

BEFORE THE COMMISSION ON JUDICIAL QUALIFICATIONS
FOR THE STATE OF SOUTH DAKOTA

INQUIRY CONCERNING)

JUDGE A.P. FULLER)

COPY

TRANSCRIPT OF
SPECIAL MEETING

DATE: December 13, 2010 at 8:47 a.m.

PLACE: Rushmore Plaza Holiday Inn
The Board Room
Rapid City, SD 57701

**SUPREME COURT
STATE OF SOUTH DAKOTA
FILED**

JAN 31 2011

Shirley A. Johnson, Clerk
Clerk

JUDICIAL QUALIFICATIONS COMMISSION MEMBERS:

J. Crisman Palmer, Chairman
Sally Christenson, Vice Chairman
Honorable Lori S. Wilbur, Secretary
Honorable Jeff W. Davis
Richard L. Travis
Ted L. McBride
Tom Draveland

Reported By: Jacqueline K. Perli
Black Hills Reporting
1601 Mt. Rushmore Rd., Ste. 3280
Rapid City, SD 57701
605.721.2600

A P P E A R A N C E S

Representing the MR. MICHAEL J. SCHAFFER
 Commission: Schaffer Law Office, Prof. LLC
 Attorney at Law
 412 West Ninth Street, Suite 1
 Sioux Falls, SD 57104-3602

Representing the MR. THOMAS J. NICHOLSON
 Honorable Nicholson & Nicholson
 A.P. Fuller: Attorneys at Law
 224 N. Phillips Ave., Ste. 200
 Sioux Falls, SD 57104

-and-

MR. JACK H. HIEB
 Richardson, Wyly, Wise, Sauch
 & Hieb
 Attorneys at Law
 PO Box 1030
 Aberdeen, SD 57402

I N D E X

	PAGE
OPENING STATEMENT - MR. NICHOLSON	13
CAROL FOSTER	
DIRECT EXAMINATION BY MR. SCHAFFER	15
CROSS-EXAMINATION BY MR. NICHOLSON	30
REDIRECT EXAMINATION BY MR. SCHAFFER	31
TONIA FISCHER	
DIRECT EXAMINATION BY MR. SCHAFFER	32
EXAMINATION BY JUDGE WILBUR	39
EXAMINATION BY MR. McBRIDE	39
EXAMINATION BY MR. TRAVIS	40
REDIRECT EXAMINATION BY MR. SCHAFFER	41
JUDD THOMPSON	
DIRECT EXAMINATION BY MR. SCHAFFER	42
EXAMINATION BY MR. McBRIDE	46
EXAMINATION BY MR. PALMER	48
REDIRECT EXAMINATION BY MR. SCHAFFER	48
EXAMINATION BY JUDGE WILBUR	50
FURTHER REDIRECT EXAMINATION	
BY MR. SCHAFFER	51
CROSS-EXAMINATION BY MR. HIEB	52

I N D E X

PAGE

JEFFREY KRATTENMAKER

DIRECT EXAMINATION BY MR. SCHAFFER 53

CROSS-EXAMINATION BY MR. NICHOLSON 65

REDIRECT EXAMINATION BY MR. SCHAFFER 69

EXAMINATION BY MR. TRAVIS 70

EXAMINATION BY MR. DRAVELAND 71

RECROSS-EXAMINATION BY MR. NICHOLSON 71

EXAMINATION BY JUDGE WILBUR 72

LARA ROETZEL

DIRECT EXAMINATION BY MR. SCHAFFER 73

CROSS-EXAMINATION BY MR. HIEB 84

REDIRECT EXAMINATION BY MR. SCHAFFER 96

RECROSS-EXAMINATION BY MR. HIEB 98

FURTHER REDIRECT EXAMINATION

BY MR. SCHAFFER 103

GLENN BRENNER

DIRECT EXAMINATION BY MR. SCHAFFER 104

CROSS-EXAMINATION BY MR. HIEB 118

REDIRECT EXAMINATION BY MR. SCHAFFER 119

EXAMINATION BY JUDGE WILBUR 120

ALICIA RAMSDELL

DIRECT EXAMINATION BY MR. SCHAFFER

(WITNESSES CALLED OUT OF ORDER)

ROBERT ARNIO, Ph.D.

DIRECT EXAMINATION BY MR. HIEB 129

CROSS-EXAMINATION BY MR. SCHAFFER 149

EXAMINATION BY MR. PALMER 160

EXAMINATION BY MS. CHRISTENSON 161

EXAMINATION BY JUDGE WILBUR 163

RECROSS-EXAMINATION BY MR. SCHAFFER 164

EXAMINATION BY MR. DRAVELAND 164

ROBERT HOLMES

DIRECT EXAMINATION BY MR. HIEB 168

CROSS-EXAMINATION BY MR. SCHAFFER 191

EXAMINATION BY JUDGE WILBUR 203

EXAMINATION BY MR. DRAVELAND 205

RECROSS-EXAMINATION BY MR. SCHAFFER 209

JUDGE JOHN SIMKO - TELEPHONICALLY

DIRECT EXAMINATION BY MR. NICHOLSON 211

CROSS-EXAMINATION BY MR. SCHAFFER 220

JUDGE DAVID GIENAPP

DIRECT EXAMINATION BY MR. NICHOLSON 226

CROSS-EXAMINATION BY MR. SCHAFFER 240

I N D E X

PAGE

JOHN NOONEY

DIRECT EXAMINATION BY MR. NICHOLSON 244

CROSS-EXAMINATION BY MR. SCHAFER 252

REDIRECT EXAMINATION BY MR. NICHOLSON 254

RECROSS-EXAMINATION BY MR. SCHAFER 255

MICHAEL WILSON

DIRECT EXAMINATION BY MR. HIEB 256

CROSS-EXAMINATION BY MR. SCHAFER 263

EXAMINATION BY MR. McBRIDE 267

THOMAS FRITZ

DIRECT EXAMINATION BY MR. NICHOLSON 268

CROSS-EXAMINATION BY MR. SCHAFER 275

GREG EIESLAND

DIRECT EXAMINATION BY MR. NICHOLSON 276

CROSS-EXAMINATION BY MR. SCHAFER 285

MICHAEL LOOS

DIRECT EXAMINATION BY MR. HIEB 286

CROSS-EXAMINATION BY MR. SCHAFER 291

REDIRECT EXAMINATION BY MR. HIEB 293

JUDGE WALLY EKLUND

DIRECT EXAMINATION BY MR. NICHOLSON 294

CROSS-EXAMINATION BY MR. SCHAFER 298

REDIRECT EXAMINATION BY MR. NICHOLSON 298

JUDGE A. PETER FULLER

DIRECT EXAMINATION BY MR. SCHAFER 301

CROSS-EXAMINATION BY MR. NICHOLSON 337

REDIRECT EXAMINATION BY MR. SCHAFER 382

EXAMINATION BY JUDGE WILBUR 387

EXAMINATION BY MR. DRAVELAND 390

EXAMINATION BY MR. PALMER 395

EXAMINATION BY MR. DRAVELAND 395

EXAMINATION BY MR. McBRIDE 399

EXAMINATION BY MS. CHRISTENSON 401

EXAMINATION BY MR. PALMER 403

EXAMINATION BY MR. McBRIDE 404

EXAMINATION BY JUDGE WILBUR 407

RECROSS-EXAMINATION BY MR. NICHOLSON 409

E X H I B I T S

EXHIBIT	DESCRIPTION	RECEIVED ON PAGE
E	6-28-04 Email to Mr. Krattenmaker from Ms. Foster re Judge Fuller's demeanor	22
F	Photo of Judge Fuller's courtroom	61
G	Photo of artwork of barristers in powdered wigs	61
H	Partial transcript of jury trial, Dr. Looyenga's testimony in Star Fox Horn matter	104
I	Memo to Ms. Roetzel from Ms. Ramsdell re Judge Fuller's comments	125
J	12-8-10 letter to Mr. Schaffer from Dr. Arnio, with attached CV	134
K	Behavior Management Systems progress notes	170
L	Affidavit of Judge Marshall Young	300
M	Ten Commandments For The New Judge	334
N	Evaluation form of Judge A. Peter Fuller, 2004	336
O	9-14-10 memo to Circuit Court Judges from Presiding Judge Davis re court assignments	376
**P	South Dakota Retirement System benefit estimate	384
**Q	South Dakota Retirement System benefit estimate	384
**Exhibits are separately sealed per request of Commission.		
Testimony beginning Page 238, line 20 through Page 239, line 14 has been redacted and sealed per request of Commission.		

1	BEFORE THE COMMISSION ON JUDICIAL QUALIFICATIONS
2	FOR THE STATE OF SOUTH DAKOTA
3	
4	INQUIRY CONCERNING)
5	JUDGE A.P. FULLER)
6	
7	TRANSCRIPT OF
8	SPECIAL MEETING
9	DATE: December 13, 2010 at 8:47 a.m.
10	PLACE: Rushmore Plaza Holiday Inn
11	The Board Room
12	Rapid City, SD 57701
13	
14	JUDICIAL QUALIFICATIONS COMMISSION MEMBERS:
15	J. Crisman Palmer, Chairman
16	Sally Christenson, Vice Chairman
17	Honorable Lori S. Wilbur, Secretary
18	Honorable Jeff W. Davis
19	Richard L. Travis
20	Ted L. McBride
21	Tom Draveland
22	
23	Reported By: Jacqueline K. Perli
24	Black Hills Reporting
25	1601 Mt. Rushmore Rd., Ste. 3280
	Rapid City, SD 57701
	605.721.2600

1

1	I N D E X	
2		PAGE
3	JEFFREY KRATTENMAKER	
4	DIRECT EXAMINATION BY MR. SCHAFFER	53
5	CROSS-EXAMINATION BY MR. NICHOLSON	65
6	REDIRECT EXAMINATION BY MR. SCHAFFER	69
7	EXAMINATION BY MR. TRAVIS	70
8	EXAMINATION BY MR. DRAVELAND	71
9	RE-CROSS-EXAMINATION BY MR. NICHOLSON	71
10	EXAMINATION BY JUDGE WILBUR	72
11	LARA ROETZEL	
12	DIRECT EXAMINATION BY MR. SCHAFFER	73
13	CROSS-EXAMINATION BY MR. HIEB	84
14	REDIRECT EXAMINATION BY MR. SCHAFFER	96
15	RE-CROSS-EXAMINATION BY MR. HIEB	98
16	FURTHER REDIRECT EXAMINATION	
17	BY MR. SCHAFFER	103
18	GLENN BRENNER	
19	DIRECT EXAMINATION BY MR. SCHAFFER	104
20	CROSS-EXAMINATION BY MR. HIEB	118
21	REDIRECT EXAMINATION BY MR. SCHAFFER	119
22	EXAMINATION BY JUDGE WILBUR	120
23	ALICIA RAMSDELL	
24	DIRECT EXAMINATION BY MR. SCHAFFER	
25	(WITNESSES CALLED OUT OF ORDER)	
	ROBERT ARNIO, Ph.D.	
	DIRECT EXAMINATION BY MR. HIEB	129
	CROSS-EXAMINATION BY MR. SCHAFFER	149
	EXAMINATION BY MR. PALMER	160
	EXAMINATION BY MS. CHRISTENSON	161
	EXAMINATION BY JUDGE WILBUR	163
	RE-CROSS-EXAMINATION BY MR. SCHAFFER	164
	EXAMINATION BY MR. DRAVELAND	164
	ROBERT HOLMES	
	DIRECT EXAMINATION BY MR. HIEB	168
	CROSS-EXAMINATION BY MR. SCHAFFER	191
	EXAMINATION BY JUDGE WILBUR	203
	EXAMINATION BY MR. DRAVELAND	205
	RE-CROSS-EXAMINATION BY MR. SCHAFFER	209
	JUDGE JOHN SIMKO - TELEPHONICALLY	
	DIRECT EXAMINATION BY MR. NICHOLSON	211
	CROSS-EXAMINATION BY MR. SCHAFFER	220
	JUDGE DAVID GIENAPP	
	DIRECT EXAMINATION BY MR. NICHOLSON	226
	CROSS-EXAMINATION BY MR. SCHAFFER	240

3

1	A P P E A R A N C E S	
2		
3	Representing the	MR. MICHAEL J. SCHAFFER
4	Commission:	Schaffer Law Office, Prof. LLC
5		Attorney at Law
6		412 West Ninth Street, Suite 1
7		Sioux Falls, SD 57104-3602
8	Representing the	MR. THOMAS J. NICHOLSON
9	Honorable	Nicholson & Nicholson
10	A.P. Fuller:	Attorneys at Law
11		224 N. Phillips Ave., Ste. 200
12		Sioux Falls, SD 57104
13		-and-
14		MR. JACK H. HIEB
15		Richardson, Wylie, Wise, Sauch
16		& Hieb
17		Attorneys at Law
18		PO Box 1030
19		Aberdeen, SD 57402
20		
21		
22		
23	I N D E X	PAGE
24	OPENING STATEMENT - MR. NICHOLSON	13
25	CAROL FOSTER	
	DIRECT EXAMINATION BY MR. SCHAFFER	15
	CROSS-EXAMINATION BY MR. NICHOLSON	30
	REDIRECT EXAMINATION BY MR. SCHAFFER	31
	TONIA FISCHER	
	DIRECT EXAMINATION BY MR. SCHAFFER	32
	EXAMINATION BY JUDGE WILBUR	39
	EXAMINATION BY MR. MCBRIDE	39
	EXAMINATION BY MR. TRAVIS	40
	REDIRECT EXAMINATION BY MR. SCHAFFER	41
	JUDD THOMPSON	
	DIRECT EXAMINATION BY MR. SCHAFFER	42
	EXAMINATION BY MR. MCBRIDE	46
	EXAMINATION BY MR. PALMER	48
	REDIRECT EXAMINATION BY MR. SCHAFFER	48
	EXAMINATION BY JUDGE WILBUR	50
	FURTHER REDIRECT EXAMINATION	
	BY MR. SCHAFFER	51
	CROSS-EXAMINATION BY MR. HIEB	52

2

1	I N D E X	
2		PAGE
3	JOHN NOONEY	
4	DIRECT EXAMINATION BY MR. NICHOLSON	244
5	CROSS-EXAMINATION BY MR. SCHAFFER	252
6	REDIRECT EXAMINATION BY MR. NICHOLSON	254
7	RE-CROSS-EXAMINATION BY MR. SCHAFFER	255
8	MICHAEL WILSON	
9	DIRECT EXAMINATION BY MR. HIEB	256
10	CROSS-EXAMINATION BY MR. SCHAFFER	263
11	EXAMINATION BY MR. MCBRIDE	267
12	THOMAS FRITZ	
13	DIRECT EXAMINATION BY MR. NICHOLSON	268
14	CROSS-EXAMINATION BY MR. SCHAFFER	275
15	GREG EIESLAND	
16	DIRECT EXAMINATION BY MR. NICHOLSON	276
17	CROSS-EXAMINATION BY MR. SCHAFFER	285
18	MICHAEL LOOS	
19	DIRECT EXAMINATION BY MR. HIEB	286
20	CROSS-EXAMINATION BY MR. SCHAFFER	291
21	REDIRECT EXAMINATION BY MR. HIEB	293
22	JUDGE WALLY EKLUND	
23	DIRECT EXAMINATION BY MR. NICHOLSON	294
24	CROSS-EXAMINATION BY MR. SCHAFFER	298
25	REDIRECT EXAMINATION BY MR. NICHOLSON	298
	JUDGE A. PETER FULLER	
	DIRECT EXAMINATION BY MR. SCHAFFER	301
	CROSS-EXAMINATION BY MR. NICHOLSON	337
	REDIRECT EXAMINATION BY MR. SCHAFFER	382
	EXAMINATION BY JUDGE WILBUR	387
	EXAMINATION BY MR. DRAVELAND	390
	EXAMINATION BY MR. PALMER	395
	EXAMINATION BY MR. DRAVELAND	395
	EXAMINATION BY MR. MCBRIDE	399
	EXAMINATION BY MS. CHRISTENSON	401
	EXAMINATION BY MR. PALMER	403
	EXAMINATION BY MR. MCBRIDE	404
	EXAMINATION BY JUDGE WILBUR	407
	RE-CROSS-EXAMINATION BY MR. NICHOLSON	409

4

1	EXHIBITS		
2	EXHIBIT	DESCRIPTION	RECEIVED ON PAGE
3	E	6-28-04 Email to Mr. Krattenmaker from Ms. Foster re Judge Fuller's demeanor	22
4			
5	F	Photo of Judge Fuller's courtroom	61
6	G	Photo of artwork of barristers in powdered wigs	61
7	H	Partial transcript of jury trial, Dr. Looyenga's testimony in Star Fox Horn matter	104
8			
9	I	Memo to Ms. Roetzel from Ms. Ramsdell re Judge Fuller's comments	125
10			
11	J	12-8-10 letter to Mr. Schaffer from Dr. Arnio, with attached CV	134
12			
13	K	Behavior Management Systems progress notes	170
14	L	Affidavit of Judge Marshall Young	300
15	M	Ten Commandments For The New Judge	334
16	N	Evaluation form of Judge A. Peter Fuller, 2004	336
17			
18	O	9-14-10 memo to Circuit Court Judges from Presiding Judge Davis re court assignments	376
19			
20	**P	South Dakota Retirement System benefit estimate	384
21			
22	**Q	South Dakota Retirement System benefit estimate	384
23		**Exhibits are separately sealed per request of Commission.	
24		Testimony beginning Page 238, line 20 through Page 239, line 14 has been redacted and sealed per request of Commission.	
25			

5

1 MR. PALMER: Let's go on the record. I'm
2 going to go ahead and convene the -- a special
3 meeting of the South Dakota Judicial
4 Qualifications Commission. It's in re the
5 inquiry of Judge A.P. Fuller. It's Monday,
6 December 13, 2010. It's 8:47 as we commence
7 these proceedings.

8 I'm going to do some introductions or have
9 people introduce themselves so everybody knows
10 who they are speaking to. First, our court
11 reporter is Jacque Perli today. I know
12 everybody, but I'm Cris Palmer, the current
13 chairperson of the Judicial Qualifications
14 Commission. I'm going to start on the far end
15 with Judge Wilbur and ask everybody to introduce
16 themselves.

17 JUDGE WILBUR: I'm Lori Wilbur.
18 MS. CHRISTENSON: Sally Christenson.
19 MR. MCBRIDE: Ted McBride.
20 JUDGE DAVIS: Jeff Davis.
21 MR. TRAVIS: Dick Travis.
22 MR. DRAVELAND: Tom Draveland.
23 MR. PALMER: Counsel, you want to make
24 appearances, please.
25 MR. SCHAFER: My name is Mike Schaffer.

6

1 I'm appearing as counsel to the Commission.
2 MR. HIEB: Jack Hieb appearing on behalf of
3 Judge Fuller.
4 MR. NICHOLSON: Tom Nicholson appearing on
5 behalf of Judge Fuller, and Judge Fuller is
6 sitting between us here.
7 MR. PALMER: Absolutely. The way we're
8 going to proceed today, so that everybody knows
9 kind of how it's going to operate, Mr. Schaffer
10 will start with his witnesses as soon as we're
11 done with this introductory material.
12 My understanding is that we're going to take
13 a break at 11:00 to allow Mr. Holmes and
14 Dr. Arnio to testify, so we can deal with that
15 then.
16 Once Mike then finishes all of his
17 witnesses, Jack and Tom, you'll be allowed on
18 behalf of Judge Fuller to present your
19 witnesses. And then at that time we'll close
20 the hearing.
21 You'll have an opportunity to make opening
22 statements if you choose, closing statements, if
23 you choose. And then we'll go in recess and
24 make our decision.
25 So you know, one of the things that we have

7

1 to do as set out by statute is, when we've
2 concluded and made our decision, and with our
3 recommendation to the Supreme Court we have to
4 make findings. And our findings have to be
5 submitted to the Court with our recommendation.
6 So I'm anticipating that we're going to have
7 findings conclude at whatever decision we make
8 this week to submit to the Court. And at that
9 time, the Court, I've been advised by
10 Chief Justice Gilbertson, intends to conduct
11 their own hearing.

12 And they are going to have a proceeding
13 where Counsel would appear for -- again,
14 whatever the decision, Counsel -- they are going
15 to have a hearing, Counsel would appear for each
16 side. And Judge Fuller, I'm advised that they
17 would want to hear from you personally, also, at
18 such a proceeding.

19 I want to make sure everybody understands
20 once we send our materials to Pierre, that this
21 is all public then. I mean, it's a matter of
22 public record. There will be a file in Pierre
23 that will contain the entire transcript of these
24 proceedings, all exhibits, and the entire record
25 as we've compiled it.

8

1 With that, there's a couple things I want to
2 make sure that we have stipulation on and
3 clarification. One, I think it's been agreed
4 that the original transcript of the Order to
5 Show Cause proceeding and its attached Exhibits
6 A through D are going to be entered as a part of
7 this record. Am I correct, Mr. Schaffer?

8 MR. SCHAFFER: That's correct. And actually
9 I have an extra copy of all of them that I
10 proposed to leave with you that has the tapes,
11 the exhibits, and the transcript.

12 MR. PALMER: Mr. Hieb.

13 MR. HIEB: The only concern I have in that
14 regard, Chairman Palmer, we did agree that all
15 the testimony that was given at the previous
16 hearing could go in as if it were given here.

17 There's the report of Dave Nelson, in
18 looking through it, I think it looks like it was
19 attached as an attachment to an exhibit in that
20 Show Cause hearing. I've got some concerns
21 about that simply because of there's a
22 significant amount of double hearsay and things
23 in there in terms of, I heard a story that, and
24 it goes in almost as if it's substantive
25 evidence.

9

1 agreeable that could be disseminated to the
2 Commission?

3 MR. HIEB: Yes, Chairman Palmer, and I've
4 got extra copies with exhibit stickers for those
5 reports. We can mark those and put them in when
6 they testify.

7 MR. PALMER: Okay. The other item I had was
8 Marty Jackley was listed as a witness on behalf
9 of Judge Fuller. Ted McBride, I think,
10 appropriately raised the issue since we sit at a
11 quasi-judicial proceeding here that there might
12 be some issue regarding whether he would have to
13 disqualify himself since he works for Marty and
14 any appearance of impartiality, and it's my
15 understanding that both sides have agreed it's
16 acceptable for Mr. McBride to proceed.

17 MR. NICHOLSON: We would waive any objection
18 to that.

19 MR. HIEB: Yes.

20 MR. SCHAFFER: We would, also.

21 MR. PALMER: Okay. I think that's all the
22 introductory material I have.

23 MR. NICHOLSON: Chairman Palmer, just one
24 other housekeeping --

25 MR. PALMER: Sure.

11

1 In looking at the rules, it does appear that
2 the Rules of Evidence do apply to this hearing,
3 and I would object to that report going in as
4 substantive evidence. I think all of the people
5 interviewed there have either testified or will
6 be testifying or have the opportunity to call
7 them.

8 So I do have a concern about that and I
9 wanted to make a record in that regard.

10 MR. PALMER: Sure.

11 MR. HIEB: Thank you.

12 MR. PALMER: You're welcome. And we'll let
13 you know what we're going to do with that before
14 we're done today.

15 MR. SCHAFFER: Well, I would just add,
16 Your Honor, that that report is part of the
17 formal complaint against Judge Fuller. It's an
18 exhibit and an attachment to that complaint,
19 which I would assume would be part of the record
20 in this case.

21 MR. PALMER: Thank you, Mr. Schaffer. The
22 other issues that I had is, one, we do have
23 materials that have been submitted to us from
24 Mr. Holmes and Dr. Arnio that all of the board
25 members have. Is it my understanding it's

10

1 MR. NICHOLSON: -- matter. Judge Simko had
2 planned on being here and he got caught up in a
3 trial that he thought would be done last
4 Thursday, and it probably won't even be done
5 tomorrow. So he has asked to appear by
6 telephone, also, and he has a break in his trial
7 at 2:00 Central Time, 1:00 here. And I'm
8 requesting that we be able to get him on the
9 speakerphone at 1:00, right after our lunch
10 break.

11 MR. PALMER: That sounds fine. That's
12 totally acceptable. And also it's my
13 understanding, just maybe in that vein, that
14 Marshall Young will not be testifying live and
15 there will be an affidavit on --

16 MR. NICHOLSON: Yeah, I have an affidavit.
17 I have copies for all. We can mark those at
18 some point and pass them out. I assume that's
19 the best way. Mike stipulated we could just
20 submit the affidavit, so.

21 MR. PALMER: Yeah, that's just fine. That's
22 agreeable to you, Mr. Schaffer?

23 MR. SCHAFFER: That's agreeable.

24 MR. PALMER: Anything else that anybody has
25 preliminarily before we proceed? If not,

12

1 Mr. Schaffer, do you choose to make an opening
2 statement?

3 MR. SCHAFFER: I'm going to waive opening
4 statement. I think that the Commission knows
5 what the issues are and what the factual issues
6 are.

7 MR. PALMER: Mr. Nicholson?

8 MR. NICHOLSON: Very briefly. I think you
9 all can tell from the answer that was submitted
10 that Judge Fuller is not contesting what's
11 happened here, primarily the allegations in the
12 complaint.

13 And he's here today to show you what he's
14 done, what kind of mitigation this Commission
15 should look at, and he's been ashamed, and this
16 has had a very drastic impact on his life. He's
17 done some real soul-searching. You'll hear some
18 of that today.

19 I think you'll hear that he's a good person
20 overall. He has a lot of good qualities. That
21 hasn't been brought out to you yet in the
22 proceedings that have been before you. He's a
23 very able and capable judge. He's very able and
24 willing to make changes. And I'd ask you all to
25 keep a very open mind going forward in the first

13

1 part of this morning and listen very carefully
2 to the people we bring in today, and in
3 particular, the counselors.

4 The counselors will come in about 11:00 this
5 morning, and I think there will be some real
6 instruction to you there about Judge Fuller's
7 capabilities as a person and his ability to make
8 changes. And I think he'll be a real -- he's
9 got the ability to be a very good judge.

10 And what we are going to be asking the
11 Commission here at the end of all of this is to
12 consider his capability to make changes and not
13 only to be a good judge, but a really good
14 person.

15 And there's not -- you're not going to hear
16 anything today that really contests any of these
17 facts that will come before you from
18 Mr. Schaffer. We feel this is a matter of a
19 person who can make changes in his life, that
20 he's received a wake-up call, and he's ready,
21 willing, and able to be a good judge. Thank
22 you.

23 MR. PALMER: Okay. Call your first witness.

24 MR. SCHAFFER: Call Carol Foster.

25 ///

14

1 CAROL FOSTER,
2 called as a witness herein, having been first duly
3 sworn, was examined and testified as follows:

4 DIRECT EXAMINATION BY MR. SCHAFFER:

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

7 A Carol Foster, C-A-R-O-L, Foster, F-O-S-T-E-R.

8 Q Carol, I'm going to ask you to speak up because
9 sometimes with the equipment running in here,
10 it's hard to hear, and I want everybody to make
11 sure they hear your testimony.

12 A Okay.

13 Q Would you please tell the Commission what you
14 do, what your title is, and what your duties
15 are.

16 A I'm a Clerk Magistrate 1 for Fall River and
17 Shannon Counties in Hot Springs, and I do the
18 duties of a clerk of courts, scheduling,
19 supervising, operating the court.

20 Q Ms. Foster, you're here pursuant to a subpoena;
21 is that correct?

22 A Correct.

23 Q As I understand it, Mr. Nelson interviewed you
24 in connection with the complaint against
25 Mr. Fuller some time ago; is that correct?

15

1 A Yes.

2 Q How long have you had the position as
3 Clerk Magistrate for Fall River County?

4 A About 15 years.

5 Q So you've seen a number of judges over the
6 course of those years?

7 A Yes.

8 Q Is that a fair statement?

9 A Yes.

10 Q When -- do you remember when Judge Fuller first
11 came on the bench and first sat in Fall River
12 County?

13 A Yes, I do.

14 Q Do you remember about what year it was?

15 A It was mid-2000s, maybe '04, '05, '06, somewhere
16 in there.

17 Q Okay. And what was -- tell the Commission your
18 first experience or encounter with Judge Fuller.

19 A On the first day he came, I went to him and I
20 said that some of the compli -- I didn't know
21 what kind of law he had specialized in. And
22 some of the more complicated cases, like the
23 child support can be, come to us from all
24 different directions, from referees, from
25 Pierre, Rapid City, state's attorney, divorce

16

1 cases.
2 And that I would be happy to put notes on
3 the files and say whether service had been done
4 or whether there was something to look out for
5 or if something needed to be -- he needed to be
6 aware of something before he would sign the
7 legal documents.

8 Q Did you ask him about what type of law he had
9 practiced or that type of thing?

10 A Yes.

11 Q And what was his response?

12 A He said he was an expert in everything.

13 Q An expert in everything?

14 A Yes.

15 Q With the sticky notes, what was his response to
16 that?

17 A He would often say I was the sticky queen, and I
18 don't know what it was with -- I use those
19 Post-it notes, we all use those Post-it notes in
20 our business to have the cases flow, what needs
21 to be done. And he said he didn't like sticky
22 notes and he was going to throw them out, which
23 he did.

24 Q Okay. And did there -- was there any
25 consequences as a result of that?

17

1 A Yeah. Some of the things that -- well, I had
2 to -- when he would have court, I would need to
3 go through the garbage after court because he
4 would throw juvenile documents into the trash
5 can, and they have to be shredded. So I'd go
6 through there and I would find sticky notes in
7 the trash can.

8 Some of them are things like if an attorney
9 brings in a case on a court date, we get
10 everything in a file, send it to the judges, but
11 we don't pause to get anything else done, like
12 entering it into the computer, charging it out.

13 So we'd put a sticky note on it, say, Clerk
14 charge out, or we would say, Attorney asked for
15 three certified copies, CCs. We put, Attorney 3
16 CC or something on there to remind us what
17 needed to be done. They were in the trash can,
18 too.

19 Q Did any mistakes get made as a result of that?

20 A Not that I know of, because I went through the
21 trash.

22 Q Okay. And did your deputies go into court with
23 you?

24 A Yes.

25 Q Did you have complaints from the deputies?

18

1 A Yes.

2 Q What were those?

3 A First, I had Kim Schnose, who was the regular
4 clerk that did criminal cases, tickets,
5 protection orders. She would go in for those
6 cases and she said that she didn't want to go in
7 court anymore because she thought that the
8 comments from the Judge were degrading.

9 Q And what did you do to replace her then?

10 A Glenda Reder. I'd send Glenda Reder in. Glenda
11 has worked for the court systems off and on for
12 40 years and nothing phases Glenda, generally.

13 Q And what was her complaint?

14 A She came out of the courtroom, there was an
15 incident where somebody had asked to put an --
16 add a case to the calendar, and it was -- we
17 blocked things on the calendar so the Judge will
18 have arraignments, then they'll have sentencings
19 and motions. And he had already done the
20 arraignments and we had -- somebody had added to
21 the calendar for a fellow that wanted to come up
22 from the jail, be arraigned in circuit court,
23 plead, and then be ready for sentencing.

24 And I don't know who added it on, that's not
25 something the clerks just decide to do. But

19

1 he -- but Judge Fuller was extremely upset that
2 he had to do the arraignment again, and so he
3 had been chewing on Glenda in the courtroom
4 about -- what he often said was Goddamn clerk
5 and the Goddamn schedule, and why did he have to
6 do this again. So she came out of the courtroom
7 and she was upset, real upset.

8 Q What was her demeanor?

9 A Her demeanor to that?

10 Q Yes.

11 A She was shaken by it.

12 Q Was she crying?

13 A No. Not at that point. She went down -- she
14 was mad. She went down the hall, she felt -- to
15 the -- down the hall is both the men's room and
16 the women's room, bathrooms, and she felt
17 Judge Fuller followed her down the hall. I kind
18 of thought that he probably was going to the
19 bathroom.

20 Nevertheless, she came back in and she
21 was -- she was crying. She was mad. She was
22 crying, and she said that he had stopped her in
23 the hall, blocked her path, and used the F word.

24 I don't think he -- I think it was about the
25 schedule or the cases or something. And again,

20

1 the Goddamn clerks can't just do the schedule
2 like this. Something about the F'ing
3 arraignment or something. And she was -- she
4 said she will quit before she will ever go in
5 that courtroom again.
6 Q And you've known her how long?
7 A Fifteen years.
8 Q And how long has she worked as a clerk?
9 A Forty-some years.
10 Q And so she's seen a number of judges over those
11 years?
12 A Yep.
13 Q As a result of that, did you prepare a
14 memorandum to the court administrator?
15 A Yes. That's my supervisor.
16 (Exhibit E was marked for identification.)
17 MR. PALMER: This has been marked as
18 Exhibit E. We had A through D so we'll pick up
19 with E.
20 Q (BY MR. SCHAFER:) Do you have in front of you
21 what the court reporter has marked as Exhibit E?
22 A Yes, I do.
23 Q Is that the memorandum that you sent to the
24 court administrator, Mr. Krattenmaker?
25 A Yes.

21

1 Q And was that prompted by this incident with
2 Glenda?
3 A Yes, it was.
4 MR. SCHAFER: We would offer Exhibit E.
5 MR. NICHOLSON: Just a minute. I haven't
6 seen this before, so --
7 MR. PALMER: Okay. Take your time.
8 MR. NICHOLSON: (Pause.) I would object on
9 relevance. This was six years ago. Unless they
10 can put some string of connection together to
11 the present, I would say that it has no
12 probative value to this hearing.
13 MR. PALMER: I'm going to overrule your
14 objection, and we're going to receive Exhibit E.
15 Go ahead, Mr. Schaffer.
16 Q (BY MR. SCHAFER:) Do you know what became of
17 this e-mail or memo to Mr. Krattenmaker? Do you
18 know what was ever done about this, if anything?
19 A I don't know. I -- I'm sure I discussed it with
20 Mr. Krattenmaker, and I believe he was going to
21 pass it on to Judge Trimble. And that's
22 probably what the note indicates at the bottom,
23 but I don't know.
24 Q And does this help you with the time frame as to
25 when this occurred, this --

22

1 A Yes.
2 Q The date of --
3 A Two thousand --
4 Q The date of the memo was what?
5 A Two -- June 28, 2004.
6 Q Okay. Would that have been prepared shortly
7 after this incident with Ms. Rader?
8 A We have court on Fridays, so it probably was the
9 next Monday.
10 Q Okay. And what was your concern for authoring
11 this memo and your concern with the situation?
12 A Both Glenda, when she was so upset, and Kim were
13 talking about it, and they are together with
14 their desks, I'm across the room. And she said
15 it's hostile treatment in the courtroom. And
16 when -- and Kim was agreeing with her.
17 And when she said that, I felt that I -- it
18 was time that I needed to pass it on up to my
19 supervisor to advise them.
20 Q And what was your concern?
21 A I agreed.
22 Q You agreed that it was hostile?
23 A Absolutely.
24 Q Were you concerned about a hostile work
25 environment in the courthouse there?

23

1 A I was, and I -- not only -- you know, I can't,
2 as a supervisor, tolerate that. I don't like my
3 employees to be feeling like that, or myself.
4 Q In your memo, you indicated that this happens
5 weekly, in the middle paragraph. How often is
6 court actually held there?
7 A Weekly would be when we have court, which is
8 every other week, or at this time it was every
9 other week.
10 Q All right. Following this incident, did you
11 then yourself handle court when Judge Fuller was
12 there?
13 A I did.
14 Q And that was to what, so your staff wouldn't
15 have to?
16 A Right. To protect the staff from going in. I
17 had two of them that didn't want to go in, so...
18 Q How did that work out for you with your other
19 duties?
20 A It -- it put a strain on my duties because you
21 spend a day in a courtroom, it's a day you don't
22 have processing cases.
23 Q When you were in court with Judge Fuller
24 present, tell the Commission the type of
25 language that he would use in open court.

24

1 A It was -- it was generally the Goddamn clerk,
2 and the schedule, problems with the schedule.
3 If a case would -- an attorney would cancel at
4 the last minute, which is always very
5 inconvenient to everybody, then you have a
6 break, so your cases aren't tight together.

7 Or you have -- you set it on for a motion
8 and you think it's going to be ten-minute motion
9 or it's an hour-long motion, and so there's not
10 a whole lot that the clerks can do to control
11 the courtroom. We schedule the calendar, and
12 frankly, I schedule a tight calendar. It
13 operates pretty smoothly.

14 Q What were the precise words that Judge Fuller
15 used in open court, the swear words that you
16 recall?

17 A Goddamn clerk. Yeah, that was...

18 Q Did he refer to the schedule in the same
19 language?

20 A Yeah. The Goddamn schedule or the Goddamn
21 calendar.

22 Q And how often -- this would happen on a frequent
23 basis or?

24 A Yes.

25 Q Virtually --

25

1 Q Tell us about that.

2 A He had a personal phone call, I assumed it was
3 his wife, it was about a bank account or
4 checkbook or something, and it was the F'ing
5 bank or checkbook, and -- and just loud so that
6 everybody in my office, which sits off the
7 chambers, heard the entire conversation. So I
8 got up and I shut the chamber doors.

9 Q Who was in your office at that time?

10 A It would have been all of my staff, attorneys, I
11 don't know who, exactly who was there. But
12 generally when the court is on a break, we've
13 got the attorneys, police officers, and staff.
14 We don't -- we have a very small hallway so they
15 don't fit out there.

16 Q Have you ever heard Judge Fuller swear at
17 lawyers in open court?

18 A Yes.

19 Q Tell the Commission about that.

20 A He had an incident with an attorney by the name
21 of Kari Nordstrom over -- she was talking about
22 a juvenile matter. I don't know if it was a
23 juvenile case or custody case, but it was a kid.

24 And she had the statutes with her and she
25 wanted to argue her point, and the Judge -- she

27

1 A Every time.

2 Q -- every time he was there?

3 A Yes.

4 Q And this was from the bench?

5 A Yes.

6 Q With the public there?

7 A Yes.

8 Q And you there?

9 A Yes.

10 Q And what, when he addressed the comment, quote,
11 Goddamn clerk, unquote, how did that make you
12 feel?

13 A Very belittling. Although he would laugh, so it
14 was as though he was saying it as though it was
15 supposed to be a joke, but it didn't feel like a
16 joke. And I should add, the incident with
17 Glenda in the hallway was, the hallway was
18 packed with people, the public.

19 Q When he used the F word --

20 A Yes.

21 Q -- and swore at her?

22 A Yes.

23 Q Now, had you heard, overheard him screaming or
24 yelling or swearing in his chambers?

25 A Yes.

26

1 said what she wanted and he said what his
2 decision was.

3 And she continued to say she was going to
4 read the statutes, and he told her to shut the
5 damn statutes, he had already made his decision
6 and he didn't need to be told what the law was.

7 Q Had -- were you ever contacted by Judge Fuller
8 in connection with the judicial election?

9 A Yes.

10 Q Tell the Commission about that.

11 A He called me and said that he wanted to know
12 that I had -- that I would be the -- let's see,
13 how did he... He was -- wanted to know that he
14 had the support of -- my support in the judicial
15 election.

16 Q What did you tell him?

17 A I told him we were not allowed to be involved in
18 judicial elections.

19 Q Why is that?

20 A Against the rules. We just don't. We don't get
21 involved in any elections, if we can help it --

22 Q That's pretty clear?

23 A But judicial is -- absolutely.

24 Q And what did you tell him?

25 A That's -- I just said we're not allowed to get

28

1 in judicial elections.
 2 Q What was his response to that?
 3 A He said that he knew that, but that he knew how
 4 it really works, that the clerk in a small
 5 community has a lot of clout.
 6 Q Did you feel like he was still asking for your
 7 support or endorsement even though you had told
 8 him that?
 9 A Yes.
 10 Q You were --
 11 A I responded again that I was not comfortable
 12 getting involved in a judicial election.
 13 Q Okay. Did he ever apologize for that?
 14 A Yes. He called me and apologized and said that
 15 he was sorry that I had misinterpreted his
 16 intentions.
 17 Q When he asked about the elections?
 18 A Right.
 19 Q Did he ever apologize for any of his other
 20 behavior in the courtroom?
 21 A Not that I ever recall.
 22 Q Has he ever apologized to you?
 23 A No.
 24 Q Do you have any reason to believe that he'll
 25 change or can change if he's put back on the

29

1 bench?
 2 MR. NICHOLSON: I'm going to object; no
 3 foundation to answer that question.
 4 MR. PALMER: I think that's -- I'm going to
 5 sustain the objection.
 6 MR. SCHAFFER: Okay. That's all the
 7 questions I have.
 8 CROSS-EXAMINATION BY MR. NICHOLSON:
 9 Q Is it Ms. or Mrs. Foster?
 10 A Mrs.
 11 Q Mrs. Foster, when was the last time that
 12 Judge Fuller had court in Fall River County?
 13 A Well, he was here this year because we go
 14 January to December for a year. He did have
 15 another occasion that I recall that he came down
 16 for a hearing on -- sometimes the judges will
 17 keep a case that they put so much time into that
 18 they understand better than others or -- and he
 19 came down for a hearing on one of those other
 20 cases. I don't recall the case.
 21 Q When Mr. Schaffer was questioning you about
 22 these events of you going into the courtroom on
 23 a I think a twice-monthly or every-other-week
 24 basis, what time frame are we talking about?
 25 A During the year 2004.

30

1 Q Okay. So all of those answers were, you were
 2 relating incidents that happened in the year
 3 2004; is that correct?
 4 A Correct.
 5 Q Okay.
 6 A With the exception of whenever that election
 7 was, I don't know.
 8 MR. NICHOLSON: I have no further questions.
 9 REDIRECT EXAMINATION BY MR. SCHAFFER:
 10 Q Just so the record is clear, Carol, my
 11 understanding is Judge Fuller was assigned to
 12 the Fall River County regular schedule in 2004
 13 for that calendar year; is that correct?
 14 A Correct.
 15 Q And the other occasions when he might be there
 16 would be on isolated cases; is that correct?
 17 A Correct.
 18 Q And I think you said he was there recently or --
 19 A He might have had a hearing -- we still got the
 20 Buck McColl case going on, and he might have had
 21 a hearing on that in the last couple years.
 22 Q Did any of the clerk staff go in for that
 23 hearing?
 24 A I don't think they did. I think that we asked
 25 the state's attorney's secretary that was in

31

1 there to tell us if there was a new date
 2 scheduled. I'm not sure if that's the right
 3 case, either.
 4 He came down for a case, went into a
 5 hearing, they held the hearing and came out and
 6 left. And we relied on the attorneys or their
 7 staff that were in there to give us the
 8 information that we needed.
 9 MR. SCHAFFER: That's all the questions I
 10 had.
 11 MR. PALMER: Do any of the Commission
 12 members have any questions?
 13 (No questions were presented.)
 14 MR. PALMER: Thank you very much. You may
 15 be released from your subpoena.
 16 MR. SCHAFFER: May she be excused?
 17 MR. PALMER: Yes. You may be released from
 18 your subpoena.
 19 (Witness left the room.)
 20 MR. SCHAFFER: Call Tonia Fischer.
 21 TONIA FISCHER,
 22 called as a witness herein, having been first duly
 23 sworn, was examined and testified as follows:
 24 DIRECT EXAMINATION BY MR. SCHAFFER:
 25 Q Would you please state your name for the record

32

1 and spell your name.
 2 A Tonia, T-O-N-I-A, Fischer, F-I-S-C-H-E-R.
 3 Q Ms. Fischer, are you here pursuant to a subpoena
 4 that I issued?
 5 A Yes, I am.
 6 Q And would you please introduce yourself to the
 7 Commission, tell them what your title is and
 8 what your duties are.
 9 A Okay. I'm Tonia Fischer. I'm a juvenile court
 10 services officer for the Seventh Circuit Court
 11 Services.
 12 Q And how long have you held that position?
 13 A It will be eight years in May.
 14 Q And prior to that, what have you done? Just
 15 give us a little thumbnail sketch of your work
 16 history.
 17 A Starting in '94, I went to work for the Juvenile
 18 Services Center. Later, several years, a few
 19 years later, moved over to the Court-Appointed
 20 Special Advocates program and was a volunteer
 21 coordinator for them. Then I moved into the
 22 Department of Social Services and did child
 23 protection for about five and a half years prior
 24 to coming to court services.
 25 Q In connection with your job as court services

33

1 officer, have you had occasion to come into
 2 contact and deal with Judge Fuller?
 3 A Yes.
 4 Q And have you had some -- well, I will just ask
 5 it this way. How would you describe
 6 Judge Fuller's demeanor when dealing with you or
 7 other court services workers?
 8 A The last -- he came on the bench in January of
 9 2010. It was the second time I had been in
 10 front of him as a juvenile officer. And at
 11 first, it was okay. I would say somewhere in
 12 February, March, it seemed like things changed
 13 and it -- he became disrespectful, demeaning,
 14 rude.
 15 Q Could you give the Commission some idea or
 16 examples of what you mean by those comments.
 17 A One of the things that comes to mind that
 18 happened quite frequently is, with juveniles we
 19 will set up a chemical dependency evaluation or
 20 psychological evaluation, things like that, that
 21 need to be done. May not always have the
 22 results of those back as the juvenile is working
 23 their way through the court process.
 24 There were times when we would get asked,
 25 When will this juvenile be going to treatment,

34

1 or, What are the recommendations at this point?
 2 If -- and we sometimes also cover other people's
 3 cases. So if our answers were, We're not sure,
 4 this doesn't indicate, quite often he would
 5 become irritated, and in a very stern voice, I
 6 don't know how to describe it, state, That's not
 7 the question I asked you. This would be done in
 8 open court. It was the best answers we could
 9 give him at the time.
 10 Q How did that make you feel?
 11 A It makes you feel incompetent, even though
 12 you're doing the best thing you can.
 13 Q And have you had specific instances that you can
 14 recall where he has called you on the carpet, so
 15 to speak?
 16 A I have. There was -- there was an instance, I
 17 had a juvenile who had been in front of him on
 18 numerous occasions and was back in front of him
 19 again. Going to be serving a sentence, and also
 20 had just completed a chemical dependency
 21 evaluation.
 22 At the end of -- or to the -- towards the
 23 end or the closing of his hearing, I had stood
 24 up and asked if home detention would be made
 25 eligible for this juvenile, which he quickly

35

1 said "no" to, and then turned around and kind of
 2 leaned over the bench at -- to me and said,
 3 really rudely, Why would you even ask me that?
 4 And I did attempt to explain, but it just
 5 eventually becomes useless, so...
 6 Q Well, why did you think home detention in that
 7 case was appropriate?
 8 A The recommendation was for outpatient treatment
 9 for that juvenile at that time. JSC will not
 10 transport for outpatient treatment, so in my --
 11 on home detention, he would have served a
 12 sentence as well as been completing. In my head
 13 I was thinking we would have been doing two
 14 things at once in 90 days. All I needed was a
 15 simple "no."
 16 Q Did you ever get an apology from that
 17 incident --
 18 A No.
 19 Q -- from Judge Fuller?
 20 A No.
 21 Q Did you ever get an apology from the juvenile?
 22 A I did, actually, both him and his mother at
 23 separate instances. He was serving his
 24 sentence, had written me a letter and thanked me
 25 for my attempts, and just in so many words

36

1 stated he felt bad for the treatment I received,
 2 as did his mother via a phone conversation.
 3 **Q So they basically apologized for Judge Fuller's**
 4 **treatment of you?**
 5 A In a sense, yes.
 6 **Q Have you ever had any concern in his courtroom**
 7 **for safety?**
 8 A Numerous times, yes.
 9 **Q Tell the Commission about that.**
 10 A The courtroom that Judge Fuller has is the
 11 smallest one I believe in our courtroom -- in
 12 our courthouse. Juvenile court days get very,
 13 very full, very busy.
 14 It started out okay, but on numerous
 15 occasions on the larger days, there would be all
 16 of the parents, all the juveniles, all of the
 17 professionals brought in at once for advisories
 18 and hearings, which then lines the courtroom
 19 literally with people standing, or chairs being
 20 maneuvered around so that even the deputy who is
 21 in your -- in the witness box would be blocked
 22 in by chairs and people standing.
 23 The railing, which would be behind us where
 24 we would sit with our stuff, and then separate
 25 the -- the viewers' box would be lined with

37

1 people directly behind us and in front of the
 2 people sitting, and it would be that way all the
 3 way around. There would be no way to move.
 4 **Q Have you expressed any concerns for your safety?**
 5 A Every time it happened, pretty much, I -- I
 6 myself would take it to my boss, Judd Thompson.
 7 **Q What would account for all of these people all**
 8 **being in court at once?**
 9 A Doing mass advisories, lots of hearings,
 10 essentially trying to move the docket through
 11 the day faster.
 12 **Q Was anything ever done to address those safety**
 13 **issues?**
 14 A Not to my knowledge, no.
 15 **Q Have you been in court when he's made**
 16 **inappropriate comments to others that you can**
 17 **recall?**
 18 A I do. There's one that comes to mind, there was
 19 others, but for a specific that comes to mind
 20 would be in regards to a Department of
 21 Corrections agent. There had been a juvenile
 22 who was with the Department of Corrections and
 23 was caught drinking in his backyard with some
 24 other juveniles.
 25 The JCA or his juvenile corrections agent

38

1 was standing in front of Judge Fuller with that
 2 juvenile, and the comment was made rather
 3 sarcastically, I wonder how a juvenile on
 4 Department of Corrections could be drinking.
 5 The JCA kind of made a face, just was
 6 uncomfortable.
 7 MR. SCHAFFER: That's all.
 8 MR. NICHOLSON: No questions.
 9 MR. PALMER: Do any of the Commission
 10 members --
 11 EXAMINATION BY JUDGE WILBUR:
 12 **Q I just had a question. When you were talking**
 13 **about the comment about home detention, that**
 14 **would be like letting the juvenile out of**
 15 **detention to be at home as opposed to staying in**
 16 **detention or kid jail?**
 17 A Yeah, except for they wear a monitor, so they
 18 are still considered in detention. They were
 19 just wearing a monitor and are restricted on
 20 monitors.
 21 JUDGE WILBUR: Thank you.
 22 EXAMINATION BY MR. McBRIDE:
 23 **Q Ms. Fischer, you testified that you had asked**
 24 **Judge Fuller about whether or not home detention**
 25 **might be appropriate, and I believe you said**

39

1 that he said, No, and then he leaned over and
 2 said, Why would you even ask me that?
 3 I'm looking at a report that was prepared by
 4 Dave Nelson, who interviewed you previously, and
 5 in there the quote is: Why would you even ask
 6 me that, that's just stupid. That's in quotes.
 7 A Correct.
 8 **Q Now, what I want to clarify is, did it make you**
 9 **feel stupid? Or were the words, That's just**
 10 **stupid, used?**
 11 A I can't -- I can't state for a fact that, That's
 12 just stupid, was in there. I did feel stupid.
 13 **Q Okay. All right. I just wanted to get that**
 14 **clarified. Thank you.**
 15 A That's fine.
 16 EXAMINATION BY MR. TRAVIS:
 17 **Q The comment that you just discussed with**
 18 **Mr. McBride, was that audible to other people in**
 19 **the courtroom, at least from your perspective?**
 20 A Oh, it was -- yeah, it was exceptionally loud.
 21 **Q Did anyone who was in the courtroom make any**
 22 **comments to you about that comment after it had**
 23 **been said to you?**
 24 A The other court services officers immediately
 25 were like... Wow.

40

1 Q You described the system that Judge Fuller would
2 use to try to expedite and move the juvenile
3 calendar along with the mass advisements of
4 rights and the concerns you had for your safety
5 and other court service personnel. Are you
6 aware of any other judges in this circuit who
7 would utilize the same system?

8 A I think that the same system is used. The
9 difference is the size of the courtroom and the
10 ability to accommodate that mass amount of
11 people.

12 MR. TRAVIS: That's all.

13 MR. PALMER: Mr. Schaffer?

14 REDIRECT EXAMINATION BY MR. SCHAFFER:

15 Q I just had -- have a follow-up. I'm trying to
16 get a -- I've been in his courtroom. How many
17 people are we talking about that are in that
18 room when you're talking about this situation?

19 A Well, essentially, numberwise that would be
20 hard. I'm just trying to do a rough estimate.
21 If you have -- if you have 70 kids on the
22 morning's docket and you bring in at least half
23 of those for advisories and even one parent
24 apiece, sometimes an attorney, I'm going to say
25 you're pushing close to 100 people.

