

EXHIBIT EE

to

Claimant Scherr's Amended Brief in Support of Coverage

NO. 98-377

1
2 JAMES F. SCHERR,) IN THE DISTRICT COURT
3 Plaintiff,)
4 vs.) EL PASO COUNTY, TEXAS
5 THE HOME INSURANCE COMPANY,)
6 Defendant.) 205TH JUDICIAL DISTRICT
7

8 *****

9 ORAL DEPOSITION OF
10 JAMES F. SCHERR
11 JANUARY 20, 2003

12 *****

13
14 ORAL DEPOSITION of JAMES F. SCHERR,
15 produced as a witness at the instance of the Defendant,
16 and duly sworn, was taken in the above-styled and
17 numbered cause on the 20th of January, 2003, from
18 12:24 p.m. to 5:05 p.m., before Rhonda McCay, CSR in and
19 for the State of Texas, reported by machine shorthand,
20 at the offices of Brannon Rasberry & Associates, 300
21 East Main, Suite 1024, El Paso, Texas, pursuant to the
22 Texas Rules of Civil Procedure.

23
24 Copy Prepared for:
25 Mr. Jim Darnell

A P P E A R A N C E S

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1 JAMES F. SCHERR,
2 having been first duly sworn, testified as follows:

3 EXAMINATION

4 BY MR. HAYES:

5 Q. Would you please state your name for the
6 record.

7 A. Jim Scherr.

8 Q. Mr. Scherr, my name is Burgain Hayes. You and
9 I met briefly at the deposition of Ms. Jobe; is that
10 correct?

11 A. Yes, sir. Nice to meet you.

12 Q. Nice to meet you again.

13 I'm here to take your deposition today as a
14 result of your being a plaintiff in a lawsuit that is
15 styled James F. Scherr, Plaintiff, versus The Home
16 Insurance Company.

17 You are an attorney in the State of Texas;
18 is that correct, sir?

19 A. Yes, sir.

20 Q. Then I will not attempt to discuss with you the
21 nuances of taking a deposition.

22 I just want to make sure that we are both
23 understanding the capacity in which you are here.
24 Counsel and I have had a conversation and an exchange --
25 a Rule 11 exchange indicating that the only expertise

1 you are being designated for is in the area of talking
2 about attorney's fees. Is that as you understand it?

3 A. You will have to confer with Mr. Darnell.

4 Q. Well, I understand that.

5 A. I don't know.

6 Q. Would you like to talk to your lawyer and find
7 out the answer to that question? I am really not
8 deposing Mr. Darnell here today.

9 A. You are welcome to ask me any question. I will
10 answer to the best of my ability.

11 MR. DARNELL: He is -- for the record, he
12 is only being designated as an expert on attorney's
13 fees.

14 Q. (BY MR. HAYES) So, then, you are here as a
15 fact witness; is that correct, sir?

16 A. In whatever capacity I'm asked, I will be happy
17 to answer your questions. But I'm here at the -- at
18 your deposition notice.

19 Q. Well, Mr. Scherr, I just want to make sure you
20 and I understand each other. If I take your deposition
21 on the basis of your acting as an expert, then that is,
22 obviously, going to take, A, a lot more time, and, B, it
23 is going to be inconsistent with the Rule 11 agreement
24 that has been entered into by your lawyer, which he
25 instructed you on.

1 I assume that you will agree with me that,
2 if you are not designated as an expert except on the
3 subject of attorney's fees, then the only capacity that
4 you would be here is as a fact witness. Is that not
5 correct?

6 A. I will follow the instructions my attorney has
7 given me. So I will answer to the best of my ability
8 whatever questions that are asked of me. I intend to
9 address the fact issues. There may be some questions
10 that are fact and law because you are asking about a
11 lawsuit.
12 So I don't intend to give any legal
13 opinions. I intend to address solely fact issues.

14 Q. Are you representing yourself here, pro se?

15 A. No, sir.

16 Q. You went to law school. Got out when? When
17 did you graduate from law school?

18 A. In 1975.

19 Q. And where did you go?

20 A. The University of Houston.

21 Q. When did you stand for the Bar?

22 A. I took the Bar in 1975.

23 Q. And when did you pass the Bar?

24 A. 1976.

25 Q. Did you take the Bar in '75 at such a time that

1 the results were not provided until 1976, or did you
2 take the Bar more than once?

3 A. Took it one time.

4 Q. When were you sworn in?

5 A. In 1976.

6 Q. And what job did you have as your first job as
7 a lawyer?

8 A. Sole practitioner.

9 Q. Where?

10 A. Here in El Paso.

11 Q. What type of law did you practice?

12 A. Anything that walked in the door.

13 Q. From that time until today's date, have you
14 become board certified in anything?

15 A. No, sir.

16 Q. What would you define as your primary practice
17 over the majority of your career?

18 A. Helping people.

19 Q. Okay. And in what branches of law were you
20 helping people?

21 A. I'd say, since the early '80s, I have been
22 handling trial law and personal injury, products, on
23 behalf of people.

24 Q. You represent plaintiffs as opposed to
25 defendants?

1 A. Yes, sir.

2 Q. You represent plaintiffs as opposed to
3 defendants in cases which ordinarily have a contingency
4 fee?

5 A. Yes, sir.

6 Q. Do you -- strike that.

7 Have you ever been disciplined by the State
8 Bar?

9 A. Yes, sir, I have.

10 Q. And how many times have you been disciplined by
11 the State Bar?

12 A. Once, to the best of my recollection.

13 Q. And when was that?

14 A. I think it was in 1997 or 1998. I don't
15 remember the exact date.

16 Q. And what was the subject of the discipline?

17 A. We had a business that was a separate
18 corporation called Discount Legal Services, ~~S~~Scherr &
19 Legate, P.C. The El Paso phone book left out in the
20 regular listing of the phone of Scherr & Legate, P.C.,
21 and just ran the name Discount Legal Services. We were
22 disciplined for false advertising, for failure to put
23 our names in the ad. It was not a paid ad. It was just
24 part of our listing in the phone book.

25 Q. What was the discipline assessed?

1 A. I don't remember at this time.

2 Q. Was your license suspended?

3 A. No. There was no -- I think it was a
4 written -- I don't remember what type of disciplinary
5 action was taken, other than it was -- I don't know what
6 disciplinary action was taken.

7 Q. Let me stop for a second and approach it this
8 way. Has your license with the State Bar of Texas
9 stayed in force and effect since 1976 until now?

10 A. Yes, sir.

11 Q. It has not been suspended?

12 A. Correct.

13 Q. So I would assume that whatever disciplinary
14 action was taken by the State Bar against you for the
15 discussion that we just had, it would have been other
16 than a suspension of your license?

