. But apparently it did get to Charlie Cajero,
18 because this is a communication, the whole
19 communication is from Charlie Cajero to Douglas Stone.
20 Do you read it at the top?

21 A. Yes.

22 Q. You did not receive this back in February?

23 A. I did not receive it, and I don't know when
24 Charlie received it.

25 Q. But you were aware that he was working with

1 her, trying to straighten things out with Lori
2 Mayfield?

3 A. Yes.

4 Q. And you knew that she was not -- you were
5 advised that she was not willing to accept the
6 reversal as of the time you advised her?

7 A. That's correct.

8 Q. Now, I'm talking about Janet Mayfield.
9 Before you left Morgan Stanley Dean Witter on April
10 2nd, 2001, did Janet Mayfield make any written
11 complaint about unauthorized transactions in her
12 account?

13 A. Not that I was aware of.

14 Q. Have you seen any?

15 A. Not before that date.

16 Q. Pardon me. In any of the documents that
17 we've seen, have you seen any written communication
18 from Janet Mayfield that's dated before April 2nd,
19 2001?

20 A. No.

21 Q. Did she complain to you before you left on
22 April 2nd, 2001, about any unauthorized transactions
23 in her account?

24 A. No.

25 Q. Did you have conversations with her between,

1 let's say, the time you advised Lori Mayfield about
2 the problem with her account, and when you left on
3 April 2nd?

4 A. Yes.

5 Q. Were those in connection with trades in the
6 account?

7 A. Yes.

8 Q. Did she make any complaint to you in those
9 conversations about unauthorized transactions in your
10 account?

11 A. No.

12 Q. In her account.

13 Were you discharged by Morgan Stanley?

14 A. I was specifically discharged by Douglas
15 Stone, the compliance person in San Francisco, Dean
16 Witter office.

17 Q. Did you have benefits that you lost as a
18 result of being discharged?

19 MR. BINGHAM: Objection.

20 ALJ DION: Where are you going with this,
21 Mr. Lewis?

22 MR. LEWIS: You have to decide -- he's not
23 denying that he did something that's contrary to the
24 rules, regulations, et cetera. You have to decide
25 what the penalty should be. And this has to do --

1 he's been severely penalized already, and I think you
2 should be aware of what the economic cost to him of
3 this has been.

4 ALJ DION: I'll overrule the objection. I'll
5 listen to it, but I'm probably going to listen to it
6 more in the frame of, as a reason he would have had
7 for potentially trying to cover up the Mayfield
8 situation. I'm going to take that into consideration
9 because outside factors, what happened in regards to
10 what should happen to him, aren't as applicable.

11 But I will listen to it because I am
12 interested because that might have been something
13 Mr. Merrill knew when going to Mr. Cajero. So what
14 were some of those benefits?

15 Q. (BY MR. LEWIS) What were the benefits that
16 you lost as a result of being discharged?

17 A. As a result of being discharged, I lost five
18 years of accumulated deferred bonuses, amounting to
19 approximately \$65,000. I lost all my stock options
20 that had accumulated at that time. I lost my pension
21 that was to start in November of this year. I lost a
22 deferred, it was not a bonus, it was deferred
23 compensation in that calendar year that is received by
24 financial advisors for investments such as mutual
25 funds and insurance products. They accumulate a

1 compensation that's paid out the second week in
2 December of every year. And that amounted to, based
3 on the prior year, it amounted to about \$15,000.
4 Those are the numbers.

5 The impact on me personally has been rather
6 severe, since I had approximately 300 clients, and I
7 spent many hours, many days, months talking to former
8 clients, clients who wanted an explanation as to what
9 happened and why I left the company. I don't know how
10 else to say it, it's been a very, very traumatic
11 experience for me. I even made a personal trip to see
12 some classmates of mine over in San Diego who had
13 accounts with me.

14 MR. LEWIS: I have no further questions.

15 ALJ DION: Mr. Bingham.

16 MR. BINGHAM: Thank you.

17

18

CROSS-EXAMINATION

19

20 Q. (BY MR. BINGHAM) Mr. Merrill, you testified
21 previously that you talked to Lori Mayfield the first
22 week in January 2001, when she returned from her trip.

23 A. It may have been the second week. It was
24 early January, after she returned from her trip.

25 Q. During your testimony you admitted to making

1 some unauthorized transactions in Lori Mayfield's
2 accounts; correct?

3 A. Yes.

4 Q. But you never specified which trades were
5 unauthorized, did you? Which trades were unauthorized
6 that you conducted?

7 A. Any of the trades that were made prior to her
8 leaving, in her account, with the exception of the
9 Oracle.

10 Q. Prior to her leaving for India?

11 A. Yes.

12 Q. Can you repeat your answer again, any of them
13 that were made prior to her trip?

14 A. Made prior to her trip to India in the second
15 week in December, when I made all those trades.

16 Q. But weren't the trades, a lot of trades made
17 while she was in India, on the trip?

18 A. I didn't know exactly. I had forgotten what
19 date that she had left for India, so...

20 Q. But the reason -- I'm sorry, go ahead.

21 A. The trades made in her account were in the
22 month of December.

23 Q. With the exception of, perhaps, Oracle?

24 A. Yes.

25 Q. Do you remember when Oracle was traded?

1 A. Not exactly what day, but it was in December.

2 Q. Now, you testified about a meeting right
3 after Thanksgiving with Lori. When, after that, was
4 it that you discussed any possible trades in her
5 accounts before she returned from her trip?

6 A. It was in that early 7th, 8th -- 6th, 7th,
7 8th of December, early part of December before she
8 left.

9 Q. So you discussed some of these mutual funds,
10 stocks, et cetera?

11 A. Yes.

12 Q. You mentioned that when she returned from her
13 trip, you had a telephone conversation with her soon
14 after?

15 A. That's right.

16 Q. She was upset at the trades that you had made
17 in her account without her authorization?

18 A. I wouldn't use the word upset. She brought
19 it to my attention that she had not authorized these
20 trades.

21 Q. But didn't you just testify five to ten
22 minutes ago that she was upset when she discovered
23 these trades?

24 A. I might have used that word.

25 Q. She was at least in strong disagreement;

1 right?

2 A. Yes.

3 Q. You testified a few minutes ago that these
4 unauthorized trades you made in Lori Mayfield's
5 accounts were an oversight on your part?

6 A. Yes, sir.

7 Q. Just an oversight?

8 A. It was not intentional.

9 Q. You made trades that were unauthorized in her
10 accounts that were unintentional?

11 A. Yes. We had a number of clients at that time
12 that were investing in the same assets, same
13 investments. And I knew I had spoken to her before.
14 I knew she had approved Oracle. And I went ahead, and
15 it was an oversight on my part. I did not -- I would
16 not intentionally do something, certainly, that would
17 cause my dismissal.

18 Q. You testified you had around 300 customers,
19 on the average?

20 A. Yes.

21 Q. That's a lot of customers for a broker, isn't
22 it?

23 A. No, it is not. For a new broker, yes; for a
24 seasoned broker, no.

25 Q. You're a seasoned broker?

1 A. I had been with the company over seven years.

2 Q. Seasoned brokers take notes on what their
3 clients authorize, don't they?

4 A. They may.

5 Q. Shouldn't they?

6 A. Whenever -- in regards to a trade, yes.

7 Q. You didn't take any notes regarding Lori
8 Mayfield not authorizing you to make these trades, did
9 you?

10 A. No.

11 Q. You're an honest person, aren't you?

12 A. Yes, sir.

13 Q. You would not do anything to deceive anybody,
14 would you?

15 MR. LEWIS: I didn't hear the question.

16 MR. BINGHAM: You would not do anything to
17 deceive anyone.

18 MR. LEWIS: Thank you.

19 THE WITNESS: No, sir.

20 Q. (BY MR. BINGHAM) Isn't being a broker about
21 making money for your customers? Isn't that what it's
22 mostly about?

23 A. That's exactly what it's about.

24 Q. You've got to make money for your customers?

25 A. You have to try. You don't have control over

1 everything, but you have to try to achieve their
2 financial objectives and to service their accounts and
3 their interests.

4 Q. If you don't make money, you probably won't
5 stay their broker long, will you?

6 A. That's right.

7 Q. You talked about investment objectives. You
8 want to meet their investment objectives; correct?

9 A. Yes.

10 Q. Is meeting a customer's investment objectives
11 putting all their eggs in one basket?

12 A. No.

13 Q. A broker shouldn't do that, should they?

14 A. No.

15 Q. A broker shouldn't put even most of the eggs
16 in one basket, should they?

17 A. The final decision is up to the client.

18 Q. Who has expertise typically, the customer or
19 the broker?

20 A. Sometimes the client has more expertise than
21 the broker. In most cases, the broker has the
22 expertise, and that's why the client has an account
23 with them.

24 For various reasons in Sun City, people have
25 brokerage accounts because they did not want to handle

1 their money. They want advice from other people.

2 Q. Beatrice DuChene was a very inexperienced
3 investor, wasn't she?

4 A. She had an account and had been investing for
5 a long time when I got her account. Certainly longer
6 than I had been in the business.

7 Q. Viola Brotherson?

8 A. She too had an account. She was not a new
9 investor.

10 Q. Sylvia Hays?

11 A. Same thing.

12 Q. Let's start with Exhibit S-49. This exhibit
13 consists of a total of three pages, Mr. Merrill.
14 Please review those pages and let me know when you're
15 done.

16 A. I'm familiar with them, sir.

17 Q. You provided these documents to the
18 Securities Division, didn't you?

19 A. Yes.

20 Q. The first page is your resume. Let's look
21 under education. You list there MBA finance,
22 University of Southern California, Los Angeles. See
23 that?

24 A. Yes, sir.

25 Q. You don't have an MBA from USC, do you?

1 A. I have a master's.

2 Q. Do you have an MBA from USC?

3 MR. LEWIS: May he answer the question, Your
4 Honor.

5 MR. BINGHAM: It's a yes or no answer.

6 MR. LEWIS: Pardon me. May the witness
7 answer the question without interruption from
8 Mr. Bingham?

9 ALJ DION: He can answer the question without
10 interruption from Mr. Bingham in the same fashion he
11 can answer without interruption from you, Mr. Lewis.
12 I understand that, but we're going to conduct
13 ourselves in an orderly fashion, and we will do that.

14 Mr. Bingham, if you have another question or
15 if you want to follow up on that, that's fine. But if
16 you want to tailor your question so that it is a more
17 implicit yes or no answer, that's also fine, too. So
18 I'm going to let the witness answer the question.

19 MR. BINGHAM: I'll re-ask it, Your Honor.

20 ALJ DION: I'll listen to what he has to say.

21 Mr. Merrill -- I'm going to ask the question
22 after you ask that question anyway, Mr. Bingham.

23 Mr. Merrill, the question was do you have an
24 MBA from University of Southern California. What is
25 your answer, sir?

1 THE WITNESS: No. Can I explain?

2 Q. (BY MR. BINGHAM) You do have a master of
3 science in systems management from USC, don't you?

4 A. Yes, I do.

5 ALJ DION: I'm going to answer your question
6 right now, Mr. Merrill, since you kind of threw it out
7 there. Mr. Lewis is going to have the opportunity,
8 where things that Mr. Bingham, you think that I should
9 know through Mr. Bingham's questions, Mr. Lewis can
10 ask you those questions. Okay?

11 THE WITNESS: I understand, sir.

12 Q. (BY MR. BINGHAM) Now, towards the bottom,
13 there's a section that's labeled my professional
14 philosophy. Do you see that?

15 A. Yes, sir.

16 Q. Will you please read that.

17 A. To provide financial assessments and informed
18 investment recommendations consistent with the
19 personal objectives of each client, to ensure
20 responsive service based on honesty and respect.

21 Q. You handed a copy of this resume to each
22 prospective customer, didn't you?

23 A. I'd say yes.

24 Q. The last page lists just client services that
25 you can provide; correct?

1 A. Yes.

2 MR. BINGHAM: Your Honor, I move that S-49 be
3 introduced into evidence. I don't think this has been
4 admitted yet. Maybe it has, but I'm not showing it as
5 having been admitted.

6 ALJ DION: And I'm looking at my list.

7 Q. (BY MR. BINGHAM) Mr. Merrill, you also
8 testified, I believe yesterday, about some training
9 that you had with Dean Witter when you started the
10 company.

11 A. Yes.

12 Q. That training included diversification of
13 portfolios for clients; correct?

14 A. Yes.

15 Q. Training -- I'm sorry. Suitable investments
16 for particular customers?

17 A. In a general sense, yes.

18 Q. You also covered variable annuities as part
19 of your training; right?

20 A. Absolutely, yes.

21 Q. What are some factors that you look at in
22 determining whether variable annuity is suitable for
23 an individual or not?

24 A. Do they have existing annuities, how long
25 have they had them, do they have money that they would

1 not like necessarily to be constantly paying tax on,
2 would they like to defer taxes, and would they
3 primarily like to have the peace of mind of a
4 guaranteed death benefit for their children and
5 beneficiaries, and do they also want to perhaps invest
6 in an asset that has potential for a capital
7 appreciation.

8 Q. Age is also a factor?

9 A. Variable annuities are sold to people of all
10 ages. If a person is young and does not have a 401(k)
11 plan, a variable annuity is a suitable investment.

12 Q. I'm sorry, if the person is what age?

13 A. Young and is working, and does not have
14 access to a typical 401(k) type retirement program,
15 then a variable annuity is that vehicle.

16 Q. For a young person?

17 A. It could be.

18 Q. What about for a retired person that's in
19 their 60s?

20 A. If you went to Sun City, you would find lots
21 and lots of people of all ages with variable
22 annuities.

23 Q. Someone in their 70s?

24 A. Yes.

25 Q. 80s?

1 A. Yes.

2 Q. Don't you also look at the overall finances
3 of the individual?

4 A. That would be a consideration.

5 Q. You would consider 75 years of age well into
6 someone's retirement, wouldn't you?

7 A. Well into someone's retirement?

8 Q. Yes.

9 A. It could be. People are living longer and
10 people are working longer nowadays.

11 Q. Mr. Merrill, you also testified a number of
12 times on direct examination that many of your
13 customers trusted you?

14 A. Yes.

15 Q. Many of them did not know the difference
16 between a stock and a bond?

17 A. Yes.

18 Q. Many of them relied on your financial
19 expertise?

20 A. Yes.

21 Q. A lot of them were just not astute as to the
22 stock market?

23 A. That's true across the country, yes, sir.

24 Q. Quite often when you would talk to a new
25 client, or even existing client, you write down their

1 investment objectives on a note pad, wouldn't you?

2 A. It would be included in the -- on a new
3 account form, and any discussion we had along those
4 lines, I would probably also write it down in my
5 notes.

6 Q. And that was in a green spiral notebook?

7 A. For the most part, yes.

8 Q. If it wasn't, then was it on a memo page?

9 A. It was in another type of diary that I was
10 using at the time.

11 Q. What type was that?

12 A. It was just a diary. It was a spiral note
13 pad, notebook. At one time I was using brown ones,
14 but for quite a long time, I was using like a 5-by-7
15 spiral notebook, yellow pages.

16 Q. That notebook, along with other similar
17 notebooks, were turned in to Dean Witter after the end
18 of each calendar year?

19 A. Yes.

20 Q. And that was the policy of Dean Witter?

21 A. Yes.

22 Q. Same for Morgan Stanley?

23 A. Yes.

24 Q. Any other notes you had taken were turned in;
25 correct?

1 A. If there were notes that I had taken based on
2 communication or contact with a client, and I had in
3 front of me a printout of their statement, I might
4 have made notes, particularly relevant to a trade. I
5 would have made notes on that statement which I could
6 then file in their personal folder, so that if any
7 discussion came up subsequently, I could pull that
8 out, because the spiral notebook was chronological and
9 it's very hard to go back in time and say, well, what
10 I did a couple of months ago with respect to a given
11 client. But I did have notes relative to specifically
12 trades in the personal folder of each client.

13 Q. Those are kept by Morgan Stanley?

14 A. When I left, yes.

15 Q. A lot of notes concerning clients' investment
16 objectives were thrown away, weren't they? When I say
17 thrown away, I'm referring to thrown away by you.

18 A. They weren't thrown away. The answer is no.

19 Q. Were any of those notes concerning investment
20 objectives of customers thrown away by you at anytime?

21 A. No. I have no recollection of ever throwing
22 away that type of documentation.

23 Q. Do you remember on November 27th, 2001, you
24 came to the Securities Division's office for an
25 examination under oath?

1 A. Yes.

2 Q. I was present there?

3 A. Yes.

4 Q. Mr. Lowe, I believe, was also present there?

5 A. Yes.

6 Q. There was a court reporter present?

7 A. Yes.

8 Q. The court reporter took down everything that
9 was said during that interview?

10 A. Yes.

11 Q. I bring your attention to Exhibit S-52. Go
12 to page 61.

13 A. Okay.

14 Q. Starting with Line 3, I asked you if you
15 noted on note pads the investment objectives.

16 MR. LEWIS: Can you read that correctly,
17 please, Mr. Bingham?

18 MR. BINGHAM: Hmm?

19 MR. LEWIS: I'm asking you if you could read
20 it correctly to the witness instead of paraphrasing.

21 Q. (BY MR. BINGHAM) Line 3, the question. You
22 mentioned that you noted on note pads the objective
23 investments in your clients?

24 MR. LEWIS: Of your clients.

25 MR. BINGHAM: Of your clients; is that

1 correct? Mr. Merrill, will you read the answer
2 starting on Line 6.

3 THE WITNESS: I had it written down, as I
4 said, but it -- on paper that has probably long since
5 been thrown, thrown, thrown away.

6 Q. (BY MR. BINGHAM) Next line I asked you where
7 those papers were kept. Your response was, in your
8 briefcase or in your files at work; correct?

9 A. Yes.

10 Q. Then you said that you left some things with
11 Dean Witter; correct?

12 A. Everything I left with Dean Witter.

13 Q. Starting on Line 17, I asked you: Did you
14 record anywhere else the personal investment
15 objectives of your clients other than on those note
16 pads? Your response was no, sir; right?

17 A. Yes.

18 Q. Then I asked you did you refer to anything
19 provided by Morgan Stanley Dean Witter which might be
20 documents of any sort in determining what the personal
21 investment objectives of your clients were. Your
22 answer was?

23 A. No, sir.

24 Q. And didn't you also add that it was not
25 required by Dean Witter?

1 A. The personal investment objectives were
2 documented on the new account form as well as on
3 personal notes that I had.

4 Q. I'm asking you, starting on Line 25, Page 61,
5 your answer was no, sir, was not, nothing was
6 required; is that correct?

7 A. Nothing was required, but I did it.

8 Q. The next, on Page 62 that paragraph
9 continues. And again you said that there was no form
10 or anything else that was required by Dean Witter;
11 correct?

12 A. There was no record that was formally
13 required, with the exception of identifying the
14 financial objectives on the new account form.
15 Anything else that I recorded, I recorded because it
16 was appropriate to record it. I needed it for
17 information, and I recorded it on the note pads that I
18 had.

19 Q. Which some of them you threw away?

20 A. I did not throw them away.

21 Q. Sir, let's go back to page 61.

22 A. It says they were thrown away, but I didn't
23 throw them away. We could not find them in the Dean
24 Witter office in Sun City, and a lot of them --

25 Q. Hold on. I'm asking questions.

1 Starting on Line 6, ending on Line 8, it
2 says, your answer was: But it's on paper that has
3 probably long since been thrown, thrown away.

4 You're claiming now that you didn't throw
5 those away?

6 A. No.

7 Q. You're claiming that someone else at Dean
8 Witter threw those away?

9 A. I was not allowed to keep my records of my
10 clients. I left the company, they had the records.
11 And all -- and from year to year, the records in
12 spiral note pad form were collected up, and to my
13 knowledge, they were sent back to the World Trade
14 Center for archiving. That's where I would have
15 personally written down financial objectives and any
16 other information related to a client.

17 Q. Who told you they were sent back to the World
18 Trade Center?

19 A. That was a company procedure. The head
20 secretary went around in December of every year and
21 collected daytimers, calendars, whatever the broker
22 personally wanted to use as a record. And later on
23 people were doing it on their computers, so the --
24 they would download it to a disk, and then that disk
25 was given to the secretary to send back to New York.

1 Q. Did you keep notes on computer?

2 A. I kept some notes on my computer, yes.

3 Q. Did you keep any notes on the computer
4 concerning Beatrice DuChene, Viola Brotherson, Lori or
5 Janet Mayfield, or Sylvia Hays?

6 A. I do not recall.

7 Q. Did you request any notes from Morgan Stanley
8 when you went there to their branch office a few
9 months ago?

10 A. Yes, we requested documentation that they had
11 related to my documentation that I had left there, and
12 they were able to provide us.

13 Q. They provided you with documentation?

14 A. Some small amount of documentation. I had,
15 as I said before, two oak cabinets, four drawers each,
16 that comprise my total records of my clients.

17 Q. Was that kept in your office?

18 A. Yes.

19 Q. Mr. Merrill, going back to this answer about
20 these documents being thrown away, you didn't specify
21 that Dean Witter or someone at Dean Witter threw them
22 away, did you?

23 MR. LEWIS: I object, Your Honor. He wasn't
24 asked. He wasn't asked this question.

25 ALJ DION: He also wasn't asked if he threw

1 it away. He volunteered that information.

2 Your answer didn't mention Dean Witter, did
3 it, Mr. Merrill? It's apparent on its face. You
4 didn't mention Dean Witter, did you?

5 MR. BINGHAM: I can't hear the question.

6 ALJ DION: Didn't mention Dean Witter or
7 Morgan Stanley. He didn't talk about it.

8 MR. LEWIS: Except in the next question.

9 ALJ DION: The next question talks about --

10 MR. LEWIS: Line 12.

11 ALJ DION: Right, Line 12, he talks about
12 retaining anything that he retained were left with
13 Dean Witter. Things that are thrown away aren't
14 generally retained.

15 But in any event, Mr. Merrill, it's your
16 contention that, on Line 6, that if items were thrown
17 away, they were thrown away by someone else, not you?

18 THE WITNESS: That's correct. I had a
19 reputation for --

20 ALJ DION: We can move on, Mr. Merrill.

21 Q. (BY MR. BINGHAM) Didn't you retain the
22 investment objectives of all your clients in your
23 head? In other words, if I told you a name of one of
24 your customers, you could tell me what their
25 investment objectives were?

1 A. I probably could.

2 Q. Probably?

3 A. For many of them.

4 Q. What about for the customers that have
5 testified in this hearing?

6 A. Yes.

7 Q. All of them?

8 A. Yes.

9 Q. Have new account forms always had investment
10 objectives?

11 A. As long as --

12 MR. LEWIS: Pardon me, I was going to object
13 to the form of the question. I don't have any from
14 1900 or 1890.

15 MR. BINGHAM: I'll rephrase it.

16 Q. (BY MR. BINGHAM) While you were with Dean
17 Witter and later Morgan Stanley, did the new account
18 forms that you used always include a section for
19 investment objectives?

20 A. Yes.

21 Q. Please turn to Page 69.

22 A. Okay.

23 Q. Now, you didn't update investment objectives
24 very frequently, did you?

25 A. I always ask the client, if I had a new

1 client that had been transferred to me with an
2 existing account, whether or not the financial
3 objectives were consistent, and I would not update
4 them if her answer was yes.

5 Q. What about with existing customers, you
6 didn't update their investment objectives often, did
7 you?

8 A. I did in some cases.

9 Q. What about with the individuals who have
10 testified in this hearing?

11 A. No, no. The individuals who had something
12 significant go on in their life.

13 Q. So the answer was no?

14 A. Not with the clients you mentioned. The
15 answer is no.

16 Q. Which are the clients who testified in this
17 hearing?

18 A. That's right, the answer is no.

19 Q. On Page 69, Line 8, I asked you: Did new
20 account forms have investment objectives on them?
21 Line 10, your first answer was: I would say no. Is
22 that correct?