41

1 Q And where are you sitting or standing or
2 whatever during this situation?

3 A If -- if those two tables were, say, the defense
4 table and the court services table and -- we
5 would be sitting there with people lined behind
6 us. On one occasion I sat on the steps on the
7 witness box next to his bench, along with my
8 boss.

9 Q That was the only available place?

10 A It was. I was up for a hearing, for a...

11 MR. SCHAFFER: Okay. That's all.

12 MR. NICHOLSON: I have nothing.

13 MR. PALMER: Anybody?

14 (No further questions were presented.)

15 MR. PALMER: Thank you. You're released
16 from your subpoena. Thank you.

17 (Witness left the room.)

18 MR. SCHAFFER: Call Judd Thompson.

19 JUDD THOMPSON,

20 called as a witness herein, having been first duly
21 sworn, was examined and testified as follows:

22 EXAMINATION BY MR. SCHAFFER:

23 Q Would you please state your name for the record
24 and spell your name.

25 A Judd Thompson. J-U-D-D is the first name,

42

1 Thompson, T-H-O-M-P-S-O-N.

2 Q Mr. Thompson, tell the Commission what your
3 title is and what your duties are.

4 A I am the chief court service officer for the
5 Seventh Circuit Court, which encompasses Custer,
6 Fall River and Shannon Counties, and Pennington.
7 My job is to manage the court service office,
8 the probation office of the court, to manage all
9 the staff, provide supervision to their -- to
10 the 23 court service officers and the
11 5 secretaries, and handle the budget for that
12 office.

13 Q And how long have you held that position?

14 A Since January of 1987.

15 Q Which makes it how many years now?

16 A Soon to be 24.

17 Q How many people work underneath you,
18 Mr. Thompson?

19 A There's a total of 28 staff in my office.

20 Q You're going to have to speak up.

21 A Twenty-eight staff in my office. I'm sorry.

22 Q Tonia Fischer would be one of those?

23 A Yes, sir.

24 Q Judd, in connection with this case, have you
25 received complaints from your court services

43

1 officers concerning Judge Fuller's conduct or
2 demeanor?

3 A Yes, I have.

4 Q Tell the Commission what those complaints are.

5 A Offhanded comments, not responding to safety
6 issues in the courtroom, trying to handle his
7 docket too quickly, were the basic three
8 complaints, I think.

9 MR. NICHOLSON: Excuse me, I can't hear.

10 THE WITNESS: Okay. Demeanor in the
11 courtroom, safety in the courtroom, and trying
12 to handle the docket too quickly.

13 Q (BY MR. SCHAFFER:) When you say offhanded
14 comments, can you give me an example of what
15 complaints were reported to you.

16 A One of the comments was, a comment was made in
17 open court that, I know court service officers
18 don't do their job. That was made during a
19 hearing.

20 Q How did that court service officer feel about
21 that?

22 A Slighted, felt horrible.

23 Q Do you believe that to be true?

24 A No, I do not.

25 Q And have you ever addressed safety concerns that

44

1 have been brought to your attention with
 2 Judge Fuller?
 3 A Yes, I did.
 4 Q And what concerns have been brought to your
 5 attention by your staff?
 6 A The number of people in his courtroom at any
 7 given time to the point where people had to sit
 8 on the floor, my staff would sit on the floor.
 9 And I addressed that with Judge Fuller, asking
 10 that not be scheduled that way because there was
 11 a safety concern and I was afraid something
 12 could happen in the courtroom.
 13 Q What was his response?
 14 A We'll wait until something happens.
 15 Q We'll wait until something happens?
 16 A Yes, sir.
 17 Q Was it ever addressed by Judge Fuller?
 18 A Not to my knowledge, it wasn't.
 19 Q And what time frame would that have been that
 20 you raised that concern?
 21 A Sometime between probably March and June of
 22 2010.
 23 Q And when the staff are concerned about safety,
 24 give the Commission an idea of what they are --
 25 what your safety concerns are. Are we talking

45

1 about people acting out in court or starting
 2 fights or what?
 3 A We deal with delinquents and children out of
 4 control, their parents. The courtroom is packed
 5 full of people. Their concern is something will
 6 blow up and either the bailiff or my staff will
 7 not be able to respond to it in an appropriate
 8 manner.
 9 MR. SCHAFFER: That's all the questions I
 10 have.
 11 MR. NICHOLSON: No questions.
 12 MR. PALMER: Anybody from the Commission,
 13 any questions?
 14 EXAMINATION BY MR. McBRIDE:
 15 Q Mr. Thompson, you say you addressed the safety
 16 issues. Did you address either of the other two
 17 areas that you highlighted here today?
 18 A I did address the docket, timeliness of the
 19 docket. I asked him to spend the time that
 20 needed to be spent on the docket.
 21 Q What response did you get?
 22 A I can be like Judge Tice if you want me to.
 23 Q Was there any explanation of what that comment
 24 meant?
 25 A No. I knew what that comment meant.

46

1 MR. TRAVIS: I'm sorry?
 2 THE WITNESS: I knew what that comment
 3 meant.
 4 JUDGE WILBUR: What did it mean?
 5 THE WITNESS: It meant, I will take all day
 6 and we'll go late if we have to. That was my
 7 perception of it.
 8 Q (BY MR. McBRIDE:) One more thing. You -- you
 9 remember talking to Dave Nelson, who came and
 10 interviewed you?
 11 A Yes, I do.
 12 Q There was -- in the report he prepared, he said
 13 that you -- that the words that Judge Fuller
 14 used didn't necessarily convey the impropriety
 15 of the comments, and he quoted you saying, You
 16 need to hear the tone of voice and the context
 17 in which it is said.
 18 A Yes.
 19 Q And does that relate to things you had actually
 20 personally heard?
 21 A That related to information from my staff that
 22 was brought to me after court.
 23 Q They were telling you you had to hear the tone?
 24 A Yes.
 25 Q Did you actually hear a tone of voice that they

47

1 were describing?
 2 A My time in the courtroom is very limited, so,
 3 no, I never did.
 4 MR. McBRIDE: Okay. Thank you.
 5 EXAMINATION BY MR. PALMER:
 6 Q I have a question, Judd. Tell me, when you said
 7 you had concerns about how the docket was
 8 handled, I haven't been -- handled a juvenile
 9 matter in 25 years, 30 years, probably, but tell
 10 me what you mean by that.
 11 A Some of the issues that my office saw were not
 12 clearly explaining rights, doing hearings
 13 without parents in the courtroom, just the speed
 14 of the hearing.
 15 Q How many hearings a day on average for a
 16 juvenile day would you have?
 17 A There was times there was upward of 70.
 18 Q Seventy hearings in a day?
 19 A (No audible response - Witness nodded.)
 20 MR. PALMER: Any of our questions prompt --
 21 REDIRECT EXAMINATION BY MR. SCHAFFER:
 22 Q Well, Judd, I was just -- when you brought up
 23 the scheduling concern to Judge Fuller, he
 24 responded, I can be like Judge Tice. I mean,
 25 you said you interpreted that to mean that he

48

1 could drag things out all day into the night.
 2 Did he ever respond with a solution?
 3 A There were times we attempted to have solutions
 4 to the scheduling. They never worked.
 5 Q What were the solutions?
 6 A More time in court. I mean, more days. They
 7 never happened, or at least to my knowledge
 8 didn't happen on a regular basis.
 9 Q And why is that?
 10 A I don't handle the schedule.
 11 Q Who schedules that?
 12 A State's attorney's office schedules.
 13 Q Okay. And I guess the impression that the
 14 scheduling problem is -- were filling the
 15 courtroom with, you know, many, many people,
 16 many juveniles, and were all stacked up at once.
 17 Was there any attempt to space those out?
 18 A Conversations were had to space it out. It
 19 never happened, to my knowledge.
 20 Q Conversations were had with whom?
 21 A State's attorney's office, who schedules, and
 22 with Judge Fuller.
 23 Q You're saying it just never came to pass?
 24 A Never came to pass.
 25 Q Did you ever talk to Judge Fuller about the

49

1 offhanded comments that he made about the staff,
 2 your people not doing their job and that type
 3 of --
 4 A The only time I ever talked to Judge Fuller
 5 about an offhanded comment had to do with us
 6 wearing badges, and that was in the back hallway
 7 of the courthouse. And he made a comment about
 8 my badge, and I asked him not to make fun of or
 9 not to minimize the badge and its importance.
 10 Q Well, had he?
 11 A In my mind, he had, yeah.
 12 Q What did he say?
 13 A I don't remember the exact words. Can't tell
 14 you.
 15 MR. SCHAFFER: Okay. That's all.
 16 MR. NICHOLSON: Nothing.
 17 JUDGE WILBUR: I'm sorry, but I've got one
 18 more question.
 19 MR. PALMER: Sure, of course.
 20 EXAMINATION BY JUDGE WILBUR:
 21 Q On a normal juvenile day, I might do a group
 22 advisement and then have people shuffle out and
 23 take cases one at a time. Would that happen or
 24 did everybody stay in the courtroom the whole
 25 time that court was going on?

50

1 A Everybody stayed in the courtroom.
 2 Q So a juvenile case for one juvenile occurred
 3 when there's 100 people in the courtroom?
 4 A Uh-huh.
 5 Q And the kid had to stand up and admit and give a
 6 factual basis of what was going on?
 7 A Yes.
 8 Q What's the most -- I mean, how big -- what's the
 9 biggest calendar you ever saw of number of
 10 juveniles in one day?
 11 A Probably that 70 number.
 12 JUDGE WILBUR: Okay. Okay. Thanks. Sorry.
 13 Anybody else have a question?
 14 FURTHER REDIRECT EXAMINATION BY MR. SCHAFFER:
 15 Q I guess it just prompts me to ask, I thought
 16 these juvenile proceedings were confidential in
 17 nature, or are they?
 18 A They are confidential by statute unless there's
 19 a compelling reason that they not be.
 20 Q How does that work if you've got everybody
 21 standing in court when the other juveniles are
 22 talking about their case?
 23 A That -- whether the hearings are private or not
 24 is a judicial decision, it's not mine.
 25 MR. SCHAFFER: Okay.

51

1 MR. HIEB: Just to clarify.
 2 MR. PALMER: Certainly.
 3 CROSS-EXAMINATION BY MR. HIEB:
 4 Q Did -- were you present, did Judge Fuller offer
 5 them the right to a private hearing?
 6 A I think that in most cases that statement was
 7 made, yes.
 8 Q So he said to them, You've got a right to clear
 9 the courtroom out?
 10 A Yes.
 11 Q And people would say, No, I will admit without
 12 that? I -- you're not suggesting, because I
 13 have never seen the allegation in this complaint
 14 or in your statement, that Judge Fuller was out
 15 repeatedly violating the rights of juveniles.
 16 And I don't want that coming out now with us
 17 getting jumped by it. There's no allegation
 18 along those lines, is there?
 19 A I'm not making any allegations.
 20 Q Okay. Well, and I'm not trying to beat you up.
 21 I just want to make sure that you're not
 22 suggesting that he was not giving juveniles a
 23 right to a private hearing.
 24 A As far as I know, the statement was made that
 25 you could have a private hearing.

52

1 Q Be gave them that option?

2 A As far as I know.

3 MR. HIEB: Thank you.

4 MR. PALMER: Prompt anything? Anybody?

5 (No further questions were presented.)

6 MR. PALMER: Thank you, Judd.

7 MR. SCHAFER: May he be released?

8 MR. PALMER: Yes. You are released from

9 your subpoena.

10 (Brief recess was taken.)

11 MR. SCHAFER: Call Jeff Krattenmaker.

12 JEFFREY L. KRATTENMAKER,

13 called as a witness herein, having been first duly

14 sworn, was examined and testified as follows:

15 DIRECT EXAMINATION BY MR. SCHAFER:

16 Q Would you please state your name and spell your

17 name for the record.

18 A Sure. Jeffrey, J-E-F-F-R-E-Y, L.,

19 Krattenmaker, K-R-A-T-T-E-N-M-A-K-E-R.

20 Q Mr. Krattenmaker, sometimes it's difficult to

21 hear in here, but I think we've solved the

22 problem. So make sure you speak up.

23 A Okay.

24 Q Your title is what?

25 A I'm a circuit court administrator.

53

1 Q For which circuit?

2 A Seventh.

3 (Mr. Hieb left the room.)

4 Q (BY MR. SCHAFER:) How long have you held that

5 position?

6 A A little over nine years.

7 Q And you started approximately when?

8 A July of '01.

9 Q Okay. And prior to that, what did you do?

10 A I worked for Northrop Grumman in San Diego, and

11 LexisNexis, Dayton, Ohio, and I was a trial

12 court administrator for the State of Maine for

13 nine years.

14 Q What time period would that have been?

15 A Oh, the '80s in Maine, the '90s for LexisNexis,

16 and I've been here since.

17 Q And you serve at the pleasure of the presiding

18 judge; is that correct?

19 A I do.

20 Q And since you assumed the position in 2001, who

21 have the presiding judges been in Seventh

22 Circuit?

23 A Well, it started out with Judge Fitzgerald, who

24 passed away before I got here. Then it was

25 Judge Tice, then it was Judge Trimble, and now

54

1 Judge Davis.

2 Q Okay. And in your position as a court

3 administrator, have you had an opportunity to

4 observe personally or hear about complaints or

5 problems with Judge Fuller?

6 A Yes.

7 Q Tell us from the personal side.

8 A I guess from the personal side, I deal with the

9 clerks of court, I know that there were problems

10 in Custer and Fall River County when he was down

11 there. I know that there are problems with the

12 clerk's office in -- in here as well.

13 Q And the problems -- we have a document, I think

14 that it's in front of you, I think, Exhibit E,

15 which was a memorandum from Carol Foster to you

16 in June of 2004. Do you remember receiving

17 this, Mr. Krattenmaker?

18 A I do.

19 Q Do you remember discussing that with Ms. Foster?

20 A I do. I've had several discussions with her.

21 (Mr. Hieb returned.)

22 Q (BY MR. SCHAFER:) Do you know what became of

23 this complaint?

24 A Because it was a complaint involving a judge, I

25 would have turned this over to Presiding

55

1 Judge Trimble at the time. He and I discussed

2 the comments that Carol made. We discussed the

3 tendency to micromanage and the tendency to

4 bully some of the staff, and as such, that's

5 generally the way a court administrator and

6 presiding judge work with another one.

7 Q Do you know what, if anything, Judge Trimble did

8 with this?

9 A I don't. I know he had a discussion with

10 Carol Foster, and I'm not sure where he went

11 thereafter.

12 Q Tell the Commission what type of clerk and

13 person Carol Foster is.

14 A Carol Foster is a rare find. I guess I style

15 her as perhaps one of the best clerks that we

16 have in the state of South Dakota. She has an

17 interest in the position, she's well-respected

18 across the state, she serves on a number of

19 committees, and she is probably just the best

20 clerk that one could ever work with. She's

21 level-headed, doesn't jump to conclusions, and

22 very, very stable in terms of the way that she

23 examines and administers her office.

24 Q Did you have similar complaints from the clerk

25 in Custer, Debbie Salzsieder?

56

1 A I did. We did.
 2 Q And she testified at the last hearing in this
 3 matter, and her testimony is part of the record.
 4 But generally what were those complaints?
 5 A Basically the same types of complaints, the
 6 micromanagement of the office, bullying of the,
 7 some of the staff, attorneys, law enforcement.
 8 Q Bullying by whom?
 9 A By Judge Fuller.
 10 Q When you say bullying, what are you talking
 11 about?
 12 A Just exuding excess force. Just basically, to
 13 me, bullying is something very similar to what
 14 we see in the media. It's basically, if you
 15 have the power, you are using undo force on
 16 others, and as such, it causes problems.
 17 Q Let me ask you this. Have you personally
 18 observed or had any situations with Judge Fuller
 19 you thought were inappropriate?
 20 A Yes.
 21 Q Tell the Commission about those.
 22 A From time to time Judge Fuller likes to wander
 23 around and use some double entendre, and I know
 24 there were a couple of occasions where he has
 25 referred to photographs in his courtroom. I

57

1 think when he initially put them up, the
 2 response was, This is where I hang my Indians.
 3 I know that from time to time he'll refer to
 4 juveniles as little peckerheads and a variety of
 5 those comments, which may be humorous at the
 6 time, but obviously tend to dwell upon others.
 7 I guess I'm the type of person that still
 8 appears to be squeamish when I hear the word
 9 juvies as opposed to juveniles, so perhaps it's
 10 my conservative nature.
 11 Q By the way, has Judge Fuller been assigned to
 12 Custer or Fall River County since that -- this
 13 memo or that year, I guess, 2004?
 14 A No.
 15 Q Why is that?
 16 A I guess we encountered enough difficult issues
 17 during those two assignments to make the
 18 presiding judge and myself question about
 19 subsequent assignments.
 20 Q I gather that he appears there from time to time
 21 on isolated cases; is that --
 22 A That's correct.
 23 Q But he's not on the regular rotation there?
 24 A Right.
 25 Q And that's due to the problems he's had with the

58

1 staff down there?
 2 A (No audible response - Witness nodded.)
 3 Q Is that right?
 4 A That is correct.
 5 Q Tell me about the -- you've heard him make the
 6 comments about juveniles as little peckerheads.
 7 Has he said that to you directly?
 8 A He said that in the outer office. He said it in
 9 front of a number of folks a number of times.
 10 Q There was some discussion previously about the
 11 license plate on his car, which I -- or van,
 12 which I understood was probable cause or praub
 13 cause. Has he ever explained to you his
 14 experience with that, or with the van and law
 15 enforcement?
 16 A We did have a conversation at one point in time
 17 in the garage. I have a vanity license plate
 18 that says AWS, for American Water Spaniel. His
 19 says Probable Cause, and he did tell me at one
 20 point in time about a situation that occurred in
 21 another state, I believe it was Colorado, where
 22 law enforcement apparently saw his van, singled
 23 it out, conducted a search of the vehicle, and
 24 it was fairly traumatic for both himself and his
 25 spouse. And as such, he decided to memorialize

59

1 that with the probable cause or praub cause on
 2 his license plate in a vanity plate.
 3 Q Did he say what happened to him in the stop?
 4 A Apparently it was fairly traumatic. I think
 5 they singled out his vehicle and asked his -- he
 6 and his spouse to step out, searched the
 7 vehicle, I think made them sit by the vehicle as
 8 they did that.
 9 Q Okay. There was also some previous testimony
 10 about him wearing a powdered wig from time to
 11 time. Have you observed that?
 12 A Yes.
 13 Q Where?
 14 A I believe in the outer office, and I think he
 15 also wore it into court a few times. I believe
 16 he wore it in front of juvenile court.
 17 Q What was the genesis of the wig?
 18 A Judge Delaney was part of a local acting group
 19 that appeared for an MTV filming up at
 20 Mt. Rushmore, and I think Judge Delaney was
 21 given the powdered wig and subsequently
 22 presented it to Judge Fuller as a thinking cap.
 23 I think he called it Judge Fuller's thinking
 24 cap, and as such, it was worn around.
 25 Q And did there come a time recently when

60

1 Judge Fuller put a picture of a number of people
2 in powdered wigs on his bench?
3 A Yes.
4 Q Did I ask you to take photographs of that?
5 A Yes.
6 Q And you did?
7 A I did.
8 (Exhibits F and G were
9 marked for identification.)
10 MR. PALMER: Before you pass those out,
11 Mike, let's let these guys look at them, see if
12 they have any objection.
13 MR. HIEB: I've got no objection.
14 MR. NICHOLSON: No.
15 MR. PALMER: What Exhibits are those?
16 MR. SCHAFFER: It'll be F and G.
17 MR. NICHOLSON: There's more than one
18 picture? I just have one.
19 MR. HIEB: The second one is laying right
20 there.
21 MR. SCHAFFER: F is the picture of the
22 entire courtroom and G is the picture of the
23 picture.
24 MR. PALMER: If there are no objections, F
25 and G will be received.

61

1 Q (BY MR. SCHAFFER:) For the benefit of the
2 Commission, Exhibit F is a picture of his
3 courtroom from -- looking from the back?
4 A Right. As the public would enter the courtroom
5 from the rear, this would be a picture facing
6 the bench.
7 Q And the pictures of the Native Americans on the
8 left would be the Indian portraits that he
9 referred to?
10 A Right.
11 Q And the picture on the bench, is Exhibit G a
12 blow-up of that?
13 A Yes. That is correct.
14 MR. SCHAFFER: We'd offer Exhibits F and G.
15 MR. NICHOLSON: I have no objection.
16 MR. PALMER: F and G are received.
17 Q (BY MR. SCHAFFER:) And for the benefit of the
18 Commission, when did this picture of these
19 individuals with their powdered wigs go on the
20 bench?
21 A Best I can determine, it was the week of
22 September 20th. There was a judicial conference
23 in Chamberlain and a court administrators
24 meeting also in Chamberlain, so somewhere the
25 week of September 20th through the 24th, I

62

1 believe, they were put up.
2 Q Okay. Mr. Krattenmaker, did Judge Fuller ever
3 contact you in connection with the judicial
4 election?
5 A Yes, he did.
6 Q What did he ask you or say to you?
7 MR. NICHOLSON: You know, at some point,
8 Chairman Palmer, I mean, it's kind of been going
9 this way all morning. There's things that are
10 coming out that have never been pled and given
11 us notice about. I mean, I understand that we
12 were -- we're entitled to know some of this
13 before the hearing, I would think.
14 MR. SCHAFFER: Mr. Nicholson did interview
15 Mr. Krattenmaker and was told about this last
16 week.
17 MR. NICHOLSON: I was not told -- he told me
18 he did not want to discuss anything about the
19 judicial election in my interview with him.
20 MR. PALMER: Well, just so we get our record
21 clear. Number one, I think that
22 Mr. Krattenmaker has the ability to talk to you
23 if he wants to or not talk to you if he doesn't
24 want to. I understand that this may not have
25 been part of Dave Nelson's interview, although I

63

1 think there was some reference to that in Dave
2 Nelson's materials, if I'm not mistaken. But
3 I'm going to go ahead and allow you to proceed.
4 Q (BY MR. SCHAFFER:) Okay. Mr. Krattenmaker,
5 what did Judge Fuller say to you in connection
6 with the election?
7 A I guess there were a couple things that come to
8 mind. First of all, there was somewhat of an
9 expectation that the court staff would serve as
10 a campaign staff to Judge Fuller during the
11 course of the election.
12 Secondly, there was some concern of the fact
13 that petitions needed to be circulated, and I
14 believe his court reporter circulated petitions
15 in his behalf.
16 Thirdly, there was kind of a hallway
17 fundraising, and I was originally somewhat
18 flattered when I was asked to give \$1,000 to the
19 campaign. But I had to go back to the personnel
20 policies which said I wish I could, but I can't
21 because the UJS personnel policies are specific
22 about the involvement of court staff in
23 circulation of petitions, campaign and
24 fundraising activities.
25 Q Did Judge Fuller solicit a contribution from

64

1 you?
2 A He asked if I would like to give him \$1,000.
3 Q And your response was what?
4 A I wish I could, but I can't.
5 Q And his response was?
6 A Somewhat of shock, I guess.
7 Q And you were prohibited under the rules --
8 A Yes.
9 Q -- weren't you?
10 A Yes, most definitely.
11 MR. SCHAFFER: That's all the questions I
12 have.
13 CROSS-EXAMINATION BY MR. NICHOLSON:
14 Q Mr. Krattenmaker, how did Mr. Schaffer become
15 aware, or how did he get this picture,
16 Exhibit G, which is the close-up of the judges
17 in the wigs?
18 A I had it and I gave it to him.
19 Q Why did you think that was something that you
20 should give to him?
21 A I had it and I gave it to him. I'm not sure.
22 Q Were you seeking ways to try to find negative
23 aspects to Judge Fuller?
24 A No. I guess I was just trying to portray what
25 the courtroom itself looked like.

65

1 Q When I interviewed you, you were very guarded
2 and didn't want to talk to me, did you?
3 A No.
4 Q And you referred to -- when I asked you
5 questions, you referred to Mr. Schaffer as your
6 lawyer, didn't you?
7 A Yes.
8 Q Do you view him as your lawyer representing you
9 in this?
10 A No, I really don't. In retrospect, I should
11 have brought my own in. But in this case, I see
12 he is a lawyer for the Commission.
13 Q Why did you feel you needed your own lawyer?
14 A Because I'm not quite sure what's going to occur
15 today.
16 Q I see. So you feel you have a position in this
17 that you're going to take or you're trying to
18 take?
19 A No. I'm only responding to the questions asked.
20 Q It was apparent to me, Mr. Krattenmaker, and
21 would you agree with me, when I interviewed you
22 that you had an ax to grind, you were trying to
23 look for things that you could find negative
24 about Judge Fuller?
25 A No. I was trying to be objective, I guess, in

66

1 terms of questions that were asked.
2 Q And isn't it true that this -- the other
3 picture, Exhibit F, where we see a row of
4 pictures that have Native Americans to the left
5 of the bench, do you see that?
6 A I do.
7 Q Are those the pictures you referred to when you
8 said, That's where I hang my Indians?
9 A That is correct.
10 Q And isn't it true that behind at least one of
11 those pictures is part of the audio visual
12 equipment for the courtroom?
13 A Right.
14 Q So that picture has to come down and be put back
15 up again?
16 A They do.
17 Q Okay. Now, Mr. Thompson -- excuse me,
18 Mr. Krattenmaker, are you familiar with the
19 CourtSmart system?
20 A I am.
21 Q And what is it?
22 A It's an electronic recording system.
23 Q How does it work?
24 A There's a central operator and there are cameras
25 and recording devices in three courtrooms.

67

1 Q Is there one in Judge Fuller's courtroom?
2 A There has been.
3 Q And that -- they are in all the magistrate
4 courtrooms; right?
5 A Uh-huh.
6 Q And Judge Fuller's courtroom used to be a
7 magistrate courtroom; correct?
8 A That's correct.
9 Q Okay. And is there audio and video on the
10 CourtSmart system?
11 A Only audio.
12 Q And so any comments made during the day by
13 anyone in the courtroom would be picked up on
14 the CourtSmart system?
15 A Correct.
16 Q And who turns that on and off?
17 A It's always on.
18 Q Okay. Who has the capability of turning it off?
19 A I don't think we have that capability under the
20 new system.
21 Q Okay. What do you mean by the new system?
22 There was a former?
23 A There have been two or three different versions
24 of that software. The new software has an
25 automatic backup fail-safe so that it's on at

68

1 all times.
 2 Q And there's not a technician that operates it?
 3 A There is a technician that operates it.
 4 Q Okay. Does it get -- so it's not turned off at
 5 night when the courtroom is not being used?
 6 A I think somewhere between 8:00 and 6:00, it does
 7 go into an Off mode, but there's a default
 8 setting so that it's always running during the
 9 course of the day.
 10 Q I see. And that, of course, has to be
 11 programmed in by the technician?
 12 A No. It's actually programmed in by the
 13 CourtSmart people and our technical staff out of
 14 Pierre. It's a very sophisticated system.
 15 MR. NICHOLSON: I have no other questions.
 16 MR. PALMER: Did that prompt anything from
 17 you, Mr. Schaffer?
 18 REDIRECT EXAMINATION BY MR. SCHAFFER:
 19 Q I just have a question. I think the question
 20 Mr. Nicholson asked you when he interviewed you
 21 last week was how you handled yourself around
 22 Judge Fuller, and I think you said you were
 23 guarded. Do you remember that?
 24 A I do.
 25 Q Okay. The comment in connection with being

69

1 guarded was in connection with how you handled
 2 yourself around Judge Fuller --
 3 A Uh-huh.
 4 Q -- correct?
 5 A Correct.
 6 MR. SCHAFFER: Okay. That's all.
 7 MR. PALMER: Anybody on the Commission?
 8 Dick.
 9 EXAMINATION BY MR. TRAVIS:
 10 Q Just for clarification and make sure the record
 11 is clear, F and G, Exhibits F and G were taken
 12 September of 2010?
 13 A They were. I believe they were taken after the
 14 judicial conference, which occurred the 23rd and
 15 the 24th. My recollection is they were taken
 16 the first part of the following week, probably
 17 on the 29th.
 18 Q September -- week of September 29th?
 19 A Week of September 27th.
 20 Q Of 2010?
 21 A Right.
 22 MR. PALMER: Oh, I'm sorry, Tom.
 23 MR. DRAVELAND: Cris, yes.
 24 MR. PALMER: Please. I'm sorry.
 25 ///

70

1 EXAMINATION BY MR. DRAVELAND:
 2 Q Mr. Krattenmaker, in the Seventh Circuit, in the
 3 courtrooms that judges are assigned, are judges
 4 able to decorate or put up any pictures that
 5 they feel they want to have in their courtroom?
 6 Do you have any rules, I guess, or regulations
 7 in the Seventh Circuit concerning the courtroom
 8 itself and what is kept or housed there by the
 9 judges?
 10 A We have no specific rules and we've had no
 11 specific problems before.
 12 Q I'm just going to ask your opinion. In your
 13 opinion, are the pictures that are shown here on
 14 these pictures appropriate for the decorum of a
 15 courtroom in the Seventh Circuit?
 16 A I have concern about the one that was mounted on
 17 the face of the bench. In my career I've never
 18 seen a picture mounted on the face of the bench,
 19 and this one just struck me as particularly odd.
 20 MR. DRAVELAND: Thank you.
 21 MR. PALMER: Any other questions?
 22 Mr. Nicholson?
 23 RECROSS-EXAMINATION BY MR. NICHOLSON:
 24 Q What does that picture, Exhibit G, depict to
 25 you, Mr. Krattenmaker?

71

1 A Obviously, it depicts an English courtroom with
 2 powdered wigs.
 3 Q And the powdered wigs are what you find
 4 offensive?
 5 A I just find the whole picture to be somewhat
 6 offensive. I'm not quite sure why it was
 7 actually posted on the face of the bench.
 8 Q Did you get complaints about it?
 9 A No, I don't believe I did at the time.
 10 Q Once again, this picture was given to
 11 Mr. Schaffer at your own volition, not because
 12 he asked for it?
 13 A That is correct.
 14 MR. NICHOLSON: No further questions.
 15 EXAMINATION BY JUDGE WILBUR:
 16 Q This is a stupid question, but how is the
 17 picture attached to the bench? Is there, I
 18 mean --
 19 A There is a nail that's driven into the rail at
 20 the top of the bench normally where bench
 21 conferences are had. So there's a tack driven
 22 into the --
 23 Q Tack or nail?
 24 A Somewhere between the two. It's a fastener
 25 sufficient to hold the size of the artwork but

72

1 it's driven into the top of the bench.
 2 MR. PALMER: Anybody, anything else?
 3 (No further questions were presented.)
 4 MR. PALMER: Thank you, Mr. Krattenmaker.
 5 You are released from your subpoena, also.
 6 (Witness left the room.)
 7 LARA ROETZEL,
 8 called as a witness herein, having been first duly
 9 sworn, was examined and testified as follows:
 10 DIRECT EXAMINATION BY MR. SCHAFER:
 11 Q Would you please state your name for the record
 12 and spell your name.
 13 A Yes. My name is Lara Roetzel, L-A-R-A, Roetzel,
 14 R-O-E-T-Z-E-L.
 15 Q Where do you live, Ms. Roetzel?
 16 A I live here in Rapid City.
 17 Q Tell the Commission what your title and what
 18 your duties are.
 19 A Okay. I'm the chief deputy prosecutor for
 20 Pennington County. Glenn Brenner is the elected
 21 state's attorney, so I'm his first assistant. I
 22 supervise 11 other attorneys in the office and
 23 also handle some felony prosecution cases of my
 24 own.
 25 Q How long have you held that position?

73

1 A As chief deputy?
 2 Q Yes.
 3 A I've been chief deputy most recently for
 4 approximately two years, but I held that
 5 position previously for about another
 6 three years. I've been a prosecutor for about
 7 fourteen years.
 8 Q Tell the Commission a little bit about your
 9 legal education and your employment history.
 10 A All right. So I went to the University of
 11 Nebraska-Lincoln for college and then
 12 Creighton University for law school. I -- my
 13 first employment was with the Pennington County
 14 State's Attorney's Office. That was in 1996. I
 15 have worked there pretty much ever since.
 16 I left in 2001. Okay, from 1996 to 2001, I
 17 was at the state's attorney's office. Then I
 18 was in private practice with Deb Watson for
 19 three years, two and a half years, three years.
 20 Then I went back to the state's attorney's
 21 office, where I've been ever since.
 22 Q Tell the Commission your first encounter with
 23 Judge Fuller.
 24 A Well, my first -- my very first encounter with
 25 him was probably in the courtroom, but I believe

74

1 that what you are asking is my first kind of
 2 personal encounter with Judge Fuller.
 3 There's a sally port that goes in between
 4 the state's attorney's office where I work and
 5 the jail. They are interconnected buildings and
 6 there's an underground kind of parking garage
 7 where we have to walk to get to the courthouse,
 8 and all of the judges park underneath there.
 9 So I was walking from my building into the
 10 courthouse and I encountered Judge Fuller. I
 11 think he was smoking at the time, but he was --
 12 a lot of people go down in that sally port area
 13 because it's semi-outdoor to smoke.
 14 He had a very unusual vehicle. It's an
 15 old-school Volkswagen Bug, like a '60s kind of
 16 Volkswagen Bug. Orange, very unique looking.
 17 And it had a unique license plate, one of those
 18 vanity plates.
 19 And Judge Fuller was standing there, so I
 20 asked him, I said, What, I don't get it, what
 21 does your vanity plate mean? It spelled,
 22 P-R-O-B, and I think it was, C-O Z. It said,
 23 PROBOZ. He said, Well, it stands for probable
 24 cause. Let the sons-of-bitches remember that
 25 when they pull me over.

75

1 And it just, I was so taken aback and so
 2 struck by that kind of anti-law enforcement
 3 stance, that he was calling law enforcement
 4 sons-of-bitches, and let them remember that when
 5 they have the nerve to pull him over.
 6 Q Ms. Roetzel, are you absolutely certain those
 7 are the words that he used?
 8 A I'm 100 percent certain those are the words that
 9 he used.
 10 Q What time frame are we talking about?
 11 A It was very early -- it would have been right
 12 after he became a judge. So, 2004, 2003.
 13 Q Ms. Roetzel, describe for the Commission his
 14 demeanor in court when you've been in front of
 15 him.
 16 A I just never got the impression that
 17 Judge Fuller took being a judge seriously. As a
 18 member of the bar, as a lawyer, I take that -- I
 19 treat that role with such tremendous respect and
 20 I never got the impression that he felt that
 21 way.
 22 He was very anti-law enforcement, very
 23 belittling, rude, condescending in his approach
 24 to the State. It seemed like he was different,
 25 acted differently towards the defendant than he

76

1 did to the State.
 2 But as for how he related to me
 3 particularly, most of the time he just ignored
 4 me. I mean, virtually ignored me. If I wanted
 5 to be heard in his courtroom, I would have to
 6 assert myself. Your Honor, the State would like
 7 to be heard. And then it was with disdain. You
 8 know, he'd kind of roll his eyes and look at me
 9 like, Go ahead. The impression being, Not that
 10 anything you say is going to matter, but all
 11 right, go ahead. He was very condescending
 12 towards me.

13 **Q Ms. Roetzel, you actually ran against**
 14 **Judge Fuller in 2006, didn't you?**

15 A I did.

16 **Q And why was that?**

17 A Well, I ran against him because I did not think
 18 he was a good judge. I thought he was
 19 anti-law enforcement, I thought -- I got the
 20 impression he did not like women, I thought that
 21 his service was a disservice to the judiciary.

22 And of course, there were other factors as
 23 well. He wasn't from our circuit, and he was
 24 the newest judge, so those things played into
 25 account, too. But I wouldn't have run against

77

1 any other judge. I chose him for a reason,
 2 because I -- honestly, I thought I could do a
 3 better job than he did.
 4 **Q Ms. Roetzel, the Commission knows Glenn Brenner,**
 5 **the state's attorney, filed the initial**
 6 **complaint in this case. Can you tell the**
 7 **Commission after that what the state's**
 8 **attorney's office's practice was with respect to**
 9 **recusing or filing affidavits on Judge Fuller?**

10 A Well, recusing a judge is something that
 11 everyone takes very, very seriously. So even
 12 after we filed the complaint, it was our hope
 13 that we could still bring cases in front of him.
 14 And we tried to for a period of time.

15 But it got to the point where we could not
 16 have a fair hearing in front of that judge, and
 17 quite frankly, we couldn't send our people over
 18 there anymore, they would come back so upset.

19 I remember Tony Bolson coming back, I think
 20 he had the first court appearance after Judge
 21 was served with his, whatever paperwork he was
 22 served with, after we suspected that had
 23 happened.

24 He had that next docket day, and he came
 25 back, he said, I don't think I can go back there

78

1 anymore. I mean, he -- he doesn't even hear
 2 what I say. He does not want to hear what I
 3 say, he doesn't hear what I say.

4 The other example I would give is
 5 Roxie Erickson, because she had the juvenile
 6 docket. So she was back in front of him for
 7 extensive periods of time. And I remember one
 8 really long, full day, and she was on the verge
 9 of tears when she came back.

10 And Glenn's approach through the whole thing
 11 was and, well, has always been, You make your
 12 own independent decision about whether you're
 13 going to recuse a judge. I'm not doing any kind
 14 of blanket recusal, I'm not telling anybody what
 15 do to. This needs to be your personal decision
 16 and I'm giving you the authority to make that
 17 personal decision.

18 But with Roxie, he finally had to say, No,
 19 I'm making this decision for you, you can't go
 20 back here. Because her actual health was
 21 affected. She was a wreck. He told her she
 22 couldn't go back there.

23 **Q Let me ask you about a particular incident**
 24 **involving a juvenile proceeding that**
 25 **Ms. Erickson handled that you also were involved**

79

1 **in where Judge Fuller ordered witnesses to be**
 2 **polygraphed. Would you please tell the**
 3 **Commission about that.**

4 A Yeah. And that was during the same time frame,
 5 very recently, I believe, after Judge Fuller
 6 would have been served with the paperwork that
 7 has to do with this proceeding. All right.

8 So what happened was, Roxie came back from
 9 court, she was hysterical. I mean, she was
 10 literally -- she was crying, and she said that
 11 she'd a juvenile rape adjudication. That's like
 12 a trial. In juvenile court, it's called an
 13 adjudication.

14 It was a young girl, like 13 or 14 years
 15 old, had been the victim of a young man, like 16
 16 or 17 years old, a rape case. And she had the
 17 adjudication, she put on all of the testimony,
 18 and at the conclusion of the testimony, Judge
 19 Fuller had ordered that both of the parties, the
 20 victim and the defendant, both juveniles be
 21 polygraphed to figure out which one of them were
 22 lying.

23 She was very, very upset about the idea
 24 of -- we don't polygraph rape victims, we don't
 25 polygraph children. So this was a very bizarre

80

1 combination. Now we're going to polygraph
2 children and also alleged rape victims. So
3 Roxie was very, very upset.

4 There was a date set where Roxie Erickson
5 and Cathy Mattson, who was the defense attorney,
6 were supposed to go back in front of Judge
7 Fuller and have their respective juveniles with
8 them to talk about this polygraph that was going
9 to happen. That was the next stage of the
10 proceeding.

11 So I went over there. Well, we waited in
12 the courtroom for just a couple of minutes, then
13 Roxie stepped out. I don't know why, but she
14 wasn't in the courtroom. It was just me at the
15 prosecution table, Cathy Mattson at the defense
16 table, and we waited for Judge Fuller to enter.

17 He came in the room through the side door,
18 not up on the bench, just through the side door.
19 He stopped and he just stared at Cathy Mattson.
20 He said, Where is your client? He's not here,
21 Your Honor. He's not coming.

22 He still has yet to even look at me, but
23 this was typical. I mean, he would not ever
24 look at me or really address me in court. But I
25 kind of piped up and, Your Honor, the victim is

81

1 not coming, either.

2 And Judge Fuller, again directing his
3 comments to Cathy Mattson, said, Do you expect
4 me to make a decision in this case based on the
5 evidence presented at trial? Yeah, that's --
6 that's what a judge is supposed to do.

7 So Cathy Mattson said, Yes, Your Honor. And
8 I piped in, even though no one was talking to
9 me. Yes, Your Honor, that's what our
10 expectation is.

11 And he became so upset, he was red, he was
12 trembling, he had tears in his eyes, and he just
13 through gritted teeth said, That is very unfair.
14 And then I was livid at that point, so I piped
15 up, No, what's unfair is that you want to
16 polygraph a 13-year-old rape victim.

17 And he went (Witness gestured) and walked
18 out of the courtroom. That's the last
19 interaction I've had with him.

20 **Q Have you had occasion to observe Judge Fuller in**
21 **connection with a judicial evaluation form?**

22 **A** I had kind of forgotten about it, but yes, I
23 absolutely do. I was thinking about this whole
24 proceeding and this whole idea of whether
25 Judge Fuller could change and come back this

82

1 new, improved person and thinking about whether
2 whatever happens today, whether I'd bring cases
3 in front of him.

4 And so I remembered back to this day, and I
5 can't give you the time frame, but I'm sure some
6 of you will remember, the Supreme Court
7 ordered -- didn't order, but offered the
8 opportunity for judges to participate in a
9 survey experience where members of the bar, we
10 got questionnaires. I think it would have been,
11 like, 2006, I want to say, 2007.

12 But we were invited to fill these out and
13 critique the judges, and I think the judges had
14 the opportunity of whether they want to
15 participate or not. I don't know how it worked
16 on that end.

17 So some of us filled out these surveys. I
18 happened to be in Judge Fuller's chambers. It
19 would have been on a case or something. I
20 wouldn't have been up there for any other
21 reason. I was sitting there having a
22 conversation him about whatever we were talking
23 about, and I couldn't help but notice there was
24 one of these surveys taped to his wall, like
25 right next to -- right on his wall next to his

83

1 door.

2 And I was very distracted by it because I
3 recognized the handwriting. I knew who had
4 written it. I knew this woman that had written
5 it. And so I think that he caught my eyes as I
6 was distracted, looking over at it.

7 And I don't remember what he said exactly.
8 All I remember is the tone of the -- of his
9 response, which was that it was very funny. He
10 thought it was very, very funny. Just thought
11 it was -- I don't know how to describe, just the
12 impression I got was that it was ridiculous to
13 think that anybody could criticize a judge and
14 that that would matter in any way.

15 My point being, I did not get the impression
16 at all that he looked at that and thought, Wow,
17 someone is critical of the job I'm going to do,
18 so I'm going to change and I'm going to be
19 better for having had that criticism. It was
20 quite the contrary. He thought it was a joke.

21 MR. SCHAFFER: That's all.

22 CROSS-EXAMINATION BY MR. HIEB:

23 **Q Ms. Roetzel, let's go back to that, the last**
24 **thing you were talking about, the evaluation**
25 **form. That was a voluntary evaluation judges**

84

1 could either agree to be evaluated or not;
 2 correct?
 3 A I think that is the case.
 4 Q Okay.
 5 A My understanding of it was that every attorney
 6 got different ones. Judges could voluntarily
 7 participate if they wanted, and then each
 8 attorney -- not all of us got every judge to
 9 critique. Each attorney just got a couple
 10 judges to critique. That's my understanding of
 11 it.
 12 Q Right. The judges could say, I don't want to be
 13 evaluated, I don't care what people think, I'm
 14 going to do what I do and I don't want to know.
 15 A Yeah.
 16 Q Or they could say, Yeah, I want some feedback;
 17 right?
 18 A That's my understanding.
 19 Q And you said there was an evaluation form posted
 20 where?
 21 A On the wall. It was posted on the wall in his
 22 chambers. So, like, my recollection is that
 23 when you walk into his chambers, it would be,
 24 like, kind of over by the door.
 25 Q Okay. There was no name attached to that, it

85

1 was anonymous; correct?
 2 A It was anonymous, but I knew who had written it.
 3 Q Well, you didn't give any indication that you
 4 knew who wrote it, did you?
 5 A Absolutely not.
 6 Q You don't have any knowledge that he knew who
 7 wrote it, did you?
 8 A No.
 9 Q Okay. And in fact, that was the same time frame
 10 in which you were running against him; correct?
 11 2006?
 12 A Quite possibly, yes.
 13 Q You mentioned the fact that you ran against him
 14 because you didn't think he did a good job, you
 15 thought he was anti-law enforcement, and you
 16 thought he didn't like women. Those were some
 17 of the reasons that caused you to want to run
 18 against him; correct?
 19 A Yes.
 20 Q And the voters disagreed with you, didn't they?
 21 A They did, yeah, they elected --
 22 Q He ended up getting reelected, didn't he?
 23 A Yes, Judge Fuller won that election.
 24 Q And what I'm curious about, when you were
 25 interviewed by Dave Nelson in this matter, there

86

1 are a number of things that were attributed to
 2 you, statements attributed to you in the report.
 3 Have you had a chance to see the statements that
 4 Mr. Nelson attributed to you in his report?
 5 A I have seen a portion of that, I believe.
 6 Q When you say a portion of it, what portion did
 7 you see?
 8 A Well, I don't know what there is to see, but I
 9 know that Attorney Schaffer gave me a small
 10 narrative that I understood to be a summary. I
 11 don't know if it was the totality of the report.
 12 Q So it was all of the statements attributed to
 13 you?
 14 MR. HIEB: Is that correct, Mike?
 15 MR. SCHAFFER: Yes. Yes.
 16 Q (BY MR. HIEB:) I don't -- so --
 17 A It was about this long.
 18 Q So you've seen the part of the report that
 19 relates to statements that you gave?
 20 A I think so.
 21 Q Okay.
 22 A I'm not entirely sure.
 23 Q All right. Well, I'm trying to figure out how
 24 these statements were elicited. Did Mr. Nelson
 25 come to you and ask you about the personalized

87

1 license plates or is that something you brought
 2 up to him?
 3 A How were statements elicited? Well, I guess if
 4 you're asking what my conversation with
 5 Dave Nelson was like, it was kind of an
 6 open-ended, free-flowing conversation. I talked
 7 about lots of things and certainly not all of
 8 them are in the report that I think you've seen.
 9 Q Let's talk specifically about the license
 10 plates. Did Dave Nelson come to you and say,
 11 What do you know about these license plates, or
 12 did you, in the context of being interviewed by
 13 him, say, There's -- he's got these license
 14 plates that I want to talk about?
 15 A I think that it came up in the context, that
 16 particular incident, we kind of started out
 17 talking about my general impressions, and I
 18 talked about that anti-law enforcement
 19 perspective. And then he was asking me for
 20 examples, and that's one of the examples that I
 21 gave in support of my statement that it's my
 22 opinion that he's anti-law enforcement.
 23 Q Do you know where the license plate came from,
 24 by chance?
 25 A Do I know where it came from?

88

1 Q Yeah.
 2 A I assume from the Department of Motor Vehicles.
 3 I don't know.
 4 Q Well, do you know if Pete went out and bought
 5 that himself or where he got that from?
 6 A No, I don't know.
 7 Q Okay. And do you know anything about where the
 8 van -- I think that you've described the van for
 9 the Commission. But I think it's fair to say
 10 that the van that Pete has been known to drive
 11 could be characterized as sort of a hippie van
 12 throwback, surfboard hanging on the side of it,
 13 something you'd see in a Cheech and Chong movie?
 14 A Yes.
 15 Q And you were trying to relate that to
 16 Mr. Nelson, too, weren't you, that this is the
 17 kind of van this guy drives and parks in the
 18 courthouse; right?
 19 A Yes.
 20 Q And that -- that the nature of that vehicle
 21 itself is somewhat offensive to you, isn't it,
 22 for a judge to be driving that?
 23 A Yes.
 24 Q Do you know anything about the history of that
 25 van?

89

1 A No.
 2 Q Did you ever bother to ask him?
 3 A No.
 4 Q Did you care?
 5 A Did I care about the history of the van?
 6 Q Yeah.
 7 A No. No.
 8 Q So you just made the assumptions that you made
 9 based upon what you saw and based upon your
 10 impressions of Judge Fuller?
 11 A Yes, and the statement regarding the license
 12 plate, yes.
 13 Q There's another statement attributed to you in
 14 here that I found interesting. You indicate
 15 that you recall during a DUI jury trial that
 16 Judge Fuller referred on the record and in front
 17 of the jury that the state's expert chemist was
 18 a hired whore or a State whore.
 19 A Yes.
 20 Q Were you the prosecutor in that case?
 21 A No. One of the attorneys that I supervise,
 22 Josh Hendrickson, was prosecuting that case.
 23 Q So you weren't present when that statement was
 24 made?
 25 A No, I was not.

90

1 Q Was there a transcript prepared from that trial?
 2 A Yes.
 3 Q And do you have a copy of that?
 4 A Yes.
 5 Q Do you have it with you?
 6 A I have it -- not with me right now, but it's out
 7 in the hallway, yes.
 8 Q Okay. Was that provided to Mr. Schaffer?
 9 A Yes.
 10 Q Okay. And I'm curious, was there an objection
 11 made at that time or a motion for a mistrial or
 12 anything along those lines?
 13 A Not to my knowledge, no. Josh -- I don't
 14 believe that Josh Hendrickson made a motion for
 15 a mistrial.
 16 Q When you -- you indicate that Judge Fuller's
 17 anti-law enforcement, or I should say your words
 18 were, Very anti-law enforcement. Did
 19 Judge Fuller routinely rule against the State in
 20 cases where you thought the State should have --
 21 he should have ruled in the State's favor?
 22 A Very -- yes, very often Judge Fuller ruled
 23 against the State in cases where I believed he
 24 should not have.
 25 Q He gave sentences you didn't agree with;

91

1 correct?
 2 A Yes.
 3 Q That was some of the problems, some of the axes
 4 you have to grind with Judge Fuller, isn't it?
 5 A I don't have an ax to grind. I'm -- but yes,
 6 those were some of the reasons that I did not
 7 appreciate being in his courtroom.
 8 Q You've been verbally outspoken and critical of
 9 the -- some of the sentences he's given, haven't
 10 you?
 11 A Yes.
 12 Q And in fact, you're familiar with
 13 Heidi Linngren, aren't you?
 14 A Yes.
 15 Q And Heidi Linngren is in front of -- or, was in
 16 front of Judge Fuller quite frequently on
 17 criminal matters on behalf of the attorney
 18 general's office; correct?
 19 A Correct.
 20 Q Would it surprise you if Heidi Linngren had
 21 indicated that while some of Judge Fuller's
 22 conduct she didn't appreciate, she never lost a
 23 hearing on behalf of the State in front of him?
 24 A That would surprise me.
 25 Q Okay. But you wouldn't have any evidence to the

92

1 contrary, would you?

2 A No, I don't track -- Heidi doesn't work for me,
3 she works in a different office, so I don't keep
4 track of her record in the courtroom.

5 Q But you would agree with me, Ms. Roetzel, that
6 we're not here to build a case against
7 Judge Fuller which relates to his sentencing or
8 what he does as a judge; correct?

9 A Yes. I understand that.

10 Q So then what's the point of bringing all that
11 up?

12 A The point of bringing all what up?

13 Q All the things that you've brought up about how
14 you don't appreciate him and you think he's
15 anti-law enforcement and the things that don't
16 really relate to conduct.

17 A It was never my intention to discuss his rulings
18 and sentences and findings in court. When we
19 did the complaint, when Glenn Brenner sat down
20 and drafted that, we understood very well that
21 the reason we were doing it had to do with
22 demeanor, courtroom demeanor.

23 So if some of that has gotten mixed in there
24 and confused the issue, it certainly was not my
25 intention. I absolutely understand that the

93

1 reason we are here has to do with courtroom
2 demeanor and conduct.

3 Q But you will admit that during the same time
4 frame, you were verbally or vocally outspoken
5 about some of the sentences he handed down,
6 weren't you?

7 A I can't think of a specific example, but yes.

8 Q How about a rape sentence that you were offended
9 by, do you remember that one?

10 A I think that there have been a couple, but I
11 don't remember one in particular.

12 Q You remember talking about those, don't you, and
13 being a -- being outraged that Judge Fuller
14 would sentence in that fashion?

15 A Yes. But again, I understand that's not why
16 we're here.

17 Q But it's in the same time frame as the
18 affidavits started flying, isn't it?

19 A I don't think so. What rape case are you
20 talking about?

21 Q I don't know the name specifically, but you
22 evidently referenced it to the point where the
23 attorney general of South Dakota heard about it.
24 Do you recall it?

25 A No. I don't.

94

1 Q Do you recall being outraged about sentencing in
2 the same time frame that you started having
3 affidavits flying out of your office with
4 respect to Judge Fuller?