17 A. Yes, sir.

18 Q. What is your experience or was your experience
19 with class action litigation at the time that you
20 undertook the representation which was filed as Rhodes
21 versus American General?

22 A. In law school, an experience with interest on
23 telephone company deposits, not paying interest on them,
24 and then had been, basically, a student of class
25 actions, meaning that I had not been involved as lead

1 counsel in class actions prior to the Rhodes case.

2 Q. Now, as we have discussed, we have a number of
3 exhibits present in the room that are original exhibits
4 that have been associated with the depositions of Mr.
5 Hudgins and Ms. Jobe. I'd like you to look -- let me
6 find them. Somewhere I have a cheat sheet at hand.

7 I would like you to look and see if you can
8 locate the exhibit that is --

9 A. If you'll tell me what it is, I'll try and find
10 it.

11 Q. I can tell you exactly what exhibit it is.
12 Look at Exhibit Number 4, please.

13 A. Yes, sir.

14 Q. What is Exhibit Number 4?

15 A. It is the original class action petition that I
16 prepared and filed. It was an attempt to create a class
17 action.

18 Q. Looking at that particular document, Exhibit
19 Number 4, who -- would you look and tell me who the
20 attorney is that signed it?

21 A. Me.

22 Q. Did you have co-counsel at that time on this
23 particular pleading?

24 A. Not to the best of my knowledge.

25 Q. Well --

1 A. I was the only one who signed the pleadings. I
2 may have conferred with an attorney at that point, but I
3 don't recollect at this time whether I had or not.

4 Q. Mr. Scherr, I asked a bad question. Let me ask
5 it again.

6 You are aware that when a lawyer or lawyers
7 file a pleading, that they put their name on that
8 pleading?

9 A. Yes, sir.

10 Q. I'd like you to look at Exhibit Number 4 and
11 I'd like you to tell me the totality of the lawyers that
12 are listed as attorney of record on that particular suit
13 as evidenced by Exhibit Number 4, please.

14 A. Me, James F. Scherr.

15 Q. So, then, you were acting in the capacity of
16 sole counsel for the individuals named in that case at
17 that time, were you not, according to that pleading?

18 A. Yes, sir.

19 Q. Now, do you recognize that when you file a
20 class action, that there is a specific rule under the
21 Texas Rules of Civil Procedure that governs that
22 particular pleading?

23 A. Yes, sir.

24 Q. And are you in agreement that that is Rule 42
25 of the Texas Rules of Civil Procedure?

1 A. To the best of my recollection, that is
2 correct.

3 Q. Well, I have a copy of *O'Connor's Rules* for the
4 year 2002 here, which I will put in the middle of the
5 desk or hand to you so that you can look at it. I don't
6 want there to be any mystery about this.

7 Have you had a chance to look to see
8 whether or not there is a Rule 42 in the Texas Rules of
9 Civil Procedure, whether or not that rule governs class
10 action pleadings?

11 A. Yes, sir.

12 Q. Now, did you -- in the exhibit which is Exhibit
13 Number 4, did you refer to the Texas Rules of Civil
14 Procedure, Rule 42?

15 A. I did.

16 Q. Did you -- when you did that, did you enunciate
17 or did you pull from the rule any particular language in
18 that pleading?

19 A. Yes, sir.

20 Q. Would you please read for the record the
21 specific allegation that you made in that pleading,
22 Exhibit Number 4, that relates to Rule 42?

23 A. (Reading) Plaintiffs would show that: 1) the
24 class is so numerous, ^{that} the joinder of all members is
25 impracticable; 2) there are questions of law or fact

1 common to the class; 3) the claims of plaintiffs are
2 typical of the claims of the class; 4) Plaintiffs, as
3 the representative party, will fairly and adequately
4 protect the interests of the class. Further, Plaintiffs
5 would show that this class action is maintainable
6 pursuant to Texas Rules of Civil Procedure 42(b) for the
7 reason that the prosecution of separate actions by or
8 against the individual members of the class would create
9 a risk of inconsistent or varying adjudications with
10 respect to individual members of the class which would
11 establish incompatible standards of conduct for the
12 party opposing the class, and the common questions of
13 law or fact concerning the refusal to pay chiropractic
14 services by Defendants predominate over any questions
15 affecting only individual members in the class action is
16 superior to other methods available for the fair and
17 efficient adjudication of the controversy.

18 Q. Okay. Mr. Scherr, when you filed that, were
19 you aware that there is an obligation in order to
20 receive certification that the lawyer that files a class
21 action has to demonstrate to the court that he is
22 capable of handling a class action as a lawyer?

23 A. Yes, sir.

24 Q. At the time that you filed this pleading, did
25 you have a personal opinion as to whether or not you

1 were adequately capable to handle a class action?

2 A. Are you asking me a legal opinion?

3 Q. I'm not asking a legal opinion. I'm asking
4 what your personal opinion was. I was very careful to
5 use the word "personal opinion." It may be a personal
6 opinion judging your legal ability. I'm here in an
7 attempt to learn what your personal opinion was at that
8 point, sir.

9 A. Yes, sir.

10 Q. Now, I'll ask the question again.

11 A. No. I answered the question. You asked if I
12 had an opinion, and I said yes.

13 Q. What was that opinion?

14 A. I felt that I was capable of handling the class
15 action lawsuit both financially and from a legal
16 standpoint. However, in addition to that, I had already
17 consulted other attorneys for consultation purposes and
18 eventually brought in another firm to assist me in
19 certifying -- in pursuing the class action.

20 Q. But you are in agreement with me that, at the
21 time that you filed Plaintiff's Original Class Action
22 Petition, the attorneys noted on the pleading were you
23 alone?

24 A. Me, myself and I, yes, sir.

25 Q. You realize that there was an obligation by

1 you -- or that you, by filing that pleading, were making
2 a representation to the court about your capacity to
3 represent the class in the class action lawsuit itself;
4 is that correct?

5 A. Yes, sir.

6 Q. In other words, it wasn't your first rodeo in
7 terms of class action litigation? This is not the first
8 time you had ever tried this? Is this the first class
9 action you ever filed?

10 A. Yes, sir. I think I indicated that to you. It
11 was the first class action I had filed as lead counsel.

12 Q. I'm sorry. I was confused. I thought you were
13 trying to suggest to me that when you were in law
14 school, you participated legally in some fashion with a
15 class action lawsuit that had something to do with an
16 overcharging by --

17 A. I wasn't licensed as an attorney. I was not on
18 the pleadings. I was not an attorney of record in any
19 way, shape or form in that case --

20 Q. Now --

21 A. -- in law school.

22 Q. You also recognized -- or do you agree that
23 prior to the certification of the class action by the
24 court that what is marked as Exhibit Number 4 is a
25 lawsuit brought on behalf of the named plaintiffs until

1 a court certifies that it is more; is that correct?

