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BEFORE THE ARIZONA CORPORATION

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

At: Phoenix, Arizona
 Date: August 26, 2002
 Filed: **SEP 11 2002**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Volume I

(Pages 1 through 227)

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1 BE IT REMEMBERED that the above-entitled
 2 and numbered matter came on regularly to be heard
 3 before the Arizona Corporation Commission, in Hearing
 4 Room 1 of said Commission, 1200 West Washington
 5 Street, Phoenix, Arizona, commencing at 10:00 a.m., on
 6 the 26th day of August, 2002.

7
 8 BEFORE: PHILIP J. DION, III, Administrative Law Judge

9 APPEARANCES:

10
 11 For the Arizona Corporation Commission
 Securities Division:

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

15
 16 For the Respondent:

17 BEGAM, LEWIS, MARKS & WOLFE, P.A.
 By Mr. Frank Lewis
 18 111 West Monroe, Suite 1400
 Phoenix, Arizona 85003-1787

19
 20 Also present:

21 Mr. Jerry Lowe, Investigator, Securities Division

22
 23
 24 CECELIA BROOKMAN, RPR
 Certified Court Reporter
 25 Certificate No. 50154

1 ALJ DION: Good morning, everyone, and
2 welcome to the Arizona Corporation Commission. My
3 name is Phil Dion, and I'll be presiding over the
4 hearing today. It's the matter of Philip William
5 Merrill. The docket number is S-03450A-02-0000. As I
6 stated, this is the time set for the hearing in this
7 matter, and I'm going to begin by taking appearances,
8 and I will start with the Division.

9 MR. BINGHAM: Anthony Bingham, Your Honor,
10 attorney for the Securities Division.

11 ALJ DION: Good morning, Mr. Bingham.
12 And on behalf of Mr. Merrill.

13 MR. LEWIS: My name is Frank Lewis. I'm an
14 attorney with the Phoenix law firm Begam, Lewis, Marks
15 & Wolfe.

16 ALJ DION: Good morning, Mr. Lewis.

17 Just briefly, we talked a little bit about
18 the listen line, so if you'll be kind enough to move
19 your microphones in that area where people will
20 actually listen, I'd appreciate that.

21 Mr. Lewis, if you need to speak to your
22 client please feel free to cover up the microphone or
23 walk away, or ask me for a brief recess, and I will
24 accommodate you.

25 MR. LEWIS: Thank you.

1 ALJ DION: Before we start this matter, I
2 just want to put something on the record. Last week,
3 we had a telephone conference, kind of an impromptu
4 conference between Mr. Bingham, Mr. Lewis and myself,
5 regarding Mr. Bingham's motion for telephonic
6 witnesses, and the motion itself listed three
7 witnesses that Mr. Bingham wanted to bring in and have
8 them testify via the telephone.

9 Mr. Lewis objected to two of them, and a
10 third one he raised some concerns, but didn't
11 necessarily object to the testimony. The reason for
12 that is because the third individual is an attorney
13 out of New York, and he felt that some of the
14 objections he had with the other witnesses could be
15 resolved due to the fact that the third witness was an
16 attorney, and presumably, under the oath, even in the
17 State of New York, attorneys are not supposed to
18 mislead tribunals, hearing officers, courts, and
19 whatnot. So he agreed that this particular individual
20 could testify via the telephone, and I agreed -- I
21 accepted that, and we'll allow that telephonic
22 testimony. As for the other two witnesses, they are
23 nonlawyers, and they don't have those particular
24 safeguards.

25 Additionally, one of the witnesses actually

1 resides here in Phoenix, and just is out of town this
2 week. And so for those reasons, and for a couple of
3 other reasons that I stated on the phone, I would not
4 allow them to testify telephonically, and they will be
5 present should Mr. Bingham decide to call them, but
6 just on a later date, is my understanding.

7 Also, my understanding is that after that
8 date, that will be the time that Mr. Lewis will, if he
9 so chooses and if Mr. Merrill so chooses, would then
10 present evidence and witnesses, although they are
11 certainly not obligated to do so.

12 I think that, in a nutshell, described the
13 telephone conversation and rulings that I made.

14 Mr. Bingham, does that accurately depict the
15 conversations we had?

16 MR. BINGHAM: Yes, Your Honor.

17 ALJ DION: And do you agree with that
18 summary?

19 MR. BINGHAM: I agree with the summary, yes.

20 ALJ DION: Mr. Lewis.

21 MR. LEWIS: There was one additional item.
22 Mr. Bingham was to advise you when these other two
23 witnesses, I believe were Sylvia Hays and Lori
24 Mayfield, would be available in person to testify, so
25 that we could try and schedule what the continued date

1 would be.

2 ALJ DION: That's correct, and I assume we
3 will do that probably at some point today.

4 I'm just trying to figure out how long we're
5 going to be here, if we're going to be here today,
6 tomorrow and Wednesday, we're going to be here today
7 and tomorrow, or just going to be here today. But at
8 some point I'm going to need that information.

9 Besides, that do you agree with my summary?

10 MR. LEWIS: I'm sorry, when I said
11 additional, I agreed with everything else. I just
12 said there was an additional item that we discussed.
13 Thank you.

14 ALJ DION: That is true. With that, I think
15 that takes care of kind of the motions or any
16 in limine items, and at this point --

17 MR. BINGHAM: Your Honor, can I mention one
18 other thing at this point?

19 ALJ DION: Sure.

20 MR. BINGHAM: We also, and I just remembered
21 this, we also discussed the issue of where Janet
22 Mayfield can be served with a subpoena that has been
23 issued on behalf of the respondent. I did inform
24 Mr. Lewis that he should be able to have her served at
25 her house latter part of this week. From what I

1 understand, she'll be in and out, but she will at
2 least be home, and perhaps she could even be served by
3 mail, because I know that she will be -- she was
4 having her mail held, and I know she's going to pick
5 it up today or tomorrow, sometime the last half of
6 this week.

7 ALJ DION: That information is based upon
8 your conversation with her daughter; is that correct?

9 MR. BINGHAM: Actually with her daughter, and
10 then we actually did contact Janet Mayfield.

11 ALJ DION: Okay. I appreciate that. Thank
12 you, Mr. Bingham.

13 And as to what service you're more
14 comfortable with, Mr. Lewis, I'll leave that up to
15 you.

16 MR. LEWIS: I didn't realize when I read the
17 rules that I could serve her by mail.

18 ALJ DION: Well, you can. The caveat is that
19 there is always that -- the dilemma that someone,
20 especially when receiving a subpoena from perhaps an
21 opposing party in this situation, can say I never
22 received service, I didn't get my mail, it got lost in
23 the mail. There are a number of pitfalls with that
24 kind of service, and there can be service, and it's
25 done all the time, believe it or not, where service is

1 left at somebody's door, you know, things like that.

2 For the majority of people who receive that
3 type of service, for either a court summons or
4 whatever it is, they then appear. The problem is as
5 you noted, that if those people do not appear, then
6 you have the question of were they actually served or
7 not.

8 So it would not necessarily be the best way
9 or, you know, the way that if I was doing it, I would
10 prefer, especially if I was serving a subpoena on a
11 hostile or on someone from the other side. It's
12 certainly not a way that I would recommend. But
13 you're free to do that; if the witness appears for the
14 hearing, then we're fine. But I would certainly
15 suggest personal service, especially in the situation
16 that I told you beforehand.

17 MR. BINGHAM: Can I also add that she was
18 aware, as I mentioned, Mr. Lewis is trying to serve
19 her, and she's been informed of that, and so I don't
20 think she'll try and evade service, but she certainly
21 is aware that she may be served, if she is, at any
22 given time soon.

23 ALJ DION: We're going to address Mr. Lewis'
24 concern by the afternoon session, because I'm assuming
25 his office is going to want to draft the subpoena, and

1 we're going to pick a date.

2 MR. LEWIS: The subpoena has already been
3 issued, sir.

4 ALJ DION: That's right, it was the Executive
5 Secretary's office.

6 MR. LEWIS: The return date was tomorrow at
7 9:00 a.m. Do I need to get a new subpoena issued
8 because tomorrow at 9:00 a.m. doesn't look like a
9 viable time?

10 ALJ DION: No, it certainly doesn't.

11 I wouldn't -- Mr. Lewis, I don't think you
12 have to have another subpoena issued. I think the
13 issue in this case is going to be the timing if we
14 break for two weeks, then having her appear, you
15 understand what I'm trying to say?

16 MR. LEWIS: Yes, sir.

17 ALJ DION: Mr. Bingham.

18 MR. BINGHAM: Given the circumstances, as the
19 way the motions and so forth have evolved, we have
20 subpoenaed her service, we've done it, we've tried to
21 do it by mail. We have not received the return
22 receipt back. We expect to receive it probably within
23 the next week, so that may be a moot issue for
24 Mr. Lewis if she is subpoenaed by us. It does comply
25 with that subpoena. And that subpoena won't be until

1 she -- she won't be testifying this week, because of
2 her circumstances. I will be asking to have her
3 testify basically the same time frame as her daughter
4 and Sylvia Hays, who is the other individual who is
5 out of town right now.

6 ALJ DION: But certainly it doesn't prove
7 pudding for Mr. Lewis, and out of an abundance of
8 caution he issued his own subpoena. It may become an
9 issue where she is present and some of the things that
10 we've gone through up to today are not as prevalent.

11 But I want to give Mr. Lewis every
12 opportunity to, as far as the time frame and
13 information and whatnot, when we leave today,
14 certainly, so that he is in a position to have that
15 witness, whether or not the state calls her or not.

16 MR. LEWIS: Sir, I'm a little confused, if I
17 may.

18 Mr. Bingham told me some time ago that he did
19 not intend to call Janet Mayfield as a witness.
20 That's why I had the subpoena issued. If he's now
21 telling me that he intends to call her as a witness,
22 and will have her here as a witness, I don't need to
23 continue my efforts to subpoena her.

24 I guess what you're saying to me is that if
25 he subpoenas her, and she doesn't honor his subpoena,

1 I may be without any remedy. I'm not sure that that's
2 correct. I think I'm entitled, if the witness has
3 been subpoenaed by any party, and has information that
4 certainly she's one of the people named in the charge,
5 as being the customer of Mr. Merrill's, who claims
6 that things happened to her that shouldn't happen, and
7 that's what he wants her to testify about, I certainly
8 feel she's a material witness, and if he's telling me
9 he's going to have her here, I don't need to subpoena
10 her any longer. The only reason for commencing that
11 process was because he told me he would not have her
12 here.

13 Now, what I would say to the court is this.
14 If we get to September, whatever, with a continued
15 hearing, and he doesn't have her here as a witness at
16 that time, I will make a decision based upon how he
17 attempts, and how he is allowed to present what is
18 material to her situation, and then ask the court for
19 a continuance to bring her in and have her testify.

20 I think, out of fairness, I shouldn't be put
21 in a position where I have to subpoena a witness that
22 he is saying he's going to have here. And if he
23 doesn't have her here for whatever reason, then I
24 should be able to do what's necessary to get her here.

25 If I understand what you're saying is that

1 even though he's now saying he's going to have her
2 here as witness, I've got to go out and subpoena her
3 anyway.

4 ALJ DION: What I'm saying, Mr. Lewis, is I
5 don't want to be in a situation where, especially with
6 this particular witness where we've had a lot of
7 discussion, and she is on the witness list, but she is
8 testifying, she isn't testifying, I'm going to have
9 her here, I'm not going to have her here, I don't want
10 to be in a position two weeks down the road, if
11 Mr. Bingham makes a tactical decision not to call her
12 on the stand any longer, and informs her of that, that
13 I am not calling you to the stand, that she thinks she
14 is free and clear, does not need to appear, and we get
15 to that continuance, now we continue the case and we
16 go on.

17 I want it clear to this particular individual
18 that her presence is required even though Mr. Bingham
19 does not intend to call her.

20 I understand that, and I also understand that
21 the subpoena has already issued; correct?

22 MR. LEWIS: Yes. It issued on, I think,
23 August 12th.

24 ALJ DION: We're really just talking about
25 the service of process, which I understand can be

1 accomplished sometime later this week. So I'm trying
2 to understand the difficulty.

3 MR. LEWIS: May I ask this, then, instead of
4 having another subpoena issued, there is one issued
5 for her appearance today, if tomorrow, if I just
6 attach a letter saying the timing of your appearance
7 as stated in the subpoena at the time it was actually
8 issued, it now looks that you will not be testifying
9 until a later date, we will leave you a telephonic
10 message as to when you're to appear?

11 ALJ DION: The typical thing you usually see,
12 please call by 10:00 a.m. on X day at this number to
13 find out if you're actually needed, blah, blah, blah.
14 That's fine.

15 But I'm just -- and I understand your
16 concern, Mr. Lewis, and I don't disagree with you. I
17 just -- we're going to continue this case once based
18 upon my ruling, but obviously that's up to conjecture.
19 I don't want to be in a situation where we're going to
20 continue it again if we can avoid that.

21 MR. LEWIS: Thank you. I understand.

22 ALJ DION: Based upon those discussions, I
23 don't think there's anything else as far as motions or
24 limine rulings, so therefore we'll start with opening
25 statements.

1 Does the Division have any opening
2 statements?

3 MR. BINGHAM: Yes, Your Honor. Your Honor, I
4 did fail to introduce Jerry Lowe, who is the
5 investigator on this case, to my left, and I wish to
6 do that at this time.

7 MR. LEWIS: Sir, before we start, I'd like to
8 have all witnesses excluded from the proceeding.

9 ALJ DION: Pursuant to the rule?

10 MR. LEWIS: Yes.

11 ALJ DION: Mr. Bingham, who do we have?

12 MR. BINGHAM: As far as witnesses?

13 ALJ DION: Yes, sir.

14 MR. BINGHAM: Your Honor, Mr. Donovan, Cathie
15 and Beatrice DuChene are also present. Mr. Lowe again
16 is the investigator in this case, and he very well may
17 be testifying later in the case, but because he's an
18 investigator, I would like to keep him here.

19 ALJ DION: You're attempting to authorize him
20 as the case agent?

21 MR. BINGHAM: Somewhat, yes. He is somewhat
22 the case agent. He has helped with the files, is
23 aware of where a number of documents are. In other
24 words, he is equivalent of a detective or a police
25 officer in a criminal case who is allowed to remain

1 seated in the courtroom during the process of the
2 trial.

3 ALJ DION: Before we get to that, I want to
4 explain the rule, because we have some people here
5 that might not understand that.

6 Basically, the exclusion of witnesses during
7 a hearing, the rationale behind that is so that the
8 witnesses aren't sitting there listening to one person
9 testify about events and then their own personal
10 recollections are biased, swayed because of what they
11 have just heard.

12 So we want you to testify on your independent
13 recollections. We're not trying to exclude you from
14 the proceedings here. Rather, we are trying to get
15 you to tell us, to the best of your recollection, what
16 has occurred, what happened, instead of just kind of
17 parroting what other individuals have said, because
18 that's what's kind of fresh in your mind.

19 So I hope you guys understand. It's not --
20 we're not trying to exclude you from the process, but
21 it's a situation that is necessary so that when you
22 testify, it is based upon, like I said, your own
23 recollection, and not necessarily things that you've
24 heard or perceive. Okay. So I just want to address
25 that with you guys first. You can stay here until we

1 finish because we haven't done anything yet.

2 Mr. Lewis, did you want to say something?

3 MR. LEWIS: First, I want to ask who the
4 other gentleman is.

5 MR. BINGHAM: This is Mr. Michael Donovan.

6 MR. LEWIS: He is going to be a witness also?

7 MR. BINGHAM: Yes, and he'll be leaving.

8 MR. LEWIS: As far as Mr. Lowe is concerned,
9 my conversations with Mr. Bingham, during my
10 conversations with Mr. Bingham, especially concerning
11 Janet Mayfield, was that he felt he could present her
12 testimony through Mr. Lowe, that he -- Mr. Lowe could
13 testify about what Janet Mayfield had told him. I
14 presume he assumes he can do the same thing as far as
15 any other witness is concerned.

16 To say that this person can sit in court and
17 listen to the direct and cross-examination of that
18 witness, and then get on the witness stand, and for
19 instance, say well, you know, she forgot, what she
20 really told me and what really happened is this, which
21 is different than what she testified to under oath,
22 that's a very real potential in this matter.

23 If he is going to testify, and if the
24 potential is he's going to testify about what these
25 witnesses, critical witnesses told him, then he should

1 be excluded from the hearing. By that I don't mean to
2 say I will not object if he attempts to give hearsay
3 testimony. But that is Mr. Bingham's intention along
4 with other matters.

5 He is not here as a representative of the
6 Corporation Commission, he's here because he is the
7 person who investigated these things. I presume he's
8 got notes about conversations with witnesses that we
9 ought to be able to see. He's got, according to
10 Mr. Bingham, testimony that's material, what the
11 state's witnesses, Division's witnesses told him.

12 He can't sit here and listen to the
13 cross-examination and opening statements in this
14 matter and be a fair and candid witness on all these
15 subject matters. I mean, you can't have this witness
16 as your cleanup man, come in and solve all of the
17 problems that have been created by the testimony of
18 all of the other witnesses and cross-examination of
19 those witnesses.

20 Thank you, sir.

21 ALJ DION: You're welcome.

22 Mr. Bingham, did you have a quick response?

23 MR. BINGHAM: Yes, Your Honor. First of all,
24 Mr. Jerry Lowe is a sworn law enforcement officer;
25 therefore, he is bound by the ethical obligations as a

1 sworn law enforcement officer.

2 From what I understand, it is not abnormal
3 for someone such as Jerry Lowe, who is the
4 investigator on the case, to be present during a
5 hearing. He has informed me just a few seconds ago
6 that he has been present during hearings before that
7 have been held here before the Commission. Those were
8 with different attorneys, but still he was present
9 during the entire hearing.

10 Mr. Lewis, in my opinion, is raising the idea
11 that Mr. Lowe will fabricate his testimony based upon
12 what he's heard previously during the hearing. Again,
13 he is a law enforcement officer, he is bound to tell
14 the truth, and if he is asked a question that he does
15 not know the answer to, then he is bound to say he
16 does not know, as opposed to create an answer that
17 will be beneficial to the state.

18 ALJ DION: Okay. I get Mr. Lewis'
19 objections, but if a witness gives testimony under
20 sworn testimony, and then if your concerns rise to the
21 level to where Mr. Lowe then says something else, I
22 will certainly give that its due weight. In other
23 words, I believe that I have the ability to determine
24 whether or not someone is being a cleanup man or not.
25 I believe I have the ability to judge the witness in

1 this particular case, and judge Mr. Lowe as to what's
2 going on.

3 I also believe that in this particular case,
4 I have no idea as to what Mr. Lowe is going to testify
5 to and/or about, and nor do I know whether or not he
6 will come in to talk about the other witnesses and
7 what they said and what they actually said. I assume
8 that that's a very probable result as that's -- I
9 think I started the word case agent, and Mr. Bingham
10 followed up, as I'm sure detectives and investigators
11 take notes and make reports and do those things.

12 But I do not find that Mr. Lowe, in staying
13 here, will prejudice me or in any way influence me as
14 to what a witness says in that chair under oath, and I
15 think that I will be able to properly weigh and
16 balance what that witness said and what Mr. Lowe has
17 said. So I'm going to overrule Mr. Lewis' objection.

18 Mr. Lowe, you can stay, but the other
19 witnesses, as I've explained, for the reasons that I
20 stated earlier, at this point I would ask that you be
21 excused, and then as you're called in one at a time,
22 Mr. Bingham can go outside, come in, and bring you
23 out.

24 Whether you can stay after you've testified
25 is also a different question. It's the same, we're

1 talking about the same things, but it's whether or not
2 you will be recalled or called as a rebuttal witness
3 or whatnot. So don't think that after you've
4 testified you get to stay here either. I just wanted
5 to make that very clear.

6 It's entirely possible that you will, but
7 it's not yet determined. Okay. So with that, I'd ask
8 those who were identified to just go ahead and sit
9 outside.

10 (All witnesses were excused.)

11 (An off-the-record discussion ensued.)

12 ALJ DION: We can start with opening
13 statements now.

14 Mr. Bingham.

15 MR. BINGHAM: Yes, thank you, Your Honor.

16 Your Honor, this case really has some
17 principles that are very simple. This is a case about
18 a stockbroker who clearly crossed the line several
19 times. He crossed the line of ethical behavior by
20 conducting unauthorized transactions in five
21 customers' accounts. In all five of those customers'
22 accounts, there was at least one unauthorized
23 transaction that the respondent conducted in their
24 accounts.

25 This is also a case about the respondent

1 crossing the line of honesty, by not receiving
2 authorization or permission from his clients before he
3 conducted transactions in their accounts. He went
4 ahead and conducted those transactions.

5 Your Honor, there's a common thread between
6 all five customers that are listed in the notice of
7 opportunity for hearing. That common thread first, as
8 I've mentioned, is unauthorized transactions. Some of
9 these clients had a number of different unauthorized
10 transactions that the respondent conducted in their
11 accounts. As I said also, one of them only with one.

12 Another common thread is they're all female.
13 Four of five, that is four out of five of these
14 customers are widows, senior citizens.

15 Your Honor, we're alleging that in the
16 accounts of Customers One and Two, as listed in the
17 notice of opportunity for hearing, not only were
18 unauthorized transactions conducted by the respondent,
19 but also unsuitable transactions were conducted by the
20 respondent. Those were unsuitable given the
21 customer's age, financial condition, and other
22 relevant factors.

23 We believe that through the witnesses and
24 throughout this hearing, we'll show that unauthorized
25 and unsuitable transactions were conducted by the

1 respondent.

2 At the end of this hearing, I'm going to ask
3 the court to, number one, revoke the respondent's
4 registration to sell securities in the State of
5 Arizona. Next, I'm going to ask that restitution be
6 ordered for the benefit of the former customers of the
7 respondent. I'm also going to ask for administrative
8 penalties be ordered against the respondent.

9 Nothing further at this time.

10 ALJ DION: Mr. Lewis.

11 MR. LEWIS: Thank you.

12 This case does not involve a contest
13 concerning whether or not there should be some
14 sanction leveled against Mr. Merrill. Mr. Merrill has
15 always said that there was one customer by the name of
16 Lori Mayfield whom he had discussions with in November
17 and December of the year 2000 concerning opening a new
18 account. She then went on a trip, and he entered some
19 orders in her account, similar to orders he entered in
20 those of other customers.

21 When she returned from her trip, she called
22 him and asked him about the items that were on the
23 monthly statements that had been received in her
24 absence. He immediately agreed that he had not had
25 her authorization, but thought they were in her best

1 interests, and that if she wanted to reverse the
2 transactions, he would be willing to do so. The
3 securities had gone down in value, and he would take
4 care of the matter in that fashion.

5 She said no, I don't want to do that now. He
6 then told his manager about what had happened, and
7 indicated that it had been an unauthorized
8 transaction. He has always stood up and told
9 everybody who asked him the truth about that situation
10 with Lori Mayfield. He told the NASD when they asked
11 him. He was discharged by Morgan Stanley Dean Witter,
12 the equivalent on his U-5, because of unauthorized
13 trading. He told everybody. And in November of last
14 year, Mr. Bingham had him come to his office, and
15 under oath, without an attorney, without any
16 preparation, he admitted under oath that that's what
17 had happened.

18 We don't contest that. We think that you
19 should listen to what the consequences have been to
20 him as a result of that one, that one situation, the
21 loss of his job, the loss of his pension, the loss of
22 his deferred compensation and so forth, in determining
23 what the sanction should be.

24 Because of that, Mr. Bingham has accepted
25 statements by others that there were unauthorized

1 transactions in their accounts, claims that were not
2 made in one instance till more than a year after it
3 had happened. In others, seven, six months after it
4 happened, where there were multiple discussions with
5 these people as to what was happening in their
6 account, what was going on. Many of them
7 face-to-face.

8 One of these accounts was wildly profitable.
9 Over 84 percent increase in value in a relatively
10 short period of time. And they're claiming the
11 transactions occurred in that account that were
12 unsuitable.

13 But on the basis of 20/20 hindsight,
14 Mr. Bingham's got a lot of people out there, anybody
15 who recommended Enron, WorldCom, all of the other
16 securities that were being touted by everybody on the
17 street as good buys, they went down in value
18 tremendously, Mr. Bingham would say they are now
19 unsuitable.

20 You do not, as a broker making
21 recommendations, guarantee if the things will go up in
22 value. You have to have a reasonable basis for doing
23 it. And Mr. Merrill had a reasonable basis for all of
24 the recommendations that he made. And not 100 percent
25 of them went up in value. That doesn't make them

1 unsuitable.

2 They have marked on the exhibits as
3 unsuitable, multiple trades that made very significant
4 profits, and they're asking for restitution on trades
5 that were profitable where the customer had, in
6 effect, ratified all of those trades, because the
7 events had occurred, they received confirmations of
8 the trade, they had discussions with Mr. Merrill, they
9 never complained about these things until long after,
10 for varying reasons.

11 I haven't had the opportunity to talk to
12 these ladies, but I think we'll find out that because
13 they've been told maybe they'll get restitution of
14 some amount of money as a result of these proceedings,
15 that they have a bias and prejudice that's involved.

16 MR. BINGHAM: Objection; Your Honor, that's
17 inappropriate.

18 MR. LEWIS: I'm talking about what the
19 evidence will show, Your Honor, I haven't had the
20 opportunity to talk to them, I believe it will show
21 that.

22 ALJ DION: And that's fine. I'm going to
23 rule on -- I won't rule on the objection. Proceed.

24 MR. LEWIS: You will hear Mr. Merrill is a
25 graduate of the United States Naval Academy, subject

1 to the code of honor there, and that he has followed
2 that in all of his life, and that he stood up and he
3 said yes, I did something wrong when he did something
4 wrong. And he has never denied it, he will not deny
5 it here. He did not deny it in the examination under
6 oath.

7 He was there without an attorney. And you
8 will see in the record, on various occasions,
9 Mr. Bingham tried to get him by misstating his prior
10 testimony in the record, trying to get him to admit
11 that he had done things that he shouldn't have done.
12 And he, without any preparation, without any attorney,
13 he picked up, and he said no, that didn't happen, I
14 didn't say that.

15 That's what this case is about. It's not
16 about determining on one that he has admitted what the
17 sanctions should be. It's getting something for
18 people who are not entitled to it, people who did not
19 complain about problems until long after, and
20 certainly, in Ms. DuChene's instance, where she had
21 made an unbelievable profit, had taken the account
22 away from Mr. Merrill. They were very secure
23 investments, they were guaranteed investments for a
24 substantial portion of her portfolio. That's what
25 this hearing is going to be all about.

1 The cross-examination of these people, the
2 cross-examination of Mr. Lowe, who supposedly has
3 information concerning what happened, and the
4 cross-examination of someone who's going to come in
5 here and claim that Mr. Merrill did not have a
6 reasonable basis for making the recommendations that
7 he made, that's the unsuitability, and the fact that
8 these transactions were not unauthorized. Thank you.

