(Beginning at 1:06 p.m. October 12, 2005, the following proceedings continued OUTSIDE THE PRESENCE of the jury.)

THE COURT: Well, I hate to takes things up twice, but I'm going to take up the matter of these subpoenas, TR and his father, because Mr. Ariagno is here. I don't know that I can rule on these right now because, frankly, I'm not sure what the law is on these subpoenas. With regard to the father, my understanding is that the Government want the father to testify.

MS. TREADWAY: Yes, Judge, and I was just talking to Mr. Ariagno. It appears that he is able to testify. He's not able to travel. And if we can succeed in getting the video hook up, he is willing to do it that way.

THE COURT: Do you object to that?

MR. ARIAGNO: No, Your Honor. Actually, with regards to the motion to quash as to Bertram, there are actually two issues. The defense had subpoenaed him as guardian. The prosecution subpoenaed him --

THE COURT: But the defense doesn't want him any more.

MR. ARIAGNO: That's what I've understood is they don't have an objection to that. And we're making arrangements, apparently, for him to testify from Manhattan. His doctors have no problem with him testifying. It's just

the traveling they have a problem with. And the family counsel, John Conda, will be present at that time period with him in Manhattan.

THE COURT: All right. Well, that takes care of that one. And I told counsel before that we've done those video hook ups before. You can talk to Carolyn about how it's done. I don't know how it's done. But that doesn't resolve the issue regarding the son, and my understanding is that it's the Defendants who have subpoenaed the son. Is that correct?

MR. JOSEPH: That is correct, Your Honor. That's my subpoena.

MR. HANEY: That's correct.

THE COURT: All right. Well, here's my problem. We have affidavits regarding the son's condition, or, well, we don't have. We have a doctor's letter. We have a licensed mental health practitioner's letter. We have a licensed psychologist's letter. And a mental health practitioner's letter. All with respect to this man's condition. They all one way or another express that it would be detrimental for him to appear to testify. Now, my initial concern is whether letters are sufficient; and if letters are not sufficient, are affidavits sufficient. And if affidavits aren't sufficient, then are depositions enough or would these individuals, that is, the authors of these letters, have to come and testify personally. Not as to his competence, competency. I see this

as different. But rather as to the effect of having him testify on his health.

MR. ARIAGNO: Your Honor, as I -- certainly we can have those letters put in affidavit format. We would be happy to do that.

THE COURT: I figured.

MR. ARIAGNO: And as I understand it, one or more of those doctors are available for live testimony if you want to have a hearing on it or if the defense desires to hear from them personally. I think we can get them down here for it.

THE COURT: We wouldn't have to get them down here. We can do it over the telephone. I don't want to have to have them come down here.

MR. ARIAGNO: We would certainly be glad to make those arrangements. I don't have any feeling that the doctors are reluctant or hesitant to do so.

THE COURT: Well, accepting as true, however, what's in the letters with respect to this individual's -- the effects that testimony will have on this individual, not whether he's competent, but the effects it will have, what's the position of the Defendants with respect to that issue? Mr. Haney?

MR. HANEY: Your Honor, if I could briefly give the Court some background and then respond to the Court directly. We have not had any access to TR. We've attempted to

interview him through his guardians. His guardian declined. So we have no interviews of him. We have no medical condition of him, current medical reports, and he has declined to be interviewed.

THE COURT: Well, actually you haven't even served him, if I read this correctly.

MR. JOSEPH: I can address that, Your Honor. Because I was in charge of the service. The facility where he stays barred our person from serving him personally.

THE COURT: That's what I figured. All right.

MR. HANEY: So I can't give the Court any first hand information about his condition. We have not sought an independent medical exam. We got this motion just a couple days ago, haven't even had a chance to respond to it yet.

THE COURT: Well, I'm going to give you a chance to respond but I -- if you need one.

MR. HANEY: I can advise the Court, of course, the Government has the burden in this case and we believe that Mr. TR is obviously a material witness. Just based on what the Court's heard thus far --

THE COURT: Well, I'm not sure I agree with that. I haven't heard his name mentioned but very briefly.

MR. HANEY: He attended these group therapy sessions --

THE COURT: So did a lot of other people.

MR. HANEY: -- unclothed. And he was the only one that Dr. Menninger wasn't given the reports for but still the only one that Dr. Menninger opined these people were not able to consent. So it's important to us to find out what Mr. R------ has to say about that area and other areas. I don't want to tell the Court what my strategy is with Mr. R------. We consider him --

THE COURT: No, I'm not asking for that, but what I'm asking is if the guy is going to commit suicide if he is served with a subpoena, is that something you really want?

MR. HANEY: Obviously not, Your Honor.

THE COURT: Didn't think so.

MR. HANEY: Obviously not. And what I'm telling the Court is I can't verify that or I can't confirm it or deny it.

THE COURT: Do you think that the best way then is to have a separate hearing outside the presence of the jury of his medical -- of the doctors and these individuals who are treating him so that you can question them with respect to the consequences of him responding to a subpoena? Because if you're -- the way I see it, Tom, is that if the letters are accepted at face value, the consequences of him having to testify could be disastrous to his well-being, not to his competence, but to his well-being.

MR. HANEY: Your Honor, one of the problems for the Court and counsel, of course, is that Mr. TR is not the only

former resident that we've subpoenaed. There's only been a motion to quash as far as two. But in cases I've been involved in where this issue came up, I can honestly tell the Court I haven't had as many people with that potential problem, and normally the procedure the Court suggested we would accomplish where there was a hearing outside the jury, we would have an opportunity to question these people and request an independent medical or psychiatric exam by an expert selected by the defense also or an independent exam by a court selected individual. That's -- that's time consuming, I know it is, but that's what we're looking at, Your Honor. And when I file a response, that will probably be part of the response I would have. That's generally what my thoughts are now.

THE COURT: When you file a response, I also want you to, to the extent you can, since you have not talked with him, provide me with an offer of proof about what you believe his testimony will be, number one; and number two -- and I think the case that Steve cited --

MR. ARIAGNO: Kretcher (ph) I believe, Your Honor.

THE COURT: Yeah. It's a good starting place. I haven't had a chance to really look at it that carefully. You also need to provide me with some information regarding why this witness is necessary and you can't get the substance of his testimony any other way.

MR. HANEY: We can do that.

THE COURT: Okay. I think that's what we have to do at this point. Monday, can you get that in by Monday?

MR. HANEY: Your Honor, can I have until Tuesday?

THE COURT: Yes, you may. Now --

MR. JOSEPH: Yes, sir.

THE COURT: I take it this procedure is all right with you, Mr. Joseph.

MR. JOSEPH: Yes, Your Honor, it is. It's okay with me. I think it's appropriate to do that. And I would say at a minimum I'd want to examine the doctor, cross-examine the doctor. You know, telephone call would be fine to do that.

THE COURT: Well, Tom, based on the letters, if we ended up taking telephone testimony, who would you want --

MR. HANEY: As far as the -- I would want the -- I think there were three letters that accompanied -- Dr. Mark Wetzel -- wait a minute. I've got the wrong motion. I'm sorry.

MS. TREADWAY: He's Bertram's physician.

MR. HANEY: That's right. I've got the wrong letter. It would be --

MS. TREADWAY: All four letters were identical on both motions.

THE COURT: Yeah. But Wetzel's the guy that talks about the father's inability to travel. We've resolved that.

MR. HANEY: Your Honor, I'm reviewing the letters of Mary Hepburn O'Shea and Joseph Svoboda and Steven Saloyolk. S-A-L-O-Y-O-L-K. But they're the three whose letters are attached.

THE COURT: Wouldn't be necessary to do all three of them? I'm trying to give Steve Ariagno a heads up about it.

MR. HANEY: Those are the only three there. I think they made statements, all three of 'em, that were in support of the motion, so, yes, Your Honor.

THE COURT: Well, here's what I'm going to do. The statements are not that -- they're not that different, and I'll require the Defendants to identify one of those persons to have a hearing about. What's the problem?

MR. JOSEPH: Well, the problem is, Your Honor, in looking at the letters, it's hard to tell, one, who would be qualified to render an opinion other than, obviously, the licensed psychologist would be; and whether that psychologist is the person who's had the most contact or sufficient contact to make the evaluation. It lists him as a supervisor. And in that very letter it says that the community support worker, a Kay -- with a K -- Williams, is the one that's had the most contact with him, that is, with Tom. I mean, I don't know if I can say who would be the one that -- I think that ought to be up to the movant.

THE COURT: Yeah, but I don't want to start down too

many rabbit trails in this case. And while I recognize the importance of letting Defendants have a defense and their witnesses, I can see if we're going to have to take testimony from three medical people about this guy's ability to come in and testify, we'll have to -- that will take half a day at least.

MR. JOSEPH: What I'm thinking, Your Honor, is it's not my motion. If Mr. Ariagno brings the motion, he should identify the person who can support his motion, not me. I don't know who can support it or is most qualified.

THE COURT: Can you do that?

MR. ARIAGNO: Sure, Your Honor. I'll contact these individuals who signed the letters and they'll be able to tell me exactly who they think is the most qualified to provide that testimony. I'm very happy -- they'll know who's had the most contact with TR and who's the most qualified.

THE COURT: Why don't you do that. You contact them and then you can just call the lawyers and tell 'em who that person's going to be. And Mr. Joseph is right, it's your motion, and if that person isn't good enough, then we'll go on to the next step.

MR. ARIAGNO: I have no problem finding out which one, Your Honor.

THE COURT: But I will say this, I'm not going to require the facility where he's housed at this point to allow

him to be served with a subpoena; but -- unless this medical professional can convince me that he cannot testify for health reasons, then I don't think it would be appropriate for that facility to prevent him from being served unless he would willingly come and appear. Now, his father's going to appear by telephone. Right?

MS. TREADWAY: Video.

THE COURT: Video. I mean video. What about him?

MR. JOSEPH: Our position with regard to the video is that's perfectly all right; but as to our subpoena to him, it's a subpoena to him as the guardian. Frankly, I don't even think we need to serve Tom with the subpoena. When you serve the guardian, that has the same effect. It's like with a child. The guardian, natural guardian or court appointed guardian brings the ward. And we're not releasing Mr. R------ --

MR. HANEY: I did it.

MR. JOSEPH: I'm sorry. We're not releasing Bertram from the subpoena. But I understand he's going to make alternative arrangements and not personally have to produce his ward. And that's perfectly all right with us as long as he makes those arrangements.

MR. ARIAGNO: If Your Honor decides not to quash as to TR, they will make arrangements to get him down here. I don't think the facility was trying to circumvent the court

system. I think they were genuinely wanting to see whether he was going to be needed before they allowed --

THE COURT: I wasn't suggesting that.

MR. ARIAGNO: It was before my representation that the subpoena got served so --

THE COURT: I understand.

MR. JOSEPH: Nor am I. I think you know we didn't try to press the issue. Once they said we don't want to have you deliver this, we left it with them and said fine for now.

THE COURT: Well, I suppose that can be explored in any kind of a testimony with a medical treating person whether or not he can travel.

MR. ARIAGNO: And we will give -- depending on what Your Honor's order is, they will make arrangements outside of Bertram's having to do it.

THE COURT: To get him here.

MR. ARIAGNO: Yes. We will make other arrangements rather than Bertram. I think the defense is satisfied with that. We still have our motion with regard to TR, but we will make the arrangements if Your Honor orders it.

THE COURT: Well, I'm not going to decide --

MR. HANEY: Your Honor, if I may make a suggestion. The issue as to Tom R, whether he's going to be available as a witness, probably should be decided before we take the video deposition of his father because it certainly may make some

evidentiary issues if we have a witness who's his son who is not going to be available to testify then it's going to effect how we examine his father and what he may or may not say.

THE COURT: Well, keeping in mind that at least doctors are never available except on their own time, the Defendants have a right to be present for the testimony of the treating professional. The jury doesn't need to be here. I'm just going to arbitrarily set that for 5:15 on October 19. So, Steve, whoever it is that's going to testify has to be available at that time. Any objection to that?

MR. ARIAGNO: No objection by myself, Your Honor. I'm sure we can make those arrangements.

THE COURT: And I appreciate your cooperation on this. All right. If there's nothing else we can do about that, we'll just have to take up Mr. Lowry's motion when he's here. All right. Unless there's something else, let's get the jury and the witness and continue.

MR. ARIAGNO: May I be excused, Your Honor?

THE COURT: Thank you for coming in.

MR. ARIAGNO: Thank you, sir.

(Jury enters the courtroom at 1:35 p.m. and the following proceedings continued.)

THE COURT: Please be seated. You may continue. Yes, sir.

MR. JOSEPH: Thank you, Your Honor.

Q (By Mr. Joseph.) Nancy, on direct examination you told Government's counsel that you told others, members of the church, people at Prairieview and SRS about your confinement in the seclusion room and they didn't believe you. You're aware, aren't you, that SRS in fact conducted an investigation of your allegations?
A Now I am.
Q And you remember a lawsuit arose out of that and you gave a deposition to some attorneys in Colorado in 1992 about your experiences?
A I gave a deposition.
Q Let me show you Defendant's Exhibit LK-6. It's a photocopy --
MS. PARKER: Counsel, please. Can I see it?
MR. JOSEPH: I'm sorry.
Q (By Mr. Joseph.) Let me show you Defendant's Exhibit LK-6. And could you tell me generally if you recognize what that is?
A It's a thank you note.
Q Pardon me.
A It's a thank you note.
MS. PARKER: Judge, I have an objection to this exhibit. The witness testified on direct that she thanked the Defendant Arlan Kaufman after she completed her services with him. This is extrinsic evidence of something she has not denied. Rule 613.

THE COURT: Let me see the letter, or card or whatever it is.

(Off-the-record.)

THE COURT: Rule 613 doesn't apply to this based on my review of the note. And the objection is overruled.

MR. JOSEPH: Thank you, Your Honor.

Q (By Mr. Joseph.) In any event, Nancy, Defendant's Exhibit LK-6 is the thank you note that you wrote to Dr. Kaufman when you terminated your individual therapy with him; isn't that right?

A Yes.

Q Now --

MR. JOSEPH: Your Honor, we'll now formally offer Defendant Exhibit LK-6.

THE COURT: It's received over objection.

Q (By Mr. Joseph.) I understand from your direct testimony, though, Nancy, that you said that you were forced to write that note because the church thought it was something you should do?

A I don't believe I used the word forced.

Q Okay. You wrote the note then why?

A The church thought that I should write him a thank you note.

Q When you say the church, who do you mean?

A Can you repeat the question.

Q When you say the church, who do you mean? The church thought you should write a note is what you said. Is that a person?
A It was Steve and my small group.
Q That would be Steve Schmidt, your pastor?
A Yes.
Q Thought you should write a thank you note to Dr. Kaufman?
A Yes.
Q And you say your small group. What is that?
A That was like three or four other couples that I met with weekly.
Q And you talked to them about your experiences with Dr. Kaufman?
A Yes.
Q And they thought you should write him a thank you note for that?
A Yes.
Q Would it be fair to say that you didn't tell them anything bad happened to you there at Dr. Kaufman's house?
A No.
Q So you told them that bad things happened to you at the Kaufman House and they said you should write a thank you note for that?
A Yes.
Q Is that correct?

A Yes.
Q You told Mr. Haney that you wanted to be a witness. You know, he asked you, you don't really wanna be here. And you said, yes, I do. You want to be here to testify against the Kaufmans?
A I'm wanting to tell my story of what happened to me.
Q Do you think of yourself as part of the prosecution team here?
A I wanted to share what happened to me.
Q Before this trial started, however, I asked to speak with you through your attorney and you didn't wanna share what happened with you to me, did you, or to Mr. Haney?
A I do not remember that.
Q Do you have an attorney who represents you in connection with this matter?
A Yes.
Q His name is Mr. Lowry?
A Yes.
Q Mr. Lowry told us that you didn't want to speak with Mr. Haney or myself. Is that not true?
A I did not want to accept your subpoena.
Q Okay. And you didn't accept it, did you?
A No.
Q When the person came to knock on the door to serve you, you didn't come to the door, did you?

A Nobody came to my door.
Q Did you tell Mr. Lowry that you were not willing to speak with us?
A No, I did not.
Q Can you think of any reason, then, why Mr. Lowry would have told me and Mr. Haney that you declined to speak with us and share your story?
A I am not aware of your conversation with Mr. Lowry. All I know is that I did not want to accept your subpoena.
Q Let me show you Defendant's Exhibit LK-7, Nancy. Would you take a look at that.

MS. PARKER: Counsel, could you please show me the exhibits first.

MR. JOSEPH: I'm sorry. I apologize, Your Honor.

Q (By Mr. Joseph.) I'm going to show you Exhibit LK-7. Do you recognize what that is?
A That's the layout of the house.
Q Of the house on 7th street?
A Yes.
Q And have you seen that before?
A I do not remember.
Q Is there any writing on there that's your writing?
A Yes.
Q Do you recall that -- well, think back to 1992. It was quite a while ago. 13 years ago. When you were deposed by

some other lawyers. Do you recall being shown that diagram and asked questions about it?
A It must have happened then.
Q Okay. In any event, it does have some of your handwriting on it, doesn't it?
A Yes, it does.
Q There are two diagrams on Exhibit LK-7, are there not? The first floor and the second floor of the 7th street house.
A Yes.
Q And is that a, that diagram, an accurate representation of the relationship of the different rooms on the first floor and the second floor of the Kaufman House at 7th street?
A Can you repeat the question.
Q Does that diagram show accurately where the rooms were on the first and second floors of the 7th street house?
A I don't understand the question.
Q Okay. Earlier in your testimony, Nancy, you said that the office was to the right of the front door when you came in the front door of the 7th street house; isn't that right?
A Yes.
Q Is it shown that way on the diagram? With the word storage?
A Yes.
Q Okay. And does that diagram then show generally where the seclusion room was that you've described?

A Yes.
Q And the word bedroom shows in that diagram?
A Yes.
Q Okay. So what I'm asking -- and we'll change the labels here to fit your testimony in just a second -- but what I'm saying here is do those diagrams show where the rooms were in the house?
A Yes.
Q When you were there in 1986 and '87?
A I would have to say no.
Q What's different?
A I don't remember the bathroom on the, on the addition.
Q Okay. But other than that -- it's the same as when you were there?
A I don't remember two separate rooms upstairs. I remember a big room.
Q Okay. Let me do this. Just for future reference. Let me hand you a red pen and -- do you have written on there "my bedroom"?
A Yes.
Q In your handwriting?
A Yes.
Q Would you circle that, please.
(Witness complies with request.)
Q And you've got that in two separate places circled now?