5 A Within the last couple months?

6 Q No, within the last six to eight months.

7 A No. I don't. I'm sorry, I don't remember -- I
8 haven't brought any -- I haven't brought any of
9 my cases in front of Judge Fuller for a long
10 time because he's had such a grudge against me
11 because of running against him. So I would have
12 never brought a rape case in front of
13 Judge Fuller within the last probably
14 five years.

15 But it's certainly possible that there was a
16 sentence that one of the attorneys in my office
17 received that I wasn't happy about, but I do not
18 recall being quoted in the media or verbally
19 outspoken about any rape sentence in the last
20 six to eight months.

21 Q I'm not talking about you being quoted in the
22 media. I'm talking about you expressing
23 displeasure with sentencing. And I didn't say
24 it was your case, I'm saying a case coming out
25 of your office.

95

1 A I don't remember that. I'm sorry.

2 MR. HIEB: Okay. I have got no further
3 questions.

4 MR. PALMER: Mr. Schaffer, does that prompt
5 any from you?

6 MR. SCHAFFER: Yes, I have a couple.

7 REDIRECT EXAMINATION BY MR. SCHAFFER:

8 Q And I'm just looking at Mr. Nelson's report
9 relating to the incident involving the State's
10 expert chemist. Do you recall that?

11 A Yes. Dr. Looyenga.

12 Q And you were not present during that trial?

13 A No, I was not present during that trial. It was
14 something that Josh Hendrickson reported back to
15 me as his supervisor.

16 MR. SCHAFFER: And I'm going to mark, I
17 don't have an extra copy of it, but I'm going to
18 mark the original transcript of that hearing and
19 make it part of the record.

20 MR. HIEB: Well, could I see it before --

21 MR. PALMER: Sure.

22 MR. HIEB: Thank you.

23 MR. PALMER: Why don't you have Jacque mark
24 it first.

25 MR. HIEB: Is there a page, Mike, you want

96

1 to refer to?

2 MR. SCHAFFER: No, I want the whole thing.

3 MR. HIEB: Okay. But I mean, is --

4 MR. SCHAFFER: All right.

5 MR. HIEB: I'll let you mark it --

6 MR. SCHAFFER: I mean, you want to read the

7 whole thing --

8 MR. HIEB: I just want to know if --

9 MR. PALMER: Hey, hey, hey, guys. Hang on.

10 MR. HIEB: I'm sorry.

11 MR. PALMER: Let's mark the transcript and

12 give Jacque a break so she can mark the

13 transcript.

14 (Exhibit H was marked for identification.)

15 MR. PALMER: Now, what -- the transcript is

16 marked H. And what is that a transcript of,

17 Mr. Schaffer?

18 MR. SCHAFFER: That's a transcript of a jury

19 trial, partial transcript of a jury trial, State

20 of South Dakota versus Redd Star Fox Horn dated

21 August 31, 2009. It's a transcript I think of

22 the testimony of Dr. Looyenga. I'm intending to

23 ask her a few questions about it.

24 Q (BY MR. SCHAFFER:) I gave you a copy of that to

25 review, did I not?

97

1 A You did.

2 Q And there's no reference -- in fairness to

3 Judge Fuller, there's no reference in that

4 transcript to him referring to Dr. Looyenga as

5 a, quote, hired whore or State whore, is there?

6 A No. He did not use that word. I believe that

7 the section that Josh Hendrickson was upset

8 about was -- would be starting on page 29, which

9 happened outside of the presence of the jury,

10 and where Judge Fuller is very, very critical

11 and angry regarding Dr. Looyenga, and that's

12 what the transcript reflects, but he --

13 Q It was not in the presence of the jury?

14 A It was not in the presence of the jury. That

15 was my misunderstanding from talking with

16 Mr. Hendrickson.

17 Q Okay.

18 A But that's certainly the gist of what he's

19 saying.

20 MR. HIEB: Can I follow up?

21 MR. PALMER: Please.

22 RE-CROSS-EXAMINATION BY MR. HIEB:

23 Q So in other words, Ms. Roetzel, what you're

24 telling us is -- I want to go back now to this

25 report. And this is the concern that I have

98

1 about the report that I raised previously with

2 the Committee, and this is before you were here.

3 This report was prepared by Dave Nelson.

4 And as I understand it, the way Mr. Nelson would

5 have done this is, he would have prepared this

6 and probably talked to you after he prepared it

7 to confirm that what he was telling the

8 Commission was consistent with what you told

9 him. Did that happen in your case?

10 A No. Dave Nelson -- I had a conversation with

11 Dave Nelson and then he generated a report,

12 which I have seen at least part of through

13 Mr. Schaffer.

14 Q No, you are misunderstanding my question. I

15 believe what Mr. Nelson's practice was with the

16 rest of the witnesses that he interviewed was to

17 call them back on the phone and say, Here is

18 what I'm going to write with respect to what you

19 told me, is that -- does this sound correct.

20 A I don't specifically recall if he did that or

21 not. I don't remember him calling me up and

22 going through it with me.

23 Q Okay.

24 A That might have happened, but I don't remember.

25 Q Well, and that's -- I can tell you from talking

99

1 to some of the other witnesses, that was his

2 practice with them to make sure that what he

3 gave this body was accurate. You don't know,

4 you can't recall having a phone conversation

5 with Mr. Nelson?

6 A No. But I'm not saying that I didn't.

7 Q Okay.

8 A That's possible.

9 Q And you saw the report from Mr. Schaffer;

10 correct?

11 A I'm nervous because mine didn't look like that.

12 MR. SCHAFFER: No. No. I'm going to

13 object. She'd never seen the report. All she

14 saw was the portion of the report that relates

15 to what was credited to her.

16 Q (BY MR. HIEB:) Sure, that's fair. You saw the

17 portions of the report, and I'm -- I've known

18 Mr. Schaffer a long time, and if he tells me

19 what he showed you is what's here, I believe

20 that.

21 A Okay.

22 Q The portion relating to what you told

23 Mr. Nelson, you saw?

24 A I did, yes. That's --

25 Q And did you --

100

1 A -- what I got. I did.
 2 Q And at that point, did you tell Mr. Schaffer,
 3 You know, it says here that I specifically told
 4 Dave Nelson that Judge Fuller called a State
 5 chemist on the record in the presence of the
 6 jury a hired whore or a State whore. You know,
 7 Mr. Schaffer, that's wrong. Did you tell him
 8 that?
 9 A Yes.
 10 Q How come that didn't come out on direct before I
 11 brought it up? You would want that clarified,
 12 wouldn't you?
 13 MR. SCHAFFER: I'm going to object; it's
 14 argumentative, Your Honor.
 15 MR. PALMER: It is argumentative.
 16 A I don't understand the question.
 17 Q (BY MR. HIEB:) Let me do it this way. Are you
 18 here to try to bury Judge Fuller as deep as you
 19 can bury him, or are you here to try to give
 20 objective evidence to this body so that a
 21 decision can be made regarding discipline?
 22 A I don't have any control over the outcome of
 23 this hearing and I have no intention of burying
 24 Judge Fuller. I'm offended that he would
 25 insinuate that's what I'm doing. I don't want

101

1 to be here. None of us want to be here. I got
 2 a subpoena and that's why I'm here and I'm
 3 telling you what I know.
 4 Q Ms. Roetzel, as an officer of the court, you
 5 would agree with me, because when I read this
 6 and I looked at it where you said point blank
 7 Judge Fuller called an expert witness in the
 8 presence of the jury on the record a hired whore
 9 or a State whore, that's about as damning a
 10 comment as you made in here. Would you agree
 11 with that, as an attorney?
 12 A It's one of the things that I brought up, yes,
 13 but I don't consider it damning or the most
 14 damning.
 15 Q And it didn't happen, did it?
 16 A I was relaying a conversation that
 17 Josh Hendrickson told me about. We looked into
 18 it further and the facts are what they are.
 19 Q And it didn't happen, did it?
 20 A Josh Hendrickson told me that Judge Fuller
 21 called Dr. Looyenga a hired whore, so that's
 22 what I reported.
 23 Q But you reported it happened on the record in
 24 the presence of the jury, and we now know that
 25 didn't happen, did it?

102

1 A That was my understanding of what Josh -- see, I
 2 supervise all these attorneys, so a lot of
 3 what's in that report is things that my
 4 attorneys have reported back to me. That's all
 5 it was.
 6 Q You don't know whether a lot of the things in
 7 this report are even accurate, do you?
 8 A I'm not -- I don't think that's a fair question.
 9 Q This one wasn't, was it?
 10 A I was relating back what Josh Hendrickson had
 11 said to me.
 12 MR. HIEB: I've got no further questions.
 13 FURTHER REDIRECT EXAMINATION BY MR. SCHAFFER:
 14 Q Ms. Roetzel, I brought this up to you when I
 15 visited with you. I actually got a copy of the
 16 transcript, I gave it to you to look at --
 17 A Yes.
 18 Q -- to confirm that it didn't happen.
 19 A Right.
 20 Q And there were -- and the Commission can look at
 21 what he actually said and judge for themselves.
 22 A Exactly.
 23 MR. SCHAFFER: That's all.
 24 MR. PALMER: Does that prompt any questions
 25 from anyone on the Commission?

103

1 MR. McBRIDE: Was that offered?
 2 MR. PALMER: We've marked the transcript H.
 3 Are you offering H?
 4 MR. SCHAFFER: Yes, I'd offer H.
 5 MR. HIEB: No objection.
 6 MR. PALMER: Okay. H will be received.
 7 Thank you very much for your time. You're
 8 released from your subpoena.
 9 (Witness left the room.)
 10 MR. SCHAFFER: Call Glenn Brenner.
 11 GLENN BRENNER,
 12 called as a witness herein, having been first duly
 13 sworn, was examined and testified as follows:
 14 DIRECT EXAMINATION BY MR. SCHAFFER:
 15 Q Would you please state your name for the record
 16 and spell your name.
 17 A Yes. Glenn Brenner. G-L-E-N-N, B-R-E-N-N-E-R.
 18 Q And your position is what, Mr. Brenner?
 19 A I'm the State's Attorney here in Pennington
 20 County.
 21 Q And how long have you held that position?
 22 A I was elected in 1996 and took office in 1997,
 23 January of 1997.
 24 Q And you're here pursuant to a subpoena; is that
 25 correct?

104

1 A That is correct.

2 Q **And tell us a little bit about your background**
3 **in the law, your education and where you've**
4 **worked.**

5 A Okay. I graduated from the University of
6 South Dakota in 1992, and my last semester I did
7 a clinical program with the state's attorney's
8 office and subsequently was hired on as a deputy
9 state's attorney and worked there until 1995,
10 May of 1995.

11 I left the office and went into private
12 practice for about a year, handling just a
13 variety of everything that pretty much walked in
14 the door, and then took out petitions and ran in
15 a primary against the then-state's attorney and
16 was successful. Since then, I've had two or
17 three elections for the office and have been
18 state's attorney ever since.

19 Q **So you've been state's attorney since 1997?**

20 A Yes, that's correct.

21 Q **Took office in January of that year?**

22 A Yes.

23 Q **Mr. Brenner, you filed the original complaint**
24 **that brings us here involving the incident with**
25 **Officer Twedt; is that correct?**

105

1 A That is correct.

2 Q **And why did you file that?**

3 A Well, because -- there's really two reasons I
4 filed that. Number one is how egregious
5 essentially the statement itself was, you know,
6 in the sense that it was -- it was overly harsh
7 and not something that I felt was -- could be
8 taken lightly. It could affect this young
9 officer's career for the rest of his life, as
10 well as a reflection on the Rapid City Police
11 Department.

12 The second real reason was because I just
13 did not feel like there was going to be any
14 other means to accomplish any sort of change in
15 behavior. The history that I had at the time
16 from the deputies that worked with me at the
17 office was that this pattern of behavior or
18 maybe philosophy of thought was existent and
19 nothing was really going to change it, so I
20 filed the --

21 Q **What do you mean by that?**

22 A -- complaint. Well, the fellow -- my
23 colleagues, the deputy state's attorneys which
24 worked with myself, we have regular staff
25 meetings, and there were -- there were constant

106

1 stories about extracurricular comments.

2 I can't recall specifically a lot of the
3 comments, but there were comments that were made
4 to give me the impression that there was a
5 philosophical belief by this particular judge
6 that he wasn't able to leave at the door of the
7 courtroom, that he was bringing in with him, and
8 it was reflecting not only in maybe the cases,
9 but more so in how he was treating the attorneys
10 that appeared in front of him.

11 Q **What do you mean by how he was treating the**
12 **lawyers?**

13 A There's a -- there's a disparity in power
14 between a judge and any attorney who is in the
15 courtroom, naturally. And it just appeared that
16 he would -- the attorneys were frustrated and
17 not looking forward to going into his courtroom,
18 they weren't treated with respect, and because
19 of their position within government, that they
20 were treated as less.

21 Q **In this particular case, it's my understanding**
22 **that the attorney general, Marty Jackley,**
23 **contacted you; is that correct?**

24 A That is correct.

25 Q **What did he tell you?**

107

1 A Marty and I regularly have communication based
2 on our positions, and so we have each other's
3 cell phones and we contact each other regarding
4 various issues that come up.

5 But what he had said was that he spoke with
6 Jack Hieb, who I didn't know at the time, but
7 was an attorney that has a relationship with
8 Marty and that they are friends and that Jack
9 had mentioned he was going to visit with me.

10 And Marty said, Well, I know Glenn and I can
11 call him and see if he's willing to visit with
12 you. And so I'm calling to ask if that's
13 something that you would be willing to do. And
14 I said yes, I would.

15 And he said, As a heads-up, he's most likely
16 going to ask you about whether or not if the
17 powers that be saw fit to put Judge Fuller back
18 on the bench, if you would be willing to have
19 your attorneys in your office appear in front of
20 him.

21 That was pretty much the extent of the
22 conversation with Marty Jackley.

23 Q **Let me ask you this. After you filed the**
24 **complaint against Judge Fuller, what was your**
25 **policy -- well, maybe before and after, what was**

108

1 your policy with respect to any recusals of
2 Judge Fuller?
3 A Well, there's -- attorneys within the office
4 have the right to file an affidavit on a judge
5 within the law if they see it fit and have good
6 reason. Our office is one that we don't
7 micromanage, so if they see it fit and have good
8 reason to file an affidavit, it's well within
9 the rights, within the law to do so, so they can
10 do that.

11 Now, if somebody were to file affidavits on
12 a judge in every single case that they had, I
13 think I would expect that I would be informed
14 and communicated with about that. Because if
15 that were to happen amongst the entire office,
16 it would affect the entire criminal justice
17 system. So that's something that I think
18 everybody was well aware would not be
19 acceptable.

20 But what I -- since -- at the filing of the
21 complaint, I had said to the office, and there
22 were -- at a staff meeting, and there were many
23 deputies who had routinely complained about
24 perhaps how they were treated in Judge Fuller's
25 courtroom or something that had occurred in

109

1 there or the way this case went.

2 So I had said at this one particular staff
3 meeting that I am giving the official green
4 light to affidavit Judge Fuller if they see it
5 fit, especially after the complaint was filed.

6 Now, I don't recall if I had mentioned that
7 there was a complaint filed, but I do remember
8 suggesting that they have the discretion as to
9 whether or not they would like to affidavit him
10 on a case and I will not come down on them. If
11 they decide to do it on every case or if they
12 decide not to do it, they have that discretion.
13 That was the marching orders from that
14 particular staff meeting.

15 Q And did most of your attorneys then affidavit
16 him?

17 A All of them did. Surprisingly, all of them did,
18 because there were a few attorneys I did not
19 think would or maybe wouldn't. But every one of
20 them did except for one attorney within the
21 office.

22 Q Who was that?

23 A Roxie.

24 Q What, Roxanne Erickson?

25 A Yes, that's correct.

110

1 Q What kind of cases did she handle?

2 A She was our and is our lead juvenile in the area
3 of juvenile delinquency and abuse and neglect
4 proceedings. She's our lead attorney in that
5 department.

6 Q Okay. Ultimately did she come to the point
7 where she, even she recused him?

8 A She did, but that was different. That one, I
9 had suggested that she recuse him for her own
10 sake. It got to the point where Roxie was going
11 to Judge Fuller's courtroom and there was a lot
12 of discussion -- I can't remember specifically
13 the conversations, but there was discussion
14 about the complaint itself and our office's
15 treatment of the Judge, and whose side she would
16 be on.

17 And it was -- it was making it extremely
18 uncomfortable for that particular prosecutor to
19 go into his courtroom. I think she felt, in a
20 difficult situation, uncomfortable. She liked
21 this particular judge as a person, and so she
22 was caught in the middle and felt very
23 uncomfortable.

24 I think it got to the point where she didn't
25 look forward to coming to work every day, and at

111

1 that point -- and there was incidents she came
2 into my office to tell me what was happening.

3 At that point, I suggested for her sake, I'm
4 not going to let her go into that courtroom
5 anymore. We are going to remove him from the
6 cases you hear, and that way there won't be that
7 awkwardness or uncomfortableness.

8 Q In Mr. Nelson's report he refers to a comment
9 that you advised him Judge Fuller made about
10 Justice Sabers. Do you remember the context of
11 that?

12 A I do, because it struck me as interesting on the
13 particular case that -- well, the incident that
14 it took place. We were in the hallway between
15 Judge Fuller's courtroom and Judge Delaney's and
16 the hearing was a habeas hearing on a pretty
17 high -- not high profile, but very serious rape
18 case.

19 And it was a habeas hearing that
20 Judge Delaney was hearing, and I had walked out
21 of the courtroom and I was a little bit
22 frustrated with the way the hearing itself went.

23 And Judge Fuller was coming out of the
24 courtroom at the same time and we had contact in
25 the hallway. And he had brought it up, and I

112

1 was a little bit surprised that he knew so much
2 about this case, because it wasn't his case.
3 Not that there was anything wrong with it, but
4 it did shock me a little bit that he was that
5 familiar with it.

6 And, you know, made statements about how,
7 Well, Judge Delaney ought to do this with it and
8 ought to do that. And I started to contest that
9 with him, and he said something to the effect
10 of, one of his favorite statements was, Why
11 must -- that Justice Sabers had made. Why must
12 the wind always be at the -- in the face of --
13 at the back of the State and in the face of the
14 defendant, which was a philosophical belief
15 that -- I don't know, just the comment, it stuck
16 with me.

17 **Q Have you -- you've appeared in front of**
18 **Judge Fuller?**

19 **A** Yes, I have.

20 **Q How has he treated you?**

21 **A** Fine. Good, as a matter of fact. And it's
22 interesting, because the way that I tend to deal
23 with issues, if issues come up, I like to go
24 firsthand. If there's an issue with a
25 magistrate court in the way it's running, I have

113

1 myself assigned to magistrate court so that I
2 can firsthand see what's happening with that
3 particular -- and if there are corrections, then
4 I can go to the administrator or presiding judge
5 and discuss what those issues are.

6 So I would regularly have myself assigned to
7 Judge Fuller's courtroom, especially after
8 reports were given to me that there was an
9 inappropriate comment here or there or something
10 happening in a particular case.

11 But I think it was different with me because
12 I'm the elected state's attorney. So I think
13 there was a different -- I think it was a little
14 bit different. And so I really never had --
15 there was -- there was one particular case where
16 there was some behavior that I had never seen
17 before in a courtroom or by a judge, but other
18 than that, I don't remember any mistreatment.

19 **Q What behavior was that?**

20 **A** There was a case that I prosecuted several years
21 ago where the defendant was a juvenile who got
22 transferred to adult court who shot at police
23 officers, several of them. And he was shot as
24 well, and survived.

25 And we were at the sentencing hearing, and

114

1 there was -- there was some emotional testimony,
2 I guess, on both sides. There was officers'
3 wives who testified that they were concerned
4 that they'd never see the officer again or that
5 thought never crossed their mind that when they
6 leave the door for work, they might never come
7 home.

8 And of course, there was from the victim's
9 side, the victim's family, there was emotional
10 on this victim kind of what it was that caused
11 him to shoot at the police officers' at this
12 house.

13 **Q The defendant was the victim?**

14 **A** Or the defendant. I'm sorry, the defendant.
15 The victims' wives were the police officers who
16 testified, and then the defendant and the
17 defendant's family.

18 And the reason why I misspoke there and said
19 victim is because I got the impression that the
20 Judge had kind of turned the roles to an extent,
21 and the defendant, who was maybe now in a
22 different place, became a victim.

23 And through the mitigating testimony that
24 the victim -- that the defendant's family was
25 giving, the Judge broke out and started to cry,

115

1 and cried uncontrollably. I just had never seen
2 that before.

3 I did not know whether we were going to be
4 able to complete the hearing because the Judge
5 was in tears, and really, I think we had to take
6 a little break before we could complete the
7 hearing. Right there in the courtroom, we
8 didn't exit the courtroom. But it was an
9 emotional outbreak that I just had never seen
10 before, and it stuck with me as well.

11 **Q Mr. Brenner, in light of the fact that you filed**
12 **the initial complaint and these hearings are**
13 **taking place, you're obviously testifying, do**
14 **you have any concern if Judge Fuller is put back**
15 **on the bench, appearing in front of him?**

16 **A** Yeah. I've thought a lot about that because
17 I've -- I did have a meeting with Jack Hieb and
18 we did discuss that and I said I need to think
19 about that. I need to think about that question
20 as to whether or not if the powers that be saw
21 fit to have Judge Fuller back on the bench, I
22 could personally appear and what the marching
23 orders would be from the office. I wouldn't be
24 comfortable.

25 Of course, this entire process, you know,

116

1 while Judge Fuller was still at the courthouse,
2 I was uncomfortable going to court, you know, in
3 the sense that maybe we would run into each
4 other in the elevator, and that's a natural
5 human reaction.

6 But I would be uncomfortable for two
7 reasons. Number one, the fact that there might
8 be retaliation. There is a disparity of power.
9 We're both elected officials, but he is a judge.
10 And number two, if there wasn't -- if he was
11 going to change his behavior, I would always
12 question whether or not either I or the State,
13 or I should say the State or the other side was
14 getting a fair shake, why the decisions were
15 being made. Were they based strictly on the
16 hearing and the evidence and the law or was it
17 something else.

18 That would always question -- so there's
19 other judges in the circuit, I would use the law
20 and affidavit this particular judge. And the
21 marching orders for the office would be the same
22 as they were, that you could -- you could decide
23 what you would like to do. I wouldn't mandate
24 that he be removed. On the other hand, I would
25 be removing him. So I don't know if they would

117

1 follow suit.

2 MR. SCHAFFER: Okay. That's all.

3 CROSS-EXAMINATION BY MR. HIEB:

4 Q Just briefly, Glenn. I think you've summarized
5 our conversation pretty well. It's my
6 understanding that you and Marty have discussed
7 it and you've both agreed there won't be a
8 policy in either of your offices where there
9 would be a blanket affidavit of Judge Fuller if
10 he's put back on the bench; is that correct?

11 A That is correct. I recently spoke to Marty and
12 he -- you know, he's -- the discussion came that
13 he's more of an administrator and doesn't go
14 personally into court, you know, as much as his
15 deputies do. But he would be consistent with my
16 policies, you know.

17 Q Yeah. He -- I'm trying to, if I can, and with
18 some leeway, I'm trying to avoid having to call
19 him. And I actually talked to him to find out
20 and he said the two of you spoke and that you
21 had an agreement that there wouldn't be a
22 blanket affidavit. You'd let your prosecutors
23 have the autonomy to decide what they wanted to
24 do in each particular case; correct?

25 A Yeah.

118

1 Q Okay.

2 A I think it's important, by way of background,
3 the attorney general helps us on this particular
4 side of the state where there's -- they assign a
5 special deputy or assistant attorney general to
6 handle the drugs cases. So they are really our
7 drug cases, but we are getting help of which we
8 really appreciate because of the numbers we see.

9 So it would be bad or wrong if there was a
10 different set of policies amongst our office and
11 the attorney general's, and that was the nature
12 of the discussion.

13 Q Thanks for the background on that, Glenn. I
14 should have pointed that out. Marty has a
15 couple of people --

16 A Stationed.

17 Q -- in Rapid City that are working in this
18 courthouse --

19 A Uh-huh.

20 Q -- constantly; correct?

21 A Yeah, that is correct.

22 MR. HIEB: All right. I've got nothing
23 further.

24 REDIRECT EXAMINATION BY MR. SCHAFFER:

25 Q Just so the Commission is clear, you didn't have

119

1 a blanket policy after you filed the complaint,
2 either, did you?

3 A Never did have a blanket policy. I was giving
4 everybody the discretion to do what they saw
5 fit.

6 Q You on your own decided, Since I filed this
7 complaint against Judge Fuller, I don't think I
8 can appear in front of him?

9 A That's correct.

10 Q And you left all of your deputies with that
11 discretion to make their own call?

12 A Yes.

13 Q And that would be the same going forward?

14 A That's correct.

15 MR. SCHAFFER: Okay. That's all.

16 MR. HIEB: Nothing.

17 MR. PALMER: Judge Wilbur.

18 EXAMINATION BY JUDGE WILBUR:

19 Q The complaint that you filed initially with JQC,
20 I was looking through that last night, and as I
21 recall, and what we focused on is the hearing
22 with the Officer Twedt.

23 A Uh-huh.

24 Q Was there a second part of that complaint that
25 is part of -- that's attached to our pleadings

120

1 that involves Investigator Kent Przyms and a
 2 ruling that Judge Fuller made that -- are you
 3 familiar with that --
 4 A I am.
 5 Q -- as part of your complaint?
 6 A Yes, I am familiar with it. It has to do more
 7 with -- and this was kind of a regular
 8 occurrence, but it has to do more with the fact
 9 that in that particular case, it involved, I
 10 believe, a suppression hearing that was not
 11 brought on by the defense attorney, that shocked
 12 the defense attorney as much as it shocked the
 13 prosecutor in the courtroom.
 14 Q What do you mean, it wasn't brought on by --
 15 A It wasn't instigated by anybody. It was, the
 16 Judge just saw fit to say that, I feel there's a
 17 constitutional violation in this statement and
 18 I'm suppressing the evidence.
 19 Now, I understand that a judge has the
 20 absolute right to do that, but this is something
 21 that, if you research, would find Judge Fuller
 22 had a habit of more than any other judge that
 23 I've ever come into contact with.
 24 So it seemed as though that there was maybe
 25 a philosophical belief about government, and

121

1 that he was going to fix the wrong in the
 2 courtroom with cases like that.
 3 Q As I read through that, it looks like then the
 4 officer went in and talked with Judge Fuller
 5 after the hearing was concluded outside the
 6 presence of anyone else?
 7 A I believe so. I don't recall. I'm sorry.
 8 Q All right. I just didn't know whether --
 9 nobody has ever addressed that part of the
 10 complaint. So I was just curious about whether
 11 that's a fact that we're to rely on or not, so.
 12 Okay.
 13 MR. PALMER: Anything else from anybody?
 14 Mr. Schaffer? Mr. Hieb?
 15 MR. HIEB: No. No.
 16 MR. SCHAFFER: No.
 17 MR. PALMER: Thank you, Glenn.
 18 MR. SCHAFFER: May he be excused from his
 19 subpoena?
 20 MR. PALMER: You're released from your
 21 subpoena. Thank you.
 22 (Witness left the room.)
 23 MR. SCHAFFER: Call Alicia Ramsdell.
 24 (Mr. Hieb not present.)
 25 ///

122

1 ALICIA RAMSDELL,
 2 called as a witness herein, having been first duly
 3 sworn, was examined and testified as follows:
 4 EXAMINATION BY MR. SCHAFFER:
 5 Q Would you please state your name for the record
 6 and spell your name.
 7 A Alicia Ramsdell. A-L-I-C-A, R-A-M-S-D-E-I-L.
 8 Q Tell the Commission what you do.
 9 A I'm a law student. I'm a third-year law
 10 student.
 11 Q At the University of South Dakota?
 12 A Yes.
 13 Q And tell me a little bit about your background.
 14 Where were you born and raised, Alicia?
 15 A I was born in Deadwood, raised in Black Hawk,
 16 graduated from high school in Sturgis. Was in
 17 the National Guard for three years. I'm
 18 currently a reserve police officer for Sturgis
 19 and have been for almost six years.
 20 Q And are you married?
 21 A Yes.
 22 Q Children?
 23 A Yes, I have a three-year-old.
 24 Q Okay. Is that a boy or girl?
 25 A Boy.

123

1 Q Okay. And besides going to law school, do you
 2 work?
 3 A I do. I work at Dakota Dunes Country Club, and
 4 I also volunteer at the Minnehaha Public
 5 Defender's Office.
 6 Q How many hours a week do you work at the
 7 country club?
 8 A Between 12 to 18.
 9 Q And the volunteer work is with what
 10 organization?
 11 A The Minnehaha Public Defender's Office.
 12 Q What do you do there?
 13 A I do a lot of research, writing. I've
 14 written -- I'm going to start my fourth Supreme
 15 Court brief here this week, and then just
 16 research and just help where I can.
 17 Q Okay. I've sent you a subpoena to appear here
 18 today; is that correct?
 19 A That's correct.
 20 Q And my understanding is you had a final today.
 21 A Yes.
 22 Q You got that rescheduled, didn't you?
 23 A Yes.
 24 Q Okay. So you came all the way from Vermillion
 25 to be here?

124

1 A Yes.

2 Q In the summer of 2010, did you intern with the

3 state's attorney office in Pennington County?

4 A Yes, I did.

5 Q And tell me, would that have been basically from

6 June until August?

7 A It was towards the end of May until the end of

8 July because I work the Rally for Sturgis during

9 August.

10 Q So then you worked as a reserve police officer?

11 A Yes.

12 (Mr. Hieb returned.)

13 (Exhibit I was marked for identification.)

14 Q (BY MR. SCHAFER:) Lara, [sic] I'm going to

15 hand you what the court reporter has marked as

16 Exhibit I. Is that a memorandum that you

17 prepared following an experience in

18 Judge Fuller's courtroom?

19 A Yes. Yes.

20 MR. SCHAFER: We'd offer Exhibit I.

21 MR. NICHOLSON: No objections.

22 MR. PALMER: Exhibit I will be received.

23 Q (BY MR. SCHAFER:) Ms. Roetzel, [sic] I think

24 I'm going to let people have a chance to look at

25 this, but as I understand it, you were in -- or

125

1 I'm sorry. Ms. Ramsdell, you were in court with

2 a lawyer from Pennington County. Who was that?

3 A Josh Zellmer.

4 Q And that's the reference to JZ in the

5 memorandum?

6 A Yes.

7 Q And this was during a break in the proceedings?

8 A Yes. The jury had gone out for lunch and we had

9 to go over some motions before they came back

10 in.

11 Q Tell the Commission exactly what happened.

12 A Well, the defense attorney and Josh went to the

13 bathroom together, and we were joking around

14 that typically only women go to the bathroom

15 together. And I don't know how that segued into

16 talking about women in the legal profession, but

17 he said -- and that's not verbatim. He said

18 something to the effect that the legal

19 profession was better before women and that he

20 wishes it could go back to 1916 or 1918.

21 Q And did he say that in a joking fashion or what

22 was the tone of the comment?

23 A I thought he was joking because he said it with

24 a smile on his face and we had been joking.

25 Q Nevertheless, did that offend you?

126

1 A It did, because I didn't see how that was funny,

2 I guess.

3 Q Tell the Commission about your own experience

4 with discrimination in the professions that

5 you've been in prior to going to law school.

6 A Well, when I was in the military and on active

7 duty, I heard a lot of comments that women

8 didn't belong in the military and in law

9 enforcement. I still hear comments that we

10 shouldn't be there, that we're not strong

11 enough, that we should leave it to the men to

12 do. So it just -- I'm more sensitive to it than

13 probably most.

14 Q Well, did this comment catch you off guard as

15 far as did you think you were going to encounter

16 those same types of prejudices in the legal

17 profession?

18 A Not at all, because now it's almost 50/50 in law

19 school with women and men. So I didn't expect

20 it at all.

21 MR. SCHAFER: That's all.

22 MR. NICHOLSON: No questions.

23 MR. PALMER: Anybody on the Commission have

24 any questions?

25 (No questions were presented.)

127

1 MR. PALMER: You came a long ways. Thank

2 you very much.

3 MR. SCHAFER: May she be released?

4 MR. PALMER: You may be released. Who was

5 the professor who let you change your final?

6 THE WITNESS: Pasqualucci, for commercial

7 law.

8 MR. PALMER: All right. Please tell --

9 MR. McBRIDE: Thank you very much.

10 MR. SCHAFER: Yes, thank you very much.

11 (Witness left the room.)

12 MR. PALMER: Let's talk for a second here.

13 We are at 11:00 -- let's go off the record.

14 (Discussion was held off the record.)

15 (Exhibit J was marked for identification.)

16 MR. PALMER: Let's go back on the record.

17 At this time I think by agreement of the

18 parties, we'll go out of order. And Mr. Hieb,

19 call your witness.

20 MR. HIEB: Thank you. I call Dr. Arnio.

21 Mr. Chairman, I have marked Exhibit J. I

22 have provided a copy to Counsel and I'll

23 represent to the Commission that Exhibit J is

24 the report of Dr. Arnio, along with his

25 Curriculum Vitae. They are both part of that

128

1 exhibit. Do you have copies of those or --
2 MR. PALMER: We do have copies of those.
3 Just so we're clear, the Dr. Arnio letter to
4 Mike Schaffer is dated December 8, 2010?

5 MR. HIEB: Yes.

6 MR. PALMER: Okay. Perfect.

7 ROBERT ARNIO, Ph.D.

8 called as a witness herein, having been first duly
9 sworn, was examined and testified as follows:

10 DIRECT EXAMINATION BY MR. HIEB:

11 Q Could you state your name for the record,
12 please.

13 A Robert Harold Arnio.

14 Q I'm going to refer to you as Dr. Arnio.

15 Dr. Arnio, what is your profession?

16 A I'm a licensed psychologist.

17 Q Where do you practice?

18 A At Psychological Associates here in Rapid City,
19 South Dakota.

20 Q I know you're a licensed psychologist, but what
21 is your -- what is your field of practice? Are
22 you in forensics, clinical work, what do you do?

23 A I have a general practice. I see adults,
24 children, and families. I do evaluations and
25 psychotherapy. I do some forensic work, but I'm

129

1 not a board-certified forensic psychologist.

2 Q And how long have you been a licensed
3 psychologist?

4 A I think 32 years.

5 Q And spent that entire time here in Rapid City?

6 A Yes. Well, I have -- I was in Spearfish for, I
7 think, two years and then in Spearfish and
8 Sturgis, and I think we started the Rapid City
9 office about 25, 26 years ago. Somewhere in
10 that range.

11 Q When did you first meet Pete Fuller?

12 A In the early 1980s.

13 Q And what was the reason for that?

14 A I ended up seeing one of his children, an
15 adolescent who was having some adjustment
16 problems. And in the process of seeing his
17 child, I ended up seeing Pete and the family.

18 Q Why don't you expound on that. Explain that to
19 the Commission.

20 A I'm going on the basis of my memory of 25 or so
21 years ago. The student was having -- it was,
22 Pete's son was having some trouble in school and
23 some oppositional and noncompliant type of
24 behavior.

25 So I had seen him and done some assessment,

130

1 and there were problems, conflicts within the
2 family, and difficulties within the family
3 hierarchy. So I ended up seeing the entire
4 family in family therapy to try to sort out what
5 was going on.

6 At that time, it became apparent as an
7 attorney, Pete was gone a lot, but he also was
8 drinking quite a bit, and that was another
9 factor that was involved with the family. And
10 during the process of the family therapy, I
11 noted to Mr. Fuller that, you know, he was not
12 functioning completely as a father to his
13 adolescents due to his work absence and use of
14 alcohol.

15 At that point or somewhere around that time,
16 he stopped drinking. Not because he was being
17 seen for an alcohol problem or had been referred
18 for that, but I believe because of the comments
19 that I made to him, how it is -- it's impacting
20 the family.

21 The family changed, I think, fairly
22 dramatically in a relatively short period of
23 time, and then I haven't seen him until he
24 called concerning this matter.

25 Q And with respect to this matter, what were you

131

1 asked to do or what did you see as your role
2 with respect to your dealings with Pete in this
3 matter?

4 A Well, I had seen in the paper that there had
5 been a disciplinary action with Mr. Fuller,
6 Judge Fuller. And so he called and said, I'm in
7 some trouble and I need a psychological
8 evaluation.

9 So at that point, I told him I would set an
10 appointment and I would talk to him about
11 whether it made sense for me to evaluate him or
12 not. So I saw him on a Saturday morning in my
13 office, and he brought the complaint papers and
14 explained what was going on.

15 I -- I explained to him I had some hesitancy
16 in evaluating him in that he was a judge in
17 Rapid City and I'm a psychologist in Rapid City,
18 and would the Commission look at that as a
19 biased evaluation because I'm from here, that
20 would -- would that be something, should he have
21 maybe an evaluation by somebody out of the area.

22 He said he felt that he knew me and I knew
23 his history and that he was not being required
24 to have an evaluation, he was trying to do that,
25 and felt that in his mind I would be a person

132

1 who would be able to do a fair evaluation. And
2 if at any point should he return to be a judge,
3 that anything would come up, then he would
4 simply recuse himself. I felt that was
5 reasonable.

6 And I don't do a lot of forensic work on --
7 I don't -- I go to court maybe once every two
8 years. So it's not a heavy part. But I did
9 caution him to talk to -- he said he had two
10 attorneys, and I cautioned him to talk to them
11 and make sure that they were, you know, okay
12 with my doing this with the history and being in
13 this area.

14 He called back and said he thought in
15 consulting with the attorneys it would not
16 present a problem.

17 Q Okay.

18 A So at that point, I said, All right, we'll
19 schedule some times and I'll do an assessment.

20 Q And just to get this out of the way, I have put
21 in front of you a copy of an exhibit that's been
22 marked as Exhibit J. Is that a copy of the
23 report that you prepared in connection with this
24 matter?

25 A Yes, it is.

133

1 Q And the last two pages of that exhibit, are
2 those an up-to-date Curriculum Vitae?

3 A Yes, it is.

4 MR. HIEB: I would offer Exhibit J at this
5 time.

6 MR. SCHAFFER: No objection.

7 MR. PALMER: J will be received.

8 Q (BY MR. HIEB:) Now, and I can assure you that
9 the Commission members either have or will read
10 your report, so I'll try not to just have you
11 regurgitate that here. But I do want you to
12 touch on, for the members of this body, why you
13 did what you did, the reasons for it, and then
14 what conclusions you may have been able to
15 reach.

16 Let's start with the history portion of this
17 report. There's a fairly detailed history that
18 you take here. Why is that something that you
19 do or did in this case?

20 A Well, probably the, one of the most important
21 pieces of information in assessing anyone,
22 maybe, if not the most important, is the
23 history. You can tell a lot of things that have
24 gone on in terms of the person's history and
25 what the historical context of their current

134

1 situation is.

2 It's like a movie, the frames that came
3 before. To try to understand what's going on
4 now, you want to know historical kinds of
5 things. And I obviously couldn't remember from
6 25 years ago Mr. Fuller's history, and so
7 getting a more complete history at this time
8 seemed to make sense to me.

9 Q And what in particular about the history that
10 you obtained from him was relevant to you in
11 forming whatever opinions you formed in this
12 case?

13 A Well, Mr. Fuller's history indicates that he is
14 somewhat of a stimulus-seeking person. You
15 could probably divide personalities into those
16 people who are more laid back, we sometimes use
17 the term Type A individuals -- or I'm sorry,
18 Type B, or Type A individuals, stimulus-seekers,
19 people who are involved, active, and moving.

20 One personality therapist, Ted Millon, says
21 that you can think of people as plants or
22 animals. Some animals go out and they change
23 their environment, they move and want to make
24 changes. Plants want to find a spot, put down
25 roots, and grow and flower.

135

1 And history would suggest that Mr. Fuller is
2 more of an active, stimulus-seeking, interacting
3 with his environment-type person.

4 Q He's an animal?

5 A From Ted Millon's standpoint, he would be on the
6 animal side, yes, not on the plant.

7 Q And then you get the history, and it's laid out
8 here in the report, I think, fairly extensively.
9 Following that, you did some actual
10 psychological testing of him --

11 A Yes, I did.

12 Q -- is that correct? Let's talk about those.

13 The first thing you did was a Wechsler Adult
14 Intelligence Scale test?

15 A Yes.

16 Q What is that?

17 A That is the most frequently used individual
18 intelligence test in clinical psychology.

19 Q Is that an IQ test?

20 A Yes, an IQ test.

21 Q What did that tell you? What did that test
22 reveal?

23 A Well, I found that Mr. Fuller is very, very
24 bright in terms of verbal skills, he is in a
25 very high percentile; that he has average

136

1 nonverbal types of skills, visual, spatial types
2 of things; and that he also had average but
3 lower scores in the area of what we call
4 processing speed and working memory.

5 So there's a difference in these four
6 different index values. We used to think of and
7 look at it intellect or intelligence as being
8 verbal versus nonverbal. And we would talk
9 about a verbal IQ such as language, and
10 nonverbal IQ such as nonlanguage or creativity
11 or ability to be like a mechanical engineer or
12 sheet metal worker, to see patterns in
13 nonverbal.

14 Research over the last 10 to 15 years has
15 changed that where now we no longer use those
16 terms, because we have found that processing
17 variables, how we process information, the speed
18 with which we process information, and a
19 variable called working memory, how much we keep
20 in our mind at a given time, are also important
21 in the criterion variables that an intelligence
22 test is measured against.

23 If you have an intelligence test and people
24 who graduate with As from Harvard do the same as
25 someone who, you know, can't get through a

137

1 smaller college, then the criterion, what are
2 you measuring.

3 So a test is a sampling of behavior, and
4 you're measuring it and then you're -- you have
5 some criteria, external criteria out here that
6 you look at. Does this test match with the
7 external criteria?

8 When we look at overall achievement in terms
9 of academic achievement or vocational
10 achievement, processing speed and working memory
11 account for a large portion of that. In other
12 words, you can have people who have very high
13 verbal -- what we used to call verbal IQs, here
14 we call verbal comprehension, very high
15 perceptual reasoning, and if they also don't
16 have high working memory and high processing
17 speed, they may not do as well as you would
18 expect them to do, given their intelligence.

19 So we have very intelligent people who maybe
20 it's harder for them or they don't do as well as
21 we predict on the basis of the IQ measures.

22 So currently, with the current psychological
23 testing, you look at four indexes in trying to
24 understand the makeup of how a person deals with
25 the world from a cognitive or intellectual

138

1 standpoint.

2 **Q How did the test results that you got on**
3 **Judge Fuller, what did that -- what picture did**
4 **that paint for you?**

5 **A** Well, everything was average or above, but he
6 was very high in the area of verbal skills and
7 less so in the area of working memory and
8 processing speeds. So those two variables again
9 were average, but significantly lower.

10 In fact, I think -- as I recall, if you look
11 at the standardization population, this kind of
12 a difference would only occur in one instance, I
13 think it was the working memory, 8 out of
14 100 times, or I think it was 11 out of
15 100 times. So it's statistically unusual for
16 that to occur, and so that can have a difference
17 in how he deals with information.

18 My own experience has been individuals who
19 have lower processing speed and working memory,
20 when in situations where a lot of information is
21 coming, may not process all of the information
22 as you might think they would with the high,
23 say, verbal IQ in terms of doing that.

24 Now, if you had a much lower performance IQ
25 than Mr. Fuller did -- his is within the average

139

1 range. But when you have a very high verbal IQ
2 and the performance score goes down lower, it's
3 a condition that's sometimes referred to as a
4 nonverbal, i.e., the nonverbal score of the test
5 learning disorder.

6 Now, when I see that with young people,
7 adolescents and so forth and children, what
8 happens is much of the information we take into
9 account is nonverbal. You know, I'm sitting
10 over here and talking to all of you, but if I
11 were to get up and start walking in front of
12 this table, I would dramatically change the
13 social context of this meeting. Yet that's a
14 nonverbal skill.

15 And what happens when the nonverbal score
16 gets a lot lower is these individuals don't pick
17 up on that. They don't understand that. And
18 they -- and among kids, what happens is they
19 have a really hard time interacting with people
20 because they're not picking up on a lot of
21 nonverbal kind of feedback that's going on.

22 **Q I'm going to use the word "cues." Is that a**
23 **word that gets used in your profession? The**
24 **cues that you get from --**

25 **A** Right. These -- and in younger people, with a

140

1 greater difference. These are the kids that
2 don't get what the teacher calls, The Look. I
3 give them The Look and they don't get it. They
4 look at me like, What? And they don't
5 understand what The Look means. The Look means
6 you're doing -- stop doing what you are doing.
7 And they don't understand that.

8 Now, again, Mr. Fuller's profile is up
9 within the average range, and to say that these
10 difficulties would clearly exist, you know,
11 can't be said. But it is a pattern of this
12 discrepancy, along with the processing speed and
13 working memory being average, that there at
14 least be -- it would at least be consistent in
15 terms of what I read in the complaints against
16 Mr. Fuller, that some of those kinds of things
17 are happening, not out of a malicious intent,
18 but perhaps missing cues, perhaps not
19 understanding the significance of that,
20 particularly within a, such a sensitive position
21 as a circuit court judge.

22 Q **The next test you did was the MMPI. Describe**
23 **that, please.**

24 A I gave Mr. Fuller actually the MMPI-2-RF. And
25 the MMPI is a test that's been around for a very

141

1 long time. The original MMPI was developed in
2 the 1940s. The MMPI-2-RF is the most current
3 version of that test, and in my opinion, by far
4 the best of the personality profile. Many of
5 the other difficulties were removed. So he did
6 complete the MMPI-2-RF.

7 Q **Why did you do the MMPI? What were you looking**
8 **for?**

9 A The MMPI is used to try to assess the presence
10 of psychological characteristics that may be
11 related to a psychiatric disorder, either a
12 major mental disorder like an Axis I or
13 personality disorder like Axis II. It also
14 probably has the most refined validity scales in
15 terms of, is the person filling it out honestly
16 and straightforward or are they being defensive
17 or not. So a great deal of research has gone
18 into those factors, also.

19 So in terms of doing an evaluation, looking
20 at the MMPI-RF-2 that has good research, it's
21 helpful to look at the validity scales as well
22 as the clinical scales, and the supplemental
23 scales that the test will generate based on the
24 person's responses.

25 Q **And did you have any indication from the results**

142

1 of those tests that Judge Fuller had any
2 personality or psychiatric disorders on Axis I
3 or Axis II?

4 A No. On the basis that the scores on the test
5 have a -- everybody is going to be somewhere,
6 and the mean is 50. And you look at it as being
7 a, quote, significant scale if it's a T score of
8 65 or above. And none of his scores were at a
9 65 or above in terms of that level.

10 They were all within what we would consider
11 to be normal range. Nor were there problems in
12 the validity scale. So on the basis of that
13 test, it's what we would call a normal profile.

14 Q **So you take that out of the equation as one of**
15 **the possibilities for behavior?**

16 A Yes. As a serious Axis I or Axis II disorder,
17 the MMPI results would not support that type of
18 interpretation.

19 Q **Then finally, there's the Rorschach -- I don't**
20 **know if I said that correctly. The Rorschach**
21 **test.**

22 A Rorschach.

23 Q **What does that tell you?**

24 A Rorschach is a test that's also been around for
25 a very long time. It consists of ten plates,

143

1 ink blots that people interpret to you. A man
2 by the name of John Exner about 30 years ago
3 took this test and helped develop a better
4 scoring system.

5 The biggest problem with the Rorschach is
6 that under other scoring systems, it was
7 unreliable. And if a test is unreliable, it's
8 not valid. If two people don't give the same
9 test and get the same results, then it's not a
10 helpful test.

11 Dr. Exner looked at this test and found none
12 of the scoring systems -- he was trying to find
13 the best scoring system, and he found that none
14 of them are adequate in all ways. So
15 combinations were taken of each of the scoring
16 systems' good points, and put together, called
17 the comprehensive system, and there's about now
18 20 to 30 years of research on the comprehensive
19 system. So it became a valid instrument.

20 The Rorschach picks up on many kinds of
21 things, degree of stress a person is under. You
22 also look for any kind of major mental or
23 cognitive slippage. Some of the special scores
24 are if people in the ink blots, the precepts,
25 put things together that shouldn't go together.

144

1 And that, like, you know, a dog's head on a
2 chicken or something.

3 If you're starting to do something like that
4 or other kinds of things, it goes under special
5 scores and you try to see, Okay, how consistent
6 is this and can you see what they see? Is it a
7 popular response?

8 So a lot of these different ways of scoring
9 this -- and each of the responses is put into a
10 computer program so all the statistics and so
11 forth are done through the Exner system, so you
12 don't make a mistake.

13 But it gives you some more kind of dynamic
14 information about how the person is perhaps
15 seeing the world or some of their important
16 personality traits or characteristics.

17 **Q So if we take this testing that you did and**
18 **bundle it together, what conclusions did you**
19 **reach?**

20 **A** I did not see any major mental disorder, Axis I
21 or Axis II, with Mr. Fuller. On some of the
22 subscales of the MMPI-RF-2 he did score higher
23 in the area of anger proneness, and he -- that
24 is something that he talked about during the
25 interview.

145

1 His Rorschach was indicative of being under
2 very significant situational stress, that he is
3 currently feeling a great deal of stress and
4 emotion and could make him somewhat emotionally
5 vulnerable at this point. His defenses have
6 kind of been brought down.

7 I did not see indications of narcissism, I
8 did not see indications of other personality
9 characteristics on either of the tests that
10 would strongly suggest personality
11 characteristics that are resistant to change.

12 If you're looking at therapy, and one of the
13 things testing could be helpful is how likely is
14 this to change, particularly Axis II types of
15 problems. And that's why we have a multilevel
16 axis in our diagnosis.

17 When you have an Axis II disorder, you do --
18 in the long run, you do things that are
19 destructive to yourself. But you continue to do
20 them regardless of the feedback that you get.

21 There's probably exemplifying the story of
22 the spider and the frog. There's a black widow
23 spider that wants a ride across a pond, and the
24 frog said, No, you will bite me and I will die.
25 And the widow says, Well, why would I do that?

146

1 I'd die, too, because I can't swim. And that
2 makes sense to the frog.

3 So halfway across the pond, the spider bites
4 the frog. With his dying breath, the frog says,
5 Why did you do that? Now we're going to both
6 die. And the spider said, I don't know. I
7 guess it's just in my nature.

8 And that's what you see when you see Axis II
9 kinds of problems. Despite feedback, the
10 problem persists. It's engrained within the
11 personality. I didn't see those characteristics
12 with Mr. Fuller in the testing that I did or the
13 interviewing.

14 In my life experience with him 25 years ago,
15 when he found that alcohol was affecting his
16 family dynamics, he stopped, and that's pretty
17 hard for people to do. I mean, he could have
18 cut down on his drinking or done something else,
19 but he quit.

20 And so the testing I had was consistent with
21 my background and understanding of Mr. Fuller
22 that, given appropriate feedback, he is capable
23 of changing and you know, not have other
24 personality characteristics that would be an
25 impediment to.

147

1 **Q And finally, you've talked to Bob Holmes, who is**
2 **the anger management counselor that we're going**
3 **to hear from in a minute. Are you aware of the**
4 **type of treatment that Bob has been providing**
5 **Judge Fuller?**

6 **A** You had provided me some of Bob's notes, and I
7 wasn't able to talk to him until five minutes
8 before I came in here, but -- and based on the
9 notes and things he had written there, I think
10 the treatment is quite appropriate.

11 And in fact, Mr. Fuller had seen Mr. Holmes
12 for one or two sessions prior to my actually
13 having time in my schedule to test him, and he
14 did discuss that and he was -- seemed surprised
15 and said he was surprised that he had never
16 thought of irritation as being anywhere on an
17 anger continuum. He thought it separate from
18 being angry.

19 And Mr. Holmes pointed out that, No, if
20 you're feeling irritation, irritation is on a
21 continuum of anger. And he was then keeping
22 track of when he felt irritated or so forth on a
23 ten-point scale as a treatment procedure that
24 Mr. Holmes had recommended.

25 And he seemed to be somewhat surprised,

148

1 maybe a little intrigued that he hadn't thought
2 about things in this way. So I think it's quite
3 appropriate.

4 Q I'm just going to finish up with this. This is
5 my own lay perspective. In other words, if you
6 had a black widow that you were dealing with,
7 treatment of that nature isn't likely to do any
8 good because it's just in their nature. The
9 testing that you've done indicated that that's
10 really not the category he fits into?