9 ALJ DION: Thank you.

10 Mr. Bingham, your first witness, sir.

11 MR. BINGHAM: Yes, first witness will be
12 Beatrice DuChene.

13

14

 BEATRICE MARY DuCHENE,
15 called as a witness, having been first duly sworn by
16 the Certified Court Reporter to speak the truth and
17 nothing but the truth, was examined and testified as
18 follows:

19

20

DIRECT EXAMINATION

21

22 Q. (BY MR. BINGHAM) Ms. DuChene, please state
23 your full name for the record.

24 A. Beatrice Mary DuChene.

25 Q. How old are you currently?

1 A. 78.

2 Q. What's your occupation?

3 A. I'm retired.

4 Q. How long have you been retired for?

5 A. Approximately five years.

6 Q. Do you have any kids, by chance?

7 A. I have three adult children.

8 Q. And is one of those children here today with
9 you?

10 A. Yes.

11 Q. What is her name?

12 A. Mary Catherine DuChene Elwood.

13 MR. LEWIS: Pardon me, I didn't hear the last
14 statement.

15 THE WITNESS: Her married name is Elwood.

16 MR. LEWIS: Elwood, thank you.

17 Q. (BY MR. BINGHAM) Do you have any education
18 past high school?

19 A. I had some college.

20 Q. How many years?

21 A. Approximately a year.

22 Q. And what types of classes did you take?

23 A. Social classes, English, math, biology.

24 Q. And general studies, then?

25 A. Yes.

1 Q. Before you retired, what was your employment?

2 A. I was a medical secretary.

3 Q. For approximately how many years?

4 A. I started about 25 years ago, I believe.

5 Q. Did you have any other employment besides
6 medical secretary?

7 A. I worked for an attorney, a prosecuting
8 attorney at one time, many years ago. I worked in
9 engineering for a while, but I went back to medical.

10 Q. Did you ever work for General Electric?

11 A. Yes, I did.

12 Q. For how long?

13 A. I'd say approximately a year.

14 Q. How has your health been in general over the
15 last eight years or so?

16 A. It could be better and it could be worse.

17 Q. Have you ever gone for cancer surgery in
18 Mexico?

19 A. No.

20 Q. Did you ever go to Mexico for any medical
21 treatment?

22 A. I went to Mexico for chelation.

23 Q. How many times?

24 A. Once.

25 Q. Have you ever received any training in

1 investing?

2 A. No.

3 Q. Ever taken any classes in stocks, bonds,
4 mutual funds?

5 A. Recently, yes.

6 Q. How recently?

7 A. Within the last few years.

8 Q. Two years, three years?

9 A. Probably the last couple of years.

10 Q. And what type of class was that? Was that at
11 a junior college or university?

12 A. No. They're the classes that are offered,
13 the brochures come in the mail that you can go to
14 them, and then you have a free breakfast or a free
15 lunch, that type.

16 Q. Did you learn much at all from those classes?

17 A. Yes and no. Some of it's over by the end.

18 Q. You were a customer of Dean Witter for a
19 number of years, weren't you?

20 A. Yes.

21 Q. Did you receive account statements
22 periodically from Dean Witter?

23 A. Yes.

24 Q. Did you receive other documents from Dean
25 Witter?

1 A. Yes.

2 Q. Did you receive prospectuses from Dean
3 Witter?

4 A. Yes.

5 Q. How well did you understand the prospectuses?

6 A. I did not. I just got them in the mail.

7 Q. What about the account statements?

8 A. I did not understand any of it.

9 Q. Do you know what confirmation pages are?

10 A. I do now.

11 Q. Did you when you were a customer of Dean
12 Witter?

13 A. No.

14 Q. What is a confirmation page to you? And when
15 I say that term, what does that mean to you now?

16 A. It means that there's something that you've
17 done that's been confirmed.

18 Q. I'm sorry, that's what?

19 A. Something that you've done that's been
20 confirmed.

21 Q. When you received these papers and documents
22 from Dean Witter -- and let me just say, do you
23 understand that Dean Witter and Morgan Stanley have
24 merged or combined or are somehow together now?

25 A. Yes.

1 Q. So if I use a word Morgan Stanley or Dean
2 Witter or Morgan Stanley Dean Witter, I'm referring to
3 the same entity.

4 A. Correct.

5 Q. When you received these documents and papers
6 from Dean Witter, did you do anything with them?

7 A. I filed them.

8 Q. Did you look at them before you filed them,
9 typically?

10 A. Not really.

11 Q. What was the reason for that?

12 A. Because I didn't understand it. I didn't
13 understand what it was.

14 Q. Did you ever ask Mr. Merrill to explain any
15 of those documents to you?

16 A. Not those documents in particular.

17 Q. Did you ever ask him to explain anything else
18 to you regarding investing?

19 A. I believe I did, yes, I did.

20 Q. Did he explain or did he give you an
21 explanation for any questions you had?

22 A. No.

23 Q. Do you remember in general what those
24 questions were?

25 A. Now?

1 Q. Yes.

2 A. Not now I don't, no.

3 Q. Did you know, when you were a customer of
4 his, how to read quotes in the newspaper, say in
5 The Republic or in the Wall Street Journal? When I
6 say quotes, I mean quotes on mutual funds and stocks
7 and bonds to determine their value.

8 A. No.

9 Q. Did you ever ask him to explain that to you?

10 A. No.

11 Q. When you were a customer of Mr. Merrill's,
12 did you travel much?

13 A. No.

14 Q. Did you go see your daughter a few times,
15 even?

16 A. About one time, I think it was.

17 Q. Does she usually come visit you?

18 A. She has, yes.

19 Q. Do you drive at all?

20 A. Very little.

21 Q. Is that one of the reasons that she typically
22 sees you, if you see her at all?

23 A. No.

24 Q. Ms. DuChene, when you first started working
25 with Mr. Merrill, did you explain to him what it was

1 you wanted done with your investments?

2 A. Yes.

3 Q. And what was that?

4 A. To supplement my Social Security.

5 Q. Did you tell him that you receive so much per
6 month from your Social Security payments?

7 A. Yes.

8 Q. Did he ask you if you had any other source of
9 income?

10 A. I'm not sure of that.

11 Q. Did you inform him at any point in time
12 whether or not you had any other source of income?

13 A. If I would have had any income, I would have
14 told him.

15 Q. You said you told him it was Social Security?

16 A. I was employed for a while.

17 Q. How long ago did your employment end?

18 A. I would say seven years ago.

19 Q. Is that an approximation?

20 A. I stopped working at the time of my mother's
21 death.

22 Q. Were you working full-time or part-time?

23 A. Part-time.

24 Q. Part-time as in less than 20 hours a week?

25 A. Approximately 20 a week.

1 Q. What was your net pay per week?

2 A. I don't recollect that at this time.

3 Q. Do you remember if you made more than \$10 an
4 hour at the time?

5 A. It's possible I made 10 or less, yes.

6 Q. Now, you said that you told Mr. Merrill that
7 you wanted income. Did he ever discuss with you how
8 much risk you were willing to take on?

9 A. No.

10 Q. Did he ever raise the issue at all of risk?

11 A. No.

12 Q. Were you willing to risk loss of your
13 principal, which is the amount that you invested?

14 A. No.

15 Q. Let me ask you another related question.
16 Knowing that you could earn more money with more
17 risk -- let me rephrase that.

18 Knowing you could earn more income with more
19 risk, would you have been willing to allow Mr. Merrill
20 to put your money into riskier investments, knowing
21 that you would earn more income?

22 A. No.

23 Q. Did you tell Mr. Merrill that your investment
24 objectives were conservative, even though you wanted
25 income?

1 A. Yes.

2 Q. Did you make that explicit to him?

3 A. Yes.

4 Q. Did you tell him --

5 MR. LEWIS: Sir, I'm going to object to any
6 further leading questions. They've been very leading
7 up to this point, and we're now getting into some very
8 critical things. I think they should not be by
9 leading questions.

10 ALJ DION: If you feel that way, what is the
11 objection?

12 MR. LEWIS: Just object to the last question,
13 did you tell him.

14 ALJ DION: Did you tell him. Can you repeat
15 the question for me. I'm sorry, I heard I'm going to
16 object, meaning?

17 MR. LEWIS: The previous question she did
18 answer was extremely leading. He then started the
19 next question, which again I objected. He hadn't
20 asked the question.

21 MR. BINGHAM: The one before that started out
22 the same way and I didn't --

23 ALJ DION: You didn't get to finish the
24 question, Mr. Bingham. I would say rephrase it. I
25 don't know what it's going to be, but I will note

1 Mr. Lewis' objection, and perhaps ask the witness her
2 recollection about the conversation regarding risk or
3 however else you'd like to phrase it.

4 Q. (BY MR. BINGHAM) Ms. DuChene, let me back up
5 a little bit. Did you ever tell Mr. Merrill that your
6 objectives with your money was anything other than
7 income?

8 MR. LEWIS: That's a leading question; I
9 object to it.

10 ALJ DION: I agree. You can certainly ask
11 her if they had a conversation regarding her risk
12 tolerance and what she recalled about that.

13 MR. BINGHAM: Sure.

14 ALJ DION: But the line of questioning, did
15 you tell her, is certainly calling for a yes or no
16 response.

17 Q. (BY MR. BINGHAM) Do you remember how many --
18 do you remember the conversation regarding risk with
19 Mr. Merrill?

20 A. I'm not sure how to answer that because --

21 Q. If I remember correctly, you said that you
22 and Mr. Merrill did have a conversation regarding your
23 goals of investing; is that correct?

24 A. Correct.

25 Q. Did you express to him what it was you wanted

1 done with your money?

2 A. Conservative investments, not to gamble with
3 my money.

4 Q. Did you ever discuss any charges or expenses
5 of investing with Mr. Merrill?

6 A. No.

7 Q. Did Mr. Merrill ever ask you any questions at
8 all regarding risk and your risk tolerance?

9 A. No.

10 Q. So from what you've testified to today, any
11 statements regarding risk from you to Mr. Merrill --

12 MR. LEWIS: That's again leading, sir. It's
13 putting the words in her mouth, and she just answered
14 yes or no.

15 MR. BINGHAM: She testified that all
16 statements -- the last question was that Mr. Merrill
17 never discussed risk with her.

18 ALJ DION: And certainly, it may call for a
19 yes or no. I don't want my ruling last time to be
20 misinterpreted. Not only did it call for a yes or no
21 answer, the leading question suggests an answer. In
22 that particular situation I felt it was suggesting an
23 answer, and in this particular case, I believe she has
24 already testified to those particular things and
25 really, Mr. Bingham is asking more of a summary

1 question. So I'm going to overrule that one.

2 Q. (BY MR. BINGHAM) Would you like that
3 question reasked?

4 A. Please.

5 Q. The question was: Given what your testimony
6 this morning has been already, were any statements
7 made concerning your risk tolerance made by you to
8 Mr. Merrill and not vice versa?

9 A. I didn't discuss risk with him because I
10 thought that what I gave to him was invested safely,
11 that I wouldn't have even used the term risk.

12 Q. Let me show you first of all what's marked as
13 Exhibit S-3. Will you please look at that first in
14 Exhibit S-3.

15 A. What are you asking me, Mr. Bingham?

16 Q. The first page has a number.

17 A. Yes.

18 Q. That's ACC 01647?

19 A. Yes.

20 Q. Please read that, and then let me know when
21 you're done reviewing it.

22 A. I reviewed it.

23 Q. Is that your signature on that short letter?

24 A. Yes.

25 Q. And let me ask you: Was this letter sent to

1 Mr. Merrill?

2 A. Yes.

3 Q. Do you know whether or not he received it?

4 A. I assume he did.

5 Q. Why was this letter sent to Mr. Merrill?

6 A. Because I didn't like what he was doing with
7 my account. My daughter discovered the discrepancy
8 when she was doing my income tax.

9 Q. Now, were account statements and other
10 documents from Dean Witter mailed to your daughter on
11 a regular basis after this letter was given to you by
12 Dean Witter?

13 A. No, he did not do that.

14 Q. If you'll turn to the next page, this is the
15 second page of this exhibit.

16 A. Yes.

17 Q. Have you had a chance to review that?

18 A. Yes.

19 Q. Is that your signature on the letter?

20 A. Yes.

21 Q. Ms. DuChene, was this letter written on or
22 about December 15th of 1998?

23 A. Yes.

24 Q. This letter says that you no longer
25 authorized Mr. Merrill to have any discretionary

1 control over anything involving your account. Did you
2 write that or did someone else write that for you?

3 A. I typed it out and took it in.

4 Q. According to the second sentence, you
5 instructed Mr. Merrill to make no other trades in your
6 account without your authorization; is that correct?

7 A. Correct.

8 Q. You gave him the two accounts that were your
9 accounts?

10 A. Yes.

11 Q. Why did you send this letter -- let me back
12 up.

13 How was -- was this letter delivered to
14 Mr. Merrill in any way?

15 A. I personally hand-carried it into the office
16 and gave it to them.

17 Q. Do you remember when or approximately when?

18 A. It was approximately before the holidays,
19 because I was going to California.

20 Q. Did you meet with Mr. Merrill in person?

21 A. No, I did not. I gave it to the
22 receptionist.

23 Q. Did Mr. Merrill ever have any conversation
24 with you subsequent to the delivery of this letter
25 about this letter?

1 A. No.

2 MR. LEWIS: I'm sorry, what was the answer to
3 the question?

4 THE WITNESS: No.

5 MR. LEWIS: Thank you.

6 Q. (BY MR. BINGHAM) Why did you give this
7 letter to Mr. Merrill?

8 A. Because he was buying and selling in my
9 account without talking to me first, like he was
10 supposed to talk to me about before he did anything on
11 my account, he was to discuss it, and he never did.
12 And so he was buying and selling without my consent,
13 without my knowledge.

14 Q. When did you first discover that there was
15 any trade in your account made without your
16 authorization?

17 A. When my daughter came in to do my income tax,
18 and she discovered that my General Electric had been
19 sold.

20 Q. Do you remember when the General Electric was
21 sold?

22 A. Probably 1998.

23 ALJ DION: I want to just clarify the record
24 a little bit. Was this stock in General Electric?

25 THE WITNESS: Yes.

1 MR. BINGHAM: I was going to ask that.

2 ALJ DION: Thank you, Mr. Bingham.

3 Q. (BY MR. BINGHAM) Ms. DuChene, did you want
4 to keep your investment in GE stock?

5 A. Yes.

6 Q. Why?

7 A. I had been employed by GE. It was important
8 to me to have that stock.

9 Q. At some given point in time had you
10 considered selling that stock?

11 A. No.

12 Q. Did you ever have any conversation with
13 Mr. Merrill concerning the sale of that stock?

14 A. I made a personal appearance in his office
15 and reprimanded him for what he did.

16 Q. But prior to that, did you at anytime have a
17 conversation with Mr. Merrill about selling the GE
18 stock?

19 A. No.

20 Q. Now, you said that you reprimanded
21 Mr. Merrill for selling that stock?

22 A. Yes, when I found out.

23 Q. When was that?

24 A. When the lady did my income tax, AARP did my
25 taxes, and that's when she told me that my GE stock

1 was sold, and it was sold, that I had a penalty with
2 it, and then that's when I went in to see him
3 personally.

4 Q. Was that the first time that you became aware
5 the GE stock had been sold?

6 A. Yes.

7 Q. Did you receive an account statement after
8 the sale of GE stock?

9 A. I didn't understand any of it, so I had no
10 idea.

11 Q. Do you remember receiving a confirmation page
12 from the sale of the GE stock?

13 A. No.

14 Q. Ms. DuChene, reading the first sentence of
15 this short letter, someone might interpret this as if
16 you had given Mr. Merrill authorization to make trades
17 for you.

18 A. I never did. He was to talk to me before he
19 ever did anything on my account.

20 Q. When did you tell him that?

21 A. Mr. Merrill also wanted to have power of
22 attorney over my account, and I refused to have him do
23 that.

24 Q. Let me take these one step at a time here.
25 Do you remember when you told Mr. Merrill that he was

1 not to make any trades in your account without talking
2 to you and getting your permission first?

3 A. That was when I first asked him to take over
4 my accounts. I asked him, that was -- it was
5 discussed then that he was not to do anything without
6 speaking to me first.

7 Q. Do you remember telling him that later on?

8 A. When I found out what he did with the GE
9 stock, and I realized he wasn't listening to what I
10 was saying.

11 Q. You mentioned that Mr. -- did Mr. Merrill
12 ever talk to you about having you sign a discretionary
13 agreement or any agreement that would give him
14 authorization to make trades in your accounts?

15 MR. LEWIS: It's a leading question to which
16 I object.

17 MR. BINGHAM: I'm asking a question if.

18 ALJ DION: Right, I do not find that as
19 leading, as if. Mr. Merrill did tell you, didn't he
20 tell you. I do not find it to be leading. The
21 objection is overruled.

22 THE WITNESS: Can you repeat that?

23 Q. (BY MR. BINGHAM) Yes. Did Mr. Merrill ever
24 ask you to sign a discretionary agreement or some
25 other agreement giving him authority to make trades in

1 your account without talking to you first?

2 A. No, not that I remember, no. I would never
3 give him authority to do anything on my account
4 without speaking to me, and I had nothing in writing
5 to that effect.

6 Q. But did he ever talk to you about obtaining a
7 discretionary agreement or that type of agreement?

8 MR. LEWIS: Sir, she just answered this
9 question. He didn't like the answer now he's asking a
10 leading question. She said he never asked me, no.
11 That was the answer to the question, and now he's
12 repeating the question again. I think this is
13 improper direct examination.

14 MR. BINGHAM: I don't believe that was her
15 response. I don't believe she understood the
16 question.

17 ALJ DION: Well, first of all, Ms. DuChene,
18 if you don't understand a question or if you're not
19 following what an attorney is saying, please ask them
20 either to -- not just because you can't hear it, to
21 repeat it, but to have them repeat it so that it's
22 clear in your mind. Okay?

23 THE WITNESS: Yes, sir.

24 ALJ DION: We do it all the time, we ask can
25 you please repeat that, can you please, because we

1 want to make sure not only that we hear it, but that
2 we also understand it, and that's very critical in
3 this.

4 And there are a number of reasons for that,
5 so I want you to feel comfortable. I know you might
6 be nervous.

7 THE WITNESS: Slightly.

8 ALJ DION: But I want you to feel comfortable
9 so that if someone says something and you don't
10 understand it, you can stand up and say I don't
11 understand this, I don't know what you're talking
12 about, make it clear. And that's going to save a lot
13 of people a good amount of aggravation, mostly
14 yourself, because you're here, and you have a purpose,
15 and that purpose is to answer the questions
16 truthfully. So if the answer is I don't know, then
17 that's the truth. Okay?

18 THE WITNESS: Okay.

19 ALJ DION: So in regards to the question, can
20 you please repeat the two questions for me.

21 MR. LEWIS: You need to hear the previous
22 question?

23 ALJ DION: I want to hear the two questions.

24 MR. BINGHAM: Your Honor, she testified
25 previously that she did talk --

1 MR. LEWIS: He's now telling how the witness
2 is going to testify.

3 ALJ DION: I'm not going to do this, either
4 one of you. I've asked for the two questions to be
5 read to me. I'm not going to argue about it.

6 Cecelia, please, when you have a chance.

7 (The record was read by the reporter as
8 requested.)

9 ALJ DION: Okay. So the question was, number
10 one, did you ever sign an agreement, and the second
11 question is, did he ever talk to you about an
12 agreement.

13 Mr. Bingham go ahead, I'm going to overrule
14 the objection.

15 Again, Ms. DuChene if you don't know, there's
16 also another appropriate thing. If you don't know the
17 answer, you can also say I don't know, and clarifying
18 the question won't help. You just don't know, and
19 that's fine, too. Okay? I want you to understand all
20 that.

21 You were asking her about if they ever had a
22 discussion about an agreement; is that correct,
23 Mr. Bingham?

24 MR. BINGHAM: Yes.

25 ALJ DION: Please continue.

1 THE WITNESS: When you're talking about a
2 discussion --

3 ALJ DION: You know, Ms. DuChene, I'm going
4 to interject. I'm going to have Mr. Bingham ask the
5 question again so that we don't have any confusion.
6 Okay?

7 THE WITNESS: Okay.

8 ALJ DION: Thank you.

9 Q. (BY MR. BINGHAM) Ms. DuChene, if I'm not
10 speaking loudly enough let me know. Sometimes I have
11 a low tone of voice.

12 Ms. DuChene, did you ever have any
13 conversation with Mr. Merrill about -- have you signed
14 a discretionary agreement or that type of an
15 agreement?

16 A. When you say discretionary, are you referring
17 to him doing things in my account? That's why I
18 didn't understand.

19 Q. Yes. A discretionary agreement.

20 And Your Honor, I don't want to become a --
21 yes, yes, never mind.

22 A. I did not sign anything like that. The only
23 conversation we had was he wanted power of attorney on
24 my account, and I refused to do that.

25 Q. Do you recall when -- first of all, let me

1 ask you: What is a power of attorney to you?

2 A. Power of attorney is when he can just do what
3 he feels he wants to do with my account.

4 Q. Do you recall when you had this conversation
5 with Mr. Merrill about a power of attorney?

6 A. It was, I'd say about maybe five years ago.
7 It was after my mother died that I talked to him, and
8 because I was looking for my children, to give power
9 of attorney to one of them, and then that's when he
10 talked to me a few times about nominating him to have
11 power of attorney. And I refused, stating that if he
12 left the company then what would happen.

13 Q. I'm sorry, you may have stated this, but did
14 have you this conversation about a power of attorney
15 more than once?

16 A. Yes.

17 Q. Approximately how many times?

18 A. I'd say several times, two, three times I had
19 that conversation with him.

20 Q. If you'll now turn to the next document in
21 this Exhibit S-3. It's a letter that is dated August
22 25th, 1999.

23 MR. BINGHAM: Your Honor, if I could approach
24 to help her find --

25 ALJ DION: Let's ask her if she recognizes

1 the letter.

2 MR. BINGHAM: Sure.

3 Q. (BY MR. BINGHAM) Have you found that letter
4 yet, Ms. DuChene?

5 A. Yes, I have.

6 Q. Sorry, I thought you were still looking for
7 it.

8 MR. LEWIS: Excuse me. She's not looking at
9 the exhibit.

10 MR. BINGHAM: Those are the exhibits in the
11 folder.

12 THE WITNESS: ACC 00233.

13 MR. LEWIS: Okay.

14 MR. BINGHAM: Your Honor, can I have a
15 second?

16 Q. (BY MR. BINGHAM) Do you recognize this
17 letter?

18 A. No.

19 Q. You don't recognize it?

20 A. No. Some of the wording I recognize because
21 it could apply.

22 Q. Have you had a chance to look at all of the
23 letter?

24 A. Yes. Where did this letter come from?

25 Q. After you've had a chance to review all that,

1 let me know.

2 A. To some extent, yes. Okay. We got all this.
3 My daughter prepared all this.

4 Q. Your daughter prepared that?

5 A. Yes, when she came over and got my things and
6 put this all together later to show what he had done.

7 Q. What is the name of the daughter that
8 prepared this?

9 A. Mary Catherine DuChene.

10 Q. Ms. DuChene, on the fourth page of this
11 letter, there's a table.

12 A. Okay. Is this the one?

13 Q. Did you discuss with your daughter
14 transactions in your accounts that you considered to
15 be unauthorized and unsuitable for purposes of this
16 letter?

17 A. I really don't know how to answer that again,
18 because Cathie put it all together by looking at all
19 the paperwork I had. I did not understand it.

20 Q. Did you talk with her about transactions that
21 you considered to be unauthorized in your accounts?

22 A. I didn't know the difference of what was
23 going on in my account, and Cathie went over it;
24 that's when she saw what was being done with my
25 account.

1 Q. Did she ask you questions about certain
2 transactions?

3 A. I don't remember that. And I didn't know
4 what this MSDW was, and the Unit, Equity. I didn't
5 know about Cisco, Microsoft, I didn't know any of
6 that. Cypercash, Nabors, I didn't know any of these.
7 I received the books in the mail, you know, that said
8 what the -- like a Dean Witter manual, and I received
9 that, then I know he done something.

10 Q. If you'll go to the -- Ms. DuChene, did you
11 ever make notes on transactions you considered to be
12 unauthorized in your accounts?

13 A. No.

14 Q. Did your daughter do that for you?

15 A. Cathie put this all together. If that would
16 be notes, then that's what this is.

17 Q. Looking at the table there, you have
18 several -- there are several transactions listed; is
19 that correct?

20 A. Yes.

21 Q. Were any of those transactions authorized, in
22 your opinion?

23 A. No. Cisco, America Online, this Unit, MSDW,
24 I didn't know anything about that, the Southwest Gas.

25 Q. Let's go through some of these. Have you --

1 when is the first time you heard about Cybercash?

2 A. If I heard anything, I would have gotten a
3 manual in the mail.

4 Q. When you say a manual, do you mean a
5 prospectus?

6 A. A prospectus is like writing paper, but I'm
7 talking about manuals with the pictures and hard
8 cover, like a magazine. I guess you would call it a
9 magazine.

10 Q. Do these manuals include information about
11 the company or the mutual fund?

12 A. I never read them. I stored them.

13 Q. Do you remember when the first time was that
14 you heard about Nabors Industrials or whatever is
15 listed here on the date of 1-21-98. It says Nabors,
16 Inds.

17 A. Is that on this same thing here?

18 Q. That's on the page that has a number on the
19 bottom, ACC 0236.

20 A. What did you want to know about Nabors?

21 Q. When was the first time you recall hearing
22 about Nabors?

23 A. When I received that manual.

24 Q. Did you talk to Mr. Merrill about Nabors
25 after you received that manual?

1 A. No.

2 Q. Why not?

3 A. I don't know, I just didn't.

4 Q. When was the first time you heard anything
5 about Smart Modular?

6 A. Same thing. The manual.

7 Q. Have you ever heard of Morgan Stanley Dean
8 Witter competitive edge BIP mutual fund?

9 A. No.

10 Q. Have you ever heard of Dean Witter high yield
11 bond fund?

12 A. No.

13 Q. Have you ever heard of Dean Witter dividend
14 growth fund?

15 A. No.

16 Q. What about Microsoft?

17 A. No.

18 Q. Dell Computer?

19 A. No.

20 Q. Cisco?

21 A. No.

22 Q. What about America Online?

23 A. No.

24 Q. Did you ever talk to Mr. Merrill about buying
25 or selling any of these securities or mutual funds

1 before they were bought or sold?

2 A. No.

3 Q. Did Mr. Merrill ever notify you, perhaps
4 subsequent to the trades, that something had been
5 bought or sold?

6 A. No.

7 Q. If you go to the next document, it should
8 be -- it consists of two pages, and it should be paper
9 clipped. The number on the bottom is ACC 214. It's a
10 letter with your name on the top, and is dated January
11 16th, 2000.