23 A. That was a misstatement on my part. I
24 think -- you used the word investment, and when you
25 say the word investment, I think of assets, you know,

1 what assets you might want to have the client in or
2 were already in, and that would not be reflected on --

3 Q. I asked you a question. Yes or no. Was that
4 your response or not on that page?

5 A. It was an incorrect response.

6 Q. But it was your response?

7 A. Yes.

8 Q. And you were testifying under oath at the
9 time?

10 A. Yes.

11 Q. Let's talk a little bit about suitability.
12 When you determined suitability, the customer's health
13 should be taken in consideration; right?

14 A. Health?

15 Q. Yes.

16 A. It would be a consideration.

17 Q. Wouldn't it be an important consideration?

18 A. That would be up to the client.

19 Q. What about their financial resources?

20 A. Definitely.

21 Q. If you don't have information on the
22 financial resources on someone, it's okay, then, to
23 put them in aggressive investments as long as they
24 consent to it?

25 A. We're trained to always get the client what

1 they want and what was appropriate and recommended for
2 that particular client, based on many objectives that
3 you discuss, many considerations.

4 Q. So my question was if you have a customer who
5 perhaps tells you they want aggressive income or
6 aggressive growth securities in their portfolio, it's
7 all right to go along with that, as long as that's
8 what they've told you, regardless of what their
9 resources are?

10 A. If it's a financial objective, and it's what
11 they wanted, there are many times I would enter a
12 trade, but it would be unsolicited, and I would
13 recommend to them whether it was appropriate for them
14 or not. But the client has the final say so.

15 Q. So if you felt it was inappropriate for them,
16 you didn't document to your --

17 A. Yes, I did.

18 Q. I haven't finished the question.

19 If you felt that it was inappropriate for the
20 client, then you didn't document your discussion with
21 the customer about your opinion regarding the
22 inappropriateness of that transaction?

23 A. No, I would.

24 Q. Where?

25 A. I would document. We had a form, and we had

1 a form that we had to fill out if it was an
2 unsolicited trade. And if the client still wanted to
3 go ahead with it, and we considered it to be not in
4 their best interests, they had to basically release us
5 from the liability, if you will, and sign -- they sign
6 that unsolicited trade document.

7 Q. You didn't fill any of those for Beatrice
8 DuChene, did you?

9 A. No.

10 Q. Viola Brotherson?

11 A. No.

12 Q. Lori or Janet Mayfield?

13 A. No.

14 Q. Sylvia Hays?

15 A. No.

16 Q. During that examination under oath that we
17 discussed, didn't you tell me that to you, aggressive
18 income was anything other than conservative income
19 investment, such as money market, CDs, treasuries and
20 investment grade bonds?

21 MR. LEWIS: Pardon me, sir, this is 100
22 some-odd pages.

23 MR. BINGHAM: Let me be more specific.

24 MR. LEWIS: May I make my objection? I'm
25 objecting to the form of the question. It's a

1 140-page document. I don't think the witness has
2 memorized it. And to say didn't you tell me in this
3 examination something, is unfair, and I object to the
4 form of the question.

5 ALJ DION: If he recalls, then he can answer
6 that question; if he can't, then he needs to refresh
7 his recollection, and we'll certainly give him that
8 opportunity.

9 Can you recall that conversation,
10 Mr. Merrill?

11 THE WITNESS: Could you rephrase the
12 question?

13 Q. (BY MR. BINGHAM) Yes. During this
14 examination under oath that was conducted with you on
15 November 27th, 2001, which, by the way -- let me back
16 up a little bit.

17 This examination under oath is Exhibit 52. I
18 assume that you've read through this transcript
19 already?

20 A. Yes.

21 Q. And as you read through it, it is, as far as
22 you can tell, accurate, to the best of your knowledge?

23 A. It is an exact recording, the best I can
24 recall, of my testimony.

25 Q. Now, during this examination under oath

1 didn't you define aggressive income as anything other
2 than conservative income investments such as money
3 markets, CDs, treasuries, investment grade bonds?

4 A. I don't recall saying that specifically.

5 Q. Let's go to page 99. Again, this is in
6 Exhibit S-52.

7 Starting on Line 16, the question I posed to
8 you was: Describe to me what the term aggressive
9 income means to you.

10 And why don't you read your answer starting
11 on Line 18, and ending on Line 20.

12 A. Investing in something other than CDs,
13 treasuries, investment grade bonds, I guess anything
14 other than that, certainly some.

15 Q. Okay. Then I asked another question, I guess
16 I interrupted you, and I said I'm sorry, did you say,
17 will you rephrase what you just said so that I can be
18 clear as to what your definition is.

19 Then you answered again, and let me have you
20 read starting on Line 24 on Page 99, and continuing
21 through Line 3 on Page 100.

22 A. Well, anything that is not considered to be a
23 conservative income investment, which would be money
24 markets, CDs, anything below investment grade ranked
25 preferred stocks. Anything other than that would

1 probably fall in the category of aggressive.

2 Q. So anything below investment grade, preferred
3 stocks would be considered aggressive income; correct?

4 A. Yes, because you're investing your money
5 in --

6 Q. No, I'm asking you a question.

7 MR. LEWIS: He's answering the question.

8 ALJ DION: And it's the form of the question.
9 If you want him to answer the question in a yes or no,
10 then phrase it that way, Mr. Bingham. You can simply
11 do that, isn't it true, however you want to do it.

12 But in any event, Mr. Merrill, go ahead and
13 answer the question. We're talking about investment
14 grade stocks.

15 MR. LEWIS: Preferred stocks.

16 THE WITNESS: Investment grade ranked
17 preferred stocks. Preferred stocks are stocks that
18 people invest in in order to gain quarterly income.
19 And those stocks are issued by a specific company, so
20 you are concentrating your money and giving it to a
21 specific company. Now, many preferred stock --

22 MR. BINGHAM: I'm going to object to that
23 long narrative answer. I'll rephrase the question if
24 I need to.

25 MR. LEWIS: Excuse me, sir.

1 ALJ DION: Mr. Merrill, I got it.

2 As I recall the question, it was anything
3 below investment grade preferred stocks are considered
4 aggressive income.

5 THE WITNESS: Right.

6 ALJ DION: As far as the explanation as to
7 what is an investment grade preferred stock, I do not
8 recall that question being asked. I recall we were
9 asking for your definition about what you considered
10 to be an aggressive income.

11 At this point, Mr. Bingham, go ahead and
12 state your question again. And I'm going to let
13 Mr. Merrill answer it, but we're starting to get a
14 little bit far afield by starting to define some of
15 these things. It might be necessary to define them,
16 but I think it was just kind of give us the category
17 you're talking about.

18 Mr. Bingham.

19 Q. (BY MR. BINGHAM) According to the definition
20 you gave here, which is included on Page 99 and 100,
21 it was your opinion, then, that anything below
22 investment grade ranked preferred stocks is aggressive
23 income; correct?

24 A. Yes.

25 Q. And according to the definition you gave on

1 Line 19 of Page 99 -- I'm sorry, on the definition you
2 gave for aggressive income, starting on Line 18
3 through Line 20 on Page 99, was anything other than an
4 investment grade bond fund was, in your opinion, at
5 least the opinion that you gave at that time,
6 aggressive income.

7 A. Yes, that's what I said.

8 Q. According to this definition you gave in the
9 examination under oath, wouldn't the high-yield bond
10 fund be aggressive income?

11 A. No.

12 Q. The high-income fund?

13 A. No.

14 Q. The high-income fund or the high-yield fund
15 that we've talked so much about didn't have many, if
16 any, investment grade bonds in them, did they?

17 A. They had some.

18 Q. Predominantly they were what I'll refer to as
19 below investment grade bonds?

20 A. Yes.

21 ALJ DION: Mr. Bingham, are you going to --
22 do you have more on this subject, or is this a good
23 stopping point?

24 MR. BINGHAM: Yes.

25 ALJ DION: Why don't we do that, we'll take

1 our first break in the morning, then we'll go till
2 five after 11:00, is when we'll start. And we'll
3 probably go into the lunch hour, 12:15 and take our
4 lunch somewhere around there. So we won't -- I'd like
5 to get as much done as we can today.

6 MR. BINGHAM: Your Honor, can I -- I don't
7 mean to interrupt, but while I'm thinking about it, I
8 want to move S-52 into evidence.

9 ALJ DION: Okay. S-52 is the examination
10 under oath of Mr. Merrill, for the record.

11 Mr. Lewis.

12 MR. LEWIS: We have discussed this
13 previously. The problem that gives me is that I've
14 got to go through this whole thing with him, then, and
15 discuss with him every aspect of it. Certainly,
16 Mr. Bingham can use it for cross-examination, but to
17 place the burden on me to go through will take a day
18 to go through here and discuss the meaning of
19 everything that's in here.

20 If you're going to admit this in evidence,
21 I've got to approach this from the standpoint is there
22 evidence, are there things said in here that need to
23 be explained. And if he hasn't asked the question on
24 cross-examination, you leave me, if this is admitted
25 in evidence -- I don't see why this has to be

1 admitted. If he wants to use it, use it for any
2 purpose he wants. He can ask -- he can cross-examine
3 on it. He's not prohibited from doing that. But to
4 admit this document into evidence, that creates a
5 necessity for me to go through and explain things in
6 here that need explanation.

7 As you've already seen, there are things that
8 do need explanation. He's asked him about it and I
9 will ask him to explain it. But there are others that
10 he hasn't yet, and that's going to create a
11 tremendous -- it's impractical, is what I'm saying.
12 It's just not practical.

13 ALJ DION: Well, irrelevant is one thing and
14 practical is another thing.

15 Mr. Bingham, I'm assuming you want this in
16 evidence; you've asked for that. You pointed out
17 specific pages, 62, 9, 100, et cetera, and if you want
18 to move those specific pages in, then it might move
19 the hearing along.

20 However, if there are other things in this
21 that you want me to consider, I'll certainly do it.
22 At this rate, in this hearing, saving time has kind of
23 run out the window. We've been doing this for two
24 weeks. Another day, although it's burdensome on
25 everyone, if that's the appropriate thing to do, we'll

1 certainly do it.

2 MR. BINGHAM: Your Honor, this has been an
3 exhibit for months in this case.

4 ALJ DION: Absolutely. I completely
5 understand that. I'm just asking you that question.
6 If you want the entire thing admitted, then that's --
7 and you want me to consider it, that's certainly
8 appropriate. I mean, the objection isn't relevancy or
9 hearsay or an evidentiary objection. It's just simply
10 this is a voluminous objection, which I'm going to
11 tell you, I won't sustain. It's perfectly admitable,
12 it's all the things you've said.

13 I'm just asking you if there's information in
14 there that you wish me to consider, then it might be
15 more expedient to do those pages, but it's entirely up
16 to you -- that suggestion is up to you, sir.

17 MR. BINGHAM: Your Honor, at least for now,
18 let me move for admission of the pages that we've
19 reviewed, and then --

20 MR. LEWIS: I have no objection to that.

21 ALJ DION: And that was pages -- we'll have
22 to go back.

23 MR. LEWIS: 69, 99 and 100.

24 MR. BINGHAM: I think 60 and 61, let me
25 check.

1 MR. LEWIS: It started with 61, Line 17.
2 61, 69, 99 and 100.

3 ALJ DION: 61, 62.

4 MR. BINGHAM: 61, 62, yes. If I can just
5 have a minute to review my notes.

6 (Brief pause.)

7 MR. BINGHAM: 69.

8 ALJ DION: 61, 62, 69, 99 and 100.

9 MR. BINGHAM: Yes.

10 MR. LEWIS: 61.

11 ALJ DION: 61, 62, 69, 99 and 100 were the
12 five pages.

13 MR. LEWIS: I have no objections.

14 ALJ DION: Those five pages will be admitted
15 into the record.

16 Mr. Bingham, I want it clear if you want any
17 of the other admitted into the record, I'm not trying
18 to be obstructionist to that. It's clearly admitable.
19 It's just if it's something that I don't need to
20 consider or gets to the point that it's duplicative,
21 then it's probably best that we don't have to go
22 through it all.

23 But again, I want to be clear that the
24 objection is merely a time saving efficiency objection
25 rather than an evidentiary objection.

1 MR. BINGHAM: Right. And I may move for
2 admission of other pages into evidence also.

3 ALJ DION: Okay. I just want that clear on
4 the record, that I'm not -- I am not sustaining that
5 objection.

6 Based on that, now, we'll get back here at
7 11:15, and we'll go through the noon hour probably
8 till like 12:30 or something in that area, and try to
9 accomplish as much as we can.

10 Mr. Bingham, based on what's happened this
11 morning, do you have a better time frame for me as to
12 how much longer?

13 MR. BINGHAM: Probably, I'm guessing three
14 hours, Your Honor.

15 ALJ DION: From the time we start up again?

16 MR. BINGHAM: Yes, because I've got a lot of
17 material I've got to cover.

18 ALJ DION: So that will put us somewhere
19 around 3:00, with two hours for redirect, if
20 appropriate.

21 MR. LEWIS: At this moment, I don't know that
22 I'll need that much.

23 ALJ DION: That's fine. All right, then,
24 we'll see everybody at -- in 15 minutes.

25 (A recess ensued.)

1 ALJ DION: Mr. Bingham, go ahead.

2 Q. (BY MR. BINGHAM) Mr. Merrill, could you
3 refuse to transact a trade that customers wanted
4 executed if you thought in your opinion it was very
5 unsuitable for that customer?

6 A. Yes.

7 Q. Have you ever done that with any customer?

8 A. Yes.

9 Q. Did you do that with of the customers that
10 have testified in this hearing?

11 A. In --

12 Q. Let's switch to mutual funds. Mutual funds
13 are a long-term investment, in your opinion, aren't
14 they?

15 A. The answer to that question is according to
16 the New York Stock Exchange, the average mutual fund
17 is held 33 months.

18 Q. In your opinion, should a mutual fund be held
19 long-term or short-term?

20 A. It depends on the fund. If it's losing
21 value, you want to get out of it.

22 Q. But if it's making money you want to stay in
23 it?

24 A. If it's making money.

25 Q. Isn't the standard definition -- I'm sorry.

1 Isn't the standard determination for how long
2 a person should be in a mutual fund three to five
3 years?

4 MR. LEWIS: Object to the form of the
5 question. I don't know what a standard definition is.

6 ALJ DION: What are you referring to,
7 Mr. Bingham?

8 MR. BINGHAM: Your Honor -- you remember the
9 examination under oath that we've discussed?

10 THE WITNESS: Yes, sir.

11 Q. (BY MR. BINGHAM) Do you remember being asked
12 whether or not a mutual fund is a long-term
13 investment, in your opinion?

14 A. I have to check to see.

15 Q. Tell you what, let's look at Page 79 of the
16 transcript of the EUO. Starting on Line 18 of
17 Page 79. This is Exhibit S-52.

18 A. I have it.

19 Q. I asked you: Are mutual funds, in your
20 opinion, a long-term investment or short-term
21 investment. Your response was what?

22 A. They're a long-term.

23 Q. Then I asked you the question: When you say
24 long-term, how many years are you referring to? And
25 your answer was what?

1 A. Generally, three to five.

2 Q. No, let's read word for word your answer.

3 A. Three to five

4 Q. Not generally, right? Your answer was three,
5 comma, five; correct?

6 A. Yes.

7 Q. And that was your opinion that you gave at
8 that point in time?

9 A. At that time.

10 Q. Has your opinion changed since then?

11 A. No, it's fairly consistent with the data from
12 the New York Stock Exchange. But again, it depends on
13 the individual fund.

14 Q. Did you explain that in your answer --

15 A. You didn't ask.

16 Q. -- that you gave here on Page 79?

17 A. No, sir.

18 Q. Let's go to Page 86. Starting on Line 14, my
19 question was: And that reminds me, before we took the
20 break, I had asked you what your definition of
21 long-term was in reference to mutual fund investments,
22 and you said to go something to the effect of three,
23 five, when you, then your answer was I think that's
24 considered a standard definition.

25 A. That's what I've heard.

1 Q. Then on Line 23, your answer was three to
2 five years and obviously longer; is that correct?

3 A. That's what it says.

4 Q. Is that the testimony that you gave?

5 A. Yes.

6 MR. BINGHAM: Your Honor, I'm going to move
7 for admission of Pages 79 and 86 into evidence.

8 ALJ DION: Any objection?

9 MR. LEWIS: No.

10 ALJ DION: No objection, those will be
11 admitted..

12 Q. (BY MR. BINGHAM) Let's talk a little bit
13 about Beatrice DuChene now. I believe you testified
14 previously that Beatrice was not, did not have any
15 expertise in investing, in your opinion; is that
16 correct?

17 A. She had a long time in the market, and her
18 degree of expertise was not the greatest.

19 Q. Didn't she tell you several times -- you've
20 testified that you talked to her about several
21 investments; correct?

22 A. Many times.

23 Q. And didn't she tell you a number of times
24 that she didn't know what it was, but she trusted you
25 and she had faith in you?

1 A. Yes.

2 Q. She relied upon you heavily?

3 A. She relied upon me.

4 Q. She relied upon your knowledge?

5 A. Yes.

6 Q. The subaccounts that her annuities were
7 invested in were subaccounts that you recommended to
8 her; correct?

9 A. Yes.

10 Q. She didn't choose any of those on her own,
11 did she?

12 A. She approved of my recommendations.

13 Q. But she didn't do any of the research and
14 choose any of those on her own without a
15 recommendation from you, did she?

16 A. I gave her all the information, including a
17 prospectus for each fund. We discussed the factors
18 related to that particular fund, and she went along
19 with my recommendations.

20 Q. She never told you specifically what
21 investments she wanted in her portfolio, did she?

22 A. She didn't know what was available until I
23 told her.

24 Q. In other words, she didn't say I want this
25 specific annuity from this specific company; correct?

1 A. No.

2 Q. Or I want this specific mutual fund from Dean
3 Witter?

4 A. No.

5 Q. Let's go to Exhibit R-10.

6 MR. BINGHAM: Your Honor, Page 79 and 86 of
7 the transcript was admitted into evidence, wasn't it?

8 ALJ DION: 79 and 86 were. 61, 62, 69, 79,
9 86, 99 and 100. If there's going to be more of this,
10 I'm leaning to admitting the entire document, but I'm
11 not going to consider the other pages for the truth of
12 the matter asserted, and just the pages, I think
13 that's going to be a cleaner way to do it, than simply
14 10 pages. I think that that's just going to be a
15 better way and easier for the court reporter as well.

16 A couple of pages, I'm fine with it. We're
17 now starting to get into seven pages, eight pages,
18 nine pages. So I think that's what I'm going to do,
19 is at this point, over Mr. Lewis' objection, I'm going
20 to admit S-52A. However, I will only consider the
21 pages that we talked about specifically, and I will
22 not consider the other pages for the truth of the
23 matter asserted, unless there is a further motion to
24 view that. I just think that's a cleaner way to
25 handle this. Okay.

1 Q. (BY MR. BINGHAM) Mr. Merrill, you have R-10
2 in front of you?

3 A. Yes, I do.

4 Q. Obviously, you testified about the documents
5 in this exhibit previously.

6 A. Uh-huh.

7 ALJ DION: Is that a yes, Mr. Merrill?

8 THE WITNESS: Yes.

9 Q. (BY MR. BINGHAM) Let's look at the first
10 page. There are several blank lines on that page,
11 wouldn't you agree?

12 A. What needed to be filled out was filled out.

13 Q. That was filled out by you, wasn't it?

14 A. And the client.

15 Q. Let's look at the top half of the page. See
16 the handwriting there has Beatrice DuChene's name
17 twice, with her address twice? Did you put that
18 handwriting on this page?

19 A. Yes.

20 Q. So you filled that portion in?

21 A. Yes.

22 Q. And other than Ms. DuChene's signature, you
23 filled in the other blank lines on this page that are
24 filled in, didn't you?

25 A. Yes.

1 Q. Let's go to the second page, which has a
2 Bates number of ACC 00785. You filled in the blank
3 lines on this page also, didn't you?

4 A. Yes, except for the signature.

5 Q. Correct. Let's go over to the third page,
6 Bates No. ACC 00786. Except for the signature, didn't
7 you fill in the information on the blank lines on this
8 page?

9 A. Yes, standard procedure.

10 Q. You say standard procedure. So typically,
11 you would fill in the information, take it to Beatrice
12 DuChene and have her sign it; correct?

13 A. Typically the broker would, yes.

14 Q. That's the way new account forms are
15 typically done; right?

16 A. Yes.

17 Q. Let's look now at Exhibits R-11 and 12. On
18 the third page of Exhibit R-11, which has a Bates
19 number of ACC 01623, there's some stocks listed. Do
20 you see the stocks, America On Line, Cisco Systems,
21 and Oracle Corp.?

22 A. Yes.

23 Q. Those are stocks that you recommended to
24 Beatrice DuChene; correct?

25 A. Yes.

1 Q. And those were placed in her account while
2 you were her account executive?

3 A. Yes.

4 Q. Turn to the next page. You see the bar chart
5 there?

6 A. Yes.

7 Q. And it says diversification bar chart?

8 A. Yes.

9 Q. Now, first of all, let's go to the prior
10 page. These three stocks I just mentioned are
11 categorized as aggressive stocks, aren't they, by
12 Edward Jones?

13 A. By Jones.

14 Q. Now, let's go to the next page that has the
15 diversification bar chart. According to the legend
16 for this bar chart, a solid bar shows what is
17 suggested for this particular individual; correct?

18 A. Yes.

19 Q. When I say suggested, I'm referring to
20 suggested investments in certain categories of
21 securities.

22 A. Yes.

23 Q. The bar charts with a kind of diagonal line
24 show the actual investment of this particular person
25 in that category of investments; correct?

1 A. Yes.

2 Q. You see aggressive growth?

3 A. Yes.

4 Q. See how it shows that she has between 40 and
5 50 percent of her portfolio in aggressive growth?

6 A. The portfolio at Jones, yes.

7 Q. At least for this account; right?

8 A. For this account.

9 Q. There was one other account, wasn't it there?

10 A. Yes, there was.

11 Q. The suggested range for Beatrice DuChene is
12 approximately 5 percent in aggressive growth, isn't
13 it, according to this chart?

14 A. Right, by their definition.

15 Q. That's their definition?

16 A. Their definition.

17 Q. Do you disagree with that definition?

18 A. Yes.

19 Q. Wouldn't you consider Edward Jones to be a
20 more conservative brokerage firm?

21 A. Not necessarily. Dean Witter had a
22 reputation for being conservative for many years.

23 Q. Let's go to the last page of this exhibit.

24 This is a bar chart again that is labeled stock
25 holdings by industry type bar chart. Do you see the

1 technology part of this bar chart?

2 A. Yes, I do.

3 Q. It shows that her actual investments in
4 technology are right around 100 percent for this
5 category of securities; correct?

6 A. Her stock holdings, yes.

7 Q. According to Edward Jones, isn't the
8 suggested amount of securities for Beatrice DuChene in
9 this category, which again is technology, between 10
10 and 20 percent?

11 A. Yes, according to the graph here for this
12 account. It does not bear on the total account
13 portfolio that she had with me when I was her broker.

14 Q. Looking at the third page of this exhibit, do
15 you agree that all of Beatrice DuChene's investments
16 in this account are listed on the third page?

17 A. Yes.

18 Q. Do you see any securities that would classify
19 as being technology sector securities other than
20 America Online, Cisco Systems, and Oracle?

21 A. Would you please repeat that?

22 Q. Sure. Have you seen any other securities
23 other than America Online, Cisco Systems, and Oracle
24 that you would categorize as securities in the
25 technology sector?