A Yes.
Q And those are bedrooms on the second floor?
A Yes.
Q And you mentioned the office, uhm, where Barb stayed at night. That has the word storage in it, doesn't it?
A Yes.
Q Okay. And then the room right above it on the diagram has the word bedroom in it but that was the, as you recall, the seclusion room?
A Yes.

MR. JOSEPH: Thank you. I have no further questions of this witness, Your Honor.

THE COURT: Brief redirect.

REDIRECT EXAMINATION

BY MS. PARKER:
Q Just a few more questions, Nancy. You were asked on cross-examination whether you had met with Government lawyers prior to your testimony here in this case. Did the Government, did I or Ms. Krigsten ever tell what you to say here?
A No.
Q What was the only thing we told you about your testimony here?
A To tell the truth.
Q And, Nancy, you also were asked on cross-examination

whether you had reviewed documents in connection with your testimony and you said that you had not. Do you remember that you reviewed a deposition transcript?

A Oh, yes, I'm sorry. I forgot.

Q And for the record, that was produced to the Defendants. And you were also asked on cross-examination whether you had a car and whether you were ever physically prevented from leaving the house. Just a couple of questions about that. Did Barbara have a car?

A No.

Q Was Barbara ever allowed to leave the house?

A No.

Q You were also asked about your ultimate decision to leave the Kaufman House and you were asked whether you were, again, physically prevented from doing so. Uhm, did the Defendant Arlan Kaufman ever say anything to you about how -- about, expressing his professional opinion of how you would do outside of the Kaufman House?

A Yes.

Q What did he say to you?

A He said that I should never get married and I should never have children. I couldn't hold down a job. I would burn out the church. I would burn out professional people.

Q You were also asked on cross-examination about your understanding of who made the rules at Kaufman House.

A Yes.
Q Were you ever punished by the Defendant Arlan Kaufman for letting someone into the house?
A Yes.
Q Were you ever punished by the Defendant Arlan Kaufman for leaving the house?
A Yes.
Q You were also asked why or whether you wanted to be a witness in this case and you said that you did. Why do you want to be a witness in this case?
A I want justice to be served.
Q Just for yourself?
A No, for, for Barbara, for sure.
Q And finally, you were also asked about the incident in which you went to the doctor after you put the pins in your vagina why you didn't tell the nurse about it. Prior to that time, had you ever told other people outside the Kaufman House about things that were happening to you in the seclusion room?
A Yes.
Q Had those people believed you?
A No.
Q What did you think would happen if you told the nurse in front of Linda Kaufman?
A I would get in trouble. I didn't know. I didn't know, I mean, Arlan was really mad and I didn't know what was going to

happen to me when I got back.

Q So you were afraid of Arlan Kaufman?

A Yes, I was.

Q Were you afraid of Linda Kaufman?

A Not as much.

MS. PARKER: Nothing further.

THE COURT: Mr. Haney.

RECROSS EXAMINATION

BY MR. HANEY:

Q Over the lunch hour did you have a chance to talk again with the Government lawyers?

A No, I did not.

Q Or anybody else?

A No, I didn't.

Q Ma'am, the Government lawyers, you said they told you that you had to tell the truth. Right?

A I wanted to tell the truth.

Q But they told you that you had to tell the truth. That was the only thing that they told you you had to do?

A Yes.

Q Dr. Kaufman, didn't he tell you that if you came back to Kaufman House for the second time that you would have to be more responsible and you would have to hold down a job; right?

A Yes.

Q And as soon as you accomplished the goals that you set with

Dr. Kaufman, you had a job, you were responsible, you had an apartment, you moved out, didn't you?
A Could you repeat the question.
Q Sure. As soon as you accomplished the goals you told us about earlier, having a job, having an apartment, being responsible, you moved out of Kaufman House?
A Yes.
Q Did Dr. Kaufman ever put in writing to you anywhere that you could never have a job, you couldn't do anything that other people could do? Did he ever write that to you?
A Could you repeat the question.
Q Sure. You've told us -- I'm just trying to make sense of these two things. You've told us that you had a plan that Dr. Kaufman and you worked on about finding a job, being responsible, moving out of the house when you had an apartment. That was what you were trying to do; right? That was the goal?
A Yes.
Q You just told the jury that Dr. Kaufman told you you could never do any of those things. Right?
A Yes.
Q How do you jive those two together?
A He said that when I was in seclusion before I went to Colorado. He stated some of that in that letter that you had on the screen.

Q Well, okay. Where is that letter? Up here.

Since it's a little easier for you to read in front of you, let me put it in front of you. Can you find the part in that letter where Dr. Kaufman told you you could never find a job, you could never be responsible, et cetera?

A In the fifth paragraph he says everything that I have to --

Q Could you read it for us.

A "In my last phone conversation with you, I suggested that you try to identify problems that you are aware of that interfere with normal living. I realize that this might be difficult task to do, but I hope you make some progress. By normal living I mean very basic goals like stable, full time employment, emotional stability for periods that last several months, free from periods of depression and hurting, unstable relationship with others, bouts of crying, significant self-control to avoid acting out when feeling stress or wanting extra attention, the ability to stop yourself from putting objects in your vagina and running to asshole friends for comfort or relationships, staying out all night in an unstable state of mind, freedom from excessive needs for attention and every day living as well, from excessive demands on professional people, support people, friendships; and last but not least, the feeling of being okay, secure in yourself, at peace with the world, confident in your ability to have normal relationships with the kind of people with whom you wish to

identify with."
Q And you interpret that as Dr. Kaufman telling you you could never be able to do any of these things?
A Yes.
Q Okay. Lastly, again going back to the seclusion room. I have just one question. The night that you ran away and Dr. Kaufman found you in the middle of the night. Right?
A Yes.
Q How were you dressed?
A I had regular clothes on.
Q Okay. You'd escaped from the seclusion room that night?
A No, I did not.
Q Where did you -- you escaped from the house or where did you escape from when you ran away?
A It was after group and I ran away from group.
Q So you didn't run away from the seclusion room?
A No.
Q Did you ever tell anybody in the past that you had run away from the seclusion room, you got out?
A I got out to make a phone call one night.
Q And got away again. Is this the second time you escaped?
MS. PARKER: Judge, I'm going to object to this as beyond the scope of redirect.
THE COURT: Sustained.
MR. HANEY: That's all.

THE COURT: Mr. Joseph.

MR. JOSEPH: I have no questions, Your Honor.

THE COURT: All right. Thank you very much. You're excused. Now, before we call the next witness, Ladies and Gentlemen, I want to tell you a little bit about a legal principle. With this witness, and I seem to recall with another and perhaps witnesses who will come in in the future, there will be some questioning about whether a government witness talked with defense counsel or with a defense investigator. You may consider the testimony of a witness in answer to those questions bearing on the witness's credibility. In other words, if the witness is biased or if that indicates bias or what-not; but under the law, no Government witness is required or can be compelled to speak with a defense lawyer or a defense investigator. All right. Who's the next witness?

MS. TREADWAY: Government calls Kathy DeHart.

KATHY DeHART

Having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows on:

DIRECT EXAMINATION

BY MS. TREADWAY:

Q Could you please state your name for the Court?

A My name is Kathleen A DeHart.

Q And where do you currently work?
A I currently work for the Centers for Medicare and Medicaid Services.
Q Is that known by the initials CMS?
A It is, CMS.
Q Was that formerly known as HCFA, H-C-F-A, or the Health Care Financing Administration?
A Yes.
Q What did HCFA and now CMS do?
A HCFA and now CMS is the actual agency of the U.S. Department of Health and Human Services that administers the Medicare program.
Q What do you particularly do for CMS?
A I do a lot of things; but currently I am the Government task force leader for two jurisdictions which includes Iowa, Missouri, Nebraska and Kansas; and Miami, Dade County, and seven southern counties in Florida.
Q Prior to working for HCFA and CMS, where did you work?
A I worked for Blue Cross & Blue Shield of Kansas.
Q And at that time was Blue Cross/Blue Shield of Kansas associated with the Medicare program?
A Yes, they were.
Q How so?
A CMS as an agency -- or HCFA as an agency contracts with insurance companies and other entities to actually process

Medicare claims and do the actual work.

Q How long did you work for Blue Cross/Blue Shield?

A I was with Blue Cross & Blue Shield from 1981 through 1996.

Q So about 15 years?

A Uh-huh. Yes, ma'am.

Q Did Blue Cross/Blue Shield of Kansas have both a Medicare side of its house and a private insurance side of its house?

A Yes, they did.

Q All right. And what side of the house of Blue Cross/Blue Shield did you work for?

A I worked in the Government programs side of the house.

Q And that would have been Medicare?

A That would have been Medicare.

Q What specifically did you do for Medicare over the 15 years that you worked there?

A I started as a claims processor. Worked my way up in customer service as a correspondent, and that entails answering questions from providers and from beneficiaries both on the telephone and in writing. An opening then came up in provider enrollment for supervisor. I applied for that and was selected for the position. And the provider enrollment unit is the actual unit and the folks that do the work to process applications from providers who would like to bill Medicare for services that they provide to people that are Medicare eligible.

Q And then did you work in the fraud and abuse unit?
A I did. Then an opening came available for a manager in the fraud and abuse unit and I applied for that and was selected for that position.
Q After leaving Medicare in 1996 and in your new roles at HCFA and CMS, were you still knowledgable about Blue Cross & Blue Shield and its relationship to the Medicare program?
A Yes, I was. They continued to be a Medicare contractor.
Q For the period of time from January, 1990, through December, 2001, did Blue Cross & Blue Shield of Kansas receive every year in excess of $100,000 from the United States Treasury?
A Yes, they did.
Q And would Blue Cross/Blue Shield of Kansas have received in excess of $100,000 yearly from the United States Treasury to pay Medicare claims?
A Yes.
Q Would that have been pursuant to its contract with HCFA or now CMS?
A Yes, it is.
Q Ms. DeHart, given your employment history, do you have a working knowledge of Medicare's rules and regulations?
A I do.
Q When a provider like the Defendant Arlan Kaufman submits a claim to Medicare for payment of services rendered, does the

submission of that claim mean that the provider is making certain representations to Medicare?
A Yes, it does.
Q What are some of the representations a provider makes by submitting a claim to Medicare?
A When a provider submits a claim to Medicare, some of the representations that he is making is, first of all, he's licensed, he or she; that the service that he's billing the Medicare program for was actually provided; that documentation exists to support that service; that the service is -- was actually provided. I think I said that. And that if documentation needs to be requested, he can provide that documentation.
Q Does the provider also represent to Medicare by submitting a claim for payment that the services that were rendered were medically necessary?
A Medically necessary and reasonable.
Q Can a provider use another person to actually prepare and send to Medicare the claim form?
A Yes.
Q What are those people typically called?
A Billers.
Q In this case the evidence has been that the Defendant Linda Kaufman actually prepared the HCFA 1500 claim forms. As the biller, did Defendant Linda Kaufman have responsibilities with

regards to Medicare?
A Yes.
Q And what would her responsibilities have been to Medicare?
MR. JOSEPH: Your Honor, I'll object to lack of foundation as to the source of these responsibilities.
THE COURT: Overruled.
Q (By Ms. Treadway.) You may answer.
A Okay. The biller's responsibilities are basically pretty much the same as the provider's responsibilities. The biller, first of all, needs to make sure that the claim is accurate; that the service was provided; that the service was a legitimate service; and that documentation exists to support the actual claim that they're billing.
Q Does Medicare have authority to audit claims submitted to it?
A Yes, we do.
Q And during the years 1990 through 2001, did Blue Cross/Blue Shield of Kansas perform those audit functions?
A Yes, they did.
Q Have you been involved in such audits over your career?
A Yes, I have.
Q Describe to the jury briefly what an audit can entail?
A An audit can entail several things. A post payment audit -- and when I say post payment, I mean after the claim has actually been paid, can be -- can take the shape of

requesting medical records and documentation to support the claims that were billed. Can take the shape of an on-site visit to a provider's office to pick up medical records and documentation. Uhm, we also do prepayment audits. On a prepayment audit, the provider is usually notified ahead of time that every claim they submit or certain claims they submit must contain the supporting documentation and medical records so that a determination can be made whether or not the claim should be paid.

Q Generally speaking, in the health care industry, what is the rule about documentation?

A If it's not documented, it didn't happen.

Q If during a Medicare audit a provider cannot or will not provide documentation that adequately supports a claim, what are Medicare's options at that point?

A If it's a post payment audit where we've already generated the payment, the Medicare organization goes in and calculates an overpayment and requests that money back. If it's a prepayment audit and the supplier or practitioner or provider doesn't send in the documentation, then the claim is denied. It's not paid.

Q So bottom line, if a claim is not documented, will Medicare pay for it or should Medicare have paid for it?

A No.

Q Do you know an individual by the name of Kathy Smith?

A I do.
Q And did you previously work with her at Blue Cross/Blue Shield?
A I did.
Q And when you moved to HCFA which then became CMS, did you continue to have contact with her?
A Yes, I did.
Q And do you know what she did at Blue Cross/Blue Shield?
A Actually I do. She worked for me in the fraud control unit and the fraud and abuse unit. And I believe prior to that, she worked in quality assurance unit.
Q What's quality assurance?
A Quality assurance is an internal procedure to the Medicare contractor whereby they randomly select claims to determine whether or not payments are being made appropriately. It's an internal check of the provider.
Q Does Medicare publish its rules and regulations for providers like the Defendant Arlan Kaufman and billers like the Defendant Linda Kaufman?
A Yes, they do.
Q Does Medicare publish the rules and regulations in various formats?
A Yes, they do.
Q Is one of those formats a provider manual?
A Yes, it is.

Q Could you explain to the jury what a provider manual is?
A A provider manual is basically a general billing manual. It gives situations where services are covered, non-covered, how to file a claim, modifiers to procedure codes. It's just basically a general instruction manual.
Q And how would people like the Defendants have obtained a provider manual from Medicare?
A At that point in time, the Medicare manual is generated automatically. Once a provider enrolls in the Medicare program and receives a billing number, it's mailed out to the address via the postal service that the provider indicates as a mailing address on their application.
Q Would Medicare update provider manuals occasionally?
A Yes.
Q And how would a provider like the Defendant Arlan Kaufman and a biller like Linda Kaufman have obtained updates up through the year 2001?
A Through the mail.
Q Let me now hand you some exhibits that we'll be discussing. I'd first like you to take a look at Exhibits 42 through 42-B. Do you recognize those?
A Yes, I do.
Q Are those excerpts from various Medicare provider manuals?
A Yes, they are.
Q And are they particular excerpts from the manual?

A Yes, they are.
Q And what excerpts are they?
A They're from the psychiatric services section.
Q Did this part of the manual give providers like the Defendant Arlan Kaufman and billers like the Defendant Linda Kaufman information about what psychotherapy services were and were not billable to Medicare?
A Yes.
Q Is the Medicare provider manual a compilation generally used and relied upon by providers and billers submitting claims to the Medicare program?
A Yes.

MS. TREADWAY: Government offers Exhibits 42, 42-A and 42-B under 803(17) and pursuant to the parties' stipulations.

MR. HANEY: The excerpts, we have no objection.

MR. JOSEPH: We have no objection either, Your Honor.

THE COURT: They are each received.

Q (By Ms. Treadway.) Let's first take a look at Exhibit 42.
A Okay.
Q What year would this particular manual have been published?
A This would have been published in August of 1992.
Q And how do you know this?
A Because it's printed on the bottom of the page.

Q All right. And is that the second page there?
A Yes.
Q All right. On Page 286 of this excerpt --
A Yes.
Q -- does the provider manual indicate whether clinical social workers can bill Medicare for psychotherapy services?
A Yes, it does.
Q What does it state?
A It states that the services of psychologists in independent practice and clinical social workers are also covered by Part B for these diagnoses, but only when the services are provided on an outpatient basis. Medicare --
Q So does this mean that if a licensed clinical social worker is providing psychotherapy on an outpatient basis that they can bill Medicare for it?
A Yes.
Q All right. Now, does the manual indicate what the reimbursement rate for outpatient psychiatric services is?
A 62.5% of the lesser of the actual charge or the fee schedule amount.
Q All right. Now we're getting into some technical detail here. Let's talk about the difference between the actual charge and the fee schedule amount. What's the actual charge?
A The actual charge is the charge that's submitted on the claim form.

Q All right. And what is the fee schedule amount?
A The fee schedule amount is what Medicare allows for that particular procedure.
Q Now, is there a yearly deductible that a Medicare beneficiary is responsible for?
A Yes, there is.
Q All right. Now let's talk about percentages of payment and who's responsible. And, if we can, let's keep track of this on our easel. If the actual charge on the claim form is, say, $200, but Medicare's fee only allows for $100, how much is the patient responsible for and of which amount?
A The patient is responsible for 20% of the allowed amount.
Q And so in our example, would that be $20?
A Yes.
Q And Medicare is typically going to pay the rest of that $100, or $80?
A Yes.
Q But when we're talking about psychiatric services, we have to multiply again, don't we?
A We're further reduced.
Q And 62.5% of $80 is $50, isn't it?
A Roughly $50.
Q All right. So if a provider submits a charge for $200 but Medicare only allows $100, eventually that provider can be paid $20 from the patient?

A Yes. Or their supplemental insurance if they have it.
Q And $50 from Medicare?
A Yes.
Q If it's for a psychotherapy service?
A Yes.
Q Now, does this manual also indicate what psychiatric diagnoses Medicare will cover?
A Medicare will cover diagnoses represented by ICD-9. And ICD-9 is just basically a diagnosis coding, manual system codes 290 through 319 for mental disorders. Did you want me to go on?
Q No, that's fine. Now let's look at Page 293 of this manual.
A Okay.
Q All right. Does the manual indicate what services Medicare will not pay for?
A Yes, it does.
Q Now, moving to the next page, Page 294, I would like you to review with the jury what Medicare will not pay for under subparagraphs S, T and U?
A Medicare will not pay for case management, code 90899, part of treatment designed to maximize the client's utilization of services provided by the community. They will not pay for daily living and self-care skills therapy, those services that are designed to teach the client to care for himself or

herself independently in the community. And will not pay for activity therapy, which are activities designed to reintegrate the client into the community, for example, resocialization groups.