12 Go ahead and look at that, and after you've
13 had a chance to review it, let me know.

14 (Brief pause.)

15 THE WITNESS: Okay.

16 Q. (BY MR. BINGHAM) Have you had a chance to
17 review that?

18 A. Briefly, yeah.

19 Q. Is that your signature on the second page?

20 A. Are you asking me on Page 215 if that's my
21 signature?

22 Q. Yes. Or --

23 A. I don't usually sign with that slash,
24 whatever that thing on the bottom there, CO.

25 Q. Did your daughter or anyone else sign that

1 for you?

2 A. No.

3 Q. Let's go to the first page of the first
4 paragraph.

5 MR. LEWIS: I'm not understanding. Is she
6 saying she wrote this letter and signed it?

7 Q. (BY MR. BINGHAM) Did you write this letter?

8 A. I'm saying -- okay, in the event that I did
9 sign this, I don't usually put a slash and that CO on
10 there.

11 Q. Did you write this letter? Let me ask it
12 first. Did you write this letter?

13 A. I think I did.

14 Q. Did you type it or did you have someone
15 else --

16 MR. LEWIS: Excuse me, Your Honor. I think
17 it's a simple thing to say whether that's her
18 signature or not. I haven't heard the answer to the
19 question.

20 ALJ DION: I think that's right. I think
21 that before you even get to that, the question was did
22 you write this letter, and you said "I think I did."

23 Ms. DuChene, do you not remember writing the
24 letter?

25 THE WITNESS: Just looking at this, I'd have

1 to really sit down and read it a lot before, to make
2 sure that I had written it.

3 ALJ DION: Go ahead and do that. We have
4 time. I don't want you to "think" about something. I
5 want a yes or no answer or an I don't know. So please
6 take your time.

7 (Brief pause.)

8 THE WITNESS: It's been a few years. It
9 appears I'm answering another letter with this letter,
10 because I'm referring to Paragraph 3, 4, 5, and 6, so
11 part of this is missing.

12 Q. (BY MR. BINGHAM) Right. But the question is
13 did you write the letter?

14 A. Yes.

15 Q. Did you sign the letter or did someone else
16 sign it for you?

17 A. I signed it. But what I don't understand is
18 where that slash came in and that CO on there, because
19 I don't usually sign my letters like that. I put the
20 cc for carbon copy down below.

21 Q. So then your testimony is that you did write
22 this letter?

23 A. I wrote the letter, yes.

24 Q. Did you mail this to Mr. Guilfoyle at Morgan
25 Stanley Dean Witter?

1 A. Yes.

2 Q. Did you explain to him in the first paragraph
3 that you had tax reinvestments when you worked with
4 Mr. Merrill?

5 A. Yes, I did.

6 Q. Did you explain in the letter that
7 Mr. Merrill tried to gain discretion over your
8 account?

9 A. I'm not sure how to answer that because of
10 the way that he, the way that he did things with me.
11 He was told by me not to do anything without
12 discussing it with me first. And another statement I
13 made to him, he was not to do anything that cost me
14 money.

15 Q. Go ahead and review Paragraph 8, at least
16 what's labeled as Paragraph 8, then there's a short
17 paragraph under that.

18 (Brief pause.)

19 THE WITNESS: Okay.

20 Q. (BY MR. BINGHAM) You said before that you
21 went to Mexico one time for medical attention?

22 A. Yes. I went for chelation.

23 Q. Did you ever tell Mr. Merrill to -- strike
24 that.

25 Did you ever tell Mr. Merrill that he had

1 permission to make any trades in your account when you
2 were gone?

3 A. No.

4 Q. Did you ever tell him that he could preserve
5 your capital if you were out of town and unable to
6 communicate with him?

7 A. No.

8 Q. Turn to the second page and look at the top
9 paragraph there. Is what you wrote there accurate
10 concerning your discovery of the GE trade?

11 A. What are you asking me again, Mr. Bingham?

12 Q. Is that an accurate account of what happened
13 when you discovered that GE stock had been sold?

14 A. Yes.

15 Q. Let's go back to Exhibit No. 2 now, and let
16 me hand you --

17 ALJ DION: Before we do that, I have a
18 question about this exhibit, if you don't mind,
19 Mr. Bingham.

20 MR. BINGHAM: Sure.

21 ALJ DION: Ms. DuChene, this is the one
22 that's marked ACC 0214. It's the letter we were just
23 talking about.

24 THE WITNESS: Yes, sir.

25 ALJ DION: I'm going to look at the second

1 paragraph. It's the first sentence under the title
2 Paragraph 3, 4, 5, and 6. It says: When I went to
3 Morgan Stanley Dean Witter, I asked F.A. Merrill. Who
4 is F.A. Merrill?

5 MR. LEWIS: Sir, that's the abbreviation for
6 financial advisor. The letter from Keith Guilfoyle
7 refers to it as financial advisor, then abbreviates
8 that F.A.

9 ALJ DION: Is that your understanding,
10 Ms. DuChene, that F.A. Merrill is financial advisor
11 Merrill?

12 THE WITNESS: That's his title.

13 ALJ DION: That's who you were talking about.
14 Thank you.

15 MR. BINGHAM: If I can ask one other question
16 regarding that letter.

17 Q. (BY MR. BINGHAM) Is there anything else that
18 you viewed in that letter that is not correct?

19 A. No. I think I told him what I was -- what my
20 opinion was, and what Mr. Merrill was doing.

21 Q. Let's go to Exhibit S-2 now. Ms. DuChene, if
22 you need to, there is a magnifying sheet here that if
23 you want to use, you can, to perhaps help you see that
24 exhibit.

25 A. It's not very easy to see.

1 Q. Go ahead and look at that first page, which
2 has the exhibit stamp on it that says S-2.

3 A. Yes.

4 Q. Ms. DuChene, did you fill -- first of all, do
5 you know what this is?

6 A. No.

7 Q. Did you fill this out, by chance, even though
8 you don't know what it is?

9 A. I don't know.

10 Q. Looking down at the bottom, can you see a
11 date in the bottom right-hand area?

12 A. 1-8-86.

13 Q. So we can assume this was done in 1986?

14 A. Yes.

15 Q. Ms. DuChene, about in the middle of the page,
16 over on the left-hand side, let me ask you this: Were
17 you retired in 1986?

18 A. Yes -- '86, wait a minute. I'm not sure.

19 Q. Do you remember discussing your investment
20 objectives with anyone back in 1986?

21 A. From what I recollect, I had a Mr. Favia from
22 Dean Witter, and I think I had CDs at that time.

23 Q. Over on the left-hand side, do you see an
24 area, well a word that is objective, and then to the
25 right of that there's some other words that are a bit

1 difficult to read?

2 A. I'm not able to read this at all.

3 MR. BINGHAM: Your Honor, can I approach and
4 point out a certain area?

5 ALJ DION: Sure.

6 Q. (BY MR. BINGHAM) Let me bring your
7 attention, Ms. DuChene, to this line right here that
8 on the far left-hand side has the word objective.

9 A. Yes.

10 Q. Ms. DuChene, the first box to the right of
11 that is marked, and I know it's difficult to read,
12 but --

13 A. Looks like a 1.

14 Q. Can you read what's to the right of that?

15 MR. LEWIS: Right of it or the left of it?

16 MR. BINGHAM: To the right.

17 THE WITNESS: To the right there's a 2.

18 Q. (BY MR. BINGHAM) Can you read the word in
19 between 1 and 2?

20 A. It looks like part of it's missing. 1-A
21 something, M.E.

22 Q. Do you see your signature anywhere on that
23 page?

24 A. No.

25 Q. Let's go to the next page in this exhibit,

1 and it has a number on the bottom, ACC 245. Is that a
2 little easier for you to read?

3 A. Yes. Still not very good.

4 Q. Ms. DuChene, this shows your date of birth as
5 11-26-23 over on the left-hand side, about in the
6 middle of the document. Do you see that?

7 A. Yes.

8 Q. Is that correct?

9 A. Yes.

10 Q. Down below that, to the right -- well, on
11 that same line, shows your marital status as single --

12 A. Yes.

13 Q. -- is that correct?

14 A. Yes.

15 Q. And let me, I should have done this before,
16 let me bring your attention to the bottom right-hand
17 corner of that document. Do you see a date there?

18 A. 11 -- was that 11-12-90?

19 Q. In about the middle of the page is a word
20 retired. Do you see that?

21 A. Yes.

22 Q. Were you retired in 1990?

23 A. I'm not sure right now. I'll have to stop
24 and think and go through my records, but...

25 Q. Come a little bit further down, and about the

1 middle of the page you'll see the words income,
2 present income, capital appreciation, speculation,
3 then there's a CA to the right of those words.

4 A. Yes.

5 Q. Do you see that?

6 A. Yes.

7 Q. Now, as I said, C and A are marked. C is for
8 capital appreciation, and A is for income, according
9 to this document.

10 MR. LEWIS: He's testifying now.

11 ALJ DION: Yes, that is --

12 MR. BINGHAM: I can ask her and bring it out.
13 I'm looking at the document.

14 ALJ DION: That's fine, let's go ahead and
15 ask her.

16 MR. BINGHAM: I can take the slower route and
17 do it step by step, but since the document says that.

18 Q. (BY MR. BINGHAM) Ms. DuChene, do you see
19 where there's a C, and to the right of that it says
20 capital apprec, a-p-p-r-e-c. It may be a little
21 difficult for you to read.

22 A. It is very difficult.

23 Q. Can you see that at all?

24 A. No, I can't read that.

25 Q. Do you see to the left where there's an A,

1 then to the right of the A, the word income?

2 A. There are like about four lines, but I'm not
3 able to decipher them. I see, looks like capital C
4 and then D is something else.

5 MR. LEWIS: Your Honor, I was only making the
6 statement because he was testifying. I agree that
7 that's what the document says, that C is capital
8 appreciation, and A is income. But I want to reserve
9 my right to object when Mr. Bingham is testifying.

10 ALJ DION: Okay.

11 MR. LEWIS: I don't argue the point.

12 MR. BINGHAM: I don't want to testify. I
13 just --

14 ALJ DION: We haven't sworn you in either,
15 Mr. Bingham, no offense, but that's what we're here to
16 do.

17 Ms. DuChene, I think the question to you was
18 in the area, I know it's kind of hard, and if you want
19 to go ahead and use the magnifying --

20 THE WITNESS: It still doesn't help.

21 ALJ DION: Then I think the question to you
22 was regarding the C and A, and the C standing for
23 capital appreciation, and A standing for income, based
24 on that, and you're going to have to take our word for
25 it today. Okay?

1 MR. BINGHAM: These are the best copies that
2 we could get.

3 THE WITNESS: I don't know what this is
4 anyway.

5 Q. (BY MR. BINGHAM) Ms. DuChene, do you know
6 what capital appreciation is?

7 A. Capital appreciation would be the money you
8 make.

9 Q. Okay. In 1990, did you know what capital
10 appreciation was?

11 A. No.

12 Q. What about 1995?

13 A. I'm learning.

14 Q. So how long have you known what capital
15 appreciation is?

16 A. About maybe four or five years now.

17 Q. Do you know what income is in relation to
18 investments?

19 A. The income would be what you receive.

20 Q. Do you know what speculation is?

21 A. That's when you're gambling.

22 Q. Do you know what aggressive income is?

23 A. That would be taking chances.

24 Q. With what?

25 A. With your money.

1 Q. Ms. DuChene, if you'll go a little bit lower,
2 you'll see some numbers, two inches below where we
3 just looked. Do you see some numbers there?

4 A. Yes.

5 Q. What is shown for income?

6 A. It doesn't say anything.

7 Q. Do you see a number there, to the right?

8 A. 130.

9 Q. If you'll go back to the left a little bit,
10 there's something there. Looks like it could be a 7.
11 Do you see that?

12 A. I see that, yes.

13 Q. And then there's some zeros to the lower
14 right of that. Do you see that?

15 A. No.

16 Q. Some very small zeros?

17 A. They are small zeros.

18 Q. Let's go to the right, and there's a box
19 labeled net worth. Do you see the number 130 in that?

20 A. Yes.

21 Q. Then you see, and you may not be able to
22 because it's hard, a bunch of zeros to the right of
23 that?

24 A. Yeah. They're very blurred.

25 Q. Let's go to the next box to the right that's

1 labeled liquid assets, and there's a number 28 with
2 three zeros to the right of that. The zeros again are
3 very small. Do you see that?

4 A. Yes, I see it; yes, I do.

5 Q. And then going further to the right, there's
6 a box labeled tax bracket, 15 percent. Do you see
7 that?

8 MR. LEWIS: 15?

9 MR. BINGHAM: 15, correct.

10 MR. LEWIS: I thought you said 50. I
11 apologize.

12 MR. BINGHAM: 15.

13 Q. (BY MR. BINGHAM) Have you ever been in the
14 50 percent tax bracket?

15 A. Not in this lifetime.

16 Q. According to these boxes, your income is
17 shown as \$7,000. Was that correct in 1990?

18 A. I'm not sure.

19 Q. Your net worth is shown as \$130,000. Was
20 that correct?

21 A. Did that include a home?

22 Q. Excluding your home.

23 A. Then I'm not sure.

24 Q. Liquid assets, you're showing \$28,000. Was
25 that correct in November 1990?

1 A. I'm not sure.

2 Q. Do you remember reviewing any of this
3 information with anyone?

4 A. No.

5 Q. Let's go -- do you see your signature
6 anywhere on that page?

7 A. No.

8 Q. Let's turn to the next page that is numbered,
9 and actually, my number got cut off, I think it might
10 be 188.

11 A. 488.

12 Q. Look on the far right-hand bottom. Do you
13 see a date?

14 A. 10-11-98.

15 Q. Were you looking in the -- about the middle
16 of the page, it shows you're single, there's a big S
17 there with the word single to the right; is that
18 correct?

19 A. Yes.

20 Q. Down below it has the word retired; is that
21 correct?

22 A. Yes.

23 Q. And further down, about in the middle,
24 you'll see the numbers 3 to 14. Do you see that?

25 A. Yes, I do.

1 Q. If you'll turn to the next page, that is at
2 the very bottom, it says 25, then above that 3806. If
3 you'll look in the client profile section, do you see
4 the words income, aggressive income, capital
5 appreciation, and speculation.

6 (Brief pause.)

7 MR. BINGHAM: Your Honor, can I point out the
8 section to her?

9 ALJ DION: Feel free to approach.

10 THE WITNESS: This is all blank.

11 Q. (BY MR. BINGHAM) See where it says client
12 profile, then to the right you can read those words
13 right there, client objective, then there's some other
14 words there. Can you read that at all?

15 A. Let's try with this again. List in order of
16 priority, income, capital, something or other. Okay,
17 I see it.

18 Q. Now, look to the prior page again, where you
19 saw the numbers 3, 2, 1, 4.

20 A. Yes.

21 Q. 3 being capital appreciation, was that your
22 main objective for your investments in October 1998?

23 A. What is what you're asking me, capital
24 appreciation?

25 Q. Was capital appreciation your main objective

1 investment in October 1998?

2 A. Are you saying -- okay, my opinion of capital
3 appreciation is what you have appreciates. Is that
4 what you're asking me?

5 Q. Yes. Assuming that definition is correct,
6 was that your primary or your main investment
7 objective in October 1998, or was it something else,
8 and if so, let us know.

9 A. My objective was to have a gain on what I had
10 invested.

11 Q. When you say gain, you mean income, or do you
12 mean an appreciation?

13 A. Income. It's income for me.

14 Q. If No. 2 is aggressive income, was that your
15 second investment objective in October, 1998?

16 A. No, not aggressive.

17 Q. Did you want any aggressive income at all?

18 A. No.

19 Q. Have you ever wanted any aggressive income?

20 A. No.

21 Q. The next number shown is 1. And I understand
22 that on the form, where it -- that has 3 to 14, it's
23 difficult to read, that's why I'm asking you to refer
24 to the next page. 1 is income. Was that an
25 investment objective of yours in October, 1998?

1 A. Yes.

2 Q. Was that a primary or secondary investment
3 objective?

4 A. Primary.

5 Q. And No. 4 being speculation. Was that an
6 objective of yours in October, 1998?

7 A. No.

8 Q. Has speculation ever been something you were
9 interested in?

10 A. No.

11 ALJ DION: Mr. Bingham, before you move on, I
12 just want to say it's getting close to the noon hour,
13 so if you think it's something that you think will
14 take five minutes, that's fine, but we've had the
15 court reporter typing for two hours now, so I'd like
16 to take a break for her, as well as a lunch break.

17 MR. BINGHAM: This will take, I'm sure,
18 longer than five minutes.

19 ALJ DION: Then why don't we go ahead and
20 take a break. We've been going at this about two
21 hours now.

22 Mr. Lewis, Mr. Bingham, an hour 15? Why
23 don't we do that. We're going to take the noon hour
24 recess. We'll reconvene here at 1:15.

25 (An off-the-record discussion ensued.)

1 ALJ DION: Ms. DuChene, you'll remember what
2 I talked about the rule, and things like that?

3 THE WITNESS: I know. I shall honor it.

4 ALJ DION: Okay, good. If you have
5 conversations with your daughter, please do not talk
6 about anything that has happened here this morning
7 while you were under oath. Okay?

8 THE WITNESS: Okay.

9 ALJ DION: I appreciate that, thank you.

10 (The lunch recess ensued from 11:54 a.m., to
11 1:15 p.m.)

12 ALJ DION: Good afternoon, everyone. We are
13 back on the record in the case of Philip William
14 Merrill. And I believe Ms. Beatrice DuChene is still
15 on the stand. She has gotten back up on the stand.

16 And I think, Mr. Bingham, you want the last
17 couple of questions read back.

18 MR. BINGHAM: Yes, if you don't mind, please.

19 (The record was read by the reporter as
20 requested.)

21 ALJ DION: I believe we were moving on to
22 another exhibit, and that's why I asked if it was a
23 good time to stop, Mr. Bingham.

24 MR. BINGHAM: Yes, it was.

25 ALJ DION: Please proceed, then.

1 MR. BINGHAM: Thank you.

2 Q. (BY MR. BINGHAM) Ms. DuChene, let's go back
3 a little bit to the GE transaction.

4 Were you ever made aware of whether or not
5 there was any cost to the sale of the GE stock that
6 you've testified about already?

7 A. No.

8 MR. BINGHAM: Your Honor, I'm going to
9 present to Ms. DuChene Exhibit S-8.

10 Q. (BY MR. BINGHAM) Ms. DuChene, I'm showing
11 you what's been marked as Exhibit S-8. Specifically,
12 page ACC 353. It is the fourth page from the very
13 last page in this exhibit.

14 Ms. DuChene, do you see where, above the box,
15 it says you sold?

16 A. Yes.

17 Q. Do you see over to the right-hand side, where
18 it says principal commission, and then net amount?

19 A. Yes.

20 Q. Do you see to the right of the word
21 commission, \$166.54?

22 A. Yes.

23 Q. Do you understand that that is the amount of
24 money that was taken out of the proceeds from the sale
25 of the GE stock?

1 A. Yes.

2 Q. Did you realize that when the stock was sold?

3 A. No.

4 Q. Were you even aware of that, when the stock
5 was sold?

6 A. No.

7 Q. Previously you mentioned that you talked to
8 Mr. Merrill about this trade afterwards.

9 A. Yes, I did.

10 Q. And I don't believe I asked this question.
11 If I did and you remember, tell me. We'll go onto
12 something else.

13 Did Mr. Merrill have anything to say to you
14 about the GE trade? In other words, the GE stock
15 being sold?

16 A. Do you mean after I went to his office and
17 bawled him out.

18 Q. Yes. What went on during that conversation?

19 A. He apologized, and he said he wouldn't do
20 that anymore, which was to sell anything without
21 talking to me.

22 Q. And you're sure of that?

23 A. I'm positive. I was very upset when I went
24 in there. But he said he was sorry and he wouldn't do
25 that again.

1 Q. Did he offer to reverse the trade?

2 A. No.

3 Q. Were you aware that that might be a
4 possibility?

5 A. No.

6 Q. If you had known that was a possibility,
7 would you have done something about it?

8 A. Yes.

9 Q. When was the next time -- when,
10 approximately, was that an in-person meeting you had
11 with Mr. Merrill?

12 A. It would have been after tax preparation
13 time, because it was AARP.

14 Q. It would have been after tax preparation time
15 or during?

16 A. Well, probably during, because she was
17 preparing my taxes, and that's when she told me, did
18 you know that this was sold, did you know that you
19 paid a penalty for it. And I said no, I didn't know
20 anything about it.

21 Q. When was the next time after your meeting
22 with Mr. Merrill that you discussed any unauthorized
23 transactions with him, whether it be in person or on
24 the telephone?

25 A. I'm not recollecting it real easily.

1 Q. Did you speak with Mr. Merrill by telephone
2 or in person about any unauthorized trades after you
3 discussed the GE trade with him?

4 A. I'm not remembering, but I know that I did
5 go -- when I found out he was still doing it, then I
6 went in with the letter.

7 Q. When you say the letter, is that the letter
8 that we reviewed already?

9 A. Yes.

10 Q. That?

11 A. Yes. What I requested from him was that he
12 send all information to my daughter regarding anything
13 he did on my account.

14 Q. Ms. DuChene, do you recall where at least a
15 good portion of the money came from that you gave
16 Mr. Merrill to invest for you?

17 A. It came from my mother when she passed away.
18 It was my inheritance.

19 Q. When did she pass away?

20 A. In October 23rd, 1995.

21 Q. When you say it came from your mother, will
22 you tell us in more detail, if you recall the funds,
23 or what it was that came from your mother, as you
24 said?

25 A. Yes. It was a tax-free Arizona bond, and it

1 was a --

2 Q. I'm sorry, Arizona what, now?

3 A. It was an Arizona tax-free bond that came
4 from the bank. And also Kemper that came from the
5 bank, and also approximately 25,000 in CDs, and that's
6 where the money came from.

7 MR. BINGHAM: Your Honor, I'm going to show
8 Ms. DuChene Exhibit S-7.

9 Q. (BY MR. BINGHAM) Ms. DuChene, I'm showing
10 you what is marked as Exhibit S-7. Starting a page
11 towards the back, this is a confirmation page deposit,
12 has a number on the bottom left-hand corner of
13 ACC 328. Will you please look at that?

14 A. Yes, yes.

15 Q. Does that look like the -- over on the right,
16 do you see where --

17 MR. LEWIS: Excuse me, the witness hasn't
18 identified the document.

19 MR. BINGHAM: I thought she had.

20 THE WITNESS: Yes, that's what it is, what he
21 said it is.

22 MR. LEWIS: Is that a document you received?

23 MR. BINGHAM: Your Honor, I'm asking the
24 questions right now.

25 MR. LEWIS: Yes, sir, but it doesn't identify

1 it by her saying yes, that's what it is. We should
2 know whether she received it.

3 ALJ DION: Right, and you can object to
4 foundation.

5 MR. LEWIS: Yes, I object to the foundation.

6 ALJ DION: Mr. Bingham, if you'll lay the
7 foundation, please.

8 THE WITNESS: I'm not sure receiving that
9 copy, but I know the funds were turned over to him.

10 Q. (BY MR. BINGHAM) Do you know what the amount
11 of funds was?

12 A. This looks like the accurate amount, 72,000,
13 73.

14 Q. You also mentioned tax-free trust of Arizona.
15 First of all, do you recall roughly -- and I'll take
16 that exhibit from you.

17 Do you recall roughly whether this was -- was
18 the Kemper fund transferred to Mr. Merrill shortly
19 after your mother's death?

20 A. Yes, it was.

21 Q. And what about the tax-free trust of Arizona
22 you identified?

23 A. That was also given to him, and I also had an
24 account.

25 Q. Hold on one second. Do you recall

1 approximately the amount of the tax-free trust of
2 Arizona?

3 A. It was 107,000.

4 Q. 107,000?

5 A. 100,000 -- it's 100,007. Am I saying it
6 right? 107,000.

7 Q. You said there was a third source?

8 A. The third source was my CD which I gave to
9 him also.

10 Q. Do you recall the approximate amount of the
11 CD?

12 A. It was around 25. And I also gave him
13 another account that I had, which was approximately
14 7,000 that was with Dean Witter, but at a different
15 branch in Phoenix. That's how I became acquainted
16 with Mr. Merrill, was by transferring that to begin
17 with.

18 Q. So then there was roughly 72,000 for the one,
19 107,000 for the other, and approximately 25,000 from
20 the CDs, was it?

21 A. Yes. And then also, I think it was 7,000 --
22 I think my representative was a Mr. Favia.

23 Q. So there was approximately over \$200,000 that
24 you delivered to Mr. Merrill; is that correct?

25 A. I would say so, yes.

1 Q. Now, did you have any investment accounts
2 anywhere else after you delivered these roughly
3 \$200,000 to Mr. Merrill?

4 A. No.

5 Q. Let's talk a little bit about the Kemper
6 government fund. Do you recall whether or not you
7 were receiving any income from that fund?

8 A. No.

9 ALJ DION: Is that you don't recall or you
10 weren't receiving any income?

11 THE WITNESS: I don't recall if I did.

12 Q. (BY MR. BINGHAM) Did you trust Mr. Merrill?

13 A. Implicitly.

14 Q. Did you trust him to do the things in your
15 accounts that were in your best interests?

16 A. That's difficult for me to answer that,
17 because if he talked to me, then actually I would make
18 the decision, then I would be the one that would say
19 it was in my best interests. Am I saying that right?

20 Q. Did Mr. Merrill ever stop by your house to
21 discuss anything with you?

22 A. Yes.

23 Q. A few times, several times? How many?

24 A. Often.

25 Q. Did he ever have any documents for you to

1 sign?

2 A. Yes.

3 Q. Did you ever review those documents with him
4 before you signed them?

5 A. No.

6 Q. Do you remember what those documents were
7 pertaining to?

8 A. Not now I don't.

9 Q. Did you read those documents after you signed
10 them?

11 A. No.

12 Q. What did you do with those?

13 A. I filed them.

14 MR. BINGHAM: If I can have just a minute,
15 Your Honor.

16 ALJ DION: Sure.

17 (Brief pause.)

18 Q. (BY MR. BINGHAM) When the GE stock was sold,
19 do you know if a profit or loss was incurred?

20 A. The accountant told me it was at a loss.

21 MR. BINGHAM: No other questions at this
22 time.

23 ALJ DION: Mr. Lewis.

24 MR. LEWIS: I'm ready.

25 ALJ DION: Your witness.

1 MR. LEWIS: Thank you, sir.

2

3

CROSS-EXAMINATION

4

5 Q. (BY MR. LEWIS) Did you really think you had
6 a loss on the sale of the GE stock, ma'am?

7 A. I'm only saying what the accountant told me.
8 She said that it was sold before the maturity date.

9 Q. Before what?

10 A. Before a maturity date.

11 Q. It was stock, wasn't it?

12 A. In other words, I hadn't held it long enough
13 for it to have been sold.

14 Q. It was stock, wasn't it?

15 A. I don't know. I think so.

16 Q. You can sell stock the day you buy it, can't
17 you?

18 A. I suppose so.

19 Q. And she told you that you received less money
20 for the sale of the stock than you paid for it; is
21 that correct?