1 A. Washington Mutual investors fund was heavily
2 into technology issues.

3 Q. Any others?

4 A. No.

5 Q. And Washington Mutual investors was an
6 investment she had?

7 A. After.

8 Q. Right. And the current value is shown as
9 \$2,490 on this statement; correct?

10 A. Yes.

11 ALJ DION: When you say after, Mr. Merrill,
12 it's after --

13 THE WITNESS: She went to Jones.

14 ALJ DION: She no longer had a relationship
15 with you.

16 THE WITNESS: Right. I did not put her in
17 that mutual.

18 ALJ DION: That's a better way to say it.

19 Q. (BY MR. BINGHAM) Let's go to Exhibit R-12.
20 Hold on, I'm sorry, let's go back a little bit.

21 Exhibit R-11, according to the first page,
22 this investment portfolio analysis was prepared on
23 January 13th, 1999; is that correct?

24 A. Yes.

25 Q. Ms. DuChene took her accounts away from you

1 and Morgan Stanley in December of 1998; correct?

2 A. Yes.

3 Q. Now let's go to Exhibit R-12. This is a
4 portfolio analysis that was prepared on January 20th
5 1999, wouldn't you agree?

6 A. Yes.

7 Q. I'm looking at the first page of this
8 exhibit. And this is for the same account that is
9 covered by the documents in Exhibit R-11, isn't it?

10 A. Correct.

11 Q. Go to the third page of this exhibit. Under
12 aggressive stocks, aren't the same stocks listed in
13 the prior exhibit except for America Online?

14 A. Correct.

15 Q. And again, according to Edward Jones, those
16 stocks are being shown as aggressive stocks, aren't
17 they?

18 A. Yes.

19 Q. Go to the fifth page, Bates No. ACC 1631.
20 This is another diversification bar chart. Do you see
21 the actual percentage of aggressive growth securities
22 in Ms. DuChene's account according to this bar chart?

23 A. Yes.

24 Q. And it's shown as approximately almost
25 30 percent; is that correct?

1 A. Yes.

2 Q. The suggested range, according to Edward
3 Jones, is 5 percent on this chart, isn't it?

4 A. Approximately. Down below it says 0-4
5 percent.

6 Q. Go to the second to last page of this exhibit
7 which has a Bates No. ACC 01634.

8 A. Okay.

9 Q. Do you see the bars for the technology
10 section of this bar chart?

11 A. Yes.

12 Q. The actual investments that Beatrice DuChene
13 has in technology securities, according to this bar
14 chart, is approximately how much?

15 A. 78.

16 Q. According to Edward Jones, her suggested
17 range should be what, according to this bar chart?

18 A. About 16, 15, 16.

19 Q. Going back to the third page, do you see any
20 other securities that you would classify as securities
21 in the technology sector other than Oracle, Cisco, and
22 Washington Mutual investors, which I believe is the
23 one that you testified to previously that you thought
24 was in the technology sector?

25 A. No, I do not.

1 Q. According to these bar charts and these
2 analyses by Edward Jones, wouldn't you say that the
3 account executive at Edward Jones thought that
4 Beatrice DuChene was too heavily concentrated in
5 aggressive growth and technology securities?

6 MR. LEWIS: I object. I don't know how
7 that's relevant. First of all, we don't know that
8 that's what he thinks, and this isn't some computer
9 system. This man's only got a very small portion of
10 her total assets under management, and it's not
11 relevant to what Mr. Merrill is doing.

12 ALJ DION: I think you can ask the
13 question -- I'm going to sustain the objection because
14 I don't know what this man thinks. But as far as the
15 account executive from Edward Jones thinks, I don't
16 know. If you want to ask him a question on it.

17 MR. BINGHAM: I need to rephrase that, Your
18 Honor.

19 ALJ DION: Okay.

20 MR. BINGHAM: And I should rephrase that, so
21 let me do it.

22 Q. (BY MR. BINGHAM) Mr. Merrill, according to
23 these analyses that were done by Edward Jones -- and I
24 assume they were done by a computer program at Edward
25 Jones -- don't these analyses show that Beatrice

1 DuChene was too heavily concentrated in aggressive
2 growth securities and in technology securities,
3 according to these analyses?

4 A. According to these analyses, but not
5 necessarily the broker. Because he left them in
6 there.

7 Q. Let me show you what's --

8 MR. BINGHAM: Has S-54 been admitted into
9 evidence, Your Honor? I'm showing that it has not.

10 MR. LEWIS: What is S-54?

11 ALJ DION: It was an extra handout that
12 includes two pages. It's Dorothy and Beatrice
13 DuChene. It's a Kemper mutual fund, there's two
14 pages. It is a statement, year-end '95 statement,
15 therefore it covers January through December.

16 MR. BINGHAM: Your Honor, I just have one
17 page.

18 ALJ DION: I have Page 1 of 2. You're right.
19 I think I have two S-54s. Let me make sure.

20 MR. BINGHAM: Come to think of it, I think
21 there were two pages, because I think Mr. Lewis
22 requested -- I think we determined that there might be
23 a back side or a second page. If I can approach and
24 look at those two pages, it might help me.

25 ALJ DION: These two are Page 1 of 2. Both

1 of them. I don't have Page 2 of 2, which could have
2 conceivably fallen out of the binder, considering it
3 was not attached.

4 But do you have both, Mr. Merrill or Bingham,
5 or do you just have 1 of 2?

6 MR. BINGHAM: We just have Page 1. You know,
7 I don't think we have Page 2, I think that's why, and
8 we can check during lunch, but I don't think we have
9 Page 2 because I think Page 2 may have been on the
10 back side or we just did not receive it. That's my
11 recollection of this. We'll check during lunch. We
12 did have a discussion about that, I do recall.

13 ALJ DION: I recall a discussion about the
14 boiler plate that is customary on the back of
15 statements. I recall that more in the Merrill Lynch
16 area as opposed to the Kemper mutual fund.

17 I'm assuming Mr. Lewis is going to have the
18 same objection as to an incomplete document, although
19 it's interesting previously, with the examination
20 under oath, his objection was exactly the opposite,
21 but...

22 MR. LEWIS: I'm entitled to do that. I think
23 you've got my copy of S-54.

24 ALJ DION: I have two, so you're certainly
25 welcome to have one. I don't need two.

1 MR. LEWIS: Thank you.

2 ALJ DION: I'll take that admission under
3 advisement, Mr. Lewis, and we'll have a small cleanup
4 session right before lunch.

5 In any event, Mr. Bingham, did you have
6 questions about S-54 for the witness?

7 MR. BINGHAM: I do have a few questions, Your
8 Honor.

9 ALJ DION: Do you have S-54 before you,
10 Mr. Merrill?

11 THE WITNESS: No. I have 52 and 49.

12 ALJ DION: All right, Mr. Bingham.

13 Q. (BY MR. BINGHAM) Mr. Merrill, do you
14 remember earlier in the hearing there was some
15 discussion concerning the Kemper U.S. government fund
16 that Beatrice DuChene had owned at one time?

17 A. Yes.

18 Q. Do you remember seeing this document?

19 A. I vaguely recall seeing this.

20 MR. LEWIS: Pardon me, that answer, during
21 the hearing or back in 1995, did you see this?

22 THE WITNESS: No, I did not see this.

23 MR. LEWIS: Except during the hearing?

24 THE WITNESS: Except during the hearing.

25 Q. (BY MR. BINGHAM) You did see it during the

1 hearing?

2 A. Yes.

3 Q. Now, at the time that Ms. DuChene was one of
4 your customers, you recommended to her that this fund
5 be sold; correct?

6 A. Yes.

7 Q. And that some Dean Witter securities be
8 purchased?

9 A. Yes.

10 Q. Didn't the funds from the redemption of this
11 Kemper government mutual fund go into -- weren't the
12 proceeds from the redemption of this fund used to
13 purchase Dean Witter high yield?

14 A. I believe that's correct.

15 Q. Did you ask Beatrice if this Kemper
16 government fund was providing any income or dividends?

17 A. I was aware that it was. It was a government
18 fund and it would pay a monthly dividend. And I
19 thought she wanted more income, and I suggested the
20 high-yield fund.

21 Q. During 1995 it paid an average of somewhere
22 around \$420, wouldn't you say?

23 ALJ DION: For what term?

24 MR. BINGHAM: Looking at the statement.

25 MR. LEWIS: Pardon me. This statement is not

1 in evidence; we don't know where this comes from.
2 He's now asking this witness to read what's on this
3 document that's not in evidence. He's got to lay some
4 foundation for him as to whether he knows that this is
5 correct and knows that this is a valid document and so
6 forth. He can't just say here's a piece of paper,
7 what does it say.

8 ALJ DION: Mr. Bingham, go ahead and ask
9 those foundational questions, then I might have a
10 question for Mr. Merrill.

11 Q. (BY MR. BINGHAM) Mr. Merrill, did you look
12 at any statements for the U.S. government fund from
13 Beatrice DuChene's account before that fund was
14 redeemed?

15 A. Yes.

16 Q. Could this have been one of the statements
17 that you looked at?

18 A. It could have been.

19 Q. Approximately how many other statements for
20 this fund did you look at before the fund was
21 redeemed?

22 A. I probably had one statement that was --
23 which she had, that she gave to me, but I don't recall
24 what the dates were for the statement.

25 Q. Is the information on statements typically

1 accurate?

2 A. Yes.

3 Q. Do you have any reason to believe that any
4 information on this statement is inaccurate?

5 A. No.

6 Q. Was Ms. DuChene's representative at the time
7 that this account was -- I'm sorry, at the time that
8 this fund was purchased Bill Kells, according to the
9 best of your knowledge?

10 MR. LEWIS: Excuse me. We can't even tell
11 from this form who purchased it. There's two names on
12 it. They're joint tenants.

13 ALJ DION: I don't think we've even gotten to
14 that point yet. Hold on a second, Mr. Lewis.

15 ALJ DION: On this piece of paper it says
16 your representative is Bill Kells, doesn't it,
17 Mr. Merrill?

18 THE WITNESS: Yes.

19 ALJ DION: You don't know if that was her
20 representative or not, do you?

21 THE WITNESS: No, it's just a name on a piece
22 of paper.

23 ALJ DION: Okay.

24 Q. (BY MR. BINGHAM) Did you take into account
25 the income that this fund was providing before you

1 recommended to Beatrice DuChene that it be redeemed?

2 A. Yes, from the statement that I looked at,
3 which may or may not have been this one.

4 Q. Do you remember her telling you about how
5 much per month this fund was providing an income to
6 her?

7 A. No, I don't recall her telling me
8 specifically. I was gathering the information based
9 on the statement that I was looking at.

10 Q. At the time that you took over Beatrice
11 DuChene's account, was she living at 10328 West
12 Prairie Hills Circle in Sun City?

13 A. Correct.

14 MR. BINGHAM: I move for admission of S-54
15 into evidence.

16 ALJ DION: Mr. Lewis.

17 MR. LEWIS: May I ask a question on voir
18 dire?

19 ALJ DION: Sure.

20

21 VOIR DIRE EXAMINATION

22

23 Q. (BY MR. LEWIS) Mr. Merrill, did you see this
24 specific document in 1995 or 1996?

25 A. I don't recall seeing it.

1 MR. LEWIS: There's no foundation for this
2 document.

3 ALJ DION: Well, I'm going to, kind of in the
4 same vein that we talked about yesterday, we talked
5 about documents getting to Ms. DuChene at this address
6 for confirmations, other things, so based upon that,
7 on the fact that I will be considering those
8 documents, the confirms and monthly statements, and
9 Ms. DuChene's address being the same, I will admit
10 this particular piece of paper regarding Kemper mutual
11 funds as to where it stood December 31st, 1995, with
12 the understanding that it probably reached Ms. DuChene
13 at her address.

14 But really, as to the information in it,
15 there's no testimony to dispute the information. It's
16 a record, but as to the information regarding it, I'm
17 going to consider Mr. Merrill's testimony that he
18 reviewed this fund about what it was paying as far as
19 income goes, and I'm going to take that more and
20 consider that than the Kemper mutual fund statement.

21 MR. BINGHAM: Your Honor, we found the
22 original S-54.

23 ALJ DION: Is it just one page?

24 MR. LOW: Yes.

25 ALJ DION: If you can hand it to the court

00027600

1 reporter. Are you through with S-54?

2 MR. BINGHAM: Yes, I'm done.

3 ALJ DION: Mr. Merrill.

4 Thank you. Please continue, Mr. Bingham.

5

6

CROSS-EXAMINATION CONTINUED

7

8 Q. (BY MR. BINGHAM) Mr. Merrill, hasn't it been
9 your testimony during this hearing that you did not
10 consider the high-income funds and the high-yield fund
11 as aggressive income?

12 A. Aggressive income was not ever defined by
13 Dean Witter, and --

14 Q. But I'm asking you.

15 MR. LEWIS: Can he answer the question?

16 ALJ DION: No, he's going to answer the
17 question. The question was not about Dean Witter --
18 this time I'm siding with Mr. Bingham -- his question
19 was about those two funds, did you consider those
20 aggressive, did you, not Dean Witter. But maybe based
21 upon your training, did you consider those to be
22 aggressive income?

23 THE WITNESS: No, I did not.

24 Q. (BY MR. BINGHAM) When you say high-income
25 fund and high-yield fund we're referring to the Dean

1 Witter funds which later became Morgan Stanley Dean
2 Witter, then Morgan Stanley funds; correct?

3 A. That's right. And it's based on the
4 information I discussed yesterday about those funds.

5 Q. So at no time up until now have you ever
6 considered those funds to be aggressive income?

7 A. No.

8 Q. If you'll turn to Exhibit S-51 -- I'm sorry,
9 S-52, it's a transcript of the examination under oath.

10 A. Right.

11 Q. Turn to Page 101.

12 A. Okay.

13 Q. Starting on page -- starting on Line 11 of
14 Page 101, didn't you make the statement: But as far
15 as the category of high yield is concerned, I do not
16 consider that to be speculative.

17 My question was, which starts on Line 13: Do
18 you consider it to be income or aggressive income?
19 Your answer, which starts on Line 15, was: I guess
20 you could call it aggressive income, but nothing --

21 A. That's what I said.

22 Q. So doing the examination under oath, didn't
23 you say that the high-yield fund was aggressive
24 income, according to this testimony?

25 A. That's what I said under oath, yes, sir.

1 MR. BINGHAM: Your Honor, given your prior
2 ruling I don't need to move for this specific page to
3 be entered into evidence; correct?

4 ALJ DION: No. Like I said, if we make
5 reference to specific pages, I will consider them.
6 The other ones I will not consider for the truth of
7 the matter asserted.

8 Q. (BY MR. BINGHAM) Mr. Merrill, you didn't
9 keep a record of all of the telephone conversations
10 with Beatrice DuChene, did you?

11 A. No. Most of my conversations were
12 face-to-face with her, in her home.

13 Q. You didn't keep records of those face-to-face
14 conversations with her in your home, did you?

15 A. Many of them I did.

16 Q. And many of them you didn't?

17 A. I said most of them I did.

18 Q. Those were kept in the green spiral
19 notebooks?

20 A. Yes.

21 Q. Now, didn't you testify previously that you
22 remember Beatrice DuChene delivering to you a
23 notarized statement telling you to stop trading in her
24 account?

25 A. Yes.

1 Q. Let's turn -- I'm sorry.

2 Now, on direct examination, didn't you
3 testify that the only unauthorized transaction that
4 you had anything to do with involving trades made in
5 Beatrice DuChene's account was the unit investment
6 trust that automatically rolls over anyway?

7 MR. LEWIS: That misstates the testimony. He
8 didn't say the trade was in a trust. What he said, it
9 didn't have anything to do -- it was rolled over
10 automatically.

11 ALJ DION: I recall that as well. I recall
12 the testimony in the unit trust, we had such a long
13 discussion explaining to me that it was a liquid
14 asset, I remember it, that it was a situation where it
15 rolled over, not necessarily it was unauthorized.

16 Mr. Merrill, that brings up this question.
17 When you discussed that opportunity with Ms. DuChene,
18 did you explain to her that unless you acted, it would
19 roll over?

20 THE WITNESS: I did from day one when she
21 initially took out the first UIT in January of '96.

22 ALJ DION: As those came due or the date in
23 which you had to state that you no longer wanted to
24 participate in the investment trust, did you notify
25 her of that date and give her a recommendation?

1 THE WITNESS: No.

2 ALJ DION: And that was based upon your
3 understanding with her that it would automatically
4 roll over unless she did not want to do that?

5 THE WITNESS: Unless I felt for some reason
6 that we should stop the action, that I would talk to
7 her, as I did in '98.

8 ALJ DION: Okay.

9 Q. (BY MR. BINGHAM) So then it's your testimony
10 that you did not make any unauthorized trades in
11 Beatrice DuChene's accounts, sir?

12 A. That's correct.

13 Q. Not even one?

14 A. That's correct.

15 Q. Let's go to Exhibit S-50.

16 Mr. Merrill, didn't you have quite a bit of
17 correspondence with NASD concerning Beatrice DuChene,
18 Lori Mayfield, and Janet Mayfield?

19 A. I had some, yes.

20 Q. And you wrote at least three letters to the
21 NASD concerning one or all three of these individuals
22 I just named?

23 A. They asked for a response, I think in each
24 case, and I gave them a response.

25 Q. Let's look at the first two pages of Exhibit

1 S-50. Do you recognize this letter?

2 A. Yes.

3 Q. On the second page, is that your signature at
4 the bottom of the page?

5 A. Yes.

6 ALJ DION: For the record, that's ACC 01653,
7 and the preceding page is 01652.

8 Q. (BY MR. BINGHAM) I assume you drafted this
9 letter?

10 A. Yes.

11 Q. You didn't have anyone else draft it for you?

12 A. No.

13 Q. This is also an exhibit in the examination
14 under oath that was conducted with you, wasn't it? If
15 you'll look -- I'm sorry, let me back up a little bit.

16 Do you remember seeing this letter as one of
17 the exhibits in examination under oath that was
18 conducted with you in November of 2001?

19 A. If you say so, but I don't specifically
20 recall.

21 Q. Is there anything in this letter that is
22 different from the letter that you sent NASD?

23 A. No, it looks verbatim what I sent to them.

24 Q. Let's go to the first page, the paragraph
25 that's labeled 1, and then to the right of that are

1 the words, did I view the subject client's account as
2 a discretionary account. Do you see that?

3 A. Yes.

4 Q. Did you ever conduct any transactions in
5 Beatrice DuChene's accounts that were transacted when
6 she was away from home?

7 A. Not unless she gave me prior approval.

8 Q. Did she give you prior approval for some
9 transactions?

10 A. The UIT we just talked about.

11 Q. What other transactions?

12 A. I don't recall.

13 Q. Doesn't that type of discretion require a
14 written agreement between the customer and you and/or
15 Morgan Stanley?

16 A. I did not have -- there was no such thing as
17 a form that's discretionary in Dean Witter. I did not
18 have, create any form, I did not have a discretionary
19 account; it was forbidden by the company. If she gave
20 me permission to do something, like a client would
21 call in at 3:00 and give me an order to execute the
22 next day, I can't execute the order until the next
23 day.

24 Q. What kind of permission did she give you?

25 A. If we talked about a specific investment, and

1 I suggested it to her and she agreed to it, then it
2 would be executed. If she went away the next day or I
3 was not able to get in contact with her, she -- I had
4 prior approval, as I did for the rollover of the UIT.
5 It's much like a dividend reinvestment, dividends roll
6 over all the time.

7 Q. Now, the last sentence of that first
8 paragraph says, this was done with her permission
9 infrequently, and she did receive confirmations and
10 was subsequently informed of any change.

11 A. Yes.

12 Q. But you don't recall how infrequently this is
13 done now, do you?

14 A. As I say, the only time I can recall it is
15 when she was away visiting, I think her son back in
16 Detroit, was when one of the UITs rolled over. I
17 didn't know when it was going to roll over. I just
18 talked to her about the fact that if it did roll over,
19 I have no objection to it, and she said fine, and we
20 just let it roll over. I had no discretion as far as
21 time or price.

22 Q. Let's go to the next page. The last sentence
23 of the paragraph that continues on the first page
24 reads: Without her willingness to accept the
25 consolidating of these annuities, there would have

1 been no reason to initiate and carry forward a
2 relationship with this client.

3 Do you see that?

4 A. Yes, I do.

5 Q. Why were the annuities that Beatrice DuChene
6 had so important that without consolidation of those
7 annuities, there would have been no reason for a
8 relationship with her?

9 A. Her account was transferred to me, and when I
10 went to see her initially, I talked to her about her
11 existing account, her existing portfolio, what it
12 consisted of, and what she wanted to do about it. And
13 at that time she expressed a satisfaction with her
14 existing fixed annuities, which was the bulk of her
15 investments, and she said we've got to do something
16 about this, and I want you to advise me. That's when
17 I suggested moving her assets into the variable
18 annuities.

19 Q. You didn't consolidate the variable
20 annuities, did you, because there were four variable
21 annuities?

22 A. I consolidated them in terms of having one
23 company, namely Dean Witter. They could not be
24 consolidated because when you do a 1035, even though
25 you do two of them, you can't bring them into the same

1 company. They have to have some paper trail back to
2 where they came from. Therefore, you do it separately
3 for each annuity, it has its own separate account
4 number.

5 Q. There were annuities with Northbrook,
6 correct, and also one with Hartford?

7 A. Three with Northbrook, one with Hartford,
8 because that's what she wanted.

9 Q. Now, let's go to the next letter that is from
10 NASD and starts with the Bates No. ACC 1659.

11 A. Yes.

12 Q. This is a cautionary letter from the NASD;
13 correct?

14 A. Yes.

15 Q. Do you recall receiving this letter?

16 A. Yes.

17 Q. It was in response to the prior letter that
18 we just reviewed, wasn't it?

19 A. Yes.

20 Q. Is there anything in this letter that is
21 different from the letter that you received from NASD?

22 A. No.

23 Q. In the third paragraph of this letter, on the
24 first page, did the NASD find that by using your
25 judgment to make changes in Ms. DuChene's account, as

1 you admitted, you violated one of the NASD rules?

2 MR. LEWIS: You used the word admitted. I
3 don't see that in the letter.

4 MR. BINGHAM: It says account, comma, as
5 admitted, comma, you violated this rule. It's in the
6 second to the last sentence of the paragraph.

7 MR. LEWIS: I'm sorry, I'm not finding where
8 you are.

9 MR. BINGHAM: Right there.

10 Q. (BY MR. BINGHAM) Do you see what I'm
11 referring to, Mr. Merrill?

12 A. No, I don't.

13 Q. If you'll go to the third full paragraph on
14 the first page --

15 A. Okay.

16 Q. -- then look at the second to the last
17 sentence in that paragraph.

18 A. Beginning in this matter?

19 Q. Yes. You responded to that letter, didn't
20 you?

21 MR. LEWIS: To which letter?

22 MR. BINGHAM: To this letter from the NASD
23 dated May 19th, 2000.

24 THE WITNESS: I was advised by my branch
25 manager, but I disagree that I had violated any rule.

1 Q. (BY MR. BINGHAM) Let's go to the next page
2 in this exhibit, which has a Bates stamp of ACC 01661.
3 It's a letter supposedly from you dated June 2nd,
4 2000. Do you see that letter?

5 A. Yes, I do.

6 Q. Was that a letter that you sent to the NASD
7 in response to their letter dated May 19th, 2000 that
8 you just reviewed?

9 A. Yes.

10 Q. Will you please read the first paragraph of
11 that.

12 A. I have received a letter of caution sent to
13 me in connection with the above-referenced matter. At
14 the outset you should know that I take this type of
15 matter seriously, and will endeavor to prevent even an
16 appearance of this type of conduct mentioned in your
17 letter.

18 Q. Then please read the second paragraph also.

19 A. Specifically, I will consult with my
20 supervisors at any point when I become aware of a
21 situation that could arise leading to these kinds of
22 allegations raised by Ms. DuChene. I have also
23 reviewed various rules and regulations of the NASD and
24 NYSE, as well as our firm's compliance guide with
25 respect to relevant provisions, including provisions

1 such as, you know, your customer rule, discretionary
2 trading, and suitability.