Q Now, turning to Page 306 of this excerpt, does the manual tell us when clinical social workers' services began to be covered by Medicare?

A Yes, it does.

Q And what was that date?

A Effective July 1st, 1990.

Q So July 1st, 1990, forward, Medicare has paid for licensed clinical social workers performing services?

A Yes.

Q Now, on Page 308 does the manual go on to instruct how a clinical social worker must submit information on a claim form?

A Yes, it does.

Q And let's read that for the jury.

A Okay. "Services provided by clinical social workers should be submitted using the following CPT codes." And CPT stands for Current Procedural Terminology. But it also says the payment for all covered services is based on the lower of the actual --

Q Wait a minute. Wait a minute. Let's read the line right under the numbers.

A Gotcha. "Claims for all services provided by clinical social worker must include the appropriate CPT code -- " which is the procedure code " -- with the modifier AJ."
Q Now, what is the significance of that modifier AJ?
A The modifier AJ indicates that a clinical social worker performed the service.
Q And why is that gonna be important to Medicare? Is that the next part that you were getting ready to read for us?
A Yes, it is.
Q And what's the importance of that AJ modifier when it hits a Medicare person?
A The importance of the AJ modifier when it hits the Medicare claims processing system is that it indicates that it was performed by a clinical social worker; and the fee schedule for clinical social worker services is set at 75%.
Q So returning to our chart here. When a licensed clinical social worker submits this claim, he's not going to get the $50 from Medicare, is he?
A No, he's not.
Q He's only going to get 75%?
A That's right.
Q Now let's look at Government Exhibit 42-A. And I want to go immediately to Page 273 which discusses the non-covered services.
A Okay.

Q Once again, do we have a listing of what Medicare will not pay for in terms of psychiatric services?
A Yes.
Q Now, when was this particular portion of the manual effective?
A January of 1996.
Q And that's, again, on the bottom of this page?
A That's right.
Q And we see some shading on this page. What does that shading signify?
A That indicates that those were the revisions to that manual page.
Q As of January 1996?
A Yes.
Q Now, moving to the next page, Page 274, do we see the same exclusions that we saw before, the case management, the daily living and the activity therapy?
A Yes.
Q They have different sub numbers. T-U-V now instead of S-T-U. And do we have a new one?
A Yes, we do.
Q W?
A W.
Q What is the new non-covered service as of January 1996?
A Psychosocial therapy.

Q When Medicare decides not to pay for something, does that mean Medicare says it's a bad service or an unnecessary service or an illegitimate service?
A Not at all. Medicare -- it may very well be a service, a useful service, but Medicare makes the decision not to cover that service.
Q So just because a service is rendered and just because it's useful doesn't mean Medicare is gonna pay for it?
A That's right.
Q As an example, until very recently did Medicare pay for prescription drugs?
A No, they did not.
Q Now let's look at Exhibit 42-B. This is yet another version of the manual?
A Yes, it is.
Q What is the date of this manual?
A This date is March of 1998.
Q And, again, do we still have in this manual a list of excluded services that Medicare won't pay for?
A Yes, we do.
Q And are psychosocial services still excluded in March of 1998?
A Yes, they are.
Q In addition to those provider manuals, did Medicare/Blue Cross & Blue Shield of Kansas also publish what are known as

local policies?
A Yes.
Q Take a look at Exhibit 43. Do you recognize that document?
A Yes, I do.
Q And what is that?
A This is a local medical review policy that was written by Blue Cross/Blue Shield of Kansas regarding individual medical psychotherapy.
Q How would a provider like the Defendant Arlan Kaufman or a biller like the Defendant Linda Kaufman have obtained a copy of these local medical policy manuals in the time period of 1990 through 2001?
A That would be hard copy through the mail via a newsletter or a special publication.
Q And did Blue Cross/Blue Shield mail those out to providers as a regular course of business?
A Yes.
Q All right. Do these supplement or replace the provider manuals?
A Both.
Q And are these local medical policy manuals generally used and relied upon by Medicare providers and Medicare billers in submitting claims to Medicare?
A Yes, they are.
MS. TREADWAY: Government offers Exhibit 43 pursuant

to the parties' stipulations.

MR. HANEY: No objection.

MR. JOSEPH: No objection, Your Honor.

THE COURT: It's received.

Q (By Ms. Treadway.) I'd like to turn to Page 4 of Exhibit 43 and ask you if there is information about documenting individual psychotherapy services?

A Yes, there is.

Q Let's review those documentation requirements with the jury.

A Certainly. "The documentation of psychotherapy must be present in the patient's medical record and include the following: Date and length of session, including start and stop time in clock hours; the content of session, i.e., major things discussed; patient's current clinical status as evidenced by the patient's signs and symptoms; statement summarizing therapeutic intervention attempted during the session; a statement summarizing the patient's degree of progress or lack of progress for treatment goals; presence of signature and credential of person actually performing the psychotherapy." And all of the above notations must be legible.

Q Now, with regard to these documentation requirements for psychotherapy, according to the dates on the bottom of that page, when was this documentation local policy first published

to providers and billers?
A It was first published to providers and billers on September 1st of 1995.
Q And when did it become effective?
A It became effective on October 1st, 1995.
Q Is that to give people sufficient time to get up to speed on the new policies?
A Yes, it is.
Q Now, would this have been the only information that providers and billers of psychiatric services would have had about documentation?
A Oh, no. No.
Q Based upon your working in the Medicare industry since 1981 and based on your work with providers, where do you understand providers first learn about how to properly document services they render?
A Where they first learn about it would be through their education and training to be a professional.
Q And will they learn throughout their work with Medicare what Medicare expects?
A Yes, they would.
Q Does Medicare require a provider to maintain documentation sufficient to support any claims submitted?
A Yes.
Q And does Medicare require that documentation to be

contemporaneous?
A Yes.
Q And what do you mean by contemporaneous documentation?
A The documentation was actually done before the claim is submitted to the Medicare carrier for payment.
Q So at the time the service is rendered?
A Yes.
Q That's when the documentation should occur?
A Yes.
Q Does Medicare require different documentation for psychotherapy services depending on the degree of the person rendering it? For instance, would you expect a doctor, an M.D. psychiatrist, a psychologist and a licensed clinical social worker to have different documentation requirements for Medicare?
A No.
Q Based on your experience in the Medicare program, does Medicare require that a provider will as a matter of standard medical practice document any encounter for which a claim is submitted?
A Yes.
Q Ms. DeHart, are you familiar with whether Medicare will pay claims for services rendered in the context of a medical research project?
A Yes.

Q Will Medicare pay for services rendered in a medical research project?
A Yes.
Q Under what conditions?
A Under the conditions that the grant has been applied for; the grant has been approved, or research project; and that it's indicated on the claim form that the grant has been approved. And that indication would probably be the modifier.
Q All right. Are there two particular organizations that Medicare will pay services for in terms of research project?
A Yes.
Q And what are those organizations that will -- Medicare will recognize?
A HRSA and NIH.
Q And what does HRSA stand for?
A HRSA stands for Health Care Resources and Standards Administration.
Q And is that a Government agency or does it work under a Government agency?
A It's an agency of the Department of U.S -- the U.S. Department of Health and Human Services.
Q And what is the NIH?
A NIH is the National Institutes of Health.
Q Are there data bases that you can search to determine if a given provider has applied for and received such a grant

through HRSA or NIH to conduct medical research?
A Yes.
Q And what data bases are those?
A The NIH and HRSA data bases.
Q And are those data bases generally available on the Internet?
A Yes.
Q Prior to your testimony today, Ms. DeHart, did you search these data bases to determine if the Defendant Arlan Kaufman, the Defendant Linda Kaufman, or Kaufman House Treatment Center ever had applied for, ever had received, a grant to conduct research through either HRSA or NIH that would allow them to bill Medicare for that research?
A I did.
Q For what period of time did you search?
A I searched through the archives from 1973 through 2001.
Q And what did you find?
A Nothing.
Q And you said when someone is submitting a claim to Medicare for an approved HRSA or NIH research project, Medicare is gonna know that by the claim itself?
A Yes.
Q And explain that again.
A Medicare is going to know that by a modifier that's usually submitted on the claim with the procedure code. We also have

normal review processes to look back at these research grants. We're very well aware of who has the research projects and grants.

MS. TREADWAY: Nothing further, Judge.

THE COURT: Mr. Haney.

MR. HANEY: Thank you.

CROSS EXAMINATION

BY MR. HANEY:

Q If I understand your testimony correctly today, what you are doing is giving the jury some general knowledge and -- general knowledge within your area of expertise of Medicare and billing procedures and when they pay and when they don't pay; correct? General knowledge?

A Yes.

Q And some specifics, obviously.

A Yes.

Q But you were not charged with and haven't done anything regarding Arlan and Linda Kaufman other than run a computer search to see if there was anything that they ever billed for research?

A Correct.

Q All right. So they had not billed for research and were rejected, they just didn't bill for research. That would have showed up if they would have sought a research reimbursement and been rejected?

A Yes.
Q All right. And you didn't find that either?
A No.
Q Okay. Do you have an idea of the health care providers in this country across the board how many are in compliance with the medical billing procedures that Medicare recommends?
A No, I don't.
Q Do you have any ballpark idea how many would be in compliance and compliance to what amount or what degree?
A No, I don't.
Q Have you seen figures like that in the past?
A No, I haven't.
Q Or attended seminars where you have been advised that there are only so many health care providers who are in compliance with certain percentage regarding Medicare and Medicaid?
A No, I haven't.
Q When Medicare discovers an overbilling -- there are all sorts of ways that someone could submit an overbilling; correct?
A Correct.
Q One of them -- not an overbilling -- one of the errors that could be made would be a coding error. What is that?
A A coding error is when a code is billed that represents a service other than what was provided.
Q And what's the common name for that code?

A I'm sorry.
Q CPT code?
A CPT code.
Q And is there another code that would go along with the CPT code?
A There's a diagnosis code.
Q And if a CPT code is used incorrectly, doesn't make any difference if the procedure was billed under the wrong CPT code, Medicare is not going to pay for it unless it's changed?
A Medicare will change it itself.
Q Medicare will also send it back to the health care provider, won't they, and either deny that -- deny the claim?
A I don't understand what you're asking.
Q Sure. Are you saying Medicare will go ahead and change CPT codes to make them correct or will they deny them and send them back to the provider for correction?
A They could do both if they knew that it was an incorrectly coded claim.
Q And by incorrectly coded claims, these claims change. They could be different decimal points that were added to a CPT code?
A CPT codes don't have decimal points.
Q Or diagnostic codes?
A They do.
Q And if I understand correctly, it was some technical error

that Medicare would automatically know what it was, they'd just change it and pay it? Like if there was a digit off or something, or what --

A They could use a CC modifier, which means changed code, and that's normally during the process of medical review.

Q Or they could just send it back to the provider denied and that provider would try and figure out what the problem is?

A They could.

Q And not all of those situations are Medicare fraud, are they, where these bills may go back for correction?

A No.

Q There is another concept that is discussed in Medicare as Medicare abuse. Are you familiar with that?

A Yes, uh-huh.

Q Can you tell the jury what the difference between Medicare fraud and Medicare abuse is?

A Medicare fraud is when a provider knowingly and willfully submits a claim knowing that it's false or knowing that it's not legitimate or accurate.

Medicare abuse is usually overutilization. And when I say overutilization, too many service -- billing for too many services. Medicare will only pay for a certain number of services in a certain period of time. Or upcoding. And when I say upcoding, I'm talking about issues like when you go to your family doctor and the doctor might see you for some minor

evaluation. And you're not a new patient. If that claim is coded as you're a new patient, you were there for 45 minutes or it's a procedure that requires 45 minutes face time, face-to-face, that's a coding. That can be an abuse.

Q And an example -- not in this case, but an example of Medicare fraud would be if a provider would bill for a patient service in Wichita, Kansas, on October 12th of 2005, and the health care provider was actually in the Bahamas somewhere on vacation. Would that be a pretty clear indication of fraud?

A That's a clear indication of fraud.

Q All right. You have indicated that Medicare will pay for group therapy by social workers?

A I have indicated that?

Q That's what I'm talking about.

A Yes.

Q All right. And is there any Medicare prohibition as to the number of group therapy sessions which can be performed in any given period of time per patient?

A I don't know that.

Q All right. Is there any Medicare prohibition as to the number of individual group therapy sessions which can be performed with any one individual patient during a specified period of time?

A I don't know.

Q Do you know of any Medicare prohibition that says that an

individual receiving group therapy cannot attend that group therapy session in the nude?
A I don't know that.
Q Okay. You mentioned and have shown us the regulation, we can go back and forth, but at least, if I'm correct, that in 1996 and on, Medicare decided it was not going to pay for psychosocial therapy?
A Yes.
Q And psychosocial therapy is a Medicare term or where did that term come from?
A I don't know.
Q And you're not an expert or you couldn't tell us the differences between group therapy and psychosocial therapy?
A No, I could not.
Q Other than Medicare will pay for one and not the other?
A I'm not a health care professional.
Q Will Medicare only pay for group therapy if in fact the patient shows improvement during the group therapy? Are you aware of that?
A I know that there should be an established goal.
Q And could that established goal be stabilization and avoidance of having that patient return to an inpatient hospitalization status? Would that be a goal?
A I don't know.
Q Don't know. But -- if it's not your area of expertise,

just tell me. I appreciate that.
A I will.
Q You don't know -- well, if I understood your testimony correctly, there are other circumstances that Medicare will pay for group therapy other than patient has to be getting better if there's a stated goal?
A Yes.
Q And all of the requirements that you had talked about that must be kept, and I think we were talking about, if I wrote this down correctly, I think it was Exhibit 43, the documentation. If I could see your exhibit and make sure I've gone the right one. Thank you.
If I understand, ma'am, the last page -- I'll hand this back to you, I'm not hidin' it from you. Would you read the documentation required, preparatory sentence to what's required?
A The preparatory sentence?
Q Yes.
A "Documentation of psychotherapy must be present in the patient's medical record and include the following."
Q Okay. And it doesn't say that on every group therapy session that an individual provider has with a patient, all of that stuff has to be in each one of the individual therapy session notes, does it?
A Does it say that verbatim?

Q Or --
A In your words?
Q Well, we know it doesn't say it verbatim, does it? Correct?
A It doesn't say what you said.
Q Okay. It said it has to be in the medical records?
A Yes.
Q If there were, for example, eight group therapy sessions a week for a patient, would each one of the doctors or provider's notes, social worker's notes, would each one of those eight sessions have to have everything that's on that page in each one of the individual or group therapy session notes from all eight of those days?
A Yes.
Q So read what you think that that means as far as like the morning session of October 12, and let's say there's an afternoon session of October 12 group therapy. What must be in both of those sessions?
A The date and length of the session, including start and stop times in clock hours.
Q Okay.
A Did you want me to continue?
Q Go ahead.
A The content of the session. Major themes discussed. The patient's current clinical status as evidenced by patient's

signs and symptoms. A statement summarizing therapeutic intervention attempted during the session. A statement summarizing the patient's degree of progress or lack of progress for treatment goals. The presence of signature or accreditation of the person actually performing the psychotherapy. And all of the above notations must be legible.

Q And it's your belief that that has to appear in each one of the session notes from a group therapy session?

A Yes.

Q All of those. The options that are available to Medicare when a billing problem is discovered, whether it's overbilling, whether it's improper billing, what are Medicaid -- Medicare's options when that occurs? What can they do? That may be a bad question.

You've mentioned in coding errors in some circumstances they can change it themselves if it's a minor matter; right?

A They can resubmit the claim.

Q Or they can send it back to the health care provider for -- with or without instructions? Just they can deny it and send it back?

A If it's unprocessable.

Q All right. And when -- what other options do they have?

A The other options that they have would be to calculate the

overpayment and collect that money from the provider.
Q Okay.
A Put that provider on prepayment review if it's something that happens often.
Q And what's -- I didn't mean to interrupt. What's prepayment review?
A Prepayment review is, as I stated before, a review that happens before the claim is actually paid. Medicare sends a letter out to the provider and says from now on when you submit a claim, attach medical records and documentation to support the service that you're billing.
Q And are you familiar with the term a flag audit?
A A flag audit?
Q A flag audit. Does that mean anything to you with Medicare?
A There are audits.
Q But the term flag audit?
A Yes.
Q The documentation that's required to be kept is required to be kept in what form?
A Written.
Q Would a dictation -- I know a lot of doctors dictate patient notes. Dictate, would that be authorized?
A Then they're subsequently published so they're written.
Q And they're later subsequently published; right? The

dictation maybe contemporaneous and they're later written down?

A But the documentation still must exist before the claim is filed.

Q I'm not arguing with you.

A Okay.

Q I'm just saying that the written documentation from a dictation doesn't have to be done immediately, does it, at that time?

A No.

Q Or if a videotape was kept of an actual group session, would that be different in some way than a doctor's notations of what happened during that group session?

A I don't know.

Q Or notes that a doctor may take during a group session, those would be -- at least the notes would be taken contemporaneously?

A Yes.

Q If from those notes and from the videotape a report was made later, are you saying that that would be a non-contemporaneous report because it was written at a later date but based upon these earlier documents?

A I believe so.

Q How much later would make it non-contemporaneous?

A Documentation actually should be immediate.

Q Immediate means what?
A Immediately following the procedure or process performed.
Q Do you have any idea generally for physicians when they use their dictaphone on notes, when it may be transcribed and submitted into a report?
A Do I have any idea?
Q Do you have any idea?
A No, sir.
Q Do you know whether it's common in the field in the industry to wait a week or even more than a week before those are actually transcribed and dictated?
A I don't know, sir.
Q If that was done, that, in your thinking, would not be contemporaneous?
A No, I wouldn't think so.
Q Do we have any definitions by Medicare as to what contemporaneous means other than our common ideas?
A No.
Q All right. Concerning the documentation, you indicated that the documentation for, like group therapy, must be sufficient? I know I'm paraphrasing some of it, but is that generally what you said, must be sufficient?
A Must be as indicated.
Q Okay. And who makes that decision, that determination, whether it's sufficient or not sufficient?