22 A. That's the way I understood it, yes.

23 Q. Ms. DuChene, pardon me, but I get the
24 impression that you're having trouble remembering
25 things. Am I correct?

1 A. I would say going back on time, but without a
2 reference to it, yes.

3 Q. Things happened four or five years ago,
4 you're having trouble remembering?

5 A. To some degree.

6 Q. You don't remember when you retired?

7 A. Because I worked part-time, so I retired but
8 I wasn't retired.

9 Q. When did you retire?

10 A. I would say like in '96 that I retired,
11 probably at that time, after my mother died.

12 Q. So even at this moment, after you answered my
13 question, you're not sure when you retired?

14 A. No, because I was working part-time.

15 Q. When did you stop working?

16 A. Around the time that my mother died, so
17 around '95, '96.

18 Q. But you're really not certain?

19 A. It has to be within that time frame.

20 ALJ DION: Mr. Lewis, will you excuse me a
21 second.

22 Mr. Bingham, I just want to make sure. We
23 had some people walk in. They're not witnesses, are
24 they?

25 MR. BINGHAM: They're from the Securities

1 Division. They are not listed as witnesses in the
2 case.

3 ALJ DION: I just wanted to make sure. Thank
4 you.

5 Thank you, Mr. Lewis, I apologize for
6 interrupting.

7 MR. LEWIS: It's all right, I don't have eyes
8 in the back of my head.

9 ALJ DION: I wanted to make sure your wishes
10 were followed.

11 MR. LEWIS: Thank you.

12 Q. (BY MR. LEWIS) Ms. DuChene, what did you do
13 to prepare for your testimony here today?

14 A. I'm not sure what you're asking.

15 Q. Did you look at any documents before you took
16 the witness stand?

17 A. No.

18 Q. Did you talk to anyone? And I mean anyone.

19 A. I talked to Mr. Bingham.

20 Q. When?

21 A. About I would say a week ago.

22 Q. Where?

23 A. At my home.

24 Q. He came to your home?

25 A. Yes.

1 Q. Did you talk to him about what you were going
2 to testify to today?

3 A. I wouldn't say specifically, no.

4 Q. But you talked to him about your relationship
5 with Mr. Merrill and your accounts with him?

6 A. Yes.

7 Q. Did you show him any documents that you had?

8 A. I would show him, yes, I showed him what I
9 had.

10 Q. Did you have the monthly statement?

11 A. I had everything that was ever given to me.

12 Q. Would that include confirmation?

13 A. It was everything that was given to me except
14 the manuals. I threw those out, and prospectuses.

15 Q. I just wanted to make sure the record is
16 clear. You were sent confirmations and you kept them?

17 A. I was sent mail from Dean Witter and I filed
18 it.

19 Q. And that included monthly statements that you
20 received once a month; is that correct?

21 A. Yes.

22 Q. And things that you received during the month
23 were trade confirmations that showed things that had
24 happened in your account; is that correct?

25 A. That's what it was that was sent to me, yes.

1 Q. And where are those trade confirmations now,
2 did you give them to Mr. Bingham, or did you keep
3 them?

4 A. They're in my file.

5 Q. At anytime did you ever meet with anyone else
6 from Mr. Bingham's office? Mr. Lowe, for example?

7 A. Yes.

8 Q. When did you meet with him?

9 A. I would say maybe a week ago.

10 Q. Was Mr. Bingham with him at the time, or did
11 you meet separately?

12 A. They were together.

13 Q. So they saw all of these documents that you
14 had?

15 A. Yes.

16 Q. You said that you did not understand the
17 trade confirmations; is that correct?

18 A. No, I didn't.

19 Q. You didn't say that or you didn't understand?

20 A. I didn't understand any of the things that
21 were sent to me. I just filed them.

22 Q. You looked at them before you filed them?

23 A. Well, I saw what the address was, the
24 account, and I just filed it.

25 Q. Would you look -- Mr. Bingham asked you a

1 question about something that is in Exhibit S-7, and
2 it's near the back of that exhibit.

3 A. In S-3, is it in here, then?

4 Q. S-7. I think it's the one on the counter.

5 ALJ DION: The top one.

6 Q. (BY MR. LEWIS) It's a thick one. Is that
7 S-7?

8 A. S-8. Here it is.

9 ALJ DION: You found it?

10 THE WITNESS: Yes.

11 Q. (BY MR. LEWIS) The document he asked you
12 about is near the back. It's the fourth one from the
13 back. It's got ACC number 003553.

14 A. 353?

15 Q. 3553. It's the fourth document from the back
16 of the exhibit, ma'am.

17 Could I help you find it?

18 ALJ DION: I have --

19 MR. LEWIS: 353.

20 ALJ DION: 353 would probably be in S-8.

21 MR. LEWIS: You're right, sir. I'm still
22 suffering from vision problems.

23 Q. (BY MR. LEWIS) Ma'am, I apologize to you.
24 It's in Exhibit S-8, and it's the fourth document from
25 the back, and it's 353. I added a 5 because I'm

1 seeing double.

2 A. He's had eye surgery, too, okay.

3 Q. Mr. Bingham asked you questions about that
4 document --

5 A. Yes.

6 Q. -- remember that?

7 Now, ma'am, would you tell me what there is
8 on this document that you don't understand?

9 A. Frankly, I don't ever remember receiving
10 this. Right now, looking at it now, now I understand,
11 but I didn't at the time. This is a general stock, it
12 says principal commission.

13 Q. Let's go through this. Okay?

14 A. Yes.

15 Q. I think you'll find that all of the
16 confirmations, all of them look exactly the same as
17 this, and the typewritten material is different.
18 Okay.

19 Did you understand that it said Beatrice Mary
20 DuChene at the top?

21 A. Yes.

22 Q. And on the right it said your account
23 executive, Philip Merrill. Did you understand that?

24 A. Yes.

25 Q. Now, in the center it says you sold. Do you

1 understand what that means?

2 A. Yes.

3 Q. And it said the trade date was 12-15-97. If
4 you had read that, would you have understood that,
5 ma'am, 12-15-97?

6 A. If I had specifically done what you said,
7 yes.

8 Q. If you read it?

9 A. If I had done what you said, yes. But I just
10 took these.

11 Q. What do you mean if you had done what I said?

12 All --

13 A. You're having me --

14 ALJ DION: Hold on. What we're going to do
15 is we're not going to talk over each other. She has
16 to write down everything we're saying, and it's hard
17 enough with just one person talking, but with two
18 people at the same time it's going to be hard.

19 THE WITNESS: Sorry.

20 ALJ DION: It's okay. So we're going to do
21 it like that.

22 And I'm going to want you to repeat the
23 question, so start over.

24 Q. (BY MR. LEWIS) Do you understand what
25 12-15-97 means?

1 A. It's a date.

2 Q. Did you understand what trade date, you sold
3 on that date?

4 A. Yes, what you're saying, yes.

5 Q. And for settlement, that means when it had to
6 be paid for on 12-18-97. Did you understand that?

7 A. It says on this.

8 Q. It says quantity. Do you understand what
9 that means?

10 A. Yes.

11 Q. Do you see the number, can you read the
12 number?

13 A. Yes.

14 Q. Do you understand the number?

15 A. Yes.

16 Q. And then it says price. When you read across
17 the top the next item is price?

18 A. Is that supposed to be \$73.78.

19 Q. Seven-eighths. \$73 and seven-eighths. In
20 those days they didn't do decimalization, they did it
21 in eighths. But you understood it was at least \$73;
22 right?

23 A. I understand now, yes.

24 Q. Underneath it says description, General
25 Electric Company. Can you read that?

1 A. Yes.

2 Q. So no matter which security was being sold,
3 if you had looked at the confirmations, you could have
4 understood whether you were buying or selling; is that
5 correct?

6 A. If I had done what you're saying.

7 Q. What does that mean, if you had done what I'm
8 saying?

9 A. What I did, when I received this, I just took
10 it and filed it. I did not examine it.

11 Q. Why not?

12 A. Because I didn't. I didn't know I was
13 supposed to.

14 Q. Didn't you think it had something to do with
15 your account?

16 A. Like I said, I did not know.

17 Q. You didn't know whether it had anything to do
18 with your account?

19 A. I did not.

20 MR. BINGHAM: Objection, Your Honor; asked
21 and answered.

22 ALJ DION: I'm going to allow it.

23 Go ahead, ask that question again.

24 Q. (BY MR. LEWIS) You didn't know that these
25 things that came in an envelope from Dean Witter or

1 Morgan Stanley Dean Witter had something to do with
2 your account? You didn't know that?

3 A. I knew that it came from them and I put it in
4 a file that said Dean Witter.

5 Q. Did you open it up?

6 A. I opened the envelope and I put it in there,
7 yes, but I did not scrutinize it like you're saying.

8 Q. I don't mean scrutinize it. Did you just
9 look at it and see what it said?

10 A. I just looked at it, what it said, and I
11 filed it. It had my name on it, came from Dean
12 Witter, and I filed it.

13 Q. And it said at the top you bought or you sold
14 something?

15 A. I didn't pay any attention to that. I just
16 saw that I received it, and I filed it, from Phil
17 Merrill. I put everything in a file.

18 Q. You didn't care enough about what was going
19 on in your account about --

20 A. That's not true, that's not true.

21 Q. Ma'am, you get --

22 A. I did not understand it.

23 Q. What didn't you understand?

24 A. I just told you. I just filed it because I
25 didn't know what I was supposed to do with it.

1 Q. Didn't you understand that this was telling
2 you that you sold a security?

3 A. No, I did not.

4 Q. It says that, doesn't it?

5 A. It says that, but I did not know that.

6 Q. If you read it you would have understood it,
7 wouldn't you?

8 A. Even if I read it I wouldn't have understood
9 it. All I knew was to file it.

10 Q. If you read the words you sold, you wouldn't
11 understand what that meant?

12 MR. BINGHAM: Objection; Your Honor.

13 ALJ DION: What's your objection,
14 Mr. Bingham?

15 MR. BINGHAM: Reiterating same information,
16 same questions.

17 ALJ DION: We're getting close to that,
18 Mr. Lewis, but go ahead and ask that question.

19 Q. (BY MR. LEWIS) Some of these documents said
20 you bought and some of them said you sold; isn't that
21 correct?

22 A. I think that's what it said, confirmation or
23 something like that.

24 Q. Do you know the difference between you sold
25 and you bought?

1 A. Yes.

2 Q. So if you had taken the time to look at it,
3 you would have understood that it was telling you you
4 bought something or you sold something; is that
5 correct?

6 A. The way that you're saying it is not the way
7 that I looked at it. I took it because it came from
8 Phil, and I filed it, and I just felt I was supposed
9 to keep it, and that's all I did with it.

10 MR. LEWIS: That's not answering my question.

11 ALJ DION: I'm going to follow up.

12 You're kind of quantifying your answer. And
13 I appreciate what you're saying, I understand what
14 you're saying. What you're saying, as I understand
15 it, is that when you got these pieces of paper you
16 filed them, that you didn't look at it; is that
17 correct?

18 THE WITNESS: Right. I did not look at it to
19 see what it was all about.

20 ALJ DION: I understand that. His question
21 is if you would have looked at it, would you have
22 understood that you bought or sold something.

23 THE WITNESS: If I had looked at it, yeah.
24 But I still don't even know if I would have understood
25 what it was, because I knew nothing about any of it.

1 ALJ DION: Okay.

2 Q. (BY MR. LEWIS) When it said here you sold
3 General Electric, you would have understood that;
4 right?

5 A. Now, yes.

6 Q. You wouldn't have understood it in December
7 of 1997?

8 A. If it had been pointed out to me, I probably
9 would have.

10 Q. This particular document, looking at it?

11 A. I'm looking at it now and I see it, yes.

12 Q. And you're saying that in December of 1997,
13 if you had read this document, you would not have
14 realized it was telling you you sold 131 shares of
15 General Electric?

16 A. Let me say, if I had known, I would have done
17 something then. I would have not waited until AARP is
18 the one that told me what had been done.

19 Q. And they told you you had sold it at a loss?

20 A. She told me that I had sold it, and she said
21 I sold it, it had something to do with the time
22 element.

23 Q. You testified earlier that she told you you
24 sold it at a loss?

25 A. That's what she said, that it was at a loss.

1 There's like a penalty, she said, that's what it was,
2 a penalty for selling it ahead of time.

3 Q. What was the penalty?

4 A. I don't know.

5 Q. You didn't ask?

6 A. It was done on my taxes.

7 Q. What was the penalty?

8 A. I don't know.

9 MR. BINGHAM: Objection; Your Honor.

10 ALJ DION: She's answered that question. She
11 said she doesn't know.

12 Q. (BY MR. LEWIS) How much was the penalty?

13 ALJ DION: I don't think she's knows the
14 answer to these either. She said she doesn't know,
15 unless there's something to refresh her recollection
16 that I don't know about.

17 THE WITNESS: I paid the taxes on it, that's
18 what I did.

19 Q. (BY MR. LEWIS) You paid some taxes on a
20 loss?

21 A. I paid the penalty.

22 Q. You paid taxes on a loss, is that what you're
23 saying?

24 A. I don't know.

25 Q. In fact, ma'am, didn't you make a significant

1 profit on the sale of the GE stock?

2 A. I don't know.

3 Q. Isn't that what your tax accountant told you,
4 you had to pay the tax on the gain?

5 A. She did not tell me that. She told me that
6 my GE stock was sold, and it was sold before it should
7 have been sold, and that there was a penalty for it.
8 That's all I'm saying.

9 Q. Do you remember what tax bracket you were in
10 for 1997? Was it still --

11 A. 15 percent.

12 Q. Ma'am, isn't what she told you was that it
13 had been sold in less than a year, so you weren't --
14 you couldn't qualify for a long-term capital gain on
15 the profit made on the sale of GE stock?

16 A. No, I don't remember.

17 Q. Are you saying she didn't tell you that?

18 A. She just told me that it ought not to have
19 been sold, is what she said, and that's all that I
20 know.

21 Q. Because of the time issue?

22 A. I'm just saying that's all she said to me,
23 was that it should not have been cashed in.

24 Q. Have you been told that one of the objectives
25 of these proceedings is to obtain money for you from

1 Phil Merrill?

2 A. I was told there would probably be no money
3 obtained from this.

4 Q. By whom?

5 A. By Mr. Bingham.

6 Q. He told you that there wouldn't be any money
7 obtained for you?

8 A. You're putting words in my mouth.

9 Q. I'm trying to find out what the words are,
10 ma'am. Please explain what he said.

11 A. He said that there may be.

12 ALJ DION: Okay.

13 THE WITNESS: He's badgering me.

14 ALJ DION: I get to decide that. I get to
15 decide a couple other things. What I've decided is
16 you guys are talking over each other again. Now, I
17 understand that the exchange may get a little heated
18 sometimes, but take a breath, let him finish, take a
19 breath, let her finish. Okay? And answer the
20 questions to the best of your recollection.

21 The question was, if I recall -- and if I
22 state it inaccurately, Mr. Lewis, you can correct
23 me -- as I recall, it was would there be any, as a
24 result of these proceedings, would there basically be
25 any money, and it seemed to me that certainly the

1 implication was money to you. Your answer was that
2 Mr. Bingham told you there wouldn't be any money; is
3 that what you're saying? What did he say, that's what
4 I want to know.

5 THE WITNESS: He said there may be no money.

6 Q. (BY MR. LEWIS) And there might not be,
7 depending upon your testimony.

8 MR. BINGHAM: Objection; Your Honor.

9 THE WITNESS: He did not say that. Depending
10 on my testimony was never brought into the subject at
11 all.

12 ALJ DION: Hold on a second.

13 Mr. Bingham, I'm going to rule on your
14 objection. I'm going to overrule it. It goes towards
15 a possible bias.

16 THE WITNESS: But he never said that at all.
17 He only said that there may be no money in this for me
18 at all, period.

19 Q. (BY MR. LEWIS) But he also said there might
20 be money?

21 MR. BINGHAM: Objection. He's trying to put
22 words into her mouth, Your Honor. I don't believe she
23 said that previously.

24 MR. LEWIS: I believe she did, sir.

25 ALJ DION: I think -- I also kind of recall

1 that on the record as well.

2 Would it be fair to say that the conversation
3 was there might be money and there might not be money?
4 Is that what you're trying to tell us?

5 THE WITNESS: Right. And I'm not doing this
6 for the money, I'm doing this because of what was done
7 to me by Mr. Merrill.

8 ALJ DION: So your understanding was that as
9 a result of this proceeding, there might be some money
10 which might come to you in the form of restitution?

11 THE WITNESS: Correct.

12 ALJ DION: But then again, there might not be
13 any money.

14 THE WITNESS: Correct.

15 ALJ DION: Okay, I think we've covered that.

16 Q. (BY MR. LEWIS) What would determine whether
17 you would get money or not?

18 A. I think the judge would answer that.

19 Q. It would be based on your testimony?

20 A. I'm not the only witness here.

21 Q. You're the main witness concerned with what
22 happened with your account.

23 A. You're telling me that, I don't know that.

24 Q. Would you look at a folder that has Exhibit
25 S-3 in it.

1 ALJ DION: Do you have that, Ms. DuChene?

2 THE WITNESS: Yes.

3 Q. (BY MR. LEWIS) Would you look at the letter
4 that's dated August 25th, 1999. I think it's the
5 third document there.

6 A. Okay.

7 Q. I'm not sure I understand what your testimony
8 is. Did you write this letter?

9 A. No, I don't believe I did.

10 Q. Was it written on your behalf?

11 A. Probably.

12 Q. Did you read it before it was sent out?

13 A. Yes, I would have done that. My daughter
14 would have sent me a copy.

15 Q. Did you see anything in it that you disagreed
16 with?

17 A. No.

18 Q. Are all of the statements made in that letter
19 correct?

20 A. To my ability, yes.

21 Q. To your knowledge?

22 A. Yes.

23 Q. Let's go through these things and see what's
24 correct. Okay?

25 On the first page, it says in capitals,

1 annuity; right? You see that?

2 A. Uh-huh.

3 ALJ DION: Is that a yes?

4 THE WITNESS: Yes.

5 Q. (BY MR. LEWIS) "Phil cashed in the
6 investments that I had made independent of MSDW and
7 when he did this he did not inform me of any of the
8 limitations of these investments." Is that correct?

9 A. Yes.

10 Q. Did you know you were investing in other
11 things with the money?

12 A. How are you meaning that?

13 Q. Well, you say: Phil cashed in the
14 investments I had and the investments that I made
15 independent, and when he did this he didn't inform me
16 of any limitations of these investments.

17 What limitations are you referring to?

18 A. What I'm referring to is that my mother had
19 an annuity, and that annuity had a medical clause in
20 it. And when she was dying, I was able to use the
21 interest off of that to pay her bills. And I asked
22 Phil if that's what he had done for me, and he said
23 no. He did not discuss it with me at all.

24 Q. Did he discuss the fact that you were buying
25 annuities, investing in annuities with you?

1 A. Not to my knowledge, no.

2 Q. Not at all?

3 A. No.

4 Q. At no time?

5 A. Not the annuity, no.

6 Q. At no time?

7 A. Not to my knowledge, no.

8 Q. Didn't you have to sign papers to buy the
9 annuity?

10 A. I signed a lot of papers with Phil that I
11 never knew what I was signing.

12 Q. You didn't sign papers that indicated they
13 were annuities purchases, and you were purchasing
14 annuities?

15 A. Phil stopped over and gave me papers to sign
16 and I signed them and gave them to him. He would stop
17 into my home and gave me these papers to sign, which I
18 did.

19 Q. And he wouldn't discuss them with you?

20 A. No. He'd just breeze in and say I need your
21 signature, and I gave it to him.

22 Q. The next thing says: I understand that I
23 lost a lot of money when he switched my account. Is
24 that a true statement?

25 A. I'm not following you on this.

1 Q. I'm reading the letter that you said you
2 looked at, and everything was correct then. I want to
3 know if this statement, the second line in the
4 paragraph entitled annuity, it says: It is my
5 understanding that I lost a lot of money when he
6 switched my accounts. Is that a true statement?

7 A. Went from the tax-free to what he did, from
8 there was limitations, yes.

9 Q. You lost money investing in these?

10 A. In the annuities, yes, I lost considerably
11 from investing in annuities.

12 Q. How much did you lose?

13 A. I would say over 100 some thousand dollars.

14 Q. You lost over \$107,000?

15 A. Over 100 some thousand dollars from what he
16 did with my annuities.

17 Q. Simply by investing in annuities?

18 A. In the Northbrook annuities, yes.

19 Q. Did you lose that immediately, or did you
20 lose that over a period of time?

21 A. I lost it over a period of time. And when I
22 tried to get out of it I couldn't, and I had to have a
23 penalty, and I finally paid a penalty to get out of it
24 last year. I was stuck in Northbrook.

25 Q. What was the penalty?

1 A. I paid it. And I don't have those figures in
2 front of me right now, but I had to pay on three of
3 them.

4 Q. Let me make sure I understand. Your
5 testimony is the money that was taken out of the
6 investments that you had independent of MSDW was put
7 in annuities and you lost \$107,000 in those?

8 A. I would say the way that it was done, yes, I
9 lost money on the annuities.

10 Q. \$107,000?

11 A. I would say I lost more than that.

12 Q. On the annuities that Mr. Merrill recommended
13 you purchase and you did purchase?

14 A. Say that to me again.

15 Q. The funds from these other investments were
16 put into variable annuities; isn't that correct?

17 A. Yes.

18 Q. And you're saying you lost \$107,000 investing
19 in those variable annuities; is that correct?

20 A. I would say I lost more than that.

21 Q. When did you realize the loss?

22 A. Over the year, trying to get out of it and I
23 couldn't, and I was losing and losing. I don't
24 understand all the principles of it. I'm just telling
25 you briefly a summary of it. My daughter knows all

1 the figures, and that's when I turned it over to her.
2 But what was happening to me, she has all the figures
3 for you. I don't have them.

4 Q. You took these accounts away from Phil
5 Merrill at the end of 1998; is that correct?

6 A. I took them and gave them to Mr. Asher.

7 Q. Where is Mr. Asher?

8 A. In California.

9 Q. Did you have a loss in those variable
10 annuities at that time?

11 A. I'm not sure, no.

12 Q. Didn't you have a very substantial gain?

13 A. I had gains and then I had losses.

14 Q. At the time you took the accounts away from
15 Mr. Merrill, didn't you have substantial gains in the
16 annuities?

17 A. I cannot answer that right now.

18 Q. You don't know whether you had a loss or a
19 gain at the time you took the accounts away from him?

20 A. I don't have those figures in front of me, so
21 I cannot say.

22 Q. I'm not asking -- listen to the concept.

23 A. I'm just saying I cannot tell you that.

24 Q. So you may have made money and you don't
25 remember?

1 A. If I had made money, I think I would have
2 remembered. There was a reason why I took those funds
3 away from Phil Merrill.

4 Q. Mrs. DuChene, would it surprise you to learn
5 that you invested in variable annuities with
6 Mr. Merrill, \$195,280, and that when you took the
7 account away from him, it was worth in excess of
8 \$307,000 for a gain of \$112,000? Would that surprise
9 you?

10 MR. BINGHAM: Your Honor, before she answers
11 that, and I don't mean to cut her off, but I'm going
12 to object, because annuities were not -- it was
13 nothing that was alleged in the notice, alleged on the
14 irrelevant basis. I have allowed Mr. Lewis to
15 continue with his questions regarding annuities, but
16 again I'm objecting on a relevance basis.

17 ALJ DION: Mr. Lewis.

18 MR. LEWIS: She charges that Mr. Merrill
19 improperly handled her account. He did not. She
20 turned over the total package to him, and he did
21 exceptionally well with that total package.
22 Mr. Bingham very assiduously wants to carve out a
23 major portion of profit from his case because it does
24 create damage to his theory. But that's not her
25 answer, saying it's material. She turned the case

1 over to him and trusted him to handle her accounts.
2 This was part of the regular account. It's listed as
3 an asset on the regular account.

4 ALJ DION: And I'm going to overrule the
5 objection.

6 Additionally to that, this letter was
7 submitted, it hasn't been entered into evidence, but
8 it has been submitted to this witness to talk about
9 various sales and accounts, and the table is talked
10 about, but this, it's within the confines of the
11 letter that Ms. DuChene either wrote or was written
12 for her, and in there they do talk about the annuity.
13 So I think it's relevant as to, somewhat, to the total
14 package, but I do think it's relevant certainly to
15 credibility as well, especially in portions of the
16 annuity letter.

17 So the question was, would it surprise you if
18 you invested roughly \$200,000 in the annuity program.

19 MR. LEWIS: 195, sir.

20 ALJ DION: I said approximately 200,000.

21 THE WITNESS: I thought it was 300,000.

22 ALJ DION: When it was cashed out.

23 MR. LEWIS: Not cashed out, taken away and
24 sent to the gentleman in California.

25 ALJ DION: When it was removed from

1 Mr. Merrill's control it was upwards of 300,000.

2 What was the number again, Mr. Lewis?

3 MR. LEWIS: 307.

4 ALJ DION: 307,000. Would that surprise you?

5 THE WITNESS: I'm not sure if it would or
6 not, because the basic thing was is that he was buying
7 and selling, buying and selling with my account
8 without talking to me, and I had no control over my
9 account. So I think it's not so much the overall
10 value, as it was hey, stop what you're doing because
11 it's not what you're supposed to be doing with my
12 money.

13 ALJ DION: But it's entirely possible that
14 that happened; is that right?

15 THE WITNESS: It's possible, but that's he
16 figuring the entire sum because I had given him, he
17 had \$500,000 of my money, so I can't see where that
18 300 would come in. I mean there's a lot of other
19 things that go into that with what he's talking about.

20 ALJ DION: Okay, but it is possible that --
21 you've stated before that you really didn't follow
22 this stuff too closely.

23 THE WITNESS: My daughter --

24 ALJ DION: I want to finish. You stated that
25 you didn't follow this stuff too closely; is that

1 right?

2 THE WITNESS: That's true.

3 ALJ DION: It's possible in this particular
4 section, the annuity section, meaning section of your
5 entire portfolio, so in other words, of all your
6 investments, some of your money was in this stuff
7 called an annuity; right? And it's possible that you
8 made some money on that. That sounds like over the
9 period of time, it could have been \$300,000 from
10 approximately \$200,000. That's possible; right?