3 Q. You didn't include anywhere in that response
4 letter a denial of the allegation of your admission
5 that the NASD made in their letter dated May 19th,
6 2000, did you?

7 A. No.

8 Q. Is that your signature at the bottom of the
9 letter?

10 A. Yes.

11 Q. Let's go to the next letter that is from the
12 NASD dated July 10th, 2001.

13 A. Okay.

14 Q. Do you recall receiving this letter from the
15 NASD?

16 A. Yes.

17 Q. Is it an accurate copy of the letter that you
18 received, to the best of your knowledge?

19 A. To the best of my knowledge, yes.

20 Q. Let's go to the next letter, which is dated
21 July 13th, 2001. There's a signature that's purported
22 to be yours?

23 MR. LEWIS: You mean July 31st?

24 MR. BINGHAM: When did I say?

25 ALJ DION: 13th.

1 MR. BINGHAM: Thank you. July 31st, 2001.

2 THE WITNESS: Yes, it's my signature.

3 Q. (BY MR. BINGHAM) Is that an accurate copy of
4 the letter that you sent to the NASD?

5 A. Yes.

6 Q. Did you include with that letter your written
7 response concerning Lori Mayfield's complaint and
8 Janet Mayfield's complaint?

9 A. Yes.

10 Q. You've already admitted, Mr. Merrill, that
11 you did make some unauthorized transactions in Lori
12 Mayfield's account, didn't you?

13 A. Correct.

14 Q. That was only approximately five to six
15 months after you told the NASD that you would prevent
16 even the appearance of a type of conduct mentioned in
17 your letter -- I'm sorry, let me rephrase that.

18 The unauthorized transactions in Lori
19 Mayfield's account occurred approximately five to six
20 months after you wrote your June 2nd, 2000 letter to
21 NASD telling them that you would avoid even the
22 appearance of what happened with Beatrice DuChene?

23 A. Yes.

24 Q. It's not very long afterwards, is it?

25 A. No, sir.

1 Q. Let's go back to the letter dated July 31st,
2 2001, written by you. If you'll turn to the second
3 page of that letter, it's entitled response to client
4 complaint, subject Lori Mayfield. Do you have that
5 page, sir?

6 A. Yes.

7 Q. In the second paragraph of this letter, you
8 said that you did not secure the express approval from
9 Lori Mayfield to conduct securities transactions
10 before she left on a trip to India; is that correct?

11 A. Yes.

12 Q. And you could not reach her; correct?

13 A. Correct.

14 Q. Didn't she give you an e-mail address before
15 she left India?

16 A. She left it. I did not have e-mail
17 capability and I lost the address.

18 Q. You say you did not have e-mail capability in
19 your office?

20 A. Our branch office was converting over to
21 Microsoft 2000 and I did not have e-mail capability.

22 Q. Did you tell Lori Mayfield that if you needed
23 to communicate with her by e-mail, that you could not
24 do so at that time?

25 A. I wasn't aware of the situation.

1 Q. In this letter, didn't you admit to
2 conducting unauthorized trades in the Morgan Stanley
3 Dean Witter Health Sciences fund and the Van Kampen
4 emerging growth fund?

5 A. Yes.

6 Q. And those are all in Lori Mayfield's
7 accounts?

8 A. Yes.

9 Q. Down in the last paragraph of this letter you
10 said that your actions were a result of bad judgment
11 and hectic time of the year, nothing more; is that
12 correct?

13 A. When it says hectic, it involved those things
14 I talked about yesterday.

15 Q. Which, in general, are what?

16 A. It was December, we were doing a lot of tax
17 selling for our clients, we were performing a lot of
18 analysis to comply with required minimum distributions
19 for all clients who were over 70 and a half and had
20 IRA accounts, and in my mind, my mind was distracted
21 by the pending operation on my son.

22 Q. Wasn't your wife also suffering with some
23 type of cancer at that time, too?

24 A. Yes.

25 Q. Did not the medical situation of your wife

1 take a toll on you?

2 A. They occupied my mind quite frequently.

3 Q. Did it have an emotional impact on you?

4 A. Yes.

5 Q. A physical impact upon you?

6 A. Mental.

7 Q. Took up quite a bit of your time, didn't you
8 testify?

9 A. I wouldn't say quite a bit. It was an
10 ongoing concern of mine.

11 Q. It was hard for you to keep track of
12 everything that was going on at that time of the year,
13 wasn't it?

14 A. It was a busy time of year.

15 Q. Wasn't it kind of tough, though, to keep
16 track of correspondence with your clients,
17 communications with your clients, trades that needed
18 to be made, didn't need to be made?

19 A. It was a challenging time to keep track of
20 everything, which I did my utmost and worked extra
21 hours in order to meet the obligations of my clients,
22 particularly those that required action by the end of
23 the year.

24 Q. I asked you, wasn't it --

25 Then in the last sentence of this paragraph,

1 again, this is page ACC 2832, you wrote, didn't you,
2 that this was a complete factual account to the best
3 of your recollection?

4 A. Yes.

5 Q. That's your signature at the bottom?

6 A. Yes.

7 Q. On the next page is your response concerning
8 Janet Mayfield; correct?

9 A. Yes.

10 Q. And basically in that response you claim that
11 there is no basis to Janet's claims?

12 A. That's correct.

13 Q. Let's go to the next letter. This is dated
14 August 7th, 2001 from the NASD. Do you recall
15 receiving this letter from the NASD?

16 A. I believe so.

17 Q. To the best of your knowledge, is it an
18 accurate copy of the letter that you received?

19 A. Yes.

20 Q. Let's go to the next letter, which is on
21 Acacia Group letterhead, dated August 21st, 2001. Do
22 you see that letter?

23 A. I'm sorry, what letter?

24 Q. It's the next letter after the letter from
25 the NASD that's to you, that's dated August 7th, 2001.

1 The Bates number is ACC 2829.

2 A. I have it.

3 ALJ DION: Mr. Bingham, is this and the
4 following page going to be shorter or longer in your
5 estimation for your questions?

6 MR. BINGHAM: I think shorter.

7 ALJ DION: There's about three documents.

8 MR. BINGHAM: Three, four documents, they
9 won't take as much time as I've taken already, I don't
10 believe.

11 ALJ DION: I'm still going to say why don't
12 we take a break. The court reporter's been going at
13 it for a while and we're going to come back in the
14 afternoon anyway, so why don't we go ahead and do
15 that, we'll take a break and we'll reconvene -- I'd
16 like to do it sooner than later. Why don't we try for
17 quarter to 2:00. That will give us about an hour and
18 10 minutes for our lunch, get back at quarter to 2:00
19 and continue on.

20 About how much longer do you think you'll
21 need, Mr. Bingham?

22 MR. BINGHAM: I'm estimating two, two and a
23 half hours, Your Honor. I'll try and keep it short.
24 Try and keep it about two. I think I started about
25 10:30, didn't I?

1 MR. LEWIS: Five minutes after 10:00.

2 ALJ DION: Real briefly, do you have any
3 objection to R-18, this e-mail, Mr. Bingham?

4 MR. BINGHAM: No.

5 ALJ DION: I don't think we ever admitted
6 R-2A, Bates No. 1086 through 1100, or R-7 which was
7 the trade confirmation with the back page. R-2, Bates
8 stamps 1086 through 1100. Then R-7, those two I want
9 you to check.

10 Mr. Lewis, I'm looking at S-15, S-11 and
11 S-2A. S-2A is account information. S-11 is a list of
12 transactions in an account, and S-15 is a list of
13 transactions in an account.

14 MR. BINGHAM: S-2A is actually --

15 ALJ DION: I have written here not admitted.
16 Did you even offer that one, Mr. Bingham?

17 MR. BINGHAM: S-2A?

18 ALJ DION: S-2A is a compilation that says
19 account folder, account number primary objective,
20 open, closed. Has that information -- it's this page.

21 MR. BINGHAM: I thought that was admitted,
22 Your Honor.

23 ALJ DION: I don't have it as admitted.

24 Mr. Merrill, I want to hear about the three
25 that I asked, S-2A, S-11 and 15. 11 and 15 I think

1 are just statements from Dean Witter.

2 MR. BINGHAM: S-11 and S-15?

3 ALJ DION: Yes.

4 MR. LEWIS: I do have an objection to S-2A
5 because it's not complete and it's misleading.

6 MR. BINGHAM: Which exhibit are you referring
7 to?

8 MR. LEWIS: S-2A. I don't know who prepared
9 it.

10 MR. BINGHAM: Your Honor, we went through
11 this previously. This was prepared by Mr. Guilfoyle
12 at Morgan Stanley. We went through that.

13 MR. LEWIS: Just because he prepared it --
14 it's incomplete. I'll tell you, for instance, in
15 connection with Beatrice DuChene, it doesn't show, it
16 says primary investment objectives, there was more
17 than one on the new account.

18 ALJ DION: That's what the word primary
19 means.

20 MR. BINGHAM: I think it's already admitted.
21 S-2A.

22 ALJ DION: There's a difference between being
23 marked and admitted and I have in my volume --

24 Let's handle this first, S-11 and S-15.

25 MR. LEWIS: No objection.

1 ALJ DION: They are entered.

2 R-18, do you have any objection to that
3 e-mail?

4 MR. BINGHAM: No.

5 ALJ DION: No objection to R-18, it shall be
6 admitted.

7 R-7 and R-2A, any objection, Mr. Bingham?

8 MR. BINGHAM: Your Honor let me look at R-7.

9 ALJ DION: R-7 is a copy of a confirm to
10 Beatrice DuChene, and it's also got Joseph Paul
11 DuChene and Mary DuChene. It's a statement regarding
12 a selling of the GE stock, and it includes the back
13 page.

14 So this is the Exhibit R-7 which has the
15 front page confirmation, but also the back side. And
16 R-7 more specifically was used to show information on
17 the back page of confirms. Do you have any objection
18 to that?

19 MR. BINGHAM: No.

20 ALJ DION: R-7 will be admitted.

21 Do you have any objection to R-11, 12, 13?

22 Those are the statements prepared --

23 MR. BINGHAM: No. Those are the statements I
24 just used for cross-examination, also.

25 ALJ DION: 11, 12, 13 shall be admitted.

1 2A was the one I was asking about.

2 17, any objection to R-17, Mr. Bingham? It
3 is the account statements from Morgan Stanley Dean
4 Witter for the month ending December 31st, 2000 to
5 Janet Mayfield.

6 MR. BINGHAM: No.

7 ALJ DION: Then I will admit that 2A was R-2
8 exhibit specific Bates stamps 1086 to 1100. Most of
9 them involved the notes that Mr. Merrill had taken.
10 There were other things in there, but that seemed to
11 be the majority of that information.

12 Do you have any objection to that?

13 MR. BINGHAM: I'm sorry, I'm thinking, Your
14 Honor.

15 I certainly recall Mr. Merrill testifying
16 that he created the account performance analysis that
17 is comprised of 1088 through 1100. I don't object to
18 that. The notes from the other two pages, which is
19 1086 and 1087, I don't object to those.

20 ALJ DION: Those will be admitted.

21 Regarding S-2A, I think that's the last one,
22 I'll note Mr. Lewis' objection as far as the -- his
23 objection it's incomplete. It uses the word primary
24 investment objective. There's been other testimony
25 and there's certainly the better evidence is going to

1 be the client sheets that were filled out by the
2 client and their investment objectives. But I will
3 admit it over that objection.

4 However, I will note that the better evidence
5 in this case is the information provided by the client
6 in the new client forms and the other forms either
7 filled out by Mr. Merrill or by other Dean Witter or
8 Morgan Stanley representatives. I think that that
9 takes care of all the exhibits.

10 Yes, Mr. Lewis.

11 MR. LEWIS: Before you break, I just want to
12 make a suggestion to try and maybe speed things up.
13 Mr. Bingham was using exhibits in Tab 50. I've looked
14 at the ones that he hasn't talked about, and I'm
15 willing to agree that when they're letters addressed
16 to Mr. Merrill, that he received them; when they're
17 letters sent by Mr. Merrill, that he sent them, and
18 we'll offer the contents.

19 ALJ DION: I appreciate that. You have no
20 objection to S-50?

21 MR. LEWIS: What I'm trying to do is to speed
22 things up. Mr. Merrill has admitted that he had
23 unauthorized transactions in Lori Mayfield's account.
24 He's now asked the question eight times, and if he's
25 going to go through these things, he's going to ask

1 another 10 times. I'm saying there's no contradiction
2 to that. It's here, and these documents were received
3 by him, were addressed to him. The signature that
4 purports to be his is his, and he authored the
5 documents.

6 ALJ DION: So you have no objection to S-50?

7 MR. LEWIS: Right.

8 ALJ DION: I will admit S-50 at this time, if
9 that's what you want.

10 MR. BINGHAM: Your Honor, I still want him to
11 bring out some of the things that he put in these
12 letters, because there is a difference in testimony as
13 to what transactions were authorized and which ones
14 weren't.

15 MR. LEWIS: I thought it would be helpful. I
16 guess it isn't. Let me withdraw the offer.

17 ALJ DION: I think that Mr. Bingham is right,
18 I'm not going to tell him what he can and can't use as
19 exhibits or what he can't point out.

20 However, I'm with Mr. Lewis, we're kind of
21 duplicating stuff, especially on the Lori Mayfield
22 area. If there's a specific point such as the one
23 that you made regarding the letter to Ms. DuChene
24 earlier, and then this activity, the alleged activity
25 with Ms. DuChene and the activity that Mr. Merrill

1 admitted to with Lori Mayfield later on, I'll
2 certainly listen to that. But having Mr. Merrill
3 repeat that he made an unauthorized transaction four
4 different ways, we're going to cut that off. I am
5 just --

6 MR. BINGHAM: Can I just say something, Your
7 Honor?

8 ALJ DION: We're not going to talk about it.
9 It's just that if there's a point to be made, then
10 we'll make it and we'll go on.

11 But as far as the account goes, based on the
12 evidence at this point, and the statements from both
13 client and counsel, it appears that to that count,
14 we'll have basically admitted it. So the extra effort
15 of doing things and that, I think is just going to be
16 duplicate. If you want to concentrate on the other
17 accounts that's fine. If there's a point you'd like
18 to make, I'm telling you I'll listen to it as far as
19 prior notice, things like that. That was the example
20 that I gave that I believe was your point.

21 But as to going over this, that then if
22 Mr. Lewis makes it an asked and answered or similar
23 objection, then I am going to field that objection.

24 That being said, we're going to move into the
25 other room. I'll ask the Staff of the Hearing

1 Division to open these things up so that we can just
2 move things. If you've got boxes on the chairs just,
3 if you'd be so kind to pull them off, because I know
4 that they're going to want to do that and turn the
5 chairs around. Then before we start the hearing,
6 which now we've kind of gone on, we'll start the
7 hearing at 2:00 now, we'll be in the other room
8 because we may need that telephonic.

9 We will be back at 2:00. You can leave
10 everything, but just try to get back a little earlier
11 so that we can move it all and start at 2:00. We're
12 off the record.

13 (The lunch recess ensued at 12:46 p.m., and
14 the proceedings resumed at 2:00 p.m.)

15 ALJ DION: Let's get back on the record in
16 the Merrill matter. Mr. Merrill is still on the
17 stand.

18 You remember that you're under oath, sir?

19 THE WITNESS: Yes.

20 ALJ DION: The Division was cross-examining
21 him, so your witness, Mr. Bingham.

22 MR. BINGHAM: Yes, Your Honor. Your Honor, I
23 still do have what I consider to be a few questions
24 concerning S-50, and I do want to ask those questions
25 so I'm going to proceed with that.

1 ALJ DION: That's fine. As I recall, we
2 admitted that in evidence.

3 MR. BINGHAM: I'm not sure if Mr. Lewis
4 objected to admission of S-50 in evidence or not.

5 ALJ DION: I recall him not, and additionally
6 I admitted it.

7 MR. LEWIS: I was just trying to make it
8 easier. He can ask any questions he wants.

9 Q. (BY MR. BINGHAM) Mr. Merrill, when we left
10 off, we were about to go over the letter dated August
11 21st, 2001 written by you on the Acacia Group
12 letterhead. The first page has a Bates number of
13 ACC 02829.

14 A. I have it.

15 Q. Was this an accurate copy of the letter that
16 you sent to the NASD?

17 A. Yes.

18 Q. And I take it that on the second page, that
19 is your signature?

20 A. Yes.

21 Q. Let's go to the next letter from the NASD to
22 you, dated October 17th, 2001. Go to the third page
23 of this letter. It has a Bates No. ACC 01844. See
24 that list of securities there?

25 A. Yes.

1 Q. And I want to clarify and make sure that I
2 understand what your testimony is on these
3 transactions.

4 Is it your testimony that the first five of
5 these transactions were executed by you without the
6 express approval of Lori Mayfield?

7 A. Yes.

8 MR. LEWIS: Which first five are you
9 referring to?

10 THE WITNESS: With the exception of Oracle.

11 MR. BINGHAM: Again, I'm on Page 1844.

12 Q. (BY MR. BINGHAM) There are six securities
13 listed on this page; correct?

14 A. Yes.

15 Q. So is it your testimony that besides Oracle
16 and Triquent, these were unauthorized transactions?

17 A. Yes.

18 Q. The next group of documents consists of four
19 documents. It again appears to be written by you on
20 Acacia letterhead. I'm sorry, as an Acacia Group fax
21 cover memo page.

22 A. Yes.

23 Q. Is this an accurate copy of what you sent to
24 Roger Hogoboom at the NASD?

25 A. Yes.

1 Q. Let's go to the last group of documents in
2 this exhibit that consists of three pages. The first
3 page has a Bates number of ACC 01920.

4 A. Yes.

5 Q. When was this written?

6 First of all, I'm sorry, let me back up. On
7 the third page is your purported signature. Is that
8 your signature?

9 A. Yes.

10 Q. Is this an accurate copy of what you drafted,
11 I assume sent to NASD?

12 A. Yes.

13 Q. When did you send this to NASD?

14 A. I would say it was after their letter of
15 22 October, or that's my letter.

16 Q. So after October 22nd?

17 A. Their letter was 17 October, so this is
18 sometime afterwards.

19 MR. BINGHAM: Your Honor, I move for Exhibit
20 S-50 be admitted into evidence.

21 ALJ DION: It's already been admitted.

22 Q. (BY MR. BINGHAM) Do you remember during
23 examination under oath we discussed Viola Brotherson?

24 A. Yes.

25 Q. Do you remember testifying about her account,

1 her circumstances, any knowledge you had about her
2 financial situation, et cetera?

3 A. Yes.

4 Q. Do you remember telling me during that
5 examination under oath that you did not knowingly put
6 her in any aggressive income investments?

7 A. I'd have to look at the transcripts.

8 Q. Let's go to Page 110 of the transcript, which
9 is S-52. Just for your assistance, you'll want to
10 start on Page 109 with Line 16, starting at Page 109.

11 MR. BINGHAM: This is just to give him a
12 little assistance because his actual answer is on 110,
13 but the question and response start on 109.

14 (Brief pause.)

15 THE WITNESS: Okay. Again, I did not
16 consider the high-yield bond fund to be aggressive for
17 her. It was recommended to me by several senior
18 brokers in my office.

19 Q. (BY MR. BINGHAM) I'm asking you what your
20 testimony was on this date. And according to your
21 testimony on this date, on Page 110, you say you did
22 not knowingly put her in any aggressive income; is
23 that correct?

24 A. That's right.

25 Q. On the prior page, which is 109, when I asked

1 you what her investment objectives were, didn't you
2 tell me income, and not aggressive income?

3 A. I did not differentiate.

4 Q. Let's start on Line 24 and Page 109. I asked
5 you the question was that income or aggressive income?

6 A. You said it was income.

7 Q. I'm sorry, what?

8 A. I didn't, it was income.

9 Q. It was after that that you said you did not
10 put her in aggressive income investments; right?

11 A. That's right, I considered high-yield bond
12 fund to be, according to the investment pyramid, an
13 income investment.

14 Q. Didn't you have aggressive income marked on
15 the new account form?

16 A. That's right.

17 Q. Weren't you aware of that?

18 A. I was certainly aware of that, because it had
19 not changed from the prior broker.

20 Q. You didn't view Ms. Brotherson's account as a
21 high-risk account, did you?

22 A. No, I did not. It did have already in it
23 what I thought was unsuitable stock equity funds, and
24 those were not identified as --

25 Q. I'm asking you if you considered it as a

1 risky account or unrisky account.

2 MR. LEWIS: Sir, he may not like the answer,
3 but he's got to let him finish the answer, then he can
4 object, move to strike cross-examination. He's done
5 this on multiple occasions now; he's interrupted him
6 while he's giving an answer.

7 ALJ DION: I side with Mr. Lewis, who also
8 had the tendency to do it yesterday as well.

9 I would also say, Mr. Merrill, listen to the
10 question and then give your answer accordingly.

11 THE WITNESS: That's what I'm trying to do,
12 sir.

13 MR. BINGHAM: If I ask him if he considered
14 the account to be risky or not, that's a one, maybe
15 two-word answer. If he wants to explain it later, if
16 I ask him why, then that certainly opens the door for
17 an explanation on his part, or on redirect, Mr. Lewis
18 can bring up the issue, and Mr. Merrill can explain
19 why.

20 ALJ DION: Actually, I'm going to disagree
21 with you. If you asked him is this an aggressive
22 investment, isn't it? That's a one-word answer. Do
23 you consider this -- when you ask somebody to consider
24 something, you're asking for their opinion and that
25 may or may not be a one-word answer. So I think if

1 the questions are more narrowly tailored, we won't run
2 into this as much.

3 But again, Mr. Merrill, try to pay attention.
4 If you volunteer information, you do so at your own
5 peril.

6 THE WITNESS: I understand.

7 Q. (BY MR. BINGHAM) Mr. Merrill, didn't you
8 have a good recollection of the investments in Viola's
9 Brotherson's account at the time of the examination
10 under oath?

11 A. Yes.

12 Q. Wouldn't you say your recollection of the
13 investments in her account was better then than it
14 would be now since time has passed?

15 A. Please say that again.

16 Q. Sure. Would you say your recollection of the
17 investments in Viola Brotherson's account was better
18 at the time of the examination under oath than it is
19 now?

20 A. I have to check to see. I have not seen her
21 account since then.

22 MR. LEWIS: He's not excluding what's in
23 connection with these proceedings?

24 MR. BINGHAM: Your Honor, he gave his answer.
25 I'm ready to move on.

1 MR. LEWIS: It's a tricky question. Is he
2 talking about solely his recollection? We look at
3 documents in connection, he testified in connection
4 with documents concerning the Viola Brotherson
5 account, that he looked at since November 27th, 2001.

6 ALJ DION: You can ask him those questions on
7 redirect, Mr. Lewis. The question is simply a memory
8 question, is your memory better now than it was then.
9 It is really a pretty simple question. If he answers
10 it, I don't know, I don't recall or whatever his
11 answer is, then we're stuck with his answer. If you
12 want, on redirect, to expound on that, then that's
13 fine.

14 But Mr. Bingham, go ahead, move on.

15 Q. (BY MR. BINGHAM) Mr. Merrill, during the
16 examination under oath, do you remember telling me
17 that Viola Brotherson's account consisted of three or
18 four investment grade preferred stocks?

19 A. Three stock equity funds, not stocks, stock
20 funds.

21 Q. Stock funds?

22 A. Funds.

23 Q. What were those three equity stock funds, the
24 best of your recollection?

25 A. Pioneer and two AIM funds. The Pioneer was a

1 small cap fund.

2 Q. Do you remember when I asked you a question
3 how much of her portfolio, referring to Viola
4 Brotherson, was invested in the high-yield bond fund,
5 your response was about a quarter? And I'll refer you
6 to page 111, if you want to look at that testimony.

7 Do you remember giving that answer to my
8 question? It's towards the bottom, from Line 19
9 through 23.

10 A. I had a point in time when I initially put
11 her in it. It may have amounted to about a quarter,
12 but it changed over time.