11 A That would be correct.

12 MR. HIEB: Okay. I've got no further
13 questions.

14 MR. SCHAFFER: Mr. Schaffer.

15 CROSS-EXAMINATION BY MR. SCHAFFER:

16 Q Dr. Arnio, when did Judge Fuller contact you?

17 A About a week before the first time I saw him. I
18 don't have that date with me. I'm sorry.

19 Q Do you have your file with you?

20 A No, I didn't bring my file. I brought my
21 report.

22 Q Do you have any way to fix a date?

23 A It would have been after the news in the paper
24 because I was aware of what had happened. I
25 think about two weeks before I actually started

149

1 testing him.

2 Q When did you test him?

3 A Well, I'm remiss. I didn't put that in here.
4 It was about three weeks ago. Within the last
5 month.

6 Q Within the month of December or within the month
7 of November?

8 A I believe it was in the latter part of November.

9 Q And who asked you to test him?

10 A Mr. Fuller.

11 Q Did you talk to his attorneys?

12 A After -- no. I talked to Mr. Fuller. As I
13 said, on the first meeting, I suggested
14 Mr. Fuller talk to his attorneys, and then I did
15 talk to Mr. Hieb Saturday morning, this last
16 Saturday morning, for about 20 minutes.

17 Q And did you understand you were going to appear
18 here and testify as an expert? Is that your
19 understanding?

20 A Yes.

21 Q That's what Mr. Hieb told you?

22 A That's what Mr. Fuller told me, in all
23 probability I would be asked to talk in front of
24 the Commission.

25 MR. SCHAFFER: Your Honor, I would just

150

1 point out that Mr. Nicholson informed me that
2 neither Mr. Arnio nor Mr. Holmes would appear as
3 experts. They are here as fact witnesses.

4 MR. PALMER: Any record you want to make to
5 that Mr. --

6 MR. NICHOLSON: We had that conversation,
7 Your Honor, the -- because of the quickness of
8 these hearings and the production of the report,
9 you know, it came together when Mr. Arnio put
10 his examination together and his tests and so
11 on, and it came out in the form of a report,
12 which created an opinion. And I think in
13 fairness to Judge Fuller, the Commission is
14 entitled to hear that.

15 MR. PALMER: I don't disagree, and I
16 appreciate Mr. Schaffer making the record.
17 There's some awkwardness to it, but let's go
18 ahead.

19 Q (BY MR. SCHAFFER:) Dr. Arnio, the -- you say
20 your experience with Judge Fuller is such that
21 he's not like a black widow that it's just in
22 his nature. And you base that on his handling
23 of alcohol and quitting drinking?

24 A And the family therapy context, that's one piece
25 of information. The other information is the

151

1 absence of clear signs of a personality disorder
2 in my assessment of Mr. Fuller at this time.

3 Q Have you reviewed Dr. Holmes' notes?

4 A Yes, last Saturday I reviewed some of them.

5 Q Okay. I'm just reading from Dr. Holmes' note of
6 October 20, 2010, where he is referring to
7 Judge Fuller. He says, quote: He has not been
8 drinking at all since suspension, as this helps
9 keep him at the top of his game, unquote.

10 Were you aware of that?

11 A That he had been drinking prior to suspension?

12 Q Yes.

13 A No, I was not aware of that.

14 Q He told you he quit in 1986 and never had a
15 drink since?

16 A That was my impression, yes. I don't know if he
17 said those exact words, but -- well, I think he
18 did. I think it was '83, actually.

19 Q I'm reading your report, it says December of
20 '86, he began --

21 A '86.

22 Q -- quitting?

23 A Okay.

24 Q Okay. And he hasn't had a drink since?

25 A That was my impression.

152

1 Q That's what he told you?
 2 A That's -- I believe so.
 3 Q And if that's not true, that might affect your
 4 opinion as to the validity or the value of that
 5 experience in quitting drinking?
 6 A It could.
 7 Q Let me ask you, in looking through the history,
 8 I see a history of acting-out behavior. Would
 9 you agree with that?
 10 A Yes.
 11 Q I see a history of lack of impulse control. Do
 12 you agree with that?
 13 A Particularly when drinking, yes.
 14 Q I see a history of acting arrogant, rude, and
 15 disrespectfully toward others. Do you agree
 16 with that?
 17 A Yes.
 18 Q That's what brings him here; correct?
 19 A Yes, by his own words.
 20 Q And I see a history of him being power oriented.
 21 Do you agree with that?
 22 A I don't know as that was specifically in his
 23 history.
 24 Q Well, it was in his testing, wasn't it?
 25 A Yeah. Testing shows that he -- toward power,

153

1 but I don't remember him describing any
 2 interpersonal situations where he was -- where I
 3 was left with that impression with the testing.
 4 Q He also has a history of lack of insight or
 5 introspection into his own behavior; correct?
 6 A I believe so, yes.
 7 Q And that's -- all of that is consistent with
 8 reports in this case, the complaints in this
 9 case of how he treated staff, attorneys, and
 10 people that appeared in his court?
 11 A Lack of understanding of the impact of his
 12 behavior, yes, I think that's a fair statement.
 13 Q And the lack of respect for those people?
 14 A I don't think that in my conversations with
 15 Mr. Fuller, I don't believe he perceived his
 16 behavior as being a lack of respect. My
 17 impression, it was perceived by others that way.
 18 But in my discussions with Mr. Fuller, he noted
 19 he liked -- he used humor, he was provocative.
 20 He liked to do those things. But I did not get
 21 an impression from Mr. Fuller that he lacked
 22 respect for people in general.
 23 He did admit in the incident with the police
 24 officer that he was -- he was dismayed and
 25 angered about what had happened, and that he was

154

1 upset that those things were going on, but in
 2 retrospect realized it would have been a lot
 3 better way to deal with it than to make the
 4 comments that he did.
 5 Q I just want to make sure this Commission
 6 understands your testimony. Are you telling the
 7 Commission that Judge Fuller did not perceive
 8 that how he treated these people showed a lack
 9 of respect toward them?
 10 A I don't -- I believe that from what I have heard
 11 from Mr. Fuller, that at the time he engaged in
 12 those behaviors, he did not see these as a major
 13 lack of respect for that person.
 14 Q Okay.
 15 A Retrospectively, having this being brought to
 16 him, he looks at that and sees it as it wasn't
 17 respectful, was not perceived as respectful,
 18 therefore isn't, and the -- that he was, as I
 19 think I said in my report, saw himself now,
 20 having being confronted with this, as having
 21 behaved in an arrogant or so-and-so fashion.
 22 But in my discussions with him in
 23 interviewing, I did not get the impression that
 24 he believed those things to be true at the time
 25 that they were happening. I mean, to believe to

155

1 be disrespectful and arrogant. I don't think he
 2 thought of himself as disrespectful and arrogant
 3 during the process. Now does.
 4 Q The fact that he got this complaint and the
 5 suspension and all of that is what brought it to
 6 his attention?
 7 A Yes.
 8 Q Is that what you are saying?
 9 A That's what I'm saying.
 10 Q Do you agree, Doctor, that his past behavior,
 11 his a history of acting out, lack of impulse
 12 control, showing a lack of respect for people,
 13 you agree that he has that history?
 14 A I agree his history as a young man, college
 15 student and so forth, he had problems with
 16 acting out and impulse control. But we have a
 17 diagnosis in our manual for people at that time.
 18 It's called adolescent antisocial behavior.
 19 It occurs so frequently that we don't look
 20 at it as a mental disorder because many people
 21 in their younger years begin to act out and do
 22 things in that fashion, particularly if that
 23 behavior is fueled and the impulse problems are
 24 fueled by alcohol.
 25 Q Now, you agree that past behaviors is a

156

1 predictor of future behavior, don't you?
 2 A I think in general, yes, that's true.
 3 Q So we can look at somebody's past to see what we
 4 can expect them to do in the future?
 5 A Well, that's the whole point of what I was
 6 saying here. Yes, you can, if -- particularly
 7 if their behavior is A, they are -- if they're
 8 not bright, they don't understand the problems
 9 or the behavior; and B, their behavior is
 10 generated by some personality disorder or
 11 characteristic that, despite given the
 12 information of the behavior not being adaptive,
 13 they continue to do that. That occurs with Axis
 14 II disorders and often with addictions.
 15 Q But he has not been diagnosed with any
 16 psychological disorder or personality disorder;
 17 is that true?
 18 A That's true.
 19 Q I'm looking at page 3 of your report. Can you
 20 go to that. In the middle of the page, he said:
 21 It wasn't until I received the complaint about
 22 what I said to the officer that I realized I had
 23 been out of line. I must have been naive or
 24 too egotistical to realize my conduct was
 25 arrogant, rude, and disrespectful. Then came

157

1 the second complaint and it really hit home.
 2 What was the second complaint?
 3 A I'm not sure what he was referring to.
 4 Q Was that the formal complaint?
 5 A I believe that's what he meant, that's what he
 6 said.
 7 Q Okay. So did you gather from talking to him
 8 that it never -- he never really realized the
 9 seriousness of the matter until he got the
 10 formal complaint?
 11 A I -- until these things happened, he didn't
 12 realize the seriousness of the matter, was the
 13 impression I got.
 14 Q And from the psychological testing on page 4,
 15 you've used these phrases to describe the
 16 results of the MMPI. That he's anger prone;
 17 correct?
 18 A Yes.
 19 Q That he has problems with irritability and a low
 20 frustration tolerance; correct?
 21 A Yes.
 22 Q That he has difficulty holding his temper;
 23 correct?
 24 A The testing says he could have that.
 25 Q Yeah. At times, he's power oriented?

158

1 A Uh-huh.
 2 Q "Yes"?
 3 A Yes.
 4 Q What does that mean?
 5 A Well, you have to put it within a context.
 6 Okay. The psychological testing, the power
 7 oriented, wanting to be in control and do things
 8 might fit a lot of political figures. Political
 9 figures are power oriented and they want to have
 10 power and do things. It could also be in a more
 11 negative light of being power oriented and
 12 behaving in an inappropriate manner.
 13 So the testing is saying individuals who
 14 have certain types of profiles want to be in
 15 control, and they want to have the power to be
 16 in control.
 17 One of the things control allows us is to
 18 have power; one thing power allows us is to have
 19 control. So it would be on that type of
 20 dimension, he's going to try to find a way to do
 21 that.
 22 Q Doctor, you're not suggesting to the Commission
 23 or the Supreme Court that the conduct that
 24 Judge Fuller has engaged in should be tolerated
 25 from a judge, are you?

159

1 A No, I'm not suggesting that.
 2 Q And you're not suggesting or you can't make any
 3 guarantees it won't happen again, either, can
 4 you?
 5 A I can't make a guarantee that it will or will
 6 not happen again.
 7 Q You're only looking at this from the perspective
 8 of Judge Fuller, not the judicial system as a
 9 whole, on what effect the disclosure of this
 10 might have on the public's perception of the
 11 judicial system, are you?
 12 A No, I'm not.
 13 MR. SCHAFER: Okay. That's all.
 14 MR. HIEB: I've got nothing.
 15 EXAMINATION BY MR. PALMER:
 16 Q I have a question. Dr. Arnio, what did
 17 Judge Fuller share with you? I mean, were you
 18 provided a copy of the transcript from any
 19 proceedings or did he show you the actual
 20 complaints that had been made? How was that
 21 communicated to you?
 22 A On the morning he met with me, he showed me the
 23 complaints that were made and his responses to
 24 the complaints.
 25 Q Okay.

160

1 A I told him then, I gave it back to him. The
2 first morning I met with him, I wasn't sure I
3 was going to evaluate him. I wanted him to
4 think about it and make sure that, you know, it
5 wouldn't be a problem, someone from this region
6 evaluating him, somebody that knew him. Then I
7 told him I wanted that back so I could again
8 look at it when I wrote my report.

9 At that time, he also provided me the report
10 from Mr. Nelson. So I was able to read through
11 the report from Mr. Nelson and so forth after
12 having written the report. There was nothing in
13 the original indictment or in the report from
14 Mr. Nelson that would change what I have said in
15 this report.

16 MR. PALMER: Okay. Thank you. Did that
17 prompt anything from --

18 MR. HIEB: No. No, sir.

19 MR. SCHAFFER: No questions.

20 MR. PALMER: Anybody else?

21 EXAMINATION BY MS. CHRISTENSON:

22 Q I just have one clarification. It was in your
23 report, it was the bottom of page 4, and you
24 say: This stress may seem much more aware of
25 environmental complexities than is usual. It

161

1 also suggests that he may have a tendency to
2 blur ego boundaries.

3 Would you please explain that a little bit
4 more, please.

5 A Okay. If I'm blurring ego boundaries, something
6 I will -- I'm -- an example of that in my life
7 would be, I really want something so I convince
8 myself my wife wants it, too. This is good for
9 the both of us. There's an ego boundary. It's
10 really what I want, and now I'm including her
11 within that.

12 In Mr. Fuller's case, from the things that
13 I've read, I think it's possible that some of
14 his comments, he felt people might be getting a
15 kick out of or enjoying. That he made those
16 comments and therefore other people probably --
17 rather than, What the heck did you just say?
18 Okay.

19 So the testing was consistent with this kind
20 of blurring that, okay, in absence of feedback
21 that no, my wife doesn't want that. My wife --
22 then I would go about thinking well, it's good
23 for both of us.

24 MS. CHRISTENSON: Thank you.

25 ///

162

1 EXAMINATION BY JUDGE WILBUR:

2 Q I have one question, too. This might be kind of
3 dumb. An Axis II diagnosis is the one that you
4 said is harder to change?

5 A Yes.

6 Q Can you give examples of what an Axis II
7 diagnosis would be?

8 A Well, there's really three clusters of
9 personality disorder. Cluster A are people who
10 are paranoid, schizophrenic, schizoid
11 personalities. They just think different and
12 they'll take a piece of information and really
13 imply their own interpretation of that.

14 Cluster B tends to be more borderline
15 personalities. These are very dramatic people,
16 antisocial people. You know, they just -- they
17 just can't go by rules.

18 And then Axis [sic] C is more in terms of
19 anxiety-prone, obsessive-compulsive personality
20 disorder, or depressive kinds of symptoms that
21 are just there for a very long time and it
22 becomes incorporated in how they deal with the
23 world.

24 MR. SCHAFFER: That prompts a question for
25 me.

163

1 RECROSS-EXAMINATION BY MR. SCHAFFER:

2 Q And I guess those of us that have lived around
3 or been around alcoholics and seen them go
4 through treatment, I assume you've been in that
5 position yourself with patients that you've
6 dealt with? Have you?

7 A The question is, do I have patients who have
8 been in treatment? Yes.

9 Q Okay. There's kind of an expression that I've
10 heard that sometimes people that go through the
11 treatment, quit drinking, sometimes even after
12 the treatment, they are still jerks. Right?
13 You've heard that expression?

14 A Dry drunks?

15 Q Yes.

16 A Yes, I've heard that expression.

17 MR. SCHAFFER: That's all.

18 EXAMINATION BY MR. DRAVELAND:

19 Q Just one quick question. It's on page 4, also.
20 Mr. Schaffer asked you a number of questions
21 that you agreed with, based on your analysis of
22 Mr. Fuller, where you related in your report
23 that he may be anger prone, have irritability
24 problems, low frustration tolerance, could be
25 argumentative, may have difficulty holding his

164

1 **temper, may be power oriented. Yet in the very**
 2 **last sentence of that paragraph, it says: But**
 3 **there are no indications of interpersonal**
 4 **functioning problems in this protocol.**

5 I'm struggling with how, with that litany of
 6 issues, that none of those become interpersonal
 7 functioning problems.

8 A That's a very good question. I think -- I want
 9 you to keep in mind that this profile is within
 10 normal limits. Okay? Now, when you're
 11 interpreting a normal profile, some of the
 12 statements can sound more extreme.

13 Also, most prevalent, the most potent
 14 personality factor is not in the personality
 15 test. It's your intelligence. Very intelligent
 16 people can have these feelings, these types of
 17 things, and it can take a very different
 18 expression.

19 Now, in my -- in the personality profile,
 20 people who are having higher scores under all
 21 probability will have interpersonal
 22 relationships. It doesn't say he couldn't have.
 23 It -- it's saying that there's not an indication
 24 that the profile is not elevated to a point
 25 where you would.

165

1 Now, if you take a normal profile and
 2 certain configurations, you can elevate it out.
 3 You say, What is the likelihood this person is
 4 going to have personal problems? You'd say,
 5 Well, really likely. I mean, that profile is so
 6 high, even if they are really intelligent, they
 7 will have problems.

8 Or if you take a profile and say, Okay, what
 9 would be a mitigating circumstance? These are
 10 some traits or people are prone to this, what
 11 would mitigate against this? Well, one would be
 12 motivation, you know, certain kinds of things in
 13 certain circumstances. Even a person who's
 14 anger-prone tends not to exhibit that in church
 15 to people. That's a social situation.

16 And the other thing that would mitigate
 17 against it is motivation. Now, when I'm talking
 18 to you about the change I believe that
 19 Mr. Fuller can make, these are characteristics
 20 there. He's, you know, more likely than
 21 somebody without this profile to have
 22 anger-proneness and so forth, but he's also
 23 extremely bright.

24 And the other factor is, in my history with
 25 him, he's -- as I understand it, he's a

166

1 fourth-generation attorney in his family. And
 2 he, in my interaction with him and talking with
 3 him, seems to be willing to do anything that he
 4 can. His motivation is very high to do anything
 5 he can to change the way he's been reacting.
 6 He's seen this and says this was wrong.

7 Now, I think that he has the intelligence,
 8 he has a normal profile with those traits, but
 9 it's still within normal limits. Everybody is
 10 going to score somewhere on that test. And he's
 11 extremely motivated to make changes with that.

12 So that's when I talked to you about, you
 13 know, the changeability, the possibility in
 14 terms of what I'm seeing with him, based on what
 15 I've known, if it's correct, of him in the past,
 16 is where I came to those conclusions.

17 MR. DRAVELAND: Okay. That's all I have.

18 MR. PALMER: Thanks, Tom.

19 MR. HIEB: Nothing.

20 MR. SCHAEFFER: No further questions.

21 MR. PALMER: Thank you, Dr. Arnio.

22 (Witness left the room.)

23 (Exhibit K was marked for identification.)

24 ///

25 ///

167

1 ROBERT HOLMES,
 2 called as a witness herein, having been first duly
 3 sworn, was examined and testified as follows:

4 DIRECT EXAMINATION BY MR. HIEB:

5 Q Could you state your name, please.

6 A Bob Holmes.

7 Q And I'm going to place in front of you a copy of
 8 what I believe to be all of the notes that you
 9 have provided, along with --

10 A Oh, yeah.

11 Q I thought your Curriculum Vitae was in here
 12 someplace.

13 A Yes, it is.

14 Q Okay. Yes, it is. And I believe that's been
 15 marked as Exhibit K; is that correct? Yeah,
 16 that's Exhibit K.

17 MR. HIEB: Once again, Chairman Palmer, does
 18 everybody on the Commission have this to review?

19 MR. PALMER: This is the --

20 JUDGE WILBUR: That one is thicker than
 21 what I've got.

22 MR. HIEB: Looks thicker than what I've got,
 23 too. Tom made the copies.

24 MR. PALMER: To clear up the record, I think
 25 what happened is, you got his notes, the rest of

168

1 it is a form. As I understand, it is used in
2 the anger management program, but there's a lot
3 more to it. That's all that Mr. Holmes has, and
4 there's a blank anger management program form.
5 I'm making that up.

6 MR. HIEB: No, you've got it right. That's
7 exactly what it is. It's behind here as part of
8 this exhibit.

9 Q (BY MR. HIEB:) Could you please go ahead and
10 let the Commission members know what you do for
11 a living.

12 A Now, I'm just curious. Am I speaking to you or
13 am I speaking to --

14 Q Speak to them.

15 A Good. All right. I am a counselor,
16 psychotherapist at Behavior Management Systems
17 in Rapid City, where I do generic, general
18 practice of counseling and psychotherapy with
19 people who seek my assistance.

20 Q And does your -- the Curriculum Vitae that is
21 part of Exhibit K, does that accurately reflect
22 your training --

23 A Yes.

24 Q -- and experience?

25 A Yes, it does.

169

1 Q And Exhibit K, which I have placed in front of
2 you, are those copies of all of the treatment
3 notes that you generated since October, along
4 with your Curriculum Vitae, and the anger
5 management program --

6 A Yes. Well, what you have --

7 Q -- documents?

8 A What you have here is, after my Vitae, you have
9 some forms that are used, called an anger log,
10 in the anger management program. And then at --
11 after the about seven of those forms, if this
12 was copied exactly, there is a something that
13 looks like this that says, Anger Management
14 Program. And that is a workbook that we use in
15 the program that I provide to people who
16 participate in that program.

17 MR. HIEB: Okay. I would offer Exhibit K at
18 this time.

19 MR. SCHAFER: No objection.

20 MR. PALMER: K will be received.

21 Q (BY MR. HIEB:) Okay. Let's talk about, when
22 did you first meet Judge Fuller?

23 A It was in the end of June, I believe, of this
24 year.

25 Q And I want to clarify that. I found this out

170

1 for the first time yesterday. The notes we have
2 indicate that the first record that we have is
3 from October 20, 2010. Were you actually
4 meeting with and providing assistance to
5 Judge Fuller before that time?

6 A Yes. I don't know the exact number, but I
7 believe I met with him three times prior to
8 that.

9 Q Now, in relation to that, I asked you why some
10 of the words --

11 A Right.

12 Q -- on the first page of Exhibit K are redacted
13 or blacked out.

14 A Right.

15 Q Can you provide that explanation?

16 A Yes. There was someone participating in that
17 session that I have -- from whom I did not, just
18 no particular reason, did not obtain permission
19 to release information that was generated by
20 that individual during this meeting, and I just
21 deleted it.

22 Q Okay. Let's go up here on the first page of
23 Exhibit K. The box, Family Therapy, is checked.

24 A Correct.

25 Q Was that the nature of this session?

171

1 A Yes.

2 Q It was a family therapy session?

3 A Yes.

4 Q All right. And did the sessions that came prior
5 to October 20, 2010, were they family therapy
6 sessions, also?

7 A Yes.

8 Q Is that the reason why there's another person
9 present?

10 A Yes.

11 Q All right. Let's talk about why -- let's talk
12 about why Pete came to you the first time.

13 A Okay.

14 Q What was the reason for it?

15 A Again, it's difficult. I'm addressing the --
16 Q Yes, you address them.

17 A Judge Fuller came to see me for assistance with
18 his relationship with his wife.

19 Q Okay. And why don't you please describe that.

20 A Well, the best way to describe it is to describe
21 it in terms of the goals that we had for those
22 conversations, and the goals were that they
23 would have more time together that was more
24 enjoyable for both of them, obviously indicating
25 that this was not something that was happening

172

1 to their mutual satisfaction at that time.
 2 And also, that he would -- actually, it's
 3 interesting, I just looked at that this morning
 4 and what I had written down on the plan that
 5 Judge Fuller signed was, Shut up and listen,
 6 okay, which was a shorthand, I think, for paying
 7 more attention to what his wife was saying and
 8 wanting and feeling, and less time and energy
 9 expressing himself. Would be sort of a
 10 shorthand of saying what we were working on.
 11 And we did that for three sessions prior to the
 12 one that you have a note for.
 13 Q Now, would it be fair to say that this, the
 14 issues relating to the proceeding we're here for
 15 today, first came up in the session --
 16 A Yes.
 17 Q -- of -- on October 20, 2010?
 18 A Correct.
 19 Q All right. Did there end up being a connection
 20 between the two?
 21 A Yes, I think so.
 22 Q Describe that.
 23 A Yeah. Well, you know, you have here information
 24 about this anger management program, and I would
 25 be clear that I use the title, Anger Management

173

1 Program, because people have some sense about
 2 what that means. And ultimately it's a
 3 marketing tool, okay, the title.
 4 But it doesn't actually capture what we do
 5 because we could say that is an anger reduction
 6 and aggression management program is what the
 7 program is. And in -- I know that the issue
 8 before -- this is a Commission; is that correct?
 9 Okay. Before the Commission, has to do with
 10 demeanor, remarks that Pete has made that might
 11 be interpreted as hostile, rude, something like
 12 that. Okay. And there was some similar issues
 13 in the marriage as well.
 14 And so when we started working on those
 15 things, and then it came to the sessions that he
 16 had this, I don't know what it is, reprimand or
 17 whatever, investigation from the Commission, it
 18 was sort of part of the same kind of thing,
 19 okay, which one could say involved saying things
 20 that were impolite, rude, maybe perceived as
 21 hostile by others, and saying them without
 22 thinking about them prior to doing that. So
 23 that was the similarity between what we did
 24 before and what we do -- did as reflected in
 25 these notes.

174

1 Q All right. Now, you've talked about what you've
 2 been doing, let's talk about that specifically.
 3 What is the program as it relates to
 4 Judge Fuller? What have you been working on and
 5 what is the desired effect, if you will?
 6 A Okay. So I'll speak to what is reflected in the
 7 notes that you have starting on the 20th of
 8 October because that's the time when -- I'm not
 9 going to look at my notes, but I believe that's
 10 the time when we started a conversation about
 11 focusing on this as an anger, hostility issue.
 12 And I introduced to him either at this
 13 session or the subsequent session information
 14 about our anger management program and how that
 15 worked, what it was, et cetera.
 16 And we did have a conversation about him
 17 participating in a group, which he was
 18 interested in. And then subsequent to that we
 19 decided for various reasons, some of it having
 20 to do with his position as a judge who may
 21 actually have been involved in ordering someone
 22 to that program as a judge, that we could do
 23 this individually.
 24 Now, I'll say that I usually don't do this
 25 individually with people, and part of the reason

175

1 is that, how would I say this, it's one thing to
 2 be in a group and to deliver a program,
 3 material, information to people, and some people
 4 are interested and some people are not. But
 5 it's certainly another thing to try to do that
 6 in a one-on-one session when the person is not
 7 interested.
 8 So anticipating oftentimes with the people
 9 who come to see me that there's a lot I would
 10 want to provide them, if they are not interested
 11 in it, I just choose not to do that because
 12 it's -- it's not satisfying, okay. And also,
 13 with the group, it works better.
 14 But in Pete's case, I got the sense that he
 15 was -- every time I brought up something, an
 16 idea, a question, an observation, a request for
 17 him to observe himself and evaluate himself and
 18 his behavior, he did it with a very high level
 19 of attention, and with a very excellent result
 20 in terms of self-awareness, behavior change.
 21 So I thought delivering this one-on-one with
 22 him would be more fruitful and satisfying, as
 23 fruitful and satisfying as doing it as a group.
 24 So based on those reasons, I started to do
 25 this program individually with him, which also

176

1 provided us with the opportunity to alter the
2 sequence with which this material was delivered
3 and worked on to fit whatever his particular
4 situation, interest, concern was at the time.

5 Q **Let's talk specifically --**

6 A Tailor it to him.

7 Q **-- what were some of the tools you've given**

8 **Judge Fuller and how have you asked him to apply**
9 **those and then the responses you've achieved.**

10 A Yeah. The -- the program and the material that
11 I use with people involve several things. First
12 thing it involves is a self-awareness, a
13 monitoring of one's angry emotions, angry
14 feelings, and aggressive -- we call it
15 aggressive, you could call it hostile,
16 behaviors.

17 And the method that I use to assist people
18 to observe that is a rating scale, where one
19 would rate their angry feelings or emotions and
20 also rate the intensity of the aggressiveness of
21 their behaviors on a scale of 0 to 10, 0 being
22 none and 10 being an extreme.

23 So anger, for example, a 10 or a 9 might be
24 considered rage, and 1 or 2 or 3 or 4 might be
25 building frustration or annoyance. And then you

177

1 get into 4, 5, 6, 7, 8, where you might be
2 calling that anger, more anger or less anger.

3 Q **I want to interrupt you because to make sure**
4 **that I understand this and that the Commission**
5 **understands it --**

6 A Uh-huh.

7 Q **-- you've got anger, which as I understand is an**
8 **emotion.**

9 A Yes.

10 Q **And you've got an aggression, which as I**
11 **understand is a response --**

12 A Well --

13 Q **-- or --**

14 A Okay. That's very good. Very good. Because --
15 because if someone has a problem, has a
16 difficulty with behaving in ways that people
17 experience as aggressive, sometimes they think
18 of it as a response, okay, and one could call it
19 a response.

20 But what we try to communicate and have
21 people think about is that it's a response that
22 you can -- you can choose to do or not. So you
23 could do a different response. So it's not a
24 response like if, you know, the doctor hits your
25 knee and, you know, the reflex, okay. It's a

178

1 response that one can alter. And what we --

2 Q **When you were asking him -- I don't mean to**
3 **interrupt you. But when you were asking him to**
4 **rate both of them --**

5 A You rate them separately.

6 Q **Right. You rate, How much anger am I feeling?**

7 A Right.

8 Q **Then I rate, What was the response that I gave**
9 **to it?**

10 A Yes. Right.

11 Q **That's all I wanted to know.**

12 A What did I do, what did I do afterwards.

13 Q **All right.**

14 A So the first thing is the awareness, and one of
15 the intended results is that -- is that many
16 people -- in fact, most people I've run into who
17 I've spoken to about this, these ideas, okay, if
18 they are interested and pay attention and try to
19 apply it to themselves, most people I've run
20 into learn a very interesting thing about
21 themselves, which is that if you rate the anger
22 from 0 to 10 and you rate it based on your body
23 arousal, your feelings, that could be -- a lot
24 of people, it's easily associated with the
25 notion that you've got, like, adrenaline. It's

179

1 what you feel in your body when you're anxious,
2 a little nervous.

3 That what most people come to realize is
4 that they are, I'm going to use in quotes,
5 "angry," more than they know. Because anger
6 doesn't start necessarily at an 8, 9, or 10. It
7 might start at a 4, 5, 6. It might start as
8 annoyance.

9 So the notion here is to assist people to
10 recognize that they are becoming, I use the word
11 "aroused" with adrenaline, at levels that
12 previously escaped their notice. Or if they
13 noticed it, it escaped their attention and
14 recognition that it was somehow significant or
15 important.

16 And so one of the -- you're interested in me
17 addressing not only what I offered, but Pete's
18 response; right?

19 Q **Right.**

20 A Correct. And his response to this was to say,
21 Wow, I never even realized this. I never
22 thought about this. This is, like,
23 enlightening. It's an eye-opener to realize
24 that whereas previously my threshold for saying
25 to myself I'm angry was maybe a 5 or a 6, but

180

1 now I realize that I can start saying that to
2 myself when I'm a 1 or a 2, which gives a person
3 a great advantage, which is that they can
4 utilize tactics or strategies to calm themselves
5 down and stop that arousal or tactics and
6 strategies to stop the behavior that might
7 follow in the arousal.

8 They can use them at a lower level, and
9 therefore usually be more successful at that.
10 Because if you wait until you're highly aroused,
11 it's often harder to control that behavior.

12 **Q What are the tactics and the strategies that**
13 **you've taught Pete or that you teach people who**
14 **participate in this program to help deal with**
15 **that feeling of arousal, that feeling of**
16 **adrenaline?**

17 **A** Yeah. Well, the -- there are two things that --
18 well, one -- two things that we do to help
19 people with calming their emotional arousal,
20 which is the anger part of it.

21 And the first thing usually is a process of
22 body relaxation. And this is what you might be
23 familiar with, when someone says, I took a deep
24 breath, okay, or, I walked around the block.
25 Okay. That's an example of changing the

181

1 physiological process.

2 I generally do a specific series of brief
3 relaxation techniques that I run somebody
4 through in my office and then have them practice
5 it on a CD that they listen to that takes about
6 30 minutes.

7 But we have not gotten to that yet because
8 we started with the second tactic that I use to
9 help people calm themselves down in their
10 arousal, which is to alter their -- what they
11 think.

12 The general idea is that anger is an arousal
13 of the body that is pretty much distinguishable
14 from anxiety. And the difference between anger
15 and anxiety is that anxiety is one where one
16 thinks about, It's dangerous, I'm afraid, I'm
17 nervous, whereas anger is an emotion in which
18 the arousal is accompanied by thoughts that
19 someone is doing something wrong, that's blame,
20 or someone should change, they should be
21 different.

22 And in working with Pete, teaching him about
23 these particular anger thoughts and then getting
24 to the question of what can you substitute for
25 these came up, because he started talking about

182

1 some of the thoughts that he had, for example,
2 when he was dealing with his wife, or dealing
3 with people in court or something like that, and
4 what these were, were classic anger thoughts.

5 And so I used those to illustrate anger
6 thoughts. And it was that process that got us
7 into exploring the whole issue of anger
8 thoughts, which we did over the last couple
9 sessions.

10 And then a third thing that we do, that is
11 a -- it's a combination of A, being able to calm
12 yourself down physiologically, and B, avoiding
13 aggressive behaviors when one is aroused is
14 something that has been thematic through the
15 last few sessions that we had, which is the one
16 of noticing your arousal, and when you notice
17 it, stop, which is actually the same idea as
18 what we I said earlier, which is, Shut up.
19 Okay. Like, You want to say something, don't.
20 Okay.

21 And I believe one of the things that we --
22 we talked about was, he said usually if he's on
23 the bench, for example, he's got a pitcher and
24 some water. Well, if you want to say something
25 and you're running -- you decided that you want

183

1 to stop and think because you notice you're
2 aroused, say to yourself, Well, maybe you
3 should -- should withhold what you might feel
4 inclined to say and pour yourself some water and
5 take a drink.

6 And if you need to excuse yourself -- and I
7 don't know what you do as the judge -- but go to
8 the bathroom. Okay. Something like that, okay,
9 which places a time to A, calm yourself down, B,
10 think things through in a different way, so that
11 you can calm your arousal down and then be less
12 inclined to feel the pressure to say or do
13 something that you might later think was not
14 such a good idea.

15 So those are the strategies and tactics that
16 are used for calming arousal.

17 **Q The last thing I want to discuss with you,**
18 **you've heard the terms, there's a theory of**
19 **change, I think, that's generally accepted in**
20 **the psychological community --**

21 **A** Uh-huh.

22 **Q -- and I think it has to do with people change**
23 **in stages.**

24 **A** Okay.

25 **Q Are you familiar with that?**

184

1 A Yes.
 2 Q Can you describe that for the Commission --
 3 A Okay.
 4 Q -- as briefly as you can, and then describe for
 5 them where you see Pete being in that continuum.
 6 A Okay. I'll do it first as briefly as I think I
 7 can.
 8 Q Sure.
 9 A Then if you want to --
 10 Q That's fine.
 11 A -- get some clarification. But some very good
 12 research on people who have quit smoking and
 13 quit drinking and started to exercise and eat
 14 better has led to a realization from studies
 15 that have been done that this is the way all of
 16 us tend to change, something we have in common,
 17 whether you're getting counseling or going to
 18 church or whatever you are doing, what gets
 19 people to change and how they change.
 20 And there are predictable stages people go
 21 through. And the first stage, which doesn't
 22 sound like a stage at all, it's called
 23 precontemplation, which means you're not
 24 thinking about change.
 25 You may have a behavior that people complain

185

1 about or you don't like, but you're not thinking
 2 about changing it, for whatever reason.
 3 The second stage which follows
 4 precontemplation is contemplation, which means
 5 that for some reason, usually because you have
 6 new awarenesses of things, new information about
 7 the possibilities of change and the costs of
 8 not, you get into the stage called
 9 contemplation, which means you're thinking about
 10 it. Not taking action, but thinking about it.
 11 The third stage is called preparation, and
 12 preparation is a crucial and pivotal stage
 13 because it's the stage in which someone says,
 14 You know what, I'm going to do something
 15 different, for whatever reason.
 16 Some people think that this requires
 17 admitting that you did wrong and that kind of
 18 thing, and we discovered that's not necessary.
 19 What's necessary is you say, I'm going to be
 20 different than this particular way. That's
 21 preparation.
 22 And in that stage, people make plans for,
 23 you know, getting help or doing certain things,
 24 like counting how angry you are and rating it or
 25 having a drink of water or that kind of thing.

186

1 Then you have action, and action is a stage
 2 in which the commitment to change and the plans
 3 are carried out and then you begin to see
 4 change. And when change has been occurring, and
 5 they have different time periods for this, but,
 6 like, for a week or two, okay, that's the action
 7 stage.

8 And change, full change has not occurred,
 9 the full desired change has not occurred, but
 10 you're clearly on the path.

11 Then once the full desired change has
 12 occurred, then you have a maintenance stage
 13 where people -- the new behavior is not yet a
 14 habit, which means they have to attend to it in
 15 some way. And this might be someone who's
 16 drinking goes to AA meetings, for example, or
 17 like that.

18 Then once that behavior is so second nature
 19 that there is a very low likelihood that even
 20 under certain stresses the person will return to
 21 the previously undesired behavior, that's called
 22 termination. There's no need to even think
 23 about it. Okay.

24 So with regard to Pete, I would have to say
 25 this, there are -- okay. When he came to me the

187

1 first time talking about marital stuff, okay, he
 2 was in contemplation regarding those issues,
 3 okay.

4 Very quickly, in fact, within 20 minutes, he
 5 moved into preparation. Not yet committed, but
 6 willing to be thinking about things that he
 7 might do differently.

8 And then the second time that we met, he was
 9 in the preparation and action stage. Had
 10 already taken action with -- in his relationship
 11 with his wife that had made a positive
 12 difference.

13 And I would say that overall, in general, he
 14 has been in the action stage, which means --
 15 again, I'll remind you two things. One is that
 16 he's doing things on purpose to make changes,
 17 and second of all, these things are being
 18 successful. So that's --

19 Q In terms of moving forward, you've gone through
 20 the stages, obviously. Would it be your
 21 recommendation that there be continuing
 22 maintenance on this until there can be some
 23 agreement between you and him that you've
 24 reached termination?

25 A Yeah.

188

1 Q Is that how it works?

2 A I think that would be very reasonable.

3 Q Okay.

4 A Okay. Now, usually with people, I would, if --

5 if -- if Pete were in a slightly different

6 situation, I would have conversations with him

7 about, you know, does he think he can do this

8 without further counseling, do we have

9 check-ins, whatever. Okay.

10 And I will do that with him, although I

11 think that there might be some other factors

12 involved, such as continuing because that's kind

13 of what's going to show that he's going to

14 continue to work. Okay.

15 But another part of it is that there are

16 parts of what I usually provide to people for

17 anger management that we haven't gotten to, such

18 as the techniques for soothing your arousal.

19 And I haven't evaluated that with him so much,

20 but I think this could be something that could

21 be very, very useful, although I think he would

22 move very fast through this whole process,

23 because that's --

24 Q Is that based on your experience?

25 A That's based on my experience with him

189

1 previously.

2 Now, in the anger program, there are three

3 other things that we do that I think help

4 people. One, and they have to do with creating

5 relationships with others that A, decrease the

6 likelihood of conflict and make conflict

7 resolution more likely. And those are skills

8 that might fall into the realm that would be

9 called communication, okay, such as expressing

10 appreciation, which is a specific tactic that

11 goes beyond saying thank you.

12 Creating a positive atmosphere in

13 relationships, listening, which you will

14 remember was one of the things that we targeted

15 when he first came in for marital assistance,

16 and then how to assert oneself in a way that is

17 not experienced as threatening by another

18 person, and I think those would be useful, also.

19 Q Okay.

20 A So this would be -- if we played this out, this

21 would be five or six more sessions, and then I

22 would have a conversation with him about if and

23 how we would want to continue to help him

24 maintain the change.

25 MR. HIEB: I have no further questions.

190

1 MR. PALMER: Mr. Schaffer.

2 CROSS-EXAMINATION BY MR. SCHAFER:

3 Q Is it Mr. Holmes?

4 A Mr. Holmes, yes.

5 Q What is your degree in?

6 A Social work.

7 Q Are you a licensed psychologist?

8 A No.

9 Q Never have been?

10 A No.

11 Q Are you a counselor?

12 A Yes.

13 Q And the first time you saw Judge Fuller was

14 when?

15 A End of June, I believe.

16 Q Of 2010?

17 A Yes.

18 Q And he came to you here about marital problems?

19 A Correct.

20 Q Did he relate to you any problems he'd had on

21 the bench at that point?

22 A No.

23 Q Did he relate to you any problems about any

24 complaints that he may have had?

25 A No.

191

1 Q And you saw him how many times in connection

2 with this family therapy?

3 A Three.

4 Q That was when?

5 A June and thereafter.

6 Q Do you have your file with you here?

7 A All I have is the -- is the notes that I sent.

8 So there were three sessions, an evaluation and

9 two sessions prior to the one, the first one you

10 have on the 20th.

11 Q Were you asked not to bring your file here?

12 A I -- no.

13 Q I guess I'm curious, how do we get a date for

14 when you met with him in family therapy?

15 A Well, it was June 20th, sometime between

16 June 20th and June 28th, and there were three

17 sessions, that first one and two others prior to

18 Wednesday, October 20th.

19 Q And what months were those other two sessions?

20 A I don't know.

21 Q So my understanding, we've got notes for four

22 visits. Is that the sum total of it?

23 A Yes. And there was one subsequent -- whatever

24 you have here, if you'd like me to count them.

25 Q I have a note, October 20, 2010 --

192

1 A Two, three --
 2 Q You can't talk while I'm talking.
 3 A I'm sorry.
 4 Q I mean, so the court reporter can get it down.
 5 A Sure.
 6 Q October 20, 2010; November 8, 2010; November 15,
 7 2010; and November 30, 2010?
 8 A If that's -- yeah, I guess.
 9 Q Are there any notes we're missing?
 10 A There's a note, there's a note from, I think it
 11 was last week, that is not here.
 12 Q And that was an individual session?
 13 A Correct.
 14 Q In looking at your first note, you make this
 15 comment: He suspended from the bench due to
 16 rudeness to the court.
 17 A Right.
 18 Q I assume that's something he told you?
 19 A Yeah. I -- I choose to write my notes with --
 20 basically everything that I say, write down, is
 21 what the person said unless it's clear that it's
 22 a comment that I'm making. Okay.
 23 Q Then it says: He spoke at length about how he
 24 has come across as rude, acknowledging he needs
 25 to rein in his negative comments, and saying

193

1 that he wouldn't be in this mess if he had come
 2 to RX a year ago.
 3 A Right. RX, counseling treatment.
 4 Q That's what he told you?
 5 A Yes.
 6 Q So his response to the suspension was if he'd
 7 only gone to counseling a year earlier, he
 8 wouldn't have been here?
 9 A Well, that's what he said, yes.
 10 Q Okay. Then you say: He has not been drinking
 11 at all since suspension, as this helps keep him
 12 at the top of his game, end quote.
 13 A Yes.
 14 Q Do you see that?
 15 A Yes.
 16 Q Had he confided in you that he had been drinking
 17 up until the time of his suspension?
 18 A He told -- he told me that he had drank alcohol,
 19 you know, prior -- when I first met with him, he
 20 told me about that, yes.
 21 Q In June of 2010?
 22 A Correct.
 23 Q And he told you that he didn't quit until after
 24 his suspension; is that correct?
 25 A Well, he told me that he had not been drinking

194

1 at all since his suspension, yes.
 2 Q So he quit after his suspension?
 3 A I'm not sure if that's what that means. I
 4 assume it does, but --
 5 Q Okay.
 6 A -- I would let that speak for itself.
 7 Q Well, do you remember as you sit here?
 8 A No, I don't remember.
 9 Q But you certainly remember that he told you he
 10 was drinking when he saw you in June?
 11 A Yes.
 12 Q And on the note on November 8, 2010, he shared
 13 at length the nature of the complaints against
 14 him and his responses to these. Do you see --
 15 A Yes.
 16 Q -- that comment?
 17 A Uh-huh.
 18 Q What did he tell you about the complaints
 19 against him?
 20 A He told me about saying that a policeman was
 21 racist, and some other things that I don't
 22 recall.
 23 Q And you also said, And his responses to these.
 24 A Yes.
 25 Q What were his responses to these complaints?

195

1 A As far as I recall, and might not have been in
 2 this session, but at some point he told me that
 3 he provided written responses in which he pretty
 4 much -- might have been a small deviation from
 5 this, but he admitted to the facts of the
 6 complaints, okay, that he did what was said he
 7 did, and that also he said that this conduct was
 8 inappropriate for him on the bench.
 9 Q And he told you it was in violation of the
 10 Judicial Code of Conduct?
 11 A Violation of the Code, yes.
 12 Q Then you have this comment: He noted that his
 13 court reporter has told him he's changed since
 14 the initial complaint such that he's not much
 15 fun to work for anymore.
 16 A Uh-huh.
 17 Q Do you see that?
 18 A Yes.
 19 Q Then you have your note that he basically
 20 distilled everything down to, Stop if you think
 21 that you're going to say something stupid.
 22 A Right.
 23 Q Shut up --
 24 A Right.
 25 Q -- basically?

196

1 A Until thinking it through, correct.
 2 Q And did he tell you that was a plan that he had
 3 developed after he first came to see you?
 4 A Oh, I don't recall.
 5 Q Had he told you that was a method of dealing
 6 with bad behavior for a period of a long time?
 7 A I don't recall. I do believe that -- just from
 8 reading the statement, I do believe that he was
 9 indicating that he -- well, actually I --
 10 actually I -- I don't know. I don't know if he
 11 had been thinking about doing that previously or
 12 if that was an idea that came from our
 13 conversation about that issue. I don't know. I
 14 don't recall.
 15 Q I think you said you've never really done this
 16 program on an individual basis before. Do you
 17 usually do it in group therapy?
 18 A I've done variations of this with people, but
 19 not usually.
 20 Q Okay. What's the success rate if you do it
 21 individually as opposed to in a group therapy?
 22 A I don't have enough data for that.
 23 Q Group therapy is important because the person
 24 gets feedback from other people right there on
 25 the spot; right?

197

1 A Not the way I do it. They get feedback from me,
 2 mostly.
 3 Q Okay.
 4 A So that would be -- that would be no difference.
 5 The reason -- frankly, the reason why the group
 6 therapy works better is two. First of all, I
 7 can deliver the material that I need to deliver
 8 with some gusto and engagement for people. But
 9 if I'm sitting there with somebody who's not
 10 that interested and it's one on one, I can't
 11 muster that. Okay. So the person won't get the
 12 benefit of that.
 13 And the second reason why group therapy
 14 works for most people is that they feel the
 15 sense of relief they are not the only people who
 16 have this issue, and that's my sense about the
 17 most important parts.
 18 Oh, plus people learn things from others by
 19 hearing how others deal with things, whereas in
 20 individual therapy, all they learn from is their
 21 thoughts and my thoughts.
 22 Q I notice on your November 30th note, you say:
 23 He completed HW assign last session. I assume
 24 that's homework?
 25 A Homework, yes.

198

1 Q I looked through this sheet of materials for the
 2 anger management program. There's a whole sheet
 3 of things for the person to fill out to
 4 assess --
 5 A Uh-huh.
 6 Q -- themselves.
 7 A Uh-huh.
 8 Q Did he ever do that?
 9 A Yes.
 10 Q Where is that?
 11 A I assume that he has it.
 12 Q You don't keep it?
 13 A Correct.
 14 Q So he would have all of the -- all of the
 15 documents filled out as to how he's dealing with
 16 the program?
 17 A I don't have them. I guess he would have them.
 18 Let me say -- let me say that I'm not sure if he
 19 actually filled out an anger log. Okay.
 20 That's -- that may be what you are referring to,
 21 is this -- these things, anger log. I'm not
 22 sure that he did that. Okay. But about 50
 23 percent of the people who participate in the
 24 anger management program fill this out.
 25 Q Do you know what he did?

199

1 A Yeah, I know. Yes, I do. I know that he has
 2 come to me with a notepad with notes about his
 3 anger levels and thoughts and observations and
 4 stuff like that. In fact, the last session we
 5 had, he had two pages of notes that he had
 6 taken.
 7 Q But you don't know whether he's completed the
 8 questions in the forms that you provided to him?
 9 A Correct. Yes. And I don't consider that
 10 significant. I consider it significant if he
 11 participates in a way that brings him progress,
 12 which he's doing. So I don't worry if people do
 13 their homework or not. What I worry is if they
 14 report change. And they can do their homework
 15 any way that they like.
 16 Q I notice there's a form here, Anger Management
 17 Program Participation Consent.
 18 A Right.
 19 Q Has he ever signed that?
 20 A No, because he signed a different treatment
 21 plan.
 22 Q So what form did he sign?
 23 A He signed a case service plan at Behavior
 24 Management Systems.
 25 Q Is that a separate entity?

200

1 A Yeah. It's the -- it's the form that had
2 written on it those goals about being quiet and
3 listening and spending more time with his wife.
4 Q Okay. I notice on this anger management program
5 participant consent form, the participant says:
6 I understand that Behavior Management Systems
7 anger management program is a psychotherapeutic
8 program designed to help participants decrease
9 anger, aggression, and the problems they cause
10 in life. I understand that while most people
11 who complete the program show a decrease in
12 their anger and aggression, results may vary and
13 are not guaranteed.
14 A Correct.
15 Q That's true of Judge Fuller, also, but he never
16 signed a form.
17 A I'm sorry. What is true of him?
18 Q That results aren't guaranteed.
19 A Yeah.
20 Q Are you the type of counselor that believes that
21 anger and inability to control it is a
22 psychological condition or a personal failing?
23 A Is this a forced-choice question? I have to
24 pick one or the other?
25 Q Can you answer it "yes" or "no"?

201

1 MR. HIEB: For the record, I don't think it
2 was a "yes" or "no" question. Maybe it was. I
3 guess it was.
4 A I think that it's a psychologist -- okay. I think
5 that it's a psychological -- okay. I think it
6 is a failure to exercise behaviors that will
7 lead to the change that people desire.
8 Q (BY MR. SCHAFER:) And this problem that
9 Judge Fuller has has been a condition of long
10 standing. Would you agree with that?
11 A Yes.
12 Q And --
13 A But I would also say that it did not -- first of
14 all, I would -- just to be clear, my expertise
15 is not in evaluating people and making
16 predictions about future behavior. My expertise
17 is helping people change. It's what I do.
18 Q Okay.
19 A I believe you got testimony from Dr. Arnio about
20 evaluation, and I would say that anything
21 Dr. Arnio said would probably trump what I say
22 in terms of diagnosis and evaluation.
23 Q You're not here to predict his future behavior?
24 A Correct.
25 Q Would you agree that most often people who have

202

1 a problem like this hear about it from their
2 families and their spouses well before they hear
3 about it from anybody else?
4 A That's often the case.
5 Q That's the case here, isn't it?
6 A Yes.
7 MR. SCHAFER: That's all.
8 MR. HIEB: Nothing.
9 MR. PALMER: Any members of the Commission
10 have any questions?
11 EXAMINATION BY JUDGE WILBUR:
12 Q You mentioned that you aren't concerned about
13 whether Judge Fuller did the paperwork for the
14 anger management class --
15 A Correct.
16 Q -- but your concern is more that he makes
17 progress.
18 A Right.
19 Q How do you assess whether he's making
20 progress --
21 A Right. Good. Yeah.
22 Q When we both talk at the same time --
23 A I'm sorry.
24 Q -- she can't write that down, and I want a good
25 record --

203

1 A I'm sorry.
2 Q -- here, so --
3 A I'm sorry.
4 Q -- if you can restrain --
5 A I will I will.
6 Q You just didn't. Okay?
7 A Okay.
8 Q All right. Thank you. How do you know, how do
9 you measure progress?
10 A Measure progress by several methods. One method
11 which works very well in individual work is, I
12 get reports from him about how things are the
13 same or different. Okay.
14 A second way I measure progress is that he,
15 as all people in the anger program, make a
16 report of, an accounting of how often they feel
17 angry at a level 1 to 10 and the highest level
18 of that during a previous week, and then do the
19 same thing for aggression.
20 And then when I am done with the program
21 with the person, they then do the same
22 evaluation for the previous week and we compare
23 those. So that's one.
24 A second way that we do that is, I
25 administer an outcome rating scale. That is a

204

1 four-question self-report of how the person
2 perceives that they are doing in four areas of
3 life functioning. And I do that at the
4 beginning and at the end and compare those.

5 And a third way that I do it is, at the end
6 of the program I ask people whether they believe
7 that their anger and/or aggression has got
8 worse, stayed the same, decreased some, or
9 decreased a lot, or stopped. That's my
10 measures.

11 Q So really, none of the ways that you have to
12 measure progress are from an independent source,
13 they are all from the individual you're
14 counseling?