11 THE WITNESS: It was possible because he had
12 500,000 of my money.

13 ALJ DION: But it is possible?

14 THE WITNESS: Yes.

15 ALJ DION: Okay.

16 Thank you, Mr. Lewis.

17 Q. (BY MR. LEWIS) In the next sentence you say:
18 I went from tax-free investments to my money being
19 subjected to very extreme limitations. What were the
20 extreme, very extreme limitations?

21 A. It would be access to my money, would be
22 number one. Because you're only allowed so much of a
23 percentage to take out in annuities.

24 Q. What else?

25 A. That's all I can think of right now.

1 Q. You were allowed to take out, depending upon
2 the annuity, 10 or 15 percent a year without any
3 penalty?

4 A. Yes.

5 Q. So the extreme limitation was you couldn't
6 take out all your money without some penalty?

7 A. Correct.

8 Q. What was the penalty?

9 A. I don't know right now.

10 Q. Wasn't it a declining percentage of the
11 amount invested?

12 A. I don't know.

13 Q. You state in this letter, subjected to a very
14 extreme limitation, and you define that as being the
15 penalty that would have to be taken if you were to get
16 money. What is this very extreme limitation?

17 A. I don't know, but I know there is a penalty.

18 Q. How much is it?

19 A. I don't know. I don't have the document in
20 front of me.

21 MR. BINGHAM: Your Honor, I'm going to have
22 to object; asked and answered several times.

23 ALJ DION: Yes, I agree. I'm going to
24 sustain that.

25 Q. (BY MR. LEWIS) You did talk to him about

1 what he had switched you into; right?

2 A. I talked to whom? Whom did I talk to?

3 Q. Phil Merrill.

4 A. No, he did not discuss that with me.

5 Q. After he switched them did you talk to him
6 about it?

7 A. After I switched, no. But he never talked to
8 me about any of it before he did it.

9 Q. Did he talk to you about the performance of
10 the variable annuities after he did it?

11 A. No, not that I remember, no.

12 Q. Does that mean it didn't happen, or you just
13 don't remember it happening?

14 A. I don't remember him doing that.

15 Q. Ma'am, didn't he come to your house just
16 about every month when you received your monthly
17 statement from Dean Witter?

18 A. When I had my monthly statement, no; to
19 discuss my monthly statement, no.

20 Q. Didn't he come to your house every month,
21 shortly after you received your monthly statement?

22 A. Mr. Merrill came to my home when I first
23 signed up with him. When he first made my
24 investments, he came over and I remember the papers
25 where he wrote little notes on, you know, this is

1 this, and this is that, and then it stopped. Then he
2 stopped coming over to do that. He just would stop by
3 when he had to have something signed. He did not sit
4 down and discuss with me, no.

5 Q. He didn't come over every month, after you
6 received a monthly statement?

7 A. No.

8 MR. BINGHAM: Objection; asked and answered.
9 It's answered at least twice now.

10 ALJ DION: Yes, she's answered that question.

11 Q. (BY MR. LEWIS) Down in the next paragraph,
12 it starts with: I am in three annuities. There's a
13 sentence that starts: These funds are tied up until I
14 am 81 years of age old.

15 Is that your understanding, that the money
16 was tied up until you were 81?

17 A. I don't remember. I know it was tied up, but
18 I'm not sure how old I had to be.

19 Q. What did you mean when you -- mean by tied
20 up?

21 A. Well, in other words, you have a penalty
22 until you reach a certain age that you invested it in
23 for.

24 Q. That's what you meant it was tied up?

25 A. Yes.

1 Q. Didn't the penalty decline every year?

2 A. Yes, it did.

3 Q. And didn't it become zero after a while?

4 A. Yes, it would have become zero.

5 Q. Wouldn't it have become zero before you were
6 81?

7 A. I don't know that, no.

8 MR. BINGHAM: Objection; Your Honor. I'm
9 objecting because --

10 ALJ DION: Hold on a second, Ms. DuChene.

11 MR. BINGHAM: I'm objecting because unless
12 she can testify to how long the redemption period is,
13 which is what Mr. Lewis is referring to, then she
14 would be speculating as to when the withdrawal penalty
15 reaches zero.

16 Actually, it -- he's asking her to speculate,
17 is the basis of my objection, unless she can testify
18 that she knew the period for redemption fees.

19 ALJ DION: Well, and I'm --

20 MR. LEWIS: I'm cross-examining her about
21 this letter.

22 ALJ DION: I don't need to hear anything. I
23 think you're going to win on this one. In this letter
24 it says, these funds are tied up until I'm 81 years
25 old, and so there's a letter that she's indicated that

1 she's reviewed, and it's correct. Mr. Lewis has asked
2 her indication of what tied up means, and so the
3 appropriate question I think is, was it your
4 understanding that it was at 81 years old, that's the
5 first time it became a zero percent for zero penalty
6 to you.

7 THE WITNESS: Your Honor, I just paid a
8 penalty to take them out, so I still had a penalty for
9 them, which I paid last year because I was losing so
10 much that I cashed it in and I paid the penalty. So I
11 don't know how much longer it would have had to go,
12 but I cashed them in because I was stuck with them.

13 ALJ DION: And you're not 81 years old?

14 THE WITNESS: No, I'm 78.

15 ALJ DION: But to your way of thinking,
16 having funds tied up, it's not necessarily that they
17 were tied up and you couldn't get to them, you could
18 get to them and you could use them; right?

19 THE WITNESS: With a penalty.

20 ALJ DION: That's my next question. But it
21 would be with a penalty; is that correct?

22 THE WITNESS: Yes, sir.

23 ALJ DION: So it's not that they're really
24 tied up that you can't ever, ever, ever use them?

25 THE WITNESS: No.

1 ALJ DION: It's just that you understood
2 there would be a penalty associated with it?

3 THE WITNESS: Yes.

4 ALJ DION: Your understanding was that
5 penalty would go away when you turned 81.

6 THE WITNESS: Yes.

7 ALJ DION: Okay.

8 MR. LEWIS: Thank you.

9 Q. (BY MR. LEWIS) When you say, at that time if
10 I choose to withdraw these funds, I am subject to a
11 very high taxation level, is that a true statement?

12 A. Yes, I'm taxed if I dig it out.

13 Q. What are you taxed on, ma'am? The money you
14 put in or the gain?

15 A. You're taxed on the money you take out. I'm
16 sure you're familiar with annuities.

17 Q. I am, but I can't testify, however. When you
18 take the money out of the annuity you're not taxed on
19 the amount you put in, are you, just the gain?

20 A. If you take it out you're taxed.

21 Q. On the gain, not on what you put into it?

22 A. It depends. If the gain is not more than
23 what your principal is, then it comes off of that,
24 because I just lost on it and I know they took some of
25 my principal on it.

1 Q. Ma'am, let me give you a hypothetical. If
2 you put in \$100,000 and the value of the variable
3 annuity goes up to 125,000, you take the whole 125
4 out, do you pay the tax on the 125 or just on the 25?

5 A. I think -- I'm not a tax expert, but I would
6 say it would be on the 25.

7 Q. So this severe --

8 ALJ DION: Mr. Lewis, I'm going to follow up
9 because there might be a little less --

10 So the 25,000 that you made on your \$100,000
11 would be considered a gain; is that right?

12 THE WITNESS: Yes.

13 ALJ DION: I want to get that terminology
14 down in case you have that question in the future.

15 Q. (BY MR. LEWIS) So this extreme most severe
16 level of taxation that you referred to in the letter
17 would only be on a gain; isn't that correct, ma'am?

18 A. Yes.

19 Q. And at the time --

20 A. I believe so.

21 Q. -- at the time you wrote this letter, didn't
22 you have a big gain in the annuity?

23 A. My daughter wrote this letter for me, and so
24 when she's here you can ask her all about it. It
25 would save a lot of your folks' time.

1 Q. You're not aware whether you have a loss or
2 gain?

3 A. I understand, but you're confusing me. I'll
4 put it in plain English. You're confusing me very
5 much that I'm not sure about anything right now.

6 Q. You said there wasn't anything in this letter
7 that was made in this statement. I asked you that
8 before we started talking about it?

9 A. It's your manner of questioning, sir, it's
10 very confusing to me, the way that you're doing it.

11 Q. All right. Let me try again.

12 The words in this letter are: At that time,
13 if I choose to withdraw these funds I am subjected to
14 a very high taxation level.

15 That very high taxation level would only be
16 on the gain; is that correct?

17 A. Yes.

18 Q. And wouldn't, if you held it more than a
19 year, wouldn't it be a 20 percent tax on long-term
20 capital gain?

21 A. I don't know that.

22 Q. If I pass away, my family will be burdened
23 with the most severe level of taxation. That's on the
24 gain; isn't that correct?

25 A. Yes, I think it is. I'm not sure.

1 Q. Down at the bottom of the letter, it says:
2 When I had my taxes prepared by AARP.

3 Are we talking about in February of 1998; is
4 that correct?

5 A. Yes.

6 Q. And that would have been your 1997 tax
7 return; is that correct?

8 A. Sir, I'm not sure right now. All I know is
9 that when she prepared my GE stock, there was a
10 problem, and that was brought to my attention, and at
11 that time I was aware that Mr. Merrill was doing
12 things with my funds that he was not supposed to be
13 doing, and that's all that I know.

14 ALJ DION: Okay, Ms. DuChene. Okay. What
15 he's asking you is the letter or the taxes about the
16 time frame, is it possible that it was around February
17 of 1998 that you got that information from the AARP,
18 February, March?

19 THE WITNESS: It would have, would have been,
20 I believe, then, yes.

21 ALJ DION: 1998.

22 THE WITNESS: Yes.

23 ALJ DION: 1998 you're preparing your taxes
24 for the previous year. So the 1997 tax year is
25 reported on April 15th, 1998; is that right?

1 THE WITNESS: Right.

2 ALJ DION: That's all he was asking.

3 Go ahead, Mr. Lewis.

4 Q. (BY MR. LEWIS) I was told that my General
5 Electric stock was bought and sold within the same
6 year and placed me in a different tax bracket.

7 Does that refresh your recollection as to
8 what the accountant told you?

9 A. There was, it sounds familiar, yes.

10 Q. What was the different tax bracket that your
11 accountant --

12 A. I don't remember, no.

13 Q. You told me you were in a 15 percent tax
14 bracket?

15 A. Yes.

16 Q. Were you put in a higher tax bracket?

17 A. I don't remember that.

18 Q. So this statement may be incorrect?

19 A. I don't believe it will be incorrect. It's
20 just that I don't have that fact in front of me right
21 now.

22 Q. Turn to the next page. It's the one the says
23 234 at the bottom.

24 A. Okay.

25 Q. In the middle of the page, just below it

1 says: My daughter flew to Phoenix to help me prepare
2 my income tax.

3 Was that for 1997 or 1998?

4 A. I believe that was '97.

5 Q. So you --

6 A. In other words, it was -- she was preparing
7 my taxes for the year that the GE stock was sold and
8 that's --

9 Q. But you also had somebody from the AARP doing
10 that?

11 A. That year, yes, but she came in to do my
12 taxes for me this one year.

13 Q. That's what I'm trying to find out. Are we
14 talking about the same year or the next year?

15 A. What do you mean? The same year as what?

16 Q. Okay. You have testified that in February of
17 1998 you went to the AARP to have your taxes prepared
18 for 1997.

19 A. Then this would have had to have been '99's
20 taxes, then. You're getting me very confused now.
21 All I know is that when Cathie came to do my taxes,
22 she spent all of that time trying to put them
23 together, and it was so convoluted that she took it
24 back to an accountant to have to do my taxes.

25 Q. All I'm trying to find out, Ms. DuChene, is

1 when your daughter was helping you with your taxes,
2 was it for the tax year 1998 or the tax year 1997?

3 A. It must have been '97.

4 Q. So the AARP people didn't do your taxes for
5 you for 1997?

6 A. It would have had to have been the year
7 before. You're mixing me up because all I know is
8 that -- no, it wouldn't have been the same year,
9 because Cathie took my taxes to an accountant the next
10 tax year, this year here.

11 Q. For 1998?

12 A. Must have been, yeah.

13 Q. Is that your best recollection now, that AARP
14 did your taxes for 1997 and your daughter helped you
15 with your taxes for 1998?

16 A. I'm not sure now. You've got me mixed up.
17 You're mixing me up.

18 Q. Because I asked you the question I got you
19 mixed up?

20 A. It would have had to have been done in '98,
21 because this letter is written in '99, so the taxes
22 would have had to have been for '98.

23 Q. Ma'am, I'm just asking you questions about
24 the words used in the letter that you said represents
25 a correct statement.

1 A. Cathie wrote this letter.

2 Q. But I asked you to read it and I asked you if
3 it's stated correctly.

4 A. I read it.

5 ALJ DION: Hold on. He's got to finish his
6 question.

7 Q. (BY MR. LEWIS) I asked you whether there was
8 anything incorrect, and you said no.

9 A. I don't know right now.

10 Q. The next sentence starts out: I was further
11 upset by the type of annuities he selected which
12 locked me into MSDW. What do you mean by that?

13 A. In other words, the Northbrook was not a good
14 investment for me, and I tried to get out of it. And
15 there was no way to get out of it because it was a
16 Dean Witter annuity. In other words, you couldn't
17 transfer without a severe penalty, because I tried to
18 get out of it, and that was at too severe a penalty
19 for me to pay.

20 Q. The deferred service charge, it goes down
21 every year. Is that the penalty you're talking about?

22 A. Whatever penalties would be associated with
23 getting out of those annuities from Northbrook, yes.

24 Q. They weren't truly locked in, just if you
25 wanted to take them out you would have to face a

1 diminishing service charge?

2 A. If you wanted to cash them in to go to
3 something else, you could not transfer the annuities
4 to another company like most people can do. You had
5 to pay a penalty.

6 Q. It's your understanding that you can transfer
7 an annuity from one company to another without paying
8 a deferred service charge?

9 A. Yes.

10 Q. Where did you get that understanding at?

11 A. Because I just did it.

12 Q. How long did you hold the annuity?

13 A. I just got rid of Northbrook.

14 Q. So you held it so that the deferred service
15 charge was down to zero?

16 A. It's not down to zero, I still paid a big
17 penalty. I still had to pay a penalty.

18 Q. All right. Now I'm asking you, what kind of
19 annuity can you change from one annuity contract to
20 another annuity contract without paying that deferred
21 service charge?

22 A. You'll have to check into that, because I did
23 it.

24 Q. What annuity, what company?

25 A. Morgan Stanley Dean Witter. I did it with

1 the bank.

2 Q. You did it with what?

3 A. I did it with the bank.

4 Q. For what annuity?

5 A. For the Morgan Stanley Dean Witter for the
6 Northbrook.

7 Q. You just said you had to pay a penalty.

8 A. I did pay a penalty, yes, and I switched it
9 over to them.

10 Q. So you were able to transfer?

11 A. But with paying a penalty. I still paid a
12 penalty.

13 Q. Is it your understanding that there's any
14 annuity company that issues an annuity, then allows
15 you to transfer it before the deferred service charge
16 period ends without paying the deferred service
17 charge?

18 A. I'm not a stockbroker, I don't know.

19 Q. In this same paragraph you say numerous
20 times: He suggested that I put MSDW, (essentially
21 him) in charge of my trust account. Is that a correct
22 statement?

23 A. Yes. It wasn't specifically. It was -- it's
24 not worded -- in other words, Mr. Merrill asked me to
25 give him power of attorney, and that's what this is.

1 But it's not worded exactly the way that I said the
2 way it was done.

3 Q. Let's talk about that, ma'am. Didn't
4 Mr. Merrill suggest to you that you have a managed
5 account with the Morgan Stanley Dean Witter?

6 A. He might have said that, but he suggested I
7 give him power of attorney. That was the whole thing,
8 and that's why I did nothing.

9 Q. Let's talk about the managed account. Did he
10 not suggest to you that it would be a good idea for
11 you to have a managed account with Morgan Stanley Dean
12 Witter?

13 A. He mentioned it, but he didn't word it the
14 way you're wording it.

15 Q. How did he word it?

16 A. He suggested that as a possibility of doing
17 it, but not --

18 Q. And you didn't want to do that?

19 A. He first of all wanted me to give him power
20 of attorney, which I refused to do.

21 Q. Ma'am, wasn't it in connection with a managed
22 account that the question of who would have the power
23 to make the trades in your account came up, and didn't
24 he tell you it would be someone at Morgan Stanley Dean
25 Witter who operated managed accounts? Isn't that what

1 he told you?

2 A. That's not the way the implication was, no.

3 Q. Not the implication?

4 A. No, that's not -- you're wording it
5 differently than what he did.

6 Q. When was it that you had this conversation
7 with him, what year?

8 A. It's before I took everything away from him.

9 Q. Didn't you have this conversation numerous
10 times, and he suggested starting from the beginning
11 when he had the account?

12 A. No, not from the beginning, no.

13 Q. When was the first time that he suggested you
14 have an MSDW managed account?

15 A. Well, when he started talking to me about
16 having a power of attorney.

17 Q. Wasn't it in connection with the managed
18 account that he talked about the power of attorney?

19 A. Well, his power of attorney would have to be
20 with what I had with Dean Witter to have power of
21 attorney. He would have had control of my assets with
22 Dean Witter.

23 Q. And Dean Witter would be handling a managed
24 account for you?

25 A. But he was in charge of the account, not Dean

1 Witter. He was the one who would be in charge.

2 Q. Well, ma'am, do you remember the details of
3 the discussion, or are you just remembering?

4 A. Exact details?

5 Q. Yes.

6 A. I'm telling you that what he said to me was
7 he wanted to have power of attorney, and I said no.
8 And I didn't know how to get out of it. I was really
9 very concerned because he was very insistent that he
10 have power of attorney.

11 Q. He or Morgan Stanley Dean Witter?

12 A. It had nothing to do with Morgan Stanley
13 Dean --

14 Q. I'm saying there's no possibility that you
15 would have misunderstood him?

16 A. No, there was no possibility. That's why I
17 didn't trust him again. No, there was no mistaking
18 it.

19 Q. When was the first time when he said he
20 wanted power of attorney?

21 A. It was the time he was doing my accounts. I
22 don't remember the exact date.

23 Q. What year?

24 A. I don't remember the exact date.

25 Q. Could it have been as early as 1997?

1 A. He would have had to have been representing
2 me for a while to have made the suggestion.

3 Q. When did he start representing you?

4 A. I believe it was '96.

5 Q. Wasn't it in 1995, ma'am, that he started
6 handling your account?

7 A. It was the time that my mother died. My
8 mother died in '95.

9 Q. And within a year after he was handling the
10 accounts, didn't he suggest to you that you should use
11 a Dean Witter managed account?

12 A. No, no.

13 Q. He didn't suggest it?

14 A. I do not remember that at all, no.

15 Q. When was the first time he talked to you
16 about power of attorney, what year?

17 MR. BINGHAM: Your Honor, I'm going to have
18 to object; asked and answered a couple times.

19 MR. LEWIS: I'll stop if I know what the
20 answer is.

21 THE WITNESS: I'm trying to tell him. It was
22 after --

23 ALJ DION: Hold on a second, Ms. DuChene. I
24 think that Mr. Lewis is right. I think we're talking
25 about two different things, which is that is a little

1 bit confusing. One is the managed account and one is
2 the power of attorney. I think we've addressed the
3 managed account, when that was first discussed.

4 Was the power of attorney discussed at the
5 same time as the managed account, or was it later than
6 that, to the best of your recollection?

7 THE WITNESS: I would say that it was the
8 power of attorney first, and then if the other came
9 up, then it would have been after that.

10 But he really was very insistent with the
11 power of attorney. And that's because I was trying --
12 since my mother died, I had to do something with the
13 money that I had from her, and so I had to have
14 someone have power of attorney for me. And then
15 that's because he was, Mr. Merrill, was doing it for
16 other women, and so that's how the subject came up.

17 Q. (BY MR. LEWIS) He was doing what for other
18 women?

19 A. He had power of attorney for someone else.

20 Q. Did he tell you he had managed accounts for
21 someone else?

22 A. He told me he had power of attorney over
23 another woman in Sun City.

24 Q. At Dean Witter for --

25 A. Yes, he was at -- yes, he was helping her

1 from Dean Witter, yes. She lived in Sun City.

2 Q. Did he ever show you a document to sign?

3 A. What kind of a document?

4 Q. Power of attorney document.

5 A. I told him no.

6 Q. Did he ever show you a document and ask you
7 to sign?

8 A. No.

9 Q. Would you turn the page.

10 In the first paragraph at the top of the page
11 there's a sentence that starts, near the right, it
12 says: He did not want to place my annuities in the
13 money market temporarily while the market was in such
14 flux over the Asia crisis. Is that a true statement,
15 ma'am?

16 A. Yes.

17 Q. Did you ask him to put your annuities in the
18 money market again?

19 A. My daughter asked him to put, I think it was
20 \$80,000 of my money where it would be safe, to
21 transfer it over from where it was.

22 Q. Out of an annuity?

23 A. I have no idea. Just where the money was, to
24 move it because of the way the stock market was.

25 Q. Excuse me, ma'am. This letter says: He did

1 not want to place my annuities in a money market
2 account. Is that an incorrect statement?

3 A. That I don't know. I have to say I don't
4 know right now. All I know, there was \$80,000 that he
5 was asked to move.

6 Q. Where was the \$80,000?

7 A. In my funds.

8 Q. In what, in which account?

9 A. I don't know. It was just in my account. It
10 was \$80,000, and I asked him to move it.

11 Q. You're saying this letter is in error when he
12 says he did not want to place my annuities in a money
13 market account?

14 A. Whatever it was that I had \$80,000 in, asked
15 him to put it where it would be safe to do, period.

16 Q. Ma'am, you had a regular account and you had
17 an IRA account.

18 A. It was an \$80,000 account. I asked him to
19 move --

20 Q. Was it a single account that had 80,000?

21 A. It was an \$80,000 account that I asked him to
22 move.

23 Q. All right. You had two accounts, you had an
24 IRA account and you had what was referred to as a
25 regular account. The regular account in the end of

1 1998 was transferred to a trust account; is that
2 correct, ma'am?

3 A. All I know is that there was \$80,000 in
4 jeopardy, and I asked him to move it and put it where
5 it was safe.

6 Q. How was it in jeopardy? What was it in,
7 ma'am?

8 A. At a loss, and it did go down, it went down.
9 I asked him to move it where it would be safe, and
10 that's all that I know about it.

11 Q. What was the investment that was in jeopardy?

12 A. I don't know. I don't know. I just told
13 you, I don't know. But it was an \$80,000 figure.

14 Q. It says here: I believe checking my account
15 would show a loss of approximately \$80,000.

16 When was that, ma'am? When was that loss?

17 A. It was at the time that the Japanese thing,
18 the thing happened in the Asian crisis. You know that
19 time better than I do, I don't remember.

20 Q. No, ma'am, I don't know that time. I'm
21 asking you.

22 A. I don't remember, I don't remember.

23 Q. Do you remember what year it was in?

24 A. I don't remember.

25 Q. This letter was written on August 25th, 1999.

1 That was eight months after you took the accounts away
2 from Mr. Merrill; is that correct? You took them away
3 in December of 1998.

4 A. You have the figure. I don't have it in my
5 head right now.

6 ALJ DION: He can't -- Ms. DuChene, you've
7 done that a couple times.

8 THE WITNESS: I don't really know.

9 ALJ DION: Okay. You're going to let me
10 finish, okay? That's the way it's going to work.

11 He can't answer that. When you're on the
12 witness stand you really don't get to ask questions,
13 that's just how it works. You get to answer
14 questions. So if you don't know, that's fine. He may
15 then ask you a follow-up, is it possible, is it
16 probable, something like that. So listen to it, and
17 answer it to the best of your recollection.

18 Sometimes these things get confusing because
19 we're not really listening and we're trying to
20 anticipate too much. So if you can't recall when you
21 took the accounts away from Mr. Merrill, that's fine.
22 That's what you've told us; is that right?

23 THE WITNESS: Right. I'm not sure of the
24 date.

25 ALJ DION: Is it possible it was around

1 Christmastime in 1998, is that a possible time, or is
2 that impossible based on your recollection.

3 THE WITNESS: It could be possible, because
4 that's when I wrote that letter to him, to stop doing
5 anything with my account, and then took it away from
6 him right after that. So probably, then, about '99,
7 then.

8 ALJ DION: Well, '98, or did you do it in
9 '98?

10 THE WITNESS: I think I took that letter to
11 him in '98. It was on December.

12 ALJ DION: And you said shortly afterwards --

13 THE WITNESS: It was right after that that I
14 took everything away from him.

15 ALJ DION: Okay. So even though you can't
16 remember the exact date, we're kind of able to get a
17 picture doing it. So if I recall, the other letter
18 was around December 15th. The only reason that I
19 recall is I'm looking at the number ACC, in S-3, and
20 it's marked as ACC 03340 at the bottom.

21 MR. LEWIS: Second document.

22 ALJ DION: It was that letter we talked about
23 in December, in 1998, that you said you handed to the
24 receptionist, I believe.

25 THE WITNESS: Yes.

1 ALJ DION: You wrote that letter saying I
2 don't want Philip Merrill to do my account anymore, or
3 I don't give him authorization, and you walked that
4 into Dean Witter yourself and you handed it to the
5 receptionist; right?

6 THE WITNESS: Yes.

7 ALJ DION: You said that this morning.
8 That's around December 15th, 1998. So shortly after
9 that, you took control away from Mr. Merrill of the
10 rest of your accounts.

11 THE WITNESS: That's right.

12 ALJ DION: The end of December, holidays in
13 December, 1998, that's a real possible time that that
14 happened; right?

15 THE WITNESS: Definitely, yes.

16 Q. (BY MR. LEWIS) Looking at that same
17 document, you testified, when Mr. Bingham asked you a
18 question, that writing that letter was a direct result
19 of the sale of the GE stock; is that correct?

20 A. I don't think it was just that. I think it
21 was because he was still doing things to my account.
22 In other words, I had told Mr. Merrill to turn around
23 and send copies of anything that he did for me to my
24 daughter, and apparently, she was getting a lot of
25 copies, and that's when we just decided hey, this had

1 to stop. That's when I wrote that -- I went into the
2 office, I wrote that thing, threw it in the office.
3 And it was after that we decided, I decided with her
4 help to not do --

5 Q. Did you testify, when Mr. Bingham asked you
6 how it got written, you said it was a direct result of
7 the sale of the GE stock?

8 A. It was a part of it, yes. That was the
9 beginning, yes. That was the very definite thing for
10 me, yes.

11 Q. Is this letter written a short time after the
12 sale of the GE stock?

13 A. When was my GE stock sold? It would have
14 been like the year before, because Cathie came to do
15 my income tax, which would have been the following
16 year. So it would have been that he had done that the
17 year before. So Cathie did my taxes, and that's when
18 she found what he had been doing with my account.

19 Q. In 1997?

20 A. So paid in '97, and paid the tax in '98.
21 Whatever.

22 Q. That's what I'm trying to find out,
23 Ms. DuChene. Didn't a whole year go by from the sale
24 of the GE stock until you wrote that letter?