13 Q. Didn't it increase over time?

14 A. Yes, it did, at her request.

15 Q. Go to Page 112, would you?

16 A. Okay.

17 Q. I asked you if 40 percent of Ms. Brotherson's
18 portfolio had been invested in the high-yield bond
19 fund. Would that have been appropriate for her, given
20 all the circumstances surrounding Ms. Brotherson? Do
21 you remember that question I posed to you?

22 A. Yes, I'm reading it here.

23 Q. Your answer, starting at Line 11, was: To
24 make that judgment call in the fall of last year, the
25 answer is yes. To make it beforehand, I would say no.

1 A. That's right.

2 Q. So from your testimony there, if her account
3 had consisted of 40 percent of the high-yield bond
4 fund before the fall of 2000 then that would have been
5 inappropriate for her; isn't that your testimony
6 there?

7 A. Say that again, sir.

8 Q. Yes, if I understand your answer correctly,
9 if Ms. Brotherson's account had consisted of 40
10 percent in the high-yield bond fund before the fall of
11 2000, then that would have been inappropriate, in your
12 opinion?

13 A. No, that's not what I'm saying. If it was 40
14 percent prior to that time I would have considered it
15 because she requested it, to be an appropriate
16 investment because it met her objectives of income.
17 She was satisfied with it, and her son was satisfied
18 with it.

19 Q. So then are you saying after, there's a point
20 in time when you would have considered it
21 inappropriate, is that what you're testifying to
22 there?

23 A. Yes. In hindsight, with all -- like all the
24 investors in Enron, they're sorry they went into
25 Enron, but at the time it was an appropriate

1 investment. And it wasn't an appropriate investment
2 for Ms. Brotherson for all the time leading up to the
3 fall of the year 2000.

4 Q. But after that it would have been
5 inappropriate, is that what you're --

6 A. That's why I contacted her, because of the
7 drop in value and the drop in the dividend. When
8 something becomes inappropriate, I got in touch with
9 my clients and made them aware of it and we discussed
10 what to do about it.

11 Q. Ms. Brotherson never told you, I want this
12 specific investment, did she?

13 A. She told me specifically that she wanted a
14 specific investment after she had been in it initially
15 and wanted to add to it.

16 Q. What specific investment or investments were
17 those?

18 A. The high-yield bond fund.

19 Q. She told you that she wanted that investment?

20 A. She wanted to increase her dollar investment
21 in the high-yield bond fund because she enjoyed
22 significantly higher income per month.

23 Q. You were aware that Ms. Brotherson lived on a
24 fixed income, weren't you?

25 A. I would not necessarily say that, sir.

1 Q. You were aware that she received Social
2 Security payments?

3 A. I was aware of that. I actually wasn't even
4 aware of that because Social Security was not going
5 into her account. She did not use her account for
6 paying bills, for paying any mortgages. It was not an
7 account used for that purpose.

8 Q. So are you saying you were not aware --

9 A. I was aware she was gaining Social Security.

10 Q. -- that she --

11 ALJ DION: Stop.

12 MR. BINGHAM: Let me ask the question.

13 ALJ DION: I said stop. We're going to let
14 each other finish, okay? It is way too difficult for
15 the court reporter when you start talking over each
16 other.

17 Additionally, when you talk over each other,
18 you can't hear each other; if you can't hear each
19 other, you can't answer each other.

20 So the question was were you aware that she
21 was going to get some -- that she received Social
22 Security. Your answer is yes, isn't it, Mr. Merrill?

23 THE WITNESS: That's right.

24 ALJ DION: It didn't go into her account at
25 Merrill Lynch or the account with you, at Morgan

1 Stanley Dean Witter, but you were aware of that
2 through either she told you or you had that other
3 information; is that correct?

4 THE WITNESS: Yes.

5 ALJ DION: Did she tell you?

6 THE WITNESS: Yes, she told me when I met
7 her.

8 ALJ DION: Mr. Bingham, go ahead.

9 Q. (BY MR. BINGHAM) You were aware, then, that
10 she did not receive any income other than from Social
11 Security and the investments that she had with Morgan
12 Stanley Dean Witter?

13 A. No, because she did not reveal her income
14 totally or net assets or liquid assets as required by
15 the new account form.

16 Q. And you still proceeded to put her in the
17 high-income and the high-yield funds?

18 A. Yes.

19 Q. Without knowing what her financial resources
20 really were?

21 A. I discussed that particular investment with
22 her and she wanted to do it, and it was in my mind to
23 be an appropriate investment for her to meet her
24 objectives more so than the three stock equity funds
25 that were in her portfolio.

1 Q. Previously you discussed a Business Week
2 article and some Forbes articles; correct? They're
3 one of your exhibits, aren't they?

4 A. Yes.

5 Q. I take it that you relied upon the
6 information and the advice in those articles?

7 A. Coupled with all the other information I
8 discussed yesterday.

9 Q. You read them roughly when they came out,
10 whether it was Business Week or Forbes?

11 A. Yes. We were all aware that that second
12 issue of the Forbes magazine that came out each August
13 would address mutual funds. I had a reference file of
14 information related to various investments, and that
15 was one of them.

16 Q. You considered the advice in those articles
17 to be reliable and accurate; right?

18 A. Yes.

19 Q. Let's go to Exhibit R-1.

20 ALJ DION: Do you have that, Mr. Merrill?

21 THE WITNESS: I don't believe so.

22 I have it, sir.

23 Q. (BY MR. BINGHAM) Did you read this article
24 carefully previously?

25 A. Did I read it carefully?

1 Q. Yes.

2 A. Yes, when it came out.

3 Q. Doesn't this article say that these
4 high-yield, high-income funds are bonds that are best
5 used in moderation?

6 Let me bring your attention to the third
7 paragraph on the first page.

8 A. Yes, I see, these bonds are best used in
9 moderation.

10 Q. Then the next sentence reads, financial
11 advisors suggest allocating no more than 3 to
12 5 percent to a high-yield bond fund; isn't that
13 correct?

14 A. I see that, yes.

15 Q. But you had Beatrice DuChene invested much
16 more heavily than 3 to 5 percent in a high-yield fund,
17 didn't you?

18 A. 14 percent.

19 Q. We'll get to that in a minute. Viola
20 Brotherson also?

21 A. Yes, at her request.

22 Q. Mr. Merrill, when does the knowledge and
23 expertise of a broker take precedence over an
24 unsuitable security that a customer wants to purchase?

25 A. I'm not sure I understand your question.

1 Q. Isn't there some point when a broker should
2 tell the customer no, I won't transact that trade for
3 you because I feel it's unsuitable and it is
4 inappropriate for you?

5 A. Yes.

6 Q. You never exercised that?

7 A. I exercised that with several of my clients.

8 Q. But not with any of these that we've
9 discussed in the hearing?

10 A. No.

11 Q. Let's go to the next page. Will you please
12 read the last sentence of the third paragraph on that
13 page that starts with, in our evaluation.

14 A. In our evaluation, the marginal extra returns
15 don't justify the element of discomfort, says Evensky,
16 who believes only investors who put a small percentage
17 of assets long-term in professionally managed funds
18 should be in high yield.

19 Q. Do you consider 15 to 19 percent a small
20 percentage of the portfolio?

21 MR. LEWIS: Excuse me. You've got to read
22 the whole paragraph. You can't pick out a sentence
23 out of context, Your Honor. That is not the import of
24 the article. This is saying to some. This is one
25 person's opinion, not the opinion of Business Week in

1 the article.

2 ALJ DION: Mr. Lewis, you can tell me that.

3 You can question your client about that.

4 Where were we again, Mr. Bingham?

5 MR. BINGHAM: The last line of the third
6 paragraph on the second page.

7 ALJ DION: Thank you.

8 Q. (BY MR. BINGHAM) 15 to 19 percent isn't a
9 small percentage of the portfolio, is it?

10 MR. LEWIS: I'm sorry?

11 THE WITNESS: That's a matter of judgment.

12 Q. (BY MR. BINGHAM) What about 30 to 40 percent
13 of a portfolio?

14 A. That's not small. It depends on the client's
15 entire portfolio.

16 Q. Let's go to the beginning of the last
17 paragraph on that second page. According to this
18 individual, and I'm trying to, looks like a Mr. Dial
19 here is being quoted in this article. Doesn't he say
20 that at that time, industries such as
21 telecommunications have great potential and a lot of
22 risk?

23 Again, this is according to this individual
24 who is being quoted in this article.

25 A. That's what it says there, currently they

1 show the greatest investment potential and the most
2 risk.

3 Q. Let's go to the next page of this article.

4 Listed on this page are what this article and
5 also what you refer to as jewels among junk bond
6 funds; correct?

7 A. Yes.

8 Q. The Dean Witter high-yield securities is
9 shown there, isn't it?

10 A. That's right.

11 Q. Didn't you testify about the numbers shown
12 for this particular mutual fund?

13 A. Yes, it was rated number two, based on a
14 five-year return and low expense.

15 Q. At the time this article was written, didn't
16 a Dean Witter high-income fund exist?

17 A. Yes, this was '96, and the high-income fund
18 lasted till '97.

19 Q. And the high-income fund is what Ms. DuChene
20 and Ms. Brotherson had in their accounts; is that
21 correct?

22 A. Had in their accounts, then it was converted
23 to high yield.

24 Q. In November of 1997; right?

25 A. That's correct.

1 Q. So then this Dean Witter high-yield
2 securities fund is a fund that neither Brotherson nor
3 DuChene had in their account in 1996?

4 A. In '96, that's correct. But the --

5 Q. And in 1997, until November of that year;
6 right?

7 A. That's right. But the two funds were
8 comparable. That's why they were joined.

9 Q. Let's go to the next article, starts on
10 what's numbered as Page 1004. You see about in the
11 middle of the page -- well, first of all, let me back
12 up.

13 This is an article in the August 28th, 1995
14 Forbes magazine; correct?

15 A. Right.

16 Q. You see in the middle of the page there?

17 A. Yes.

18 Q. It says Dean Witter high-income securities?

19 A. Yes.

20 Q. Below that it says Dean Witter high-yield
21 securities?

22 A. Yes.

23 Q. The expense ratio shown for the high-yield
24 securities fund is less than half that of the
25 high-income fund, isn't it?

1 A. Yes, according to this.

2 Q. Let's go to the next page. This is a Forbes
3 article dated August 26th, 1996.

4 A. Right.

5 Q. And in 1996, Ms. DuChene held high-income
6 fund securities in her account, didn't she?

7 A. I'd have to look, because the two funds
8 existed in parallel for a while, and it was new money
9 being --

10 Q. Mr. Merrill, I'm asking you if Ms. DuChene
11 had high-income securities fund in her account or
12 accounts.

13 MR. LEWIS: And he said "I'd have to look."

14 THE WITNESS: I'd have to look at her
15 account.

16 MR. BINGHAM: Okay.

17 Q. (BY MR. BINGHAM) Mr. Merrill, let's look at
18 Exhibit S-7. If you'll go to the August 31st, 1996
19 statement for Beatrice DuChene, it starts on page,
20 page with the Bates No. ACC 00269. Do you see that?

21 A. Yes.

22 Q. According to this statement --

23 A. She had high income.

24 Q. High income?

25 A. Yes.

1 Q. Let's go back to this Forbes article.
2 Looking at expense ratio, wasn't the expense ratio
3 less than half -- well, let me specify. Wasn't
4 expense ratio for the high-income fund almost twice
5 that of the high-yield fund?

6 A. It shows it, sir, but we don't look at the
7 expense ratio, we look at the yield and the total
8 return. If you look at the yield and the total
9 return, they're very comparable.

10 Q. My question, Mr. Merrill, according to what
11 is shown in this article, wasn't annual expense for
12 the high-income fund a little more than twice of that
13 for the high-yield fund?

14 A. Yes.

15 Q. Let's go to the next Forbes article that's
16 dated August 25th, 1997. Go ahead and read the
17 paragraph at the top of the page, would you? Not out
18 loud, just go ahead and read it to yourself.

19 A. All right.

20 Q. According to this article, don't these
21 high-yield funds, which are often referred to as junk
22 bond funds, offer the potential for bigger losses?

23 A. That's what it says there.

24 Q. The expense ratios are typically quite a bit
25 more than for an average high-grade taxable fund?

1 A. They may be.

2 Q. According to this article?

3 A. And they have a lower interest rate risk than
4 long-term high rate bonds.

5 Q. I'm asking you about expenses, Mr. Merrill.

6 ALJ DION: Mr. Merrill.

7 THE WITNESS: It was 32 cents more per
8 hundred than the average high-grade taxable funds.

9 ALJ DION: Hold on, Mr. Bingham.

10 I understand sometimes you need to explain
11 yourself when the question is given to you for your
12 opinion or something like that, but again, when you
13 start qualifying your answers, you're not necessarily
14 answering the question, and your attorney will have
15 the ability to ask you these questions to clarify any
16 of these things that you feel are left out.

17 THE WITNESS: Yes.

18 ALJ DION: Mr. Bingham.

19 Q. (BY MR. BINGHAM) Mr. Merrill, this article
20 also shows the annual expense per share for the
21 high-income fund and the high-yield fund, doesn't it?

22 A. Yes.

23 Q. Along with annualized total return on the
24 yield; correct?

25 A. Yes.

1 Q. Let's go to the literature that starts on
2 page, what you'd labeled as 1007A.

3 A. I have 1007.

4 MR. LEWIS: The page before that.

5 THE WITNESS: I have it.

6 Q. (BY MR. BINGHAM) Go to the page labeled in
7 the lower right-hand corner 1009.

8 A. Yes.

9 Q. I don't recall if you testified about the
10 current portfolio positioning that's shown at the top
11 of this page or not, but doesn't this show that
12 80 percent of the Dean Witter high-yield funds was
13 invested in B shares?

14 A. Yes.

15 Q. And that's considered to be a below
16 investment grade quality rating, isn't it?

17 A. Yes.

18 Q. I'm sorry, I said B shares, I meant B issues.

19 Doesn't this literature refer to the Dean
20 Witter high-yield fund and not the Dean Witter
21 high-income fund?

22 A. Yes.

23 Q. And haven't you agreed that that was the fund
24 that DuChene and Brotherson had in their accounts,
25 beginning in November, 1997?

1 A. I agreed for DuChene. I'd have to look at
2 Brotherson.

3 ALJ DION: Is that 1997 or 1996, Mr. Bingham,
4 on that exhibit that you had him look at?

5 MR. BINGHAM: 1997. And I'm trying to find
6 that information, Your Honor. I have November, 1997.

7 ALJ DION: It was in S-7; right?

8 MR. BINGHAM: S-5 is where I'm looking. I
9 don't know if it's in S-7 or not without looking at
10 that.

11 ALJ DION: I think we looked at S-7.

12 MR. BINGHAM: Your Honor, I don't believe
13 it's in S-7.

14 ALJ DION: What was your question,
15 Mr. Bingham?

16 MR. BINGHAM: My question was had he already
17 agreed that Beatrice DuChene and Viola Brotherson did
18 not have the Dean Witter high-yield fund in their
19 account or accounts until November, 1997. He agreed
20 in reference to Beatrice DuChene, but wasn't sure with
21 reference to Viola Brotherson.

22 ALJ DION: Okay.

23 Q. (BY MR. BINGHAM) Mr. Merrill, do you have
24 S-24?

25 A. Yes.

1 Q. If you'll look at the fifth page, which has a
2 Bates stamp number of ACC 04363, do you see in about
3 the middle of the page, where it shows the Dean Witter
4 high-income securities fund that was exchanged for the
5 Dean Witter high-yield fund?

6 A. Yes, in November.

7 Q. Of 1997; correct?

8 A. That's right.

9 Q. These pages that you have in Exhibit 1 in
10 reference to the Dean Witter high-yield fund
11 performance and other factors up through December,
12 1996 is not relevant to anything that was in the fund
13 of Beatrice DuChene or Viola Brotherson at that point
14 in time, was it?

15 A. The two funds were related very closely.
16 That's why they merged.

17 Q. They had different expense ratios; right?

18 A. Yes, and they had different yields. But
19 again, very comparable yields and total returns.

20 ALJ DION: Were the investments comparable as
21 well?

22 MR. BINGHAM: I'm going to object to that
23 question because --

24 ALJ DION: You can object all you want; I'll
25 overrule. He's told me that the yield was the same,

1 he's told me that although the expenses are different,
2 the yields are similar. Were they, were similar
3 investments in each of those, were they -- were each
4 of them corporate bonds or primarily B issues, et
5 cetera?

6 MR. BINGHAM: Your Honor, objection, because
7 unless he can lay a foundation that he read through
8 the prospectuses and that he's aware of the investment
9 objectives of each fund, I don't think he's qualified
10 to answer that question.

11 ALJ DION: How familiar were you with the
12 high-income fund?

13 THE WITNESS: I was familiar with the high
14 income because I had recommended it to my clients.

15 ALJ DION: You had gone through the brochure,
16 the prospectus, the brochure that Dean Witter gave
17 you?

18 THE WITNESS: Yes.

19 ALJ DION: I just wondered, were they similar
20 vehicles?

21 THE WITNESS: They were similar.

22 ALJ DION: Primarily B issues?

23 THE WITNESS: I don't want to guess. They
24 were below investment grade bonds, corporate bonds.

25 ALJ DION: Okay.

1 THE WITNESS: I think high income also
2 included some treasuries.

3 ALJ DION: Okay.

4 Go ahead, Mr. Bingham.

5 Q. (BY MR. BINGHAM) Don't you believe that the
6 net asset value of the high-yield, not high-income
7 fund, declined because the manager of that fund
8 purchased a considerable amount of telecommunication
9 bonds?

10 A. He purchased telecom bonds it became apparent
11 to us later on. To what extent, I can't say.

12 Q. Isn't it your opinion that the high-income
13 fund and the high-yield fund had a fairly high beta?

14 A. I don't believe it was -- I don't know what
15 the beta was. I can't remember what the beta was.

16 Q. Aren't funds with junk bonds more volatile
17 than funds with more conservative bonds?

18 A. They're less volatile than long-term
19 government bonds, as stated in the Forbes articles.
20 Historically, high-yield corporate bonds are of a
21 shorter duration than the long-term government bonds.

22 Q. That would be due to interest rate
23 fluctuations, wouldn't it?

24 A. Yes.

25 Q. When you say that -- when I say volatile, I'm

1 referring to the net asset value. Is that what you
2 were referring to also?

3 A. Fluctuation in the net asset value.

4 Q. Yes. So you're saying that --

5 A. The fluctuation in the yield.

6 Q. So you're saying that they're not very
7 volatile?

8 A. They're less risky, is the terminology used
9 in the article, than long-term government bonds.

10 Q. But I'm talking about volatility of the net
11 asset value.

12 A. Less volatility.

13 Q. Less volatility?

14 A. Yes.

15 Q. Have you always held that opinion?

16 A. I can't define always.

17 Q. Do you recall, during examination under oath,
18 I asked you the question, is a mutual fund consisting
19 of junk bonds likely to be more volatile or less
20 volatile in reference to the net asset value?

21 MR. LEWIS: Than what?

22 THE WITNESS: Than what?

23 MR. BINGHAM: I didn't include that in the
24 question.

25 Q. (BY MR. BINGHAM) Do you remember me asking

1 you that question?

2 A. Not specifically. You may have.

3 Q. Let me have exhibit -- what's in your Tab 2,
4 which has been labeled as Exhibit R-2A, let me have
5 that handed to you.

6 A. I have it.

7 Q. If you'll turn to the page that has a
8 high-income, high-yield mutual fund performance
9 detail.

10 ALJ DION: Which exhibit?

11 MR. BINGHAM: 1096.

12 ALJ DION: R-2A.

13 MR. BINGHAM: I thought it was R-2A.

14 ALJ DION: It is. Do you have R-2A in front
15 of you?

16 THE WITNESS: I have 1096.

17 ALJ DION: You're looking at your copy and
18 you have a copy with the Bates stamp 1096?

19 THE WITNESS: Yes.

20 ALJ DION: Okay. I recall R-2A being a
21 packet from between Bates stamp number from respondent
22 1086 to 1100. So we're on 1096.

23 Again, your question, Mr. Bingham.

24 MR. BINGHAM: Yes.

25 Q. (BY MR. BINGHAM) You created this table,

1 didn't you?

2 A. Yes.

3 Q. In the bottom right-hand corner is a
4 percentage, 14.69 percent?

5 A. Right.

6 Q. Is that the average of the percentages shown
7 above, in that same column?

8 A. That is the value as of the time that her
9 investment left, that was the end of '98, the last
10 statement that I had as of 11/30 that show the
11 high-yield bond fund.

12 Q. So according to percentages in that same
13 column that are above, the percentage of Ms. DuChene's
14 accounts that consisted of the high-income or the
15 high-yield fund ranged from 6.8 percent to
16 18.3 percent; correct?

17 A. 18.3 was the highest, yes.

18 Q. Now, when you calculated that percentage, you
19 were including annuities in the accounts; right?

20 A. Total portfolio value.

21 Q. Which included annuities; right?

22 A. Yes.

23 Q. Okay. Now, if we were to take out annuities,
24 then wouldn't you agree that that percentage would be
25 much higher?

1 A. Certainly, but it wouldn't be representative
2 of a total portfolio.

3 Q. But it would be higher; right?

4 A. Yes.

5 Q. Did you ever calculate any percentages of the
6 high yield or the high-income fund for Viola
7 Brotherson's account?

8 A. I'm not sure that I did.

9 Q. Did you look at the percentages in S-21 that
10 was previously reviewed by Mr. Donovan? Let's hand
11 you S-21.

12 (Brief pause.)

13 MR. LEWIS: Is there a question?

14 MR. BINGHAM: I'm letting him look at it.

15 Q. (BY MR. BINGHAM) Are you done looking at it?

16 A. Yes, I see it.

17 Q. So you say as far as you can remember, you
18 didn't calculate the percentage of the high-yield fund
19 or the high-income fund in Viola Brotherson's account?

20 A. No.

21 Q. But did you look at these percentages before
22 today?

23 A. Yes, I've seen them.

24 Q. Do you have any reason to believe that those
25 percentages are inaccurate?

1 A. I wouldn't know.

2 Q. Would you agree that the percentage of the
3 high-income or the high-yield fund, I'm sorry, the
4 high-yield fund in her account went from, at least
5 according to these percentages, 88 percent to
6 77 percent, roughly?

7 MR. LEWIS: Pardon me. I'll agree with you
8 that that's what it says on this document. That's not
9 the witness' testimony, however. If he is asking him
10 what this document says, I'll stipulate to what the
11 document says. I can read it, he can read it.

12 THE WITNESS: And it's only with respect to
13 one account. It's not with respect to both of her
14 accounts. You don't have both accounts here.

15 Q. (BY MR. BINGHAM) What was the other account
16 that you're referring to?

17 A. The IRA account, 35355.

18 Q. That was with Beatrice DuChene.

19 A. I'm sorry, I stand corrected. This is Viola
20 Brotherson. That's right. She had one account.

21 Q. Wouldn't you say that this one account was
22 heavily invested in one fund from at least January,
23 '98 through May of 2002?

24 A. Yes, I would say that. Again, it was at her
25 request.

1 Q. I asked you if you agreed with that
2 statement.

3 A. Yes.

4 Q. You've testified quite a bit about notes that
5 you took in reference to trades that you made for
6 these five customers that have been discussed during
7 the hearing. Other than what you've produced and
8 testified about, do you have anything else to indicate
9 that these trades were authorized and that you did
10 communicate with the customer before the trade was
11 made?

12 A. We researched every source possible, and I
13 can't all of a sudden produce something that would
14 verify what went -- what the communication was and
15 when it was that took place. I do know that I took
16 notes and put them in a spiral notebook, and also had
17 notes on individual statements whenever I talked to a
18 client about their account, and that was in the file
19 folder retained by Dean Witter.