15 A Yes, unless -- unless I happen to have contact
16 with somebody who is involved with the person.

17 Q Okay.

18 A Correct.

19 JUDGE WILBUR: Thank you.

20 MR. PALMER: Tom.

21 EXAMINATION BY MR. DRAVELAND:

22 Q I have a question. You said at one point in
23 your testimony -- may not be exact here, so bear
24 with me. What I wrote down was that group
25 therapy generally works better for you, in your

205

1 anger management classes.

2 The question I have is, on your notes from
3 November 15th, the first line says: We decided
4 that in balance, it would be better if he did
5 his anger treatment in individual counseling
6 instead of group.

7 A Uh-huh.

8 Q What was the balance that you were making there?

9 A Well, let me say something about the -- the
10 situation with people who come to me for anger
11 management, usually. Okay. Probably
12 60 percent, maybe a little more, are somehow
13 under some requirement to do this. The court
14 has ordered them, a probation or parole officer,
15 an employer or a spouse who says, If you don't
16 get help with your anger, you know, something is
17 going to happen. So people are under some
18 compulsion -- compulsion, if that's the word.
19 They feel compelled to participate.

20 Almost always, the people who ask me to be
21 seen individually are the people who are in the
22 precontemplation stage. They are not
23 interested. Okay.

24 And when I -- having been aware, having
25 worked with Pete for three sessions prior to

206

1 instituting the work on the program, that he
2 certainly was in the action stage with regard to
3 his marriage, and I was anticipating that the
4 same thing would occur, that was -- that made
5 individual counseling the appropriate thing to
6 do.

7 And frankly, I think that, in my opinion,
8 that decision has turned out to be a good one,
9 because it's working quite well.

10 Q If I might --

11 MR. PALMER: Please.

12 Q (BY MR. DRAVELAND:) In the first part of the
13 question, though, it says, We decided in
14 balance.

15 A Right. Right.

16 Q So I'm assuming there was conversation --

17 A Right.

18 Q -- between you and Pete --

19 A Right.

20 Q -- that Pete was saying at some point also,
21 since you've indicated that group therapy tends
22 to work better, that Pete is saying, I'd rather
23 not do that.

24 A Ah. There was another issue. Okay. Yes.

25 Thank you. Pete had a concern that, and we

207

1 talked about this and we talked around it and --
2 but he had a concern that to go to the anger
3 management program might in some way lead to him
4 revealing something about the proceedings with
5 this Commission that would be in violation of
6 the rule of privacy, that he's not supposed to
7 tell anybody about this. And I didn't -- this
8 is something that's -- the legal stuff is new to
9 me. Okay. So I didn't know. Okay.

10 But given that I saw no reasons not to do it
11 individually, okay, and I saw that it would be,
12 from my past experience, be likely to work, I
13 decided we would do that.

14 And one of his concerns about doing it in a
15 group was that there could be some way in which
16 he might even inadvertently reveal information
17 that was -- he wasn't supposed to with regard to
18 what's happening with this Commission. That he
19 would inadvertently reveal something and he
20 would be in violation, so that was another
21 reason.

22 MR. PALMER: Prompt anything --

23 MR. HIEB: I have nothing further.

24 MR. PALMER: -- else from anybody?

25 ///

208

1 RECROSS-EXAMINATION BY MR. SCHAFER:
2 Q Yeah, I have a question. Mr. Holmes.
3 A Yes.
4 Q When you talk about progress, and it's based on
5 reports from him.
6 A Uh-huh.
7 Q How can you fairly chart his progress if all of
8 this work is being done while he's under
9 suspension? In other words, he's not in his
10 job, how does that work?
11 A That's good. Good question. Okay. There is a
12 principle in theory, in behaviorist theory of
13 human behavior, which is called generalization
14 of behavior. And what it asserts is that not
15 always, but it's not uncommon for behavior in
16 one context to be enacted in a different
17 context. Okay.
18 And so the context within which he's
19 actually on a daily basis working on these
20 things is in the context of his relationship
21 with his wife and his children and his
22 grandchild, who just came to live with him and
23 his wife.
24 Those constitute the laboratory within
25 which -- it's sort of like a -- it's sort of

209

1 like a football coach who watches his player in
2 practice and says, Yeah, he's doing great in
3 practice, so we'll put him in the game. You
4 know, you have to wait until the game to find
5 out.
6 But the way I evaluate the progress is, his
7 change in the areas where he is on the field,
8 which is with his wife, his children, and his
9 granddaughter.
10 Q But the problems that brought him to the
11 Commission all involved his involvement in
12 dealings with people in his court; correct?
13 A As far as I know, yes.
14 MR. SCHAFER: That's all.
15 MR. HIEB: Nothing.
16 MR. PALMER: Anybody?
17 (No further questions were presented.)
18 MR. PALMER: Thank you, Mr. Holmes.
19 (Witness left the room.)
20 MR. PALMER: Let's go off the record.
21 (Discussion was held off the record.)
22 (The noon recess was taken from
23 1:04 p.m. to 2:02 p.m.)
24 ///
25 ///

210

1 JUDGE JOHN SIMKO,
2 telephonically called as a witness herein, having
3 been first duly sworn, was examined and testified as
4 follows:
5 DIRECT EXAMINATION BY MR. NICHOLSON:
6 Q Would you give us your full name, please,
7 Judge Simko.
8 A John Simko.
9 Q And what's your current occupation?
10 A I am a United States Magistrate Judge.
11 Q And prior to being a United States Magistrate
12 Judge, what was your occupation?
13 A I was in the practice of law with the law firm
14 of Woods, Fuller, Shultz & Smith in Sioux Falls.
15 Q And how --
16 A Incidentally, the Fuller -- excuse me. I was
17 going to say the Fuller of that firm was Pete
18 Fuller's uncle Howell, for whatever that's
19 worth, and I also practiced with Pete's cousin,
20 Bill Fuller.
21 (Brief interruption in the proceeding.)
22 Q (BY MR. NICHOLSON:) I'm trying to adjust the
23 volume, Judge Simko. Could you say that again,
24 please.
25 A I practiced law with the law firm of Woods,

211

1 Fuller, Shultz & Smith in Sioux Falls before
2 becoming a U.S. Magistrate Judge. And I said
3 incidentally, during that time, Pete's uncle
4 Howell Fuller was one of my partners, as was
5 Bill Fuller, Pete Fuller's cousin.
6 Q How long were you a practicing attorney at
7 Woods, Fuller, Shultz & Smith?
8 A Thirty-two years.
9 Q Okay. And what year did you go on the federal
10 magistrate bench?
11 A I came on to this job September 1, 2000.
12 Q Can you tell us what your history is with
13 Pete Fuller, how you know him.
14 A Well, I can't -- first, if you allow me to thank
15 you and Mike and the Commission for allowing me
16 to testify by phone, I appreciate that very
17 much. Thank you for that.
18 And I also want you to know that I'm not
19 making any prepared statements. I'm in the
20 office by myself, the doors are closed, and I do
21 not have any notes in front of me and do not
22 have any prepared statement. I do happen to
23 have a copy of the Code of Conduct for
24 United States judges, however, as a crutch to
25 lean on.

212

1 I first knew Pete when we were both freshmen
2 in law school in 1965.
3 Q Were you classmates?
4 A Yes, we were.
5 Q And have you considered Pete to be a friend of
6 yours since that time?
7 A Pete has been a friend of mine since that time.
8 Our contact has not been particularly frequent,
9 but it's like it is with all friends, we can go
10 a long time without seeing each other, and when
11 we see each other, it seems like only a couple
12 weeks.
13 Q When you were practicing law at Woods, Fuller,
14 Shultz & Smith, what kind of law did you
15 practice?
16 A I was primarily a trial lawyer.
17 Q And in your practice as a trial lawyer, did you
18 have the occasion to be in front of a number of
19 different judges?
20 A I did.
21 Q And I'm assuming that as a practitioner, like we
22 all do, you drew some impressions and some
23 evaluations of the judges that you appeared in
24 front of.
25 A I suppose that happens, yeah.

213

1 Q Okay. And in your capacity as a trial judge,
2 were you an -- excuse me, a trial lawyer, were
3 you an active trial lawyer? In other words,
4 were you in front of judges on what I guess in
5 our profession would be quite often?
6 A Well, yeah, I think so. Kind of hard to compare
7 except, I guess, by looking at Westlaw sometimes
8 and see how many times your name appears. And I
9 did that when I prepared my application for this
10 job. I attached a copy of Westlaw appearances
11 that are shown there, and there were quite a
12 few.
13 Q I'm assuming that with your current profession
14 of about ten years and your time as a trial
15 lawyer, that you drew some impressions as to
16 what the characteristics would be of a good
17 judge?
18 A I'd like to think so.
19 Q All right. And would honesty and integrity be a
20 couple of those characteristics that you would
21 want in a judge?
22 A Absolutely.
23 Q Tell me a little bit about your relationship
24 with Pete and what your observations with him
25 over the years have been as far as his

214

1 personality and his character.
2 A Well, as I said, I've known Pete for some
3 45 years. We haven't exchanged Christmas cards
4 or birthday cards or visited socially each of us
5 in his home, but we have seen each other at
6 Bar Association events. And other times when I
7 happened to be in the Black Hills or he happened
8 to be here in Sioux Falls, we'd play golf. It
9 has not been a close relationship, but I'd like
10 to tell you about the Pete Fuller I know.
11 The Pete Fuller I know is an honorable guy
12 who is honest. He's professionally competent,
13 and he's of good moral character, and I'd like
14 to tell you what, in my opinion is what you
15 could expect from him in the future, if you
16 choose to reinstate him.
17 My thought is that he is capable of being
18 patient and dignified, respectful and courteous
19 to those in court with him.
20 Q There's been -- Judge Simko, there's been some
21 discussion in the room today about an old van
22 that Judge Fuller drives. Do you know the
23 history of that van?
24 A I think I do. You know, I know if you ask me
25 the details about the van, I won't be able to

215

1 tell you. You know, my senior partner,
2 Ted Woods, used to say a lot of lawyers say more
3 than they know. I'm going to try to avoid that.
4 What I know about the van is this. Used to
5 belong to Pete's brother, Thad. Thad and Pete
6 were close. Thad died at an early age and that
7 was Thad's van. Thad, I think, had used it in
8 Alaska, and Pete then kept that van, Volkswagen
9 bus, and still to this day, so far as I know,
10 has it and drives it.
11 I remember one time I saw him in Sioux Falls
12 when he had driven clear across the state in it
13 and was still, oh, maybe two-thirds of the way
14 towards his destination, at 45 or 55 miles an
15 hour the whole way. That van is near and dear
16 to him because it belonged to his brother.
17 Q Correct me if I'm wrong here, Judge Simko, but I
18 believe that the contact that was initiated
19 between the two of us some weeks ago was
20 initiated by you calling me; is that correct?
21 A Here's what happened on that. When I first
22 learned about Pete being suspended, I
23 immediately called Pete. I said, Pete, I don't
24 know what happened and I don't really care to
25 know and I'm not asking you what happened.

216

1 What I'm telling you is that I know, because
2 I know you, Pete, that it had nothing to do with
3 dishonesty, it had nothing to do with you not
4 being competent. And I'm your friend, I'm here
5 to support you. If there's anything I can do to
6 help you, let me know.

7 Pete said, Well, Tom Nicholson is my lawyer.
8 You can call him and tell him that. So that's
9 what I did, and that was the end of it until
10 sometime later, you called me and asked if I
11 would be willing to testify.

12 And I'm most certainly willing, able, and
13 anxious to testify on Pete's behalf and try to
14 offer my opinion, for whatever it's worth, about
15 what can be expected from him in the future if
16 he's reinstated.

17 Q Given your respect and your lifetime employment
18 in the judicial system and as a lawyer relating
19 to the judicial system, would you have called me
20 and offered that support for Judge Fuller if you
21 thought the characteristics that he possessed
22 would not do well on the bench?

23 A Oh, absolutely not. You know, I -- I've got
24 some friends I wouldn't say the same thing
25 about. You know, I wouldn't offer testimony

217

1 like this for some of my college buddies and
2 their pranks. But Pete, in my opinion, deserves
3 my support, and I am offering whatever support I
4 can give to him as honestly as I can possibly do
5 it.

6 Q Your history with Pete, would it indicate that
7 when he says he's going to do something, that he
8 actually does it, carries through on his word?

9 A Well, one of the things about Pete that anybody
10 who knows him knows, is that Pete expects high
11 standards from himself. That's been true from
12 when he was a freshman in law school. He
13 prepared very well, his strength was his
14 preparation, and he expects that same high
15 standard of conduct about preparation from

16 other people. [REDACTED] Pete
17 is [REDACTED] and
18 he [REDACTED].

20 Now, the thing about that that I think is true
21 is that, as quick as Pete can be to give
22 constructive criticism, I think he can be as
23 quick to accept constructive criticism.

24 Q If I told you that the reason he's in front of
25 this Commission primarily is because of

218

1 basically bench demeanor or demeanor in general,
2 and if Pete says he's going to change, given
3 your history with Pete and what you know of him,
4 do you believe he's capable of doing what he
5 says?

6 A Without a doubt. I'm as certain as one can be
7 that, while this Commission would perhaps, if
8 you choose to reinstate him, give him some dos
9 and don'ts, I am as reasonably certain as one
10 can be that even without that, whatever lesson
11 there was to be learned has been learned and
12 Pete would conduct himself in a way which is
13 consistent with the way this Commission wants
14 him to act, and not only this Commission, but
15 the entire judicial system. I think Pete would
16 adjust his behavior even if this Commission did
17 nothing after reinstating him.

18 Q Judge Simko, if it came out that one of the
19 things that the Commission and/or the
20 Supreme Court would require of Judge Fuller is
21 that he have -- and that counseling recommended,
22 also, that he have kind of an outlet to visit
23 with people about his feelings from time to time
24 or to vent maybe some of his frustrations, kind
25 of a liaison/mentor kind of a person, would you

219

1 agree to be available for him based upon some
2 reasonable schedule or formula that would be put
3 forth for Pete?

4 A Well, provided I'm a person that, you know, when
5 he needs a good ear, I'd be pleased to do that.
6 Absolutely.

7 MR. NICHOLSON: Thank you. I have no
8 further questions.

9 MR. PALMER: Mr. Schaffer.

10 MR. SCHAFFER: Can I sit over there?

11 MR. NICHOLSON: Sure.

12 CROSS-EXAMINATION BY MR. SCHAFFER:

13 Q Judge Simko, this is Mike Schaffer. Can you
14 hear me?

15 A Yes, I can, Mike. How are you?

16 Q Good. It's my understanding that you're
17 appearing here voluntarily; is that correct?

18 A That's correct.

19 Q And your original plan was to drive over here
20 and be here in person?

21 A That's correct.

22 Q You're not here pursuant to any subpoena; is
23 that correct?

24 A That's correct.

25 Q And you told me, I think, when I talked to you

220

1 before this hearing, that you're here to give
 2 opinion testimony and not to talk about the
 3 facts; is that right?
 4 A That's exactly -- that's exactly correct. I
 5 have no information about the facts of this case
 6 and my opinion is confined strictly to the
 7 future and what one could reasonably expect from
 8 Pete Fuller, should he be reinstated.
 9 Q You're here to testify essentially as a
 10 character witness for Pete Fuller; is that
 11 correct?
 12 A I think that's right.
 13 Q And if I heard you say correctly, you don't know
 14 what happened, what brought him here?
 15 A That's correct. Now, let me say this, I have
 16 some vague information that I can, of course --
 17 I was born at night but not last night, so I can
 18 kind of figure out what happened, but I don't
 19 know any of the specifics.
 20 Q I don't want you to offer speculation. Did
 21 Mr. Fuller tell you what got him into trouble?
 22 A No. He did not.
 23 Q So do you have any factual --
 24 A And that's something I don't want to know.
 25 Q Pardon? I didn't hear you, I'm sorry.

221

1 A I said -- I said to him when we talked about it,
 2 I don't care to know, don't want to know, and
 3 then I followed immediately with my comment
 4 about I know it wasn't dishonesty and I know it
 5 wasn't incompetence, and I'm here to offer my
 6 help in any way if I can. If I can, let me
 7 know.
 8 Q Okay. Judge, I have appeared in your court. I
 9 think of any judge I've ever appeared in front
 10 of, you treat everyone with the utmost respect.
 11 Would you agree with that?
 12 A Well, I appreciate your comment and I would like
 13 to think that's true.
 14 Q You treat the litigants with respect, don't you?
 15 A I try to.
 16 Q You treat the lawyers with respect?
 17 A I try to. I remember what it was like on the
 18 other side of the bench.
 19 Q Exactly. And you treat court staff with the
 20 utmost respect?
 21 A I try to.
 22 Q And that's what the Canons in the Code of
 23 Judicial Conduct require, isn't it?
 24 A I think -- I think so, yes.
 25 Q And Judge, would you think it would be

222

1 appropriate for a sitting judge from the bench
 2 to call a police officer a racist in open court
 3 in front of everyone on the record?
 4 A Well, you know, I don't want to -- the answer
 5 is -- how did you ask that? Say that again. Is
 6 this a negative or positive answer you're
 7 looking for?
 8 Q Do you think it's appropriate for a --
 9 A No. No, I do not think that's appropriate,
 10 although, you know, one might want to know what
 11 the circumstances are. But I would say no,
 12 that's not appropriate.
 13 Q Do you think it's appropriate for a judge to
 14 flip the bird, the middle finger of the hand, in
 15 open court from the bench to one of the
 16 attorneys in the presence of his client?
 17 A No, I would not think that's appropriate.
 18 Q There wouldn't be any circumstances that would
 19 warrant that, would there be?
 20 A Not that I can think of.
 21 Q Do you think it would be appropriate for a
 22 sitting judge in open court to swear and refer
 23 to his clerk as that Goddamn clerk and words to
 24 that effect?
 25 MR. NICHOLSON: Your Honor, at this point

223

1 I'm going to object. It's beyond the scope of
 2 direct, and it also gets into testimony that
 3 Judge Fuller has admitted he did, and he
 4 admitted he violated the Canons by doing it.
 5 MR. PALMER: I understand, but I'm going to
 6 allow it. You may continue. Your objection is
 7 overruled.
 8 Q (BY MR. SCHAFER:) Do you think that would be
 9 appropriate to refer to a clerk of courts with a
 10 swear word?
 11 A Absolutely not.
 12 Q You'd never do that, would you, Judge?
 13 A No, I would not.
 14 Q When is the last time you saw Judge Fuller?
 15 A Well, the last time I saw Pete, it's been more
 16 than a year. I can't remember. I remember one
 17 of the last times I saw him, we played golf in
 18 Sioux Falls, and that's been probably as many as
 19 three years ago.
 20 Q Did you ever appear in court before him?
 21 A I did not.
 22 Q Because I think you were actually on the bench
 23 before he went on the bench; correct?
 24 A Correct.
 25 Q Okay.

224

1 A Correct.

2 Q **And you are a friend of his?**

3 A Yes, I am.

4 MR. SCHAFFER: That's all.

5 MR. PALMER: Mr. Nicholson, anything else?

6 MR. NICHOLSON: No further questions.

7 MR. PALMER: Any members of the Commission?

8 (No questions were presented.)

9 MR. PALMER: Judge Simko, this is Cris

10 Palmer. Thank you very much for this time. I

11 don't think anybody on the Commission has any

12 questions.

13 THE WITNESS: All right. Did I -- Cris, I

14 heard you identify yourself, and I heard that

15 you were the judicial -- did I hear you say the

16 Commissioners have no questions?

17 MR. PALMER: Yes, Judge Simko. I'll move

18 closer to the phone. The Commission has no

19 questions, and Tom doesn't have any redirect, so

20 we thank for you time.

21 THE WITNESS: I thank you for allowing me to

22 appear by telephone.

23 MR. PALMER: Absolutely. Thank you, Judge.

24 THE WITNESS: All right. Bye.

25 MR. PALMER: Bye, now.

225

1 MR. NICHOLSON: You know, I -- and I can't

2 remember who was a part of this conversation at

3 the break. But you know, Mike and I, we visited

4 about, because we have so many people waiting,

5 that if it's okay with the Commission, that we

6 kind of juggle the order a little, and Mike said

7 he would like to call Judge Fuller later in the

8 day.

9 MR. PALMER: That's just --

10 MR. SCHAFFER: That's perfectly agreeable.

11 MR. PALMER: Just fine. Just fine.

12 JUDGE DAVID GIENAPP,

13 called as a witness herein, having been first duly

14 sworn, was examined and testified as follows:

15 DIRECT EXAMINATION BY MR. NICHOLSON:

16 Q **Your name is David Gienapp; correct?**

17 A That's correct.

18 Q **And you're a sitting circuit court judge with**

19 **your main office in Brookings, South Dakota; is**

20 **that correct?**

21 A Correct.

22 Q **Can you just run us through your background a**

23 **little bit, your legal background before being a**

24 **judge, and how long you've been on the bench.**

25 A I started and clerked for the South Dakota

226

1 Supreme Court for a. Year, I was with the

2 attorney general's office over in the highway

3 department for maybe a year and a half. Then I

4 was with the U.S. Attorney's Office for maybe

5 seven years, I think. Went into private

6 practice in Madison in '76, and then went on the

7 bench in the middle of 2002, I believe.

8 Q **What -- in your background as a private lawyer**

9 **before going on the bench, what primarily kind**

10 **of work did you do?**

11 A Oh, you know, we had a -- I did more litigation

12 than -- but still had an office practice, being

13 in Madison.

14 Q **Did you try a lot of jury trials?**

15 A Yes.

16 Q **Appear in front of a lot of judges before you**

17 **became one?**

18 A Yes.

19 Q **Did you do that also when you were in the**

20 **U.S. Attorney's Office?**

21 A Yeah, I tried a lot of cases there and, you

22 know, the variety of judges was a little more

23 limited, but still -- and I, you know, but I in

24 South Dakota, I tried in front of a lot of

25 judges and some out of state, also.

227

1 Q **When you were at the U.S. Attorney's Office,**

2 **what were your primary duties?**

3 A Well, originally I started to do a bunch of

4 condemnation cases, but then I got over on the

5 criminal side and my latter years were all

6 criminal or primarily criminal.

7 Q **Basically you prosecuted criminal cases?**

8 A Right.

9 Q **Have you been active in the bar? I mean, have**

10 **you held any offices, you been on any**

11 **commissions or boards?**

12 A Yeah, I was president of the state bar, I was

13 president of the South Dakota Trial Lawyers

14 Association. I was -- had a number of committee

15 assignments in the state bar. I was on the

16 Judicial Qualifications Commission and chaired

17 that for four years. I was -- and I just got

18 off the House of Delegates for the American Bar

19 Association and was -- not -- well, both the

20 House of Delegates, but I was on the Board of

21 Governors for the last three years.

22 Q **Basically for the last 30-some years or more,**

23 **you've been involved in some aspect of the bar,**

24 **either on a committee or a board or some aspect**

25 **where you've been active; is that correct?**

228

1 A That would be correct.

2 Q You indicated you'd been member of the Judicial
3 Qualifications Commission. When was that?

4 A Good question. I started whenever Dave Vrooman
5 was president of the bar, so I don't know. I
6 would guess it would have been in the '80s
7 sometime.

8 Q Okay. And have you always been --

9 A And I think --

10 Q Excuse me.

11 A I think Mickelson was governor at that time.

12 Q Have you also represented the Judicial
13 Qualifications Commission as their attorney in
14 these types of proceedings like we have here?

15 A Yeah, I did on four separate occasions. I think
16 most of them before I went on the Commission.

17 Q Okay. Have you been appointed to any
18 commissions or study teams by the Supreme Court?

19 A Yeah. I'm -- I was on the committee that
20 rewrote the Canons after White versus Minnesota;
21 I was on the -- I'm on the PAC Committee. Can
22 ask Judge Davis what that stands for. I don't
23 know what the acronym stands for.

24 And I was on the Equal Justice Commission
25 that went around to all the reservations and

229

1 various other locations to look into racial bias
2 in the courts and other aspects of law
3 enforcement.

4 Q When were you on that commission?

5 A Would have been probably shortly after I was on
6 the bench, so I would guess it maybe started in
7 2003 and probably took two years.

8 Q When did you start -- I mean, what's your
9 background with Pete? When did you start
10 becoming more familiar with him? Maybe tell us
11 when you met him. Start that way and work us
12 through your history with Pete.

13 A Well, Pete and I were in undergrad together. We
14 knew each other in undergrad. I wouldn't say
15 we -- we probably socialized some, but not a
16 lot. We belonged to different fraternities. I
17 didn't go to law school at the University of
18 South Dakota, I went to Wyoming.

19 But I know I had occasions to be with Pete
20 and Jacque when we were both in law school in
21 Madison. She's from Madison. And for a while I
22 was going with a girl that was in her class, and
23 so we'd get together over Christmas, I think, a
24 few times.

25 And then after we got into the -- after I

230

1 got the U.S. Attorney's Office, I had some
2 litigation with him, and we -- I can't remember
3 the nature of it, but we spent quite a little
4 time together on that.

5 And then things evolved, we were friends and
6 we'd see each other at various functions, and he
7 would be in Madison occasionally. And then,
8 well, maybe 20 years ago, a group of us started
9 going to Green Lake, Willmar, Minnesota right
10 after Labor Day, golfing for about four, five,
11 six days.

12 And during that period of time, Pete and I
13 were -- probably spent more time together than
14 any of the others because I would generally
15 drive up. He'd either meet me in Madison or I'd
16 pick him up at his in-laws'. I knew his in-laws
17 well in Madison, too, so I'd see him through
18 them.

19 Q You kept -- other than his -- the golf trips,
20 have you kept regular contact with him over the
21 years?

22 A Yeah. You know, regular, I mean, certainly it
23 wasn't on a weekly basis, but we'd have
24 occasionally phone calls and get together if we
25 were at bar functions, that type thing.

231

1 Q When you were -- after Pete became a sitting
2 circuit court judge, did you have -- did you get
3 a chance to visit with him, particularly on
4 these golf trips, about judging and your
5 philosophies and those types of things?

6 A Yeah, no question about it. We would, like I
7 said, we would probably spend eight hours in the
8 car, just the two of us, and that's basically
9 what we talked about, was the law, judging.

10 He would ask me things about how I handled
11 certain matters, I would ask him things,
12 questions about how he handled matters, and
13 discuss the pros and cons of it. I probably
14 had -- well, I know I've had more discussions
15 with Pete about judging than any other judge.

16 Q Do you get a sense for what his respect or what
17 his feelings are about the judiciary and the
18 practice of law?

19 A Well, I mean, yeah, just didn't come from since
20 we've been judges. I was on the bench a little
21 earlier than him. I always felt Pete had a
22 tremendous respect for the rule of law, the
23 courts, the procedures, that he viewed the legal
24 profession as a profession and not a job. You
25 know, he would be frustrated at times, but he

232

1 was trying to, you know, learn.

2 And in private practice, I think, even
3 though in the later years I didn't have much in
4 litigation, one on each side, was very
5 interested in representing his clients. And
6 when I'd see him, I'd have -- occasionally talk
7 about cases.

8 Q If I told you here that the main reason that
9 Pete is in front of this Commission is basically
10 demeanor in the courtroom, both on the bench and
11 informally, maybe even outside the courtroom
12 itself and the courthouse, have you seen or
13 heard any of or talked to him at all about that
14 characteristic or his personality and his
15 demeanor and how he likes to control it or not
16 control it?

17 A Not -- not really. I remember talking to him
18 about, you know, where he would be frustrated
19 perhaps with the amount of, the status of
20 preparation that would, as I was, that you would
21 see oftentimes, not by what you would classify
22 as the -- I shouldn't say good lawyers, but the
23 lawyers that litigate. But there's -- there was
24 a frustration there I could see, and I had the
25 same frustration.

233

1 Q Have you had -- I think you related to me an
2 occasion where -- or, at least one occasion
3 where you felt that a witness in front of your
4 court was just not reliable, and I think you
5 related to me an incident about a Wessington law
6 enforcement officer. Could you tell the
7 Commission about that and how you handled it.

8 A Well, yeah, I've had quite a few cases where I
9 didn't feel a witness was reliable. But as far
10 as law enforcement was concerned, I definitely
11 had a situation in Wessington Springs where I
12 felt that and made a specific finding that a law
13 enforcement officer was not credible in
14 connection with an arrest and his testimony in
15 connection with it. And there were two separate
16 cases.

17 The first one, I didn't make a credibility
18 finding, but I think I might have made a finding
19 that his actions were inappropriate. And then
20 in the second one, I definitely made a
21 credibility finding.

22 And I had one other situation where I, even
23 though the State won, I made a credibility
24 finding that I can recall relating to a DCI
25 agent where I just found he was less credible

234

1 than a parole agent.

2 Q One of the issues here in front of the
3 Commission is Pete's ability to handle
4 situations like when he has somebody in his
5 courtroom that he maybe has some sense about or
6 some feelings, and he doesn't appropriately
7 verbalize or show the proper respect to those
8 kinds of witnesses.

9 Given your history with Pete and your
10 knowledge of him and your discussions with him,
11 if it was brought to Pete's attention that his
12 actions were detrimental to the process, and he
13 was told how to change and he said he wanted to
14 change and he was willing to change, would you
15 believe him?

16 A Yes.

17 Q And why?

18 A Well, first of all, I -- based on, first of all,
19 based on Pete's tremendous respect for the
20 system that I truly believe and have got to
21 learn over the years, and I -- you know, and
22 not -- I don't know any of the, necessarily any
23 of the facts here. But I do know that Pete,
24 just through my knowledge of him, is quicker to
25 say what he feels than I might be.

235

1 But I don't think there's any question, if
2 that's the problem of saying it right off the
3 top of your head and not putting it in writing
4 later on, I guess there's no question in my mind
5 that he would conform to that.

6 Q Do you have any doubt about Pete's integrity as
7 a person and his honesty in dealing with people
8 and just, I guess, his sense of being a moral
9 person?

10 A No, absolutely not.

11 Q Given your history in the bar and how active
12 you've been, I take it that the practice of law
13 and the judiciary means a lot to you.

14 A Yes.

15 Q Would you be here offering these comments if you
16 believed that Pete Fuller could not be a good
17 judge, and that if he has some problems with
18 character on the bench, that he couldn't change
19 them?

20 A No, I wouldn't be.

21 Q Now, there's -- there has been some -- I'll just
22 very quickly summarize this to you. There's
23 been some testimony by some mental health
24 professionals, and Pete is currently seeing
25 those mental health professionals. If it comes

236

1 out of that, and if the Commission were to think
2 it was a good idea, would you agree to be some
3 kind of a contact -- it's hard to describe it at
4 this point, but a contact person or a mentor or
5 a liaison for Pete to discuss his frustrations,
6 if he has any to discuss, the positive parts,
7 just to be an outlet for Pete if it's needed by
8 him?

9 A Yep. Certainly.

10 Q How many years were you a prosecutor?

11 A Seven.

12 Q Have you ever heard Pete verbalize or say
13 anything that led you to believe that he was
14 anti-law enforcement?

15 A No. You know, he, along with numerous other
16 judges I've been around, have been critical of
17 law enforcement in specific cases. But no, I
18 certainly haven't heard him generally attack law
19 enforcement as a whole.

20 Q Anything different than your opinion of that
21 Wessington officer that we talked about?

22 A No. And you know, there's -- you know, you
23 hear -- I hear it more in my circuit just
24 talking to judges, and had one judge that, you
25 know, in the circuit that disbelieved a law

237

1 enforcement officers so much that he finally
2 felt he had to recuse himself on every case that
3 person was in because he couldn't be fair and
4 impartial. And -- but you know, it was an
5 isolated incident. He didn't broadly attack law
6 enforcement.

7 Q Now, when you were -- at some point earlier in
8 your career, didn't they have a, what I want to
9 call -- and I think maybe through the Judicial
10 Qualifications Commission, didn't they have,
11 whenever a judge was experiencing something
12 before they, you know -- not that -- a multiple
13 discipline situation, when someone was getting
14 their first disciplinary complaint against them
15 or a situation was starting to develop, wasn't
16 there something I think you related to me about
17 a team of people or judges that would come in
18 and maybe help that judge get back on the right
19 track?

20 (Beginning of sealed testimony.)

21 .
22 .
23 .
24 .
25 .

238

1 .
2 .
3 .
4 .
5 .
6 .
7 .
8 .
9 .
10 .
11 .
12 .
13 .

14 (End of sealed testimony.)

15 Q Just before you, we heard from Judge Simko in
16 Sioux Falls, and I asked him the question of
17 whether or not he'd be there to be someone who
18 would visit with and help Pete out if he had
19 issues or questions and so on, and I think I
20 asked you that.

21 Would you have any problem, if the
22 Commission thought it was appropriate, for you
23 to visit with Judge Simko occasionally and the
24 two of you confer and talk with Pete and act as
25 some kind of a team, if need be, just to, you

239

1 know, let him continue with his mental health
2 objectives and to help him have an outlet for
3 those type of objectives?

4 A Absolutely. And I'm -- I know John well and
5 we're good friends and would have no problem
6 doing that.

7 MR. NICHOLSON: I have no further questions.

8 CROSS-EXAMINATION BY MR. SCHAFER:

9 Q Judge, are you appearing here voluntarily?

10 A Yes.

11 Q And I think you told me you set aside a day so
12 you could be here in person --

13 A Right.

14 Q -- is that correct? You're not here under
15 subpoena?

16 A No.

17 Q And you're here as a character witness for
18 Judge Fuller?

19 A Well, I'm here to answer any questions.

20 Q But you'd agree you're here as a character
21 witness --

22 A Yeah.

23 Q -- for Judge Fuller? When you drafted the
24 Canons, was that recently?

25 A Well, the Canons we were involved with strictly

240

1 dealt with elections.
 2 Q Okay. Gotcha. I'm just going to show you --
 3 A White versus Minnesota changed everything and...
 4 Q I'm going to just show you this Canon, it's
 5 Canon 2B, and ask you to read the last sentence
 6 in the record out loud.
 7 A A judge shall not testify voluntarily as a
 8 character witness.
 9 Q Do you -- and read the comment.
 10 A That a judge must not testify voluntarily as a
 11 character witness because to do so may lend
 12 prestige of the judicial office in support of
 13 the party for whom the judge testifies.
 14 Q Had Mr. Nicholson brought that to your attention
 15 before you showed up here?
 16 A I guess I was -- you know, and I had told
 17 Mr. Nicholson one time, you know, If you want to
 18 give me a subpoena, that's fine. But I look at
 19 that Canon as being something not -- many of the
 20 instances I prosecuted, judges testified one way
 21 or the other. I look at that as being a
 22 noncommissioned-type situation.
 23 Q So you don't think that applies here?
 24 A No.
 25 Q Let me ask you this, you said you had a case in

241

1 Wessington Springs where you questioned the
 2 credibility of a law enforcement officer.
 3 A Yes.
 4 Q Was that in connection with a motion hearing of
 5 some type?
 6 A Right. Yes.
 7 Q That wasn't a jury trial?
 8 A No.
 9 Q So you had to, as a judge, make credibility
 10 determinations and findings on specific issues?
 11 A Right.
 12 Q That's different from a judge commenting on a
 13 witness's credibility in a jury trial.
 14 A Well, yeah.
 15 Q And you told me about another judge that you
 16 knew that had a problem with the credibility of
 17 a witness, and he chose to recuse himself
 18 because he was concerned he couldn't be fair?
 19 A After a couple, three instances, I think, and
 20 whether he's flipped back now, I don't know.
 21 Q And just so I'm clear, you don't know anything
 22 about the underlying facts that bring us here;
 23 is that correct?
 24 A That's correct.
 25 Q And you don't know anything about the demeanor

242

1 issues that bring Judge Fuller here, do you?
 2 A No.
 3 Q He hasn't told you about those?
 4 A No, I haven't talked to him.
 5 Q Okay. Do you know if Judge Simko would even be
 6 authorized under the federal system to act as a
 7 mentor for a state court judge?
 8 A I don't think there's any question you could,
 9 but...
 10 Q You haven't researched that?
 11 A I haven't researched it but, you know, if it's
 12 okay with Chief Judge --
 13 Q Schreier?
 14 A -- Schreier, you can pretty much do anything if
 15 you're a federal judge.
 16 MR. SCHAFFER: That's all.
 17 MR. NICHOLSON: Nothing.
 18 MR. PALMER: Any members of the Commission?
 19 One thing Ted mentioned to me, I think what I'm
 20 going to, Judge Gienapp, is because this record
 21 may be public, Jacque, I'm going to want to seal
 22 that part or deal with the issue where Judge
 23 Connolly's name came up. And we'll make sure
 24 that doesn't appear in the record when it goes
 25 up. Thank you. Thank you, Judge.

243

1 (Witness left the room.)
 2 JOHN NOONEY,
 3 called as a witness herein, having been first duly
 4 sworn, was examined and testified as follows:
 5 DIRECT EXAMINATION BY MR. NICHOLSON:
 6 Q State your name, please.
 7 A John Nooney.
 8 Q And you practice law here in Sioux -- or in
 9 Rapid City, John?
 10 A Yes, I do, Mr. Nicholson.
 11 Q How long have you done that?
 12 A I've been in Rapid a little over 25 years.
 13 Q Okay. And how long have you been a practicing
 14 attorney?
 15 A Twenty-six and a half years.
 16 Q Okay. Didn't know you were that old.
 17 A Unfortunately, I am.
 18 JUDGE WILBUR: Unfortunately.
 19 Q (BY MR. NICHOLSON:) You testified, am I
 20 correct, before the Commission in a Show Cause
 21 hearing earlier this year?
 22 A Yes, I did.
 23 Q And you were interviewed by Dave Nelson prior to
 24 that; is that correct?
 25 A Yes, I was.

244

1 Q Do you know why Mr. Nelson chose to interview
2 you? Did you do something to prompt that?
3 A No. My recollection is that Mr. Nelson just
4 called me one day at the office and said he
5 would like to visit with me and told me the when
6 and where, and I met him and visited with him.
7 Q Did he tell you how he picked your name out of
8 the phone book, so to speak, or how he found his
9 way into your office?
10 A I have -- he did not say and I do not know how
11 or why.
12 Q Okay. I think you related to him, and to a
13 certain extent also in testimony here in the
14 prior proceeding, that there was an occasion
15 that you had a proceeding in front of
16 Judge Fuller. I think it had something to do
17 with land and the placement of one of the
18 correctional facilities here in Rapid City; is
19 that correct?
20 A Yes. I had shared with Mr. Nelson my
21 involvement in that litigation.
22 Q Can you tell us what that involvement was.
23 A Yes. Back in 2009, the Department of
24 Corrections had entered into a contract to buy a
25 piece of real property from a client of ours.

245

1 And prior to the closing of that transaction,
2 litigation was commenced by an adjoining
3 property owner, Mr. Don Perdue, to stop or to
4 get injunctive relief to stop that process. So
5 I was involved in representing the selling
6 party's interest in that transaction.
7 Q Okay. And at some point in that proceeding, did
8 it -- did a precedent or authority of prior
9 Supreme Court rulings come into play, or was it
10 part of what was going on in a motion hearing or
11 some other proceeding?
12 A There was some discussion about prior
13 Supreme Court decisions on a case that had some
14 relationship to this case, yes.
15 Q Can you tell us about that. I mean, tell us
16 when it happened and how it happened.
17 A Involving my contact with Judge Fuller?
18 Q Yeah. Yeah, tell me what kind of hearing it was
19 and how this discussion came up.
20 A I don't remember exactly, Mr. Nicholson. I
21 recall that there were a series of hearings on
22 the injunctive relief, and then in essence the
23 case was tried within, I think, five or
24 six weeks of the case starting.
25 So there was a number of hearings, is my

246

1 recollection, related to the injunctive relief
2 and then how the case was going to be resolved.
3 So there were at least a couple hearings, is my
4 recollection, but that's the best I can recall
5 about that.
6 Q And at some time did Judge Fuller call you at
7 your office and make some comments to you?
8 A At some time during that litigation, I don't
9 remember when it was, but like I said, the whole
10 thing lasted less than six weeks, I think. I
11 recall having a conversation, a telephonic
12 conversation with Judge Fuller about some prior
13 Supreme Court precedent as it related to this
14 particular case I was working on.
15 Q And was that information given to you because --
16 to give you an advantage in the hearing or to
17 kind of give you a heads-up that you were on the
18 bad side of the law and maybe you should go do
19 some research?
20 A My impression was that Judge Fuller's question
21 or statement to me was, John, have you
22 considered how the Supreme Court dealt with this
23 particular case? I think it was a case that
24 Judge Heck had tried down someplace in the
25 Sixth Circuit, is my recollection.

247

1 And it concerned -- again, my recollection
2 is, an issue relative to taxing of gold in the
3 Homestake Mining Company, I believe, that Judge
4 Fuller had been involved in. It was just more
5 of a, John, have you looked at this case, isn't
6 this case going to be controlling? How -- you
7 know, how are you going to deal with it?
8 And it was more just kind of a question that
9 was being raised that he had just called me and
10 asked me about it, so. And I had relayed that
11 to Mr. Nelson when he and I talked.
12 Q And the case he relayed to you was a case that
13 was not favorable for your position; is that
14 correct?
15 A I believe that to be true.
16 Q And did he also bring that case up then later in
17 open court so everybody heard about the case and
18 what his feelings about that case were?
19 A Yes. And I think -- as I mentioned when I
20 testified telephonically back in September, I
21 distinctly remember Judge Fuller mentioning that
22 case of Judge Heck's to all of the lawyers that
23 were involved in that process during one or more
24 hearings, because it did have some controlling
25 effects on the litigation, I believe.

248

1 Q And the part of that whole situation that
2 bothered you was the call to your office;
3 correct?
4 A Yeah, it is. Just with any -- whenever a judge
5 calls you, that's always something that you
6 just -- it seems awkward, I guess is the right
7 word you would use.
8 Q You felt a little uncomfortable that you were
9 visiting with him and the other party was not on
10 the phone at the same time; correct?
11 A That would be fair.
12 Q Was it your sense that it made any difference in
13 the outcome of the proceedings?
14 A None whatsoever, I don't think.
15 Q I think you also said in your interview with
16 Mr. Nelson that on occasion, that Judge Fuller
17 can be -- and these aren't your words, these are
18 just my paraphrasing. But he can be harsh or
19 critical, blunt. I don't know if those are your
20 words, but things to that effect. Do you recall
21 that?
22 A Yes, I recall telling Mr. Nelson that, and I
23 think I probably also said to Mr. Nelson, with
24 all due respect to the Judges here, that's not
25 uncommon for a lot of judges to have that

249

1 ability from time to time to be that way, so...
2 Q Okay. In your estimation, in the times you've
3 been in front of Judge Fuller, has he been a
4 competent judge?
5 A Yes. I've always found Judge Fuller to be
6 well-prepared for whatever the subject matter
7 is.
8 Q Did -- does he get his work done on time?
9 A That's always been my experience.
10 Q Did you -- had you been -- after you were
11 interviewed by Mr. Nelson, did you have an
12 occasion to be in Judge Fuller's courtroom?
13 A Yes. I was in front of Judge Fuller on a case
14 that we had tried, and then there was a briefing
15 period, is my recollection. And I was in front
16 of Judge Fuller after this process got started,
17 I think, because I was -- I believe I was aware
18 of the fact that Judge Fuller would have known
19 that I would have talked to Mr. Nelson prior to
20 this decision coming down in that case.
21 Q What was your experience with Judge Fuller on
22 that occasion?
23 A It was fine. There was nothing unique about it
24 or uncomfortable about it. It was, Judge Fuller
25 announced his decision in a case we had tried to

250

1 the court and it was a -- there was nothing
2 wrong with the process at all.
3 Q Did you sense or feel any hard feelings or
4 retaliation or anything like that towards you?
5 A No. Not at all.
6 Q If you had the occasion to have a civil
7 proceeding or a family proceeding or whatever
8 type of law that you are representing someone on
9 and Judge Fuller was drawn as the judge on that
10 case, would you have any hesitancy in leaving
11 him on your case?
12 A As a practitioner, I wouldn't have any
13 reluctance at all, no.
14 Q That's with keeping the best interest of your
15 clients in mind; correct?
16 A Of course. Subject to the client being apprised
17 of their right to recuse a judge, yes, I would
18 have no concerns myself.
19 Q As a lawyer and your knowledge of Judge Fuller,
20 you would not feel that there was any reason not
21 to leave him on a case?
22 A I would have no concerns with it.
23 MR. NICHOLSON: Okay. I have no further
24 questions.
25 MR. PALMER: Mr. Schaffer.

251

1 CROSS-EXAMINATION BY MR. SCHAFER:
2 Q Mr. Nooney, you agree that ex parte
3 communications are inappropriate?
4 A That's the reason why I made that statement to
5 Mr. Nelson. I felt uncomfortable about it, yes.
6 Q Did you also -- I'm looking at Mr. Nelson's
7 report -- make this statement: You believe
8 Judge Fuller lacks judicial temperament in that
9 he is unnecessarily bombastic or caustic?
10 A He can be at times, or had been in the past,
11 yes.
12 Q You made that statement to Mr. Nelson?
13 A Yes, I did make that statement to Dave.
14 Q And I think when I visited with you after it was
15 apparent that Judge Fuller knew your name was
16 going to be divulged in a report was before that
17 announcement of the decision in the case you had
18 tried.
19 A Exactly. Because I had called you, Mike,
20 Mr. Schaffer, and I told you that I had this
21 decision coming down, and I obviously was
22 somewhat uncomfortable because I had a client's
23 fate that was in the Court's -- Court had to
24 make a decision, and I had said something, which
25 I didn't mean to affect my client, but I was

252

1 brought into this process.
 2 **Q** You were very apprehensive, weren't you?
 3 **A** I was apprehensive before the hearing -- before
 4 the decision was announced, yes.
 5 **Q** Let me ask you this, what do you think your
 6 obligation would be to your clients in a
 7 circumstance like that where you've offered
 8 testimony in a hearing either favorable to or
 9 unfavorable to a judge?
 10 **A** Subject to what I understand of the
 11 confidentiality associated with this process, I
 12 haven't determined for myself what that
 13 obligation would be to a client. Because I
 14 obviously don't have anything in front of
 15 Judge Fuller today, I don't know what my
 16 obligation would be, that's -- I'm not going to
 17 say it's awkward, it's just something I haven't
 18 researched, I guess.
 19 **Q** You think it's your obligation or you think it's
 20 the Judge's obligation to address it?
 21 **A** I don't know the answer to that, Mr. -- I don't
 22 know if it's my obligation or the Court's
 23 obligation, so I'm -- having not read those
 24 standards, I'm not certain what the answer to
 25 that is.

253

1 **Q** You can agree with me, Mr. Nooney, that it puts
 2 you and your client in a very awkward position,
 3 if your client isn't aware that you've testified
 4 in proceedings concerning Judge Fuller, he's
 5 sitting on your client's case, something goes
 6 wrong from your client's perspective, and he
 7 finds out later that, Hey, you never told me
 8 about this. You know, I should have had full
 9 information. Can you see the problem?
 10 **A** No. I understand the dilemma.
 11 **Q** You don't have an answer to it, do you?
 12 **A** I haven't looked at it, so I just -- I haven't
 13 been faced with that situation today. I don't
 14 know what the answer to that dilemma is.
 15 **MR. SCHAFFER:** That's all.
 16 **REDIRECT EXAMINATION BY MR. NICHOLSON:**
 17 **Q** Other than these considerations that
 18 Mr. Schaffer brought about, you know, the
 19 confidentiality of this and what you have to
 20 divulge to a client and so on, you, though, with
 21 your knowledge of Judge Fuller and your prior
 22 appearances in front of him, have any reason not
 23 to take a client in front of him, based upon the
 24 kind of result that you think is appropriate in
 25 a court of law?

254

1 **A** Tom, would you please rephrase that. I want to
 2 make sure I answer the question properly.
 3 **Q** I apologize. I have cough drops in my mouth and
 4 they are sticking to my roof.
 5 Just basically on what you think would --
 6 from your perspective and what we've talked
 7 about, do you feel you could go in front of
 8 Judge Fuller and get a fair result even though
 9 he knows that you testified in that prior
 10 proceeding?
 11 **A** I wouldn't have any reservations because of the
 12 fact I have been here or I talked to Mr. Nelson
 13 or I have been in front of this body before.
 14 **MR. NICHOLSON:** Thank you. I have nothing
 15 further.
 16 **RE CROSS-EXAMINATION BY MR. SCHAFFER:**
 17 **Q** Let me ask you this question. You're now
 18 testifying on behalf of Judge Fuller; correct?
 19 **A** Mr. Schaffer, I don't think I'm testifying on --
 20 when I testified before, I didn't see myself as
 21 an advocate then, and I don't see myself as an
 22 advocate today.
 23 I see myself as someone that has been asked
 24 to tell this Commission what factually I know
 25 about certain things. I don't see myself as an

255

1 advocate, I guess.
 2 **Q** Well, if you appeared in a case in front of
 3 Judge Fuller, do you think the other lawyer on
 4 the opposite side should know that you appeared
 5 on his behalf in this proceeding?
 6 **A** I don't -- I'm -- I just don't have an answer to
 7 that. I mean, I understand the dilemma,
 8 Mr. Schaffer. I just don't know what the answer
 9 to it is.
 10 **MR. SCHAFFER:** That's all.
 11 **MR. NICHOLSON:** Nothing further.
 12 **MR. PALMER:** Commission members?
 13 (No questions were presented.)
 14 **MR. PALMER:** Thank you, John.
 15 (Witness left the room.)
 16 **MR. PALMER:** Let's take a couple minutes.
 17 (Brief recess was taken.)
 18 **MR. PALMER:** Let's go back on the record.
 19 **Mr. Hieb,** call your next witness.
 20 **MR. HIEB:** Call Mike Wilson.
 21 **MIKE WILSON,**
 22 called as a witness herein, having been first duly
 23 sworn, was examined and testified as follows:
 24 **DIRECT EXAMINATION BY MR. HIEB:**
 25 **Q** Would you state your name, please.

256

1 A Mike Wilson.
 2 Q Please just identify for the Commission what it
 3 is you do.
 4 A I'm an attorney here in Rapid City.
 5 Q How long have you been an attorney?
 6 A Twenty-three years.
 7 Q And how much of that time has been spent in the
 8 Rapid City area?
 9 A Since '92.
 10 Q Where were you at before then?
 11 A I was in Mitchell for about five years.
 12 Q So would it be fair to say that the bulk of your
 13 practice has been in the Seventh Circuit?
 14 A Yes.
 15 Q All right. Mike, what kind of law do you
 16 practice, if you were going to describe
 17 yourself?
 18 A Plaintiffs personal injury primarily.
 19 Q Trial work?
 20 A Yep.
 21 Q Or the proceedings that lead up to the trials?
 22 A Yes.
 23 Q Does that put you into contact with a fair
 24 number of judges?
 25 A Yes.

257

1 Q In your time as an attorney in this area, have
 2 you been in front of Judge Fuller frequently?
 3 A No.
 4 Q Okay. How many cases would you say you've had
 5 with him?
 6 A I haven't kept track, but less than five,
 7 different cases. Some cases have more than one
 8 matter.
 9 Q And so if you have a case with him, you might
 10 make repeated appearances in front of him,
 11 motion hearings, that sort of thing?
 12 A Right.
 13 Q Your name came up in a report that relates to
 14 this matter, which is why I contacted you and
 15 which is why I've asked you to testify here
 16 today. The -- have you seen the part of the
 17 report that was prepared by Dave Nelson?
 18 A No, but Dave read it to me after he interviewed
 19 me and I confirmed for him that it was accurate.
 20 Q Okay. And just generally describe, if you
 21 could, for the Commission what it is that you
 22 and Dave discussed about that particular case
 23 and why it is you were relating that to him.
 24 A I was surprised that Dave called me. I was
 25 sitting at my desk and Dave Nelson called, and

258

1 the last -- last time he called me before that
 2 was relating to an inquiry for prospective
 3 candidates for judge appointment.
 4 So he called me and said that this was why
 5 he was calling me, and he said that he heard
 6 that I had had an experience in a case involving
 7 a Custer County case and asked me to relate that
 8 to him, and I did.
 9 Q Okay. Would you relate it to the Commission
 10 what it is you related to him.
 11 A Well, the report is accurate, first of all, and
 12 in -- I'll just be very brief so not to waste
 13 your time. But in the proceeding, it was a
 14 motion hearing, and I felt that Judge Fuller's
 15 demeanor at the time of the hearing was, I
 16 guess, abrupt, a little aggressive by tone of
 17 voice and mannerism, and not in keeping with the
 18 finest standards of judicial decorum.
 19 Q Now, had you been in front of Judge Fuller prior
 20 to that hearing on any other cases?
 21 A I had.
 22 Q Did it take you by surprise? I mean, was it
 23 uncommon, from your experience, for him to have
 24 acted that way?
 25 A In my experience, I had cases with Judge Fuller

259

1 before this event and after this event, and this
 2 was a surprise.
 3 Q Was it aberrational, from your experience?
 4 A In my experience, and again, my information is
 5 one little sliver of the whole pie. It was an
 6 aberration, from my perspective, based upon my
 7 experience with Judge Fuller.
 8 Q Now, I haven't related to you the allegations in
 9 the complaint, but I did inform you that, you
 10 know, what I wanted to talk to you about was
 11 bench conduct and your opinions about
 12 Judge Fuller with respect to bench conduct; is
 13 that correct?
 14 A That's right.
 15 Q And what I was getting at was, this incident
 16 that's related here, was that indicative of the
 17 way you or your clients were treated by
 18 Judge Fuller in court in other cases or even in
 19 that case?
 20 A I think this was the only hearing we had with
 21 Judge Fuller on this case.
 22 Q Okay.
 23 A And this was -- I think this was the only time
 24 anything like this had happened in a court
 25 proceeding in the presence of my clients. Now,

260

1 granted, we'd had a couple of other dealings in
2 this case that's described in the report. But
3 the short answer to your question is, Mr. Hieb,
4 this was an isolated occurrence, from my
5 experience.