2 A. Correct.

3 Q. Who were the plaintiffs in that particular
4 litigation at the time that you filed that pleading?

5 A. W.C. LaRock -- Dr. W.C. LaRock, Dr. Joseph
6 Superville and Coronado Chiropractic Clinic.

7 Q. ⁴ Did that lawsuit that is evidenced as Exhibit
8 Number 1 [sic] -- and if we could have an agreement that
9 that would be called the "underlying lawsuit." Can we
10 have that agreement?

11 A. Yes, sir.

12 MR. HAYES: I believe that is -- isn't that
13 what we used before?

14 MR. DARNELL: I think.

15 MR. HAYES: I went to great efforts to make
16 sure I didn't screw this one up.

17 MR. DARNELL: I think that is what we
18 called it.

19 MR. HAYES: Okay.

20 Q. (BY MR. HAYES) My problem, Mr. Scherr, is, as
21 you know, I have layered litigation here. I have a
22 class action, I have a malpractice case, and then I have
23 your action against Home. And I'm just merely trying to
24 tell you why I'm coming up with words that could kind of
25 encapsulate a concept, as opposed to just being cute or

1 difficult.

2 If it is acceptable to you, I would like to
3 call the Plaintiffs' Original Class Action lawsuit
4 brought on behalf on Dr. W.C. LaRock, Dr. Joseph
5 Superville and Coronado Chiropractic Clinic filed
6 7/28/88 as the "underlying lawsuit." And I believe
7 you've agreed you will do that?

8 A. Yes, sir.

9 Q. Who were the plaintiffs in that particular
10 lawsuit, the underlying lawsuit?

11 A. Dr. W.C. LaRock, Dr. Joseph Superville and
12 Coronado Chiropractic Clinic.

13 Q. Was there any commonality of the two
14 individuals and that business entity?

15 A. Yes, sir.

16 Q. What was the commonality?

17 A. At the time, Dr. LaRock, Dr. Superville and
18 Coronado Chiropractic Clinic were together.

19 Q. Did they have a common position with regard to
20 the named defendant or defendants in that particular
21 case? Did they feel aggrieved by the defendants in a
22 similar fashion?

23 A. Yes, sir.

24 Q. What was the similar fashion that they felt
25 they were aggrieved by the named defendants, those two

1 persons and that business entity?

2 A. That their bills, as doctors of chiropractic,
3 had been cut unjustifiably, unfairly by these -- by the
4 named defendants.

5 Q. Which was a large slice of the insurance
6 industry in Texas?

7 A. No, sir. It was some.

8 Q. Well, in terms of insurance companies that
9 would be responsible for reviewing fees for medical
10 services by chiropractors, did you not sue a significant
11 part of the insurance industry that was doing that in
12 Texas when you filed this case?

13 A. No, sir.

14 Q. Do you know what percentage of insurance
15 companies that were potentially engaging in this
16 discriminatory practice that you discuss in your
17 pleading was sued in this lawsuit?

18 A. No, sir, I do not.

19 Q. Never undertook to find that out? You never
20 sought that information?

21 A. Well, there are different -- may I answer, if I
22 may, please?

23 Q. Sure.

24 A. There are different realms of insurance
25 companies and claims involved in chiropractic and health

1 care provider bills. The ones listed in this particular
2 lawsuit aimed at -- were aimed at those who were
3 handling workers' compensation claims on patients that
4 were being treated by the named and identified
5 plaintiffs, who had actually cut the bills of the named
6 plaintiffs, and Dr. Timberlake, who was a consultant to
7 the insurance industry -- to the insurance companies,
8 and Intracorp, which was a company that was for -- which
9 had a consulting service, which, as part of his
10 responsibilities or business, was reviewing chiropractic
11 bills.

12 Q. Let me try to rephrase my question to meet your
13 friendly amendment.

14 I get the impression that if I were to say,
15 when you selected the defendants against whom you filed
16 this lawsuit, that is Exhibit Number 4, did you select a
17 significant number of the insurance companies that you
18 felt, in your analysis, discriminated against
19 chiropractors in terms of assessing their bills for
20 services rendered within the workers' compensation
21 scheme for persons who were seeking medical -- for
22 on-the-job injuries?

23 A. The named insurance companies were carriers who
24 actually had bills of LaRock, Superville and Coronado
25 Chiropractic that had reduced or cut their charges. And

1 in reviewing the defendants, those were some of the --
2 that was a major criteria -- that was the criteria which
3 was the first hurdle in terms of being named as a
4 defendant in the initial pleading. I hope that answers
5 your question.

6 Q. It gives me an answer that I can work with.

7 A. Okay.

8 Q. Let's go to the next level. Did you add
9 additional named plaintiffs to what I will call the
10 underlying lawsuit at any time from inception, when you
11 filed that pleading, until it was resolved?

12 A. Three additional chiropractors were added as
13 named plaintiffs up until the point that my
14 representation of three or four --

15 Q. I have a Beard, Bailey and Petrosky. Was there
16 another one?

17 A. Dr. Rhodes.

18 Q. Pardon?

19 A. Dr. Walter Rhodes.

20 Four were added up to the point that Drs.
21 Beard, Bailey and Petrosky terminated our services.

22 Q. When you added -- at some point in time, you
23 represented, if I understand correctly, in this lawsuit,
24 that is, the underlying lawsuit, you represented six
25 chiropractors and one chiropractic clinic?

1 A. Yes, sir.

2 Q. And that would be Dr. LaRock, Dr. Superville,
3 Dr. Beard, Dr. Bailey, Dr. Petrosky, Dr. Rhodes and the
4 Coronado Chiropractic Clinic?

5 A. Yes, sir.

6 Q. Now, my question to you is, did you ever expand
7 the numbers of defendants from the pleading that has
8 been provided to you to look at as Exhibit Number 4?

9 A. Yes, sir. I think I did, but I don't remember
10 the names of the companies.

11 Q. When you added those additional defendants, was
12 that because while, perhaps, Dr. LaRock, Dr. Superville
13 and the Coronado Chiropractic Clinic didn't have a bill
14 or fee controversy with them, one of your new named
15 plaintiffs did?

16 A. It could have been either that or that
17 Dr. LaRock, Superville or Coronado Chiropractic Clinic
18 had additional bills that had been cut by other
19 insurance companies.