20 Q. You've talked quite a bit about these spiral
21 notebooks. Approximately how many pages in the spiral
22 notebook that you used?

23 A. I think there's 150.

24 Q. Did the spiral notebook usually cover a year
25 or more of notes?

1 A. Oh, no.

2 Q. Half a year?

3 A. I would say I would have at the end of the
4 year five or six notebooks.

5 Q. And those notebooks were turned over to Dean
6 Witter or Morgan Stanley Dean Witter; correct?

7 A. Yes, they were.

8 MR. BINGHAM: Your Honor, I'm going to ask
9 for a request, if I can have a little bit of time so I
10 can get the exhibits together that we want admitted.

11 ALJ DION: More questions?

12 MR. BINGHAM: I think I do have some more,
13 yes. I don't think it will take long, though.

14 MR. LEWIS: Is he asking to take a break? Is
15 that a roundabout way of doing that?

16 ALJ DION: I think that's what's happening.
17 Mr. Lewis, how long do you think your redirect will
18 take?

19 MR. LEWIS: Based on what's so far, I've got
20 about, I'd say 15, 20 minutes.

21 ALJ DION: Okay. Why don't we take our
22 15-minute break, and how about, why don't we do 10 so
23 that we can try to accomplish something today. We'll
24 be back here in 10 minutes, then that will give you
25 enough time, Mr. Bingham, I assume?

1 MR. BINGHAM: Yes, plenty.

2 ALJ DION: We'll come back here in 10 minutes
3 and try to do that. Mr. Bingham, will your need for a
4 rebuttal witness be based upon redirect, or is that
5 something that you're planning to do anyway?

6 MR. BINGHAM: Based upon the direct
7 examination I would like to call rebuttal witnesses,
8 yes.

9 ALJ DION: Then we'll deal with that when we
10 get back from the break.

11 (A recess ensued.)

12 ALJ DION: We're back from a break.

13 We had a brief discussion, in which
14 Mr. Bingham had brought up the issue of
15 teleconferencing a couple of people into the hearing
16 who wanted to testify, and their attorney to be
17 present on the phone. I indicated we will address
18 that issue at rebuttal, as Mr. Lewis made an objection
19 very early on, actually before the hearing regarding
20 this issue. So we will address it at that time.

21 As it stands, Mr. Merrill is still on the
22 stand.

23 MR. LEWIS: Could I ask a question about
24 Mr. Guilfoyle? Is he going to be on just as the
25 attorney for the other person, or is he going to be

1 giving substantive testimony? Because if he is, I've
2 got to look for some documents of his.

3 MR. BINGHAM: I would say both, but it would
4 be procedurally, if he gives substantive testimony, it
5 would be concerning procedures of Morgan Stanley in
6 reference to collection and preservation of documents,
7 and I don't think that he'll be -- my answer will be
8 there's a chance it will be both, but predominantly as
9 the attorney for the other individual.

10 ALJ DION: Again, we'll address that later
11 on, and perhaps even tomorrow.

12 In any event, Mr. Merrill is back on the
13 stand.

14 You're still under oath, sir.

15 THE WITNESS: Yes, sir.

16 ALJ DION: You understand that?

17 THE WITNESS: Yes, sir.

18 ALJ DION: Mr. Bingham was concluding his
19 cross.

20 Q. (BY MR. BINGHAM) Mr. Merrill, do you still
21 have Exhibit R-2A in front of you?

22 ALJ DION: That was the exhibit with the
23 Bates stamps 1086 to 1100 in your -- in the
24 respondent's exhibits.

25 THE WITNESS: Yes, I do.

1 Q. (BY MR. BINGHAM) If you'll look at
2 Page 1088.

3 A. I have it.

4 Q. The issues' starting value was 25,670; is
5 that correct?

6 A. As of February, '96, yes.

7 Q. If there had been a deposit into this account
8 during the month of February, 1996, shouldn't you have
9 shown it on this table?

10 A. It was on that statement. It would have been
11 added. You can't add to an IRA account unless you
12 have earned income, and Beatrice DuChene didn't have
13 any earned income, to my knowledge.

14 Q. Let me have Exhibit S-12 handed to you. Go
15 to the third page of the statement for February, 1996,
16 which has a Bates number of ACC 00384. Do you see
17 towards the top of the page, where on February 22nd,
18 there was a branch deposit into this account of
19 \$6,529.97.

20 A. That's right.

21 Q. Shouldn't that have been shown on this table
22 you created?

23 A. Sir, it's reflected in the total value of the
24 account.

25 Q. Right. But it was a deposit from who knows

1 where entered into the account; correct?

2 A. But then I would have to subtract it out of
3 the start value. The start value includes the
4 deposit.

5 Q. But in the additions column, didn't you show
6 deposits to this account that were not made from
7 income or from dividends that were produced by the
8 securities in this account?

9 A. Additions are new money coming into the
10 account. If there's dividends, it's reflected in the
11 value of the account as of the month that the dividend
12 is added.

13 Q. Isn't this new money coming into the account?

14 A. The very first one, deposits, yes. But that
15 is included in the start value of 25,670.

16 Q. Out of that 25,670 there was a little over
17 \$6500 that was new money; correct?

18 A. But for calculation purposes, when I got down
19 to the end of December, I can't add back in \$6,000
20 because it was already added in the month of February
21 '96. It was already added to the start value.

22 Q. Don't you agree that a little over \$6500 of
23 that 25,670 is new money in that account?

24 A. I agree it's new money, but then I would have
25 had to start the account value as of December 31st of

000276000

1 '95, which you see on that page is \$14,482. I could
2 have started with that value, but I decided to just
3 start with February of '96.

4 Q. Let's go to the February, 1998 statement for
5 this account, which is shown in Exhibit 14, and also
6 why don't you turn to Page 1089.

7 ALJ DION: What's 1089, is that R-2?

8 MR. BINGHAM: Yes, R-2A.

9 ALJ DION: R-2A, Bates stamp 1089.

10 Q. (BY MR. BINGHAM) On Page 1089 on
11 Exhibit R-2A, didn't you show the Smart Modular Tech,
12 Inc. purchase at \$48?

13 A. I showed it, and there's an error here. I
14 showed it purchased November '97 at 58. It should
15 have been 50, and there was a split in the Smart
16 Modular, so that when it was sold in February, it was
17 sold not at 48, but at 29, because of the split. The
18 total price that it was bought was \$3100. The price
19 it was sold was \$2830.95, for a loss of \$270. She
20 bought 50 shares, but 100 shares were sold.

21 Q. But didn't you use that in your calculation
22 below for the point gains for some of these stocks?

23 A. Instead of minus 10 points, that's correct,
24 down below, it should have been minus 21 points. But
25 again, it was -- the figure that I'm using is the

1 total value taken right off of the statement. I'm not
2 looking at individual asset values, I'm looking at the
3 total account value, which considers the stock split,
4 and the gain and the loss. And for February in '98,
5 the total account value was \$33,156, which is on
6 Page 1 there of S-14. I apologize for the error, but
7 it has no effect on the dollar numbers down below.

8 Q. Let me have Exhibit S-9 handed to you.

9 MR. LEWIS: 9.?

10 MR. BINGHAM: Yes, 9, that's right.

11 Q. (BY MR. BINGHAM) Then if you'll turn to Page
12 1091. If you'll go to the statement for March, 1998
13 in that exhibit.

14 A. Yes.

15 Q. on the second page of that statement do you
16 see a deposit shown in the account that occurred on
17 March 24th?

18 A. \$6,620.

19 Q. That was new money, wasn't it?

20 A. It appears to be so.

21 Q. And that should have been listed in the
22 additions column, shouldn't it, on Page 1091?

23 A. That's correct, sir.

24 Q. So that should have been subtracted from the
25 difference between the beginning and the ending value?

1 A. Right, which would have left it about
2 \$170,000 of additions, 7 from 125, \$128,000 were
3 gained in the negative account.

4 Q. So that would have affected your number at
5 least to some degree?

6 A. To some degree.

7 Q. Do you have before you a copy of Rule 2310
8 out of the NASD manual, conduct rules?

9 A. Yes.

10 Q. Do you remember any testimony concerning NASD
11 rules previously in the hearing?

12 A. I believe there's discussion about reasonable
13 basis for investment.

14 Q. If you'll look at, on the first page, what's
15 listed as IM-2310-2, fair dealing with customers.

16 ALJ DION: Has this been marked, Mr. Bingham?

17 MR. BINGHAM: I don't think it has. It was
18 referred to. It was used.

19 ALJ DION: And I can't recall where.

20 MR. BINGHAM: In testimony.

21 ALJ DION: Out of the -- if we mark it twice
22 then we mark it twice.

23 MR. LEWIS: I have no objection. I believe I
24 asked Mr. Donovan some questions about it, but I'm not
25 sure.

1 ALJ DION: I think so, too. I think I recall
2 that. It's been a while.

3 But in any event, out of caution and effort
4 to save some time, if it's been double marked then the
5 record will reflect that. For now I'm going to call
6 it S-55.

7 MR. LEWIS: No objection.

8 ALJ DION: Mr. Lewis has no objection to it
9 being entered into evidence, if you're offering it for
10 that purpose, Mr. Bingham.

11 MR. BINGHAM: Yes, Your Honor, I am.

12 ALJ DION: S-55 shall be admitted.

13 Again, I'll note for the record it might be
14 somewhere else in the number of documents we've had
15 throughout the course of this two-week hearing. Just
16 out of expediency, let's mark it and admit it.

17 Go ahead, Mr. Bingham.

18 Q. (BY MR. BINGHAM) If you'll look in that
19 rule, at Paragraph A-2, it starts with, this does not
20 mean that legitimate sales efforts. Do you see that?

21 A. Yes.

22 Q. The last sentence of that paragraph, will you
23 please read?

24 A. Does not mean, however, that sales efforts
25 must be judged on the basis of whether they can be

1 reasonably said to represent fair treatment for the
2 persons to whom the sales efforts are directed rather
3 than on the argument that they result in profits to
4 customers.

5 Q. So profits to customers isn't everything, at
6 least according to the NASD, is it?

7 A. No.

8 Q. There's more to look at than profits when
9 the -- let me rephrase that.

10 According to this NASD rule, there's more
11 factors to look at than profits, aren't there?

12 A. It appears so.

13 Q. Turn to the next page, will you? Look at
14 Paragraph 3 that's labeled trading and mutual fund
15 shares. According to this part of Rule 2310-2,
16 doesn't it say that short-term trading in mutual funds
17 is frowned upon?

18 A. That's what it says in essence, here.

19 Q. And that typically mutual funds are not
20 proper trading vehicles on a short-term basis?

21 A. They don't define short-term, but they
22 certainly should not be traded like stocks may be.

23 Q. Lastly, let's go to Paragraph 4, 3 i's, lower
24 case i's, that's titled unauthorized transactions.

25 And according to this rule, doesn't the NASD say that

1 it's inappropriate to send confirmations to customers
2 to cause them to accept the transactions that were
3 unauthorized when conducted by the broker?

4 A. Sir, I'm not sure what that means. I was
5 never involved in sending out confirmations.

6 Q. But when trades are made confirmations are
7 sent out automatically?

8 A. Automatically, yes, but not by me.

9 Q. But by entering a trade into the computer
10 system, you knew that confirmations would be sent out;
11 correct?

12 A. That's correct, yes.

13 Q. Hasn't it been your testimony that you did
14 not conduct any unauthorized transactions in any
15 account of Janet Mayfield?

16 A. That's correct.

17 Q. Hasn't it also been your testimony that you
18 did not conduct any unauthorized transactions in any
19 account of Sylvia Hays?

20 A. That's correct.

21 Q. You still abide by those statements in that
22 testimony?

23 A. Yes.

24 MR. BINGHAM: Your Honor, one other thing.

25 Exhibit S-38 I don't think has been admitted into

1 evidence, and that pertains to Janet Mayfield.

2 ALJ DION: The monthly statement starting
3 October 31, 2000?

4 MR. LEWIS: If he's offering Exhibit 38, I
5 have no objection.

6 ALJ DION: S-38 shall be admitted into
7 evidence if it hasn't already been done.

8 Any other exhibits, or did we catch them all?

9 MR. BINGHAM: No, Your Honor. In fact, I'm
10 done with cross-examination.

11 ALJ DION: There are no other exhibits you're
12 offering?

13 MR. BINGHAM: I'm not offering any other
14 exhibits right now.

15 ALJ DION: Okay. Then Mr. Lewis.

16 MR. LEWIS: When I get down the line a little
17 bit, part of the exhibit I was given this morning, I
18 need some copies, could I impose on Mr. Lowe?

19 MR. LOWE: I have some copies.

20 MR. LEWIS: You do, okay, then I've already
21 imposed. Thank you.

22

23 REDIRECT EXAMINATION

24

25 Q. (BY MR. LEWIS) Mr. Merrill, what was your

1 understanding of the education that you got at the
2 University of Southern California? What happened?

3 A. In the late 1960s, the Air Force approached
4 the University of Southern California with the desire
5 and the objective of modifying their MBA program to
6 make it more specific to the aerospace environment.
7 What came about was they looked at the curriculum of
8 the MBA program and they threw out the accounting
9 classes.

10 In my testimony I said finance. I was wrong.
11 It was more specifically the accounting classes 101,
12 102, classes like that. I guess they assumed the
13 government had enough bean counters, and they tailored
14 their curriculum, they kept about 85 percent of the
15 MBA curriculum and added to it classes that were more
16 specific to the aerospace environment, including
17 contract management, et cetera. And in the course of
18 events, they changed the name of the program.

19 But it was originally, and to the extent of
20 85 percent, the MBA program from the University of
21 Southern California. The way it was presented to us
22 in brochure form addressed that fact. They used the
23 terminology MBA and modification, and what classes
24 would be added and which ones would be taken out. And
25 I started pursuing it at that time at Sunnyvale Air

1 Station.

2 Q. Did you complete that program?

3 A. I eventually completed it. The program was
4 changed and modified with the desire of presenting it
5 at many different defense installations throughout the
6 world, including Europe. And I finally finished it at
7 El Toro Marine Corps Base in Southern California.

8 Q. Over the years, how many new account forms
9 have you filled out for customers, new account people,
10 approximately?

11 A. 200 plus.

12 Q. Does the new account form ask for the
13 investment objective?

14 A. Yes, it does.

15 Q. Do you record that information there?

16 A. Yes.

17 Q. Do you also sometimes record it elsewhere?

18 A. Yes.

19 Q. You were asked questions about whether mutual
20 funds are long-term investments. Does buying a mutual
21 fund mean you hold onto it no matter what happens to
22 it?

23 A. Absolutely not.

24 Q. What is your position on when it might be
25 appropriate to sell a mutual fund if it isn't

1 long-term?

2 A. If there's a change in management of that
3 fund, and if there's a change in its objectives or its
4 composition.

5 Many mutual funds in the late '90s drifted
6 away from their primary objectives, and they wanted to
7 show improvement in their results at the end of each
8 quarter, window dressing as they call it, and so they
9 moved into the Microsoft stocks of the world. And so
10 you have to monitor many factors related to a mutual
11 fund, and if you adopt this buy and hold philosophy,
12 if you did it with the Janus fund and many others, you
13 lost an awful lot of money.

14 Q. When mutual funds were sold in the accounts
15 of the people who testified here, did you have a good
16 reason for it, for recommending it?

17 A. Yes.

18 Q. And if it had been held less than long-term,
19 did you have a good reason for it?

20 A. Yes. Most of them were held for a long-term.

21 Q. Was there any mutual fund that was sold less
22 than five years?

23 A. Yes. I sold shares of dividend growth, for
24 example, and the shares that I sold were in the
25 category of free shares, which meant that because of

1 capital gains and dividends, they had no costs
2 associated with them to sell. The shares could be
3 sold and those -- the money, the proceeds from that
4 transaction could then be reinvested, or as I did, I
5 think once we did it in growth, we added to her
6 annuity. She agreed to it because it increased the
7 value of the annuity, it increased the capital that
8 she had access to, without any cost or charge, and of
9 course it increased the death benefit of the annuity.

10 Q. Did you have a situation where a mutual fund
11 had actually gone down in value?

12 A. Well, the high-yield fund in the year 2000
13 started to go down. And later on, the Information
14 fund that I put Ms. Brotherson in also started to go
15 down.

16 Q. Would you look at the Exhibits R-11, R-12 and
17 R-13. Those are the Edward Jones documents.

18 A. I'm sorry, I have it.

19 Q. Let's look at R-11.

20 A. Okay.

21 Q. Would you look at page 1623, 01623?

22 A. I have it.

23 Q. They have a category of aggressive stock,
24 real estate, limited partnerships, and currency?

25 A. Yes.

1 Q. They list three stocks under that; is that
2 correct?

3 A. That's correct.

4 Q. America Online, Cisco Systems, and Oracle; is
5 that correct?

6 A. Yes.

7 Q. Would you look at the page in front of that.
8 You see the description of aggressive growth?

9 A. Yes.

10 Q. Do you agree that those three stocks belong
11 under that description of aggressive growth?

12 A. Absolutely not.

13 Q. Why not?

14 A. Those are the three largest companies that
15 are traded on the New York Exchange. They are growth
16 stocks, but they are not aggressive growth, and they
17 should certainly not be in the same category as real
18 estate limited partnerships.

19 Q. Well, under the definition of aggressive
20 growth, are they small or growing companies?

21 A. Microsoft is not small. They're not emerging
22 market mutual funds.

23 Q. And they're not mutual funds without
24 dividends?

25 A. That's right.

1 ALJ DION: You mentioned Microsoft.

2 MR. LEWIS: That was on one of the others.

3 ALJ DION: Yes.

4 Q. (BY MR. LEWIS) Microsoft is not on this one
5 that we're looking at; is that correct?

6 A. That's correct. Each one of those companies
7 is the leader in its respective field.

8 Q. Mr. Bingham asked you, if you look on this
9 R-11 at the last page, the technology as a percentage
10 of the portfolio in terms of stocks. What portion of
11 Beatrice DuChene's total portfolio that you had under
12 management did this gentleman at Edward Jones have
13 under management?

14 A. He only received the IRA account.

15 Q. Didn't he also have part of the regular
16 account?

17 A. And he received part of the regular account,
18 but he did not receive everything; he did not receive
19 the bulk. He did not receive the annuities. He
20 received, I would say, maybe 20 to 30 percent of her
21 total account, if that.

22 Q. Is it a distortion of what you had under
23 management to look at, for instance, what's on this
24 R-11 in terms of the total investments as far as you
25 were concerned?

1 A. Yes, sir, absolutely.

2 Q. Have you heard the term assets under
3 management?

4 A. Yes.

5 Q. What does it mean, can you explain it to his
6 honor?

7 A. Well, association with the financial advisor,
8 what is the value of all the accounts that that
9 particular advisor has under management. And I think
10 at the peak of the market, I had approximately
11 \$40 million under management.

12 Q. As far as Ms. DuChene is concerned, did you
13 have all of her assets that were in the various
14 accounts under your management?

15 A. Yes, I did.

16 Q. Were you legally responsible for what would
17 happen in the annuities and so forth? If a mistake
18 had been made, would you have been responsible for it?

19 A. Absolutely.

20 Q. Were you responsible for recommending, and
21 did you recommend what goes into the subaccounts?

22 A. Yes.

23 Q. Do you have the investment pyramid?

24 A. Yes.

25 MR. LEWIS: I have mine, but I didn't put a

1 number on it. I think you did, Judge.

2 ALJ DION: It's R-9.

3 Q. (BY MR. LEWIS) Does Dean Witter, in all the
4 time you were with them, anywhere define what
5 aggressive growth is?

6 A. You mean --

7 Q. Pardon me, aggressive income.

8 A. No, sir.

9 Q. This investment pyramid that was provided to
10 you, I just want, for the record, the intent is, as
11 you go up the pyramid, things get riskier; is that
12 correct?

13 A. That's correct.

14 Q. The things at the bottom are the most stable?

15 A. Yes.

16 Q. What does this pyramid show is the most
17 stable, the yellow portion?

18 A. Yellow, CDs, government T-bills, commercial
19 paper, money market funds, short-term municipals.

20 Q. Are any of those growth income items?

21 A. Yes, they all have an intention of providing
22 some interest, which may be considered income.

23 Q. Do those yellow things have an income
24 feature? Are they income producing?

25 A. Yes.

1 Q. The next level up is the income level?

2 A. That's correct.

3 Q. And as you go up the pyramid, are you
4 becoming more aggressive?

5 A. Yes.

6 Q. And within the blue -- the blue is between
7 the cash equivalents and the growth; is that correct?

8 A. That's correct.

9 Q. Within the blue, what does it show on the
10 specific exhibit, page that has the income on it?

11 A. It includes municipal bonds, fixed annuities,
12 cash value, insurance, treasury bonds, preferred
13 issues, U.S. agency bonds, investment grade corporate
14 bonds, asset-backed securities and high-yield
15 corporate bonds.

16 Q. Now, it indicates that there are varying
17 levels of volatility within those things; is that
18 correct?

19 A. That's correct.

20 Q. But the income, including the high-yield
21 bonds, is all within that category; is that correct?

22 A. That's correct.

23 Q. Did that indicate to you that it was
24 aggressive income, more aggressive than the yellow?

25 A. More aggressive than the yellow, yes.

1 Q. You were asked questions about the high-yield
2 and the high-income fund, and you gave, I think, some
3 of the similarities.

4 First of all, did they have different
5 managers or the same managers?

6 A. They had the same manager.

7 Q. Did they have essentially the same investment
8 objectives?

9 A. Yes.

10 Q. Did they invest in essentially the same type
11 of bond issues?

12 A. Yes.

13 MR. BINGHAM: Objection; foundation.

14 Q. (BY MR. LEWIS) To your knowledge, sir, did
15 they do that?

16 A. To my knowledge, yes.

17 MR. BINGHAM: Objection; foundation.

18 ALJ DION: I believe that during my question
19 that Mr. Merrill stated that he had reviewed the
20 prospectus and had reviewed the brochure issued by
21 Morgan Stanley Dean Witter, and he testified that it
22 was the same manager. You knew that?

23 THE WITNESS: Yes.

24 ALJ DION: That person was an individual at
25 Morgan Stanley Dean Witter?

1 THE WITNESS: Yes.

2 ALJ DION: Senior vice-president or some
3 title like that?

4 THE WITNESS: Yes.

5 ALJ DION: And you had the ability to review
6 both investment vehicles; is that correct?

7 THE WITNESS: Yes.

8 ALJ DION: I believe you stated that they
9 were similar, except that the high yield might have
10 had some treasury bills or something like that.

11 THE WITNESS: The high income might have had
12 a little bit more diversification into government
13 issues. But also corporate issues.

14 ALJ DION: It was predominantly B issues?

15 THE WITNESS: I believe so, but I can't be
16 for certain.

17 ALJ DION: Okay.

18 Q. (BY MR. LEWIS) Would you look at our
19 exhibit, the one of the Business Week article, our
20 Tab 1.

21 A. Which one?

22 Q. The Business Week article, 1001.

23 A. Yes.

24 Q. Sir, when you looked at this thing, did you
25 just pick out one sentence and focus on that, or did

1 you read the whole article?

2 A. I read the whole article.

3 Q. And in reading the whole article, what did it
4 mean to you, sir?

5 A. It meant that the high-yield corporate bond
6 fund would -- Dean Witter had a very good rating and
7 was appropriate in terms of risk of providing
8 predictable income for my clients.

9 Q. Did everybody in the financial world have the
10 same opinion or same conclusions concerning these
11 things, or were there differences of opinions?

12 A. I'm sure there were lots of different
13 opinions about it.

14 Q. Did the Business Week article contain some
15 different opinions?

16 A. Yes. That's why I consulted also many of the
17 brokers in my office, to see what their opinions were
18 as well.

19 Q. Did you talk to Viola Brotherson about
20 placing the bond funds in her account?

21 A. Yes, I did.

22 Q. Did you talk with her son Gaylen about it?

23 A. Yes.

24 Q. I think there were three different times,
25 there were three different purchases of the high-yield

1 fund; is that correct?