6 Q You related something to me about walking into
7 his courtroom the next day because you needed
8 something, and I think you described yourself as
9 tip-toeing in. Could you just relate that to
10 the Commission.

11 A That's true. I don't want to minimize what
12 happened because, I'll tell you, my clients were
13 pretty upset and I was pretty upset, too. And
14 the next day I didn't know what was coming, and
15 I was a little anxious about that. And
16 Judge Fuller was as gracious and as cordial and
17 as congenial as he had always otherwise been.
18 And so, and everything went very -- you know,
19 just very -- it was handled appropriately
20 judicially, very good demeanor, and he was
21 perfect.

22 Q From your experience, that experience, and other
23 experiences where Judge Fuller acted
24 appropriately, do you believe that Judge Fuller
25 is capable of being a good judge?

261

1 A Well, I -- let me -- let's be clear about one
2 thing. I've never been critical of the rulings
3 or the quality of the judicial decision-making
4 process. You know, we always disagree with the
5 judge because there's always a winner and a
6 loser in every motion. So, at least half the
7 time I'm upset with the ruling. But my only
8 concern was with the way he presided, not the
9 decision that was made.

10 Q And I guess that was a poor question on my part.
11 He has presided in cases with you where he's
12 acted appropriately?

13 A Oh, absolutely.

14 Q And so, I guess, does that lead you to believe
15 he can act appropriately?

16 A Absolutely.

17 Q Okay. Going forward, I realize that
18 Judge Fuller is no longer the judge on the case
19 that brought you in contact with Dave Nelson,
20 and that's been reassigned to a different judge.
21 But going forward, do you have any qualms as an
22 attorney about appearing before Judge Fuller
23 because of your having to be involved in this
24 matter?

25 A I've been thinking about that question a long

262

1 time. You called me last week and I've been
2 thinking about that whole thing since the phone
3 rang and Dave Nelson told me why he was calling
4 me, because this is a very uncomfortable
5 position for any advocate who is going to appear
6 in front of a judge going forward, is that
7 question.

8 And I have thought about this a lot. And I
9 respect every lawyer in this room. And so I am
10 convinced that Judge Fuller -- I have no
11 question whatsoever that moving forward, I can
12 appear in Judge Fuller's court as if this never
13 happened.

14 And I'm sure that he will treat me
15 appropriately and my clients appropriately and
16 will make rulings like he sees them going
17 forward, and I'm not worried about that. That's
18 the conclusion I've drawn after thinking about
19 this for a very long time.

20 MR. HIEB: I don't have any other questions,
21 Chairman Nelson [sic].

22 MR. PALMER: Mr. Schaffer.

23 CROSS-EXAMINATION BY MR. SCHAFER:

24 Q Mr. Wilson, I don't know if the report really
25 tells anybody what happened. So maybe you

263

1 should tell the Commission why your client was
2 in tears and the husband was upset and what
3 exactly Judge Fuller did to cause that.

4 A You know, when Mr. Schaffer -- when Mr. Nelson
5 called me and asked me that and I told him what
6 I told him and he read it back to me, I kind of
7 felt like a crybaby, like, What am I complaining
8 about. If you ask my wife that question, she
9 could answer -- she could tell you exactly what
10 was said and how it was said.

11 I can only tell you that the tone and the
12 demeanor was -- was impatient, it was abrupt, it
13 was aggressive, it was condescending, it was
14 rude. And my clients thought he was going to be
15 unfair going forward because it seemed like to
16 them, they had been treated very unfairly that
17 day. That was the feeling, Mike, that we had
18 about that after that day.

19 And my client -- you understand she's
20 paralyzed. And this is the most horrible case
21 I've ever had in my life and the stakes in this
22 case are huge. And she's powerless to do
23 anything other than to take what someone gives
24 her. And she felt like this judge was going to
25 be unfair with her, and she was very, very upset

264

1 and frightened, as was her husband, as was I.
 2 **Q And you shared her feelings?**
 3 **A** I did. I was very upset with the way we had
 4 been treated that day.
 5 **Q And you had some reluctance to even talk to**
 6 **Mr. Nelson about it, knowing that case was still**
 7 **pending?**
 8 **A** I was reluctant to talk to Mr. Nelson at all,
 9 and then I decided that this process is more
 10 important than one case or one lawyer or one
 11 judge, and I decided to talk to Dave and tell it
 12 like it was. I didn't call Dave, he called me.
 13 But yeah, I was reluctant.
 14 **Q I think you told me one time when we visited**
 15 **that you say: One day Judge Fuller's hot and**
 16 **the other day he's -- and you described a swear**
 17 **word.**
 18 **A** What was the word I used?
 19 **Q Well, I think you said he's a son-of-a-bitch.**
 20 **A** That's right.
 21 **Q Do you agree with that?**
 22 **A** That day, he was.
 23 **Q Yes.**
 24 **A** That day, he was.
 25 **Q Let me ask you this, Mr. Wilson, do you think --**

265

1 this proceeding is about Judge Fuller, or
 2 what -- why do you think you're here?
 3 **A** Well, I'm not happy to be here, but I'm -- I
 4 guess I'm here because Mr. Hieb asked me if,
 5 going forward I would have any trepidation about
 6 his behavior and his treatment of my clients and
 7 me, and I think that's why I'm here. I think
 8 that's why I was called, was to answer that
 9 question.
 10 **Q Do you think that should be a question that you**
 11 **should have to answer?**
 12 **MR. HIEB:** I'll object as argumentative.
 13 **MR. PALMER:** Overruled. You may answer the
 14 question.
 15 **A** Well, I think that you could ask every single
 16 lawyer who has appeared in Judge Fuller's court
 17 and you could get a thousand answers and they
 18 would be what they are.
 19 But I think the larger question really is,
 20 where do we go from here? There's been a
 21 newspaper article and there's been a man
 22 suspended and it's been secret. And I think the
 23 larger question frankly is, how do we get from
 24 the mess we're in right now to where we are
 25 ultimately going to go? And that's up to you,

266

1 obviously, as how that's handled. And to me,
 2 that's a much larger question than do I think
 3 he'll be fair going forward. And I don't have
 4 an answer for that.
 5 **MR. SCHAFFER:** Okay. That's all.
 6 **MR. HIEB:** Nothing.
 7 **MR. PALMER:** Any of the Commissioners?
 8 (No questions were presented).
 9 **MR. PALMER:** Thanks, Mike.
 10 **MR. McBRIDE:** I do.
 11 **MR. PALMER:** Oh, Ted.
 12 **MR. McBRIDE:** I'm sorry.
 13 **EXAMINATION BY MR. McBRIDE:**
 14 **Q Mr. Wilson, you didn't call Mr. Nelson, did you?**
 15 **A** No.
 16 **Q You didn't go in to Judge Fuller and say, You**
 17 **know what, you were out of line yesterday, did**
 18 **you?**
 19 **A** I did not.
 20 **Q Can you imagine yourself doing that to a judge?**
 21 **A** I don't think I've got the courage.
 22 **Q Not many of us in the practice of law do, do we?**
 23 **To go in and tell a judge that they've been out**
 24 **of line?**
 25 **A** There are some who do and there are some who

267

1 have, and I have never done that.
 2 **Q Causes the judge to have an absence of feedback**
 3 **when they act in this way; is that correct?**
 4 **That -- that feeling. That feeling that you**
 5 **had, he didn't get feedback; right?**
 6 **A** Nothing direct. He may have sensed from my body
 7 language that I wasn't very happy, but I didn't
 8 sass him, and I didn't go into his chambers and
 9 tell him that he was out of line.
 10 **MR. McBRIDE:** That's all I have.
 11 **MR. PALMER:** Prompt anything, Jack?
 12 **MR. HIEB:** No.
 13 **MR. PALMER:** Mike?
 14 **MR. SCHAFFER:** No.
 15 **MR. PALMER:** Anybody?
 16 (No further questions were presented.)
 17 **MR. PALMER:** Thank you, Mike. Appreciate
 18 it.
 19 (Witness left the room.)
 20 **THOMAS G. FRITZ,**
 21 called as a witness herein, having been first duly
 22 sworn, was examined and testified as follows:
 23 **DIRECT EXAMINATION BY MR. NICHOLSON:**
 24 **Q State your name, please.**
 25 **A** Thomas Fritz. Thomas G. Fritz.

268

1 Q You're a lawyer, is that correct, Mr. Fritz?
 2 A That's correct.
 3 Q And are you in private practice?
 4 A I am.
 5 Q How long have you been a private practicing
 6 lawyer?
 7 A Since 1972.
 8 Q Is that when you graduated from law school?
 9 A No, I graduated in '71. Then I came out and did
 10 a one-year clerkship with a Judge Andrew Bogue.
 11 Q Who was a federal judge at that time; correct?
 12 A Federal judge.
 13 Q And --
 14 A Then I started with the law firm in September
 15 of '72, and I had to go in the military for a
 16 little while, then I came back.
 17 Q What law firm is that?
 18 A Lynn, Jackson, Shultz & Lebrun.
 19 Q Can you give us kind of a quick summary of the
 20 kind of practice you've been in since you
 21 started.
 22 A It's been 90 percent litigation.
 23 Q Have you been active in bar activities, do you
 24 hold offices, been in organizations, those types
 25 of things?

269

1 A I have.
 2 Q Can you tell us about that.
 3 A Well, let's see, I guess Charlie Thompson as a
 4 mentor, I went through the -- I got involved in
 5 the state bar and -- as well as the American Bar
 6 Association, served as the state bar delegate in
 7 the ABA for 18 years, served on the Board of
 8 Governors of the American Bar Association for
 9 three years, and I served as a state bar
 10 commissioner, and then president of the bar.
 11 Q Actually, you were elected in this facility,
 12 weren't you? Or were you? Or was that in
 13 Sioux Falls?
 14 A No, I think I was elected, I think I actually
 15 got elected in Pierre.
 16 Q Okay. That's not relevant to anything. When
 17 did you first meet Pete Fuller?
 18 A Pete Fuller is from Mitchell, South Dakota, as I
 19 am. So I probably met Pete when I was in
 20 junior high or younger. My parents and his
 21 parents were very close friends, so we spent a
 22 lot of -- I spent every 4th of July that I can
 23 remember at the Fuller residence, out at
 24 Lake Mitchell.
 25 So I knew Pete in high school, and I think I

270

1 probably began to appreciate him and his
 2 friendship back then. And we both went to the
 3 University of South Dakota together, and I
 4 joined his fraternity and then followed him into
 5 law school.
 6 Q Okay.
 7 A So I've known him most certainly all of my adult
 8 life.
 9 Q You kept in regular contact with him over the
 10 years?
 11 A I have.
 12 Q Visit with him not only -- not only see him in
 13 the courthouse, obviously, as a practicing
 14 lawyer, but do you run into him outside of the
 15 legal setting?
 16 A Absolutely.
 17 Q And can you tell us about that a little bit, the
 18 frequency? Is it social?
 19 A Well, he -- until he became a judge, he lived in
 20 Lead, so I didn't see him probably as regularly
 21 as I would have liked to. But yeah, I knew his
 22 wife, Jacque. She was from Madison, and we all
 23 went to school together down in Vermillion. We
 24 were in the same fraternity, our wives were in
 25 the same sorority. We had a lot of mutual

271

1 friends and did a lot of pheasant hunting
 2 together. And then I'd see him up on the ski
 3 slopes when he'd do that, and he still does it,
 4 and I play golf with him every now and then.
 5 Q Did you have any cases against him when he was a
 6 practicing lawyer?
 7 A I most certainly did.
 8 Q And have you had cases in front of him since
 9 he's been on the bench?
 10 A Yes, I have, several.
 11 Q Do you think with all your history with him and
 12 your background both him as a lawyer and as a
 13 judge, that you have a pretty good sense of his
 14 character and who he is?
 15 A Definitely.
 16 Q What's your sense of his integrity?
 17 A If you ask me to describe Pete Fuller, that
 18 would be one of the words I would use. His
 19 integrity is beyond question. He's very honest
 20 and I'd trust him with my life.
 21 Q If he tells you that he's going to do something
 22 or wants to do something, does he follow through
 23 with it? Can you trust him?
 24 A Most definitely.
 25 Q I assume that in your practice, you've been in

272

1 front of other judges besides Judge Fuller in
 2 the 30-some years you've been practicing, or is
 3 it 40? No, almost 40, high 30s?
 4 A I have been.
 5 Q How does Judge Fuller compare, as far as his
 6 competence and knowledge of the law, to those
 7 other judges?
 8 A Well, I -- I think, you know, Pete is extremely
 9 competent. I was very pleased when he told me
 10 that he wanted to seek the judgeship. He is
 11 extremely competent, and I'd trust any client's
 12 case that I have in front of him on a competency
 13 basis.
 14 Q Was he competent as a lawyer? Did you feel that
 15 he understood the law and the procedure and how
 16 to try a case?
 17 A Oh, yeah.
 18 Q Have you had an occasion or do you have personal
 19 experience with any complex cases that have been
 20 in front of Judge Fuller?
 21 A Well, we finished up the Dr. Schwartz/Dr. Teuber
 22 matter here earlier this year in front of him,
 23 which was very complex. I thought it was
 24 very -- had a lot of kind of tricky
 25 medical-legal questions like peer review, and we

273

1 also had half a dozen very well-qualified trial
 2 lawyers who were kind of after him day and night
 3 to either make a decision or screw it up or
 4 somehow -- whatever we trial lawyers try to do.
 5 But he handled all of it, I thought, very well.
 6 I disagreed with some of his decisions, of
 7 course, but...
 8 Q So in other words, just because you're his
 9 friend, you didn't see him throwing anything
 10 your direction?
 11 A No. I did not.
 12 Q Have you had -- I mean, is he a hard worker, is
 13 he prepared for his cases, does he do his work?
 14 A Definitely.
 15 Q And have you had -- have you heard from any of
 16 your partners or you yourself experiencing any
 17 complaints about him getting his work done?
 18 A None.
 19 Q I know you're his friend, and Mr. Schaffer is
 20 probably going to ask you this, but -- and
 21 you've known him for an awful long time. But
 22 would you be in here talking about his integrity
 23 and saying -- and giving your opinion about him
 24 being a competent and good judge if you didn't
 25 think it was so?

274

1 A I really value my profession, and I really value
 2 the judiciary's role in this legal profession.
 3 And I have friends who say, you know, Maybe I'd
 4 be a judge, or I'd like to be a judge, and I
 5 don't know if I'd encourage that.
 6 But that has never been a problem for me and
 7 Pete Fuller. I wholeheartedly endorsed his
 8 decision to get into the judgeship. I tried to
 9 help him when he had an election this last time
 10 around. So I wouldn't sacrifice what I think
 11 about the profession or what I think of our
 12 judiciary simply because he's a friend.
 13 MR. HIEB: Thank you. I have no further
 14 questions.
 15 MR. PALMER: Mr. Schaffer.
 16 CROSS-EXAMINATION BY MR. SCHAFFER:
 17 Q Mr. Fritz, do you know anything about the
 18 underlying allegations that bring us here?
 19 A You know, I know very, very little, Mike. I
 20 really do. If you recall, you asked me what I
 21 was going to say here, and I said I had no idea
 22 because I don't know what the issue is.
 23 Q You don't know anything about the allegations?
 24 A I -- well, there's -- no. There's all kinds of
 25 everything whirling out there. That's why I'd

275

1 like to see this kind of get moving because, you
 2 know, I've heard everything from running drugs
 3 in and out of Nebraska to whatever. I mean,
 4 there's a lot of viciousness out there as a
 5 result of the way this is.
 6 Q Setting aside all of the rumors, do you have any
 7 personal knowledge of the underlying
 8 allegations?
 9 A I don't know what the underlying allegations
 10 are.
 11 MR. SCHAFFER: That's all.
 12 MR. PALMER: Any Commission members with any
 13 questions for Mr. Fritz? Tom, anything else?
 14 MR. NICHOLSON: Nothing further.
 15 MR. PALMER: Thank you, Tom.
 16 THE WITNESS: Thank you.
 17 MR. PALMER: You bet.
 18 (Witness left the room.)
 19 GREG EIESLAND,
 20 called as a witness herein, having been first duly
 21 sworn, was examined and testified as follows:
 22 DIRECT EXAMINATION BY MR. NICHOLSON:
 23 Q State your name, please.
 24 A Greg Eiesland.
 25 Q What's your occupation, Mr. Eiesland?

276

1 A Lawyer.
 2 Q You practice here in Sioux Falls?
 3 A Rapid City.
 4 Q Rapid City. How long have you been practicing
 5 here?
 6 A Since '71.
 7 Q Are you with a firm?
 8 A Johnson, Eiesland & Associates.
 9 Q All right. And have you been involved in other
 10 law firms prior to that association?
 11 A Yes.
 12 Q Can you give us a little history of your legal
 13 background.
 14 A Law clerk for Judge Bogue out of law school
 15 from '71 to '72. Then in Lynn, Jackson law firm
 16 until about 1991. Then in Quinn, Eiesland,
 17 Day & Barker until 1999, and since that time,
 18 the Johnson, Eiesland Law Firm.
 19 Q Primarily what kind of a practice do you have?
 20 A Plaintiffs, plaintiffs personal injury,
 21 primarily.
 22 Q Okay. About how many cases, jury trials, have
 23 you had in your career, if you know?
 24 A It's over 150, 100 -- maybe 170, something like
 25 that.

277

1 Q Just to put a context on that, I think it would
 2 be fair to say that most lawyers that claim to
 3 be trial lawyers probably have less than maybe
 4 25 in their career.
 5 A That's -- that's very frequent. There aren't as
 6 many trials as there used to be. We used to do
 7 a lot more trials before but still do a fair
 8 amount.
 9 Q Have you been active in the bar? Have you
 10 participated in any organizations, committees,
 11 those types of things?
 12 A Yeah, been active in the South Dakota Bar,
 13 South Dakota Trial Lawyers, and then active in
 14 some national organizations, too.
 15 Q Have you held any offices with the Trial Lawyers
 16 or the State Bar Association?
 17 A I've been president of both of them, and with
 18 the state bar, I was on the disciplinary board
 19 for six years.
 20 Q Can you tell me what the duties or what you did
 21 or describe what the disciplinary board does.
 22 A We take complaints that come in from the public,
 23 from a lot of times clients, sometimes judges.
 24 And we are under the auspices of the
 25 South Dakota Supreme Court, and we investigate

278

1 them, sometimes we have a hearing on them, and
 2 we make our recommendation to the Supreme Court.
 3 Q Hearings that are for lawyers rather than
 4 judges, but that are similar to what we're doing
 5 here today; correct?
 6 A I've done them in this very room right here.
 7 Q It would be fair to say you have an
 8 understanding of the disciplinary process for
 9 our profession and also probably for judges?
 10 A I -- I'm just kind of assuming it's something
 11 close to what it is for lawyers, and I don't --
 12 I don't pretend to know what the procedure is,
 13 but I'm assuming that it, that the Board also
 14 reports to the Supreme Court and makes their
 15 recommendations.
 16 Q You understand the need for discipline and for
 17 having some kind of a watchdog over both judges
 18 and lawyers as a profession?
 19 A Very much so.
 20 Q And you respect that process?
 21 A Very much so.
 22 Q How long have you known Pete Fuller?
 23 A I knew him first when he was practicing up in
 24 Lead. We had cases against each other from time
 25 to time throughout our careers. I don't recall

279

1 if we were ever on the same side on anything,
 2 but it runs in my mind that we were, you know,
 3 maybe co-defendants on something or whatever,
 4 but primarily on the other side of cases.
 5 Q What was your impression of his competence as a
 6 lawyer?
 7 A He was very competent. There is no question on
 8 his competency.
 9 Q Was he prepared?
 10 A Yes.
 11 Q Did he -- did you feel that he understood the
 12 law and the procedure that went along with
 13 trying cases?
 14 A Yes. There's no doubt about that.
 15 Q Have you had a chance to be in front of him
 16 since he's gone on the bench?
 17 A Yeah. The other part, which I -- I would want
 18 to say for as a lawyer, you could take his word.
 19 You could take it to the bank. If it was
 20 settled, we did it over the telephone or a
 21 handshake or whatever. And there are -- the
 22 vast, vast majority of South Dakota lawyers, you
 23 can do that with, and Pete Fuller has always
 24 been one of those lawyers.
 25 Q Have you been in front of him as a judge?

280

1 A Yes.

2 Q I assume it's been all trial work?

3 A Yes.

4 Q What's your impression of his competence as a judge?

5

6 A He's always prepared, he listens to the arguments, he rules promptly. Most of the time he would rule from the bench because he was prepared, and — he was prepared and he knows the law. He knows the law. He'll grill you on your cases, which is — I mean, that's fine. He grills both sides, that I've seen.

13 The latest case that I've had with him was an alienation of affections case, and Bill Janklow is the plaintiff's lawyer and I'm defending on it. And we were in front of him with — you know, the arguments were very specific and advocated strongly by both sides. And he was ready for it, he asked all the questions he needed to, and ruled right from the bench.

22 Q Do you consider yourself when you go into court a well-prepared lawyer?

23

24 A I try to be. I do.

25 Q All right.

281

1 A My mentor was Horace Jackson and he stressed that. And I don't pretend to be as prepared as Horace Jackson ever was, but I try to be.

4 Q When you are prepared and you're in Judge Fuller's courtroom, do you ever have any trouble with him?

5

6

7 A No, not at all. Not at all.

8 Q Have you noticed that he respects lawyers that are well-prepared in his courtroom?

9

10 A Oh, yeah.

11 Q Okay.

12 A Haven't.

13 Q Now, have you had Judge Fuller in front of juries?

14

15 A I can't remember if I've — I was trying to wrack my brain here as to whether or not I have tried a case, whether we actually have — and I can't think right off the top of my head of a case that we've tried.

20 I've sat through part of a trial, my son Aaron had a trial and I sat through most of a day and a half of that trial. So I watched him and watched the case.

24 Q And how was Judge Fuller with a young lawyer like your son?

25

282

1 A I thought he was — he was fine.

2 Q Did he treat him fairly?

3 A Very much so.

4 Q Have there been occasions when you've noticed that Judge Fuller can be sarcastic or a little bit, what I would call, blunt?

5

6

7 A I'd say candid.

8 Q Okay.

9 A Yeah. But every court has its own personality and Judge Fuller is — you don't have to wonder what's on his mind, he'll tell you. He'll tell you the ruling. After the whole hearing gets done, he'll visit with the lawyers almost invariably, you know, both sides. And again, it'll be right there, open court, I mean, if there isn't somebody sitting, waiting to do something.

18 But he always does something friendly. Like I say, I mean, just, How is everything going. Or if the other lawyer has driven a long ways, How are the roads, something like that. But some visiting or talking, and that's the way it is.

24 Q If you bring a motion or some kind of a proceeding in front of Judge Fuller that he

25

283

1 views as not having merit or being, I guess, kind of loaded with B.S., is he direct about it, in your experience?

2

3

4 A I've never had that problem. The hearing I was just talking about, alienation of affection case, I lost on that. And, I mean, he didn't take me to task because he didn't agree with me. After we got done, I remember he made some comments about, you know, you'd think that the legislature would do something about alienation of affection. South Dakota is one of the few states that has that. And, you know, just making general comments like a number of judges would.

15 Q In those many times that you've been in front of judges over the years, how would you compare Judge Fuller?

16

17

18 A I think he's a very good judge. I think he's an excellent judge.

20 Q When you have a case or a lawsuit that you bring or that you're defending and you see that Judge Fuller is the judge that's drawn in the case, do you have any hesitancy or any negative feelings about him being on that case?

21

22

23

24

25 A Not at all.

284

1 Q Have you ever felt that way?
 2 A Not at all. Never.
 3 MR. NICHOLSON: I have no further questions.
 4 MR. PALMER: Mr. Schaffer.
 5 CROSS-EXAMINATION BY MR. SCHAFER:
 6 Q Mr. Eiesland, do you know any of the underlying
 7 factual allegations in this matter?
 8 A No. I've been speculating in my mind and people
 9 come up to you, I mean, the public and go --
 10 Q I don't want you to speculate.
 11 A Yeah. No. No.
 12 Q It's a simple question.
 13 A I have no -- I do not know --
 14 Q Okay.
 15 A -- why we're here.
 16 MR. SCHAFER: Okay. That's all.
 17 MR. PALMER: Any questions from the
 18 Commission? Anything from Tom, anything else?
 19 MR. NICHOLSON: Nothing further.
 20 MR. PALMER: Thanks, Greg.
 21 (Witness left the room.)
 22 MIKE LOOS,
 23 called as a witness herein, having been first duly
 24 sworn, was examined and testified as follows:
 25 ///

285

1 involved the attempted collection of a bill for
 2 a remodel project. It was a substantial
 3 remodel. By the time we got to Judge Fuller's
 4 court, the claim was something in the order of
 5 \$50,000 yet to be paid.
 6 On behalf of my clients, I asserted
 7 counterclaims that the work had been not done in
 8 a workmanlike manner, and so the trial to
 9 Judge Fuller by stipulation involved those
 10 issues; that is, the effort to collect, and then
 11 my client's effort to try to seek a
 12 counter-remedy either by way of offset or
 13 stand-alone damages.
 14 At the -- and the case progressed very well.
 15 Judge Fuller was engaged, active in the
 16 examination, very involved in the case.
 17 Bart Banks, very, very good and competent
 18 lawyer, was on the other side.
 19 At the conclusion of the evidence, there
 20 was -- part of the litigation involved viewing
 21 the home as well. Judge Fuller, I think, wisely
 22 took a look at the house. The Judge ordered
 23 that the plaintiff go and fix the items that we
 24 claimed were deficient or were not done and
 25 ordered that my clients pay a judgment.

287

1 DIRECT EXAMINATION BY MR. HIEB:
 2 Q Would you state your name, please.
 3 A Mike Loos.
 4 Q Mike, I'm not going to go through some of the
 5 things that I probably would have addressed with
 6 you, because we've had a lot of witnesses who
 7 have talked about character and competence and
 8 things of that nature. But I contacted you
 9 regarding this matter; is that correct?
 10 A Yes.
 11 Q And you were involved in All Star litigation --
 12 I'll call it the All Star litigation, which is
 13 something that's referenced in a report to this
 14 Commission.
 15 A Yes, I represented the defendants in that case.
 16 Q Okay. And there were -- there are some
 17 allegations with respect to Judge Fuller in
 18 relation to that case, which relate to -- I
 19 think the case was appealed and then it came
 20 back to Judge Fuller. Could you just describe
 21 for the Commission your recollection of the
 22 procedural ups and downs with respect to that
 23 case.
 24 A Sure. Like I said, I represented the
 25 defendants, husband, wife, homeowners. The case

286

1 And Mr. Banks took that up on appeal.
 2 Relevant for, I think, the remand, his position
 3 was you can't compel a party to specifically
 4 perform a personal contract. That the remedy of
 5 specific performance would not be available
 6 under these circumstances.
 7 And for what it's worth, I thought it was
 8 a -- I thought it was really a very good remedy
 9 because in these kind of cases, what you often
 10 find is for people in my client's position, the
 11 cost to fix these problems is often greatly more
 12 than what it would cost the original contractor
 13 to do it themselves. And so I think we sort of
 14 cut through the chase and said this would be a
 15 good remedy.
 16 The Supreme Court, in analyzing the specific
 17 performance piece, adopted a rationale not --
 18 not advanced by either party. The Supreme Court
 19 said under Rule 15(b) or (c) or (d), that the
 20 case -- there was not proper notice, and that
 21 the issue of specific performance was not tried
 22 by implication, which to me was -- really sort
 23 of came out of left field, because that's not
 24 what Mr. Banks advanced.
 25 So the case was remanded. And I can't

288

1 recall if there was a hearing -- well, I'm sure
2 there was a hearing. But the second ruling from
3 Judge Fuller was an attempt to make a better
4 record, if you will, on the issue of trial by
5 implication, because no one had talked about
6 that, and was probably not correct. I mean, our
7 record was replete with opportunities to talk
8 about specifically performing the workmanship
9 issues. And Mr. Banks took an appeal of that
10 issue, and the case settled.

11 **Q The question I have for you, the allegation has**
12 **been that Judge Fuller believed the**
13 **Supreme Court was wrong in deciding the appeal**
14 **and then went and pretty much issued the exact**
15 **same decision again.**

16 Did you get the sense that there was any
17 sort of an in-your-face type of attitude by
18 Judge Fuller with respect to that, or was he
19 attempting to craft a ruling that he thought,
20 from your standpoint, was consistent or at least
21 could be in line with what they sent down?

22 **A** Yeah. I mean, I think it was the latter,
23 because Mr. Banks took five issues up on appeal,
24 and it wasn't just the specific performance
25 piece that came back.

289

1 We had a prejudgment interest issue that
2 came back, and there was no sort of effort to, I
3 think, indicate that that was improper.

4 No, it was just this idea, and it was
5 Judge Barnett, who was sitting by designation,
6 that wrote the decision. And I don't want to --
7 I believe Judge Fuller thought that the initial
8 decision was just not supported by the record,
9 and I think that's a fair thing to say.

10 And then the second opinion was basically to
11 try to make clear there was a record, and maybe
12 get to the point of the merits of whether or not
13 specific performance could be ordered in this
14 kind of a case.

15 **Q I also wanted to ask you about that proceeding,**
16 **that trial with Mr. Banks, because there were**
17 **allegations about bench conduct in respect to**
18 **that. Do you recall anything out of the**
19 **ordinary between Judge Fuller and Mr. Banks --**
20 **A** I don't.

21 **Q -- of a serious nature, animosity flying back**
22 **and forth or anything?**

23 **A** No. I mean, I don't know what a serious nature
24 would necessarily be. But Mr. Banks has a huge
25 personality, and I -- my sense of the

290

1 interaction between the Judge and Mr. Banks was
2 consistent with Mr. Banks' interaction with
3 almost anybody.

4 **MR. HIEB:** All right. I've got no further
5 questions. We talked about the -- I was going
6 to ask him about the Schwartz cases, he was
7 involved in that and other witnesses have
8 already done that. I won't even go there.
9 Thank you.

10 **THE WITNESS:** I can certainly state that was
11 very, very challenging from a judicial substance
12 and administrative standpoint. If you've
13 already heard about it, it -- it was
14 extraordinary and I think very competently
15 handled.

16 **MR. PALMER:** Mr. Schaffer.

17 **CROSS-EXAMINATION BY MR. SCHAEFFER:**

18 **Q Mr. Loos, you didn't see any conduct of any**
19 **untoward nature in that proceeding?**

20 **A** The All Star?

21 **Q** Yeah.

22 **A** I did not.

23 **Q Did you see any comments or hear any comments**
24 **that Judge Fuller made you thought were**
25 **sarcastic, snide, or that type of thing?**

291

1 **A** I guess nothing of a serious nature. Nothing
2 that would make me think this is strange or I'm
3 worried about how this proceeding is going to
4 go.

5 **Q Let me ask you this, the Supreme Court ordered**
6 **prejudgment interest to be awarded in that case;**
7 **correct?**

8 **A** I think that's true.

9 **Q They said you can't get around it as a trial**
10 **judge by calling it something like specific**
11 **performance; correct?**

12 **A** I believe that was their rationale.

13 **Q And then on remand, did Judge Fuller award**
14 **prejudgment interest as the Supreme Court**
15 **directed him?**

16 **A** You know, if you've got the judgment, I'd look
17 at it. My sense was that my clients paid
18 something on the order of \$20,000 of interest.

19 **Q Well, we had testimony from Bart Banks in a**
20 **previous hearing where he said that Judge Fuller**
21 **refused to order it, and basically he had to**
22 **appeal the case because he refused to follow the**
23 **Supreme Court decision. Are you disputing that?**

24 **A** I believe he appealed, and again, I mean, it's
25 all public record. He for certainly took an

292

1 appeal on the order of specific performance
 2 twice. I recall that the judgment included
 3 interest. And if you've got a document that
 4 will say that it wasn't awarded, I'd -- I'd
 5 agree with whatever the judgment says, but I
 6 don't remember.
 7 Q Well, when I interviewed you in preparation for
 8 this hearing, you told me that what Judge Fuller
 9 did the second time around was what you called a
 10 head-scratcher. Do you recall that?
 11 A Yeah, I think -- yeah, I do.
 12 Q In other words, you were puzzled by how come he
 13 did what he did when it came back from the
 14 Supreme Court?
 15 A That's true.
 16 MR. SCHAFFER: That's all.
 17 REDIRECT EXAMINATION BY MR. HIEB:
 18 Q I'll just follow up on that briefly. Mike, is
 19 that inconsistent, though, with what you are
 20 saying here today? The result, you don't often
 21 go back in front of the judge and have them take
 22 another bite at the apple in an attempt to clean
 23 things up? Is that what you are --
 24 A True. Both -- both awards, the second award of
 25 specific performance was what the lawyers say is

293

1 sua sponte, on the court's own initiative. That
 2 was -- that was a head-scratcher because I
 3 didn't request it. I think it was defensible,
 4 but I didn't request it.
 5 MR. HIEB: I've got nothing further.
 6 MR. SCHAFFER: I have nothing further.
 7 MR. PALMER: Any members of the Commission?
 8 (No questions were presented.)
 9 MR. PALMER: Thanks, Mike.
 10 (Witness left the room.)
 11 JUDGE WALLY EKLUND,
 12 called as a witness herein, having been first duly
 13 sworn, was examined and testified as follows:
 14 DIRECT EXAMINATION BY MR. NICHOLSON:
 15 Q State your name, please.
 16 A My name is Wally Eklund.
 17 Q What's your current position?
 18 A The newest Seventh Circuit judge.
 19 Q How long have you been on the bench?
 20 A Easy. June 18, 2010.
 21 Q Prior to that, what did you do?
 22 A Practiced law.
 23 Q Where at?
 24 A At Gregory, South Dakota.
 25 Q For how many years?

294

1 A Since August of 1971, I think; 39 years.
 2 Q What kind of practice did you have?
 3 A I'd say it was a general practice with emphasis
 4 on trial work.
 5 Q Did you get an occasion to appear in front of
 6 judges on what I would call a frequent basis
 7 over those 39 years?
 8 A Pretty frequent.
 9 Q During your time as a private practitioner, did
 10 you ever work with Pete Fuller?
 11 A I did.
 12 Q As a co-counsel against him, under what roof, so
 13 to speak, did you work with him?
 14 A Pete and I tried a case together up in Deadwood,
 15 I know, back in the 19 -- probably mid to late
 16 1970s. As a law student, first trial I ever
 17 went to, I think, was a case between Pete and
 18 Rick, where Pete was on the other side.
 19 Q You're speaking about Rick Johnson?
 20 A Rick Johnson, yeah.
 21 Q Over the years, have you had what you think or
 22 would characterize as a good relationship with
 23 Pete Fuller?
 24 A Oh, Pete practiced in Chamberlain for a period
 25 of time when I was --

295

1 Q Okay.
 2 A -- a law student, and I don't remember exactly
 3 when he left and went to Deadwood. And we kind
 4 of lost track of each other along the way there,
 5 but I did have a snowmobile case out in the
 6 Hills and we associated on that.
 7 Q Have you always gotten along with Pete?
 8 A Very well.
 9 Q I think I asked you this question when I called
 10 you one day, and you said you were not aware of
 11 what the CourtSmart system is.
 12 A I'm not.
 13 Q Okay.
 14 A Still, I've heard of it.
 15 Q I think I explained to you that it's a recording
 16 or technology system that can record the
 17 activities in a courtroom.
 18 And I'm not asking you to give any opinion
 19 on the CourtSmart system since you don't know
 20 what it is. But if it was possible to have
 21 Judge Fuller's courtroom monitored by the
 22 CourtSmart system, and if tapes or CDs or
 23 however they came out of that system were made,
 24 would you be willing, assuming that the
 25 Commission were to ask you to or it was

296

1 appropriate as a part of Judge Fuller being
 2 allowed to go back on the bench, would you be
 3 willing occasionally at their direction to take
 4 the time to spot-check that tape occasionally to
 5 determine what Judge Fuller's demeanor happened
 6 to be during those spot-check occasions?
 7 A I think I would be willing to do that. I'm not
 8 exactly sure how that would work.
 9 Q But, and I'm asking -- I'm not asking how it
 10 would work.
 11 A I don't know what kind of a record you get to
 12 look at, quite frankly.
 13 Q I guess the question is, if it would be at the
 14 direction of somebody else, you're not the
 15 technician, but if -- all I'm asking you is if
 16 something like that could be arranged, would you
 17 be willing to do it?
 18 A I would. I mean, I...
 19 Q Do you feel you have a good enough relationship
 20 with Pete where, if you sensed a little bit of
 21 inappropriate tone of voice or comments or those
 22 types of things coming out of those tapes, would
 23 you feel good enough about your relationship
 24 with him that you could address him, talk to him
 25 about it, and show it to him?

297

1 A I haven't had that big of problem doing that
 2 with my -- anyone, really.
 3 MR. NICHOLSON: I have no further questions.
 4 MR. PALMER: Mr. Schaffer.
 5 CROSS-EXAMINATION BY MR. SCHAFER:
 6 Q Judge Eklund, are you here pursuant to a
 7 subpoena?
 8 A I'm not.
 9 Q Do you know how much time it would take to
 10 review transcripts of the CourtSmart system?
 11 A I have no idea.
 12 Q Do you know if as a judge, you'd even have time
 13 to do it?
 14 A I don't.
 15 Q Do you know whether you'd have to clear that
 16 with the presiding judge?
 17 A I'm sure you have to do your work.
 18 Q Do you know anything about the facts of this
 19 case?
 20 A I don't.
 21 MR. SCHAFER: That's all.
 22 MR. PALMER: Tom?
 23 REDIRECT EXAMINATION BY MR. NICHOLSON:
 24 Q I think, Judge Fuller [sic], my question to you
 25 is, would you spot-check it? I don't think I

298

1 asked you to sit and listen to 40 hours of tape
 2 or anything. Just so there's a clarification.
 3 A You know, I -- like we say, I don't know what
 4 the CourtSmart system is. I don't know whether
 5 it's strictly transcript or oral. I have no
 6 idea.
 7 Q And again, with the permission of the -- or at
 8 the direction of this Commission and, of course,
 9 the chief judge in your circuit, who's on the
 10 Commission, we'd ask for that first, as part of
 11 the question.
 12 MR. PALMER: Anything else, Mr. Schaffer?
 13 MR. SCHAFER: No.
 14 MR. PALMER: Any Commission members?
 15 (No questions were presented.)
 16 MR. PALMER: Thank you, Judge Eklund.
 17 (Witness left the room.)
 18 MR. NICHOLSON: Just a procedural question,
 19 I have Judge Young's affidavit. Should I just
 20 mark that and submit it now?
 21 MR. PALMER: I think that's a great idea.
 22 MR. NICHOLSON: I gave a copy to Mike. I
 23 don't know if he sent it to the Commission. I
 24 have some extra copies.
 25 (Exhibit L was marked for identification.)

299

1 MR. NICHOLSON: At this time, I would offer
 2 Exhibit L.
 3 MR. SCHAFER: No objection.
 4 MR. PALMER: Exhibit L will be received.
 5 MR. NICHOLSON: I would like to point out
 6 one thing in the exhibit. In paragraph
 7 Number 6, of course Judge Young isn't here to
 8 state that, but I think it's pretty obvious that
 9 when he typed that, he made a typographical
 10 error. There appears to be either an L or a 1
 11 before the word "number" in the paragraph, which
 12 makes no sense to be there. So I would just
 13 point that out as a part of the record.
 14 MR. PALMER: Okay. Thank you. Just so I
 15 understand, where are we at here procedurally?
 16 Do you have other witnesses other than
 17 Judge Fuller?
 18 MR. NICHOLSON: No. And I think our
 19 arrangement or what Mike wanted to do is, he
 20 indicated since he was going to call
 21 Judge Fuller on his part of the case, that he
 22 wanted to have that opportunity before we called
 23 him.
 24 MR. PALMER: Okay. Let's just take a very,
 25 very short recess, like no more than five

300

1 minutes.
 2 (Brief recess was taken.)
 3 MR. PALMER: Let's go back on the record.
 4 Mr. Schaffer, are you calling --
 5 MR. SCHAFER: I'll call Judge Fuller.
 6 JUDGE A. PETER FULLER,
 7 called as a witness herein, having been first duly
 8 sworn, was examined and testified as follows:
 9 DIRECT EXAMINATION BY MR. SCHAFER:
 10 Q Judge Fuller, I'm going to cover a little bit of
 11 your background and make sure that we've got
 12 this covered. You graduated from law school in
 13 what year?
 14 A 1968.
 15 Q And practiced where?
 16 A In Chamberlain for three years.
 17 Q With what firm?
 18 A Morgan & Fuller. They were in Mitchell and I
 19 was an associate in their firm.
 20 Q Did you practice with that firm in Mitchell?
 21 A Briefly, yes.
 22 Q Why did you leave to Chamberlain?
 23 A Why did I leave Chamberlain?
 24 Q Why did you go from Mitchell to Chamberlain?
 25 A My father died and the Morgans asked me to come

301

1 to Mitchell.
 2 Q No. The question, why did you leave the firm in
 3 Mitchell to go to Chamberlain?
 4 A I didn't. I went to Chamberlain when I got out
 5 of law school.
 6 Q So you went directly to Chamberlain?
 7 A Yes.
 8 Q I thought you were with the firm in Mitchell for
 9 a period of time.
 10 A I was. I was associated with them. I used to
 11 go in every Saturday morning and they would help
 12 me with the files I had.
 13 Q Is that while you were in law school?
 14 A No. I graduated from law school in '68, and
 15 then I moved to Chamberlain in July of '68. And
 16 in Chamberlain, I was associated with Morgan &
 17 Fuller in Mitchell.
 18 Q Did you ever practice in the Mitchell office?
 19 A I did for a brief period of time after my father
 20 died in 1970.
 21 Q Okay. Gotcha. Then you went to Lead when?
 22 A In July of 1971.
 23 Q And you practiced law there until your
 24 appointment to the bench?
 25 A Correct.

302

1 Q Which was -- the date again?
 2 A March of '03.
 3 Q Now, did you draft the answer to the complaint
 4 that was submitted in this case?
 5 A No, I did not.
 6 Q You signed it?
 7 A I read it and I signed it, yes.
 8 Q Okay. And I just want to make clear, because I
 9 read through it again and I notice you appear to
 10 dispute a number of the factual allegations that
 11 you admit that you violated the Canons of
 12 Ethics; correct?
 13 A I didn't -- no, I don't know that I did that.
 14 Q Okay. Because I got the impression when
 15 Mr. Nicholson gave his opening statement today
 16 that you are not disputing the factual
 17 allegations in this case.
 18 A That was my understanding of the answer, the
 19 allegations in the complaint and my answer. I
 20 thought I admitted to the factual allegations
 21 and admitted to violating Canons 1, 2, and 3.
 22 Q Okay.
 23 A That's the way I read my answer.
 24 Q And you agree, Judge, that there is clear and
 25 convincing evidence that you violated Canons 1,

303

1 2, and 3?
 2 A Yes.
 3 Q Do you admit that you flipped the bird, gave the
 4 middle finger to Bart Banks in the presence of
 5 his client from the bench in a legal proceeding?
 6 A Yes. I said that at the Show Cause hearing,
 7 yes.
 8 Q Okay.
 9 A I also called him an asshole in chambers.
 10 Q And I'm unclear on this All Star Construction
 11 versus Koehn case. My understanding was the
 12 Supreme Court sent it back to you with a mandate
 13 that you were required to award prejudgment
 14 interest and you refused to do that.
 15 A Again, I'm like Mike Loos. If I had my order, I
 16 could tell you whether I did that or not. I
 17 don't remember.
 18 Q You were here this morning when Carol Foster
 19 testified?
 20 A Yes.
 21 Q Do you admit that you swore in open court?
 22 A I do not.
 23 Q You deny that?
 24 A I deny that. I -- I don't use the word
 25 "Goddamn." I don't use the F word. So I deny

304

1 that I said that to any clerk or to the clerk in
2 the hallway.
3 Q Well, you had Mr. Nelson's report for some time,
4 haven't you?
5 A Yes.
6 Q And Mr. Nicholson said at the beginning of this
7 hearing that you weren't disputing the facts,
8 and that was one of the facts that was alleged
9 in Mr. Nelson's report, is that Carol Foster was
10 in court, that you used the word, Goddamn clerk,
11 Goddamn schedule, quote, unquote.
12 A Right.
13 Q And you saw that?
14 A Correct.
15 Q So today is the first time that you've come out
16 and actually denied that you ever said that?
17 A I deny that I said that, yes.
18 Q Okay.
19 A I don't deny Carol Foster's testimony about my
20 demeanor, my rudeness, or my arrogance, or
21 treating her or any of her staff
22 disrespectfully. I don't deny that.
23 Q Okay. Do you agree that you created a hostile
24 work environment down there at that courthouse?
25 A I don't know that I did. I had no sense that I

305

1 did. But Carol said I did, therefore, I did.
2 Q Okay. When you worked as a lawyer, did you ever
3 have occasion to deal with individuals who
4 created hostile work environments?
5 A No.
6 Q Never have?
7 A No.
8 Q Do you dispute Tonia Fischer's testimony in this
9 proceeding where she said you were rude and
10 demeaning to her?
11 A No. I -- what I have learned from Bob Holmes is
12 that -- if I may?
13 Q Yes.
14 A He showed me the anger scale, 0 to 10, and when
15 he described it to me, he said that at the
16 bottom of the scale is irritation and annoyance.
17 That is anger. I know that I act irritated and
18 annoyed, and I didn't know that that was a part
19 of anger. He --
20 Q Well, let me ask -- go ahead.
21 A He then explained to me in the aggression side
22 of it, again the 0 to 10, and at the bottom
23 scale of that, he explained to me that my body
24 language and that my tone of voice and my
25 sarcasm is aggression. I didn't know that was

306

1 aggression, either.
2 So knowing me, knowing me, I am confident
3 that the court service officer that testified
4 thought that I was, because of being irritated
5 and being annoyed, that I was angry. And
6 because of my tone of voice, she thought I was
7 acting inappropriately and aggressively. I
8 agree with what she's described.
9 Q Did you not recognize it at the time, Judge?
10 A I don't -- I did not. I did not recognize that
11 this annoyance and this irritation, which in
12 this program, it's like -- well, actually it's
13 like right now, Mr. Schaffer, I'm feeling tense
14 in my arms and across my chest, which is a
15 signal that I've learned that I now have to
16 think. I've learned I now have to think. I
17 have to -- I have to think of other thoughts, I
18 have to take -- I have to breathe, I have to
19 think. And I did not recognize that before,
20 correct.
21 Q Is it your testimony to this Commission that all
22 of the behavior that was described by these
23 court personnel, you did not realize what you
24 were doing or that you were offending these
25 people at the time?

307

1 A That I was offending them, no, I did not know
2 that.
3 Q You didn't have a clue?
4 A I did not.
5 Q Okay. And have you ever apologized to any of
6 these folks for how you behaved?
7 A No, I have not. You asked me that at the Show
8 Cause hearing and I -- I still haven't. I think
9 my attorney -- because I asked him, I said,
10 Would you ask Mr. Schaffer if I could begin
11 apologizing to these people? And I never heard
12 back. But I went ahead and I have -- I have
13 written -- I have written my apology letters.
14 In fact, I even added other lawyers to the list.
15 Q You heard the testimony of Judd Thompson about
16 the safety concerns, and his testimony was your
17 response was, Well, we'll wait to see what
18 happens, unquote. Do you remember that?
19 A My response was -- that's part of the response
20 that I did give him. Dennis, who is the person
21 that brings the people from the Juvenile Service
22 Center, he's the transporter of these people,
23 and he brings himself and typically one,
24 depending upon how many, two. I asked Dennis,
25 who is in law enforcement, if he felt that it

308

1 was a problem when it first came to my
2 attention.
3 And it first came to my attention by the
4 court service officers that were in my
5 courtroom, that they were concerned especially
6 by the people that would be standing behind them
7 as they were seated at the counsel tables, so I
8 asked Dennis about that. And he's the one that
9 said, Well, it's not a problem, why don't we see
10 if anything does transpire. And that's what I
11 thought I told Judd is what Dennis had told me.

12 **Q The Commission has seen the picture of the nine**
13 **guys with wigs on a -- on it, nailed to the**
14 **bench.**

15 A The nine members of the bar, yes.

16 **Q Okay. And I think -- do you agree that you**
17 **nailed it up sometime between the 20th and**
18 **29th of September?**

19 A You know, I don't remember when I put it up.
20 It's a gift from a lawyer, Pat Economos from
21 Mitchell. She gave me that as a present.

22 **Q And just for the benefit of the Commission, you**
23 **were served with a formal complaint on**
24 **September 8, 2010. You acknowledge that?**

25 A Yes.

309

1 **Q And that had a copy of Mr. Nelson's report,**
2 **which had a reference in it to you wearing a**
3 **powdered wig. Do you recall that?**
4 A Yes.
5 **Q And then the hearing for the Order to Show Cause**
6 **was held on the 30th?**
7 A Do you want -- do you want to know -- I did
8 that. That was my first year when I was a
9 juvenile judge in '03. Judge Delaney was in
10 plays, the Black Hills Community Theatre plays,
11 and he gave me that powdered wig.

12 And it happened to be -- we did juveniles on
13 Fridays, and it happened to be Halloween on that
14 Friday. And when the kids came in from the
15 Juvenile Service Center, I was sitting up on my
16 bench, and I did have my powdered wig on, which
17 I then took off and threw it in the drawer and
18 I've never worn it since.

19 **Q But that picture went up on the bench between**
20 **the time you got --**

21 A Yeah.

22 **Q -- the complaint and the time of the Order to**
23 **Show Cause hearing; correct?**

24 A I don't remember when I put it up, so I'll agree
25 with you.

310

1 **Q And I -- the question I'm asking is very simple.**
2 **Is there a fair inference that you put that up**
3 **to sort of thumb your nose at the Commission or**
4 **someone else?**

5 A No. No.

6 **Q Is that not a fair inference?**

7 A No, that's not a fair inference.

8 **Q And how long had you had that picture?**

9 A Well, I was in Mitchell at a meeting of our 50th
10 high school reunion, and that's when Pat gave it
11 to me because she was practicing law, and she
12 was not going to practice anymore, and she
13 handed it to me and she said, Do you want this?
14 And I said, Sure, great. So I thought that was
15 in -- I think in August. It might have even
16 been before.

17 **Q Of 2010?**

18 A Oh, yeah, 2010, right. Because next year is our
19 50th.

20 **Q Okay.**

21 A So, no, it was -- it had nothing -- it had
22 nothing to do with these proceedings at all.
23 It's just a picture of nine barristers, sitting
24 at the bar in the Old Bailey in London.

25 **Q You heard Mr. Krattenmaker testify that you hit**

311

1 him up for a thousand dollar contribution. Do
2 you dispute that?

3 A Oh, absolutely.

4 **Q You deny that?**

5 A Oh, absolutely. There's no question in my mind
6 I didn't ask him for that.

7 **Q You didn't even make a casual comment to that**
8 **effect?**

9 A That would be completely improper.

10 **Q Okay. Who circulated your petitions to put you**
11 **on the ballot?**

12 A Gee, you know, I don't remember. Dennis Dodge
13 started until I found out he had it and I took
14 it away from him.