A A medical professional.
Q Okay. A medical professional being a -- well, in the case of a licensed medical doctor, a licensed medical doctor would make that decision?
A No.
Q Could be a nurse make that decision?
A Yes.
Q Saying the doctor's --
A Registered nurse.
Q -- saying the doctor's notations and the doctor's documentation was insufficient; correct?
A Yes.
Q Like in the case of Dr. Kaufman, who is a PhD social worker, who would be making the decision that that documentation submitted with any of his submittals would be insufficient?
A At the contractor level? Is that what you're asking me?
Q Let's go there first. The contractor level?
A At the contractor level, probably a psychiatric nurse.
Q Okay. What other level would there be?
A There is no other level if you're talking about documentation submitted with the claim as appropriate.
Q If that occurs, if a psychiatric nurse or whoever is reviewing it decides that the documentation is insufficient, what are that person's options?

A That person's options would be to deny the claim.
Q Send it back?
A Pardon me.
Q Send it back?
A No. Deny the claim. If it wasn't documented, it didn't happen.
Q And that's an interesting phrase. You say if it wasn't documented, it didn't happen. It may have happened; correct? The service that was requested may have happened a hundred percent, couldn't it?
A I'm not sure I understand your question.
Q Well, you say if it wasn't documented, it didn't happen. That's one of those catch phrases that, in fact, the service that was provided, that was not documented, the service actually may have been provided correctly and just wasn't documented right?
A Or at all.
Q Or at all. But my question was it could have been provided 100 percent but not documented correctly?
A Yes.
Q Is there a corollary to what you've told us about the most important reason to document relevant in all health care settings is "if it isn't documented, it never happened," essentially is what you're saying; right?
A Essentially, yes.

Q Have you heard the rest of that, "and if it isn't documented correctly, you're gonna wish it never happened"? Have you heard that before, too?
A No, I haven't.
Q You said that with a smile.
A It made me laugh; but, no, I haven't heard that.
Q Be true, though, wouldn't it?
A I, I don't know.
Q Okay. When a claim is denied, we talked about, for lack of documentation, what is the provider notified of when it comes in and the psychiatric nurse, whoever is looking at it, it's denied, it goes into the never will be paid file or what happens to it?
A Well, actually, if it comes in, you know -- you're confusing me a little here -- but normally the way the process happens is the documentation is requested and the provider is actually given 45 days to submit the documentation.
Q Okay. You've just answered, kind of, my next question. As you mentioned earlier, if you had CPT codes or diagnostic codes that were wrong, in some circumstances that would go back to the health care provider and they'd try and figure it out.

If documentation is not there, say, a normal procedure would be to give the provider 45 days to properly document what was done?

A No. To submit the documentation that should already be there.
Q Okay. And then it would be reviewed again at that time?
A Yes.
Q And that's pretty standard in Medicare?
A Yes.
Q You mentioned audits that were conducted or that could be conducted earlier. If I can find my notes. When Medicare conducts an audit, I assume that they attempted to do it in an orderly fashion, timely fashion?
A Yes, they do.
Q Are there guidelines that you're aware of as far as timing on how when an audit is supposed to be completed, how many days, how many months or --
A I don't know.
Q Would it depend in some part on the circumstances?
A Possibly.
Q Could it depend on the availability of records may be one reason that may determine how long an audit may or may not last?
A Yes.
Q All right. The health care provider may make some different -- for example, the health care provider had a triple bypass, was not available to be interviewed to provide documents immediately, that may delay something?

A That would be taken in consideration. It would have to be proven, but it would be taken into consideration.
Q You've used such phrases in your testimony as standard in the industry. What does that mean?
A When did I say standard in the industry?
Q Okay. You don't recall? I'll withdraw that. Did you use a term medically reasonably -- medically necessary and reasonable?
A Yes.
Q And who makes that decision?
A That decision is normally made by a medical review nurse at the contractor.
Q And are you familiar with the term mainstream health care? Does that mean anything to you, mainstream health care provider? If it doesn't, fine, just tell me it doesn't mean anything to you.
A It doesn't mean anything to me.
Q All right. Or does Medicare, do you know, have specific definitions, instructions, on how a social worker may or may not conduct a group therapy session?
A I'm not sure I understand your question. I'd like you to rephrase that if you would.
Q Okay. Well, we talked about group therapy and we talked about psychosocial therapy?
A Uh-huh.

Q My question is whether you're aware whether Medicare provides specific itemizations or guidelines that a health care provider may or may not do during a group therapy session?
A Well, I believe we talked about under services not covered -- I'd have to go back to the manual.
Q Sure.
A You're talking about group therapy?
Q Yes, ma'am.
A Resocialization groups aren't covered. Activity therapy.
Q And they've never been covered? Activity therapy has never been covered?
A Yes, it has.
Q Okay. When was that? When was that valid? All the time?
A Not for social workers.
Q All right. But for psychiatrists?
A Not for psychiatrists.
Q What is that sort of therapy? Do you know?
A In an inpatient setting, it's covered.
Q Okay. And that therapy you're referring to is what, ma'am? What was it called?
A Resocialization therapy.
Q And what was -- you had another one after that?
A Activity therapy.
Q Activity therapy. Like art therapy?

A I don't know.
Q You don't know what activity therapy really means?
A No.
Q I'm not challenging you. You just don't know?
A No.
Q All right. You mentioned that one of the things that you look for, or Medicare looks for, rather, in Medicare abuse, is the number of sessions that are held?
A Yes.
Q And that's based upon what standard is looked at to say, okay, I'm looking at the number of sessions that are held but this amount is over a certain standard or below a certain standard? Where does that standard come from?
A Well, the standard can be a regional standard. It can be a state standard. It could be a national standard. But providers are compared against their peers.
Q Okay. So it's kind of an average of peers in the community? If a service or if what's being provided are above the normal, you might take a look at it?
A Yes.
Q Whether it's above or below is not an indication, clear indication of fraud one way or the other?
A No.
Q And even if it was twice as much, twice as many sessions as standard in the area, would that be a finding or indication of

fraud?
A Not -- not finite.
Q So it's one of these factors you would look at that maybe a red flag would go up and say let's take a look at this?
A Yes.
Q If I understand this chart, this related to what period of time that we're talking about here?
A July 1st of 1990 forward.
Q Okay. And this meant the actual service billed by a health care provider of $200? Is that what that is?
A That's right.
Q And the fee would be what?
A That's the Medicare fee schedule amount that's allowed for the procedure the provider is billing for.
Q What if a health care provider's normal fees was less than that? Any amount --
A There are certain situations where we would pay more; but in most situations, we would pay only the actual charge.
Q So there are certain circumstances that if somebody actually their normal billing rate would be below that, that they could submit billings to Medicare for higher than that because that's the standard that you use?
A Okay. Would you say that again?
Q That was a horrible question. I didn't even understand it.
A Or ask that again.

Q I didn't even understand it.
A I sure didn't understand it.
Q Well, we're even. What circumstances would there be where an individual may be paid more than that individual's normal billing rate?
A We have certain undervalued services and normally those are only ambulatory surgical center services because there's a set rate.
Q Okay. And if we add up the $200 actual here fee of $100, patient 20, Medicare 80, Medicare pays 50. Of course, that adds up to how much?
A I'm, I'm -- the Medicare 80% is $80. The reduction of 62.5% is applied which results in a payment of $50.
Q Okay.
A For psychiatric.
Q And the reduction of 62.5%, how's that handled? Just it's reduced period?
A It's a multiplication.
Q All right. But nobody pays that?
A Nobody pays that?
Q Who pays it?
A Who pays the $50?
Q Who pays the reduction, the 60% reduction?
A I'm not sure what you're asking me.
THE COURT: I'm not either. I'm lost.

MR. HANEY: I've lost this whole thing myself.

THE COURT: Well, let's take a recess and see if we can find ourselves.

(Recess.)

THE COURT: Okay. Have we regrouped?

MR. HANEY: I did my best, Your Honor.

THE COURT: I know you have.

Q (By Mr. Haney.) In looking at the figures again -- I'm just going to ignore this $200. I think that's where we got confused, actual billing. If a fee is scheduled at $100. And if I understand what we're saying here is that the, basically, we got some other figures, but the patient pays 20% or $20, Medicare will pay 80.

A Under normal circumstances.

Q Normal circumstances. And since these are not normal circumstances, Medicare requires this 80% to be reduced by what percentage?

A 62.5.

Q So the 62.5 comes right here? The 80 to 50, 62.5?

A Yes.

Q I'll put a minus there. Minus 62.5%. That gets down to the 50. Correct?

A You're actually multiplying it by 62.5%.

Q Well, okay. I'll put a period here. You're probably right. Point six two five. And just forget about the

percent.
A Okay.
Q Math is not my subject. But, anyway, you reduce the $80 by .625 and get $50 that Medicare actually pays?
A Uh-huh.
Q The $30 that's disappeared here, who pays that?
A The patient.
Q So the patient -- the other $30 here we can put back up here to this 20 and the patient can pay 50?
A Yes.
Q Okay. That was my point.

Secondly, the rejection by Medicare, Medicaid, of billings, is that to be done essentially contemporaneously with the billing being received or as close to contemporaneously as reasonably possible?
A Would you repeat that for me?
Q Sure. How long, generally, does Medicare have to review bills that are being submitted by the health care provider to determine whether payment is going to be made or not made?
A Medicare's payment floor is 14 days.
Q 14 days?
A Yes.
Q I'm sorry. I interrupted. 14 days?
A Yes.
Q Sometimes it takes a little longer? Sometimes it take a

little less?
A Yes. Depends on whether or not other things need to be requested.
Q Sure. And would that be -- I use the word contemporaneously. Is that something that you're familiar with in Medicare or is that just -- you're not familiar with that word in timing the sequence of bill payments?
A I'm familiar with that word. Medicare --
Q And that's where you get the 14 days or so?
A That's the payment floor. That's not where you get contemporaneously documentation -- documenting the service.
Q Okay. Yeah. My question deals more with how long Medicare will review a bill normally before it's paid or rejected?
A There are various circumstances.
Q Okay. And would five, six, seven years be an inordinately long period of time to determine we're not going to make a payment?
A Yes.

MR. HANEY: That's all.

CROSS EXAMINATION

BY MR. JOSEPH:
Q Mrs. DeHart, what you have here is July 1, 1990, was when a social worker was eligible for payment under Medicare; is that correct?
A That's correct.

Q When was Medicare adopted by Congress?
A 1965. And it went into effect in 1966.
Q So a nurse graduating from nursing school in 1964 wouldn't have even ever heard of Medicare, would she?
A No.
Q You used the term biller in your direct examination with Ms. Treadway. Where do I go to find the definition of a biller?
A In the Medicare manual, probably under provider enrollment.
Q Is there a definition there of biller?
A Biller and billing agency.
Q And the provider manual -- you have given us some excerpts already. That's 42, 42-A and 42-B?
A Yes.
Q And somewhere in there you're saying I can probably find the definition of biller?
A Not in here. Not in these excerpts, no.
Q Somewhere else in the manual?
A In the provider enrollment manual.
Q How big is that manual?
A How big is that manual?
Q Yeah, that was my question.
A I don't know.
Q How many pages?
A I don't know.

Q Isn't this manual something you work with regularly?
A Yes.
Q Well, estimate. Show the jury just kind of estimating with your hands how high it would stand up if you laid it on its side on a desk?
A It's actually part of the Program Integrity Manual and the Provider Enrollment section is in that particular manual and that manual is about that big. (Witness indicating.)
Q About five inches?
A Yes.
Q Is that correct?
A Yes.
Q So is the provider manual on line on the Internet?
A Yes.
Q How long has that happened since it's been on line?
A I believe approximately 2000.
Q Now, as the expert in these rules and regulations, would you give me the definition of what a biller is?
A A biller is the individual or agency that is actually filing claims for the providers of the service.
Q When you say filing claims, what do you mean?
A Submitting claims to the Medicare contractor for payment.
Q Okay. Well --
A Preparing and submitting.
Q Prepare and submitting. I mean, the mailman delivers them.

He's not a biller, is he?
A No.
Q Okay. So the person sitting down who fills out the form, by your understanding of the definition, is a biller? Whoever filled out from 1990 to 2000 the HCFA 1500 is a biller?
A Yes.
Q Where do I go to find the responsibilities of a biller? You listed four responsibilities for a biller. Where do I go to find those? I'm not talking about a billing agency here. A biller, the person who fills out the form.
A I don't know.
Q They're not written down anywhere, are they?
A I don't know.
Q Oh, now, wait. You're the expert in this. You don't know if they're written down anywhere?
A Without being at my desk, no, I don't know.
Q Well, where did you get the knowledge for you to be able to say that a biller is responsible to make sure the claim is accurate, the service was actually provided, the service was legitimate and the documents existed to support it? Where did you get that knowledge?
A I was a supervisor of the Provider Enrollment unit at Blue Cross/Blue Shield of Kansas for several years. I've worked with CMS for several years. As a matter of fact, I've worked with provider enrollment in CMS for several years. And there

are -- there is information laid out about billing agencies, contracts with billing agencies and billers' responsibilities.

Q And billers' responsibilities?

A Yes.

Q And -- but you don't know where that is?

A I --

Q You can't tell me right now while you're testifying where I can go find that?

A No, I can't.

Q Do you remember the last time you read it?

A No.

Q Do you remember the last time it was revised?

A Yes.

Q When was it revised?

A The last time the provider enrollment manual was.

Q Not the manual. This part that has to do with responsibilities of the biller. When was --

A I don't know.

Q And you're not even sure it's in the manual, are you?

A It's in the provider enrollment manual.

Q These responsibilities of the biller?

A Maybe not as I laid them out; but it's in the provider enrollment manual.

Q Well, where do they exist as you laid them out for this jury? Where do I go find them?

A I don't know.
Q Okay. Let's talk for a second about the biller. Assume for me -- let's take us away from the particular situation we're dealing with here.
A Okay.
Q And let's assume -- well, most hospitals are Medicare providers, aren't they?
A Yes, they are.
Q And they have staffs in their accounting office who do the billing, fill out the HCFA 1500 forms, don't they?
A Yes, they do. Actually, they're UB-92s in a hospital.
Q Okay. Whatever the form is in the hospital, they fill it out?
A Okay.
Q And they send that in; correct?
A That's correct.
Q And your understanding after all these years here is clerks sit down there and fill out those forms based on information that kind of filters down to them and they send that stuff in, fill out the forms?
A That's correct.
Q Now, are you saying that a clerk in a hospital sitting down in the basement in the accounting office is responsible for making sure the claim form is accurate?
A Yes.

Q Are you saying that that clerk down there is responsible for making sure the service was actually provided?
A Yes.
Q So you expect the clerk to go up and check with the surgeon on the tenth floor of the hospital and say, hey, doc, did you really do this surgery?
A No, I don't expect that.
Q And the service is legitimate?
A Yes.
Q You expect that clerk to determine that the service is legitimate? That's the number three thing you said: Service is legitimate.
A The billing clerks are normally the ones that we see -- that receive the billing instructions, that attend workshops on billing that are given by the contractor; and they should know or should have known that a diagnosis must match a service.
Q Oh, so --
A The modifier must --
Q Well, maybe you should tell us what you mean by legitimate. I sort of had the feeling you were saying that she needed to go review the doctor's records and see whether that patient really needed the surgery.
A No.
Q No. So what the billing clerk does in order to determine

whether the service is legitimate is the billing clerk matches up the diagnosis with the CPT code; right?

A Yes.

Q And that's all the billing clerk needs to do to make sure the service is legitimate? The codes match?

A The billing clerk also needs to see or know the documentation exists to support the claim.

Q We haven't even gotten there yet, have we?

A No.

Q That's number four. We're still with number three.

A Okay.

Q I'm talking about legitimate.

A Yes.

Q Okay. So the clerk down in the basement of the hospital just has to make sure that the CPT code matches the diagnosis?

A The clerk in the basement of the hospital, yes.

Q Okay. And the CPT codes we're talking about are these that are Government Exhibit 46? That's CPT codes?

A Those are CPT codes.

Q And the diagnosis code is Government Exhibit 47?

A Yes.

Q You don't really expect, then, in determining, you know, the person that fills out the form, to go question the doctor about the medical necessity and reasonableness of the services that the doctor provided, do you?

A No.
Q But you expect that clerk to make sure documentation exists?
A Yes.
Q That's number 4?
A Yes.
Q So if a clerk is filling out a form down there in the basement of the hospital, the patient's chart better well be there; right?
A The documentation. She better well know that the documentation exists.
Q Well, the documentation for a patient in a hospital is the patient's chart, isn't it?
A Yes.
Q And it's got all those records in it. Sometimes, I mean, they get really big, don't they?
A Sure.
Q And so what you're saying is that billing clerk down in the basement of the hospital better go up on the floor or over in the records section and bring that chart in here and personally go through and make sure that the document -- there is documentation for that CPT code and the diagnosis?
A The clerk in the basement of the hospital needs to know that the documentation exists.
Q Okay. Then you tell --

A And there's normally a procedure within a hospital that indicates the documentation exists.
Q What is that?
A Hospital -- different hospitals do things different ways and I cannot tell you that because there are different hospitals that do things different ways.
Q Do you have any personal experience with any of those clerks down in the basement checking out documentation?
A Yes.
MS. TREADWAY: While this is interesting, it's certainly not relevant and we don't have a hospital here.
THE COURT: I don't think it is either. I think we need to move on to something --
MR. JOSEPH: Very well, Your Honor.
THE COURT: And get out of the hospital and get into the Kaufman House.
Q (By Mr. Joseph.) In terms of Linda Kaufman --
A Yes.
Q What you're saying is that somewhere I can go find a requirement in the regulations or manuals or somewhere that she had a duty to make sure the CPT codes on the HCFAs that she filled out, HCFA 1500, matched the diagnosis?
A Yes. We hold billers much to the same standards as we hold providers.
Q And she had the obligation to go check and make sure, you

know, Dr. Kaufman, I need to review your notes and your files and I want to make sure there's documentation here and that it is adequate documentation?

A She should know that there's adequate documentation.

Q Well, I mean, she has to check, doesn't she?

A Yes.

Q Review the chart for individual patients?

A Yes.

Q Right. I mean, how else would she know that? She is to review all the charts and decide whether that's accurate?

A Yes.