20 Q. Was this class ever certified?

21 A. No, sir.

22 Q. Why not?

23 A. We attempted to certify it on two different
24 occasions. The first time I set it for hearing to
25 certify the class, counsel for the insurance companies

1 requested a continuance of the judge to permit discovery
2 on certification of the class. Then, when -- and we
3 went through lengthy discovery.

4 After that, I went and got another date. I
5 think it was in August of -- whatever year it was --
6 '92, '93, '94, somewhere in there. I'd have to go back
7 and look at my dates -- and set another date for
8 certification of the class.

9 Prior to the second certification hearing,
10 our firm was terminated in terms of its representation
11 by Dr. Beard, and I was unable at that point to proceed
12 forward with certification -- or setting on the
13 certification in August.

14 Q. We had a list of six chiropractors and a clinic
15 that you represented at one time, correct?

16 A. Yes, sir.

17 Q. Did you cease to represent some of those
18 individuals?

19 A. Yes, sir.

20 Q. Which individuals did you cease to represent?

21 A. First, Dr. Beard terminated our services.
22 Thereafter, Dr. Bailey and Dr. Petrosky terminated our
23 services.

24 Q. Do you have any written -- did you need to
25 confer with counsel?

1 A. No. I'm finished. And I apologize. Go ahead.

2 Q. Well, he is your lawyer. You can talk to him
3 if you want to. I think it is only fair that, on the
4 record, we understand that you have talked to your
5 lawyer, and the two of you reached an understanding on
6 something.

7 And are you prepared to proceed?

8 A. Yes, sir.

9 Q. Thank you.

10 Now, did you ever receive any document from
11 Dr. Beard, Dr. Bailey or Dr. Petrosky outlining why they
12 chose to terminate your services in the underlying
13 lawsuit?

14 (Discussion off the record)

15 A. Yes.

16 Q. (BY MR. HAYES) You know what, I forgot my
17 stupid question.

18 MR. HAYES: Would you read my question?

19 (Pertinent question read)

20 Q. (BY MR. HAYES) And your answer was yes?

21 A. Correct.

22 Q. And do you have a copy of that document with
23 you?

24 A. No, sir, I do not.

25 Q. Does your lawyer have a copy of that document?

1 A. I don't know.

2 MR. DARNELL: Either in my file or with me?

3 MR. HAYES: Either. I'm most expansive
4 with you.

5 MR. DARNELL: I've got it in my file. I
6 don't know that I brought it with me, because I think
7 that is also -- unless I'm mistaken, isn't that in our
8 exhibits?

9 MR. HAYES: Well, let's look and see.

10 MR. DARNELL: I thought it was.

11 MR. HAYES: I don't think it is.

12 Q. (BY MR. HAYES) We have an original petition
13 that -- and, obviously, I think, Mr. Scherr, it is very
14 fair to say that that is the document in which they
15 indicate to you their disquietude. But I was trying to
16 get whether or not you had a letter from any of those
17 three gentlemen giving you that information.

18 (Exhibit marked, 36)

19 MR. HAYES: Let the record reflect that we
20 have just marked as Exhibit Number 36, Plaintiffs'
21 Eighth Amended Original Petition in a lawsuit styled
22 Beard, Bailey and Petrosky versus Scherr, et al. And I
23 have provided a copy to counsel and to the witness.

24 MR. DARNELL: The more I think about your
25 question, I am honestly not sure that I have seen the

1 letter you are talking about.

2 MR. HAYES: I don't know that there is one.
3 Off the record.

4 (Discussion off the record)

5 Q. (BY MR. HAYES) Mr. Scherr, we are not trying
6 to be cute. Your lawyer and I are trying to figure out
7 whether or not there was a letter that you would have
8 received prior to the filing of the -- what I would
9 agree we can now call the "legal malpractice case," or
10 the Beard case. That is the second phrase that we use
11 to try to encapsulate a litigation.

12 Do you have a specific memory of receiving
13 a letter from either Dr. Beard, Dr. Bailey or
14 Dr. Petrosky in which they, not a lawyer on their
15 behalf, details for you the reasons behind them changing
16 counsel?

17 A. I remember receiving a letter. I don't think
18 the letter specified reasons for the change in counsel
19 on it. And I don't remember -- I don't have any
20 specific recollection of the full letter, other than
21 something to the effect that, I hereby give you notice
22 that I'm terminating your services as attorney.

23 That's all that stands out in my mind, but
24 I don't remember the details.

25 Q. I'm going to do something that is very

1 dangerous. I'm going to attempt to capture the essence
2 of what you just said. I'll try to be as fair as I can
3 because I'd like a crisp answer that captures what we
4 just discussed.

5 Would it be fair to say that you have a
6 memory of a letter from either Dr. Beard, Dr. Bailey or
7 Dr. Petrosky in which they, in writing, terminated your
8 services? You remember that, but you don't really
9 remember whether or not it went into any discussion
10 about why. Is that a fair statement?

11 A. Yes, sir.


12 Q. Why did they terminate your services at the
13 time that they left?

14 MR. DARNELL: Object to the form.

15 Q. (BY MR. HAYES) Obviously, I am calling for you
16 to give me some sense of why -- I mean, if they told you
17 orally, then say, "They told me." If it is just, "Well,
18 you know, they never really said, but I would surmise
19 from the body language or just the way things went."
20 I'm just trying to figure out why they terminated you.

21 A. Well, what I was told by Dr. Beard is that he
22 didn't want to pursue the class action any further. He
23 had personal matters that he wanted to address, that he
24 had to address, and he didn't want to be involved in it.
25 Dr. Petrosky advised -- told me that he really didn't

1 want to pursue the class action any further, and that he
2 was not getting -- he and Dr. Bailey indicated they did
3 not want to be associated with Drs. LaRock and
4 Superville.

5 And Dr. Petrosky indicated to me that 
6 purposes that he was involved in that lawsuit -- it may
7 have been Dr. Bailey too, I don't remember -- the
8 purposes for the undertaking of the action had been
9 pretty much resolved in his mind by the adoption of the
10 Texas Workers' Compensation Commission fee guidelines
11 and medical dispute rules and regulations.

12 That pretty much describes what I was told.

13 Q. Okay. Who represented them next?

14 A. I don't know.

15 Q. Okay. Well, at some point in time, a person
16 whose name is currently Jobe indicated that she
17 represented them, as I understand it. So help get me
18 there.

19 A. I don't know what happened after they
20 terminated our services, if they sought other counsel.
21 At some point, Martie Georges notified us that she was
22 going to be entering an appearance on behalf of Beard,
23 Bailey and Petrosky.