15 **Q And he was your court reporter at that time?**

16 A Yes.

17 **Q I assume they are on file someplace?**

18 A Oh, I'm assuming they are, too.

19 **Q Okay. You were here when Lara Roetzel testified**
20 **about the probable cause bumper sticker and she**
21 **made the comment quoting you that you referred**
22 **to law enforcement as sons-of-bitches, unquote?**

23 A Correct. I heard that.

24 **Q Do you dispute that?**

25 A I deny that.

312

1 Q Okay.

2 A Can I explain something to you?

3 Q No. I'm just asking if you deny it or not.

4 A Oh.

5 Q And you heard her testimony about the juvenile

6 case where you ordered the victim and the

7 perpetrator to be polygraphed?

8 A I heard her testify to that, yes.

9 Q Do you dispute her testimony?

10 A I do.

11 Q Why?

12 A Cathy Mattson represented the 13-year-old boy,

13 and Roxie Erickson represented the, I believe

14 the 11-year-old girl. This is a juvenile

15 hearing, this is not a jury trial. It's a

16 juvenile hearing. It's closed, everything.

17 And the young girl testified, and I

18 consciously made a decision when she got all

19 done, I said, She is absolutely credible. I

20 mean, she -- she listened to the questions, she

21 articulated clear answers. You know, she didn't

22 waver.

23 And then they called the young boy, and he

24 articulated the questions -- or the answers. He

25 was clear and concise, he was -- he was as

313

1 credible as this young girl was. And they got

2 done with the testimony, and they said that they

3 rested.

4 And then I said, You have no further

5 evidence? I see a note in here that Dr. Strong

6 had done an examination. Aren't you calling

7 Dr. Strong? And Ms. Roetzel said no. So I had

8 a he said/she said question -- or, hearing.

9 I was -- I was very emotionally involved in

10 these two young people that I was going to have

11 to make a decision based upon a he said/she

12 said, and two witnesses were credible. I talked

13 to Judge Davis about it because of that, because

14 I was having a real problem.

15 And Judge Davis suggested, Well, you could,

16 if you wanted to, you could recuse yourself

17 right now, and they'd have to retry it to

18 another judge. I said, No, I've heard the case,

19 I have to make a decision.

20 And I thought if the two young people would

21 agree to each take a polygraph, potentially that

22 there could be a resolution without me making a

23 decision.

24 So I let Roxie know that I would like to

25 have a polygraph, and I let Cathy Mattson know

314

1 that I'd like to have a polygraph. And I told

2 them, You talk it over with your clients and let

3 me know.

4 I believe it was like at noon, because the

5 hearing was over in the morning, and at noon we

6 met in my courtroom, and I said, What have you

7 decided? They both said no.

8 And I did say -- I did say just what Lara

9 Roetzel did say, is that I said to them, I think

10 that's unfair. And Dr. -- Mr. Holmes --

11 Q Excuse me. I'm going to ask you another

12 question about it. And I'm looking at

13 Mr. Nelson's report, page ten where he refers to

14 a statement that he got from Cathy Mattson, the

15 other lawyer opposite to the state's attorney?

16 A Right.

17 Q And you've seen this report, haven't you, Judge?

18 A Yeah.

19 Q In this report it says: Judge Fuller directed

20 that the 14-year-old alleged delinquent and the

21 11-year-old alleged victim each submit to

22 polygraph examinations. When the lawyers

23 refused to facilitate the polygraphs, the Judge

24 asked whether, quote: You're making me make a

25 decision based on what I have before me,

315

1 unquote. And the lawyers said, Yes. Judge

2 Fuller said, quote: That's not very fair to the

3 Court, unquote. Did you read that?

4 A Did I read that.

5 Q Yes?

6 A Yes, I did.

7 Q That's exactly what Lara Roetzel testified to

8 today, isn't it? And this came from the defense

9 lawyer.

10 A I thought Lara Roetzel testified to more than

11 that. Now, that's my impression.

12 Q Well, in substance she testified to the very

13 thing that Cathy Mattson informed Mr. Nelson.

14 A And I thought I just said that.

15 Q Well, you said you never ordered a polygraph.

16 A Well, she didn't say I ordered it either. She

17 said I directed it. And again, we're quibbling

18 with words. I'm sure that Cathy Mattson and

19 Roxie thought that I ordered it. But had I

20 ordered it like Lara Roetzel said, then wouldn't

21 they have done it?

22 I'm not arguing Cathy thought I directed it.

23 I'm just telling you what precipitated me asking

24 for that and what it was. And that's why I

25 want -- that's what -- just so you know, that's

316

1 what Mr. Holmes, in his workbook -- if you look
2 through the workbook there's -- I think it's
3 like on page 12 or something.

4 There's a circle of -- and it's what occurs,
5 and then one of the things in there is unfair.
6 And I told Mr. Holmes when he got there, I said,
7 I did the classic. I did exactly what you said
8 I have to change and control by what you're
9 teaching me, is that, I responded to something
10 that I thought was unfair. And I used the word.
11 I did it to them, and that's completely
12 improper.

13 It's the wrong way to handle situations.
14 It's the wrong way for anybody to have the anger
15 come, and then through my tone of voice, through
16 my body language, and through my sarcasm is to
17 show that anger. And I did it.

18 Q Judge Fuller, I'm going to ask you back to the
19 question about the credibility determination.
20 Isn't that the essence of being a judge, is to
21 make those calls?

22 A Yes.

23 Q And isn't it the essence of being a judge, if
24 you've got evidence that you can't decide which
25 way to go because it's evenly balanced, that

317

1 perhaps the person who has the burden of proof
2 loses?

3 A That's what I did.

4 Q Okay.

5 A But let me explain something to you.

6 Q No. I'm going to ask you a question.

7 A No, serious --

8 MR. NICHOLSON: I'm going to object. He
9 asked a question, he should answer.

10 MR. PALMER: Whoa. Whoa. Whoa, guys, time
11 out. I want -- Mike is asking questions. I
12 think you answered the question Mike asked.
13 Let's try and stay with the question-and-answer.
14 You're going to have plenty of time to do yours.

15 THE WITNESS: I'm sorry.

16 MR. PALMER: That's okay.

17 Q (BY MR. SCHAFER:) But this Commission, based
18 on the testimony and evidence that's been
19 presented, could decide that you did order a
20 polygraph. They could make that finding;
21 correct?

22 A The answer to the question is, yes, they could.

23 Q And based --

24 A But it would not be a proper finding.

25 Q And you would dispute it?

318

1 A That I ordered it.

2 Q Okay.

3 A But I'm not telling you, Mike -- this is the
4 thing you have to understand. I'm not telling
5 you that when somebody hears any judge ask for
6 something or direct something that they don't
7 have the clear understanding or impression that
8 the judge ordered it.

9 That's why that whole thing was completely
10 improper is because of the way I approached it.
11 As opposed to being aware that when they said
12 no, you just say, Thank you. Okay. And you --
13 you don't react the way I did.

14 Q You were here for Mr. Brenner's testimony?

15 A Yes.

16 Q Are you disputing any of his testimony?

17 A The only dispute I'll make is I'm not familiar
18 with the quote that he attributes to me. I'm
19 not familiar with the quote, so I -- I don't
20 know why I would have said that to Mr. Brenner
21 when I don't even know the quote.

22 Q Were you here when Alicia Ramsdell testified?

23 A Yes.

24 Q Do you dispute her testimony?

25 A No.

319

1 Q Did you tell her that the legal profession was
2 better off before women were allowed to enter
3 it, or words to that effect?

4 A No, I'm sure I did.

5 Q And you know that's totally inappropriate, don't
6 you?

7 A It is. Especially if I was serious about it.

8 Q Well, even if you weren't serious about it?

9 A That's what I just said, especially. I said,
10 especially.

11 Q Even if you weren't serious, it's still a
12 problem?

13 A Right. I agree with you. And I have a daughter
14 that's a lawyer.

15 Q Well, her name is Alecia, too, isn't it?

16 A Yes. And I certainly don't think my daughter
17 should not be a lawyer.

18 Q I've gotten the impression from the questions
19 your lawyers have asked other attorneys that
20 there's some attempt to get you back on the
21 bench and have lawyers that have appeared here
22 to practice in front of you. Is that a fair
23 statement of what we've been listening to today?

24 A No.

25 Q It's not?

320

1 A The first part is.
 2 Q Okay. Do you -- who should make the decision
 3 whether or not any lawyer that's participated in
 4 these proceedings should appear in front of you,
 5 if you're allowed back on the bench?
 6 A The two lawyers involved and their clients.
 7 Q You don't think you have any responsibility?
 8 A Yes, I do.
 9 Q What is that responsibility?
 10 A To tell them about this, that I've been in
 11 proceedings where so-and-so testified and
 12 so-and-so testified and that they should be
 13 telling their clients. It's the same that I
 14 have -- I live at the Sandstone Condominium, and
 15 there's a lawsuit pending. And I'm -- I'm --
 16 okay. So I have told lawyers on both sides or
 17 one, maybe only one lawyer is there, we've had
 18 discussions about this. Is it -- it's my
 19 responsibility to advise the parties and the
 20 lawyers that there's a potential of a conflict,
 21 and if you wish me to remove myself, I will do
 22 so.
 23 Q Have you ever read the Canon regarding
 24 disqualification of a judge?
 25 A I'd say no.

321

1 Q Okay. I'm going to read you part of it, Judge:
 2 Canon 380, Disqualification: A judge shall
 3 disqualify himself or herself in a proceeding in
 4 which the judge's impartiality might reasonably
 5 be questioned.
 6 A Uh-huh.
 7 Q Do you see that?
 8 A I do.
 9 Q And inasmuch as a number of people have appeared
 10 in these proceedings, perhaps testified against
 11 you, perhaps filed complaints against you, if
 12 they -- if their case comes before you, would
 13 you agree with me that it's your responsibility
 14 to disqualify yourself because your impartiality
 15 could reasonably be questioned?
 16 A I agree that is a topic that should be discussed
 17 with the attorneys. And if that attorney, be it
 18 the one that testified for me or the one that
 19 testified against me, or whatever you want to
 20 characterize it as, that if there was any
 21 question, I would remove myself, yes.
 22 Q Shouldn't that be your responsibility to take it
 23 upon your shoulders to make the decision to
 24 remove yourself and not foist it upon the
 25 lawyers to have to discuss it with their

322

1 clients?
 2 MR. NICHOLSON: I'm going to object at this
 3 point. It's a total mischaracterization as to
 4 why those lawyers were called. They were called
 5 to demonstrate the character of Judge Fuller and
 6 whether or not, based on his character, he was
 7 fit to stay on their cases.
 8 MR. PALMER: Well, I think it's a fair
 9 question. I'm going to overrule your objection,
 10 and you can go ahead and answer the question.
 11 A Do I think it's only my responsibility? I would
 12 have to say no, that's not only my
 13 responsibility.
 14 Q (BY MR. SCHAFFER:) Well, do you think it's --
 15 A Well, because --
 16 Q -- in part your responsibility?
 17 A What?
 18 Q Do you think it's at least in part your
 19 responsibility?
 20 A Oh, absolutely. We just talked about that.
 21 Because the key word there is impartial, I have
 22 to be impartial. And I don't think I wouldn't
 23 be impartial. But if anybody else did, then I
 24 should voluntarily, not by an affidavit, remove
 25 myself. But if the litigants and their clients

323

1 feel I can be impartial, then why wouldn't I be
 2 able to stay?
 3 Q I guess I read the rule to suggest that it's the
 4 Court's responsibility. It says "shall"
 5 disqualify himself where his impartiality might
 6 reasonably be questioned.
 7 And my question is to you, if Glenn Brenner
 8 showed up in your court in light of the fact
 9 that he filed the complaint and testified in
 10 these proceedings, under that rule would you
 11 disqualify yourself?
 12 A If he called -- if he asked me to, I would, yes.
 13 Q No. No. I'm saying --
 14 A No, I --
 15 Q -- unsolicited. If he showed up in your court,
 16 would you take it upon yourself and assume the
 17 burden that it's your responsibility to
 18 disqualify yourself because your impartiality
 19 could reasonably be questioned?
 20 A I don't know.
 21 Q And Lara Roetzel, if she appeared in your court,
 22 would you take it upon yourself under that Canon
 23 to disqualify yourself?
 24 A Well, I think I've answered it and I'm going
 25 to -- that would be my answer. That, if Lara

324

1 Roetzel had a case before me, she and I would
2 have a discussion, do you wish me to take myself
3 off the case because you feel that I cannot be
4 impartial? And if she said yes -- in a
5 conversation now, not by affidavit -- I would
6 remove myself. But if she felt that I could be
7 impartial -- that's my problem, I don't know
8 that I would, on my own, in all cases.

9 For instance, all the Glenn Brenner, Lara
10 Roetzel, or any of the other deputy state's
11 attorney's that were interviewed, I -- I would
12 have to say no, I don't think I would just on
13 all state's attorney cases take myself off. And
14 I think Mr. Brenner kind of talked about that
15 with the Commission.

16 Q Well, Judge --

17 A That he -- that he would remove me, but he would
18 let the other state's attorney's make their own
19 decision.

20 Q And my question to you is, is it your burden or
21 is it the attorney's burden under these
22 circumstances?

23 A Both. It's got to be discussed, Mr. Schaffer.
24 It can't be ignored.

25 Q At the Order to Show Cause hearing your defense

325

1 was, quote: I forgot that I was a judge,
2 unquote. Do you remember that?

3 A Uh-huh.

4 Q Yes?

5 A I'm sorry. Yes. The answer is yes.

6 Q And now we know from the memorandum, e-mail from
7 Carol Foster, and her testimony that there were
8 a lot of problems back in 2004 at least down in
9 Fall River County. You'd agree with that?

10 A I would agree that I was all of -- I was rude,
11 and I was demeaning, and all those things to her
12 and her staff.

13 Q And that was early on in your career?

14 A Correct.

15 Q So it wasn't a question of forgetting later on
16 in your career, it's something that happened
17 early on, too?

18 A That I was that way, yes. Yes.

19 Q Okay. Judge Fuller, do you understand that
20 judges not only have to do justice but they must
21 appear to do justice?

22 A Yes.

23 Q Why is that important?

24 A To show the impartiality of the court so that
25 when people leave the courtroom, they might

326

1 disagree with your decision, but they thought
2 they had a fair hearing, and it was
3 well-presented, and the decision was made from
4 that.

5 Q And do you understand that to lay people the
6 appearance of justice may be more important than
7 what your actual ruling is?

8 A Yes.

9 Q And you've heard the testimony of Mike Wilson
10 where his clients were terribly upset and
11 offended?

12 A Yes.

13 Q And you've also heard the testimony from the
14 prior hearing about the woman who walked out of
15 the court wondering how her child could get a
16 fair hearing when you referred to them as little
17 peckerheads. Do you remember that?

18 A Yes. That was in Dave Nelson's report, yes.

19 Q In the report from Dr. Arnio he said you quit
20 drinking in 1986; is that right?

21 A Yes.

22 Q And then in the report from Mr. Holmes he said
23 that you quit drinking after the suspension so
24 that you could be on the top of your game. Do
25 you remember that from his records?

327

1 A Correct.

2 Q So were you still drinking back then?

3 A Back when?

4 Q In 2010, the summer of 2010.

5 A Yes.

6 Q So you hadn't quit drinking in --

7 A I stopped drinking in 1987 until 1995 when
8 Alecia went off to school.

9 Q Then you started up again?

10 A I did.

11 Q And have you stopped again?

12 A I have.

13 Q Okay.

14 A It's -- yes. The answer is yes.

15 Q Are you claiming that for any of the problems
16 that bring us here?

17 A No, not at all. It's just a factor. I have
18 friends who are recovering alcoholics and
19 I've -- we've -- we talk about this. And it's a
20 factor that, if you can eliminate it, it's just
21 the best thing to do. So that's what I did when
22 I had the formal complaint.

23 Q Now, I think when we had the Order to Show Cause
24 hearing you agreed that we were not talking
25 about a single incident but a pattern of conduct

328

1 on your part?

2 A You asked me that question and I said yes. The
3 evidence that they had at that hearing showed a
4 pattern, yes.

5 Q And this evidence does as well, does it not?

6 A I don't know. I'd have -- they would have to
7 make that decision, because you've had other
8 people testify that, at least I guess my
9 impression was, that it's not a pattern.

10 Q So you don't --

11 A Mike Wilson's testimony, for instance, was in
12 that regard, I thought.

13 Q So you don't think you have a pattern of
14 mistreating people, treating them rudely in a
15 condescending, demeaning manner? You dispute
16 that?

17 A Let's back up. Let's just take the year 2010,
18 this year. Okay. Did I treat people rudely and
19 disrespectfully, with a tone and with sarcasm?
20 The answer is yes. Did I not treat people that
21 way? The answer is yes.

22 So until Mr. Holmes told me that, and I've
23 said that, until I learned that irritation and
24 annoyance is on an anger scale, I did not
25 realize that I was treating people angrily

329

1 because of my tone, because of my body language,
2 and because of my sarcasm.

3 And now I know that when people hear me say
4 those things, they think I am angry and that I'm
5 showing aggression toward them. I now know
6 that.

7 Q You're not claiming that's some type of excuse
8 for your behavior?

9 A Oh, no.

10 Q Because the Code of Judicial Conduct governs
11 conduct, not what the underlying reasons might
12 be for why you got there. You agree with that?

13 A Oh, sure. That but -- right. The answer is
14 yes.

15 Q And I guess the question that comes to my mind
16 is, how does this Commission, the Supreme Court
17 deal with this case if it goes public and the
18 public is advised through the media or whoever,
19 that we have a judge sitting out here in the
20 Seventh Circuit who has flipped the bird from
21 the bench, who the Commission may find has sworn
22 at staff in open court, who's been rude,
23 demeaning, and mistreated court services
24 workers? How do you expect the Commission and
25 the Supreme Court to address that situation?

330

1 A I expect them -- I prepared a remediation plan
2 for me, and I gave it to my lawyers. And I
3 expect them to address the proposition that the
4 Judge is remorseful, and I am. I'm absolutely
5 ashamed of myself. I'm ashamed of myself for
6 what I have done. I brought disrespect to
7 this -- to the Court, I brought disrespect to
8 attorneys, I've affected my family. I'm
9 ashamed.

10 So I think -- and I'm hopeful that these are
11 things that -- I know they can be, I can be
12 changed, because I -- in my plan, I put in that
13 a CourtSmart system is available for monitoring
14 for anybody that wants to monitor it.

15 Apparently, according to Mr. Krattenmaker, it's
16 on every day.

17 So, my calendar is public, you know, so
18 everybody knows when I'm in court. I mean, the
19 CourtSmart system would know when I'm in court,
20 be it short cause days or court trials or any of
21 that. So I can be monitored to see that I have
22 changed.

23 A mentor, somebody like Judge Gienapp or
24 Judge Simko that I could talk to. Judge Davis
25 is my presiding judge, he has court personnel,

331

1 he has staff, he has the court service officers,
2 he has the clerks. You know, they could report
3 directly to him about if I haven't changed or if
4 I've gone back to my bad habits.

5 I don't know. I guess I hope the Supreme
6 Court feels I'm worth saving.

7 Q Judge, the CourtSmart system, is that what was
8 on when you referred to the police officer as a
9 racist?

10 A Well, it had to be because you have a transcript
11 of it.

12 Q And was it the CourtSmart system that was on
13 when you had the discussion with Heidi Limgren
14 prior to the court session, about getting your
15 ass in a sling with the Judicial Qualifications
16 Commission?

17 A There's a -- yes, there's a transcript on it.

18 Q So the system was working, it's just a question
19 now you think if somebody could go through it
20 and monitor it, that they might be able to stop
21 you from doing these things?

22 A No.

23 Q Or catch them?

24 A I'm going to stop myself. I'm stopping myself.
25 Okay. They can monitor the fact that I have and

332

1 they -- and again, the court personnel for sure
2 has access to the presiding judge, if I haven't.
3 They don't even need a court services -- or,
4 excuse me, a CourtSmart system for that type of
5 a report.

6 Q But your testimony is, you never realized until
7 you went to this anger management program that
8 you were doing these things or offending these
9 people?

10 A I did not recognize that I was offending them,
11 correct.

12 MR. SCHAFFER: That's all.

13 MR. NICHOLSON: Try to reposition myself
14 here so Judge Fuller can talk to me and the
15 Commission at the same time.

16 (Discussion was held off the record.)

17 (Brief recess was taken.)

18 MR. PALMER: Go ahead, Mike.

19 (Exhibits M and N were marked for
20 identification.)

21 Q (BY MR. SCHAFFER:) Judge Fuller, I'm going to
22 show you what the court reporter has marked as
23 Exhibit M, which is a copy of a document that
24 was taped to your bench as you look out. Was
25 that on your bench?

333

1 A Oh, boy, whenever he retired, he moved out here,
2 he sat on some cases. It would be early on when
3 he was sitting on some cases where there were
4 conflicts in our circuit. And if my courtroom
5 was available, or any other judge's, he'd use my
6 courtroom and he wrote that one on my -- on my
7 Exhibit M.

8 Q Judge Martin wrote that on?

9 A Yes.

10 Q Is that based on some observations he had or
11 some discussions he had with you?

12 A No. He just -- he told me, he said, You forgot
13 one.

14 Q Okay. So this has always been right in front of
15 you?

16 A Yes.

17 Q The entire time you've been on the bench,
18 basically?

19 A Yeah. Whoever took it off the bench would know
20 exactly where it is. I have a computer here.

21 Q It's staring you right in the face, isn't it?

22 A This one is right over here, and then the next
23 exhibit is the one beside it.

24 Q Yes.

25 A Yeah.

335

1 A Yes.

2 MR. SCHAFFER: We'd offer Exhibit M.

3 MR. NICHOLSON: Which one is M, Mike?

4 MR. SCHAFFER: Ten Commandments.

5 MR. NICHOLSON: Okay.

6 MR. PALMER: Do you have any objections,
7 Mr. Nicholson?

8 MR. NICHOLSON: No objection.

9 MR. PALMER: M will be received.

10 Q (BY MR. SCHAFFER:) And I'm -- this says the Ten
11 Commandments For The New Judge. Have you had
12 that always taped to your bench?

13 A Yes.

14 Q And it has the Ten Commandments: Be kind, be
15 patient, be dignified. I mean, obviously you
16 violated a number of these, haven't you, over
17 the years?

18 A I've not always been kind. I have definitely
19 not always been patient. I have not been
20 dignified.

21 Q And I'm looking at the last handwritten
22 commandment, number 11, it says: If you cannot
23 improve on the silence, don't speak.

24 A Judge Martin gave me that one.

25 Q And how long has that been on this poster?

334

1 Q And Exhibit N, is that the exhibit that is right
2 beside the Ten Commandments?

3 A Yes. They sit on my bench like this.

4 MR. SCHAFFER: We'd offer Exhibit N.

5 MR. NICHOLSON: No objection.

6 MR. PALMER: N will be received.

7 Q (BY MR. SCHAFFER:) And Exhibit N is an
8 evaluation of you in 2004, it looks like; is
9 that right?

10 A Correct.

11 Q Is this the evaluation that Lara Roetzel
12 testified was posted in your chambers?

13 A I don't know that because it wasn't posted in my
14 chambers.

15 Q You dispute that part of her testimony?

16 A Yeah. This was on my bench.

17 Q And this was in front of you since it came out?

18 A Yes. Since Judge Davis [sic] went over these
19 with me, yes. Excuse me, Judge Young. I'm
20 sorry.

21 Q Okay.

22 A Which would be 2004.

23 Q And in comment three, it says: Pay closer
24 attention to the letter of the law and be more
25 respectful of people appearing before him, in

336

1 whatever capacity they are there.
 2 A That's what it says, yes.
 3 Q And that was also staring you in the face since
 4 at least approximately 2004?
 5 A No. Since 2004, yes, that's correct.
 6 Q So these would have been reminders to you of
 7 things that, if you would have followed, would
 8 have kept you out of the trouble that brings us
 9 here?
 10 A If I would have -- yes. The answer is if I
 11 would have been kind at all stages, and patient
 12 and dignified, and I think the other one -- and
 13 not be condescending to lawyers in the
 14 courtroom, yes, from the report that we have
 15 from Mr. Nelson and the testimony, that is all
 16 correct.

17 MR. SCHAFFER: Okay. That's all.

18 CROSS-EXAMINATION BY MR. NICHOLSON:

19 Q Judge Fuller, just so that we're fresh on the
 20 same topic, Exhibit N which is the evaluation,
 21 says at the top, Evaluation of Judge A. Peter
 22 Fuller 2004. Is that the evaluation that Judge
 23 Young specified in his affidavit as being the
 24 one that was -- you took heart to?

25 A Yes.

337

1 Q Okay. Judge Fuller, how old are you?
 2 A I'm 67.
 3 Q And how long have you been married?
 4 A 46 years.
 5 Q And your wife's name, we've heard it here in the
 6 courtroom a few times, is Jacque?
 7 A Yes.
 8 Q I take it you've only been married once?
 9 A Correct. As Tom Brokaw said, I married my
 10 trophy wife the first time.
 11 Q Do you have any children?
 12 A Four.
 13 Q Can you tell us about them, who are they, what
 14 are their ages?
 15 A Oh, wow. Okay. Oldest son, Brook, he's 43.
 16 He's an inspector for the United States Postal
 17 Department. He's in law enforcement, married,
 18 has two children and three adopted children.
 19 Jason, is 40, I think. He's 41. He's 41.
 20 He's in Austin, Texas, he is a chiropractor. He
 21 is married and he has two children.
 22 Thad is married, he has four children, and
 23 he's in the construction business in
 24 Lead/Deadwood area.
 25 And Alecia is 36, so Thad is 39 -- 36 and

339

1 Q Have you read Judge Young's affidavit?
 2 A I've read it. I -- I can't answer particular
 3 questions.
 4 Q I think one of the comments he made in the
 5 affidavit was that you ranked in the group of
 6 judges that had positive comments about them.
 7 And there were some judges that he put in the
 8 group that had negative comments about them.
 9 Did you read that in Judge Young's eval -- or
 10 report or affidavit?
 11 A I think I did, yes.
 12 Q Okay. And what was the -- and did you also see
 13 in Judge Young's affidavit that he indicated
 14 that when he gave you this evaluation form, that
 15 he took it as a positive step that you would
 16 take out the negative ones rather than the
 17 positive ones and use that as a guideline?
 18 A I read that.
 19 Q Okay. And was his depiction of that accurate?
 20 A Accurate in what way, please.
 21 Q In the fact that you -- when he indicated that
 22 he felt you pulled out the one negative and not
 23 all the positives, is that accurately what
 24 happened?
 25 A Yeah. Yes.

338

1 she's married and she has a baby daughter and is
 2 going to have another child in July, and she's a
 3 lawyer.
 4 Q She'd be the fifth generation of the Fullers; is
 5 that correct?
 6 A Yes.
 7 Q What year did you go into private practice?
 8 A '68.
 9 Q And I think Mike went through some of that
 10 history, but can you tell us what primarily your
 11 practice involved, what kind of cases you took?
 12 A I was a general when I started. Is that what
 13 you're talking about?
 14 Q Yeah.
 15 A All right. When I started, I was a general
 16 practitioner. We did -- we, the firm, we did --
 17 I did some plaintiffs work. Basically I did
 18 mostly plaintiffs work, I did some contract
 19 dispute work, contracts for small businesses in
 20 Chamberlain, some wills at that time before it
 21 became very complicated. Just, you know, a
 22 general practitioner. Did criminal defense work
 23 in Brule County, over in Lyman County.
 24 Q Did you at some time evolve into a practice that
 25 was more trial oriented?

340

1 A Actually, there was -- 50 percent of my work in
2 Chamberlain would be trial work, and then the
3 answer is it evolved even further when I moved
4 to Lead to join Mr. Keller and Mr. Driscoll
5 there.

6 Q **And did you still continue to have a general
7 practice in addition to your trial practice?**

8 A Really changed a lot when I got to Lead because
9 our primary client was Homestake Mining Company,
10 so they got sued a lot. But they had more
11 regulatory confrontations in front of the Board
12 of Mineral and Environment, or the Board -- the
13 Water Board in Pierre, or with the Mine Safety
14 and Health Administration.

15 There was also a union, United Steelworkers
16 represented the workforce there, so we had
17 arbitrations that were involved, and those are
18 in front of an arbitrator, but it's a
19 trial-setting type situation.

20 And then it evolved -- then that evolved,
21 and then also it evolved in to actually doing
22 the labor negotiations with the steelworkers.
23 And then also it evolved in to some very large
24 contracts.

25 And also from the very beginning, I did all

341

1 of the Workers' Compensation claim work for
2 Homestake Mining Company up until '98 or '99.
3 And then other -- myself and other attorneys
4 used to do it, too.

5 Q **At some point -- let me rephrase that. Why did
6 you want to become a judge? What caused you to
7 seek that position?**

8 A I thought I -- because of my experience, I
9 thought I could do good things, frankly. That
10 was my mindset: I could contribute. The
11 profession has been very good to me, and I
12 thought I would be -- I thought I would be a
13 benefit to the public and to the bar.

14 Q **I want to talk about some of the inappropriate
15 things that Mr. Schaffer pointed out that you
16 have indicated that you participated in. Can
17 you tell me what was going on when you made the
18 comment about Officer Twedt and the racist
19 remark? Tell me what that hearing was about and
20 how that comment came about.**

21 A Actually, the transcript you have describes it.
22 But it was a juvenile hearing, again, so it's
23 not a public hearing. The juvenile is present,
24 and the juvenile's lawyer, and the juvenile's
25 parent, and he would -- well, he was testifying

342

1 about what he did when he was on patrol. And
2 it's in that transcript, and that's exactly what
3 happened.

4 And as I listened to him testify, I became
5 irritated and annoyed from what he was telling
6 me. And I definitely got a tone of voice and my
7 body language was, I'm sure -- I do not know
8 that I had that body language. But if Officer
9 Twedt or the other people said that's what my
10 body was doing, I'm absolutely confident that's
11 what I was doing, that I was reacting to what I
12 was hearing.

13 Q **Did you think -- it was your impression at the
14 time that the stop that he was involved in was
15 improper?**

16 A Correct.

17 Q **And do you think it was appropriate to -- even
18 though you felt that way, do you feel it was
19 appropriate to use such strong language in a
20 courtroom with Officer Twedt there, and also
21 considering the ramifications to him and his
22 job?**

23 A Did I think it was appropriate?

24 Q **At the time, how did you feel?**

25 A At the time I must have because I did it.

343

1 Q **Okay.**

2 A I did not -- I did not stop, I did not think, I
3 reacted to what I was hearing.

4 Q **Given what you've learned now, from your mental
5 health experts, how would you handle that
6 situation today?**

7 A I would listen, I would -- if the tension was
8 coming to my arms and my body, I would have the
9 immediate signal that I was becoming irritated
10 and I was becoming annoyed. And I then would
11 stop and think, where am I, what's the
12 situation, you know. And I would not have
13 responded or reacted at all at that hearing.

14 Q **And I'm assuming whatever ruling you made in
15 that particular hearing would remain the same
16 regardless of how you handled the impression of
17 Officer Twedt's testimony?**

18 A Yes. My ruling would have been the same,
19 correct.

20 Q **Okay.**

21 A It's the way I did it.

22 Q **Can you also -- I'm just going to go down the
23 list to some of these things, and I want you to
24 tell me about it. You made the comment about,
25 my little peckerheads; correct?**

344

1 A Yes. Yes, I did.
 2 Q Is that appropriate?
 3 A No.
 4 Q What context and what particular instances? I
 5 assume it was made more than once. Did you make
 6 those comments?
 7 A Friday is juvenile day and sometimes people
 8 would say, ask me, What's on your calendar
 9 today? And I did say that, Today is my little
 10 peckerhead day.
 11 Q What was your intention in saying that? I mean,
 12 what was the meaning behind it?
 13 A Smart aleck remark.
 14 Q Okay. At the time, did you think about that or
 15 did you have any rational thought about what you
 16 were doing when you made those comments?
 17 A No.
 18 Q What's the situation with Mr. Banks? And
 19 evidently I don't know if they have -- how close
 20 in time they happened, but there's an incident
 21 where supposedly you flipped the bird to him and
 22 then you called him an asshole later in your
 23 chambers, I believe?
 24 A I think that's all in that period, that short
 25 period of time.

345

1 Q Okay.
 2 A Yeah.
 3 Q Can you tell me what context flipping him the
 4 bird was made in?
 5 A I really can't remember. I know that Bart Banks
 6 testified and I think he -- I think the world of
 7 Bart Banks. Let's start there. And he -- he
 8 and his father, for sure.
 9 And then the couple of cases I had with Bart
 10 before I went on the bench, he and I, we had a
 11 banter going, and I took it to the bench.
 12 That's the bottom line. I took it to the bench,
 13 and I shouldn't have.
 14 I obviously -- I embarrassed him in front of
 15 his client, he was very uncomfortable in front
 16 of his client. I was rude. Obviously it's
 17 rude, and it should not have happened. It did
 18 happen.
 19 Q By either one of those events, were you
 20 intending to, by flipping him the bird, was that
 21 your intent to show some aggression or what?
 22 Were you being flippant with him?
 23 A I was -- another smart aleck remark, is what it
 24 was. I got -- I erroneously got caught up in
 25 the banter and forgot I was a judge.

346

1 Q Did it have anything to do with how you really
 2 felt about him?
 3 A Oh, no. Oh, no.
 4 Q Okay.
 5 A No.
 6 Q Now, John Nooney was in here. You heard him
 7 testify it made him uncomfortable when you
 8 called him at his office about a case that might
 9 have been instructive in a proceeding he had in
 10 front of you. Did you hear that?
 11 A I did.
 12 Q Why did you take it upon yourself to call him at
 13 his office? What was your thinking behind that?
 14 A Because the case that I was familiar with that I
 15 thought to be dispositive was not in his favor
 16 and I wanted to tell him that, and to tell him
 17 that he needed to address that case before the
 18 hearing. Because if there's law contrary to
 19 this, I'm going to need to know that before I
 20 make a decision. That right now I thought it
 21 was going to be resolved and it was not going to
 22 be in his favor, and I wanted to give him the
 23 opportunity to prove me wrong.
 24 Q You wanted to make sure that the full extent of
 25 the law was in front of you and presented to you

347

1 by the lawyers so you could make the proper
 2 ruling?
 3 A That's right.
 4 Q Did you handle that intent improperly by calling
 5 him?
 6 A Absolutely. Yes.
 7 Q How would you do that today?
 8 A I'd call them both. Yeah, both. In that case
 9 there were two.
 10 Q Had you ever done that before, ex parte, or
 11 called lawyers in their office about cases?
 12 A Not -- not that I know of. Do lawyers and I
 13 have conversations about matters that the other
 14 lawyer is not on? The answer is yes on that.
 15 Like, I might call a lawyer saying, How you
 16 coming on the case? Is it still going to be --
 17 are we still good to schedule? I know I do
 18 that.
 19 Q Have you had conversations though with lawyers,
 20 one lawyer without the opposite side there
 21 about --
 22 A No.
 23 Q -- substantive matters that are in front of you?
 24 A No. That's -- no. No. I'll say no.
 25 Q Okay. Now, there's been some talk about this

348

1 wig incident. Was that -- I think, if I
 2 remember the testimony, that happened one time
 3 in 2003; is that correct?
 4 A That's -- 2003 I was a juvenile judge. That's
 5 when I got the wig from Judge Delaney and that's
 6 when I wore it, yes.
 7 Q That was seven years ago; correct?
 8 A Well, yeah.
 9 Q Have you worn it in the interim period?
 10 A No.
 11 Q This picture that Mr. Schaffer presented,
 12 Exhibit G?
 13 A Yes.
 14 Q That was on the front of your bench?
 15 A Yes.
 16 Q That was posted there by you seven years later,
 17 have anything to do with that original wig
 18 incident in 2003?
 19 A No. It was another piece of art. There's a lot
 20 of art in my courtroom.
 21 Q And who gave this to you?
 22 A Pat Economos, a lawyer in Mitchell.
 23 Q You told me about that, and that was given to
 24 you at approximately the same time you put it up
 25 on your bench; correct?

349

1 A Right.
 2 Q Does it have anything at all to do with the fact
 3 that you were facing these proceedings in front
 4 of the Commission?
 5 A No. Never, never came to mind.
 6 Q Did you ever tell anybody that it did?
 7 A No.
 8 Q Do you have any idea why Mr. Krattenmaker or
 9 Mr. Schaffer or anybody else would think that?
 10 A I don't.
 11 Q Tell me about the art in your courtroom.
 12 A Well, you can see some of it in the wider
 13 picture.
 14 Q I think it's Exhibit F.
 15 A Exhibit F. This picture shows the art on my
 16 court side, and this is a Bev Doolittle print,
 17 one of her older ones. It shows when she used
 18 the aspen trees as a part of her art. And these
 19 are Native Americans who are stealing some
 20 horses from this Cavalry line.
 21 This is a copy of the museum piece of
 22 Sitting Bull. This is a copy of a museum piece
 23 from a chief on the Rosebud reservation. This
 24 is a -- I think his name is Corbett, who does
 25 the law kind of etches. And those are some --

350

1 one of my dad's pieces that he had in his
 2 office.
 3 And then the jury -- or, excuse me, the
 4 witness stand is right here. And I have a -- I
 5 have the poster of the tribute to Governor
 6 Mickelson and the other people up there.
 7 Then I have George Washington, the classic
 8 George Washington piece behind the witness. And
 9 then I have the -- I can't remember the name of
 10 it, it's the American flag. It's by itself and
 11 it's down. It's another classic piece.
 12 And then over on behind the jury I have four
 13 of the Governor Mickelson posters that he had
 14 for his Governor's Hunt. And then in the
 15 middle, when Denny Dodge was my court reporter,
 16 a person gave him a picture of a B-1B bomber
 17 flying over a Glacier lake. So all the way
 18 around in my courtroom is art.
 19 Q You heard Mr. Krattenmaker talk about the
 20 comment that you made about, This is where I
 21 hang my Indians.
 22 A Yeah.
 23 Q Did you hear that?
 24 A I did.
 25 Q And I assume that's the art that you're

351

1 referring to that's kind of on the -- what I
 2 guess would be on your right side?
 3 A Yeah.
 4 Q As you're looking out towards the courtroom?
 5 A Right.
 6 Q Is that correct? Those are the pictures he was
 7 referring to?
 8 A Yes.
 9 Q Can you please tell me what you meant when you
 10 made that comment.
 11 A Well, I can tell you -- I can tell you -- here,
 12 if you look, is where the WIFI, or the audio
 13 visual system that is in courtroom, it would sit
 14 right here in the courtroom. This is the screen
 15 over here.
 16 So before a trial and people were using it,
 17 we would -- I would take my -- these three
 18 pieces down and put them behind this bench. And
 19 then I remember doing it. Then I -- when the
 20 trial is over, I go -- I would go back and hang
 21 my, these three pieces that I took down.
 22 And I remember saying -- I did not remember
 23 that Mr. Krattenmaker was there. But I remember
 24 saying, again in a smart aleck deal, This is
 25 where I hang my Indians. And I immediately

352

1 said, Hold it, that's completely inappropriate.
2 I'm sorry.

3 And that's the one time I said it. I've
4 never said it again. And I didn't know that
5 Mr. Krattenmaker was even there, but he could
6 have been there.

7 We weren't in court. We weren't in court,
8 we weren't in session. I'm in there just
9 hanging that stuff up, and he manages that
10 system, that audio visual system. He brings it
11 in, instructs people how to use it, he takes it
12 out and stuff.

13 Q Rather than the negative inference that was made
14 by Mr. Krattenmaker by that comment, are those
15 pictures of Native Americans hanging in your
16 courtroom because of your respect for the Native
17 Americans?

18 A That's why I put them up, because I see lots of
19 Native Americans, especially in the juvenile
20 area, and that's why I hung them because these
21 are leaders.

22 Q Mr. Krattenmaker also took issue with the fact
23 that you had -- and I believe that Chief Deputy
24 State's Attorney also, that you have a license
25 plate that says Probable Cause on it?

353

1 A Yes.

2 Q Tell me how you got that license plate.

3 A Got that from Judge Delaney.

4 Q Okay. You didn't buy it or chose it yourself?

5 A Well, he -- let's put it this way. He asked me
6 and I thought it would be funny. In fact, can
7 I -- may I tell you the funniest story?

8 Q Yes. Yes.

9 A After I got the license plate, I'm driving I
10 think on a Monday, or some morning, I'm driving
11 down from Lead after the weekend of being up in
12 the Northern Hills. And I'm driving down the
13 interstate and a highway patrolman pulls me
14 over. And he comes up -- and right by the weigh
15 station there.

16 He comes up to the window, and I said,
17 What's up? And he said, Well, you invited me.
18 I said, Oh, my license plate. And he said,
19 Yeah. Oh, by the way, I did call your plates in
20 because you don't have your tags on.

21 And I looked in my glove compartment and
22 they were there. He said, Put your tags on your
23 license plate. And he said, Have a good day.
24 It's the DCI, drug enforcement people, they --
25 they giggle about it, about the van.

354

1 You've got to remember, this is a 1974

2 Volkswagen, and it's orange, and it's

3 conspicuous, and I drive it.

4 Q Do you mean anything aggressive towards the law
5 enforcement or anybody else by that license
6 plate or by your van --

7 A No.

8 Q By driving an old van?

9 A No. No. In fact, the law enforcement people
10 that have approached me think it's funny. They
11 think it's funny.

12 Q It's kind of hard to dispute that everyone is
13 entitled to probable cause anyway, isn't it?

14 A It's just a '74 orange Volkswagen bus going down
15 the road, with a 9.2 surfboard on the top of it,
16 with bumper stickers on the back and things like
17 that.

18 That's what Delaney -- that's why he gave it
19 to me. He said, That's probable cause going
20 down the road. And that's why I did it.

21 Q Was Judge Simko's testimony about the -- why you
22 have that van and where it came from, was that
23 accurate?

24 A Yes.

25 Q Can you tell us about your brother and how you

355

1 got the van?

2 A (Pause.) Let's -- can I just leave it that John
3 was accurate and it's how I connect with my
4 brother?

5 Q Okay. How -- just, you've been on the bench for
6 seven years, right?

7 A Yes.

8 Q And during that time period, have you handled
9 juvenile matters on a regular rotation?

10 A I think so. I don't know. I was on in '03 and
11 then I came on in 2010, and I don't know if
12 that's regular or irregular.

13 Q But you've been -- I guess, you've been on
14 juveniles off and on for the seven years?

15 A Just those two times.

16 Q Okay. And you heard the -- can you tell me
17 about the evolution of how you handle juvenile
18 court and the caseload and the number of people
19 that come before you and how that's either
20 increased or decreased over the years?

21 A I -- I don't -- I have a sense that it's
22 increased but I don't know. I know that those
23 kinds of statistics are kept and are available
24 through the court system.

25 I had never done juveniles before '03, so I

356

1 was learning in '03. I was learning how to
2 handle it. I would like -- I have a prepared
3 document to advise juveniles of their rights and
4 the burden of proof and all those things.

5 Q Okay.

6 A And we have them in sections. So every section,
7 the first thing I do is advise them of their
8 rights, which I -- they are entitled to a closed
9 hearing. I tell them that at the first of my
10 advisory. Then I tell them the rest of my
11 script that I give every time.

12 And then at the end I say again, if you want
13 to have a closed hearing, all you have to do is
14 tell me. And most of them do not want a closed
15 hearing.

16 Everyone that has ever said they wanted a
17 closed hearing has been given a closed hearing,
18 and that includes the people that come from the
19 Juvenile Service Center to my courtroom also.
20 And that's -- we start with them and then we go
21 through it.

22 The juvenile conferences -- conference that
23 I went to and the things that I read and
24 recently I was involved in a meeting with the
25 Casey Family Foundation and I -- when I say

357

1 recently, that was June or July. I can't
2 remember exactly when they were here.

3 And listening to -- I think we were going to
4 be a pilot project for this Casey Family
5 Foundation in the juvenile area. And the
6 gentleman who was heading it up or something, he
7 was discussing about juvenile matters, and he
8 was talking about detention and jail and things
9 like that.

10 And what I learned at the conference that I
11 went to and through the reading and from what he
12 said, I have adopted a philosophy that I -- I am
13 the least effective in changing behavior of
14 juveniles.

15 The court service officers and the other
16 professionals in that area are the ones that can
17 effectively change behavior of juveniles. That
18 a judge who sees them in a passing setting does
19 not really have that kind of affect.

20 So this year when I started talking with
21 Roxie and with Carla and Dennis at the Juvenile
22 Service Center -- Roxie is the deputy state's
23 attorney that handles all juveniles over at
24 Pennington County. We developed -- and Jack at
25 the state's attorney's office.

358

1 We developed a schedule for juveniles, and
2 they are in sections. And so the first section
3 comes in, I -- there's never been 100 people in
4 my courtroom. But there's probably been 40 for
5 sure in my courtroom. Because that's the first
6 section.

7 And then when they are processed, then we go
8 to the next section, et cetera. So I do it in
9 sections. Then we have all hearings in the
10 afternoon. All of the juvenile hearings,
11 adjudicatory hearings, the suppression hearings,
12 things like that, we do that.

13 So that's something that we all developed,
14 and that's the process I was using. There's
15 not -- there's not a lot of conversation between
16 myself and the court service officers during the
17 juvenile hearings because I -- 99.5 percent of
18 the time do what the recommendation -- they
19 recommend.

20 At the bottom of their sheet, they give me
21 recommendations. So I merely set forth the
22 recommendations that they give, the
23 dispositions.

24 I do say a comment. I have -- and maybe
25 this is a misinterpretation. I do say a

359

1 comment. Anybody that I send to the Department
2 of Corrections, after they have been through my
3 juvenile -- you know, the juvenile, through the
4 court service officers, and through the
5 professionals, the alcohol and drug people, and
6 the psychological people, and the other
7 counseling people that we have, I tell them, I
8 do -- and this is something I picked up at the
9 conference that I went to.

10 I tell them that, We have provided you all
11 of the services that we can provide you, but our
12 funds are limited. So I say this, I say, So we
13 have failed to be able to change your behavior.
14 We failed you. And I have to apologize to you
15 for it. We tried our best. And the only other
16 place that has the funds that can hopefully turn
17 you is the Department of Corrections. So that's
18 where I'm sending you.

19 And anybody that I do send to the Department
20 of Corrections, that's what I tell them.

21 Q Judge Fuller, prior to this complaint that
22 you're in front of the Commission on, have you
23 ever had a judicial complaint filed against you?

24 A I don't know. No. I've never got -- I got a
25 letter from the secretary after this about a

360

1 person, about a sentencing or something, and
 2 that's the only other letter that I've ever
 3 gotten from the Commission.
 4 Q And that letter just was a summary, a dismissal
 5 or expungement of the complaint?
 6 A Yes, I guess so, because it didn't go anywhere.
 7 Q Other than that, have you ever had a complaint
 8 against you in front of this Commission?
 9 A If I had, if I have, they've not brought it to
 10 my attention.
 11 Q Okay. Have you ever been disciplined?
 12 A No.
 13 Q Now, these evaluations that we talked about that
 14 Judge Young had the affidavit about, are those
 15 voluntary evaluations? In other words, you had
 16 to submit yourself to those voluntarily?
 17 A Yeah. Yeah.
 18 Q And were you interested in seeing what other
 19 lawyers thought about you?
 20 A Yes.
 21 Q And by and large, you got positive feedback;
 22 correct?
 23 A That's -- that's what Judge Young characterized
 24 it as when he was talking to me and showing me
 25 the evaluations, which he then took back. But I

361

1 took that -- I asked him if I could have that
 2 one, which is an exhibit.
 3 Q In fact, Judge Young I think in his affidavit
 4 said he was impressed enough with you that he
 5 then supported you in your run for election in
 6 2006; correct?
 7 A He did.
 8 Q And part of that I think he said was based upon
 9 those evaluations?
 10 A I believe he said that in his affidavit.
 11 Q In looking at it from today's perspective, in a
 12 way those evaluations thwarted in a way any
 13 progress you made in recognizing some of these
 14 mental health issues we've talked about today;
 15 correct?
 16 A I don't know. I didn't make a conscious
 17 association that way.
 18 Q I guess, the point I'm trying to make is, at
 19 least at that time, you were under the
 20 impression that the lawyers that appeared in
 21 front of you had a positive impression of you?
 22 A Yes, I did. Yes.
 23 Q And those evaluations were anonymous; correct?
 24 A Yeah. Right.
 25 Q Evidently the chief deputy state's attorney knew

362

1 about somebody who had made a complaint against
 2 you in her office because she recognized the
 3 handwriting. Did you recognize the handwriting
 4 on this one evaluation you kept back?
 5 A No.
 6 Q Okay. You know, and you're going to have to
 7 explain this to the Commission, Judge Fuller, I
 8 can just give you the forum to do it. But you
 9 would admit that, and Mr. Schaffer asked you
 10 this, that some of your actions that we've
 11 talked about, your words, your demeanor, the
 12 forum that you did them in, created an
 13 appearance that you were not a fair individual
 14 or you were biased in some instances. Would
 15 that be a fair comment?
 16 A Yes.
 17 Q Tell me how you view yourself as far as actually
 18 being biased or actually considering cases that
 19 come in front of you.
 20 A I consciously listen to the evidence before me,
 21 I read the briefs of the attorneys, I do a lot
 22 of my own research, too. I go read the cases.
 23 Sometimes attorneys don't give you the case, and
 24 I want to read the case because, especially when
 25 you're in criminal law, you know, the facts

363

1 drive the constitution. The constitution does
 2 not drive the facts.
 3 You've got -- the facts you have to have.
 4 So when somebody cites to me principles of law,
 5 I have to read the facts to see why those
 6 principles were applicable. And so that's why I
 7 do a lot of my own research, too, because
 8 sometimes you don't get that from the lawyers.
 9 An example of that is when I called John
 10 Nooney. I went and read that case again, and
 11 that's why I -- in my mind it was dispositive.
 12 I don't -- I don't feel a bias or a prejudice or
 13 an impartiality against anybody.
 14 I think -- I think Heidi Linngren kind of
 15 summarized it in her testimony at the Show
 16 Cause. I made these comments that she testified
 17 about the law enforcement officers and things
 18 like that, and they don't like to bring this to
 19 me, or they don't like that.
 20 I've signed every search warrant that law
 21 enforcement has brought to me. I think she
 22 said, I don't like what he says but he's
 23 never -- never ruled against me in a criminal
 24 case. So I don't carry it. I don't carry it to
 25 the decision.

364

1 Q You understand the disconnect between what it
2 appears like and what's actually going on in
3 your head when you make these comments?
4 A Yes. Absolutely. Absolutely. Absolutely.
5 Q Do you view all the cases, every case that comes
6 in front of you as being an important case?
7 A I do.
8 Q And I noticed in the Ten Commandments that you
9 have in front of you that it says, number seven,
10 Remember there are no unimportant cases. Is
11 that a tenet that you follow, doing the
12 studying, reading the cases, and being prepared
13 for the hearings that come in front of you?
14 A That's my goal. That's what I try to do.
15 Q Sometimes you get immersed in these cases and
16 you're reading everything, and then things come
17 in front of you, there are frustrations that
18 develop; correct?
19 A That's correct.
20 Q And that's what's caused some of these comments
21 and inappropriate demeanor items?
22 A Correct.
23 Q Have you ever had your honesty or anybody ever
24 question whether or not when you give your word
25 or you say something, that you don't mean it or

365

1 that you've gone back on it?
2 A I've never had anybody tell me that.
3 Q Okay. Has it been kind of one of the things
4 you're proud of through your career that your
5 integrity and honesty is above reproach?
6 A Well, it's important. I started in 1968 and I
7 had the blessings of a lot of old timers, and
8 that's what they taught you, and so I learned
9 it.
10 Q Tell me again, and I want you to explain to the
11 Commission, you've had complaints in these
12 papers, we've read about sarcasm?
13 A Yes.
14 Q On your part?
15 A Yes.
16 Q Anger on your part?
17 A Yes.
18 Q Frustration?
19 A Yes.
20 Q Correct?
21 A Yes.
22 Q Inappropriate humor?
23 A Yes.
24 Q Tell me, and explain to the Commission as they
25 are sitting here, why they can expect that you

366

1 can change that behavior.
2 A They can -- you can expect it because now I
3 immediately recognize it. There's absolutely no
4 situation -- I've only had an opportunity
5 because I've not been on the bench to -- Jacque
6 has been a great feedback because I share with
7 her what Bob Holmes has been teaching me. And
8 so she's helped me because she's tuned in to it.
9 And so when I -- and I'm really getting good
10 at feeling the thing he called the feelings, the
11 adrenaline that Holmes told me about, because I
12 apparently have -- am very, say, emotional,
13 because I can feel right away in my arms and
14 across my chest the tension caused by this
15 adrenaline, this irritation, and this annoyance.
16 And it's -- it's just interesting when somebody
17 points it out to you.
18 And I now think, and I now pause, and I now
19 breathe. Instead of responding, I wait. Like
20 Bob Holmes told me, he said -- he told you about
21 drinking the water. He says, Don't have a glass
22 of water on your table. He said, Have a pitcher
23 and pour it. Take the time to pour the water
24 into your glass. Set it down. Pick your glass
25 up, drink your water, set it back down.