Q And if she's wrong -- and if she's wrong, then she's, what, committed fraud?

A If the documentation doesn't exist, if she has knowledge that the service was not provided, if she has knowledge that the service was not legitimate, then, yes, she has committed fraud if she submits that claim.

Q If she fills out the claim and passed judgment and says I'm going to do it anyway, then she's committed fraud in your view?

A Yes.

Q Where do I go in the manual to find the definition of psychotherapy or any other rule or regulation of your agency?

A In the provider manual that's provided to providers of service as well as in the contractor's claims filing manual.

They're internet manuals; but the hard copy manual should have been in their possession.

Q So you're saying there is an actual definition of psychotherapy in the provider's manual?

A I'm not saying that. I'm, I'm telling you there are on-line manuals that give you a definition of psychotherapy. What they are, what the definition is, I don't know.

Q Then how do you know that?

A I don't know.

Q Answer the question. How do you know that?

A I don't know.

Q Where do I go to find the definition of psychosocial therapy?

A I don't know.

Q Well, let's at least go to the CPT codes?

A Yes.

Q That will give us a clue, won't it?

A Sure.

Q Individual psychotherapy for code 90804, and it's got insight oriented behavior, modifying and/or supportive, in an office or outpatient facility.

If I'm a biller --

A Uh-huh.

Q -- and I know that what is going on is behavior modifying and/or supportive insight oriented in an outpatient facility,

then I'm okay, aren't I?

A Yes.

Q Unless, of course, I know for a fact that's not true and that I'm just --

A Yes.

Q -- cheating the government?

A Yes.

Q By the way, I was looking over the recess at Government Exhibit 49, which is the HCFA 1500 dated December, 1990, Government Exhibit 49. The back of that contains certain information, doesn't it?

A Yes, it does.

Q You're familiar with that HCFA 1500? You worked with it for years and years. Aren't you?

A Yes.

Q Is there anything back there about biller or biller's responsibilities? Even billing agencies?

A No.

MR. JOSEPH: No further questions.

THE COURT: Redirect, please.

MS. TREADWAY: Thank you, Judge.

REDIRECT EXAMINATION

BY MS. TREADWAY:

Q In spite of the definitions, Ms. DeHart, would it be true that Medicare pays for psychotherapy?

A Yes, Medicare does pay for psychotherapy.
Q But as we saw in the provider manual, it does not pay for psychosocial services?
A No, it doesn't.
Q I can't say that word.
A No, it does not.
Q Mr. Haney asked you questions about frequency of group therapy.
A Yes.
Q When Medicare sees patterns of what you called overutilization --
A Yes.
Q -- can they review claims for frequency? In other words, having too many services provided?
A Yes.
Q That's a common thing that you will review?
A Yes, it is.
Q And the review at that point is is it reasonable and is it medically necessary?
A Absolutely.
Q And that review is going to be conducted by a medical professional?
A Yes.
Q And sometimes you even have medical doctors make those reviews?

A Yes, we do.
Q You hire them specially for that purpose?
A Yes, we do.
Q You laughed when Mr. Haney asked you if Medicare had any policies about whether people could attend therapy in the nude and you laughed.
A I laughed because I don't ever remember seeing a policy about nudity.
Q Based on your experience in the industry and your working for Medicare and CMS, does Medicare pay for unrecognized therapies such as those that would use nudity as a part of the therapy?
A They do not pay for unrecognized therapies.
Q Now, getting to Mr. Joseph's question. First of all, a basic question --
A Yes.
Q When you send a claim to Medicare --
A Yes.
Q -- who is it in that chain of events that involves a lot of people --
A It does.
Q -- that is responsible for knowing the rules, knowin' the regulations and knowin' what you can submit a claim for? Who's responsible for that, Mrs. DeHart?
A The person that prepares and submits that claim.

Q And that includes the provider?
A If he prepares and submits the claim.
Q Or if he gives information for that claim?
A Oh, yes. Oh, yes.
Q And it includes the person that's actually performing the paperwork service?
A Yes.
Q Have billers been held criminally responsible for false and fraudulent claims?
A Yes.
Q And in this situation, Ms. DeHart, we have a biller who's not just an ordinary biller but who is a registered nurse, who is a medical professional in her own right. Do you hold her to higher standards in that situation?
MR. JOSEPH: Object. Argumentative, Your Honor.
THE COURT: Ask it a different way if you can.
Q (By Ms. Treadway.) If the biller were a medical professional such as a registered nurse, do you believe your standards in terms of her responsibility for accurate and truthful reporting to Medicare are even higher?
MR. HANEY: Object. There's no foundation of that. There's no higher standards required by Medicare of a nurse or anyone else that I'm aware of.
THE COURT: The objection is sustained.
Q (By Ms. Treadway.) One last question.

A Yes.
Q When a provider and a biller submit claims to Medicare for which there is no contemporaneous documentation, what kind of claim is that, Ms. DeHart?
A That claim is false and that claim is fraudulent.
MS. TREADWAY: Nothing further.

RECROSS EXAMINATION

BY MR. HANEY:
Q You wouldn't change any of your earlier response, would you, about taking notes and dictation and taking -- preparing written reports or notes or dictation? When you thought about it, all of your answers are still valid as far as you're concerned?
A As far as I'm concerned.
Q Okay. I will go back and revisit contemporaneous then.
Counsel asked you Medicare doesn't pay for psychosocial services, whatever Medicare defines that as. That was in the 1995-'96 manual, Exhibit number 42-A?
A Psychosocial therapy.
Q So 1995, '96, they decided we aren't gonna pay for this; correct?
A That's right.
Q Paid for it before because it wasn't excluded -- paid for it before?
A Yes.

Q And may pay for it in two years, who knows?
A That's right.
Q But as far as the definition of what that is as opposed to what diagnostic, interview, examination, individual psychotherapy, individual psychotherapy -- are you aware of the definition of psychosocial services?
A Am I aware of the definition of psychosocial therapy?
Q Yes. They don't pay for it. I'm asking whether you know what it is?
A I don't know the definition, no.

MR. HANEY: That's all.

THE COURT: Anything further of this witness?

MR. JOSEPH: I have nothing, Judge.

THE COURT: All right. Ma'am, thank you very much. You're excused. Next witness.

MS. TREADWAY: Government calls C.W. Frankenfeld.

C.W. FRANKENFELD

Having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows on:

DIRECT EXAMINATION

BY MS. TREADWAY:
Q Could you please introduce yourself to the jury?
A Yes, ma'am. My name is Charles W Frankenfeld. I am an Assistant Professor of Social Work and Sociology Social Work

Department at Fort Hays State University.
Q Are you a licensed professional, sir?
A Yes, I am.
Q And what is your license in?
A I am -- my license is in social work. I am a licensed specialist clinical social worker.
Q And how long have you held that license?
A Since licensing was accepted in Kansas around '75, I believe. I've been a licensed social worker so long, I don't remember exactly.
Q Have you worked as a licensed clinical social worker since the mid '70s?
A Yes.
Q Briefly, could you tell the jury what kind of work you've been involved in?
A Since I graduated from K.U. I've been involved in many aspects of social work from working on the street with delinquent kids in Kansas City, to the area mental health center in Dodge City where I was a clinical therapist and office coordinator responsible for a three-county office of the area mental health center. I've worked at the Larned State Hospital as a therapist. I worked at the Wyoming State Hospital as a therapist. And I worked for the Larned Correctional Mental Health Facility as a trainer and as a therapist.

Q And you're currently teaching?
A I'm currently teaching.
Q Have you ever had any responsibilities during your career with the Kansas Behavioral Sciences Regulatory Board, also known as the BSRB?
A Yes, ma'am.
Q And what is the BSRB?
A BSRB stands for Behavioral Sciences Regulatory Board.
Q And what does it do?
A The Board is charged with assuring that the public -- that professionals licensed in the State of Kansas merit the public trust. In essence, the Board ensures that citizens of the State of Kansas receive competent and expert treatment and counseling.
Q For what period of time were you associated with the Board?
A 2000 to '04.
Q And what did you do for the Board?
A I was a social work representative to the Board.
Q Was the Defendant Arlan Kaufman at one point in time granted a Kansas license as a Kansas clinical social worker?
A Yes, ma'am.
Q Let me hand you what has been marked for identification as Government Exhibit 50. Is that a copy of his license?
A Yes, ma'am.
MS. TREADWAY: Government offers Exhibit 50.

A Excuse me.

MS. TREADWAY: I offered the exhibit. He needs to rule on this.

MR. HANEY: No objection.

MR. JOSEPH: I have no objection, Your Honor.

THE COURT: 50 is received.

Q (By Ms. Treadway.) Based on Exhibit 50, sir, could you tell the jury when Defendant Arlan Kaufman was granted a Kansas license as a clinical social worker?

A Yes, ma'am. On the 6th day of September, 1988.

Q And what was his license number?

A His license number was 1031.

Q And what was he authorized and licensed to practice as?

A Mr. Kaufman was licensed as a specialist clinical social worker, which means, in essence, that he could be an independent practice -- go into independent practice and private practice.

Q Are licensed clinical social workers subject to state regulations?

A Yes, ma'am.

Q And are those published regulations?

A Yes, they are.

Q If a licensed clinical social worker fails to abide by those regulations, what can happen?

A If a social worker would fail to abide by the regulations,

there is a number of things that could happen. It could range from a letter of reprimand to having the license revoked or suspended, depending upon severity of the allegation.

Q Were you involved in an investigation into whether Defendant Arlan Kaufman had violated any of the state regulations governing licensed clinical social workers?

A Yes, ma'am, I was.

Q Who served as the board's primary investigator?

A At that point I think it was Mark Mathies was hired by the BSRB as an investigator. His job was to investigate any allegations of wrongdoing.

Q And were you also part of the investigation?

A Yes. But later Mr. Mark Mathies left the BSRB and was replaced by another individual by the name of Roger Skerlock, who is the current investigator, and it was actually with Roger Skerlock that I became involved.

Q As a part of being involved in that investigation, did you review videotapes of the Defendant Arlan Kaufman interacting with mentally ill adults?

A Yes, ma'am, I did.

Q Let me hand you what has been marked for identification as Government Exhibit 50-G. Do you recognize that document, sir?

A Yes, ma'am.

Q What is that document?

A This is a document from Mr. Mathies to Arlan Kaufman

notifying him of the report of an alleged violation.

Q Is this a record that the Behavioral Sciences Board would have created and kept in the regular course of its business?

A Yes, ma'am.

MS. TREADWAY: Government offers Exhibit 50-G as a business record under 803(6).

MR. HANEY: We object to the admission. Can we approach the bench?

THE COURT: Yes.

(Thereupon, the following proceedings were had at the bench by Court and Counsel outside the hearing of the jury.)

MR. HANEY: Your Honor, we're not objecting as to the foundation, obviously, of that document.

THE COURT: I know.

MR. HANEY: We do object to the materiality. That may be a business record, but it also is a hearsay record that contains matters which are prejudicial to Dr. Kaufman which were prepared in an administrative proceeding which is stayed at the present time. There hasn't even been a conclusion reached in this administrative proceeding. Further, this witness has not been offered by the Government in their list of witnesses as an expert in any way to give expert testimony. He wasn't listed. We haven't received a supplemental listing that he is an expert.

MS. TREADWAY: Yes, they did get a notice --

MR. HANEY: Can I finish? I've got a letter from the Government, October 10th, saying due to your objection to Diane Glynn's testimony, we're notifying you that Chuck Frankenfeld will be offering the following testimony, some of which appears to be fact which I may or may not object to, depending on what he says; but there are also opinions in this. And you don't send a letter two days before the witness testifies saying, by the way, we want to ask him this information. Still hasn't been qualified as an expert and proffered as an expert or notified.

And further, Your Honor, to try and bootleg in Exhibit 50, which is --

MS. TREADWAY: 50-G.

MR. HANEY: 52.

MS. TREADWAY: G.

MR. HANEY: 50-G, which is, at best, a bootleg offer of a possible violation of the rules and regulations --

THE COURT: They don't even really need that, it sounds to me like. These are just the things that have already been testified to that various people claim that your client did.

MS. TREADWAY: Judge, may I respond?

THE COURT: Not yet. I want to read this.

(Off-the-record.)

THE COURT: Okay. I've read the letter.

MR. JOSEPH: Can I state my objection?

THE COURT: Sure. You can state your objection, but your dog isn't in this fight.

MR. JOSEPH: Well, I think it is, Your Honor. For the same reason that the nursing board records were involved in this case so far, we don't think that it is relevant that an investigation occurred in this case or that letters were written or that anything else happened in connection with Dr. Kaufman's license other than the suspension of it. We filed a motion in limine with regard to --

THE COURT: Yeah, and I'm looking for my ruling on it but I can't find it.

MR. JOSEPH: This was the ruling where you said if you can work out a stipulation, great. If you can't, we'll take it up at that time, and if anybody wants to propose a limiting instruction, get it ready.

MS. TREADWAY: Which the Government submitted in its instructions.

THE COURT: Well, that's -- I was looking for that letter, but be that as it may, I'm more concerned about the fact of what kind of testimony this witness is going to give. Is he going to offer opinion testimony about how sociologists are supposed to act in Kansas?

MS. TREADWAY: Well, first of all, Judge, with

regard to notice, they did receive notice of this witness being an expert. They received notice in the same notice that they received Dennis Detweiler's notice and they have not given any objection whatsoever to that. This is the first notice the Government --

THE COURT: I thought I had a motion on that.

MS. TREADWAY: On Dennis, yes, but not on C.W. They did not object to C.W. Mr. Frankenfeld. And so, first of all, why didn't they object at the same time if they were going to object. And I gave them, furthermore, specific notice after I had talked with Mr. Frankenfeld and after they had objected to Diane Glynn's testimony. So I gave them notice of what he would testify to. So notice is not deficient, Judge, and they've waived --

THE COURT: No, it's not that the notice is deficient. It's that the timeliness of the notice --

MS. TREADWAY: Well, Judge, I did it as soon as I could after I talked to Mr. Frankenfeld. I did give them his C.V. on the 4th, on October 4th, when I amended the notice of experts. And, again, they never objected, Judge.

THE COURT: There's a Tenth Circuit case on this.

MS. TREADWAY: And they've had notice for two days as to all of his opinions, which are not -- they're not complicated, Judge, at all. They've also had his Jencks material as well, Judge, for a long time.

THE COURT: Which is what?

MS. TREADWAY: All of the BSRB records in which he appears.

MR. HANEY: Your Honor, this gentleman served as, I assume, some sort of finder of fact eventually with the BSRB. He is not simply an investigator.

THE COURT: I don't see how he can serve as a finder of fact if the investigation hasn't been completed.

MR. HANEY: It's stayed.

MS. TREADWAY: Well, no, Judge, that's not correct. What's happened is that Arlan Kaufman allowed his license to expire which removed jurisdiction from the Board.

MR. HANEY: Your Honor, counsel said we were notified. I know counsel doesn't want to get involved in this, but I don't find a notification. Amended Notice of Intent to Use Expert Detweiler --

MS. TREADWAY: And C.W. Frankenfeld. Look at the bottom. And then I followed up that notice after I interviewed Mr. Frankenfeld with his more specific opinions.

MR. HANEY: What that says is he will testify regarding the regulations and standards of being a licensed social worker.

MS. TREADWAY: That's exactly right, Judge. So they were notified.

THE COURT: I'll tell you what I'm going to do. I'm

going to give an opportunity here --

MR. HANEY: It also says, Your Honor, the testimony is fact-based rather than opinion-based.

MS. TREADWAY: It is fact-based to him.

MR. HANEY: Well, if he's going to give a statement that conflicts of interest --

MS. TREADWAY: No, just --

MR. HANEY: -- could have been the basis for action against the Defendant's license --

MS. TREADWAY: That's not an opinion. That is a fact. It's not an opinion at all.

MR. HANEY: I don't know what an opinion is if that's not an opinion.

MS. TREADWAY: He's not going to opine about whether Arlan Kaufman fell below the standard of care. The emergency order does that, Judge. He's not going to offer opinions of that nature. Basically I'm going to ask him questions is it a conflict of interest for a therapist to also serve as a landlord? Yes. Is it a conflict of interest for a therapist to serve as a guardian? Yes. That is not an opinion.

MR. JOSEPH: If it's not an opinion, what is it? Is it a fact?

MS. TREADWAY: Well, yes.

MR. JOSEPH: So, in other words --

MS. TREADWAY: Based on his expertise.

MR. HANEY: What does it violate? What statute or regulation?

MS. TREADWAY: I'm not asking him that.

THE COURT: You guys are arguing over -- this isn't helping me any. What I'm looking for and I thought I had was a case that points out this kind of disclosure -- which there has been disclosure. Whether it was timely or not, I don't know. What's the prejudice to the Defendants here?

MR. HANEY: The prejudice is not a fact witness. He was listed, but he also was listed -- he hasn't been giving any opinions -- well, I think that is what counsel has proffered -- that's all he is going to give is opinion.

MR. JOSEPH: Plus, I think it's cumulative, Your Honor. They did have a whole bunch of licensed social workers listed to give the same testimony.

THE COURT: Is that true?

MS. TREADWAY: No, Judge. We're not going to present cumulative testimony. And that's -- I mean, what licensed clinical social worker has appeared yet? That's a little premature to argue cumulative when this is the first licensed clinical social worker to appear before this jury.

MR. JOSEPH: I'm just relying upon the first notice you gave us. Had I think three listed.

THE COURT: Tell you what I'm going to do. I'm going to recess. I'm going to give you a continuance to take

a look at this overnight and then you can cross-examine him tomorrow.

MS. TREADWAY: Do you want me to go ahead with direct?

THE COURT: No. You can't go ahead with direct because they have a right to think about this overnight. And I don't think the jury is going to be too upset about getting to go home an hour early.

MS. TREADWAY: Well, do you not want us to put on anybody else? We have another witness we can put on.

THE COURT: Do you?

MS. TREADWAY: And we can start him.

THE COURT: All right. Let's do that.

(Thereupon, the following proceedings continued in the hearing of the jury.)

THE COURT: Here's what I'm going to do, Ladies and Gentlemen. I'm going to recess this witness, Mr. Frankenfeld, until tomorrow morning so that defense counsel can have a little more opportunity to prepare, which they are entitled to have given the subject matter of his testimony. And so you need to come back tomorrow, Mr. Frankenfeld. And the Government has another witness and we'll forge ahead with that witness until 5:00. All right.