24 Q. Since her name is now Martie Jobe and she was
25 deposed as Martie Jobe, can we assign her the nom de

1 plume Martie Jobe and speak of her that way --

2 A. Yes, sir.

3 Q. -- even though it is inaccurate if you look at
4 the pieces of paper at the time?

5 A. Yes, sir.

6 Q. And, again, at the risk of confusing the
7 matter, but trying to get my arms around it, what you
8 are suggesting to me is, you received information, and
9 if I am correct, it is probably at different times -- I
10 believe someone left first and someone else left and
11 then someone else left. But at some point in time, you
12 received notification from all three that you didn't
13 represent them. Then, at some later time, Martie
14 Georges, or now Martie Jobe, became the lawyer that
15 represented Drs. Petrosky, Bailey and Beard?

16 A. Yes.

17 Q. How did the Rhodes versus American General
18 lawsuit end for those three individuals? Did she settle
19 the case for them with the defendants, and were releases
20 executed, or do you know?

21 A. From review of the pleadings, she did settle
22 the case. She filed a judgment dismissing the case in
23 its entirety. And I believe she entered in release
24 agreements with certain -- with the defendants receiving
25 some money in settlement.

1 Q. What happened to the case that you filed
2 insofar as Dr. LaRock, Dr. Superville and the Coronado
3 Chiropractic Clinic and Dr. Rhodes? What happened with
4 that litigation?

5 A. Prior to the dismissal by Ms. Jobe, the claims
6 of LaRock, Superville, Rhodes and Coronado Chiropractic
7 were settled with the named defendants that were named
8 at that time.

9 Q. And then I assume that that particular case was
10 dismissed?

11 MR. DARNELL: Object to form.

12 A. The individual claims of the named plaintiffs
13 that I was representing were dismissed, yes, sir.

14 Q. (BY MR. HAYES) Now, do you, in your personal
15 opinion, recognize that insofar as the class action
16 issues were concerned, under Texas class action law,
17 since no class was certified, members of a noncertified
18 class were not bound by the settlements entered into by
19 the named defendants and the named plaintiffs in that
20 case, or do you know?

21 MR. DARNELL: Object to form.

22 A. Are you asking me a legal opinion?

23 Q. (BY MR. HAYES) Well, I am forced to probe that
24 because of your answer to the question. And I'm trying
25 to determine whether or not you hold an opinion, whether

1 it is a legal opinion or any kind of an opinion, that if
2 a class action is filed, a class action is not
3 certified, that somehow the dismissal of the underlying
4 action -- noncertified class action has some effect on a
5 noncertified unnamed class.

6 My reading of the law is that it doesn't.
7 There is no res judicata, no collateral estoppel. All
8 that has happened is some named plaintiffs have raised a
9 claim against some named defendants that has been worked
10 out, settlements have been executed, the matter is, at
11 that point, resolved res judicata, or accord and
12 satisfaction would attach should they attempt to raise
13 those very same claims again against those same
14 defendants, but that is all we have done.

15 I just want to know whether we have a
16 disagreement of opinion on this issue.

17 A. If I'm understanding you correctly, prior to
18 certification of the class and prior to dismissal of all
19 parties to the class, if some of the named persons
20 settle their individual claims with the defendants, that
21 is permissible --

22 Q. Well, let me say it even more succinctly.
23 Under Texas law --

24 A. -- as existed back then.

25 Q. Well, I'm going to say, even today, under Texas

1 law, then and today --

2 A. I don't know what it is today.

3 Q. Well, let's just say, back then, if a lawsuit
4 is filed and it is filed as a class action and no
5 certification occurs, the named defendant -- named
6 plaintiffs have an absolute right to settle their
7 individual claims at that point?

8 A. That's what I believe the case was in terms of
9 the individual plaintiffs that I represented at that
10 time.

11 Q. Secondly, if I were a person who was a
12 potential class member -- if the class had been
13 certified, would have been a class member, and I learned
14 about the lawsuit and learned that no class was ever
15 certified and I learned that the lawsuit was settled,
16 except for statute of limitation issues, I could file a
17 new lawsuit on my own behalf, style it a class action,
18 and my rights have not been impaired?

19 A. As I understood the law back at that time,
20 that's the way I understood it to be.

21 Q. Now, did you have, factually, an
22 attorney-client relationship with any other
23 chiropractors that were plaintiffs in the underlying
24 lawsuit that we haven't discussed?

25 A. At any time in life -- or involved in that

1 lawsuit?

2 Q. Yes.

3 A. Involved in that lawsuit, no.

4 Q. Did you not take that position later when there
5 was an intervention filed?

6 A. That's correct.

7 Q. We call that the "Gillespie intervention."

8 A. Got it.

9 Q. And I believe that the Gillespie intervention
10 was dealt with through a motion for summary judgment,
11 the basic point of which was, they weren't my clients,
12 so they can't complain about my legal services.

13 A. Correct.

14 Q. And that was upheld on appeal?

15 A. Correct.

16 Q. And I believe the Gillespie opinion is attached
17 as an exhibit here.

18 A. Correct. I think it is an exhibit.

19 MR. DARNELL: The last exhibit.

20 A. 33.

21 Q. (BY MR. HAYES) For the record, the Gillespie
22 opinion is Number 33.

23 Now, I take it that your position
24 consistently has been that, in regards to the
25 intervention, the persons who were the Gillespie

1 plaintiffs in the intervention had no standing to
2 complain about your legal services, topside or bottom,
3 because they weren't your clients?

4 A. Correct.

5 Q. It would be your position here today that the
6 appellate court agreed with you?

7 A. The appellate court found that there was no
8 attorney-client relationship.

9 Q. This may not take as long as we thought.

10 Now, I need to discuss with you -- I need
11 to discuss with you the insurance policy involved in
12 this matter, and I don't think -- I don't think that the
13 policy has been marked. Let me get a copy.

14 MR. DARNELL: It has not.

15 MR. HAYES: I'm going to suggest that this
16 is -- do we have a paper clip here? I'm going to
17 suggest this is the policy. You and I can hash that out
18 later. But I'm going to give him the dec sheets too.

19 (Exhibit marked, 37)

20 Q. (BY MR. HAYES) I'm going to hand you what the
21 court reporter is going to mark as a packet. That
22 packet, or Exhibit Number 37, is going to consist of
23 what I will call two dec sheets, or renewal
24 certificates, and an underlying policy issued by Home
25 Insurance, Professional Liability Insurance Policy,

1 slash, Lawyers.