25 A. It looks like that.

1 Q. Weren't there a lot of trades in your account
2 during that year?

3 A. Like I said, when Cathie came to do the
4 income tax, that's when it was discovered that he had
5 been doing so many, so much more.

6 And also, even after he corresponded with my
7 daughter, and he was told again by her not to do
8 anything, he did thousands of dollars worth of trades
9 again on that same day, which is documented.

10 Q. You got confirmation of each and every one of
11 those trades, didn't you?

12 A. I had it in my file, yes.

13 Q. So all you had to do during all of 1998 to
14 find out whether trades were being made was to look at
15 whether you bought or sold something?

16 A. I didn't know anything about it. I just
17 filed the statements when they came in.

18 Q. Ma'am, Mr. Bingham asked you if you wanted to
19 take a risk in your account and you said no; is that
20 correct?

21 A. Right.

22 Q. When he asked you that question, what did the
23 word risk mean to you?

24 A. Well, it meant that I could lose something.

25 Q. Lose everything or lose part?

1 A. Just lose, period.

2 Q. Well, I mean, if stock goes down one point,
3 is that a risk?

4 A. It is a risk, yes.

5 Q. So you didn't want any risk at all?

6 A. No.

7 Q. Did you know the GE stock was bought before
8 it was purchased?

9 A. I don't remember now.

10 Q. You don't remember whether he talked with you
11 about it or not?

12 A. Phil never talked to me about it, no.

13 Q. He never talked to you about any of the
14 trades before they happened?

15 A. No, he did not.

16 Q. Not a single one?

17 A. No, he didn't. I had brochures come in the
18 mail, then I knew he had done something.

19 Q. Any stock has the potential to go down as
20 well as go up; isn't that correct?

21 A. Yes.

22 Q. So the purchase of any stock would be
23 contrary to what you wanted to do because it could go
24 down?

25 A. I know that now.

1 Q. You didn't know, in 1997 and 1998, that
2 stocks could go down?

3 A. I did not understand the stock market.

4 Q. You didn't understand that stocks could go
5 down?

6 A. I did not understand the stock market.

7 ALJ DION: Okay. Did you understand that
8 stocks can go down? That's his question. His
9 question was --

10 THE WITNESS: I did not understand, no.

11 ALJ DION: Hold on a second. His question is
12 not did you understand the stock market. You have to
13 listen. His question was: Did you understand that
14 stocks can go down, not the entire market, not
15 everything that happens there. Did you just
16 understand the general principle.

17 THE WITNESS: No, no.

18 ALJ DION: Okay.

19 Q. (BY MR. LEWIS) You also said you did not
20 wish to gamble. What did the word gamble mean to you?

21 A. That's taking chances.

22 Q. What kind of chances?

23 A. Just chances.

24 Q. Chances of losing money?

25 A. You could put it that way, yes.

1 Q. What about chances of making money?

2 A. I still would not take chances.

3 Q. What type of investment would have been
4 something that would have met your ideas of what you
5 were willing to do?

6 A. My CDs were safe, my tax-free were safe.

7 Q. Safe in what sense, ma'am?

8 A. Safe of not losing it, not having a problem
9 with it.

10 Q. Not losing?

11 A. Not anyone touching it, not anyone doing
12 anything to it.

13 Q. Not losing any of the capital?

14 A. Right, I would say that. I don't think you
15 lose the capital on the tax-free.

16 Q. Did you understand the purchasing power of
17 the dollar you invested in those things go down, that
18 that was a risk?

19 A. I did not understand the stock market.

20 Q. I'm not talking about the stock market, I'm
21 talking about the CDs.

22 A. The CDs would not go down, because you take
23 them out for six months at 5 percent and that's what
24 it is.

25 Q. What about the bonds, what about the tax-free

1 bonds?

2 A. That, I just understood that that stayed the
3 same as what you take it out at.

4 Q. You mean the principal at the end, when the
5 bond matures?

6 A. What are you asking me?

7 MR. BINGHAM: Your Honor, I'm going to object
8 because that really was not -- those weren't bonds, it
9 was -- they consisted of bonds, but it was a mutual
10 fund, from my understanding.

11 MR. LEWIS: Are you talking about the
12 tax-free bonds?

13 ALJ DION: The state investment, Mr. Bingham.

14 MR. BINGHAM: I'm sorry, what investment did
15 you refer to again?

16 MR. LEWIS: She had tax-free bonds.

17 MR. BINGHAM: Okay. I'm thinking of another
18 investment. I'll withdraw that objection.

19 ALJ DION: Okay. Mr. Lewis.

20 THE WITNESS: I thought it was, that whole
21 thing was a tax-free at the bank. It was one thing
22 only.

23 Q. (BY MR. LEWIS) Ms. DuChene, did you tell
24 Mr. Merrill that you wanted income and growth? I'm
25 using the word growth, not capital appreciation, that

1 that you wanted income and growth in your account?

2 A. I don't believe that I made any direct
3 specifics. He just said that when he would take over,
4 that I would have more money coming. In other words,
5 like when he took my tax-free, that what he would put
6 it in, I would have more income. And that's all I
7 understand about it. I don't understand what he did
8 with it.

9 Q. Did you get more income?

10 A. I don't know now what happened. I don't
11 remember.

12 Q. You don't remember how much income you got
13 every month?

14 A. You're asking me about the 107. I don't know
15 right now.

16 Q. No, I'm asking you about the investments that
17 were made for you that produced income on a monthly
18 basis. You have no recollection of having investments
19 that produced a check every month?

20 A. I -- the money went back in. I didn't get
21 checks.

22 Q. It went into the money market fund?

23 A. It went back in. I didn't get the checks.

24 Q. It went into the money market fund; is that
25 correct?

1 A. Whatever he had put it in, that's what he put
2 back into.

3 Q. Didn't you take money out of the money market
4 fund?

5 A. Sometimes I did. I needed it.

6 Q. You got a monthly statement. Didn't the
7 monthly statement show that every month you got a
8 check?

9 A. I don't remember.

10 ALJ DION: Hold on a second, Ms. DuChene,
11 we're continuing to do this thing, so I know you
12 wanted to answer the question.

13 THE WITNESS: I do. I want to be honest
14 about it.

15 ALJ DION: We appreciate that. But you have
16 to let him finish the question, because he might be
17 saying something and you may think that you understand
18 the question, but it's actually something else, so I
19 need -- additionally, the court reporter needs to do
20 it, and additionally, I don't want this to get out of
21 hand. This still is -- this is a hearing room and
22 we're going to treat each other with respect; okay?

23 So wait until he finishes the question. And
24 I'm not -- I know you get excited, so I'm not trying
25 to chastise you about that, but if he doesn't finish

1 then it's going to make things more difficult, and
2 then it's going to be a problem for me, and most
3 importantly, I hate to point this out, most
4 importantly me. I'm trying to understand this, and
5 I'm trying to listen to you guys, and if I can't
6 understand it it's going to be a lot harder for me to
7 rule on it.

8 Mr. Lewis, I interrupted the
9 question-and-answer session. Do you remember your
10 last question, sir?

11 Q. (BY MR. LEWIS) My last question was: Did
12 you receive a monthly income from what Mr. Merrill
13 invested for you. Wasn't there every month money that
14 came into your account, income?

15 A. I answered that it was going back into the
16 fund.

17 Q. But it was your money; right?

18 A. It was going back in.

19 Q. It was more than that, more than you had the
20 previous month, wasn't it? You got a check each
21 month, and it went into the account?

22 A. I didn't personally have a check. The money
23 just went, what was there just went back into the
24 account.

25 Q. And on your monthly statement didn't it tell

1 you exactly how much that check was each month?

2 A. It would have.

3 Q. Didn't you get that income every month that
4 you had the account with Mr. Merrill?

5 A. There would have been an income, yes.

6 Q. So you got income. You wanted income and you
7 got income; right?

8 A. Yes.

9 Q. Did you tell him you wanted your account to
10 grow, your invested capital to increase?

11 A. Would that be a logical thing to want to do?

12 Q. I'm asking you the question.

13 A. Yes. I want my money to grow.

14 Q. And in fact, didn't you get both income and
15 growth from Mr. Merrill's handling of your account,
16 the total picture of all of your account, at the end,
17 when you took the account away from him, you had more
18 money in income, you had money that came in in income,
19 and you had a bigger account, there was more dollars
20 in it?

21 A. Yes.

22 ALJ DION: Mr. Lewis, are we going to move to
23 a different part? Because if we are, why don't we
24 take our break.

25 MR. LEWIS: A very good time for a break.

1 ALJ DION: Why don't we reconvene here in 15
2 minutes, so give everybody a chance to stretch. So
3 we'll be back here at 3:05.

4 (A recess ensued.)

5 ALJ DION: We're back on the record, and
6 Ms. Beatrice DuChene is still testifying.

7 And Mr. Lewis, it's your witness, sir.

8 MR. LEWIS: Thank you.

9 Q. (BY MR. LEWIS) Ms. DuChene, during 1997 and
10 '98, did you have a son who was living in Detroit?

11 A. Yes.

12 Q. Did you ever visit him --

13 A. Yes.

14 Q. -- during that period of time?

15 A. I'm not sure if I visited him then.

16 Q. Before you left on a trip to Detroit, didn't
17 you give Mr. Merrill your son's telephone number in
18 Detroit?

19 A. If I was going to Detroit, I would have given
20 him my number so he could reach me, so if there was
21 anything happening, he could contact me.

22 Q. When you went to your daughter in California,
23 didn't you give him your phone number there?

24 A. Yes, I did.

25 Q. Did not he actually call you in Detroit?

1 A. No.

2 Q. Did you call him on --

3 A. No.

4 Q. You don't remember doing that?

5 A. No.

6 Q. Didn't he call you when you were at your
7 daughter's house?

8 A. No.

9 Q. You didn't call him on the 800 WATS line?

10 A. In California, no. He called my daughter
11 when I wasn't there.

12 Q. You mean you were visiting, but you were out
13 of the house when you say he called but you weren't
14 there?

15 A. Okay, he called my daughter while I was here
16 in Phoenix.

17 Q. Thank you.

18 Do you remember a meeting in July of 1998 in
19 Mr. Merrill's office with your daughter and your
20 daughter's husband?

21 A. Visiting -- I introduced them to him, yes.

22 Q. Did you go to his office?

23 A. Yes.

24 Q. Did the three of you sit down together and
25 talk?

1 A. Yes.

2 Q. And didn't you talk about what was going on
3 in your accounts in July of 1998?

4 A. I don't recollect talking about my accounts,
5 specifically discussing my accounts, no.

6 Q. What do you recollect discussing with your
7 stockbroker in your stockbroker's office with your
8 daughter and her husband present?

9 A. I introduced them to the man who was handling
10 my account.

11 Q. Were you happy with that background?

12 A. At that time it was beginning, yes.

13 Q. At that time what?

14 A. At that time I had just started with Phil
15 Merrill.

16 Q. Wasn't this July of 1998?

17 A. You have the figures.

18 Q. This meeting when you and your daughter and
19 your daughter's husband went to Mr. Merrill's office,
20 wasn't it in July of 1998?

21 A. If you have that figure down, then it's
22 probably accurate.

23 Q. And during that conversation, didn't you have
24 discussions with Mr. Merrill about what was going on
25 with your account?

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1 A. I don't believe that I would have revealed
2 all of my assets to my daughter and son-in-law. I
3 would have made reference to the fact that I had an
4 account there because I was introducing him.

5 Q. I didn't ask you if you revealed all of your
6 assets to them. I'm asking whether you discussed what
7 was going on with your account. Did your daughter ask
8 Mr. Merrill questions? Did you ask Mr. Merrill
9 questions?

10 A. I don't remember that.

11 Q. Are you saying it didn't happen?

12 A. I said I don't remember that.

13 Q. That's a little ambiguous. Let me explain
14 why. When you say I don't remember that, you could
15 mean it may have happened but I don't remember it, or
16 you can be meaning I know it didn't happen. Which of
17 those two do you mean when you say I don't remember
18 that? Could it have happened, you just don't
19 remember?

20 A. I brought my daughter and son-in-law over to
21 introduce them to Mr. Merrill so that my daughter
22 would know what Mr. Merrill looked like and who was
23 handling my funds.

24 Q. And there wasn't any discussion about what
25 was happening?

1 A. That part I have to say I do not remember.

2 Q. It may have happened?

3 A. It may have.

4 Q. Would you look at S-3, please.

5 A. Yes.

6 Q. I want you to look at the document that has a
7 number at the bottom, ACC 239. You see at the bottom
8 there, it says: In July we had another conversation
9 about her investments. Isn't that the discussion that
10 took place in Mr. Merrill's office in July of 1998?

11 MR. BINGHAM: Your Honor, I don't believe
12 it's been established in that it's Ms. DuChene --

13 MR. LEWIS: I think it's her daughter who
14 wrote it.

15 MR. BINGHAM: -- who wrote this.

16 THE WITNESS: Yes.

17 Q. (BY MR. LEWIS) Your daughter is saying: I
18 had a discussion with him in July of 1998 about her
19 investments. Wasn't that in Mr. Merrill's office when
20 you were present?

21 A. That was on the telephone. Cathie spoke with
22 him on the telephone.

23 Q. About your investments?

24 A. Yes.

25 Q. Do you remember approximately when in July?

1 Would it have been early, middle, late?

2 A. No.

3 Q. How do you know it was on the telephone?

4 A. Because my daughter told me that she spoke
5 with him on the telephone.

6 Q. Was that before or after the meeting in his
7 office?

8 A. More than likely I would say after.

9 Q. Were you losing money in the stock market in
10 July of 1998?

11 A. I don't recollect that at this time.

12 Q. She says when she was losing money in the
13 stock market, right after, I talked with him in July,
14 when she was losing money of funds she had made.

15 A. She stated that I was because she has the
16 documentation.

17 Q. You were losing money in the stock market in
18 July of 1998?

19 A. If Cathie states that in here, then she has
20 facts to back it up.

21 Q. Cathie knew what your investments were, she
22 knew what stocks you had bought and sold?

23 A. No. Merrill was directed to give her copies
24 of everything.

25 Q. So she had copies of the confirmations?

1 A. The confirmation came to me. Anything that
2 was buying and selling was -- he was to talk to Cathie
3 before he did anything.

4 Q. Did you share the confirmations with your
5 daughter?

6 A. No. I filed them. I didn't share any of
7 that.

8 Q. Why not? She was talking to Mr. Merrill
9 about your investments. Why wouldn't you share the
10 copies of the confirmations with her?

11 A. I filed the copies when I got them.

12 Q. But your daughter was concerned about your
13 investment, wasn't she?

14 A. You asked me what I did. I filed those
15 copies when I got them.

16 Q. I'm trying to find out if your daughter was
17 so interested, and you wanted her to be interested,
18 why didn't you show her copies of the documents that
19 showed what you were buying and selling?

20 MR. BINGHAM: Objection, Your Honor; asked
21 and answered at least twice.

22 ALJ DION: Actually, no.

23 Ms. DuChene, I'm going to overrule his
24 objection. I want you to listen to the questions,
25 because what Mr. Lewis is asking, you're not answering

1 sometimes, so I really want you to pay attention. I
2 know that there's some things that you want to say,
3 but I want to hear the answers to the question. His
4 question was when you got these copies of the
5 confirmations -- and I'm paraphrasing, Mr. Lewis --
6 but when you got copies of the confirmations, did you
7 share them with your daughter. You said: I filed
8 them. That's not answering the question.

9 THE WITNESS: Okay.

10 ALJ DION: Answering the question is no, I
11 didn't give them to my daughter, or yes, I gave them
12 to my daughter. So I really want you to hear what
13 he's asking you. He's not asking what you did with
14 them regarding filing, he's asking the information
15 that was shared with your daughter. And he went on to
16 say if your daughter is so concerned about your
17 accounts and so forth.

18 So we're really talking about Cathie. We
19 call her Cathie instead of Catherine?

20 THE WITNESS: Yes.

21 ALJ DION: Cathie. I think where we want to
22 begin with this is did you share those with her. Did
23 you make copies for her? Did you send them to her and
24 she sent them back any way, shape, or form? Did you
25 give that information to your daughter?

1 THE WITNESS: That information was mailed to
2 Cathie from Phil Merrill's office so Cathie would know
3 what was being done in my account.

4 ALJ DION: But did you send her anything, you
5 yourself, did you ever send her anything?

6 THE WITNESS: No, but I assume she --

7 ALJ DION: You never sent her anything, but
8 you assume that she received that same sort of
9 information because of what you had asked for her to
10 be copied on your account; is that right?

11 THE WITNESS: Yes.

12 ALJ DION: That's the answer to his question.
13 Not that you filed it. So we're going to try to pay
14 attention to what he's saying, and not try to presume
15 what he's asking. So really try to listen.

16 Mr. Lewis.

17 Q. (BY MR. LEWIS) When did Cathie start getting
18 that information?

19 A. It was after she did my taxes, after she
20 discovered, when she discovered the convoluted of all
21 the -- in other words, all of the papers that I had on
22 the buys and all that, when she went through that to
23 do my taxes, then we realized, she realized something
24 wasn't right. And it was right after that that I
25 asked that everything be given to her.

1 Q. Was that when you were doing your 1997 taxes
2 or your 1998 taxes?

3 A. It probably would have been the '98.

4 Q. But you wouldn't have been doing that until
5 sometime in 1999, and you had already taken the
6 account away from Phil?

7 A. When did you say the date was that she was in
8 Mr. Merrill's office?

9 Q. In July of 1998.

10 A. Then it would have been after that.

11 Q. That she started getting the information?

12 A. It would have been as soon as I discovered
13 about the GE stock, and then that would have been that
14 I was on the alert with him. And when she came to do
15 my taxes, and then we saw all those forms that we
16 turned around.

17 Q. Ma'am, I'm sorry, I'm trying to find out what
18 you're talking about.

19 A. I'm trying to understand you, too.

20 Q. Let me see. I'm trying to find out the date
21 you're talking about. The GE stock, when was it sold?

22 A. You have the date.

23 Q. It was in December of 1997?

24 A. Okay.

25 Q. You went to the AARP in February of 1998.

1 A. Okay.

2 Q. And in February of 1998, you say you found
3 out about the GE stock sale in December of 1997?

4 A. Right.

5 Q. Okay. And you're saying that triggered your
6 daughter being concerned?

7 A. Right, that triggered us being concerned
8 about what he was doing, yes.

9 Q. So when your daughter did your tax return,
10 was it the tax return that you had to file in April of
11 1998?

12 A. She did the taxes -- she filed the taxes in
13 '98, so it would have had to have been '97 that she
14 did.

15 Q. Did you file the 1997 tax return by April
16 15th of that year, or did you ask for an extension?

17 A. I filed. No, I didn't ask for an extension.

18 Q. So your daughter did your tax return sometime
19 before April 15th of 1997?

20 ALJ DION: I think you mean '98, Mr. Lewis.

21 MR. LEWIS: You're right, I misspoke.

22 THE WITNESS: She did my taxes in '98.

23 Q. (BY MR. LEWIS) For '97?

24 A. For '97 in '98. I think that's the way it
25 was.

1 Q. I've written on a blackboard here, for the
2 record, GE stock sale December, 1997. That's correct;
3 right?

4 A. That's what you have, yes.

5 Q. To the AARP, that's the American Association
6 of Retired Persons; right?

7 A. Yes.

8 Q. They helped you with some information about
9 your tax return?

10 A. They did them.

11 Q. In February of 1998?

12 A. Yes. She was doing my taxes for '97, Cathie
13 did them for '98.

14 Q. Then your daughter didn't do your tax return
15 until April of 1999?

16 A. When she said she did the taxes, she said in
17 '98.

18 Q. When did she prepare your 1998 taxes?
19 Approximately when? Before the end of the year,
20 before you had --

21 A. She did them just before they were due,
22 before April 15th.

23 Q. So I'm going to change this now. I'm going
24 to say daughter does tax return before April 15th,
25 1999, but that's the 1998 tax return --

1 she did it in '98.

2 ALJ DION: But in any event, one year AARP
3 did your taxes and your daughter did not help file in
4 that year?

5 THE WITNESS: Right.

6 ALJ DION: Okay.

7 Q. (BY MR. LEWIS) You were talking about what
8 got your daughter involved, and you said what got her
9 involved was your claimed improper sale of the GE
10 stock.

11 A. No. What got my daughter really involved was
12 when she went to do the taxes, and I had all the
13 paperwork there, the buys and the sells, that's when
14 she took it back, so that has to be, let's see, I had
15 two people prepare taxes, so that had to have been
16 three years ago, because I had two other people do my
17 taxes.

18 Q. What you have just described is after you had
19 already taken the account away from Mr. Merrill. If
20 she was preparing your taxes in March and April of
21 1999, you had already taken the account away from
22 Mr. Merrill.

23 A. Okay. Whether we took it away then or not,
24 but the idea was that we discovered what he had done,
25 all the buys and sells that he had done, when she

1 prepared the taxes and could not -- and she's a tax
2 person, she could not even do them, she had to take
3 them back to an accountant.

4 Q. The problem is in this letter she's talking
5 with Mr. Merrill about your investments in July of
6 1998, when she was losing money in the stock market.
7 And she says that in this letter.

8 A. When she testifies you may ask her, because
9 she understands it better than I do.

10 Q. I'm asking you. What triggered your daughter
11 to become concerned about Mr. Merrill?

12 A. On the buys and sells that he was doing, and
13 the fact that he wouldn't communicate with her on what
14 he was doing with my account.

15 Q. Did you tell her, when you found out about
16 the GE stock sale in February of 1998, that he had
17 done that?

18 A. Of course I told her.

19 Q. And when did you tell her that?

20 A. I probably told her at the time he did it,
21 when I discovered it.

22 Q. So at least by February of 1998, you were
23 aware that Mr. Merrill, according to you, had engaged
24 in unauthorized transactions in your account; is that
25 correct?

1 A. Say that to me again, please.

2 Q. According to you, by February of 1998, you
3 knew that Mr. Merrill had engaged in unauthorized
4 transactions in your account; is that correct?

5 A. I'm not sure. All I know is that when she
6 was preparing those taxes, she had all the paperwork,
7 that there was something wrong. That's all that I
8 know.

9 Q. Let's go back to what you just testified to a
10 minute ago. You knew in February of 1998, according
11 to you, he had sold the GE stock without
12 authorization, and you told your daughter about that
13 when it happened?

14 A. I wouldn't say I told her that minute. I
15 would have told her about it.

16 Q. Shortly after you found out about it?

17 A. I would have mentioned it, yes. It was a
18 point of interest.

19 Q. Shortly after you found out about it?

20 A. I'm not exactly sure the exact date that I
21 told her.

22 Q. Did I ask you the exact date?

23 A. You said shortly after. Shortly after is the
24 day after, the day after.

25 Q. A week, two weeks of when you found out about

1 it?

2 A. I'm not sure of that.

3 Q. What, you knew in February of 1998 that he
4 engaged in unauthorized transactions?

5 A. Yes, I did.

6 Q. Did you tell your daughter that?

7 A. At exactly that time, no, I don't think I
8 did.

9 Q. When was the first time you mentioned to your
10 daughter that you had discovered that Mr. Merrill had
11 engaged in unauthorized transactions in the account?

12 A. I'm not sure of the exact date.

13 Q. I am not asking you the exact date.

14 A. Shortly after. It had to have been after.

15 Q. Was it sometime in February of 1998?

16 A. I'm not sure.

17 Q. Was it in March of 1998?

18 A. I'm not sure.

19 Q. Was it as late as July?

20 A. I'm not sure exactly when I told her.

21 Q. Did it concern you that he had engaged in an
22 unauthorized transaction in your account?

23 A. Yes.

24 Q. Doesn't it state in one of these letters that
25 you were furious?

1 A. Yes.

2 Q. You were furious about something Mr. Merrill
3 did, your daughter was interested in it, and you
4 didn't tell her about it?

5 A. I did tell her. You're asking me the
6 specific time and I'm not able to tell you the
7 specific time.

8 Q. Let's put it this way: You went to the AARP
9 accountant, she pointed this out to you, and you were
10 furious the GE stock had been sold without him talking
11 to you; right?

12 A. Yes.

13 Q. Now, isn't that something that you would have
14 told your daughter about at the earliest possible
15 moment?

16 A. I took care of it. I went into his office.

17 Q. That's not my question.

18 A. The question is, is that I would not
19 necessarily have told her immediately, because I took
20 care of it by going into his office and asking him to
21 cease and desist.

22 Q. But your daughter was concerned about what
23 was going on in your account, wasn't she?

24 A. Yes.

25 Q. Wasn't the existence of unauthorized

1 transactions something you would have told her about
2 the next time you talked to her about anything after
3 finding out about it?

4 A. I would have mentioned it.

5 Q. Did you talk to your daughter fairly
6 regularly? A couple of times a week at least?

7 A. No.

8 Q. How often did you talk to her in February and
9 March of 1998?

10 A. Maybe a couple times a month.

11 Q. So at least by the end of March, you had
12 talked to her two or three times after finding out
13 that there had been unauthorized transactions in your
14 account?

15 A. Yes.

16 Q. And wouldn't you have mentioned that to her
17 in at least one of those conversations?

18 A. Yes.

19 Q. What did your daughter say when you told her
20 there had been unauthorized transactions?

21 A. I don't remember her words.

22 Q. Why didn't you complain to Morgan Stanley at
23 that time about unauthorized transactions?

24 A. Are you referring to about the GE or are you
25 referring to the multiple trades?

1 Q. The GE stock was unauthorized. You were
2 furious about it. Why didn't you complain?

3 A. That was one item, then.

4 Q. Why didn't you complain about it?

5 A. I went to the person who did it.

6 Q. Why didn't you complain to his boss?

7 A. I didn't think about it.

8 Q. Did your daughter suggest to you that you
9 could complain to his boss?

10 A. No.

11 Q. It didn't take you much time to figure that
12 out later on. You sent letters to the Securities and
13 Exchange Commission, the National Association of
14 Security Dealers and to Dean Witter, didn't you?

15 A. Was that not because of the multiple actions
16 that he was doing and not answering the
17 correspondence?

18 Q. I don't know, ma'am. You're claiming now
19 that there were unauthorized trades and you knew --
20 you knew they started in December, and you knew that
21 by '97 -- you knew that by February '98. When did you
22 first complain about it?

23 A. I didn't complain to anyone about the GE, the
24 one transaction. I only complained to Mr. Merrill.
25 The only time that I complained about the others was

1 after I discovered that the accountant discovered that
2 there was a problem and what he had done with all the
3 many sales, what they call, not rushing, but there's a
4 word for it of what he had done, which was illegal.
5 And that was the time that we started to do something
6 about it. Not because of the single GE stock.