LELAND H

Having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows on:

DIRECT EXAMINATION

BY MS. PARKER:

Q Good afternoon. Could you please state your first name and your last initial?

A Leland H.

Q Leland, where do you live?

A Bloomington, Indiana.

Q How long have you lived in Bloomington, Indiana?

A Approximately five years.

Q Does anyone else presently live there with you?

A Yes. My wife Marilyn.

Q Do you have any children?

A I have three children.

Q Is one of your children a daughter?

A Yes.

Q And what is her name?

A Mary H.

Q I'm going to show you what has been marked as Government -- or admitted as Government's Exhibit 1-B. Is that a picture of your daughter Mary H?

A It is, yes.

Q Is your wife Mary's mother?
A No, she is not.
Q Is Mary's mother still alive?
A No.
Q When did she die?
A She died June 22nd, 1999.
Q Are you currently employed?
A No. I am retired.
Q How were you employed before you retired?
A Two major companies. Initially, Shell Oil Company, and then almost 33 years with Ely Lilly and Company.
Q And what did you do for Ely Lilly and Company?
A In production several years, in research, and finally at a large production plant in Clinton, Indiana, where I was one of the managers.
Q Leland, how are you spending your retirement?
A Very interested in our history. I've been published on three occasions, and hopefully a fourth one is in the press right now. These are catalogs for art exhibitions for museums.
Q I would now like to ask you a few questions about your daughter Mary. When was Mary born?
A Mary was born on June the 18th, 1956.
Q Where was she born?
A In Crawfordsville, Indiana.

Q Did Mary grow up in Indiana?
A Yes. Pardon me. For her first two decades.
Q Okay.
A Yes.
Q Are Mary's siblings older or younger than she is?
A They are older.
Q Where does Mary live now?
A She lives in a supervised facility for the mentally handicapped in Terre Haute, Indiana.
Q That leads me to my next question. Does your daughter suffer from a mental illness?
A Yes.
Q Are you familiar with her diagnosis?
A Yes.
Q What is her diagnosis?
A Schizophrenia with minimal personality disorder.
Q How did Mary do in school when she was a child?
A Mary required special education in grade school.
Q Was she able to go on and graduate from high school?
A She was.
Q And, in fact, how did she do in high school?
A She was a member of the National Honor Society for three years running.
Q When Mary was in high school, did you have an opportunity to observe how she interacted with her peers?

A We had certainly some opportunity to do that.
Q And what were your observations?
A Mary tended to gravitate toward people that had disabilities of one sort or another.
Q Did Mary eventually start college?
A Yes.
Q Where was that?
A She attended a junior college in Vincennes, Indiana, called Vincennes University.
Q And do you know what she was studying there?
A General studies at that point.
Q When did you first become aware that Mary was showing signs of a mental illness?
A Second semester while she was at Vincennes University.
Q What happened at that time?
A Suddenly she started -- while I don't know the specific detail, I was overseas at the time, my understanding is that she -- and we were told also secondhand by the university -- that she started showing very, very strange signs.
Q And did you have any understanding of what those were?
A Not at that time. They did hospitalize her at that point.
Q And how old was she at that time?
A She would have been about 20 years old.
Q And what year was that, approximately?
A Well, let's see -- mathematics -- I suppose that would have

been -- '86 subtract six, '82.
Q Would it have been about --
A That would have been about 1979.
Q How about -- would it have been about -- you say she was about 20 years old?
A Approximately.
Q And she was born in 1956?
A That's correct.
Q So how about 1976?
A Oh, I'm sorry. I may have misspoken, yes.
Q That's all right.
A Thank you.
Q That's all right. Now, you say that you were overseas at the time that this hospitalization occurred?
A Yes.
Q After Mary had the incident at Vincennes University, did she come back home for a period of time?
A A very short period of time; but I believe she had an initial short stay at Hamilton Center inpatient unit in Terre Haute, Indiana.
Q That was before she came home for a year to your house?
A That was my recollection, yes.
Q Let me focus on that brief period of time when she was back home with you. Did you notice anything at that time that indicated to you that Mary was still ill?

A She wanted to stay in her room a great deal. And I believe there was an incident where she threw an object through her window. And we called the local physician over, he talked with her, and I don't recall what he did at that point.
Q At some point after that, did you decide to have Mary hospitalized?
A Well, yes. And the Menninger Foundation was recommended by a physician that I flew back from London with. Just happened to be sitting next to him.
Q And is that the Menninger Foundation in Topeka, Kansas?
A It was at that time, yes.
Q Did you take Mary there?
A Yes.
Q And then was she subsequently hospitalized at Menninger's after that?
A Yes.
Q For how long was Mary hospitalized at the Menninger's?
A Approximately two years and nine months.
Q How often did you visit Mary when she was hospitalized at Menninger's?
A We were there every one to two months.
Q And was it at the Menninger Clinic that Mary was first diagnosed with schizophrenia?
A Yes. And the personality --
Q The personality disorder?

A -- disorder, yes. Minimal.
Q At some point were you notified that Mary could not stay hospitalized at Menninger's any longer?
A Yes.
Q Were you given a reason for that?
A Yes.
Q What was that?
A Our insurance was about to run out.
Q How did you go about finding another place for Mary to live?
A The call from Menninger's, frankly, irritated me a little bit. The following day I called my contact at Menninger's and said I have an assignment for you -- I'm paraphrasing, but it was close to this -- which is please get busy and find an alternate facility for Mary. We will do the same thing and then let's compare notes.
Q And did you actually -- were you actually able to obtain a recommendation from your contacts at Menninger's at that time?
A We did, yes.
Q And what did they recommend?
A They recommended a facility in Newton, Kansas, called -- my brain is gone now -- she spent six years there. Not Prairieview Mental Health Center --
Q Would it have been Meadowlark Homestead?
A Yes, it is. Thank you very much. Meadowlark Homestead.

Q Can you describe Mary's -- well, first of all, you did take Mary to Meadowlark Homestead?
A We did. We investigated Meadowlark and they understood Mary's condition. They felt that they could work with her. And we liked what we saw. We did take Mary there.
Q Can you describe Mary's living situation at Meadowlark in terms of the type of care she received and what her particular living circumstances were?
A Well, she just simply had a room to herself. We did not observe on short visits every -- the actual medical care she was receiving. They had licensed social workers and so on. And she actually did rather well there.
Q Did you consider it to be a supervised facility?
A Oh, yes, definitely.
Q What was your understanding of the level of supervision that she had at Meadowlark?
A Well, it apparently was pretty good because we, after six years -- normally they would keep a person two years we were told. But they apparently were interested in Mary's case. And apparently she started running away after about six years and they said we really feel now that she needs to move elsewhere.
Q And approximately when would that have been?
A Well, now, mathematics again. If we can add. Let's see, nine years from when she went to Menninger --

Q Would it have been about 1986 or so?
A She would have left Meadowlark in '86, yes. Excuse me.
Q So at that point were you in the position of having to find another place for Mary to live again?
A Yes.
Q If you could, could you -- well, first of all, was it difficult to find another place for Mary to go?
A Well, in those days it was quite difficult. I would imagine it's still difficult today, but not to the extent it was then. My wife and I looked and continued to look for places that we thought might benefit Mary more than where she was at any given time. We actually initially found more information out of Canada than we did in the United States, oddly enough. And we continued to look, clearly, after Mary was in Newton, Kansas, considering places in Wichita, Illinois, and so on. Very difficult to find something. They had certain criteria. There were places that would take her, but they would feed her night and morning and then turn her loose during the day to spend time in, for example, Wichita. There was an operation here that operated that way.
Q What was it about Mary's particular case that made it so difficult for you to find the right place for her to stay?
A They were just difficult places to find. Our impression was that most places wanted to have as their clients the semi serious, not terribly serious mentally ill patient. Now, that

was our impression. I don't know the true case.
Q Was Mary's case considered a severe case?
MR. HANEY: Objection. There's no foundation. We're getting into medical testimony now.
THE COURT: Sustained.
Q (By Ms. Parker.) Leland, what was your understanding of whether or not the facilities you visited considered Mary's case an easy or difficult case?
A For example, while she was up in Topeka at Menninger's, part of the staff felt that she was ready for one of their group homes. Truth be known that the folks in charge of the group homes said, oh, no, she's not ready. The same thing happened in Newton at Meadowlark Homestead because we also considered the possibility of moving Mary into one of their group homes. Again, for a period, that looked positive. And at the end of that short period of time, the person or people in charge of the group home said, no, she's not ready.
Q Well, what was ultimately the result of your search at this time? Did you find another place to at least look into for Mary to live?
A We did. Meadowlark Homestead suggested one of the -- the key employee there, suggested that we look into Kaufman House.
Q And where was Kaufman House?
A In Newton, Kansas. They did not recommend Kaufman House. They said they knew very little, if anything, about Kaufman

House, but did understand that they were working with some folks.

Q Did you at that time look into the possibility of Kaufman House as a new home for Mary?

A Well, we visited the Kaufman House owners.

Q And who were the owners of Kaufman House?

A Linda and Arlan Kaufman.

Q And you actually met them at the time that you visited?

A They had a meeting with us, yes.

Q Do you see Arlan Kaufman in the courtroom here today?

MR. HANEY: We'll stipulate this is Dr. Kaufman.

MS. PARKER: Witness has pointed out --

A He was behind the computer.

MS. PARKER: Yes. The witness has pointed out Mr. Kaufman.

Q (By Ms. Parker.) At that time that you met with Arlan and Linda Kaufman, did you have a discussion with the Kaufmans about their treatment program at Kaufman House?

MR. JOSEPH: Your Honor, object to the compound question. Not distinguishing between which of the Kaufmans.

THE COURT: Yes, let's try to do that.

MS. PARKER: Okay.

Q (By Ms. Parker.) Did you have a discussion with Arlan Kaufman about the treatment program at the Kaufman House?

A May I give you this answer? May or may not be appropriate.

My recollection is that both Mr. and Mrs. Kaufman were present. They both participated in the conversation, as did my wife and myself.

Q And at that time did you gain an understanding from them of how their program operated?

A We came away with the feeling of trust.

Q And what was that based on?

A Conversations that we had with Mr. and Mrs. Kaufman.

Q And if I could just get some specifics from you on what your understanding was of how their program operated.

A I cannot give you that because simply it was conversation which at that time we did not fully understand. Seemed satisfying.

Q Did you have an understanding of where Mary would live?

A Don't recall seeing the house where she lived, no.

Q Was it your understanding that she would live in a house?

A Yes.

Q And did you have an understanding of what types of, for instance, therapy services she might be provided?

A Not specifically.

Q Did you have an understanding of what Linda Kaufman's role at the house was?

A We understood and were told that she was a registered nurse.

Q And did you have any understanding of what she would do for

your daughter?
A Well, our understanding was that she would do the normal things that a nurse would do: Oversight -- oversee medication administration, and perhaps trips to doctors were needed and so on and that kind of thing.
Q So it sounds like you got a good feeling from both of the Kaufmans on this occasion?
A We did indeed, yes.
Q Why was it -- what was it about them that gave you such a good feeling?
A Well, it's a difficult question to answer. They came across very well. They seemed, certainly, interested in Mary's case. We described her to -- and I don't know that they had contact at Meadowlark, whether they did or not, I just don't know that -- but we had described to them to the best of our ability about Mary. And they felt, obviously felt that they could work with her. Excuse me.
Q Just two more questions about that. Would you describe Arlan Kaufman as someone who seemed like a knowledgable person?
A Yes.
Q Would you describe Linda Kaufman as someone who seemed like a knowledgable person?
A Yes.
Q So at that point did you make a decision about whether Mary

would go to live at the Kaufman House?
A We did, because we didn't see any alternative at that point.
Q Now, at the time that Mary started living at the Kaufman House, were you still living in Indiana?
A Yes.
Q Approximately how long of a distance is it from where you lived in Indiana to Newton, Kansas?
A Approximately 650 miles.
Q When you would come to Newton, how did you get there?
A We drove.
Q So how long would it take you to do that?
A We would stay one night out.
Q All right. Before we get into your personal dealings with the Kaufmans and Mary's experience at the Kaufman House, I would like to ask you some questions about how the Kaufman House billed you for services allegedly rendered to Mary.

First of all, I'm going to hand you what have been marked for identification as Government Exhibits 6-F, 6-G, 6-J, 23, 23-A, 24, 27, 28, 29, and 30.

THE COURT: Read those again please.

MS. PARKER: Sure. 6-F, 6-G, 6-J, 23, 23-A, 24, 27, 28, 29 and 30.

Q I'll just give you an opportunity to leaf through those.
A Thank you.

Q First of all I'd like to ask you, do you recognize these documents?
A Yes.
Q What is Government Exhibit 6-F?
A 6-F as in Frank?
Q Yes.
A I don't seem to have that.
Q Don't see that one. How about if I -- if I show you my copy. I'll show you my copy. Let's check here. What is Government Exhibit 6-F?
A It is an invoice dated March 30, 1998, from the Kaufman Treatment Center.
Q What is Government Exhibit 6-G? Let me make sure you have it.
A That, too, is a set of invoices from the Kaufman Treatment Center dated October 6 -- I beg your pardon -- October -- the copy is not too legible. Apparently, October 8, 1998.
Q And how about Government Exhibit 6-J?
A That, too, is an invoice from the Kaufman Treatment Center dated December 27, 1998.
Q What is Government Exhibit 23?
A That is a check written to the Kaufman Treatment Center on March 20, 2000.
Q Does the check have a number?
A Number 6105.

Q What is Government Exhibit 23-A?
A That is another check to the Kaufman Treatment Center dated 3-20-2000.
Q And does that check have a number?
A It does. 6106.
Q What is Government Exhibit 24?
A That, too, is an invoice from the Kaufman Treatment Center dated December 8, the year 2000.
Q And just to clarify. For the invoices that you have discussed so far, are those all invoices for your daughter Mary H?
A Yes.
Q What is Government Exhibit 27?
A That is a check to the Kaufman Treatment Center dated December 27, year 2000. Number 6328.
Q What is Government Exhibit 28?
A That is a check written to Kaufman House. The check number is 6385 and the date is 9-5-2001.
Q What is Government Exhibit 29?
A Again, invoices from the Kaufman Treatment Center dated October 2nd, 2001.
Q And, again, is that invoice for your daughter Mary H?
A Yes.
Q What is Government Exhibit 30?
A I don't appear to have 30. Let me check again. I do not

have 30.
Q I think Mr. Moore is pulling it up for us. Thank you.
A Thank you.
Q Sorry about that.
A Government Exhibit 30 is a check written to Kaufman Treatment Center on December 18th, 2001. Number -- check number 6407.
Q All right. Are Exhibits 6-F, 6-G, 6-J, 24 and 29 invoices from the Defendants Arlan and Linda Kaufman and Kaufman House?
A Assuming those are what I have just spoken to, yes.
Q Yes. Are Exhibits 23, 23-A, 27, 28 and 30 checks you sent in payment to the Defendants Arlan and Linda Kaufman at the Kaufman House?
A Yes.
MS. PARKER: All right. The Government offers Exhibit 6-F, 6-G, 6-J, 23, 23-A, 24, 27, 28, 29 and 30 into evidence.
MR. HANEY: As being checks that were sent?
THE COURT: Invoices and checks.
MS. PARKER: Invoices and checks.
MR. HANEY: I have no objection.
MR. JOSEPH: I have no objection, Your Honor.
THE COURT: They're received.
Q (By Ms. Parker.) How did you receive the invoices?
A By United States mail.

Q Was that typical of all of the invoices that you received from the Kaufmans and Kaufman House?
A To the best of my recollection.
Q Are the five invoices, again, invoices representative of the types of invoices you received for your daughter Mary while she was a Kaufman House resident?
A Yes. With possibly one exception. One of the checks, as I recall, was for a trip, a vacation trip.
Q And that was atypical?
A That was atypical.
Q How did you transmit your checks to the Defendants?
A United States mail.
Q Are these checks that you've looked at and that we've admitted into evidence here representative of the checks you mailed to the Defendants on behalf of your daughter Mary while she was a Kaufman House resident?
A Yes.
Q All right. Let's turn first to Exhibit 6-F the March 30, 1998, invoice. Taking a look at that document. Did the Defendants charge you for therapy?
A Oh, where has that gone?
Q You can also look up at the screen if you can see it.
A Oh, sorry.
Q That's okay.
A I think someone took 6-F. I had it for a period. I would

appreciate having it back.
Q Sure. There you go.
A Thank you.
Q I'm sorry about that.
A No problem at all. Would you kindly repeat your question.
Q Absolutely. Looking at that Exhibit 6-F, did the Defendants charge you for therapy?
A Yes.
Q According to the documentation that accompanied this invoice, what year was the therapy allegedly provided?
A 1997.
Q Did you make a notation in your own handwriting to the right of the therapy charges?
A That is my printing, yes.
Q What does that note say?
A At the top -- well, let's see, partially appears to be my handwriting, my printing, rather, sorry. Then adjacent to individual psychotherapy during the period 1/2 through 6/19, '97, I put the mark detail not found.
Q Do you know what you meant by that note?
A Well, I have to presume I meant that I did not receive or perhaps somehow had lost in transit or otherwise the material that would substantiate those bills, these charges, I should say.
Q All right. Let me turn your attention now to Page 5.