2 I'd like you to look at that and see if
3 that appears to be a reasonable attempt to provide you
4 with the insurance policy involved in this matter,
5 meaning your dispute between yourself and the Home
6 Insurance Company.

7 A. It appears to be.

8 MR. DARNELL: Let's look through the pages.

9 MR. HAYES: I will state on the record, as
10 an officer of the court, this is my best attempt to give
11 him the insurance policy, but I also can tell you that
12 I'm not -- you and I will need to -- why don't we agree,
13 on the record, that we, within a very reasonable period
14 of time, will satisfy ourselves that we have the proper
15 policy.

16 Q. (BY MR. HAYES) You are looking at something,
17 Mr. Scherr, and I'm not trying to invade your mental
18 processes, but is there something that you see there
19 that concerns you that suggests maybe that it is not the
20 policy in question?

21 A. I'm just reading.

22 Q. Okay.

23 MR. HAYES: Can we go off the record for a
24 second?

25 (Discussion, off the record)

1 Q. (BY MR. HAYES) Mr. Scherr, your lawyer and I
2 have recognized that we are going to, between the two of
3 us, satisfy ourselves that we have one good copy of the
4 insurance policy involved. I will purport on the record
5 to say that the document that is in Exhibit Number 37,
6 you have two dec sheets, which are renewal notices, and
7 then you have a nine-page document that ends in a 5,
8 dash, 86, and I'm going to suggest to you that is the
9 insurance policy we received from you in response to
10 your request for production responses -- or our request
11 for production responses.

12 Q. Does this appear to be the insurance policy
13 that governed your relationship with the Home Insurance
14 Company during the time that you were involved in the
15 prosecution of the underlying chiropractic class action
16 lawsuit?

17 A. I believe so.

18 Q. Okay. Now, when you got that policy, did
19 that -- did you ever get that policy personally?

20 A. I believe so.

21 Q. Did you read it?

22 A. Probably not.

23 Q. Okay.

24 A. When I got it, I don't know that I went through
25 the whole policy.

1 Q. What was the purpose of that policy when you
2 purchased it?

3 A. To provide coverage for malpractice.

4 Q. What do you mean by "malpractice," in your
5 personal opinion?

6 A. Any acts or omissions taken by myself or my law
7 firm, the employees working with me, related to or
8 arising out of the practice of law, and it protects us
9 from claims of our clients, mistakes, errors, omissions,
10 breach of fiduciary duty, mistakes that occur.

11 Q. Now, did you read the exclusions portion of
12 that particular policy?

13 A. At what point in time?

14 Q. Ever.

15 A. I have.

16 Q. Would you look at that exclusions portion of
17 the policy, please?

18 A. Yes, sir.

19 Can we go off the record for a second?

20 Q. Sure.

21 (Discussion off the record)

22 A. Okay. I'm looking.

23 Q. (BY MR. HAYES) Mr. Scherr, on what page is the
24 exclusions part of the policy?

25 A. 5 of 9.

1 Q. 5 of 9, Section C?

2 A. Yes, sir.

3 Q. In your reading of that, when is the first time
4 you read the exclusion section of this policy, to the
5 best of your knowledge?

6 A. I don't remember at this time.

7 Q. Okay. Is there a deductible associated with
8 this policy?

9 A. Yes, sir.

10 Q. What is the deductible?

11 A. I think it is 5,000. 5,000.

12 Q. 5,000 per policy, period?

13 A. Per claim.

14 Q. Per claim.

15 What does that mean, as you understand it?

16 A. That for each claim arising under the terms of
17 the policy, that the insured pays 5,000.

18 Q. The first 5,000?

19 A. Yes, sir. First 5-, whenever demand is made on
20 the insured to pay 5,000.

21 Q. Let me ask it this way: Do you know whether or
22 not the limits of this policy are burdened by costs of
23 defense?

24 A. Yes.

25 Q. Let's assume that someone files a claim under

1 this policy against the policyholder. The insurance
2 company assigns the matter to a lawyer, and the lawyer
3 sends a bill for 5,000 to the insurance company. Who
4 is, as you understand the policy, obligated to pay that
5 first bill from the lawyer, if any in the case?

6 A. Just a moment, please. May I go off the
7 record, please?

8 Q. For what purpose? Do you want to talk to your
9 lawyer?

10 A. No. Are you asking me if the policy provides
11 that the first 5- -- the legal fees come off the side of
12 the --

13 Q. Yes, sir.

14 A. -- the claims portion.

15 Q. Would you look at page 6, Limits of
16 Liability/Aggregate, Deductible, III.

17 A. Okay. It is right here.

18 Q. I believe the literal reading of that would
19 indicate that the deductible --

20 A. I was on another issue. I was on the issue of
21 whether attorney's fees come out of the claims portion.

22 Q. Well, is it your suggestion that there is any
23 question but that attorney's fees are countered against
24 the limits of the policy?

25 A. I answered before that I had an opinion on

1 that. And, in looking at this, I don't see a specific
2 provision that says attorney's fees come out of the per
3 claim limit. That's what I was asking you, if you could
4 please point me to that paragraph.

5 Q. Okay. I will, if you will just hang on for
6 just a second.

7 If you would look at Section E, Limits of
8 Liability: The liability of the company for each claim
9 first made against the insured and reported to the
10 company during the policy period, including the optional
11 reporting period, if such is purchased, shall not exceed
12 the amount stated in the declaration for each claim and
13 shall include all claim expenses.

14 MR. DARNELL: "Claim expenses" is defined
15 on the next page just above Claims, for some reason.

16 Q. (BY MR. HAYES) "Fees charged by any lawyer
17 designated by the company."

18 A. Okay.

19 Q. "All other fees, costs and expenses --"

20 A. Thank you. That clears up my question.

21 Q. My question to you is, the example that I gave
22 is that an attorney is, someone makes a claim against a
23 policyholder. The policyholder turns it over to the
24 Home Insurance Company. The Home Insurance Company
25 hires a lawyer. The lawyer does what the lawyer does

1 and sends a bill for 5,000.

2 Is there any question in your mind that the
3 first \$5,000 bill would represent the deductible and be
4 responsible to the policyholder, under the policy?

5 A. Yes, sir. That is one way it can be handled.

6 Another way that it can be handled is a
7 lawyer who is handling the claim bills the insured
8 directly and the money is paid directly.

9 Another way is that there may be legal fees
10 or expenses, claim defenses that are paid prior to the
11 law firm being retained by an insurance company that are
12 incurred.

13 But that is one way that it is definitely
14 handled.

15 MR. DARNELL: Just for purposes of the
16 record, just so we don't interrupt this, as you are
17 going through these questions, can I just have a running
18 objection that we are really doing legal opinions?