7 Q. Which account are you talking about?

8 A. I'm not sure right now because I don't have
9 it anymore.

10 Q. Are you talking about the accountant that the
11 AARP -- you just said it was the accountant told you
12 this. Are you talking about the accountant that the
13 AARP --

14 A. I'm talking about the accountant in
15 California, who did the work on the account of my
16 taxes.

17 Q. Discovered what?

18 A. That he was buying and selling when he
19 shouldn't have been doing. It was too many multiple
20 sales. It was not legal what he was doing.

21 Q. What did he have to find that out? What
22 documents did he have; monthly statements and the
23 confirmations?

24 A. I think maybe one of these would show it.

25 Q. Did he have the monthly statements and the

1 confirmations?

2 A. Yes. She took all of those to California.

3 Q. Your daughter did?

4 A. Yes.

5 Q. When did she take them to California?

6 A. The time that she came to do my taxes and she
7 couldn't do them because it was too -- the word she
8 used, convoluted, so she took them to an accountant
9 back there.

10 Q. Did you understand it was convoluted?

11 A. She explained it to me.

12 Q. What did she explain to you?

13 A. In other words, it was so complicated that
14 she wasn't able to do it, and it was kind of mixed up.

15 Q. What was complicated?

16 A. All the buys and sells.

17 Q. You have to match up the sells with the buys;
18 is that correct? Is that complicated when you have
19 the confirms?

20 A. I'm not an accountant, sir.

21 Q. What did your daughter tell you was
22 convoluted about matching the buys with the sells?

23 A. The accountant made that statement. It was
24 convoluted in that she was unable to put it all
25 together.

1 Q. Did she --

2 ALJ DION: Hold on a second, she's going to
3 finish her answer.

4 Go ahead.

5 THE WITNESS: It took a professional to be
6 able to do that. Cathie does the bookkeeping and the
7 taxes for the company that she represents, but this
8 time, it was so complicated that she had to give it to
9 someone who was more skilled at doing it.

10 Q. (BY MR. LEWIS) Did you talk to that person?

11 A. The accountant?

12 Q. Yes.

13 A. No.

14 Q. After the meeting in July of 1998, did your
15 daughter get the information that she wanted about the
16 monthly statements and confirmations?

17 A. I'm not understanding your question, sir.

18 Q. You had a meeting in July of 1998 in
19 Mr. Merrill's office. After that meeting, did your
20 daughter get the information she wanted?

21 MR. BINGHAM: I'm going to object. I don't
22 believe that states the prior evidence correctly. I
23 don't think it was a meeting in the office.

24 MR. LEWIS: I'm asking the question. There
25 is no prior evidence.

1 ALJ DION: I also think it calls for some
2 speculation as to what her daughter received.

3 Do you know if your daughter received any
4 information from Mr. Merrill about your accounts after
5 July of 1998?

6 THE WITNESS: She received some, yes.

7 ALJ DION: Do you know what that information
8 was?

9 THE WITNESS: She'll be testifying. She
10 received some information on correspondence with him
11 about what he was doing, what he wasn't doing.

12 ALJ DION: When you say "him", you mean
13 Mr. Merrill?

14 THE WITNESS: Yes.

15 ALJ DION: All right.

16 Mr. Lewis.

17 Q. (BY MR. LEWIS) Didn't she say that she took
18 to California the monthly statements and the confirms
19 to give to the accountant?

20 A. She took --

21 Q. Didn't you testify that that --

22 A. She took --

23 Q. Didn't you testify to that just a minute ago?

24 A. She took some paperwork back with her to
25 California.

1 Q. Didn't she say it was the monthly statements
2 and the confirms she took to California?

3 A. The monthly statements.

4 Q. And the confirms, wasn't it your testimony
5 just a few minutes ago --

6 A. She took some, but I know that she took all
7 of those white sheets. That I know, she took all of
8 those.

9 Q. Those are the confirmations.

10 A. Yeah, I think there's green sheets and she
11 took some of those.

12 Q. Did the white sheets she took come from you?

13 A. They were in my files, yes.

14 Q. She gave them back to you at some point?

15 A. Yes.

16 Q. When did you first give her any of the
17 confirmations?

18 A. I'm not sure of the exact date. I know it
19 was after her introduction to Mr. Merrill and after
20 the correspondence. The personal correspondence she
21 had with Mr. Merrill was led to more complications.

22 Q. Was there a time when your daughter was in
23 your house before the meeting in July, when you showed
24 her the monthly statements and the confirms?

25 A. I don't believe I showed her any of my

1 personal things prior to that.

2 Q. She wasn't interested at that time?

3 A. I didn't see any necessity to do so. I had
4 someone to prepare my taxes.

5 Q. You knew that those documents were needed to
6 prepare your taxes; correct?

7 A. I really didn't know that in the beginning,
8 but I learned that, that those papers were important
9 to be able to figure out what the losses were, and the
10 gains were, the commissions and all that. And then
11 that after --

12 Q. Didn't you, when you went to --

13 ALJ DION: Hold on a second, she's going to
14 finish.

15 The gains, the losses, the commissions.
16 Anything else?

17 THE WITNESS: What was on there all goes on
18 the paper.

19 ALJ DION: Okay.

20 Q. (BY MR. LEWIS) When you went to the AARP
21 accountant, didn't you have the monthly statements and
22 the confirms to show to that person?

23 A. I took everything I was supposed to take for
24 income tax.

25 Q. My question is: Didn't you take to the

1 accountant the monthly statements and the
2 confirmations?

3 A. All I know is what I took, what I had in
4 statements that would have come from Dean Witter.

5 Q. And that would have included monthly
6 statements and the confirmations; right? The white
7 sheets, as you explained?

8 A. Yeah. I don't know if I took those to her or
9 not. I don't think you had to take those. I don't
10 think you had to take that to the AARP. I think you
11 just take the form that they give you for income tax.
12 I think that's all that you take.

13 Q. Is that all you took at the end of the year?

14 A. That would be what I took, yes.

15 Q. That shows the date of the purchases and the
16 date of the sales, doesn't it?

17 A. That's what -- I didn't have to pay the
18 accountant.

19 Q. You gave them information that showed the
20 dates of the purchases and the dates of the sales; is
21 that correct?

22 A. Yes, what would have been given to me.

23 Q. And the amounts, the name of the securities,
24 the number of dollars involved, that was on those
25 statements?

1 A. That would have had to have been.

2 Q. When did you first complain to anyone other
3 than Mr. Merrill that he was engaging in unauthorized
4 transactions in your account?

5 A. I did it after the taxes were done by the
6 accountant in California.

7 Q. So that would be sometime in April of 1999;
8 is that correct?

9 A. Sounds right.

10 Q. And weren't there trades that occurred more
11 than a year before that that you were complaining
12 about his being unauthorized?

13 A. I would have given that accountant all of the
14 paperwork that was for -- the one year that would have
15 been taxable, and as far as the previous ones, that
16 would have been given to the tax preparer from the
17 year before.

18 Q. That's not my question, ma'am. When you
19 first complained in April of 1999 that there had been
20 unauthorized trades in your account, weren't some of
21 those trades trades that took place before April 1st
22 of 1998?

23 A. If they were -- probably there were some in
24 there.

25 Q. And you would have known about those trades

1 if you would have taken the time to look at the
2 monthly -- the confirmations; is that correct?

3 A. If you say so.

4 MR. BINGHAM: Objection; Your Honor.

5 ALJ DION: What's your objection? I'm sorry.

6 MR. BINGHAM: Can I hear the question again?

7 Q. (BY MR. LEWIS) You would have known if those
8 trades were unauthorized if you had taken the trouble
9 to look at the confirmations.

10 MR. BINGHAM: That's assuming she understood
11 the statements, where she's already told us she did
12 not understand.

13 MR. LEWIS: Sir, I think that is a question
14 of fact as to whether she could read those statements
15 or not. And I don't agree with Mr. Bingham that it's
16 established that she couldn't read the English
17 language on those statements.

18 ALJ DION: Well, I think that your question
19 is also based upon the supposition that if you had
20 done so, it seems to me if you had done so wouldn't
21 you have been given a warning or opportunity or
22 whatever word you want to throw in there to recognize
23 what was happening?

24 MR. LEWIS: Ratification. That's an issue.

25 ALJ DION: Ms. DuChene, I'm going to ask that

1 question. I understand what you've testified before,
2 that you don't believe that you've understood or you
3 understood everything that's gone on.

4 However, the question he's asking, I think,
5 is a relevant question, and it's that instead of just
6 simply filing these things, you would have looked and
7 examined them, you might not have understood them.
8 However, in examining them, you might have been able
9 to glean enough information that you could have
10 recognized some of these things happening sooner,
11 instead of if they be allegations. I should say,
12 instead of waiting till the summer of 1998. Do you
13 understand my question? So does that seem to make
14 sense to you that if --

15 THE WITNESS: If -- yes.

16 ALJ DION: -- if you had reviewed these
17 things and you would have gleaned enough information
18 from them, you would have been alerted to this
19 situation that you're alleging earlier?

20 THE WITNESS: If I understood all of it.

21 ALJ DION: Up to two years earlier, in fact,
22 because the sale of the GE stock happened in 1997;
23 right?

24 THE WITNESS: Right.

25 ALJ DION: Go ahead, Mr. Lewis.

1 MR. LEWIS: I have a witness copy of our
2 exhibit book.

3 ALJ DION: Okay.

4 MR. LEWIS: Can I give it to the witness?

5 ALJ DION: Please.

6 Q. (BY MR. LEWIS) Ms. DuChene, let me explain
7 what this is. You've been looking at exhibits that
8 were offered by the Securities Division in connection
9 with this matter. In addition to exhibits offered by
10 the Securities Division, the respondent, Mr. Merrill,
11 through me, has also offered exhibits, and that book
12 contains those exhibits.

13 Would you turn to Tab 2, please. Our
14 identifying numbers are a little bit different.
15 They're a little bit bigger and they don't have any
16 letters. You see at the bottom of the first page the
17 number 1024 in the lower left-hand corner?

18 A. Yes.

19 Q. Would you look at Exhibit 1024 and tell me if
20 your signature appears on that document?

21 A. Yes.

22 Q. Did you sign it on October 31st, 1996?

23 A. That's what it says here.

24 Q. No, ma'am.

25 A. Yes.

1 Q. My question to you is: Did you sign it on
2 October 31st, 1996?

3 A. Yes. I said yes.

4 Q. Thank you.

5 Did you look at the document before you
6 signed it?

7 A. I don't recognize it. That doesn't mean I
8 didn't sign it. I don't recognize it.

9 Q. You already told us that you signed it, that
10 that's your signature?

11 A. Right.

12 Q. I'm asking: Did you look at the document
13 before you signed it?

14 A. I don't recognize it.

15 Q. This says that you had a contract that was
16 issued on August 16th, 1990. You see that, where it
17 says contract certificate issued date?

18 A. Yes.

19 Q. Wasn't this an annuity that you had when
20 Mr. Merrill started to take over the handling of your
21 account?

22 A. I believe so.

23 Q. Didn't you have a situation where you had
24 lost the contract?

25 A. I lost the contract?

1 Q. That's what this says, lost contract
2 certificate statement. That's what this document says
3 that you signed.

4 A. Okay.

5 Q. Did you lose the document, you couldn't find
6 it?

7 A. Yes, I must have, if that's what this is,
8 yes.

9 Q. Did Mr. Merrill talk to you about it?

10 A. I don't remember it.

11 Q. Does that mean he didn't talk to you about
12 it?

13 A. I said I don't remember it.

14 Q. Again, we're at this ambiguous place. Are
15 you saying that he didn't talk to you about it, or he
16 may have, but you don't remember?

17 A. You could say he may have, but I do not
18 remember.

19 Q. There was no surrender charge when you
20 transferred this annuity, was there?

21 A. I don't remember.

22 Q. Would you look at Page 1025.

23 A. I'm looking.

24 Q. Do you see your signature on that page?

25 A. Yes, I do.

1 Q. Did you sign that in October of 1996?

2 A. Yes.

3 Q. You see where it says signature guaranteed,
4 Evelyn Conk?

5 A. Yes.

6 Q. Do you know who Evelyn Conk is?

7 A. No.

8 Q. She was the secretary, I don't know what
9 they're called, probably an operations officer in
10 Mr. Merrill's office of Morgan Stanley Dean Witter.
11 You went before her and signed this; is that correct?

12 A. I don't remember.

13 Q. Turn to 1026 -- let's go back to 1025.
14 Did Mr. Merrill talk to you about that
15 document before you signed it?

16 A. I don't remember that.

17 Q. He may have, but you don't remember; is that
18 correct?

19 A. Yes.

20 Q. Would you turn to Page 1026. Does your
21 signature appear on that document?

22 A. Yes.

23 Q. Did you sign it on November 7th, 1996?

24 A. Yes.

25 Q. Was your signature again guaranteed by Evelyn

1 Conk in the Dean Witter office?

2 A. Yes.

3 Q. Did you look at that document before you
4 signed it?

5 A. I don't remember.

6 Q. Did Mr. Merrill discuss it with you?

7 A. I don't remember.

8 Q. He may have, but you don't remember?

9 A. Right.

10 Q. Is that correct?

11 A. Yes.

12 Q. Would you turn to Page 1027. Did you receive
13 this letter?

14 (Brief pause.)

15 THE WITNESS: What does it actually mean?

16 Q. (BY MR. LEWIS) Excuse me?

17 A. What does this actually mean?

18 Q. I'm just asking if you received the letter.

19 We'll get into what it means after that.

20 A. I don't remember.

21 Q. You may have received it, but you again don't
22 remember. Is that your correct address at the top?

23 A. Yes, yes, it is.

24 Q. You don't remember receiving this letter one
25 way or the other --

1 A. No.

2 Q. -- is that correct, ma'am?

3 A. Yes.

4 You sent this to my son, too.

5 Q. Excuse me?

6 A. You sent a copy of this to my son.

7 Q. Where does it say that?

8 A. At the top of the page.

9 Q. Sent to. Oh J.P. DuChene, is that your son?

10 A. Yes.

11 Q. Is he the one that lives in Detroit?

12 A. Yes.

13 Q. Somebody wrote on here that a copy was sent.

14 Do you know who wrote that on there?

15 A. No.

16 Q. I think maybe it was Mr. Merrill.

17 A. I don't write DuChene the way that is.

18 Q. I'm not asking if you wrote it.

19 A. No. You asked if I signed it.

20 Q. I didn't ask if you signed this document,

21 ma'am. It's addressed to you.

22 A. I'm saying you asked about this J.P. DuChene.

23 I don't believe I wrote that.

24 Q. Thank you.

25 Would you turn to Page 1031. Does your

1 signature appear on that page, ma'am?

2 A. Yes.

3 Q. Is there anything in that letter you don't
4 understand?

5 A. Okay, I understand it.

6 Q. Pardon me?

7 A. Yes, I understand.

8 Q. Did you go into Mr. Merrill's office and sign
9 that before Evelyn Conk?

10 A. Looks like I did.

11 Q. Was that on December 4th, 1995?

12 A. Where's the date on here?

13 Q. At the top.

14 A. Oh, I see it.

15 Q. When you went into the office to sign these
16 things, did you have any discussions with Mr. Merrill?
17 Did he greet you, say hello?

18 A. Yes.

19 Q. Did he talk to you about your account when
20 you were there?

21 A. Yes.

22 Q. Did he talk to you about these documents?

23 A. I don't remember all of this, okay?

24 Q. Are you saying he didn't? If he testifies
25 that when you came into the office, he took you into

1 the office to sign these documents, he met you and
2 talked with you about your accounts, you say he's
3 not -- that's not the truth?

4 A. No, I did not say that.

5 Q. Would you turn to Page 1032.

6 A. Turn what?

7 Q. Turn the page to 1032. Does your signature
8 appear on here?

9 A. Yes.

10 Q. Do you know what that is, what that document
11 is?

12 A. No. It just says tax notice.

13 Q. To avoid backup withholding?

14 A. I don't know.

15 Q. Did Mr. Merrill explain to you what backup
16 withholding was and why you needed to sign it?

17 A. I don't remember.

18 Q. Did you sign it on December 6th, 1995?

19 A. Yes.

20 Q. Would you turn the page to 1033. Does this
21 have to do with an account of your mother's Dorothy
22 McCue, is that your mother?

23 A. It says tax-free trust.

24 Q. Was Dorothy McCue your mother?

25 A. Yes.

1 Q. And this was signed -- you signed this
2 Beatrice M. DuChene on August, 8-9-95?

3 A. Yes.

4 Q. Your mother signed it on the same date; is
5 that correct?

6 A. It looks like I wrote that, but I don't
7 remember. She died in October -- no, August the 23rd.

8 Q. And you were giving investment authorization
9 to someone; is that correct?

10 A. Is that what this says?

11 Q. Read at the top. Can you read the English at
12 the top? What does it say at the top?

13 MR. BINGHAM: Objection; Your Honor.

14 Q. (BY MR. LEWIS) What does it say at the top?

15 ALJ DION: Mr. Lewis, hold on. Stop with the
16 English. Listen, and I'll say please read the words
17 at the top.

18 Q. (BY MR. LEWIS) Would you read the words at
19 the top of the page. Would you read them out loud.

20 A. Investment authorization form for mutual
21 funds.

22 Q. Do you understand what authorization means?

23 A. I gave him permission to get mutual funds.

24 Q. In connection with your mother's account; is
25 that correct?

1 A. Yes.

2 Q. Was this at Dean Witter? Did your mother
3 have an account at Dean Witter with Mr. Merrill?

4 A. No.

5 Q. Did you read this document before you signed
6 it?

7 A. I must have, but I'm not -- who's it to?

8 Q. Did you understand what it meant?

9 A. It means you're investing into mutual funds
10 and investing \$25,000. It's a conservative tax-free
11 trust of Arizona so that's at the bank.

12 Q. The investment objective was tax advantage
13 checked on; is that correct? See it's about a third
14 of the way down.

15 A. I don't understand it, sir.

16 Q. Mr. Merrill didn't ask you to sign this
17 document, did he?

18 A. I don't know. I don't know what this is. It
19 says the branch number. Dan Baudston, employee name.
20 Here it is, Bank One Corporation. This is a Bank One
21 statement.

22 Q. It had nothing to do with Mr. Merrill, did
23 it?

24 A. No.

25 Q. Excuse me?

1 A. No. I don't see where it did.

2 Q. Did whoever asked you to sign this explain it
3 to you?

4 A. I don't remember this now.

5 Q. Thank you.

6 Would you look at 1034. Did you receive that
7 letter, ma'am?

8 A. What number, sir?

9 Q. 1034, it's the next page. Do you remember
10 receiving that document?

11 A. No.

12 ALJ DION: Mr. Lewis, I'm going to ask a
13 question.

14 I notice the same address on all these
15 things, 10328 Prairie Hills Circle in Sun City. Is
16 that your address?

17 THE WITNESS: Yes, sir. My mother lived with
18 me, sir.

19 ALJ DION: Your mother lived with you at that
20 residence?

21 THE WITNESS: Yes.

22 ALJ DION: Okay.

23 Q. (BY MR. LEWIS) Would you turn to Page 1047.
24 Did you have a life insurance contract? Wait a
25 minute.

1 Did you have a contract with Hartford
2 Insurance Company that your son William DuChene was
3 made the beneficiary, changing from Mary Catherine
4 DuChene?

5 A. Yes, I did have Hartford.

6 Q. Did you say yes?

7 A. I said yes.

8 Q. Would you turn to Page 1049, please. Is that
9 your signature on there, ma'am?

10 A. Yes.

11 Q. And it's guaranteed by someone in the Dean
12 Witter office, not Evelyn Conk. It looks like Allen
13 Mall?

14 A. Yes, it does.

15 Q. And did you sign that on or about October
16 12th, 1998?

17 A. Yes, yes.

18 Q. At the time had you just set up a new trust
19 that was dated in October of 1998, and your account
20 was changed at Dean Witter from what had been a
21 regular account to the trust account, and was that the
22 purpose of this?

23 A. Are you saying that I took -- it was a Dean
24 Witter account, and I changed it from what Dean Witter
25 account it was to another account?

1 Q. At Dean Witter, you changed it from a regular
2 account to a trust account where you were the trustee.

3 A. Yes, I did. I took a trust out.

4 Q. And that was in October of 1998 --

5 A. Okay.

6 Q. -- is that correct?

7 A. Yes.

8 Q. And this was your advice to the John Hancock
9 that had one of the annuities, telling them what you
10 had done; is that correct?

11 A. Say that to me again.

12 Q. This letter, 1049, was written to John
13 Hancock that had one of the annuity contracts, and you
14 were telling them to change it --

15 A. Yes.

16 Q. -- to the trust?

17 A. Yes.

18 Q. Would you turn to Page 1050.

19 By the way, did Mr. Merrill talk to you about
20 that document before you signed it, 1049?

21 A. The trust?

22 Q. The letter dated October 12th, 1998. Did he
23 talk to you about it?

24 A. No.

25 Q. Wasn't he the one who asked you to sign the

1 letter?

2 A. In other words --

3 Q. Didn't Mr. Merrill have this letter typed up
4 and told you you needed to sign it because you just
5 changed?

6 A. Right. I had to -- I was taking it out of a
7 regular account and putting it into a trust.

8 Q. Mr. Merrill talked to you about that?

9 A. I would have had to ask someone over there to
10 do it, so then probably more than likely, it was
11 Mr. Merrill.

12 Q. Would you turn to 1050. Is that your
13 signature on there?

14 A. Yes, yes.

15 Q. Can you read the title of this document?

16 A. Trustee certification of investment powers.

17 Q. Was this document explained to you before you
18 signed it?

19 A. I didn't think it needed to be explained,
20 because I was taking my funds and putting them into a
21 trust account.

22 Q. Didn't the trust say that these investments
23 were permitted, it says investments permitted that are
24 checked off? Isn't that what the trust said, you
25 could invest in those investments?

1 A. Right, everything I had was to go in the
2 trust.

3 Q. And the trust could invest in these items
4 that were checked off; you as trustee were confirming
5 what investments the trust could invest in?

6 A. In other words, I don't understand that,
7 because if I am the trustee, then it would be my right
8 to say what could be done in the trust. What is this
9 explaining that I'm doing here?

10 Q. The accounts at Dean Witter; is that correct?

11 A. Right.

12 Q. And you were the trustee?

13 A. Right.

14 Q. You had to tell Dean Witter what your powers
15 were?

16 A. Right.

17 Q. That's what this document --

18 A. This is saying what I can do, not what Dean
19 Witter can do?

20 Q. These are saying what investments are
21 permitted in the trust.

22 A. That makes sense to me. Okay.

23 Q. You didn't check off limited partnership; is
24 that correct? You checked off everything else?

25 A. All of the above, yes. I didn't check

1 anything aggressive.

2 Q. Turn to Page 1051. Is that your signature?

3 A. Okay, I signed this, yes.

4 Q. Did you sign it on October 15th, 1998?

5 A. Yes.

6 Q. Was this document explained to you before you
7 signed it?

8 A. I don't remember it now, but it would be
9 something I had to do if it's a tax notice.

10 Q. Turn to 1052. Is that your signature,
11 October 15th, 1998?

12 A. Yes.

13 Q. What's the title of the document?

14 A. Authorization to journal securities or funds.

15 Q. It's from the regular account to the trust
16 account. Would you read at the top?

17 A. It says authority to journal securities or
18 funds, authorization to journal the securities. Does
19 that mean to travel them, cross them over or what?

20 Q. It's just a bookkeeping thing. You've
21 changed the name of the account and a new account
22 number was given to the trust account that's
23 different. See account number 205-29773-29, that
24 says: Upon my instruction, please journal securities
25 and/or funds as specified below from my account. Do

1 you see the account number? It's at the top of the
2 page.

3 A. Yeah.

4 Q. You see the account number?

5 A. It's 205-29773 dash --

6 Q. Then it says journal those things to account
7 name DuChene trust, account number 205-46102-29.

8 A. Okay, I understand.

9 Q. They were saying take everything that's in
10 the regular account, put it in the trust account.
11 Isn't that what you wanted done?

12 A. Yes.

13 Q. Didn't Mr. Merrill explain to you you needed
14 to do that, this document would do it?

15 A. The attorney told me that that's what they
16 would do.

17 Q. What attorney?

18 A. Mr. DiMatteo, who drew up the trust.

19 Q. Mr. DiMatteo didn't work for Dean Witter, did
20 he?

21 A. Mr. DiMatteo is the attorney who did the
22 paperwork and told me what to do, what to tell him to
23 do.

24 Q. You mean Mr. Merrill didn't know that when
25 you set up a new account with him he had to journal

1 the securities from one account to another?

2 MR. BINGHAM: Objection; speculation.

3 ALJ DION: Yes, that calls for speculation.

4 But the underlying question is: Did Mr. Merrill talk
5 to you about this particular piece of paper, do you
6 remember that?

7 THE WITNESS: No, I don't remember that.

8 ALJ DION: When you say no, I don't remember
9 that, is it possible he talked to you about that?

10 THE WITNESS: It's possible.

11 ALJ DION: Okay.

12 Q. (BY MR. LEWIS) Turn to Page 1053. I think
13 the signature on this is farther down the road. Yeah,
14 it's on 1056. Is that your signature there?

15 A. Yes.

16 Q. And that date is April 22nd, 1996; right?

17 A. Yes.

18 Q. Is that your handwriting on the beneficiary
19 number one?

20 A. Yes.

21 Q. What were you doing by this document? Who
22 were you designating as the beneficiary?

23 A. Son William.

24 ALJ DION: Is that your son William?

25 MR. LEWIS: His name is not son William. His

1 name is William and he's her son.

2 THE WITNESS: Son William DuChene.

3 Q. (BY MR. LEWIS) Would you turn to Page 1057.
4 This is the same type of document. Would you turn to
5 Page 1060, which is Page 4 of that document. Is that
6 your signature there?

7 A. Yes, I see here.

8 Q. And you were changing the beneficiary from,
9 as you put it, son William to son Joseph; right?

10 A. Yes.

11 Q. And you did that about two years later?

12 A. Yes.

13 Q. Would you turn to Page 1061. Is that your
14 signature on that page, ma'am?

15 A. Yes.

16 Q. This is now an annuity; is that correct?
17 Northbrook had an annuity?

18 A. It's Northbrook up there, yes.

19 Q. And it says date of request, July 25th, 1996
20 at the top. In the upper right-hand corner, in the
21 top, is that correct, is that the date you sign it?

22 A. Yeah.

23 Q. And you were making the death beneficiary
24 your son Joseph on that; is that correct?

25 A. Yes.

1 ALJ DION: I'm going to clarify something.
2 Back on 1060, you made the beneficiary your son Joseph
3 on 7-25-96; is that right?

4 THE WITNESS: Yes.

5 ALJ DION: If you turn to 1056, you had
6 originally made the beneficiary William DuChene, who
7 is also your son.

8 THE WITNESS: Yes.

9 ALJ DION: But that to me looks like a one,
10 but I think your testimony is April 22nd, 1996.

11 MR. LEWIS: Sir, look at the top.

12 ALJ DION: April 22nd, 1996; is that right?

13 THE WITNESS: Looks like a two to me.

14 ALJ DION: April 22, 1996.

15 I think your question, Mr. Lewis, she changed
16 Joseph as the beneficiary two years after Stewart. It
17 doesn't appear to be that way.