A Yes.
Q Looking at that page, how many group therapy sessions did the Defendants charge you for just December of 1997?
A 26.
Q And also looking at that same page, how many individual therapy sessions did the Defendants charge you for in the month of December of 1997?
A There were only two listed.
Q Also according to Page 5 of this invoice, did the Defendants also submit claims to Medicare for this 1997 therapy?
A Yes.
Q According to this invoice, did the Defendants apply your daughter Mary's Social Security benefits to these charges?
A Unless I'm overlooking it, it is not obvious from this.
Q How about if you look back at the first page.
A Yes. Indeed, on the first page.
Q And how much for each?
A The paid portion is captioned "Less Payments Applied to These Charges". And then beneath that, Social Security Disability Checks $5,160, bracket, 12 months at $430, end of bracket. And then supplemental security income, amount $888, bracket, below that, 12 months at $74, end of bracket.
Q According to this invoice, what did you owe the Defendants for your daughter's individual therapy for January through

June 19 of 1997? And I believe you can find that right above where you were just looking?
A Well, I find total charges.
Q Do you see where it says "Individual Therapy"?
A I do indeed.
Q January 2nd through June 19 of 1997?
A Yes. Captioned "Mary's share of".
Q How much is that amount?
A I'm sorry, which particular --
Q The amount you just -- or the line you just read, individual therapy for January 2nd through June --
A Sorry. Yes, indeed.
Q June 19.
A $668.12.
Q And what did you owe the Defendants for your daughter's alleged individual therapy for June 24 through December 9 of 1997?
A $668.12.
Q What did you owe the Defendants for your daughter's alleged group therapy for January through November -- or, excuse me, June through November -- no, January through November of 1997? Sorry.
A Through November 26, of 1997, the figure was $3,625.42.
Q And what did you owe the Defendants for your daughter's alleged group therapy for December of 1997? Or -- I'm

sorry -- for December 1997 therapy. That's my fault.
A This says December of 1997 therapy.
Q Does that say $313.84?
A That's $313.84, yes.
Q Leland, do you know whether these services were actually provided to your daughter Mary?
A No.
Q Does this invoice also charge you for nursing services?
A Yes.
Q And do you see up there the amount for nursing services -- I'm sorry -- nursing care and supervision?
A Yes.
Q Is $1,580?
A I do.
Q What did you understand that this charge was for?
A Well, again, controlling and providing at the appropriate time various medications that my daughter needed. If she needed to go elsewhere in the community such as to her physician or a psychiatrist in a nearby town, transportation and so on, she would accompany her.
Q Do you know whether these services were actually provided to your daughter Mary?
A Well, I really don't know. I assume they were.
Q But you don't personally know?
A I do not personally know.

Q Did you pay the Defendants for the therapy and the nursing services?
A Yes.
Q All right. Let's move on to Government Exhibit 6-G, the October, 1998, invoice. We'll get it up there. All right. Did the Defendants charge you in this invoice for nursing care?
A Yes. May I have a copy of that?
Q Yes.
A Thank you.
Q It's okay.
A Kindly restate.
Q Yes. Did the Defendants charge you in this invoice for nursing services?
A Yes.
Q And do you see there that the amount is $1,162?
A Yes.
Q What did you understand this charge to be for?
A The same area of help to our daughter that I previously mentioned.
Q And, again, same question, do you personally know whether these services were actually provided to your daughter Mary?
A No.
Q Did the Defendants also charge you for therapy services?
A Yes.

Q And do you see there on that invoice the amount they charged was $720.87?
A Yes.
Q All right. Moving on to Page 5, which is the last page of this document. And looking, if you could, at the highlighted -- well, actually, let me ask you. The highlighted portion of Page 5 says that the number of therapy sessions or therapy services allegedly provided to Mary in 1998 totalled 25.
A Yes.
Q Did you pay the Defendants for these nursing and therapy services?
A Yes.
Q Did the Defendants also use Mary's Social Security benefits to pay for these services and other expenses? And there again, I believe you may need to refer back to the first page. Or it actually may be reflected on Page 3.
A Yes. On Page 3 we have the nursing charges and below that credits, payments, received from Mary's Social Security check, and covering the period December 31, '97, through 9-3-'98.
Q And just to speed things along a little bit, there are multiple references to SSI and Social Security disability on this page. Is that correct?
A Yes.
Q All right. Moving next to Government Exhibit 6-J. The

December 27th, 1998, invoice. Did the Defendants charge you in this invoice for nursing services?

A There again, I don't appear to have that.

Q I believe I handed that one to you.

A Oh, I beg your pardon. I thought we had that one before. My error. Sorry.

Q That's all right. Lots of documents. Again, the question is: On this particular invoice from December 27 of 1998, did the Defendants charge you in this invoice for nursing services?

A Yes.

Q And does the amount reflected for the nursing charge, is it $1,560?

A Yes.

Q Do you personally know whether these services were actually provided to your daughter Mary?

A No.

Q Did the Defendants charge you for individual therapy from January through June of 1998?

A Yes.

Q And is that amount $739.75.

A Yes.

Q And did they also charge you for the Defendants' individual therapy from July through December of 1998?

A Yes.

Q And was that $720.87?
A Yes.
Q Did the Defendants charge you for group therapy in 1998?
A Yes.
Q And is that amount $4,010.51?
A Yes, it is.
Q All right. Let me turn your attention to Pages 11 through 17 of this Exhibit and I'll just let you leaf through those while I ask you if those pages document alleged group therapy?
A Yes, they are so labeled.
Q Okay. And turning your attention to Page 14, according to this documentation, did the Defendants allegedly provide Mary from January through June of 1998 with 204 hours of group therapy services?
A Yes.
Q And also according to this same documentation, on Page 17, did the Defendants allegedly provide Mary from July through December of 1998 with 167 hours of group therapy?
A Yes.
Q Do you know -- do you personally know whether these services were actually provided to your daughter Mary?
A No.
Q Did you pay the Defendants for the nursing services and the therapy?
A Yes.

Q All right. Let's look now at Exhibits 23 and 23-A. I'll give you a chance to shuffle your papers there.
A Thank you. All right.
Q Okay. Are these exhibits copies of checks you paid to the Defendants for Mary?
A Yes.
Q All right. Looking at Exhibit 23, what is the date and the amount of that check?
A The date is March 20th, 2000. The amount is $753.36.
Q And how is this check endorsed for deposit?
A Kaufman Treatment Center, Linda J Kaufman.
Q What is the date and the amount of the check, Exhibit 23-A?
A The date is 3-20-2000, and the amount is $973.09.
Q How was this check endorsed for deposit?
A It is endorsed Kaufman Treatment Center, Linda J Kaufman.
Q Moving next to Government Exhibit 24, the December 8, 2000, invoice. Did the Defendants charge you in this invoice for nursing services?
A Yes.
Q And is the amount reflected next to the notation for nursing care and supervision $1,694?
A Yes.
Q Do you personally know whether these services were actually provided to your daughter Mary?
A No.

Q Did the Defendants discuss Medicare charges in this invoice?
A There's a statement there: Therapy charges have been sent to Medicare.
Q Again, do you personally know whether these services were actually provided to your daughter Mary?
A No.
Q Did you pay the Defendants for the nursing services and the therapy?
A Yes.
Q Let's next look at Exhibit 27. Is this a check that you sent to the Defendants for your daughter Mary?
A Yes.
Q What is the date and the amount?
A Date December 27, 2000. The amount is $5,000.
Q How was this check endorsed for deposit?
A Kaufman Treatment Center, signed Linda J Kaufman.
Q All right. Moving on to Exhibit 29. The October 2nd, 2001, invoice. Did the Defendants charge you -- I'm sorry, we'll wait until we catch up with the --
A Let me catch up here.
Q We're all needing to catch up. Okay. Again, for the record, this is Exhibit 29. The October 2nd, 2001, invoice. Did the Defendants charge you in this invoice for nursing care and also for groups?

A Clearly nursing care and, yes, both categories.
Q Is the amount reflected for nursing care $1,600?
A Yes.
Q And is the amount reflected for groups $3,696?
A Yes.
Q When you received this invoice, or at any time prior to receiving this invoice in December of 2001, were you aware that the Defendant Arlan Kaufman's license to practice clinical social work had been suspended in August of 2001?
A No.
Q Did the Defendants charge for group meetings occurring after August 9 of 2001? And you can turn to Page 6 in order to verify that.
A After what date, please?
Q After August 9 of 2001, were you charged for therapy services or group meetings?
A Yes.
Q And turning to Exhibit 30 --
A I'm sorry. The number again please.
Q 30.
A 30.
Q Is Exhibit 30 another check you sent to the Defendants for your daughter Mary?
A Yes.
Q What is the date and the amount?

A Looks to be December 18th, year 2001. The amount is $7,000. I don't believe I may have a copy of that here.
Q How is this check endorsed for deposit?
A Endorsed Kaufman Treatment Center, Linda J Kaufman.
MS. PARKER: All right, Sean. Thank you.
Q (By Ms. Parker.) All right. Turning back from the financial stuff to your personal observations of Mary's experience at the Kaufman House. What contact did you have with Mary in the first few years that she lived at the Kaufman House?
A We visited every -- twice a year.
Q And when you say we, who are you referring to?
A My late wife and myself.
Q Which of the Kaufman residences did Mary live in?
A What was it? 621 or 721 or something, west 7th, I believe.
Q Would 321 West 7th Street ring a bell?
A Thank you, yes. I could find it, but didn't need the number.
Q You knew it was 7th street?
A Right.
Q When you went to visit Mary, did you go inside the house?
A In the early years, yes.
Q And let's focus first on the early years. What level of access did you have to the house in those first few years when you made your visits?

A Well, we seemed to have complete access. I should say we had complete access.
Q And do you know whether Mary had a bedroom?
A Yes.
Q And did her bedroom have a bed?
A Yes.
Q Did you have any other way of keeping in contact with Mary besides visiting her?
A Letters and occasional phone calls.
Q At some point did the frequency of your visits to Mary at the Kaufman House change?
A There was one period -- and I would be hard-pressed to give you a precise date -- but I believe it would be somewhere in the early to mid 1990s.
Q And what changed at this particular time in terms of your frequency of visits?
A My recollection is that there was approximately a two year period in there where we were clearly not encouraged to visit. But that is a dim recollection.
Q Was that a two year period in which you actually did not visit Mary at all?
A That is correct.
Q And you say you were not encouraged to visit. What is it that gives you that idea?
A Well, I don't recall that I've ever been -- we were ever

encouraged to visit.
Q Let me ask it to you this way. During this two year period when you did not visit your daughter Mary, were you discouraged by anyone from visiting her?
A I'm sorry, I don't remember. Because I don't remember precise detail. There clearly -- if I may. There clearly was a reason that we didn't because we've always been very close to our daughter. And somewhere, somehow, we got the impression that we should not visit. For her benefit, but I cannot be specific.
Q But you had the impression that it was for her benefit that you should stay away for this period of time?
A Yes.
Q During that two year period when you didn't see your daughter, why is it that you complied with this notion that it wasn't in her benefit for you to see her?
A Well, we must have been so advised. And our policy as parents had always been to work with the therapists that were working with our daughter.
Q And is that true for you in the present day?
A Absolutely.
Q So if you -- have you ever been told by Mary's current therapist that you shouldn't visit her?
A Only on one occasion.
Q And did you comply with that?

A Absolutely, yes. And that was a very short period of time.
Q At some point did you resume having in-person visits with your daughter?
A Yes.
Q Who made the decision that you would start visiting with Mary again?
A There was one point in time when I said simply we're coming to visit our daughter. I cannot be a hundred percent certain that it was that statement that caused us to start visiting again.
Q But it was your own decision?
A To the best of my knowledge, it was our decision.
Q And just to be entirely clear for the record, during the time that your daughter Mary lived at the Kaufman House, do you ever remember the Defendant Arlan Kaufman encouraging you to visit Mary?
A No.
Q Do you ever remember the Defendant Linda Kaufman encouraging you to visit Mary?
A No.
Q Was that different from other places that Mary had lived up to that point?
A Yes.
Q In what way?
A We were encouraged to visit the Menninger Foundation

frequently; thus, every month or two, we were there. Meadowlark Homestead, we could just visit whenever we chose. And we visited numerous times.

Q Now let me just ask you a few questions about how you would go about making plans to visit your daughter. On the occasions when you visited Mary, did you ever drop by unannounced?

A No.

Q When you made plans to visit Mary, did you deal directly with Mary?

A Initially, yes.

Q Did that change?

A In what location?

Q At the Kaufman House. When you made plans to visit Mary, did you make those plans directly with her?

A Yes.

Q Was there ever any point at which that was different?

A Only one occasion, and I can't give you the date, when it became obvious that we needed to see our daughter and we were coming; but, otherwise, we would work with Mary.

Q Did you typically notify the Defendants Arlan and Linda Kaufman when you were coming for a visit?

A I believe --

MR. JOSEPH: Object, Your Honor.

MS. PARKER: I will rephrase.

Q (By Ms. Parker.) Did you ever notify the Defendant Arlan Kaufman before you would make a visit to Mary at the Kaufman House?
A I do not recall doing so.
Q Okay. Do you recall ever doing so with the Defendant Linda Kaufman?
A I don't recall doing so.
Q When you resumed visiting your daughter, did you have the same amount of access to her bedroom that you had had previously?
A The access to the house changed in three different -- I'll call them episodes. Initially, as I previously stated, we had access to the entire home. Then, and I cannot give a precise date for this, but my feeling would be it would be early 19 -- very early 1990s, we only had access to the living room. And then probably starting around, oh, 1998ish, we could not even go in the house.
Q Now, did you have an understanding of why your access to the inside of the house changed in the manner that you just described?
A When we were -- I use the word isolated -- I don't mean to use that word -- but to the living room, when we were not allowed to leave the living room -- I'll restate. My daughter Mary said that there were some people upstairs that were not fully clothed, as I recall.

Q And then what about being denied access to the house at all, did you have any understanding of the reason for that?
A Well, my daughter Mary told us that no one was allowed in the house and they had been specifically advised not to allow anyone from SRS in the house.
Q And SRS, what was your understanding of what that was?
A Obviously, a state agency. I used to know. I don't know now.
Q Would it be Department of Social and Rehabilitation Services?
A It is indeed.
Q All right. Just a couple of questions about that. Uhm, first of all, when Mary mentioned nudity at the house to you, did this raise any questions in your mind?
A It did not.
Q It did not. And why is that?
A It did seem a little strange; but, on the other hand, if you have a group of women, for example, living on the second floor of a dwelling, I assume they have freedom to come and go as they choose.
Q So this was -- your understanding was simply that this was people are upstairs and it's their private area of the house?
A Yes.
Q And this issue of not telling anyone from social -- or allowing anyone from social services into the house, did that

raise any questions in your mind?
A Yes, but I did not pursue it.
Q And when you say you didn't pursue it, does that mean you did not pursue it with either of the two Defendants, Arlan and Linda Kaufman?
A I rarely saw the two Defendants.
Q Why is it that you wouldn't have or didn't pursue an issue like that with your daughter's caregivers at the time?
A I have --
MR. HANEY: Asked and answered, Your Honor.
THE COURT: I beg your pardon.
MR. HANEY: That's already been asked and answered. The question is repetitive.
THE COURT: Overruled.
Q (By Ms. Parker.) My question was on the issue of your daughter telling you that social services was not to be allowed into the house, why didn't you ask either of your daughters caregivers what the reason for that was?
A When you have a mentally ill child and you have her placed in an area where you can trust the various caregivers, it is not good policy to make waves. Thus, I did not ask.
Q And can you just explain that a little bit more for the jury. Why is it not good policy to make waves when you have a mentally ill child?
A Well, within our experience, it's extremely difficult to

find places to house appropriately a mentally ill child, so that should you lose that opportunity for whatever reason, then you have a serious problem on your hands.

MS. PARKER: I have quite a bit more, Your Honor. I don't know if this is a good time to stop.

THE COURT: It is. Ladies and Gentlemen, remember and heed the admonition. I will see you tomorrow at 9:00. You're excused.

(Jury excused for the evening at 4:58 p.m.)

THE COURT: All right. Now, you all can stay if you wish or you can leave if you wish. I'm going to take up some matters with the lawyers.

A Thank you.

THE COURT: I finally found the cases I was looking for when you all were up here arguing with respect to the testimony of Mr. Frankenfeld. In the case of United States vs. Ivory, which is one of Judge Lungstrum's cases, went up to the Circuit. Judge Lungstrum sanctioned the Government for failing to comply with the discovery order. The Circuit reversed. Said that the factors the district court should consider in determining if a sanction is appropriate are the reasons the Government delayed producing the requested materials, including whether or not the Government acted in bad faith when it failed to comply with the discovery order;

the extent of prejudice to the defendant as the result of the Government's delay; and the feasibility of curing the prejudice with a continuance.

One of the cases that the Government -- or that the Tenth Circuit cites is United States vs. Golyansky, G-O-L-Y-A-N-S-K-Y, 291, Fed. 3rd, 1245, a Tenth Circuit case, written by Judge Baldock, who knows what happens in trials. And at Page 1049 the Court again lists these factors and says: "In the absence of a finding of bad faith, the court should impose the least severe sanction that will accomplish prompt and full compliance with the discovery order. The preferred sanction is a continuance. It would be a rare case where, absent bad faith, a district court should exclude evidence rather than continue the proceedings."

That's the law. Now, you can make your arguments to me about whether I should permit Mr. Frankenfelder -- or whatever his name is -- to testify tomorrow. It's your objection, Mr. Haney.

MR. HANEY: Thank you. Your Honor, I've never tried to give the Court the impression that he can't testify. That's not my objection. My objection is that he cannot --

THE COURT: Well, to give expert testimony.

MR. HANEY: He cannot testify -- well, he cannot give opinion testimony. He can talk about what BSRB does and what their procedures are, but he cannot give opinion

testimony that relates to Dr. Kaufman. That's my objection.

THE COURT: But --

MR. HANEY: And I don't think the Government has offered opinion testimony. They think they can do it without being opinion testimony.

THE COURT: But you haven't touched on those factors. How are you prejudiced by this letter that Ms. Treadway wrote to you? I don't remember the date on it, but it's a couple three days ago, outlining what his testimony was gonna be.

MR. HANEY: Well, Your Honor, originally the notification we had where he was going to be a potential expert, which was, we contend, filed out of time, even in that letter said he was not going to be providing testimony in the form of opinion.

THE COURT: Well, where is that letter? I'm not doubting you --

MR. HANEY: It's not a letter. It's a motion. It's a motion that's on file. I have the docket number.

MR. JOSEPH: Docket number 270, Judge.

MR. HANEY: And states in part: "The testimony is fact-based rather than opinion-based. However, to the extent the witness may use his professional expertise as a basis for testimony, the Government is attempting to give the Defendants fair notice."

That was the notice, the letter which we received a couple days ago.

THE COURT: I read it when you were up here.

MR. HANEY: Seems to me, in reading that letter, that there's no way that some of that testimony could be presented other than in the form of opinion, and to this day -- my objection is, he can testify, he can testify as to what we had notice of. He has expertise in his field. But he cannot testify as to opinion testimony. There's been no notice. Even to this very moment there's been no notice that he is going to give opinion testimony. And if the Government says he's not, then that may take care of it.