2 A. That's correct.

3 Q. Did you talk to her each time?

4 A. Yes.

5 Q. Did you talk to Gaylen each time?

6 A. Either I talked to him directly, or
7 Ms. Brotherson talked to her son and then got back
8 with me. Again, we were cautioned about talking to
9 anyone about any account other than the owner of the
10 account.

11 Q. Was the high-yield fund that you recommended
12 to Ms. Brotherson, was it diversified over many
13 issues?

14 A. Yes.

15 Q. Did you consider that when you recommended to
16 her the purchase of a high-yield fund that you were
17 putting all of her, quote, eggs in one basket, end
18 quote?

19 A. It was a mutual fund that was well
20 diversified.

21 Q. Do you consider a mutual fund putting all
22 your eggs in one basket?

23 A. No.

24 Q. What is the purpose of a mutual fund?

25 A. Two purposes. To achieve professional

1 management of a diversified portfolio.

2 Q. The purchase of a single, below investment
3 grade bond, if you had recommended that, would that be
4 more speculative and much more aggressive than what
5 you did recommend?

6 A. Yes.

7 Q. Why?

8 A. Because there you're putting your eggs in one
9 basket. You're buying a bond that's associated with
10 one entity, one company, and they could default.

11 Q. And you indicated that the material that you
12 read showed how many different issuers these funds
13 were invested in?

14 A. In the high-yield bond fund, approximately
15 200. And I recall we looked at the top 10, and two of
16 them that come to mind are Pepsi and Disney were two
17 of the issuers.

18 Q. I want you to go to Exhibit S-50.

19 A. I have it.

20 Q. Mr. Merrill, this exhibit, your letter of
21 3 April '00, was that in response to a letter you
22 received?

23 A. Yes.

24 MR. BINGHAM: Wait a minute, Your Honor. I'm
25 sorry, which letter are you on?

1 MR. LEWIS: The first one in Exhibit S-50.

2 Q. (BY MR. LEWIS) Are the Arabic numerals, 1,
3 2, 3, are they responding to similar denominated
4 questions on the letter that was sent to you?

5 A. Yes.

6 Q. And did you repeat the questions that were
7 asked of you?

8 A. Yes.

9 Q. Was there any investigation that you know of?
10 Did anybody come to talk to you, did anybody talk to
11 you on the telephone from the NASD about this, or was
12 this the only thing that you received?

13 A. I simply received a letter that I responded
14 to. I had no other discussion or contact.

15 Q. And this letter contains the total amount of
16 information that you gave to the NASD?

17 A. Yes.

18 Q. The letter from the NASD dated May 19th,
19 2000, says that you admitted using your judgment to
20 make changes in Ms. DuChene's account. Did your
21 letter to them make such an admission?

22 A. No.

23 Q. You explained, but let's explain it again.
24 The situations that came up where you didn't talk to
25 her about something going into her account that hadn't

1 been there before was what?

2 A. The unit investment trust series, what they
3 call Dow select 10, which we had talked about early
4 on, how appropriate it was for her to invest in a
5 conservative portfolio of these 10 Dow stocks. It
6 would last for a year. It would then cease in that
7 series and roll over into a new one.

8 Q. Mr. Merrill, when it rolled over, that was a
9 new purchase, wasn't it?

10 A. Yes.

11 Q. Did you talk with her about that, other than
12 when you originally bought it? When it rolled over,
13 did you talk to her about it?

14 A. No.

15 Q. Is that what you were referring to --

16 A. Yes.

17 Q. -- in this letter?

18 A. I would not have talked to her about
19 something we had previously agreed to. I told her
20 it's just like a dividend, it's going to happen. If I
21 have any reason to contact you about this one way or
22 another, I will, and otherwise, it just automatically
23 rolls over.

24 Q. Go with the letter that you signed, dated
25 June 2nd, 2000.

1 A. Okay.

2 Q. Did you agree with the letter you had
3 received, that you admitted having a discretionary
4 action in her account?

5 A. No, I did not agree with that.

6 Q. Then why did you sign this letter?

7 A. Because my branch manager said that it's a
8 minor infraction, just go ahead and sign this and
9 nothing will come of it.

10 Q. Were you aware at the time, in June of 2000,
11 were you aware of the full extent of the complaint
12 that Ms. DuChene had made to the NASD?

13 A. No, I was not aware of it.

14 Q. Were you aware that she complained about over
15 30 unauthorized transactions to the NASD?

16 A. No. It was long after she had left my
17 services.

18 Q. Sir, you've answered my question.

19 ALJ DION: We're going to let him answer the
20 question. We did before, we're going to do it.

21 MR. LEWIS: We didn't do it before, Your
22 Honor.

23 ALJ DION: No, we did. I let him answer the
24 questions when Mr. Bingham would interrupt him, I
25 would let him.

1 Q. (BY MR. LEWIS) Go ahead, finish your answer.

2 A. I'm finished.

3 MR. BINGHAM: Yes, upon the cue of Mr. Lewis
4 to be quiet, he's finished.

5 MR. LEWIS: Your Honor, all during the time
6 those five ladies were on the witness stand, you
7 couldn't get them to stop talking, and every time that
8 I said something, they were allowed to finish their
9 answers, and now he's making that kind of a comment
10 about me. I take personal umbrage about that. I
11 really do. I don't think it's appropriate.

12 ALJ DION: It is late in the day, and all I
13 am saying is that we're going to let Mr. Merrill
14 finish his answers no matter who asks the question,
15 including myself.

16 MR. LEWIS: I'm in favor of that.

17 ALJ DION: Thank you.

18 MR. LEWIS: Could I have the rest of these
19 exhibits.

20 Q. (BY MR. LEWIS) These are documents that bear
21 Bates stamp ACC 01426 through 1437, and these were
22 obtained by me this morning from Mr. Bingham.

23 MR. BINGHAM: Your Honor, I want to make sure
24 that Mr. Lewis received all the copies of documents in
25 our possession concerning --

1 ALJ DION: While you're doing that, we're
2 going to go ahead and mark this as R-19.

3 Q. (BY MR. LEWIS) Mr. Merrill, were you aware,
4 before we got these documents from Mr. Bingham, that
5 in March and April of 2000, that Beatrice DuChene had
6 communicated with the NASD and provided them great
7 detailed information about her claim against you?

8 A. No.

9 Q. You knew she communicated with them because
10 you got a letter asking to respond to her complaint?

11 A. Yes.

12 Q. Now, if you'll look in these exhibits, she
13 has listed, and I'm -- let's go to Page 01433.

14 A. Okay.

15 Q. You have to compare this with 01428. She's
16 answering the questions on a separate piece of paper.
17 On 01428, Mr. Merrill, do you see Question No. 3?

18 A. Yes.

19 Q. Read Question No. 3.

20 A. Please list the alleged unauthorized trades.
21 Please refer to confirmation slips and account
22 statements, and please attach copies.

23 Q. And someone has written in what?

24 A. Previously submitted. See original.

25 Q. Now, go to 01433.

1 A. Okay.

2 Q. And you see that there are numbers, and
3 there's a No. 3, list of unauthorized trades?

4 A. Yes.

5 Q. Then she has listed on that page six items;
6 is that correct?

7 A. Yes.

8 Q. And then on the next page she's listed 19, if
9 I've counted correctly. And then on the next page,
10 she's listed 9 unauthorized trades; is that correct?

11 A. Yes.

12 Q. And the result of this investigation was a
13 letter of caution saying there might have been a
14 misrepresentation -- pardon me, a misunderstanding?

15 A. That's what it says in the NASD letter.

16 Q. And as far as you know, the NASD had this
17 claim by her that there had been over 30 unauthorized
18 transactions by you; is that correct?

19 A. Yes.

20 Q. As a result of this --

21 MR. BINGHAM: Objection. Can that question
22 be rephrased? I'm sorry, repeated. I didn't hear all
23 the question.

24 Q. (BY MR. LEWIS) Okay. The investigation of
25 the NASD included gathering, as far as you know,

1 gathering information from you and from Ms. DuChene;
2 is that correct?

3 A. Yes.

4 Q. In the information they gathered from
5 Ms. DuChene, she claimed some 30 plus unauthorized
6 trades; is that correct?

7 A. Yes.

8 Q. You responded not knowing that she had
9 claimed all of that, just to the three questions that
10 were asked of you?

11 A. Yes.

12 Q. And the result of the investigation of the
13 NASD was to give you a letter of caution saying that
14 there might have been miscommunication between you and
15 Ms. DuChene?

16 A. Yes.

17 MR. LEWIS: I have no further questions.

18 MR. BINGHAM: Is this being offered into
19 evidence?

20 MR. LEWIS: Yes.

21 ALJ DION: Why don't we go off the record.

22 Mr. Bingham, tell me when you're ready to go
23 back on the record.

24 (An off-the-record discussion ensued.)

25 ALJ DION: We'll go back on the record.

1 We've had a short conversation off the
2 record, and apparently the majority of the items are
3 already in evidence. The only thing that isn't in
4 evidence is a piece of correspondence between
5 Ms. DuChene's attorney and herself, a questionnaire of
6 some sort of a couple pages, so Mr. Bingham has agreed
7 to withdraw his objection. Or he wasn't necessarily
8 objecting that it be admitted, he was indicating that
9 the entire package should be admitted, but because
10 they would be duplicative, we will simply admit R-19
11 into the record at this point.

12 That concluded Mr. Lewis' questions.
13 Hopefully most of mine have been erased, but we'll
14 see.

15

16

EXAMINATION

17

18 Q. (BY ALJ DION) Mr. Merrill, if you can recall
19 back to the testimony of, I believe it was
20 Mr. Donovan, and his -- he talked about family of
21 funds and the fact that you don't necessarily get
22 charged if you switch within the family of funds, and
23 you mentioned that previously.

24 A. Yes, sir.

25 Q. Is there a reason, when the AIM and the

1 Pioneer funds were exchanged or sold and then
2 subsequently Dean Witter products were bought, is
3 there a reason why those family of funds weren't used
4 if they had similar vehicles that could achieve the
5 same objectives?

6 A. I don't believe that I found funds that had
7 similar objectives, and more importantly than that,
8 similar performance characteristics.

9 Q. You talked a lot about the process of, at
10 Morgan Stanley Dean Witter and as a broker makes a
11 trade, there's a day that it's bought, but
12 subsequently a couple of days later there's a
13 settlement date; correct?

14 A. Yes.

15 Q. That's for a variety of reasons. One might
16 be the market, but part of that reason is that there's
17 a supervisor who kind of has to approve the trades.
18 He looks at the trades of the day and approves, and
19 once that approval is granted, then the trade goes
20 through. Is that part of the delay?

21 A. That's part of it.

22 Q. When a manager, if you know -- you've never
23 really had in your capacity at Morgan Stanley Dean
24 Witter or in your current capacity, you were never
25 really a supervisor broker; is that correct?

1 A. No.

2 Q. Just from your own experience is what I want
3 to know, if a manager received the day's trades and
4 turned down a specific trade, what were some of the
5 reasons for that?

6 A. I wasn't aware of any specific trades that
7 our manager had turned down. If there were any, he
8 might have considered the timing of the trade or
9 simply that he thought it was inappropriate based on
10 his review of the client's financial objectives.

11 Q. So he had all that information that he
12 could --

13 A. He could pull up all that information on his
14 computer.

15 Q. So he could look at the history of the
16 client?

17 A. Yes. I do recall, sir, that there was a
18 co-broker of mine who invested heavily in one
19 particular stock. He had a tremendous background and
20 experience and knowledge about the telecommunications
21 industry, and he was very high on a particular stock.
22 The symbol is IDCC.

23 And he had an awful large number of his
24 family members and clients in this stock, and I do
25 know that he was cautioned both by New York and a

1 branch manager at a point in time of don't do it
2 anymore. You're just overloaded too much in this one
3 stock.

4 Q. But the branch manager could pull up the
5 history of the client?

6 A. Yes.

7 Q. Age of the client?

8 A. Yes.

9 Q. Their risk tolerance based on the filings
10 that they made?

11 A. Yes. If he had any question, he would call
12 the broker, if there's any information that he lacked.

13 Q. But the manager underlying all that was
14 really reliant upon the broker to fill out those
15 forms, and the computer system, or however it worked
16 out, so that the information that he or she was
17 reading was accurate about that particular client?

18 A. Yes.

19 Q. And really, the broker was in better shoes to
20 kind of evaluate whether or not something is suitable
21 for his or her own client; is that correct?

22 A. Yes. But he would do it, sir, primarily to
23 oversee, I'm sure, some of the younger brokers who
24 were new in the industry.

25 Q. We've kind of danced around the topic a

1 little bit and I think it's been brought up. Are you
2 familiar with the term fiduciary or fiduciary duty?

3 A. Yes.

4 Q. Would you say that in your capacity as an
5 investment advisor, financial advisor, you have that
6 duty, that fiduciary duty to your client?

7 A. Well, I guess to the extent that I can define
8 that term, I felt that I had fiduciary responsibility
9 for a client. There may be a broader definition of
10 the word than I'm familiar with.

11 Q. Essentially, you know, the duty to your
12 client is certainly greater than to your own -- in
13 other words, that there are -- you have a greater duty
14 to your client than really to your own self-interests;
15 is that fair to say?

16 A. That's right.

17 Q. And I think you testified that at a point,
18 even when a client wants to do something, there is a
19 point when a broker should say I am not going to do
20 that; is that correct?

21 A. Yes.

22 Q. And although it may sever the relationship
23 with the client, because of that duty incumbent upon
24 that financial advisor, and their opinions regarding
25 what is best for their client, that precludes them

1 from acting out even -- or acting upon the client's
2 wishes even though that's what the client really,
3 really, really wants; is that correct?

4 A. That's correct. But there are times when I
5 would enter an order, but it would be totally an
6 unsolicited order that had been signed off and
7 accepted by the branch manager. You're signing this
8 form, you're relieving the broker and you're relieving
9 Dean Witter of any responsibility for the outcome.

10 Q. Sure. And that's a situation where that
11 particular individual is not using you as a financial
12 advisor, per se, to give him advice on a particular
13 stock, but really just using you as a broker to
14 transact?

15 A. To enter the trade.

16 Q. Exactly. And at that point, it's kind of --
17 you have kind of a dual role. But in situations where
18 it's unsolicited, where somebody's friend knows
19 somebody and they got a hot stock pick, and they get
20 that information and they want to execute that, you,
21 as the broker, then give them the warning that, you
22 know, we'll certainly do this for you and we'll
23 execute this trade as your broker, but not necessarily
24 as your financial advisor; is that correct?

25 A. That's correct.

1 Q. We talked a lot about that exhibit with the
2 pyramid. In your opinion, in the income area, would
3 you stick the high yield, the bond fund and the
4 high-income fund, where would that fall? Would that
5 be in the upper tier of the income, middle, or kind of
6 the lower tier income? What I mean by that is that
7 income covers a number of opportunities, investment
8 vehicles, and I'm just trying to gauge where you think
9 in that investment income area -- income area, not
10 investment, those high-yield or high-income securities
11 fall?

12 A. If we broke that blue area out into four
13 segments, I would say the high-income, high-yield
14 corporate bond fund would be in, right in the middle.
15 Because above it, in a more risky situation, a more
16 risky category would be the individual bonds
17 themselves, not the fund. It would be preferred
18 stocks, with a specific company that had less than a
19 investment grade rating, and which we were given many
20 new preferred stocks to sell that had a B plus or a BB
21 rating, which is definitely less than investment
22 grade, and again, I would put that in a higher
23 category, because you're kind of putting your eggs in
24 one basket. And I would certainly include options,
25 covered calls, managed futures, foreign currency.

1 Real estate.

2 There's lots of categories that I think you
3 can lump into that blue income category that would
4 fall definitely above the corporate bond mutual fund.

5 Q. And below it would be some more of the muni
6 steps?

7 A. Yeah, the municipal bonds, the government
8 bills, notes and bonds.

9 Q. Fixed annuities?

10 A. Yes.

11 Q. And you were talking about, I'm sorry, I
12 forgot, the high yield or the high income?

13 A. Both.

14 Q. You would put them both in the mid tier, in
15 the blue?

16 A. Yeah. Someone woke up and said why do we
17 have two funds doing the same thing.

18 Q. Now, it's alleged in the complaint, and I'm
19 reading from Page 3 of the complaint, that during much
20 of the '97 and '98, the high-yield securities fund
21 represented approximately 40 percent of Beatrice
22 DuChene's portfolio. You disagree with that; is that
23 correct?

24 A. Once I calculated the numbers, yes, because I
25 was responsible for her total portfolio, and as I

1 calculated before, it peaked at 18 percent for the
2 total portfolio, and ended, when she took her account
3 away, at 14 percent.

4 Q. Now, moving on to what Mr. Lewis was talking
5 about, about a mutual fund and how diversification
6 works, and I think we talked a little bit before about
7 a beta, no one ever really defined what that is, but
8 there's something out there called the beta
9 coefficient; is that right?

10 A. That's right.

11 Q. The beta coefficient of stocks measures,
12 according to this scale, how a particular stock, in
13 very, very limited terms, is categorized and measured
14 against other stocks.

15 So in essence, if you have something within a
16 beta of plus 2, if you had something with a beta of
17 negative 2, you would come out with a zero. And in
18 that regard, it means that as the one stock of plus 2
19 fluctuates perhaps down, the other one at minus 2
20 would fluctuate up, enough to offset the risks, and
21 therefore you have not put your eggs in one basket in
22 which you might get the upswing of one or the
23 downswing of the other; is that right?

24 A. That's --

25 Q. Really simple, that's really, really simple?

1 A. That's correct. The beta term normally
2 pertains to stocks. I don't know that it pertains to
3 funds.

4 Q. But the same -- and I agree with that. But
5 the principle of the beta is to try to get that beta
6 as close to or in a position where that the portfolio
7 as a whole is able to diversify the risks, so that
8 it's not just a situation -- diversifying, I guess my
9 point is diversifying a portfolio doesn't mean you
10 just have a bunch of stocks, does it?

11 A. No.

12 Q. Because if you had a bunch of stocks in the
13 oil industry and the rubber industry and the metal
14 industry, you would be subject to downturns in the
15 auto market; correct?

16 A. That's correct.

17 Q. Could be. In essence, you want to diversify
18 the stocks among sectors of industry?

19 A. Industries.

20 Q. So that the risk to your investment
21 decreases; is that correct?

22 A. That's correct.

23 Q. And the same principle can be applied to
24 bonds as well?

25 A. Right.

1 Q. There's really not a beta coefficient, I
2 agree with that. There's not a beta coefficient
3 associated with bonds, and bonds are issued rather
4 than stocks. But you can pull corporate bonds from
5 different sectors and in essence achieve that
6 diversification; is that right?

7 A. Yes, sir.

8 Q. Now, that was -- was that done in the high
9 yield and the high income bond fund?

10 A. Yes, it was.

11 MR. BINGHAM: Objection; lack of foundation,
12 Your Honor. Unless he can testify as to categories
13 that -- that is, to sectors that investments were made
14 in these funds, and rough dollar amounts, then I'm
15 going to object as to foundation.

16 ALJ DION: I'm going to overrule the
17 objection. You told me that there were 200 different
18 bond funds. Can you tell me the different sectors
19 that were involved in that particular fund?

20 You told me Pepsi and Disney. There's some
21 correlation between Pepsi and Disney, but not a whole
22 lot. Can you tell me, were there concentrations in
23 like the health, technology, anything like that, do
24 you know that?

25 THE WITNESS: What I know is from reading the

1 prospectus, and the prospectus said that the
2 objectives of the fund would be achieved by investing
3 in a variety of industries, a variety of sector groups
4 within those industries, and then a variety of
5 companies. They're all totaled up to be 200. But I
6 can't -- I know telecommunications was at one time
7 invested in. To what extent, I don't know.

8 Q. (BY ALJ DION) I guess what I'm getting to is
9 that based on the information that I received, and we
10 can go to the monthly statements, but from Viola
11 Brotherson's account, it looked like she had a couple
12 of stock or small interest, I can't recall --

13 A. Preferred.

14 Q. There's preferred stock?

15 A. There's one preferred stock.

16 Q. The vast majority, well over 70 percent was
17 in at a period of time the high-income or the
18 high-yield bond; is that correct?

19 A. That's correct.

20 Q. And your testimony is that you were
21 comfortable with that because it was a diversified,
22 the bonds within that fund were diversified; is that
23 correct?

24 A. That's correct.

25 Q. When that subsequently was changed into the

1 technology fund, and then I think it was changed
2 again, it was redeemed a technology, then redeemed
3 health sciences?

4 A. Information fund, then it went to health
5 care.

6 Q. Effectively, didn't you take away or didn't
7 some of that diversification go away as you were more
8 reliant upon sector funds, that being the information
9 fund and then the health sciences fund?

10 A. The health science fund was, could be
11 considered a sector, but the information fund was
12 extremely broad because it included three categories
13 of industries. It included the communications
14 industry, the media industry, as well as technology.
15 So it was a very well diversified fund in different
16 sectors.

17 Q. And isn't there a strong connection, though,
18 between technology and communications, though? Isn't
19 there, and especially at this time with the Internet
20 and things like that that were occurring?

21 A. There is a connection, but there's a layer in
22 between of, you know, the supplier versus the company
23 that's generating the technology, and then the
24 companies that are laying the infrastructure. So
25 there is that difference.

1 Q. And going back to Ms. DuChene, she had the
2 annuities, et cetera, and then the -- you calculated
3 over the life of that fund, it was about 14.69
4 percent; is that correct? You remember that
5 calculation?

6 A. For the high income, yes, 14.69.

7 Q. And I guess -- and you answered my question
8 about health sciences. I guess what I'm trying to
9 rectify between the two is in one client you're asking
10 me to look at their total portfolio value and that it
11 only encompasses 14.69 percent of the entire
12 portfolio, and another client, it encompasses 70 to
13 80 percent of the two clients.

14 I understand clients have different
15 objectives, but in the DuChene area, you're asking me
16 to look at the total portfolio, and I understand that.
17 I can understand where an asset manager would put
18 perhaps a larger sum of money from a specific account
19 into some of these higher yielding bonds, because
20 there are multiple other accounts offsetting maybe
21 some of the risk that is accrued in this high yield.

22 But in the Brotherson account, I have a
23 situation -- there's a situation where she's at 70 or
24 80 percent into these funds, and going back to -- I
25 understand Ms. Brotherson said that that's what she

1 wanted to do. But going back to my fiduciary duty
2 question, isn't there a point where even in this
3 diversified area, and especially in the health
4 sciences where she's 80 percent or 70 percent in the
5 health science sector, isn't there a point where you
6 say even though this is a diversified fund, in an
7 asset allocation, I've essentially undone what I've
8 tried to do? In essence, I want to diversify my
9 portfolio and in so doing, I'm going to enter into
10 these municipal funds.

11 Isn't there a point, though, when, if you
12 enter into it so large, that you are totally dependent
13 upon that one mutual fund? In essence, shouldn't have
14 there been more an allocation towards cash or other
15 type of vehicles for her, meaning Ms. Brotherson, in
16 order to balance out her large stake in these high
17 interest, high-yield bonds?

18 And I don't mean to be a Monday morning
19 quarterback, because I've read your letter to the
20 NASD, and you get, you call it different. You phrase
21 it differently. But this is the quandary I'm in. In
22 one area I'm not supposed to consider it because it's
23 such a small thing, and here, in the Brotherson
24 account, it's the majority of her account.

25 A. Well, I tried to react to the market

1 conditions, and I was conscious and aware and very
2 sensitive to the fact that she wanted to retain some
3 income, and what I wanted to do was also to regain
4 some value in the account. And I felt that by -- if
5 you're in a bond fund and it's starting to go south, a
6 hike in the interest rates or whatever, it usually
7 takes a bond fund longer to come back than a stock
8 equity fund, and I had all the indications that those
9 stock equity funds were going to turn around. And the
10 information fund had an extremely good performance, if
11 you look back in time.