19 MR. HAYES: Sure. To the extent that -- I
20 mean, I'm just going to be candid on the record with
21 both of you. My point is, I don't think that it
22 requires a lawyer to read that policy, and I'm asking
23 him here, as a fact witness, the same as I would do if
24 he were a guy sitting here with a Home policy. I'm not
25 asking for opinions as a lawyer.

1 It is my position that this policy is --
2 how would we say? -- clear and unambiguous and subject
3 to being read by the average individual. And that's the
4 predicate upon which I'm asking you these questions.
5 And I will join you in an objection if I'm calling for a
6 legal conclusion.

7 If he, at any time, feels that, you know,
8 "I believe that a lawyer is going to have to answer that
9 question, that is just not something that I think can be
10 read in the policy and understood in the policy, you've
11 got to be an insurance lawyer to understand that," I'm
12 going to invite Mr. Scherr to say that on the record,
13 and then I will say, "I will move on."

14 Do we understand each other clearly?

15 MR. DARNELL: Uh-huh.

16 MR. HAYES: I appreciate your distinction
17 there.

18 A. There may have been some answers I gave
19 previously, counsel, that would have been legal opinions
20 in my interpretation of years of handling insurance
21 claims on behalf of plaintiffs.

22 Q. (BY MR. HAYES) I will give you an opportunity,
23 at this point, Mr. Scherr, that if you answered any
24 questions about how you looked at your policy, and you
25 think that any of the answers that you gave were answers

1 that required an insurance lawyer to give, and that that
2 is because the policy is sufficiently complex, that the
3 terms are sufficiently legalistic or confusing that they
4 can't be understood by the average individual that would
5 be able to read an insurance policy, I will invite you,
6 at this point, to stake out your ground, and we'll get
7 it staked out and move on.

8 A. It would be hard for me to do that, because you
9 have covered some territory already. I would propose
10 that we move forward. And hereafter, I -- if I think
11 there is a legal -- because I can't remember all the
12 questions that you --

13 Q. I will ask it simple for you. I will ask the
14 same questions again very quickly.

15 Number one, you have indicated that you
16 received the policy; is that correct?

17 A. Yes, sir.

18 Q. And you -- I'm going to say to you what kind of
19 insurance policy did you buy, Mr. Scherr, when you
20 bought this policy? What were you intending to do?

21 A. You are asking for a legal opinion, or are you
22 asking me for what I wanted as a person buying a policy
23 of insurance?

24 Q. I'm asking you for -- I mean, I'm asking you,
25 what did you think that you paid your money for? What

1 did you buy?

2 You went to a broker. You told him, "I
3 want malpractice coverage." I mean, I would assume your
4 answer is, "If I was negligent, as a lawyer, I wanted a
5 policy to cover me." Is that what you bought a policy
6 to cover for?

7 A. No. I bought a policy of insurance, from my
8 standpoint, in layman's terms, to provide coverage for
9 me, my employees, or people working under me or at my
10 direction to provide -- to pay for the defense of and
11 pay any judgment or settlement that may be rendered
12 against us for any acts or omissions involved in the
13 practice of law.

14 And that would have been whether it be
15 negligence -- now we are getting into legal --
16 negligence, breach of fiduciary duties, whatever the
17 cause of actions that may be legally brought against
18 attorneys or legal professionals for representation of
19 clients.

20 Q. Well, let me ask this question: What if
21 someone came to your office as a client, and, during the
22 time that individual was in your office as a client, you
23 got in an altercation, and you struck that individual,
24 and they filed a claim against you for battery? Did you
25 believe that would be covered by this policy, as a

1 layperson?

2 A. That is a legal opinion that you are asking
3 for.

4 Q. No. I'm asking whether or not you thought that
5 when you bought this policy, you were buying a policy
6 that would cover you for intentional torts. That's my
7 point.

8 If the answer is yes, that's fine. If the
9 answer is no, that's fine. I don't think that takes
10 someone who is an insurance lawyer to answer.

11 A. Well, you are asking for a legal opinion. I
12 think, if a client comes into your office to discuss
13 with you legal matters, that client beats you up --

14 Q. That wasn't my question.

15 A. -- and you respond to that client doing so in
16 defense of yourself bodily, that emanated out of the
17 practice of law, I don't know whether that would be
18 covered or not. I have seen attorneys that have gotten
19 shot and killed in divorce matters. It has been -- it's
20 a real tragedy.

21 I can't answer -- I don't know. That is
22 pretty complicated legal stuff to me. I don't know how
23 far it goes.

24 MR. HAYES: I'm going to object to that as
25 nonresponsive.

1 Q. (BY MR. HAYES) Would you please not rephrase
2 my question. Listen to my question. If you don't
3 understand it, tell me, and I'll rephrase it.

4 Here is my question. Someone comes into
5 your office. He is your client. You two have a verbal
6 disagreement. And you, not to defend yourself but
7 because you just are irritated, poke him in the nose.

8 Okay. Now, I want to know whether or not
9 it is your testimony here today, as a person who bought
10 this policy, that you thought that conduct ought to be
11 covered by your policy? And the facts are just that
12 stark.

13 A. I think you are asking for a legal opinion on
14 that. Is that what you are asking me for?

15 Q. No. I'm asking you as an individual -- you are
16 a person who can read and write the English language.
17 You have a policy in front of you. If you want to tell
18 me that you are incapable, as you sit here today, in
19 explaining -- in answering that question without going
20 into some sophisticated insurance law concept, then that
21 is fine. Then I would like to hear that answer, and we
22 will move on.

23 If you are going to tell me, "Mr. Hayes,
24 that is pretty plain, that's pretty simple, that's kind
25 of a stupid question, of course that is not covered.

1 That is an intentional tort. I'm poking someone in the
2 nose for no reason except I got irritated, and there is
3 no way that anyone would suggest that policy covers
4 that."

5 But if that is not your opinion, then fine.

6 MR. DARNELL: Object to form and object to
7 sidebar.

8 The problem we are running into here is, we
9 are making a fine distinction between personal and
10 legal. And the only people that buy legal malpractice
11 policies are lawyers, and lawyers cease being people
12 about the second week of law school.

13 So we have a running objection on that.
14 You have given me that.

15 I would say, answer it as best you can
16 without trying to make a legal distinction.

17 MR. HAYES: I want to be very clear -- just
18 a second. I want to be very clear on the record just so
19 we have no argument about this later.

20 Just -- well, lawyers buy insurance just
21 like anybody else. And you and I recognize that
22 sometimes lawyers get in disagreements with their
23 insurance companies about the policies, and the
24 insurance company and the lawyer both go to get an
25 expert to argue it out.