THE COURT: Did you want to weigh in on this, Mr. Joseph? Even though, as I told you, your dog is not in this fight.

MR. JOSEPH: No, Your Honor. I have nothing in addition to add to what Mr. Haney said.

THE COURT: All right. What's your response, Ms. Treadway?

MS. TREADWAY: Well, again, Judge, I don't believe they've shown bad faith. The Government amended its expert notice on October 4th. They objected to that notice as to one witness. They did not object as to another witness, and that's the witness at issue, Mr. Frankenfeld. Because of the objections that the Defendants raised as to Ms. Glynn, we

decided that we would give fuller notice, which we did, on October 10th, which was our day off. And I tried to give that notice as soon as I could, as soon as I understood the testimony that Mr. Frankenfeld would be giving. And, again, the first time I got information that the Defendants were unhappy with that notice or unhappy with the fact that we had notified them of this additional possible expert was today at the bench.

I believe a continuance is proper, Judge. There is no prejudice. These are very well-healed (sic) defense attorneys. They can well cross-examine Mr. Frankenfeld. Therefore, there is no prejudice. And the judge was correct in offering them a continuance so they could do overnight preparation if need be. The Government's position would be that this testimony is not of the nature that they would even need that much preparation; but would agree with the Court that that's the proper sanction in this situation.

THE COURT: Well, you have to start out with Rule 16. Rule 16 says: "Expert witnesses. At the defendant's request, the Government must give to the defendant a written summary of any testimony that the Government intends to use under Rule 702, 3 or 5, during its case in chief at trial." That's all it says. And that letter that you wrote on the 10th of October gives the Defendants notice.

Now, I don't find any bad faith on the part of the

Government, and I find pursuant to those cases that I've read to you that I think that a continuance is appropriate. And I'm willing to give you a longer continuance than tomorrow. I know it's tough at 5:00 to get ready to cross-examine a witness the next morning. And if you need a longer continuance, I'll give you one.

MR. HANEY: Not if the Government can give assurances, which I haven't heard yet, that he's not going to offer opinion testimony.

THE COURT: Well, what was in that letter sure looked like opinion testimony to me.

MR. HANEY: Well --

MS. TREADWAY: He's going to testify as to the information that's in the October 10th letter, Judge.

THE COURT: Well, it looks like opinion testimony, doesn't it?

MS. TREADWAY: Yes, as to a few areas.

MR. HANEY: That's my entire objection. The notification said he was not going to give opinion testimony. It said he was going to give fact testimony. And that letter of October 10th doesn't say a word about opinion testimony. And this is the first time counsel has said he's going --

THE COURT: Bring that letter back up again.

MR. HANEY: Sure.

MR. JOSEPH: Judge, I would like to weigh in at this

point. The amended notice that we were given on October 4th, which is, what, the day the trial starts, put Mr. Frankenfeld's name in it. And, I confess, I completely missed it because it's in a paragraph at the end, not set up like the information about Mr. Detweiler. I just missed it. But it clearly says there will be no expert opinions. It is fact-based.

THE COURT: Is that what it says?

MS. TREADWAY: I don't believe so, Judge.

THE COURT: Well, let's quit arguing about what it did or didn't say. Get it up here and let me read it.

MS. TREADWAY: I don't have the document, Judge.

MR. JOSEPH: I've just got it on my computer, Your Honor. I can show you if you can read it on that small screen.

THE COURT: I'm put on my extra strong glasses.

MR. JOSEPH: This last paragraph right there.

THE COURT: Which reads, for the record: "In addition, given the circumstances of this case and an abundance of caution in giving Rule 16(a)1(G) Federal Rule of Evidence the broadest possible interpretation, Government provides notice that C.W. Frankenfeld, will provide testimony based on his expertise regarding the regulations and standards governing licensed clinical social workers, including conflicts of interest. The testimony is fact-based rather

than opinion-based. However, to the extent the witness may use his professional expertise as a basis for his testimony, the Government is attempting to give Defendants fair notice. The witness has not received and will not receive remuneration as a traditional expert witness."

MR. JOSEPH: And, Your Honor, based on that, I wouldn't have any objection to him giving fact-based testimony about what the rules and regulations are that govern social workers under BSRB; but I'm afraid that the letter that we got Monday --

THE COURT: Let me see the letter again. Bring it up. Bring it up. You don't want to be here all night, do you?

MR. HANEY: I've got it.

THE COURT: What I'm trying to do is avoid problems when the guy comes back about objections. You understand. All right. I'm going to read this into the record so that we know what we're talking about here. This is a letter from Ms. Treadway to Mr. Haney and Mr. Joseph dated October 10. "Given your objections to Diane Glynn's testimony, we are hereby notifying you that Chuck Frankenfeld will be offering the following testimony. One, documentation for requirements for licensed social workers."

He's already done that, I think. But that's not opinion testimony. "That the various roles Defendants held in

relationship to the Kaufman House residents is landlord, representative payee, guardian, purchasers/dispensers of medications, taking clients on vacation. Having clients do work to pay back vacation created conflicts of interest and that these conflicts of interest could have been the basis for an action against him, the Defendant Arlan Kaufman's license."

How is that anything other than his opinion?

MS. TREADWAY: I believe it is opinion, Judge. That's why I was notifying them of that.

THE COURT: That a licensed social worker can conduct psychotherapy but cannot prescribe medications. That may or may not be opinion.

MS. TREADWAY: I believe that's a fact, Judge.

THE COURT: That's something out of the regulations, I assume.

MR. HANEY: We don't challenge that.

THE COURT: The communication owed by a licensed social worker to a client's medical doctors and psychiatrists about the therapies being provided by the licensed social worker. Again, I don't know. Is that a regulation or is that an opinion?

MR. JOSEPH: That's opinion.

MS. TREADWAY: I believe that's a fact, Judge. And it's also a fact that's already been established by Dr. Menninger so --

THE COURT: Well, then it's repetitious. That a licensed social worker can do therapy with sex offenders. Again, is that an opinion or a fact?

MS. TREADWAY: That's a fact, Judge.

MR. JOSEPH: I agree, that's a fact.

THE COURT: Okay. Do you agree, Mr. Haney?

MR. HANEY: It seems to be a fact. I don't know how he can testify to it, but that's --

THE COURT: He has conducted therapy with sex offenders and it is not a generally accepted practice for a social worker to have such clients perform sex acts in therapy sessions.

MR. HANEY: And that is absolute opinion.

THE COURT: That's opinion.

MS. TREADWAY: I agree.

THE COURT: So we've got two opinions. We've got this last one, number 6; and we've got number 2 about his license.

Well, it's going to be the ruling of the Court that Mr. Frankenfeld will be allowed to testify on those two subjects that may be opinion testimony. If the Defendants wish a continuance longer than until this witness presently on the witness stand concludes his testimony, I will give it to them. And they don't have to tell me that tonight. They can tell me that tomorrow.

MR. HANEY: Thank you, Judge.

THE COURT: All right. Let's take this back.

Now, let's talk about the motion of Mary H to quash subpoenas. And Mr. Lowry is here. You may make your argument on that, Mr. Lowry. But let me tell you, because you weren't here this morning, or at noon when I took this up. The law in the Circuit in the case of United States vs. Gomez, 807 Fed. 2nd 1523, Tenth Circuit, 1986, a case written by Judge Brown, says: "The district judge has broad discretion in determining the competency of a witness to testify. His decision will not be reversed in the absence of an abuse of discretion. In order to exclude a witness because of incompetency, that incompetency must clearly appear from the evidence to establish doubt as to the witness's credibility."

That's the law. And what I also told counsel today is that I am concerned, not so much with the witness's credibility, because, to some extent, that can't be established in the absence of the witness herself. What I am concerned about is the affidavit attached to your motion that essentially says -- and I'm not going to read it into evidence, it's there -- that having to testify would cause her mental state to severely decompensate, which I'm not sure exactly what that means but I can guess. So go ahead.

MR. LOWRY: May it please the Court. Your Honor, I represent Mary H----- and her guardian Leland H----- in his

capacity as a guardian. I did cite United States vs. Allen Tenth Circuit, 1997, which also incorporates U.S. vs. Gomez. And my argument is that Mary, Mary H, does --

THE COURT: I think we can rely on --

MR. LOWRY: -- are that Mary is diagnosed with very significant mental illnesses, and that what's most important is that she has very substantial functional limitations as a result of that mental illness. Primarily, what would be relevant to her capacity to understand her oath would be that she is currently suffering from delusions and hallucinations as laid out in the affidavit of her current treating therapist, Angela Lee.

THE COURT: I saw that.

MR. LOWRY: And that even the service of the subpoena on her caused her to decompensate. And what that means, I think can be argued from the affidavit, is that she's having increased delusions and very substantially increased behavior such that she's a substantial and imminent danger to herself and others. She attempted to and did burn herself. And caused damage to property at her group home. And was caused to be hospitalized because she was a danger to herself or others. Solely because of the service of the subpoena. I think that it's arguable and supported by the affidavit that if she was caused to travel the 650 approximate miles to Wichita from Indiana, and to testify and face the Kaufmans,

that she would decompensate, not understand her oath, because of her mental illness, and not be able to understand the truth from falsity; and therefore, is simply not competent to testify. And that the Court should not require her to show up under the subpoena.

THE COURT: What's your view on two things? One, that she could testify by closed circuit television; and/or, number two, that her deposition could be taken in Indiana so that she would not have to travel here?

MR. LOWRY: My position based on the affidavit of her treating therapist is that she is not competent to testify in any manner, at any place, and doing so would both cause her substantial harm, cause her mental illness to decompensate, and result in additional harmful conduct to herself and others. And, most fundamentally, she is not able to understand her oath. And that means wherever she's at, therefore, she is not competent to testify.

THE COURT: All right. Thank you. Mr. Haney.

MR. HANEY: Your Honor, I think the procedure the Court had suggested earlier of having Angela Lee available for examination is certainly appropriate. And we have the same circumstances here that we had with Tom R. We have been refused through Mr. Lowry any access to Mary H at all. And I talked to Mary H's father at one time. He also declined the opportunity. So we don't know anything about her current

position. We don't have any medical records concerning this. We don't have any diagnosis concerning this. We have only the affidavit of Angela Lee who states in her opinion, assuming she's competent to give an opinion, that to a reasonable medical probability, whatever that means, I don't know. Certainly it goes without saying, and we don't have to say it, that if a witness who is going to testify is going to be in such imminent harm and danger to that witness that no one wants to do that. But she is, as the Court knows, certainly a material witness. Her father's been testifying for some period of time. We have subpoenaed her. We do intend to call her. And as the Court said, the issue of competency is what the central issue is. And I can't tell whether she is or isn't and we haven't had any opportunity to confront the affiant on this affidavit. So -- we do plan to respond based on the timing the Court's given us to file a response. But right now, after looking at this for one day, that's all I know.

THE COURT: Yes, sir.

WITNESS MR. H-----: May I comment, Your Honor?

THE COURT: You may, sir.

A As Your Honor knows, I'm the father of Mary H. I don't know that it has been brought to the Court's attention, but my daughter is on oxygen every night in her facility and has been in that condition for, oh, at least a year and a half, perhaps

a bit longer. She also undergoes nebulizer treatments, and I don't know what those are exactly, precisely, several times during the day. Not more than four.

THE COURT: Does she have a lung condition of some kind?

A Asthma, Your Honor, yes.

THE COURT: All right.

A When the subpoena was served directly to my daughter -- under normal circumstances, the treatment center, or the home where she lived, and the person in charge, should have called me to get my permission for that to happen. And I would have said no because when I was subpoenaed, they came to the door and simply said we have -- I have a check for you. Well, I'm no total idiot. I knew that it was a subpoena. But they --

THE COURT: What, are you telling me you didn't think it was Ed McMahon with the --

A The person that served my daughter's subpoena I am told also asked her to sign a document. I do not know what that document was.

THE COURT: I don't know either.

A No. In all honesty, I do not know how my daughter could be safely transported. I mean, I'm going to be 79 years old next month and I barely was able to transport myself out here. I do not know how my daughter could be transported out here safely. And, I mean, I'm not capable of doing it. If she was

to be transported out here, I would think appropriate medical services should be with her at all times.

THE COURT: Here's what I'm going to do. I'm going to do the same thing that I did with this other witness. I'm going to schedule Angela Lee's testimony by telephone on October 20 at 5:15, our time, not her time. And it will be Mr. Lowry's duty to put her on. And we can do this by telephone. The Defendants will be present here in the courtroom. You're certainly welcome to be here, too, if you wish. Or you can be back there. Your testimony will be over with by then so -- and based on that testimony, I'll decide what to do. Whether to allow her to testify at all, in other words, grant the motion to suppress, or quash the subpoena, or whether I will work out some other way for her to testify.

A Thank you, Your Honor. And may I also comment that within my -- I am not a medical person, of course, but I have seen a lot of medical people and I am extremely impressed with the abilities of Angela Lee.

THE COURT: All right. Well, she's apparently the treating person and she would be the logical person to comment so --

A Thank you, Your Honor.

THE COURT: That's the way we're going to handle it. So, Mr. Lowry, it's up to you to make those arrangements.

MR. LOWRY: I'll do it, Your Honor.

THE COURT: All right. Now, I think that --

MR. JOSEPH: Your Honor, as long as Mr. Lowry is here, I understand that he will not be filing any more motions to quash. I wish the Court would inquire on that so we can be prepared.

THE COURT: Are you going to hit us with any more motions to quash?

MR. LOWRY: Well, at this point, based on U.S. vs. Gomez, I don't have any plans on it at this point. People with mental illness can decompensate and there condition can change at any time. At this point, no.

THE COURT: I want you to tell us if you believe you're going to, for this very reason, because I think that the only reasonable way to handle these sorts of situations if a claim is that the witness just simply can't testify, not that the witness won't testify but that the witness can't testify, is to take a deposition, as it were, or take testimony outside the hearing of the jury to determine that issue. And we need lead time. So let us know.

MR. LOWRY: All right.

THE COURT: Yes, sir.

MR. JOSEPH: In case you haven't been informed yet, Your Honor, another motion to quash was filed by another attorney on behalf of another person we subpoenaed.

THE COURT: Who's that?

MR. JOSEPH: This afternoon. Carrie Schmidt.

THE COURT: There's Carrie. She's back there. I saw her back there.

MR. JOSEPH: Carrie filed a motion to quash a subpoena in a criminal case under seal, which I have no problem with given the circumstances, or using the initials of the person, with regard to Paul C, another person who was a former resident that we've subpoenaed to testify.

THE COURT: Where is he? Come up, Carrie.

MS. SCHMIDT: I apologize, Your Honor. I didn't even know this was going to happen this afternoon. I was here with an intern just observing.

THE COURT: Well, she's learning something.

MS. SCHMIDT: I guess so.

MR. JOSEPH: You have to be on your toes.

MS. SCHMIDT: Your Honor, I did file this this afternoon right around 2:00 when I was notified by the family rather late in this process. So I apologize to the Court for the lateness of it. My argument is a little bit different and I don't want to jump in front of anybody but --

THE COURT: Well, I don't want -- I want to see it and I want them to have an opportunity to consider it. But if it's in the ballpark of what we're talking about and you have an affidavit from somebody that says that he can't appear for some reason, we're going to have to schedule that person, too.

MS. SCHMIDT: Yeah. And I agree and I did serve Mr. Haney and Mr. Joseph this afternoon. And I served the United States as well, Your Honor. And it is in the -- I apologize to the Court. I've got a letter from Don Braida (ph) who is the treating psychiatrist, but I will get an affidavit, but I wanted to get something on file.

THE COURT: Well, I don't think an affidavit is necessary if it's something -- if the affidavit is going to say the same thing as the letter. We'd be wasting time --

MS. SCHMIDT: It would, Your Honor.

THE COURT: If it says what I think it may say then we're going to need to have his testimony.

MS. SCHMIDT: It's a very similar thing. I will just leave it at that. My argument is a little bit different, Your Honor, than the ones that have been advanced. And I'm late into this ballgame so I'm not familiar with everything that's occurred to this point --

THE COURT: Well, what we have now, we have a witness scheduled on the 19th and we have a witness scheduled on the 20th and I'm scheduling them after the trial day ends. When's this man or this witness scheduled in for, subpoenaed in?

MR. JOSEPH: He would probably be relatively late in the defense case.

THE COURT: All right. Then we can -- may as well

do him on the 21st.

MS. SCHMIDT: Are you talking -- and I apologize, Your Honor, are you talking about --

THE COURT: Braida.

MS. SCHMIDT: Dr. Braida.

THE COURT: Tell him at 5:15 on the 21st. And is he in Newton?

MS. SCHMIDT: Dr. Braida or my client, Your Honor?

THE COURT: Dr. Braida.

MS. SCHMIDT: No, Dr. Braida is here at the K.U. Med Center.

THE COURT: He can be here at 5:15 on the 21st and we'll take his testimony. And same way with everybody else. And I'll hear your argument at that time. But I really think that this is the logical way to do these things. It gives everybody an opportunity to explore this and gives the Court of Appeals a record if it's something that needs to be reviewed. Okay.

MS. SCHMIDT: Thank you, Your Honor.

THE COURT: Thanks. Good to see you.

MS. SCHMIDT: You, too, Judge.

THE COURT: Anything else?

MS. TREADWAY: I have a question, Judge.

THE COURT: Yeah.

MS. TREADWAY: With regards to Tom R, you requested

from the Defendants a proffer of what his testimony would be and why it could not be from someone else. I was wondering if you were going to require that as to Mary and as to Paul.

THE COURT: Well, I think I know why Mary -- they want Mary. I don't need any proffer on Mary. I've never heard of this other fella. So I think you probably ought to give me some sort of a proffer on him and on Tom R. Mainly, mainly, what I'm interested in, I told you, two things. One, what do you anticipate he's going to say; and, number two, why is he necessary as opposed to some other witness. That can't -- that could get in the same information. It does not have to be a formal proffer, but it has to be something that I can take a look at and think about. Okay. Anything else?

MR. JOSEPH: I have nothing, Your Honor.

MR. HANEY: No. Thank you, Judge.

THE COURT: I'll see you tomorrow.

(Recessed for the evening at 5:28 p.m.)