18 MR. LEWIS: Two months, I'm sorry three
19 months.

20 ALJ DION: You said two years.

21 MR. LEWIS: I misspoke. I want the record to
22 be stricken.

23 ALJ DION: Does that make sense to you,
24 Ms. DuChene, just a couple of months later you changed
25 your mind?

1 THE WITNESS: Yes.

2 ALJ DION: Thank you.

3 I believe we were on 1061.

4 Q. (BY MR. LEWIS) That's your signature on
5 there, ma'am?

6 A. Yes.

7 Q. Let's go, then, to 1062. I think, if I'm not
8 mistaken, I think this is the same document. No, it's
9 a different contract. It's the same document, same
10 date, but two different contracts. 1061 deals with
11 contract 166841 and 1062 deals with 86051112. You
12 changed both to son Joseph; is that correct?

13 A. Are those two separate Northbrook accounts?

14 Q. It appears that way. Different contracts,
15 different certificates.

16 MR. BINGHAM: Will you please clarify again
17 which contracts you're looking at?

18 MR. LEWIS: Page 1061 and 1062, the contract
19 number is right under the words change of beneficiary.

20 ALJ DION: Do you see that, Ms. DuChene?

21 THE WITNESS: Yes, I see it.

22 ALJ DION: All that information appears to be
23 similar as to what Mr. Lewis is stating, but if you
24 look at the first line, it says contract, slash,
25 certificate number; correct?

1 THE WITNESS: Yes.

2 ALJ DION: 1061, it starts off 166 and goes
3 on. The second one, it starts off 860, so those
4 appear to be two different contracts, don't they?

5 THE WITNESS: They are. My paperwork, there
6 are two different dates than this.

7 ALJ DION: Are there two different contracts?

8 THE WITNESS: There are three Northbrook.

9 ALJ DION: It appears in those two things
10 we're talking about two separate contracts. There
11 might be a third out there, but we're talking about
12 two and you signed both of them; right?

13 THE WITNESS: Yes, yes, I did.

14 Q. (BY MR. LEWIS) Will you look at 1064. Is
15 that your signature on that document, ma'am?

16 A. Yes.

17 Q. Would you look now at 1069.

18 A. Another Northbrook.

19 Q. Is that your signature there, ma'am?

20 A. Yes.

21 Q. You're changing the beneficiary on one of the
22 contracts that was to son Joseph now to daughter
23 Catherine; is that correct?

24 A. Yes.

25 Q. And this is on October 10th, 1997; is that

1 correct?

2 A. I have both names on there. I have Joseph
3 and Cathie. I added that.

4 Q. Yes, you do, it appears that way.

5 Would you look at the next document, 1070.
6 Is that your signature on there?

7 A. Yes.

8 Q. And this is the change to Catherine and
9 Joseph on another, different contract; is that
10 correct?

11 A. 1012?

12 Q. Look at 1071, is that the same document but
13 for a different contract, same thing, Mary Catherine
14 and Joseph?

15 A. It's Northbrook again.

16 Q. But it's a different contract number?

17 A. Right. There were three of them.

18 Q. Would you look at 1072. Is that your
19 signature in the middle of the page?

20 A. Yes.

21 Q. And is that instructions to Kemper on August
22 5th, 1996?

23 A. Yes, yes.

24 Q. Pardon me?

25 A. Yes.

1 Q. Did Mr. Merrill explain that to you when you
2 signed it?

3 A. He must have at the time.

4 Q. Look at 1073. Is that your signature on that
5 page?

6 A. Yes.

7 Q. Did you sign it on September 25th, 1996?

8 A. Yes.

9 Q. Did Mr. Merrill explain the purpose of that
10 letter to you before you signed it?

11 A. Yes, I think he did.

12 Q. You were liquidating free shares of Kemper
13 U.S. government securities?

14 A. From the bank, yes, the bank. The bank had
15 those.

16 MR. BINGHAM: Where?

17 MR. LEWIS: Right in the middle: I am aware
18 that the mutual funds are a long-term investment and
19 that I will not incur a sales charge.

20 MR. BINGHAM: Where does it say free shares?

21 MR. LEWIS: The end of the first line,
22 beginning of the second.

23 Q. (BY MR. LEWIS) Would you look at 1074. Did
24 you receive that letter?

25 A. Yes.

1 Q. If you'll look at 1075. This letter came
2 from Mr. Bingham. You'll see the ACC number on it
3 also. I think the bottom has been cut off, but would
4 you remember whether you signed this letter or not,
5 ma'am, on December 4th, 1995? It's similar to another
6 one that was dated the same date. I'm not trying to
7 put words in your mouth. If you don't remember, just
8 say so.

9 A. I don't understand it. There's writing up at
10 the top there.

11 Q. The problem is this signature line is cut
12 off. Let's skip that.

13 Would you look at 1076. Is that your
14 signature at the bottom?

15 A. Yes.

16 Q. Did you sign that document?

17 A. Yes.

18 Q. Would you look at the top and see what it is
19 on the upper right-hand side? It says distribution
20 request form?

21 A. I'm looking at the signature, and it doesn't
22 actually look like the way that I would write. Maybe
23 I was sick or something, but that does not look like
24 my signature. I don't write DuChene the way that is,
25 and I don't --

1 Q. Were you sick at the end of 1995?

2 A. Well, I would say my mother died so I
3 probably wasn't feeling the best.

4 Q. Did you understand, ma'am, that you had an
5 IRA account, and each year you have to make some kind
6 of a distribution?

7 A. Oh, yes.

8 Q. Did you get a distribution from that IRA
9 account from 1995?

10 A. I would have if I had to, yes.

11 Q. Would you turn to Page 1077. Is that your
12 signature at the bottom?

13 A. Yes.

14 Q. Did you sign it on December 18th, 1995?

15 A. I see somebody else's writing and my name on
16 there. This is my signature down below.

17 Q. Did Mr. Merrill explain this document to you
18 before you signed it, what it was for?

19 A. This is my IRA. I understand IRAs.

20 Q. Did he explain it to you, why you needed to
21 sign this?

22 A. Yes.

23 Q. Turn to 1078. Is that your signature on
24 there?

25 A. Yes.

1 Q. Did you sign it on November 28th, 1995?

2 A. Yes. What am I transferring? It says Dean
3 Witter accounts. What, am I transferring it to Dean
4 Witter?

5 Q. I think you were transferring it from one
6 Dean Witter office to another. But in any event, you
7 did sign this letter?

8 A. Yes, that's my signature.

9 Q. Would you look at 1079. Did you sign that,
10 ma'am, on January 31st, 1996?

11 A. Yes.

12 Q. Did you understand that you were transferring
13 a deferred annuity that had been issued in April of
14 1985?

15 A. Yes, I remember this.

16 Q. There were no service charges on that, were
17 there, where you transferred them in 1996?

18 A. I remember.

19 Q. 1080, did you sign that, ma'am?

20 A. Yes.

21 Q. You signed it on November 28th, 1995?

22 A. Yes.

23 Q. And it's an authorization to transfer a
24 retirement account?

25 A. It went from Bank One.

1 Q. At the top, the very top authorization to
2 transfer?

3 A. I had the IRA in Bank One.

4 Q. And you transferred it to Dean Witter; is
5 that correct?

6 A. Yes.

7 Q. Did Mr. Merrill talk with you about this
8 before you signed it?

9 A. I don't remember that.

10 Q. Well, he was talking to you about
11 transferring your annuities?

12 A. Yeah, I would have talked to him about it to
13 transfer it. I talked to someone to transfer it.

14 Q. I'm trying to figure out, looks like the next
15 document is just another copy of the same one.

16 Would you go to Page 1083. This looks like
17 just another copy of a document we previously looked
18 at that came from the ACC, but a different number on
19 it. So let's skip it.

20 Would you look at 1084?

21 A. Yes.

22 Q. Did you sign that on October 20th, 1998?

23 A. Yes.

24 Q. Were you seeking to withdraw \$4,000 from the
25 variable annuity?

1 A. It looks like that.

2 Q. Isn't that what the document says, you wanted
3 to take \$4,000 out of the dividend growth portfolio?

4 A. Yes.

5 Q. Was that explained to you before you signed
6 it?

7 A. I don't remember that.

8 Q. You wanted to get some money out of the
9 account?

10 A. Right.

11 Q. Did you have to ask how to do it? Did you
12 know to call up and ask for a variable annuity
13 withdrawal form?

14 A. I would have just asked Phil to do it.

15 Q. But you had to sign it?

16 A. Right.

17 MR. LEWIS: 1085 looks like another copy of
18 the same document.

19 I don't have any more questions for you.

20 ALJ DION: Mr. Bingham.

21 MR. BINGHAM: Thank you.

22 MR. LEWIS: I didn't quite say what I think
23 you thought I said. I said I don't have any more
24 questions for you from that book.

25 ALJ DION: I'm sorry, I heard "for you," I

1 didn't hear "from that book."

2 MR. LEWIS: I think I'll take your
3 suggestion. I don't have any more questions.

4 ALJ DION: Mr. Bingham, any follow-up?

5 MR. BINGHAM: Thank you, Your Honor.

6

7

REDIRECT EXAMINATION

8

9 Q. (BY MR. BINGHAM) Ms. DuChene, if you'll look
10 at, and I'm remaining in Exhibit No. 2, which are the
11 documents that you just looked at.

12 ALJ DION: Is that respondent?

13 MR. BINGHAM: I'm sorry respondent's Exhibit
14 No. 2.

15 ALJ DION: The black book, Ms. DuChene.

16 Q. (BY MR. BINGHAM) Yes, if you'll turn to
17 Exhibit No. 2 in that book. If you'll go to what is
18 marked as 1033 on the bottom. It's one of the
19 documents we looked at already. Where was the
20 tax-free trust of Arizona before it was transferred to
21 Mr. Merrill?

22 A. The bank.

23 Q. Do you remember which bank?

24 A. The one on Bell Road and probably 19th
25 Avenue.

1 Q. Do you remember the name of the bank?

2 A. It will just be Bank One of Arizona.

3 Q. Bank One of Arizona?

4 A. Yes, sir.

5 Q. Did Mr. Merrill request that you transfer
6 that tax-free trust of Arizona to your account at
7 Morgan Stanley?

8 A. Yes.

9 MR. LEWIS: Sir, I don't think questions are
10 any more permissible on redirect than on direct. That
11 was a very unique question.

12 ALJ DION: I disagree. I think the question
13 was did Mr. Merrill ask you which entity to transfer
14 the trust from to that specific entity. She's free to
15 answer yes or no, and I don't think the answer -- the
16 question, to get the answer -- if he had said
17 something along the line of Mr. Merrill told you to do
18 this, didn't he, then that certainly suggests the
19 answer. But I don't believe that suggested the
20 answer. So the witness already answered the question,
21 which was yes.

22 So go ahead and continue, Mr. Bingham.

23 Q. (BY MR. BINGHAM) Approximately how long
24 after you started working with Mr. Merrill did he
25 request that you transfer this tax-free trust of

1 Arizona?

2 A. Immediately.

3 Q. Did he give you any reason to transfer the
4 tax-free trust of Arizona?

5 A. It was to my benefit to do that.

6 Q. Who said to your benefit?

7 A. Mr. Merrill said it was to my benefit to give
8 everything to him, and he would handle it better than
9 the bank.

10 Q. Do you remember if you were making any money
11 off of the tax-free trust of Arizona?

12 A. I don't remember what it would have been.

13 Q. But were you was the question.

14 A. I believe I was, yes.

15 Q. So Mr. Merrill told you that he could do
16 better than you were doing with the tax-free trust of
17 Arizona?

18 A. Yes.

19 Q. Did he indicate to you how much better?

20 A. Mucho better. Much better.

21 Q. Did he use the word much or mucho?

22 A. He said you'll do much better for me than
23 what the bank is doing. I would be happier with him
24 than the bank.

25 Q. Was that the main reason that you transferred

1 the tax-free trust of Arizona?

2 A. Yes.

3 Q. What about the Kemper U.S. government
4 securities mutual fund, do you remember transferring
5 that fund?

6 A. He suggested I give that to him, too.

7 Q. Did he tell you why you should give it to
8 him?

9 A. Because he could do better for me than the
10 bank.

11 Q. What about the roughly \$25,000 that you had
12 saved up?

13 A. Same thing, same thing. He could do better
14 for me.

15 Q. Do you recall what year or years you were
16 placed into the Northbrook annuities?

17 A. It would be on here. Can I look on this
18 paper?

19 Q. Sure.

20 A. On here it's December the 8th, 1995, on my
21 paperwork, this paperwork here. February 8th, 1995.

22 Q. Didn't you testify to previously that you had
23 three annuities with Northbrook?

24 A. Yes, sir.

25 Q. From looking at these documents, can you get

1 any idea when the other two annuities were purchased?

2 A. Well, I'd have to look at these dates on
3 here.

4 Q. Go ahead.

5 A. January 30th, 1996. He's got April 12th,
6 1996.

7 The one thing that I noticed on here is that
8 two of them have the same date on the paperwork, and
9 he issued three annuities to me on different dates,
10 and I noticed on here, on the paperwork, there's two
11 of them that are listed, and they're both the same
12 date and that was not -- they were done separately.

13 Q. Now, were these annuities purchased sometime
14 after you started working with Mr. Merrill?

15 A. Yes, yes, he just done everything.

16 Q. Was that when Mr. Merrill was stopping by
17 your house from time to time?

18 A. Yes.

19 Q. Did you testify previously that often he
20 delivered papers to you and asked you to sign those;
21 is that correct?

22 A. Yes. He'd just run in and have me sign it
23 then he'd leave, just like that.

24 Q. So to the best of your recollection, these
25 annuity documents were signed in '95 and '96; is that

1 correct?

2 A. This is what it looks like in here. I don't
3 understand why there's two on the same date, because
4 they were, according to the paperwork I had, it was
5 issued on three separate dates, and three commissions.

6 Q. Did you have a good working relationship with
7 Mr. Merrill in 1995 and 1996 when you were working
8 with him?

9 A. I did at the beginning. But then it changed.

10 Q. Would you say that in late '95, and beginning
11 in -- and in '96, Mr. Merrill communicated with you
12 much better than he did say in 1996, '97 and '98?

13 A. Yes.

14 Q. Up until the GE transaction in December,
15 1997, you haven't alleged unauthorized transactions,
16 have you?

17 A. Say that to me again.

18 Q. Sure. Do you agree that -- let me take this
19 step by step.

20 Was the first unauthorized transaction that
21 you became aware of the GE transaction, December,
22 1997?

23 A. Yes.

24 Q. Have you alleged that after that, that again
25 being the GE stock being sold in December 1997, that

1 Mr. Merrill made unauthorized transactions in your
2 accounts?

3 A. Yes.

4 Q. Have you alleged any unauthorized
5 transactions prior to December, 1997?

6 A. No.

7 Q. If you'll turn to -- and I'll use the numbers
8 that the respondent has given these documents because
9 they are bigger. If you'll turn to Page 1049. That
10 is also Bates stamped with our number ACC 04520.

11 A. Yes, sir.

12 Q. Now, we talked about this letter previously,
13 dated October 12th, 1998; is that correct?

14 A. Again, I was looking at this. What were you
15 saying?

16 MR. LEWIS: Did you say 1040?

17 MR. BINGHAM: 1049, according to your
18 numbering system.

19 MR. LEWIS: I thought you said 1040.

20 ALJ DION: He did. I can't definitely prove
21 it without talking to the court reporter, but three of
22 us are looking at 1040.

23 MR. BINGHAM: That's a pretty good indicator,
24 then.

25 ALJ DION: 1049, Ms. DuChene, are you there?

1 THE WITNESS: Yes.

2 Q. (BY MR. BINGHAM) Did you type this letter?

3 A. No.

4 MR. LEWIS: This was prepared in his office.

5 Q. (BY MR. BINGHAM) Was this prepared in the
6 Dean Witter office, as far as you know?

7 A. Yes.

8 Q. Were a lot of these documents that you signed
9 prepared by Mr. Merrill or someone in his office?

10 A. The ones I signed that he brought in, yes. I
11 thought they were.

12 Q. Let's go to the next page, which is 1050.
13 When you discussed this document previously, you
14 seemed a bit confused about it, is that correct, in
15 your opinion?

16 A. Yes, because I didn't understand what I was
17 supposed to have been doing with this, in other words.
18 I was giving, putting everything that Dean Witter had
19 in my trust, so I was wondering, this was all checked
20 here, so that would go into the trust.

21 Q. Besides signing that, did you complete the
22 other handwritten letters and words on that form?

23 ALJ DION: In other words, Ms. DuChene, is
24 that your handwriting up at the top?

25 THE WITNESS: At the top, yes, but not the

1 grantor of the trust, that's not my writing either.
2 And this TTEE, that's not my writing, my printing.
3 It's not mine. The bottom is. The bottom signatures
4 are.

5 ALJ DION: The bottom signatures.

6 THE WITNESS: Yes, mine. But some of this up
7 here, the first page, Beatrice M. DuChene is mine, but
8 the rest of this other part is not mine.

9 ALJ DION: The first line, the title of the
10 full trust, you wrote Beatrice M. DuChene.

11 THE WITNESS: Correct.

12 ALJ DION: But the dates and everything
13 subsequent, except signatures down at the bottom,
14 somebody else wrote out?

15 THE WITNESS: Okay. I didn't fill this out,
16 so okay, I didn't fill that out, but I did fill this
17 part up here. You can see the difference in my
18 writing from here to there. It's not mine.

19 ALJ DION: I'm not a handwriting expert, so
20 that's why I'm going to ask this question. But the
21 top one, Beatrice M. DuChene.

22 THE WITNESS: Is me, April 8 there, another,
23 September 11, 1998.

24 ALJ DION: You wrote that, too?

25 THE WITNESS: Yeah. And I wrote Mary

1 Catherine Elwood, but not that other part.

2 ALJ DION: But the other stuff is not yours?

3 THE WITNESS: No, this doesn't look like mine
4 either.

5 Q. (BY MR. BINGHAM) Where it says investment
6 permitted, and there's a bunch of boxes below that,
7 did you mark any of those boxes?

8 A. I don't remember doing anything like that,
9 no.

10 Q. Did Mr. Merrill, his secretary, or anyone
11 else at Dean Witter ever help you fill out any portion
12 of these forms that you filled out yourself?

13 A. If they did, I don't remember them doing it.
14 I know Norma helped sometimes.

15 Q. Who is Norma?

16 A. She was Mr. Merrill's assistant that worked
17 in the office in there with him.

18 Q. His what again?

19 A. She worked in the office with him, again, so
20 I don't know what her title is.

21 Q. Ms. DuChene, if you'll turn now to the page
22 that is numbered 1073 in the lower right-hand corner.
23 Go ahead and look at that letter; tell me when you're
24 done.

25 (Brief pause.)

1 THE WITNESS: Okay, I'm finished.

2 Q. (BY MR. BINGHAM) When you signed this
3 letter, did you understand what it was for?

4 A. Well, I was liquidating Kemper. I was giving
5 Kemper to Dean Witter.

6 Q. Were you told whether or not you would incur
7 any charges when you liquidated Kemper funds?

8 A. It says on here that I wouldn't, but then
9 afterwards.

10 Q. There are two other securities that are
11 listed there. It says in the first Paragraph DWHIS,
12 and DIVGO, and then down below, in the second
13 paragraph, it says DW, which I assume is Dean Witter
14 high income and dividend growth funds. Do you see
15 those words?

16 A. Yes, sir, yes, sir.

17 Q. Did Mr. Merrill tell you anything about the
18 Dean Witter high income fund?

19 A. No.

20 Q. Let's be more specific. Did he talk to you
21 about any risk in the fund?

22 A. No.

23 Q. Did he talk to you about returns of the fund?

24 A. No.

25 Q. Did he talk to you about interest rate risk

1 with the fund?

2 A. No.

3 Q. Did he tell you, did he express any opinion
4 about the Dean Witter high income fund?

5 A. Well, he didn't talk to me about it. I would
6 just say if there's a risk to it I wouldn't have done
7 it.

8 Q. What about the dividend growth fund?

9 A. What is the dividend growth fund?

10 Q. Did he tell you about any risk in the
11 dividend growth fund?

12 A. No.

13 Q. Did he tell you what the nature of the fund
14 is?

15 A. No.

16 Q. Did he tell you anything about what it
17 invests in?

18 A. No.

19 Q. If I ask you those same questions about the
20 Dean Witter high income fund what would your answers
21 be?

22 A. Same, I don't know anything about it.

23 Q. Ms. DuChene, if you'll turn to what is
24 numbered as 1078 in the bottom right-hand corner.

25 Have you found that?

1 A. Yes, sir.

2 Q. Is this letter dated November 20th, 1995,
3 according to what you can see there?

4 A. Yes.

5 Q. If you'll read that first paragraph, it talks
6 about a transfer of securities and cash to your Dean
7 Witter account 205- and then there's a blank. Do you
8 know what account the money and securities were being
9 transferred into?

10 A. No.

11 Q. Do you know if someone filled in the number
12 after you signed this?

13 A. I don't know if they did or not.

14 Q. Ms. DuChene, a few hours ago you talked about
15 your GE stock being sold. You seemed a bit confused
16 about the tax situation of the GE stock that was sold
17 in December of '97; is that correct?

18 A. Yes.

19 Q. Have you ever heard of capital gains?

20 A. Yes, I have heard of it.

21 Q. Could it have been a capital gain that you
22 had paid on to sell that stock?

23 A. It sounds like it could have been that. I
24 know it was something extra that I had to pay for. In
25 other words, what he did by selling it the way he did,

1 there was something extra that I had to pay, and I
2 would assume capital gains would sound like it was
3 logical.

4 Q. Is that extra that you had to pay, what you
5 refer to as the loss?

6 A. Yes, yes. I had to pay for the sale of it,
7 yes. From what I remember, it had something to do
8 with within a year.

9 Q. So are you saying that if it had been sold
10 one year longer after it had been purchased then you
11 would not have had to pay whatever it was?

12 A. I wouldn't have had a penalty, because she
13 made an issue out of it, that he did wrong with
14 whatever he did with GE. He didn't do right with it.

15 Q. Do you understand confirmations and account
16 statements better now than you did back in '96, '97,
17 '98?

18 A. Yes.

19 Q. Why is that?

20 A. Because it's been brought up as a big issue
21 in my life. I'm glad I saved them.

22 Q. Let's go to Exhibit S-3. Let's go
23 specifically to the letter that's dated August 25th,
24 1999.

25 (An off-the-record discussion ensued.)

1 ALJ DION: We're going to continue tomorrow
2 morning at 9:00 a.m. Ms. DuChene you're going to be
3 on the stand. Mr. Bingham has a couple questions and
4 I still have a couple questions. I understand it's
5 going to be an effort, it's a hot day, but perhaps
6 with someone's help, your daughter, see if you could
7 get that file.

8 THE WITNESS: When the accountant had them,
9 he made notes on them. They're not notes by me, but
10 the accountant made notes.

11 ALJ DION: And that's something that we can
12 talk about. If those notes were made by an accountant
13 or someone else and not you, then that's fine.

14 Mr. Bingham.

15 MR. BINGHAM: What time frame are we looking
16 at being here?

17 ALJ DION: 9:00 start time.

18 MR. BINGHAM: I mean as far as the
19 confirmations.

20 MR. LEWIS: '96, '97, '98 and the monthly
21 statements.

22 THE WITNESS: I'll bring what I have.

23 ALJ DION: Bring what you have, that's fair
24 enough, Ms. DuChene, that's fine.

25 So basically, before you all start packing

1 up, there was a substitution off the record about some
2 of the documents Ms. DuChene spoke about.
3 Specifically confirmations and monthly statements that
4 she received from Dean Witter while she was a client
5 of Mr. Merrill's. After that discussion, there was
6 also a discussion about a tax form, her tax return
7 file. After that discussion, I've decided that the
8 monthly reports and the confirmations, since
9 Ms. DuChene has those and they're easily accessible,
10 and she has talked about them, that those certainly
11 should be provided to the defense for review. If they
12 wish to enter anything into evidence, then they have
13 to make some copies of those.

14 As to the tax return, there is an argument
15 that it wasn't possible what Ms. DuChene was saying it
16 was impossible, and that she didn't lose money, she
17 should have had a gain. There are a number of things
18 like that, I found that not dispositive. There's
19 ample evidence in the record today that Ms. DuChene is
20 not, was not very aware of the proper terminology of
21 financials, she's not very aware of the dates and the
22 times, and that her answer to her questions, a lot of
23 questions were, I don't have any other proof other
24 than honest and that she just didn't know.

25 So the fact that there was a gain, there was

1 a loss, that was immaterial. I found that whether it
2 was a gain or whether it was a loss at some point she
3 was put on notice regarding the transaction and that
4 was the important or relevant piece of information, so
5 I denied the tax return portion.

6 Mr. Bingham, does that accurately reflect
7 what we talked about off the record?

8 MR. BINGHAM: To the best of my recollection,
9 yes, it does.

10 ALJ DION: Do you agree with that?

11 MR. BINGHAM: Yes.

12 ALJ DION: Mr. Lewis, although you may not
13 agree with the result, do you agree that's what we
14 talked about?

15 MR. LEWIS: Yes, sir, you captured the gist
16 of it succinctly.

17 ALJ DION: I wouldn't say succinctly, but I
18 did.

19 We will reconvene at 9:00 a.m. tomorrow.
20 There will be a notice outside the door. I'm positive
21 we will be upstairs in the Commissioners' board room,
22 whatever, but that can be subject to change. So as of
23 today that's the best of my recollection.

24 MR. LEWIS: I think you told us outside the
25 door of the room we're sitting in there will be a

1 notice of where to go, and that will be posted before
2 9:00.

3 ALJ DION: If not, come to the office in the
4 Hearing Division and somebody can certainly direct
5 you. So we're off the record until 9:00 tomorrow
6 morning.

7 (An off-the-record discussion ensued.)

8 ALJ DION: We've got everyone here. I'm back
9 on the record. I just wanted to remind everybody, and
10 I'll do it again tomorrow, I don't think anything has
11 been entered into evidence so we may have to do --
12 Ms. DuChene is coming back tomorrow. I don't know if
13 you guys want it in or not, but I just want to remind
14 everybody, put it on your notes that so far nothing
15 has been admitted into evidence through Ms. DuChene.
16 That may be part of the plan but I just wanted to
17 bring everybody's attention to it. Thank you.

18 (The hearing recessed at 5:12 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.

WITNESS my hand this 4th day of September, 2002.

Cecelia Brookman
 CECELIA BROOKMAN, RPR
 Certified Court Reporter
 Certificate No. 50154