1 I'm not at that level. Don't want to go
2 there. He has not been listed or designated as an
3 insurance specialist, insurance lawyer expert.
4 Although, if he has sued an insurance company on behalf
5 of a plaintiff at some time, he probably has the
6 capacity to do that, but it is not a hat he is wearing
7 here today.

8 I'm asking, as a consumer of an insurance
9 policy, whether or not that policy, when he purchased
10 it, was what he considered to be a malpractice --
11 "malpractice" is usually defined as negligence policy.

12 And because there is an issue about things
13 that can get thrown in to a multifactorial dispute
14 between a lawyer and his client, you know, I want to
15 make sure that we are at least -- I'm getting two
16 extremes of the pole.

17 I think you will agree, yes, negligence
18 would be covered. I'm saying, fine, but I want to know
19 whether or not an intentional tort, as stark as I have
20 come up with, was it your expectation, as a consumer of
21 that policy, that that would be covered?

22 He is going to do one or two things. He is
23 going to say "yes" or "no," or he is going to say, "That
24 is too tough a question for me to answer. I don't think
25 that can get answered, because I don't think the policy

1 is clear and unambiguous at that point, and I think it's
2 going to take an insurance specialist." If he takes a
3 third option -- I don't care the answer. I want to know
4 his mindset.

5 I'm going to step back now, and I'm going
6 to ask the same question.

7 Q. (BY MR. HAYES) Do you feel, Mr. Scherr, that
8 if someone is negligent, that is covered under this
9 policy; that the failure to do what an ordinary person
10 in the same or similar circumstances, given the level of
11 legal expertise that person had in the practice of law,
12 is it your feeling that that is covered by the policy?

13 A. It is supposed to be, yes, sir.

14 Q. Okay. My next question to you is, is it your
15 opinion that this policy would cover an intentional tort
16 in which you, not in self-defense, punched one of your
17 clients in the nose because you became angry at that
18 client?

19 A. Is there a defense raised that it was done
20 negligently by the person who did the punching?

21 Q. No. You didn't just flail your arm out.

22 A. And the person just admits that he did it
23 intentionally.

24 Q. You stood up and sucker punched him.

25 A. No.

1 Q. I'm saying that is the facts of the situation.
2 You stood up at your desk and clobbered him because you
3 are mad.

4 A. Here is the problem that I have, because I have
5 a personal knowledge of a malpractice coverage carrier
6 providing a defense to an attorney locally who
7 apparently did that to somebody, and provided a defense
8 under the terms of malpractice coverage.

9 Q. But that is a different policy. You can't tell
10 me that that is this policy.

11 I'm asking you to look at this policy -- I
12 don't care about anybody else, any other policies. I
13 don't care about adjustment issues. Adjusters aside.
14 I'm talking about the literal reading of that policy.

15 Does it cover a person standing up in his
16 office and punching his client in the nose because he
17 gets irritated?

18 A. Under Section B, Coverage of Professional
19 Liability and Claims Made Clause, it says: The
20 insurance company is to pay on behalf of the insured all
21 sums in excess of the deductible amount stated in the
22 declaration which the insured shall become legally
23 obligated to pay as damages as a result of claims first
24 made against the insured during the policy period and
25 reported to the company during the policy period caused

1 by any act, error or omission for which the insured is
2 legally responsible, and arising out of the rendering or
3 failure to render professional services for others in
4 the insured's capacity as a notary and/or lawyer --
5 notary public or lawyer.

6 Exclusion provision says that: This policy
7 does not apply to any judgment or final adjudication
8 based upon, arising out of any dishonest, deliberately
9 fraudulent, criminal, maliciously or deliberately
10 wrongful acts or omissions committed by the insured.

11 To respond to your question, if there is an
12 act by the insured that arises -- that arose out of the
13 rendering or failure to render professional legal
14 services, until there is a final adjudication or
15 judgment based upon arising out of dishonest,
16 deliberately fraudulent, criminal, maliciously or
17 deliberately wrongful acts or omissions committed by the
18 insured, until that is determined, there may be
19 coverage.

20 So my answer to you is, that is the best I
21 can say it to you. It depends what the defense is.

22 Q. I'll stay with you. I'll accept that answer.

23 My next question is, is there a duty to
24 defend a lawsuit arising out of the very stark facts
25 that I gave you, which says, "I went to my lawyer's

1 office, he stood up and punched me in the nose, and I am
2 suing him for an intentional tort, battery." If that
3 lawsuit -- the pleading in that lawsuit were received by
4 you --

5 A. As a lawyer.

6 Q. -- through the constable -- no, through the
7 constable. You did it. You punched him in the nose --
8 do you have any expectation, under this policy, that
9 there is a duty on behalf of Home Insurance to defend
10 that particular claim?

11 A. First off, I'm a super pacifist.

12 Q. Mr. Scherr, I'm so proud of you. Stay with me.
13 Stay with me, Mr. Scherr.

14 A. If it is the defense of the case that it was
15 not intentional, dishonest, deliberately fraudulent,
16 criminal, malicious, or deliberately wrongful act or
17 omission committed by the insured and the insured makes
18 a request on his carrier to provide the defense, there
19 may be coverage under the terms of the policy.

20 MR. HAYES: Object. Nonresponsive.

21 Q. (BY MR. HAYES) I didn't ask you if there was
22 coverage. Let me ask you if there was a duty to defend,
23 which --

24 A. If the insured claims a defense that it was
25 arising out of the practice of law in performance of

1 services for the client and there was a defense raised
2 by the insured that it was not an intentional, criminal,
3 malicious or deliberately wrongful act, there would be a
4 duty to defend, if that is the position.

5 Q. That is your best answer to my question
6 containing the following facts: A person comes into
7 your office. He is your client. You became angry at
8 him. You stood up from your desk, and in a
9 non-negligent but intentional fashion, you punched him
10 in the nose.

11 He immediately walked out. Walked across
12 the street to another lawyer's office, told the lawyer
13 what happened. The lawyer drafted a pleading that said,
14 "Mr. Scherr intentionally struck my client for which we
15 seek monetary damages." That is taken and filed and a
16 constable takes that piece of paper over to your office,
17 serves you with it.

18 It is your suggestion to me, at this point,
19 that you would expect the insurance company to defend
20 that particular pleading -- to defend you under that
21 particular pleading. Is that what you are telling me?

22 A. I think I've already answered that.

23 Q. I don't, and I want to know right now if that
24 is what you are telling me. I disagree with you. I
25 think you have done the best you can to worm around it.