12 So what I wanted to do was jump into a stock
13 equity fund and get value back into her account. And
14 then within hopefully a reasonable time, in the
15 systematic withdrawal whereby it looks like we're
16 going back up, let's now start to sell off some
17 shares, take some money out as we did before, and
18 instead of money coming out as dividends being paid to
19 the client, money is now coming back out in the form
20 of sold shares, and the proceeds there, and then she
21 would achieve the objective of getting back some
22 income on a monthly basis.

23 So that was my thought process at the time,
24 and in so doing, I didn't want her to be charged. So
25 to switch from one fund to another achieved that

1 objective.

2 Q. Did it ever cross your mind that at some
3 point, some of the stuff should be diversified further
4 in order to try to preserve some of the principal?

5 A. Later on, I guess in hindsight, I should have
6 done that. I think a lot of people realize that. She
7 had made considerable income, close to \$20,000 over
8 that time period, and I wanted to continue to help
9 her.

10 Q. And I have to go through my notes.

11 Going to Sylvia Hays, she had EMC. Do you
12 remember that? I had some notes about that.

13 A. Yes.

14 Q. It reached a high in January of '99?

15 A. Yes.

16 Q. That was subsequently sold?

17 A. A portion of it was sold. 15 shares or so.

18 ALJ DION: Was that in April of '99, can you
19 recall? I want to get it right. Which set of
20 documents is Sylvia Hays?

21 MR. LEWIS: It's in our documents, one of
22 those handwritten notes.

23 THE WITNESS: I have it here.

24 ALJ DION: Where does the sale occur? April?

25 THE WITNESS: It was on the --

1 MR. LEWIS: 1124.

2 THE WITNESS: 5th of April, '99, sir.

3 Q. (BY ALJ DION) You testified that the
4 crosshatch meant that she had called and you had
5 called back and she agreed to the sale of EMC, and
6 that's how you cross-check it; is that correct?

7 A. That's right.

8 Q. I think I might have covered this, but we'll
9 just go ahead and get it done.

10 Regarding Janet Mayfield, when was the first
11 time she questioned or said the trades were
12 unauthorized, to your knowledge?

13 A. Not while I was working at Dean Witter.

14 Q. So you never had the -- you don't know if she
15 ever asked to reverse those charges; is that correct?

16 A. No.

17 Q. And you certainly didn't offer to do that
18 because you didn't know about it; is that correct?

19 A. That's correct.

20 Q. Regarding Ms. Mayfield, if I remember
21 correctly, she had some Amgen and Cisco and Microsoft
22 and Oracle; is that correct? And then subsequently,
23 she invested in a biotech sector and a technology
24 sector; is that correct?

25 A. Yes, a unit trust.

1 Q. Was there any thought at that point regarding
2 those individual stocks? Did you have any
3 conversations with her to say you're investing in a
4 sector now, in these unit trusts, you might want to
5 liquidate these stocks because now we may be
6 double-dipping, or we may be putting ourselves in a
7 situation where we're getting more heavily involved in
8 these sectors, and we might want to pull back? Did
9 you ever have those discussions with her?

10 MR. BINGHAM: Your Honor, excuse me for
11 interrupting. Are you still referring to Janet
12 Mayfield or Lori Mayfield?

13 ALJ DION: Janet Mayfield.

14 THE WITNESS: With respect to the unit
15 investment trusts, they have a theme and they were in
16 a sector, and in that case of the Internet trust,
17 there were upwards to 28 or 30 stocks. So if she held
18 the stock outside of the annuity also, there wasn't
19 that much of an overlap, because one was X number of
20 shares, and the other one was a smaller, much smaller
21 portion of a large portfolio.

22 Q. (BY ALJ DION) We're talking -- we've kind of
23 gone over this and I don't want to go over it too
24 much, but regarding Lori Mayfield, I really only have
25 one question for you. You've already admitted that

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1 you've made an unauthorized transaction, but you
2 indicated it was an oversight. Sir, isn't it fair to
3 say that it's more than that? I mean, it was an
4 unauthorized trade, you had to enter it into your
5 computer or fill out the forms; it wasn't a situation
6 where you inadvertently checked an extra box, which I
7 think would be more of a situation of an oversight.
8 You've admitted it was an unauthorized transaction; is
9 that right?

10 A. That's correct. It was done in haste.

11 Q. We've talked a little bit about the Mayfields
12 and Ms. Brotherson, and I've heard them testify, so I
13 have a comfort level or at least somewhat of a comfort
14 level with their knowledge of investment vehicles and
15 things like that.

16 But wouldn't you agree with me that just
17 simply having an account for a long time doesn't make
18 you necessarily a sophisticated investor? Is that
19 fair to say?

20 A. That's true.

21 Q. Edward Jones, reputable firm, would you say?

22 A. Yes.

23 Q. S-49 and S-50 have copies of your resume.
24 One is a prior resume from Dean Witter and the other
25 one is the one from the Acacia Group. I noticed on

1 the Acacia Group it still says MBA, in parentheses,
2 finance. The resume hasn't changed; is that correct?

3 A. No.

4 Q. Having gone through the process, I know that
5 at an MBA level, you have general core, just like
6 college, you have core curriculum. MBAs do that as
7 well. You have a core curriculum. It's generally
8 first year in a two-year program, and if it's a longer
9 program, then it's the equivalent of what would be the
10 first year. And then you go on to specify or
11 specialize, and you can do it in accounting,
12 marketing, finance. I said accounting. Agribusiness
13 I know is certainly one.

14 I notice on your degree, it does say the
15 science and systems management. What is systems
16 management, can you tell me what that is?

17 A. Well, the Air Force basically starts systems
18 management. The best way to understand it is with
19 respect to the space program. The space program had
20 many different system components: Airframe,
21 propulsion, electronic, et cetera. And systems
22 management related to the hierarchy, if you will, of
23 an aerospace company, or in the case of the Air Force,
24 we had system program offices. We were responsible
25 for the management of the total system. In the case

1 of the program that I was working on, it was
2 surveillance satellite program.

3 Q. I guess in looking at your resume, isn't it
4 fair to say that really the MBA is in this science, in
5 systems management more geared towards the core
6 curriculum -- not the core curriculum. The focus of
7 that degree is more towards the aerospace industry
8 than the finance industry?

9 A. The reason I put in there finance is because
10 that completion of that program qualified me to attend
11 the defense systems management school, which I'm not
12 sure I've identified, which had a specialized program,
13 a very intense program in industrial financial
14 management. So my thesis topic and having gone
15 through the specialized finance management program, I
16 felt as though I had specialized, if you want to use
17 that word, in the finance area.

18 I was not trying to convey, in that word, the
19 financial securities industry. It was the financial
20 aspects of industry, which goes beyond Wall Street.

21 Q. And I understand that. I guess, can you
22 understand where, if you're representing yourself as a
23 broker, and you indicate that you have an MBA in
24 finance, and to someone who is not perhaps as astute
25 to the various degrees of finance, where that

1 representation could go awry? Can't you see that
2 where somebody is reading that they're going to think
3 you have an MBA in finance?

4 A. Sir, I honestly would never have thought that
5 someone would read that and say that has to do with
6 the financial industry, because an MBA is a business
7 administration graduate degree, and a lot of the
8 topics, a lot of the subjects related to finance, but
9 not necessarily the world of investing. I mean an
10 aerospace company has huge amounts of financial
11 people.

12 Q. Well, and I understand that. But in an MBA
13 program you do do some -- they took accounting out of
14 the University of Southern California for this degree,
15 but you do get exposure to accounting, you do get
16 exposure to marketing. But when you graduate, it
17 generally says master of business administration in X.
18 It could say marketing, it could say agribusiness, it
19 could say accounting. I mean, that's the crux of it.
20 That's where I'm going, Mr. Merrill, is that could be
21 construed to be misleading.

22 A. I obviously did not understand or was aware
23 that that's what the interpretation of the degree
24 would be. I abbreviated it because of space
25 limitations, and because of the knowledge that was

1 given to me when they introduced the program in the
2 Air Force by the University of Southern California.

3 Q. I'm not going to belabor the point. If you
4 really want to make it small just put MBA, MBA
5 Southern California. That's kind of what I think of
6 it.

7 A. Yes, sir.

8 Q. In any event --

9 A. Again, the finance was meant to reflect the
10 industrial financial management program I attended.

11 Q. Again, I caution you because you're
12 approaching someone as a financial planner.

13 A. Yes, sir.

14 Q. Mr. Merrill, I'm in S-50. Do you have S-50
15 in front of you?

16 A. Yes, I do.

17 Q. On 2812, which is the NASD letter from August
18 7th, 2001 --

19 A. I have it, sir.

20 Q. In the first paragraph it says, one, you
21 didn't obtain Lori Mayfield's -- and I'm not rehashing
22 the Lori Mayfield thing, I want to clarify something.
23 It says A through F. If you'll look at C, it says
24 Oracle. Trade dated December 11th, purchase of
25 Oracle.

1 In your letter that follows, on 21 August,
2 '01, it says: I regret to say that I did not receive
3 specific authorization from client to execute
4 transactions A through F. That includes Oracle.

5 You have consistently denied, though, that
6 the Oracle transaction was unauthorized; is that
7 correct?

8 A. Yeah. I made a mistake, sir. She -- I did
9 get her permission to sell that, and she admitted
10 that.

11 Q. Okay. I just wanted that to be clear because
12 those letters were used.

13 Viola Brotherson, we talked about her and the
14 fact that she is a very reluctant lady to give out
15 information. And I don't know if it's a product of
16 her generation or her children, but I never got to ask
17 her that question.

18 In any event, I recall seeing something in
19 the training materials, and I can't remember where it
20 was and I should have wrote it down, about when you --
21 we talked a little bit about it, but I want to hear it
22 from you.

23 When you are presented with somebody in which
24 their financial information is not given to you, I
25 believe the manual said that you're supposed to treat

1 them as a conservative investor. Do you recall that
2 training or that background from Dean Witter Morgan
3 Stanley.

4 A. I can't say -- I've heard that, but I can't
5 say that it was ever part of our training in New York.
6 No, sir. I think it was based on other, you know,
7 consider all the other factors before you make a
8 conclusion.

9 MR. LEWIS: Your Honor, please. I believe
10 that was Mr. Donovan's testimony and not from the Dean
11 Witter manual or guide.

12 ALJ DION: It might have been. And I don't
13 remember where I heard that, so I wanted to hear from
14 Mr. Merrill, from his training and experience.

15 Q. (BY ALJ DION) Beatrice DuChene, I want to go
16 back to her very quickly. When was the first time
17 that you realized there was a complaint against you
18 with her?

19 A. When I received a letter from NASD.

20 Q. When was that, again? Was that in 2000?

21 A. 2000. It was the letter -- my letter
22 response was 3 April.

23 Q. Of 2000?

24 A. Of 2000, yes, sir. I didn't reference -- I
25 referenced their number, but I didn't reference the

1 date of their original letter.

2 Q. But it was after her, after she terminated
3 the relationship or after the relationship was
4 terminated; is that correct?

5 A. Quite a few months, yes.

6 Q. And that was December of '99; correct?

7 A. '98.

8 Q. It was December of '98?

9 A. Yes.

10 Q. When Ms. DuChene was testifying, you were
11 here, she was very adamant about her GE stock. She
12 indicated that she worked for GE and she would have
13 never sold her GE stock, and she said that was an
14 unauthorized transaction that took place on the 15th
15 of December in 1997. Did you talk to her about
16 selling GE stock?

17 A. Twice, sir.

18 Q. And did you get her permission to do so?

19 A. Yes.

20 Q. Two weeks before your relationship terminates
21 she buys GE stock, on December 14th, 1998. Can you
22 tell me why that is, Mr. Merrill, almost a year to the
23 date later, and two weeks subsequent to the
24 termination of your relationship of her or
25 thereabouts, the GE was bought in her account?

1 A. I think she reflected on the fact that it was
2 previously sold and wanted to buy some more, and I
3 entered the order for her.

4 Q. So your recollection is that she told you to
5 buy GE stock?

6 A. It was then, at that point in time, rated
7 higher.

8 Q. It was not a remedial measure upon your part?

9 A. No. I had no awareness whatsoever that she
10 had ever worked for GE. She never told me that.

11 ALJ DION: I don't have any other questions.
12 It's after 5:00, but I wanted to get through
13 that, just barely past 5:00.

14 Let's quickly address the issues that we need
15 to address. First, tomorrow is open meeting, and that
16 starts at 10:00 a.m., and they get priority, and they
17 also get Mr. Bingham. So what I am suggesting is
18 that -- well, if we do something in the morning, we
19 have to do it upstairs, and then when they are done
20 here, they go upstairs and we come back downstairs. I
21 really am not looking forward to traipsing boxes up
22 and down.

23 Additionally, I think we need the phone and
24 this is the only place to do that. What I'm
25 suggesting is that if necessary, we reconvene in the

1 afternoon. That gives everybody the morning to do
2 whatever they need to do, and we reconvene and finish
3 with rebuttal witnesses in the afternoon.

4 Now, Mr. Bingham, you wanted to talk about
5 some rebuttal witnesses. Let's talk about the person
6 who's here. Who are we talking about, Viola
7 Brotherson, Janet Mayfield? Who are we talking about
8 that testified previously that you want to call as a
9 rebuttal witness?

10 MR. BINGHAM: I'm not referring to anybody
11 that testified previously.

12 ALJ DION: Who is going to testify as a
13 rebuttal witness?

14 MR. BINGHAM: Sarah Whitmore, who is an
15 employee of Morgan Stanley.

16 ALJ DION: Where is she located?

17 MR. BINGHAM: In the Sun City office.

18 ALJ DION: Is she an attorney of any sort,
19 you know, special, like Mr. Guilfoyle?

20 MR. BINGHAM: I don't believe so. She does
21 have a company in town and she told me she spent a lot
22 of time with that company. But no, as far as I know
23 she's not an attorney.

24 MR. LEWIS: Isn't she the manager of the
25 office?

1 MR. BINGHAM: Yes.

2 ALJ DION: Who else do you have?

3 MR. BINGHAM: Mr. Guilfoyle, who we spoke
4 about already, who is in the New York office, and
5 there may be one other person who was in the office.

6 ALJ DION: What office are you talking about?

7 MR. BINGHAM: In the Sun City office. And it
8 may be a former manager, branch manager of
9 Mr. Merrill. I'm not sure about that at this point in
10 time.

11 MR. LEWIS: What is the person's name?

12 MR. BINGHAM: Mr. Cajero.

13 ALJ DION: Mr. Cajero is no longer in the
14 vicinity?

15 MR. BINGHAM: He's in Tucson, from what I
16 understand.

17 ALJ DION: Mr. Lewis, your objection, as I
18 recall from many weeks ago, you didn't necessarily
19 object to Mr. Guilfoyle because he has a higher
20 standard, shall we say, to answer to, but you would
21 object to Mr. Cajero, and what is the lady's name?

22 MR. BINGHAM: Whitmore.

23 ALJ DION: Ms. Whitmore; is that correct?

24 MR. LEWIS: Sir, if you look at the Arizona
25 statute --

1 ALJ DION: We're going to do this real quick.
2 You would object to those two; is that correct?

3 MR. LEWIS: Yes, telephonic, you cannot
4 administer an oath.

5 ALJ DION: I have said this before, if
6 Mr. Lewis will not stipulate, then they're going to
7 take the witness chair. If it had been somebody who's
8 previously here, then I would take that into
9 consideration.

10 MR. LEWIS: I said that also.

11 ALJ DION: And Mr. Lewis agreed to that. So
12 if you want Mr. Guilfoyle to testify, then what I'm
13 suggesting we do is we have him on the phone, I'm
14 going to say 1:30. The securities meeting might go on
15 past that. Call the Hearing Division at 542-4250 --
16 I'll say it again, 542-4250 -- if you don't want to be
17 here at 1:30 and the open meeting is still on.

18 MR. LEWIS: What question do I ask of whom?

19 ALJ DION: You can ask the secretary, either
20 Molly or Debbi, ask them is the open meeting still
21 going on, and what time will the hearing in the
22 Merrill matter commence, or start. Start is probably
23 a better word. But I'm shooting for 1:30. I think
24 they're going to start at 10:00, and I think 1:30 is
25 very reasonable.

1 At that time, Mr. Guilfoyle on the phone is
2 acceptable. The other two, though, if he is not going
3 to agree, he does not, then I agree with Mr. Lewis,
4 that telephonic testimony in this case will not be
5 permitted.

6 MR. BINGHAM: Your Honor, for the record, I
7 have used telephonic testimony in other hearings and I
8 know other attorneys in the office that have with the
9 permission, of course, of the ALJ, used telephonic
10 testimony of witnesses.

11 ALJ DION: Over the objection of the other
12 party?

13 MR. BINGHAM: I don't know about that in
14 every circumstance, I don't know. But I know in one,
15 pretty certain in one circumstance it was certainly
16 over the objection of the respondent's counsel.

17 ALJ DION: Well, in this particular case,
18 that is not going to be allowed. And if those
19 particular individuals want to come and be sworn and
20 testify, then that's what we're going to do.

21 I'm cognizant of the fact that Mr. Guilfoyle
22 is in New York, and I'm satisfied that Mr. Lewis will
23 allow his telephonic testimony because that would be
24 great time, great expense, and it's reasonable. But
25 if you have somebody in the valley, I understand they

1 have a company, or somebody in Tucson, then it is not
2 unreasonable to ask them to come and testify, if that
3 is what you want to do.

4 MR. LEWIS: Sir, could I quickly explain for
5 the record why I'm making this objection so in case
6 there's some kind of a post action on this...

7 ALJ DION: You filed it in a motion, and what
8 you said is that based upon the Arizona statutes, the
9 idea of having somebody testify telephonically and
10 administering an oath is there's really no
11 jurisdiction if they were subject to, if they were
12 going to be subject to a perjury charge. In addition
13 to the fact that I don't even know who's on the phone.
14 Those are your basic objections.

15 MR. LEWIS: Very quickly, the Arizona statute
16 on oaths is that it has to be something that awakens
17 the conscience of the person to tell the truth, and it
18 has to be administered in person.

19 Now, the reason why I don't object to
20 Mr. Guilfoyle is he has something that awakens his
21 conscience, which is the fact that he's an attorney
22 and the code of professional conduct prevents him from
23 misrepresenting to a tribunal. That's why I have
24 never objected to his situation. And if either of
25 these people are attorneys and will -- that's made

1 clear, then I won't object.

2 But otherwise, I do. I want the person
3 subject to some kind of compulsion to awaken their
4 conscience to tell the truth, administered in a proper
5 fashion. Thank you.

6 ALJ DION: You're welcome.

7 There's really no jurisdiction over those
8 people, and additionally I'm not necessarily satisfied
9 that the person they say they are on the phone could
10 be who they are on the phone. That's really the sum
11 and substance of it. If Mr. Lewis did not object,
12 then I would swallow those objections that I have and
13 allow it. Although this is an administrative agency,
14 it is an action that has and could have serious
15 consequences. And Mr. Lewis has objected, and is
16 entitled to cross-examine that person and see the
17 demeanor on their face and all the other things that
18 he said. So it's 5:15, and we'll not discuss it any
19 longer.

20 1:30 for Mr. Guilfoyle at a minimum. If the
21 other individuals are going to be present, then they
22 need to go at 1:30, they certainly can go at 1:30. If
23 they need another accommodation like they can't get
24 here until 2:00 or 2:30 or something like that, I'm
25 fully willing to work with it. I know it's on short

1 notice for rebuttal witnesses, and that's unfortunate,
2 but that's the animal that you deal with.

3 I don't mind working within those parameters
4 and perhaps not starting the hearing until 2:30 or
5 3:00. But as I understand it, we just have, it should
6 be fairly short as they're simply rebuttal witnesses.
7 So starting at 3:00 doesn't concern me. So I'm
8 willing to do that. However, other than that, I'd
9 really like to start this at 1:30 with Mr. Guilfoyle.

10 MR. BINGHAM: Your Honor, in order for Sarah
11 Whitmore to testify, Mr. Guilfoyle has to be able to
12 listen to her testimony because he is her attorney.
13 So...

14 ALJ DION: I think he can call in on the
15 phone.

16 MR. BINGHAM: What number should he call,
17 then?

18 ALJ DION: You're going to have to call that
19 number I gave you, 542-5240, talk to Molly; she'll
20 know how to do that.

21 MR. LEWIS: Can I ask, when we do convene,
22 and when whoever is going to testify testifies, what
23 is going to happen after that? I'd like to be
24 prepared.

25 ALJ DION: After the rebuttal witnesses, then

1 I'm going to take the matter under advisement, and
2 probably order that briefs are written so that we
3 can -- I normally wouldn't do that, but this is a
4 two-week case probably involving two thousand pages of
5 transcripts. I don't necessarily know if an oral
6 summation is going to be appropriate.

7 MR. BINGHAM: Your Honor, if you have any
8 idea of any page limit on the briefs, can you give
9 that to us if there will be a page limit?

10 THE WITNESS: If you do more than 25 or 30
11 it's probably voluminous, but that's where I'm
12 leaning.

13 If however, Mr. Lewis, you would like to make
14 an oral summation as to what it is and not submit that
15 brief, I will certainly listen to that. I, however,
16 know that this case is going to take a lot of time to
17 review.

18 MR. LEWIS: I'm sure it is, Your Honor. And
19 I certainly appreciate the attentiveness and time you
20 have spent on this thing, and I'm not concerned about
21 that. It's just that it's the period of time. My
22 client is interested in some resolution. He wants it
23 decided, he wants it decided right, and if you feel
24 that the only way to do it is to have briefs, it's a
25 problem, because it's going to take quite a while to

1 go through these transcripts and pull out everything
2 that was said, and it's also quite an expense for
3 Mr. Merrill. We ordered most of the transcript, not
4 all of the transcript -- I didn't order Mr. Donovan's
5 testimony -- and it's fairly expensive, and it's a
6 problem, and there's no way for him to get that
7 expense back.

8 ALJ DION: And I appreciate that. But I also
9 have a feeling that when a proposed opinion and order
10 is done, and the various annotations to what happened
11 in this hearing are done, the record is going to be
12 reviewed anyway. I think that that's going to happen.

13 It's a situation that has gone on for two
14 weeks, I understand that, but it is a mountain of
15 information, and it is a situation that I think that
16 both sides would be best served in telling your story.
17 There are a number of counts that are in contention.
18 There are some that can be ignored, but there are a
19 number of counts that are in contention, and there are
20 facts that I think can be brought to light by both
21 sides and make a strong argument, and I can decide to
22 make a recommendation either way.

23 MR. LEWIS: What is your procedure, do we
24 submit simultaneous briefs?

25 ALJ DION: Yes.

1 MR. LEWIS: And no response?

2 ALJ DION: What will happen is that the
3 proposed opinion and order would be generated by me,
4 and you have the ability to file exceptions at that
5 time to the proposed opinion and order, and as far as
6 the proposed opinion and order, or to follow one side
7 or the other, and at that point essentially you would
8 file, that would be your reply through your
9 exceptions.

10 MR. BINGHAM: Your Honor, can you give us any
11 time frame after the hearing has ended.

12 ALJ DION: We'll deal with that tomorrow.
13 The court reporter is way past her break time, and I
14 really -- well, I have had to beg her indulgence to
15 stay this late so we'll deal with that tomorrow.
16 Until then, we're adjourned.

17 (The hearing recessed at 5:20 p.m.)

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1 STATE OF ARIZONA)
) ss.
 2 COUNTY OF MARICOPA)

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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.

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WITNESS my hand this 4th day
 of February, 2003.

Cecelia Brookman

CECELIA BROOKMAN, RPR
 Certified Court Reporter
 Certificate No. 50154