367

1 And in that time, because of who you are,
2 you will be able to reflect upon what's
3 happening right then and there. And you would
4 be -- you'll be able to recognize how you should
5 respond appropriately. And he says, You've
6 never done that before.
7 Q Mr. -- or, Dr. Arnio would not indicate -- or
8 excuse me. I guess it was Mr. Holmes would not
9 indicate on the record who was behind the
10 crossed-out mark, but I think everybody here
11 knows it was your wife, Jacque; correct?
12 A Yep. Yep.
13 Q You know, are you practicing -- I shouldn't say
14 practicing it. You need it in your marriage, I
15 assume so, she won't --
16 A Let --
17 Q Yeah.
18 A That's right. See, that's the beauty of it is
19 that's what we've developed now, is this same --
20 I've developed in our relationship the same
21 thing that I need, that I've developed and will
22 use when I'm on the bench.
23 Q I know this is a simple little example. It's
24 unrelated to courtroom, but would you explain to
25 the Commission kind of the -- I don't know if

368

1 you call it an epiphany, but when the light bulb
2 went off during a cribbage game with your wife?
3 A Well, actually, it didn't. It -- the epiphany
4 came, I believe, the next day or the day after
5 when I was with Mr. Holmes.

6 Q All right.

7 A Jacque and I play cribbage. Jacque is not a
8 good counter. I mean, I do play a lot of
9 cribbage, and when you play cribbage, the
10 counting is -- it's part of the game. And most
11 people that play cribbage can count quite
12 rapidly when they play, and say they have 16 or
13 12 or, you know, whatever.

14 So Jacque, she's about to double skunk me,
15 and I've been counting her hand for her. And
16 I -- this is what I -- this is very early. This
17 is, like, before the second meeting, the first
18 meeting, or whatever.

19 And I said to her, I said, I'm not going to
20 count your hand anymore. She said, Well, I need
21 your help. I said, I'm not going to sit here
22 and count your hand so you can beat me. You're
23 going to have to do it all by yourself.

24 So the next hand is dealt and she looks at
25 me and she says, I need your help. So I, with a

369

1 tone of voice and my body language, there's no
2 doubt in her mind now that I'm angry. Anyway,
3 she did, she double skunked me.

4 So I'm at Holmes' and we're talking about
5 this irritation and this tone and these things.
6 And I said to him, I've got to tell you, and I
7 told him that story.

8 And he looked at me and he said, Would you
9 rather be married to someone who can't count a
10 cribbage hand or be married to a jerk like you?
11 Well, that answer was easy. We now play
12 cribbage and we have a lot of fun at it.

13 Q I'm guessing that one of the reasons that you
14 started counseling last summer with Jacque is
15 because the behavior that finally manifested
16 itself in front of the court was becoming a
17 problem in your marriage?

18 A Yes.

19 Q Okay. And I'm assuming that during that time
20 period that it was not -- or, that it was a
21 problem in your marriage, you didn't realize
22 that it was your fault because of your demeanor
23 and your actions?

24 A It must have deteriorated because, you know,
25 Jacque and I have been married for 46 years.

370

1 She knows me pretty darn well. So it must have
2 deteriorated because she's the one that said, We
3 need to go and get some help. Our relationship
4 is becoming -- it's kind of like I'm living with
5 a roommate instead of a husband. And I said,
6 Let's go. Let's do it.

7 Q Now the counseling you got with Dr. Arnio 25
8 years ago was to help you deal with a difficult
9 situation in your family at the time, correct --
10 A Absolutely.

11 Q -- with your son? And the reason you quit
12 drinking at that time was just to basically be
13 more attentive and be a better father; correct?

14 A Well, plus it was a factor. So I eliminated the
15 factor until 1995, in there, when Alecia went
16 off to college.

17 Q So you didn't drink from the meeting 25 years
18 ago up until the time your last child was gone;
19 correct?

20 A Correct.

21 Q Were you ever diagnosed, or did anybody ever
22 tell you that you needed treatment or that you
23 were an alcoholic?

24 A No.

25 Q You did that on your own 25 years ago?

371

1 A Yeah.

2 Q And when you just stopped recently again, you
3 did that on your own also; correct?

4 A Absolutely. It's just not -- it shouldn't -- I
5 don't want it to be a factor, so if you
6 eliminate that concept, you know.

7 Q Okay. The -- Mr. Schaffer asked you earlier
8 whether or not you had apologized to some of the
9 people that have been affected by your behavior.
10 Do you remember that question?

11 A I do.

12 Q And you have -- it's been your intent and you
13 have wanted to apologize since the beginning,
14 haven't you?

15 A Since Mr. Schaffer first asked me at the Show
16 Cause hearing. He asked me if I had apologized
17 to them, and I said that I have not apologized
18 to them but -- which, he's the one that sparked
19 the thought, since we were as long as we were
20 between hearings as to whether or not I could
21 send those apologizes out now -- then, a month
22 ago or so.

23 Q Did I advise you not to send them because you
24 weren't to have any contact with the people
25 involved?

372

1 A You know, I don't remember. If you did, then
2 you did. I don't remember that you did. It's
3 just that I -- it just became a nothing. I
4 mean, I didn't.
5 Q You asked me the question of whether or not you
6 could send them; correct?
7 A Right. Yeah.
8 Q Okay. You had some people testify against you,
9 I guess that would be about the only way we
10 could characterize it. They said negative
11 things about you both in the Show Cause hearing
12 and here today and also in Mr. Nelson's
13 investigation; correct?
14 A Yes.
15 Q And you're aware of every one of those people
16 that have made those comments about you?
17 A Yes.
18 Q Do you harbor any ill feelings towards them for
19 participating in this process?
20 A No. I hold no animus toward anybody who has
21 testified, hold no animus towards this
22 Commission for what -- they are doing their job.
23 I -- I do not. That is not in my character.
24 Q In a sense, it's been an awakening, a positive
25 step that you've been driven to these mental

373

1 health professionals. Would you agree with me?
2 A It's -- it has definitely turned out to be a
3 positive step. Whatever the decision is,
4 whatever the recommendation is, whatever the
5 Supreme Court does, I have the tools to change
6 and I'm going to.
7 Q And these comments that have been made about you
8 in this complaint is part of what caused you to
9 recognize that you needed help?
10 A Absolutely.
11 Q You know, I think there was some comment about
12 that your court reporter, since this complaint
13 came out, indicated at least until you were
14 suspended from the bench that you were no fun.
15 Do you remember that?
16 A That's what I told Bob Holmes, yes.
17 Q Is that because you are attempting not to --
18 your demeanor in the courtroom was lacking this
19 flippant attitude that you've talked about?
20 A Yes.
21 Q Have you ever had any problem with your court
22 reporter?
23 A Oh, no.
24 Q Do you have a good relationship with your court
25 reporter?

374

1 A I think I do. I've really worried about her for
2 what I've done to her.
3 Q What do you mean by that?
4 A She doesn't have a judge.
5 Q At some point during these proceedings, I think,
6 or just after the complaint was brought against
7 you, did Judge Davis suggest or write a memo
8 about how assignments could be done in your
9 circuit?
10 A Yeah. That would be after the complaint that
11 Glenn Brenner and the chief of police and
12 Sheriff Holloway filed, yes. That's the Officer
13 Twedt matter.
14 (Exhibit O was marked for identification.)
15 Q (BY MR. NICHOLSON:) Would you look at what's
16 been marked as Exhibit O.
17 A Yes.
18 Q Is that the memo or the schedule that Judge
19 Davis proposed starting September 14th until the
20 end of the year?
21 A Yes.
22 Q And this was as a result of the complaint
23 against you by the state's attorney's office?
24 A I think this -- the state's attorney in 2010 I
25 think, as we discussed at the Show Cause

375

1 hearing, it appeared to me that there was --
2 they were systematically filing against me, and
3 then it got a little worse where they were --
4 seemed to be escalating that they were filing
5 against me.
6 And then Roxie Erickson filed against me as
7 a juvenile, and that's when Judge Davis came and
8 said, Well, we have to do something about that.
9 And he asked me if I would be willing to do this
10 and I said that I would, this schedule.
11 Q According to my notes here, the formal complaint
12 filed against you by the Commission was on
13 November -- excuse me, September 7th, is that
14 pretty close to your recollection of that event?
15 A It's the 7th, 8th, or 9th. I know that.
16 Q And this memo would have been during that
17 process or just after that process was started;
18 correct?
19 A It's the 14th, yes.
20 MR. NICHOLSON: I would offer Exhibit O.
21 MR. SCHAFER: No objection.
22 MR. PALMER: O will be received.
23 Q (BY MR. NICHOLSON:) As a part of this process
24 that you've -- you now understand you need to
25 think about when you're angered or your

376

1 frustration starts to overtake you physically,
 2 or you can feel it physically, I think one of
 3 the hints to you was to find ways to divert by
 4 pouring a glass of water or taking a break?
 5 A Right.
 6 Q And then possibly, if you take a break, having
 7 someone, if there's enough of a gap, to call and
 8 be able to vent some of your frustrations maybe
 9 between court, between hearings, those types of
 10 things. Do you think that would be beneficial
 11 to you?
 12 A Yeah. Yes.
 13 Q If you had a --
 14 A If I had somebody to talk to, if I was -- if I
 15 was unable for sure -- if I was unable to
 16 recognize that I was falling backward, for sure
 17 that would. If I had somebody to talk to that I
 18 could tell or explain what was happening, that
 19 would be helpful and -- yeah, that would be.
 20 Q You heard Judge Gienapp and Judge Simko saying
 21 that they would be agreeable to visiting with
 22 you or helping in any way they can. Did you
 23 hear that testimony?
 24 A Yes.
 25 Q Would you be comfortable in confiding with them

377

1 and bouncing ideas off them and using them in a
 2 form that would be helpful to you?
 3 A Yes.
 4 Q Do you have any problem with -- if you're on the
 5 bench again, that there be some monitoring
 6 system by the CourtSmart system or whatever
 7 other system the Commission would think
 8 appropriate?
 9 A No. I think they should have something like
 10 that. They -- I know that I have changed and I
 11 will continue to change, but I -- that's me
 12 telling you. I think you should have a system
 13 that could monitor and check to see if I am
 14 telling you today the truth, that I have and
 15 will continue to change. That's my promise to
 16 you.
 17 Q And do you have any problems with the fact -- I
 18 mean, that that would affect your ability to
 19 make independent decisions on the bench?
 20 A No. I would continue to do what I've done in
 21 that area.
 22 Q And the part that would be changed would be the
 23 demeanor and the comments?
 24 A Right, the demeanor. I would become a judge.
 25 Q You know, there's -- we're going to submit at

378

1 the end of this hearing some proposed findings
 2 of fact and conclusions of law to the
 3 Commission. And as an exhibit to that exhibit,
 4 or those findings and conclusions would be, I
 5 think, what you gave us as what you would
 6 suggest based upon your current knowledge of
 7 what conditions you would want imposed upon you
 8 if you were back on the bench; correct?
 9 A That's right.
 10 Q And I think on that list, and I -- and the
 11 Commission will see it when we submit the
 12 findings. But I think you indicated that you
 13 felt a complete psychological exam and follow
 14 all recommendations should be part of any
 15 conditions if you are reinstated?
 16 A Yes.
 17 Q And that you enroll and successfully complete an
 18 anger management program --
 19 A Yes.
 20 Q -- correct? And that you follow through, if the
 21 Commission allows you to have that contact, with
 22 letters of apology to all of the people that
 23 might have been adversely affected by your
 24 behavior?
 25 A Yes.

379

1 Q And that a mentor or a team of people, possibly
 2 Dave Gienapp talked about that, or whatever
 3 process in that regard is appropriate to the
 4 Commission, would be either appointed or you
 5 would submit them to the Commission so that they
 6 would aid you in avoiding that type of behavior
 7 that got you here in the first place?
 8 A Yes.
 9 Q And that you -- I don't know what we call this,
 10 whether we call it judicial probation or
 11 judicial conditions or discipline, but that
 12 would continue until your retirement, which
 13 would be at age -- the last -- the end of the
 14 year at age 70; correct?
 15 A What I wrote was, that --
 16 Q Yeah.
 17 A -- the Supreme Court place me on probation until
 18 I retire December 31st, 2010.
 19 Q That's this year 2010. Do you mean --
 20 A Excuse me, 2013.
 21 Q And you're what, 68 years old?
 22 A 67. I'll be 68 in February.
 23 Q And there's mandatory retirement in the year
 24 that you reach 70; correct?
 25 A That's the way I'm reading the statute. That if

380

1 I'm 70 in February, I get to finish the year.
 2 If I'm incorrect, the retirement people will
 3 tell me. But I remember asking Justice Sabers
 4 if he finished his 70th year and he said yes.
 5 So that's -- and if -- I don't know. The
 6 retirement people tell us.
 7 Q But in any event, you're proposing that this
 8 probation stay until whatever that retirement
 9 day is?
 10 A Absolutely.
 11 Q Okay.
 12 A Yes.
 13 Q And if the Commission deems it appropriate, that
 14 you be -- continually have the CourtSmart system
 15 on during your probation, and that someone --
 16 Wally Eklund said he'd be willing to do it, he
 17 doesn't know anything about the system. But
 18 there are audio tapes, the way I understand it,
 19 and we know about a transcript here. So you
 20 wouldn't have objection to anybody spot-checking
 21 that from time to time to see if they are seeing
 22 anything in that system that would cause
 23 concern?
 24 A No. Any way that the Commission or the Supreme
 25 Court deemed appropriate to monitor me would be

381

1 satisfactory to me.
 2 Q And would you be open to any other suggestions
 3 by the Commission or the Supreme Court that you
 4 haven't thought of?
 5 A Oh, absolutely.
 6 Q Judge Fuller, just about done here. But the
 7 remorse and shameful feelings that this has
 8 brought upon you, would you ever want to go
 9 through that again and experience it? If you're
 10 back on the bench, would you ever consciously
 11 put yourself in a position where you would
 12 embarrass and basically destroy your emotional
 13 makeup the way this has done to you?
 14 A No. I'd never do it.
 15 Q How determined are you to make sure if you're
 16 put back on the bench that you recognize and
 17 solve and keep yourself, so to speak, on the
 18 straight and narrow and be the type of judge
 19 that you're capable of?
 20 A I'm absolutely focused.
 21 MR. NICHOLSON: I have nothing further.
 22 MR. SCHAFFER: I have just a few questions,
 23 Judge.
 24 REDIRECT EXAMINATION BY MR. SCHAFFER:
 25 Q I asked your attorney to have you get this

382

1 information so that the Commission has it. If
 2 you retired now, what would your benefits be?
 3 A I got that from the South Dakota Retirement
 4 System because you asked for it.
 5 (Exhibits P and Q were marked for
 6 identification.)
 7 MR. SCHAFFER: I'd offer Exhibits P and Q.
 8 MR. NICHOLSON: I'm going to object based --
 9 for two reasons. Number one, on relevance. I
 10 don't know why it makes a difference as to what
 11 kind of judge you can be based on his
 12 retirement, but number -- based on his
 13 retirement benefits.
 14 But number two, you know, I don't know how
 15 public that is. I don't know if one of us could
 16 go Google that or something. But to me that's
 17 private information, and this may become a
 18 public transcript.
 19 MR. SCHAFFER: I would defer to the
 20 Commission if they want to somehow --
 21 MR. PALMER: I think we can -- if the
 22 publication of it's any issue, we can protect it
 23 and note it in the transcript that Exhibits P
 24 and Q are submitted for the Court's review only
 25 with our recommendation, not for public, because

383

1 it's somewhat, I guess, proprietary. That's not
 2 the right term probably, but I don't have it
 3 right now.
 4 JUDGE WILBUR: Financial information, it's
 5 private. I agree.
 6 MR. PALMER: Yeah, I agree.
 7 MR. NICHOLSON: I guess I would also object
 8 on relevance. I don't know what it has to do
 9 with why we're here today.
 10 MR. SCHAFFER: Retirement is one of the
 11 possible sanctions.
 12 MR. PALMER: I think from the standpoint
 13 that we have to consider the full realm of
 14 sanctions, and maybe a couple people on the
 15 Commission know and understand how that works, I
 16 for one don't.
 17 So I guess from that standpoint, unless the
 18 Commission has a contrary feeling, I'm going to
 19 go ahead and receive Exhibits P and Q, subject
 20 to making them confidential financial
 21 information.
 22 MR. SCHAFFER: Do you want me to just give
 23 them to you?
 24 MR. PALMER: Yes, I do.
 25 MR. SCHAFFER: Okay.

384

1 MR. PALMER: Thank you.
 2 Q (BY MR. SCHAFER:) Judge Fuller, I want to make
 3 sure the record is clear on this. Is it your
 4 testimony that the first time you considered
 5 apologizing to any of these people was when I
 6 raised that question during the Show Cause
 7 hearing?
 8 A You asked me if I apologized to Officer Twedt,
 9 and I told you I did not. And then you asked me
 10 if I should, and I said yes. Something about --
 11 I'd have to see the transcript, but something
 12 about I didn't know that the timing was right or
 13 something like that.
 14 Q But is that the first time that the thought of
 15 apologizing to Officer Twedt crossed your mind?
 16 A Correct. When you said it.
 17 Q And with respect to apologies to any of these
 18 other people, the first time that crossed your
 19 mind was during these hearings?
 20 A Probably the same time.
 21 Q And as far as having the ability to contact or
 22 talk to other judges, you always had the ability
 23 to call Judge Gienapp or Judge Simko at any
 24 time?
 25 A Yes.

385

1 Q I mean, that's something that you had back in
 2 2004 and up through the present time?
 3 A Correct. I also had five other judges in my
 4 circuit, too.
 5 Q That you could have talked to?
 6 A Correct. Absolutely.
 7 Q Let me ask you -- did you? Did you avail
 8 yourself of that opportunity?
 9 A No. And that gets back to what we started out
 10 with, is my lack of recognizing my irritation
 11 and annoyance evolving into what was perceived
 12 as anger and rudeness and abrasiveness, and I
 13 believe somebody even said bullying.
 14 Q And I just want to make sure this is clear in
 15 the record. I'm going to show you a copy of the
 16 Supreme Court decision, All Star Construction
 17 Company versus Koehn, K-O-E-H-N,
 18 741 N.W.2d. 736. It was decided in December --
 19 or, October of 2007; correct?
 20 A Yes. That's what it says, yes.
 21 Q So this incident with Bart Banks where you
 22 flipped him the bird would have occurred prior
 23 to that?
 24 A Correct.
 25 MR. SCHAFER: Okay. That's all.

386

1 MR. NICHOLSON: Nothing further.
 2 MR. PALMER: Members of the Commission?
 3 EXAMINATION BY JUDGE WILBUR:
 4 Q I just had a couple questions about that
 5 judicial evaluation process, which I went
 6 through, too. And it's kind of fuzzy to me, but
 7 I have all of mine in my desk. I went through
 8 it two or so times before Lee Anderson died and
 9 it's kind of fallen off the wayside. But I have
 10 all those evaluations that the people submit.
 11 Did you say that you do or you don't have them?
 12 A I don't have them.
 13 Q Okay.
 14 A I would have brought them if I had them. I
 15 can't even find the letter, you know. Judge
 16 Young would -- would -- well, at least with me
 17 he came with a letter and he sat down with me.
 18 And I don't even -- I couldn't even find the
 19 letter in '04 or the letter in '06 or the
 20 evaluations, so. And I thought he took the
 21 evaluations back and left me the letter.
 22 Q Okay. Yeah. I'm kind of fuzzy about it but I
 23 know I've got them in my desk. Maybe we had
 24 different processes in different circuits, so.
 25 A I don't know.

387

1 Q Do you have any idea why Carol Foster, Judd
 2 Thompson, Jeff Krattenmaker, Lara Roetzel, and
 3 Glenn Brenner would all come in here today and
 4 take an oath and then lie about what you've
 5 said? Could they be that mistaken? Why would
 6 all those people do that?
 7 A Well, let's... Carol Foster is a -- I believe
 8 Mr. Krattenmaker said she's a clerk of clerks.
 9 She is. I don't know why she said I used those
 10 words. I don't use those words. Now, you said
 11 Carol Foster and then?
 12 Q Judd.
 13 A Judd. But did Judd say I swore?
 14 Q No. But about what -- he made a remark -- you
 15 made a remark to him about the safety concerns.
 16 A Correct. I did. I said I did. If it wasn't
 17 clear, yes, I did to him, saying, We'll take
 18 care of it when it happens. And I tried to
 19 expand on that. I thought the conversation was
 20 more about my conversation with Dennis from the
 21 JSC in the conversation with Judd.
 22 Q So when Judd testified that you said, We'll just
 23 wait until something happens, that's -- you
 24 think that you said more than that?
 25 A Yes. That's my point there.

388

1 Q Okay. So essentially, though, you're saying
2 he's wrong about what was said?
3 A Yes.
4 Q Okay.
5 A He didn't -- let's put -- I'd say this, he
6 didn't remember all of the conversation that we
7 had about the topic. That's what I'd say.
8 Q And you categorically denied that you hit Jeff
9 Krattenmaker up for the campaign contribution?
10 A You know, I don't know why he would ever say
11 that because I know I didn't. I didn't. I
12 didn't ask anybody for money because it's -- I
13 thought it was improper. I didn't ask anybody
14 for money.
15 Q And then Lara Roetzel's comment about your
16 remark down by the van, sons-of-bitches. She
17 made that up?
18 A I didn't say that.
19 Q Okay.
20 A I had a good relationship with law enforcement
21 about my old '74 Volkswagen. I did not have a
22 bad relationship.
23 Q Then Brenner's testimony that you disagreed with
24 was regarding the Sabers quote about the wind in
25 the prosecutor's back?

389

1 A Yeah. I don't know the quote, that's what I'm
2 saying. So I don't -- I couldn't have quoted it
3 to him since I've never read it until I read it
4 in Mr. Nelson's report. Never. Don't even know
5 the quote. Yes, that's what I'm saying to you.
6 Q So a lot of coincidences about what these people
7 are saying. I guess that's -- that's kind of
8 confusing to the Court, to the Commission.
9 A I just... May I ask a question? Do you think
10 I'm being untruthful?
11 Q That's what we have to decide here, don't we?
12 Because we have factual disputes before us, so
13 that's what I'm asking you for, some help in
14 trying to decide that.
15 A Yeah.
16 MR. DRAVELAND: Question.
17 MR. PALMER: Yes.
18 EXAMINATION BY MR. DRAVELAND:
19 Q Judge, when Mr. Krattenmaker testified, he also
20 made mention -- this is back to the vehicle
21 license plate issue and the conversation that he
22 had at that time. I wrote a note that said that
23 he felt there had been a law enforcement contact
24 with you while you were driving your van, and
25 that possibly you had been stopped and the

390

1 vehicle had been searched, and you and someone
2 else in the van -- I don't remember whether he
3 said your wife or someone else with you -- had
4 to sit roadside while a search had taken place
5 of the van. Did that happen?
6 A Yeah.
7 Q What was the circumstance there?
8 A Okay. Jacque and I had -- we had gone to Mexico
9 and we took the van. And we were coming back,
10 we had left Taos, New Mexico and --
11 (Brief interruption in the proceeding.)
12 A We were between Taos, New Mexico and Walsenburg,
13 Colorado, and a state trooper in Colorado pulled
14 us over in the van. And I've told this story.
15 He pulled us over and then on his bullhorn he
16 said, Remain in your car, stay with your hands
17 on the wheel.
18 So Jacque -- my wife, Jacque, we did. Then
19 he instructed us to, Get out of the car slowly
20 with your hands over your head and come to the
21 rear of the car. So we did.
22 Now, he is -- his patrol car is behind the
23 old bus, and he has his door open like this, and
24 he has his pistol pointing at us when we are
25 coming to the back of the bus.

391

1 And he said, Is there anybody in that van?
2 And I said, No. And he said, Keep coming
3 forward. So we kept coming forward. He said,
4 Lay down on the ground. So Jacque and I are
5 down on the ground, with our hands out, on the
6 ground on our stomachs.
7 And he went down in the ditch and was
8 walking toward the bus, and he says, Do you have
9 any weapons or guns in there? And I said, No.
10 Then another patrol officer, another Colorado
11 patrolman pulls up beside his car now, and he
12 gets out the door with his door open, and he
13 pulls his revolver on us. And then I lose sight
14 of the first officer.
15 And we stayed there on the ground, and then
16 the first officer said we could stand up. We
17 stood up. And he said, I need your license --
18 or your license and insurance. And I said,
19 Well, my license is in my billfold and the
20 insurance stuff is in the box between the two
21 seats in the car. So I pulled out my driver's
22 license and showed him that, and he told me to
23 come around and show me where that was.
24 So that was an incident in Colorado near
25 Fort Morgan going over La Veta Pass with a

392

1 Colorado Highway Patrolman.
 2 **Q** Did you have the probable cause plates on your
 3 van at that time?
 4 **A** I think I did.
 5 **Q** Did you have the surfboard mounted on top of
 6 your van at that time?
 7 **A** No, I did not.
 8 **Q** Did that bother you?
 9 **A** Scared the dickens out of me.
 10 **Q** Yeah, I would imagine. But did it bother you?
 11 **A** Oh, yeah. And we filed a complaint with the
 12 highway -- the Colorado Highway Patrol.
 13 Actually, if I may, it was at the encouragement
 14 of my son who's in law enforcement. He said,
 15 You should file a complaint. Be factual,
 16 don't -- just be very factual about what
 17 happened.
 18 And I said, Well, you know, it was very
 19 disturbing, we were frightened. He said, Well I
 20 can see that. He said, I will say this for you,
 21 Dad, when you and Mom came to the back of the
 22 bus, he should have immediately recognized what
 23 the situation was and kind of went -- cooled
 24 down a little bit. Because, you know, we are
 25 trained. He said, We're trained. We can be

393

1 right beside you and be in control of you.
 2 I mean, he drew the gun to start with but,
 3 again, I think the situation changed when you
 4 got to the back of the bus. So you should just
 5 be factual and file a complaint.
 6 And we did. We got a response from the
 7 captain thanking us for the complaint. They
 8 investigated it, found that he acted
 9 appropriately.
 10 **Q** I guess what I'm looking for is, you know, in
 11 your mind -- and I'm asking a very open-ended
 12 question here. But obviously there's been other
 13 discussion about, you know, an anti-law
 14 enforcement perception of you.
 15 **A** Yes. Yes.
 16 **Q** Has any of this incident from Colorado and that
 17 stop carried over to other incidents that you
 18 have had with law enforcement, be they in your
 19 court or in the sally port or --
 20 **A** No.
 21 **Q** -- the other things that we're hearing?
 22 **A** No. No. I considered that over when we got
 23 the -- when the captain of the, whoever, my
 24 memory is -- when he reported that he
 25 investigated it and said it was in accordance

394

1 with whatever their standards were, that he had
 2 complied, that ended it for me.
 3 **Q** Okay.
 4 **A** The rest of the thing about the Volkswagen is
 5 just -- it's meant to be a joke, and has been
 6 until these allegations, for the seven years
 7 that I've driven it.
 8 **EXAMINATION BY MR. PALMER:**
 9 **Q** When was that, Judge Fuller?
 10 **A** What was what?
 11 **Q** That incident in Colorado.
 12 **A** Oh, boy, years ago.
 13 **Q** Were you on the bench at the time?
 14 **A** To be very frank, I'll have to ask Jacque. I
 15 don't remember.
 16 **Q** Okay.
 17 **MR. PALMER:** I'm sorry. I didn't mean to
 18 interrupt.
 19 **MR. DRAVELAND:** No, that's okay.
 20 **EXAMINATION BY MR. DRAVELAND:**
 21 **Q** I think just one other question, at least for
 22 now. And obviously we've heard a lot of
 23 testimony today and a lot of discussion, be it
 24 from court service workers, state's attorneys,
 25 other bar personnel, folks that are in and out

395

1 of your court.
 2 There's also been a lot of testimony about
 3 the fact there's been numerous recusals or
 4 requests of recusals from you of cases. Did
 5 that ever start -- did you ever start to think
 6 about, Well, why are all of these folks wanting
 7 me off of these cases.
 8 Or, didn't it -- didn't it ever, I guess,
 9 ring a bell to you that there's got to be a
 10 reason that all of these folks are saying, I
 11 don't want Judge Fuller hearing my case, I don't
 12 want to be in front of Judge Fuller.
 13 **A** Right. That happened in 2010.
 14 **Q** All of the recusals?
 15 **A** Yes. We get recusals -- now, don't
 16 misunderstand me. All of us get recusals.
 17 We're asked to remove ourselves, and if we don't
 18 voluntarily do it, then you can file an
 19 affidavit, and then you must remove yourself
 20 when the affidavit is filed.
 21 **Q** Okay.
 22 **A** And records are kept and, at least in our
 23 circuit, at least they've been kept as to the
 24 numbers of recusals, in other words, affidavits
 25 that have been filed and things like that. So

396

1 we have -- until 2010, at least the last time I
2 checked, I was on the low end of judges being
3 asked to remove themselves.

4 In 2010 when the state's attorney's office,
5 not -- not other lawyers, but the state's
6 attorney's office started what I perceived to be
7 a systematic filing of affidavits, I went to
8 Judge Davis and told him, I said, I don't know
9 what's happening but I think we -- I'm -- I
10 think I have a problem here, or we have a
11 problem, because this seems to be systematic.

12 And then when it got -- it got worse. The
13 numbers of requests that I remove myself, there
14 were more of them. And I brought that to the
15 attention of my presiding judge also.

16 And then in early September is when Roxie
17 Erickson, who's the deputy state's attorney that
18 does juvenile matters, she started filing
19 against me in juvenile matters which
20 precipitated this Exhibit O where I would be
21 removed from the criminal calendar and the
22 juveniles and I would take a larger percentage
23 of civil cases.

24 Q Okay. Well, I guess where I'm going with this
25 is, it seems rather odd to me that going back to

397

1 2004, which we have a marked exhibit that shows
2 that there was an anonymous, of course, survey
3 done of you that says you are abrupt, you're
4 belligerent, you made someone mad enough to
5 write in a survey that there were issues with
6 your demeanor.

7 A Correct.

8 Q Also in 2004, 2005 in Custer County, the clerk
9 of courts office was so upset that basically
10 they said, We really don't want you around. In
11 fact, the only person that would deal with you
12 in court was the clerk of courts herself. She
13 wanted the rest of her staff isolated from it.

14 A I didn't know that. Nobody brought that to my
15 attention.

16 Q Well, I understand. But where I'm going here is
17 that then it appears that there's this gap in
18 here from 2004 to 2010 where things were good?
19 There weren't any issues going on, there wasn't
20 any that was perceived or found to be untoward
21 or out of the ordinary until 2010.

22 I know you may not have been aware of it, or
23 at least that's what you are saying, is that you
24 weren't aware of it. But there were other
25 people that were aware of it, and it just seems

398

1 to me that there's quite a gap in here from 2004
2 to 2010 without any kind of perception on your
3 part that something negative is going on with
4 people that you deal with.

5 A After I was in Fall River County, and I don't
6 remember if it was the next year or the year
7 after that, I went to Custer County and there
8 was previous testimony from the clerk of courts
9 of Custer County that I was rude and
10 disrespectful to her and to her court personnel.

11 Q Okay.

12 A But I -- I've never done a sequence, so I can't
13 tell you. But the request that I remove myself
14 from criminal trials escalated in 2010.

15 Q Okay.

16 A Not before.

17 Q All right.

18 A That's not to say I did not get requests. I
19 did. And others judges, we all get them.

20 MR. DRAVELAND: Thank you.

21 EXAMINATION BY MR. McBRIDE:

22 Q Judge, you say you haven't had any complaints
23 filed against you that you're aware of to the
24 Commission; is that right?

25 A The Qualifications Commission?

399

1 Q Yeah. You served on the Commission; is that
2 right?

3 A Correct.

4 Q My experience since I've been on it is, the vast
5 majority of the complaints don't come from the
6 lawyers. Lawyers just don't make complaints.
7 Is that what you found? Do you recall of any
8 lawyers filing complaints?

9 A I don't remember.

10 Q You've heard the phrase something to the effect,
11 If you're going to shoot at the king, be sure
12 you kill him?

13 A Have I heard the phrase?

14 Q That phrase.

15 A Yes, I have.

16 Q Do you understand that could be operating with a
17 judge who is abusive to lawyers? That that
18 operative concept is there?

19 A Yes.

20 Q You understand the lawyers who got hauled in
21 here or got interviewed, for the most part they
22 didn't come forward, did they?

23 A I don't know any of them that did.

24 Q It's a pretty extraordinary circumstance, isn't
25 it, that we're sitting in today?

400

1 A Yes.

2 MR. McBRIDE: That's all I have.

3 MR. PALMER: Sally?

4 EXAMINATION BY MS. CHRISTENSON:

5 Q I have a question, it's kind of after the fact

6 now, but it was when we were talking, we had the

7 testimony from Carol Foster and then Jeff

8 Krattenmaker. And Carol Foster kind of tried to

9 deal with it, and then she turned it over to

10 Jeff. And Jeff then tried to handle it, and

11 then he said that he turned the problem over to

12 Judge Trimble at that time which would have been

13 in 2004, I believe?

14 A Right, 2004.

15 Q Did Judge Trimble ever talk to you about things

16 that were going on or maybe ways that you could

17 improve? Did he ever have a discussion with

18 you?

19 A No.

20 Q Then I have, I don't know, it's not really a

21 question, it's more comments that I have here.

22 We've heard a lot of testimony today and

23 throughout the other days and, you know, the

24 demeanor and the abuse and the treatment of

25 women and all of those kinds of things, and

401

1 we've heard your side also.

2 But there are -- you know, there is evidence

3 in here, and so we have to -- as we talked with

4 Judge Wilbur, we have to decide what's right and

5 what's wrong. But the bottom line is, there are

6 a lot of things in here that you probably did do

7 wrong.

8 And so we look to the future, and I think

9 of, What is the public going to say out there?

10 You know, there are people that are watching

11 judges all the time just waiting to leap on

12 them, judges watching judges.

13 So I say to myself, I hope you do get

14 better, and I hope all of this turns around for

15 you. And then I say, does the court system,

16 does the Seventh Circuit, do they have the time

17 and do they have the money and the energy to see

18 you through all of this?

19 And that's a question I guess we have to all

20 ask ourselves and you have to ask yourself, too.

21 What would be the time frame for you to come to

22 grips with all of these issues that were before

23 you and still, you know, run a good court and be

24 a good judge? And those are just some of the

25 comments I'm dealing with and I'm sure you are,

402

1 too.

2 A Yeah. Thank you.

3 MR. PALMER: Judge Fuller, I have a

4 question.

5 EXAMINATION BY MR. PALMER:

6 Q I guess I'm just trying to think this through,

7 following a little bit on what Sally just said.

8 When once this entire record goes to the Supreme

9 Court and is public and you have all of this

10 testimony that's now public, how do you think

11 that's going to im -- I mean, maybe it's just a

12 wild question. But how is that going to impact

13 how the rest of the bar and other litigants are

14 going to feel about coming into your courtroom?

15 A I don't know the answer to that. I guess I'd --

16 if the Court -- if the Court would determine

17 that my -- the Canons, the violations of the

18 Canons 1, 2, and 3 is the reason for my being

19 disciplined, if you will, and then if I'm

20 allowed to come back on the bench, I guess I

21 would be -- I guess we could make it a positive

22 by saying to the public that number one, Judge

23 Fuller has not denied that he has made mistakes;

24 and number two, I'm convinced that he is

25 remorseful and sorry for his conduct. And I

403

1 think also that Judge Fuller has the ability, in

2 my opinion, or in -- to change, and I think he's

3 going to change and he's going to be a better

4 judge for this. And that we as the public

5 should give Judge Fuller an opportunity to prove

6 to the public, because I would -- I would

7 probably be under the microscope then, too, even

8 by the public or, let's say, by the press. So

9 it's a -- really what I'm asking for is an

10 opportunity. That's what I'm asking for.

11 MR. PALMER: Sure. Okay.

12 EXAMINATION BY MR. McBRIDE:

13 Q I guess I'm going to go just a little further

14 with that because, Judge, you know, I want to

15 believe you're going to get better, and I'm

16 going to assume you're going to get better.

17 At this point, with the perception that's

18 out there, particularly as it relates to law

19 enforcement, at this point there's some other

20 things, too, but the law enforcement, that

21 perception, I -- a judge should hold law

22 enforcement to the highest standards. A judge

23 should implement the constitution when the facts

24 come into play that implement the constitution.

25 A judge should give every defendant a fair

404

1 break. I firmly believe that.
 2 But with the perception that's there, how
 3 are you going to avoid the law enforcement side,
 4 the prosecution side thinking that what would
 5 otherwise be a fair but tough decision on them
 6 isn't based upon bias? And the flip side, if
 7 you back off, if you're now kinder, if you are
 8 kinder --
 9 A Right.
 10 Q -- to the prosecution --
 11 A Right.
 12 Q -- is the defense going to say, They backed him
 13 down --
 14 A Right.
 15 Q -- they got him, he's no longer a stalwart for
 16 the constitution, for the rights of defendants?
 17 A Right.
 18 Q That's the terrible dilemma I'm sitting here
 19 facing right now, how that's -- how that's going
 20 to be overcome.
 21 A Right. Well, historically, I have been the
 22 stalwart of the constitution, just as you said.
 23 But I don't -- I don't know if there's been one
 24 or two of my decisions in the criminal area that
 25 have even been appealed to the South Dakota

405

1 Supreme Court because I was wrong on the law.
 2 And I think the appeals, if I'm correct,
 3 that have gone up have been from the defense
 4 counsel as opposed to the prosecution side. So
 5 historically, I have not been anti-law
 6 enforcement. My decisions have not been
 7 anti-law enforcement. They haven't been pro
 8 defendant, either. They've been what I believed
 9 and interpreted the law to be.
 10 So I think -- if I may. I think what I'm
 11 hearing from the state's attorneys, not
 12 necessarily Ms. Roetzel or Mr. Brenner, is that
 13 it's my treatment of them in a courtroom setting
 14 as opposed to my treatment of them because they
 15 are law enforcement.
 16 It's just I'm -- and I -- that might be a
 17 close hair, but I don't think anybody has ever
 18 said that I have been pro defendant or pro
 19 prosecution in any of the testimony you've
 20 heard.
 21 Q That was certainly what I got out of it from
 22 Ms. Roetzel and Mr. Brenner, that there is a
 23 feeling in their office that they can't get a
 24 fair shake.
 25 A Oh, I wish -- I wish they could have been more

406

1 specific about that, because I did not get that
 2 impression. I apologize. I think Mr. Brenner
 3 said he could not and I think Ms. Roetzel said
 4 that she could not.
 5 Q I think they said Mr. Bolson came back and said
 6 he can't.
 7 A I -- what I read in Mr. Nelson's report was
 8 about the way -- my demeanor in treating him.
 9 So if I changed my demeanor in treating him --
 10 Q My concern is that they seem to be inextricably
 11 intertwined at this point.
 12 A Oh.
 13 Q And that's my concern and that's what I -- I'm
 14 trying to figure out how we can get over that.
 15 A Oh, I understand.
 16 MR. McBRIDE: Thank you.
 17 MR. PALMER: Other questions from the
 18 Commission members?
 19 EXAMINATION BY JUDGE WILBUR:
 20 Q Okay. So this is kind of a silly question
 21 maybe, but when you've got a roomful, 40 or so
 22 juveniles and some parents and officers in a
 23 courtroom and it's packed, and you -- do you
 24 have them come up alphabetically or how do you
 25 take their cases?

407

1 A They are on a list. They are on a scheduled
 2 list.
 3 Q So the first child that comes up with parents
 4 and has heard rights and says, I'd like to have
 5 a private -- I'd like a cleared courtroom, do
 6 you clear the courtroom right then --
 7 A No.
 8 Q -- and take that child up?
 9 A No.
 10 Q What happens to them?
 11 A They sit back down.
 12 Q And when does their case get taken up?
 13 A When we get through the group.
 14 Q So they go to the end of the line --
 15 A Yeah.
 16 Q -- basically?
 17 A Oh, yeah.
 18 Q Okay. I just didn't know logistically how that
 19 worked.
 20 A Right.
 21 Q You suppose that has a chilling affect on
 22 anybody exercising their right to a confidential
 23 hearing?
 24 A It hasn't seemed to. The ones that have said
 25 they wanted a closed hearing have been very,

408

1 very positive about it.
 2 JUDGE WILBUR: Okay. Thank you.
 3 MR. PALMER: Have any of these questions
 4 prompted questions for either of you?
 5 MR. SCHAFFER: No, Your Honor.
 6 **RE-CROSS-EXAMINATION BY MR. NICHOLSON:**
 7 **Q I want to clear something up because I don't**
 8 **know that you've been asked this question. I**
 9 **just want to clear the record based on Judge**
 10 **Wilbur's question to you.**
 11 Lara Roetzel testified that you made the
 12 comment about your license plate, pointing at
 13 the probable cause, something to the effect, Let
 14 the son-of-a-bitches see that and -- oh, let the
 15 son-of-a-bitches remember that when they pull me
 16 over. Remember that comment she made today in
 17 testimony?
 18 A Correct.
 19 **Q And did you make that comment?**
 20 A No.
 21 **Q Okay. And I wanted to make that clear on the**
 22 **record, because I don't think -- at least I**
 23 **didn't ask you that question. Maybe**
 24 **Mr. Schaffer did.**
 25 A I did not say that to her.

409

1 **Q You know, also Judge Wilbur asked you questions**
 2 **about Carol Foster's testimony. This comment**
 3 **from Lara Roetzel, we already know that she's --**
 4 **well, strike that.**
 5 You know, what would be your advantage in
 6 denying those things if you thought you made
 7 them? I mean, they are no -- are they any
 8 different than the flippant and improper remarks
 9 that you made involving the racist or any other
 10 of these other comments we've talked about?
 11 A Well, yeah. If I -- if I call somebody a
 12 son-of-a-bitch, or if I use the F word to
 13 somebody, or I say Goddamn clerks, that's a lot
 14 different than -- that's a -- that is beyond
 15 rude. That's terrible.
 16 **Q And other than wanting to tell the truth to this**
 17 **Commission, would it -- in your mind, would you**
 18 **gain any advantage whether those statements were**
 19 **true or false?**
 20 A I don't know that. I just -- I just -- I don't
 21 talk like that.
 22 MR. NICHOLSON: I have no further questions.
 23 MR. PALMER: Okay. Let's talk about just
 24 for a minute -- let's stay on the record. We're
 25 going to adjourn this proceeding. And we're --

410

1 you were talking, Mr. Nicholson, about you have
 2 findings and conclusions you want to submit?
 3 MR. NICHOLSON: Yes.
 4 MR. PALMER: Because the Commission is
 5 obligated to provide findings to the Supreme
 6 Court once we make our decision. So if you have
 7 something you want for our consideration -- and,
 8 Mr. Schaffer, I'll give you the opportunity to
 9 see what he's got, too.
 10 MR. NICHOLSON: I think probably the best
 11 way to handle this --
 12 MR. PALMER: That is the best way.
 13 MR. NICHOLSON: -- is just to give them to
 14 you to pass out.
 15 MR. PALMER: Would you give Mr. Schaffer a
 16 copy of those to start with.
 17 MR. NICHOLSON: You know, I hope there's
 18 enough copies to give him one out of that stack.
 19 MR. PALMER: If not, we can give him one of
 20 these. Does anybody else have anything for the
 21 record?
 22 MR. HIEB: Yes. I would once again -- first
 23 thing I'd like to ask you, did you get the trial
 24 brief that we submitted?
 25 MR. PALMER: We have the trial brief and I

411

1 have that. I put that in what I call the
 2 original file that I've been maintaining at my
 3 office.
 4 MR. HIEB: And the other thing I have,
 5 Chairman Palmer, thanks for indulging me, I made
 6 this point back at the beginning of the hearing
 7 with respect to the Dave Nelson report.
 8 Dave Nelson is a great friend of mine.
 9 We're on the parole board together. I think
 10 Dave took down what he heard. But as I pointed
 11 out to you at the beginning, and I think it was
 12 borne out in Lara Roetzel's testimony today,
 13 some of the comments that people have been
 14 taking as a given were not made.
 15 I mean, and this goes to Judge Wilbur's
 16 comment about, well, why would these people come
 17 in here and say that? I don't know the answer
 18 to that. I'm not going to call anybody a liar.
 19 But folks, I looked at this transcript and it
 20 doesn't come close to saying that this man on
 21 the -- in front of the jury, on the record,
 22 called Dr. Looyenga a hired whore or a State
 23 whore.
 24 Now this report asserts, by Lara Roetzel,
 25 that she recalls during -- that during a DUI

412

1 jury trial, she recalls it. Now, obviously that
2 was discussed between her and Mr. Schaffer
3 before this hearing, because they went to the
4 trouble of going and getting this transcript.

5 Now, she didn't bother to correct it with
6 this Commission on direct. And it wasn't until
7 I talked about it on cross that we found out,
8 oh, there is the transcript and we're going to
9 mark it now and put it in.

10 Then when I looked at it, and I would
11 encourage the Commission to look at it, it
12 clearly says, first of all, the following
13 proceedings were held out of the presence of the
14 jury.

15 MR. PALMER: You're talking about Exhibit H,
16 page 29?

17 MR. HIEB: Correct. And it -- the word
18 "whore" is not used anywhere in this. In fact,
19 I think what he does here is something I've seen
20 judges do frequently in commenting on the
21 credibility of a witness.

22 And so my point in saying that is, you know,
23 we didn't go through this thing sentence by
24 sentence today. We could be here all week. But
25 I think everybody here understands the rules of

413

1 evidence, they understand why we have them.

2 And I would be extremely concerned if Dave
3 Nelson's report goes to the Supreme Court as
4 some sort of a document that the veracity of it
5 is completely unchallenged.

6 We dealt with what was in the body of the
7 complaint, and if it was my mistake or Tom's
8 mistake for not somehow in the body of that
9 answer challenging the efficacy of some of what
10 was in here, then that's our mistake.

11 But I don't believe we ever stipulated to
12 the accuracy of all of this. We did stipulate
13 to the testimony that was given at the Show
14 Cause hearing. And we've heard from these
15 witnesses, and I think this points out that, in
16 some cases, some of this stuff was pushed maybe
17 a little too hard, or some of it's taken -- you
18 know, you see it on paper and you assume, man,
19 wow, that's bad, that must have happened.

20 And with respect to this report, some of the
21 second-hand, third-hand stuff we -- I have a
22 problem with it, and I wanted to make sure I
23 made that record on behalf of the Judge.
24 Because I think it's obvious in at least this
25 one case that it didn't happen.

414

1 JUDGE WILBUR: Are there any other instances
2 like that in there that you can point us to for
3 Dave Nelson's report? I thought he was going to
4 be a witness, but then I was told you stipulated
5 that the report could come in. I don't know if
6 that's accurate or not.

7 MR. HIEB: Well, and I'm not going to speak
8 for Tom. I stipulated -- what I thought we
9 stipulated to was that the testimony that was
10 given before the Commission at the Show Cause
11 hearing -- and I apologize for my voice -- that
12 could all be put in so that those people didn't
13 have to testify to the same things again. And
14 so if --

15 JUDGE WILBUR: That's different than the
16 report, though, because Dave Nelson would have
17 to come to testify about the report. I thought
18 you said he didn't have to because the report
19 could come in. Am I wrong about that?

20 MR. HIEB: And if -- if that was the
21 impression that was given -- I didn't have the
22 discussion, Tom did, but I would make this
23 comment, Judge Wilbur.

24 I don't question that Dave Nelson took down
25 exactly what was given. You all, you folks all

415

1 have the training to understand the difference
2 between a first-hand comment and something
3 somebody else said, which is very much the same
4 as when the clerk talked about how, Somebody
5 told me that he said that in the hallway.

6 And what I was responding to was your
7 comment to the Judge about, why would these
8 people come in here and lie? I don't know that
9 they were lying. They are repeating stories
10 that they've heard.

11 But I think in this particular case, we had
12 it. We knew that what was in that report wasn't
13 accurate, and it didn't come out until I brought
14 it out.

15 JUDGE WILBUR: But you can't point to
16 anything else in that report with the same
17 certainty that you do with that Lara Roetzel
18 comment?

19 MR. HIEB: I think that's fair, as I sit
20 here right now. But this is one of the few
21 things in this report that's documented in the
22 transcript, in fairness.

23 JUDGE WILBUR: Okay.

24 MR. HIEB: And that's what I'm saying and
25 that's the record I wanted to make.

416

1 MR. PALMER: Anything you want to make for
2 the record, Mr. Schaffer?

3 MR. SCHAFER: Well, I would just say, Your
4 Honor, that I had a stipulation with
5 Mr. Nicholson that all the testimony and
6 evidence presented at the Show Cause hearing
7 would become part of this record.

8 Dave Nelson testified at the Show Cause
9 hearing, his report came in, his report is also
10 appended to the formal complaint that was filed.
11 Under the rules of this Commission, you can hire
12 an investigator to go out and conduct an
13 investigation. If you get a complaint, that's
14 what you do, that's what Mr. Nelson did.

15 Now, if I didn't put it in on direct, that's
16 my mistake. I mean, I'm going through here
17 trying to get all the evidence in. When I found
18 out that she claimed that that was said, I
19 ordered the transcript. And I found it and I
20 gave her a copy of it.

21 And I sent it to her and I said, Look at
22 this, this isn't what it said. You know, number
23 one, you weren't there; number two, it was not
24 in the presence of the jury. And that's why I
25 had the transcript here, and that's why we

417

1 what it's worth, folks. Don't assume that every
2 sentence written in here is accurate because
3 it's obviously not.

4 And I do -- and I did want to make that
5 record. Because I sit on the Board of Bar
6 Examiners. We have character and fitness
7 hearings. They are very similar to these.

8 I don't view my role in that, I don't ever
9 view the role as being anything other than,
10 let's get to the bottom of it collectively.

11 This is not a murder trial where you
12 represent one side or the other and play, well,
13 let's see if they can figure it out. And I
14 assume that's the process we're using here, and
15 I hope that's the spirit of it.

16 The Roetzler disclosure bothered me, and I'm
17 just going to say that for the record. The fact
18 that that was not affirmatively brought out when
19 that was determined to be completely wrong,
20 without me having to do it, bothered me. And I
21 just wanted to say that. Thank you.

22 MR. PALMER: Okay. We've got the record.
23 Anything else for the record?

24 (Nothing further was presented.)

25 MR. PALMER: All right. We are adjourned.
(The proceeding concluded at 7:05 p.m.)

419

1 offered it, so the record is clear.

2 I did the same thing with Tonia Fischer who
3 made the comment that, He never said I was
4 stupid. And I think Commissioner McBride caught
5 that. He never said that. But that's how she
6 felt.

7 But that's exactly -- and I had the same
8 opportunity as these lawyers did. I mean, if
9 anybody wanted to contact anybody, they could
10 have, to find out if there's something else
11 that's not correct and call them in here and
12 correct the record.

13 MR. PALMER: Just for the record, from the
14 Commission standpoint it was, at least my
15 understanding, in the course of trying to sort
16 this out ahead of time and to not have to call
17 back all the witnesses that had testified, that
18 the transcript, and all of the evidence taken,
19 and all of the exhibits appended to it would be
20 part of the use for the Commission of this,
21 which included Dave Nelson's report.

22 MR. HIEB: The only comment I want to
23 make -- I'm not disagreeing with you.

24 MR. PALMER: Okay.

25 MR. HIEB: What I'm saying is, take it for

418

1 CERTIFICATE

2
3 STATE OF SOUTH DAKOTA }
4 COUNTY OF PENNINGTON } ss:

5
6
7 I, Jacqueline K. Perli, Court Reporter, do hereby
8 certify that the witness was duly sworn by me prior to
9 the taking of testimony as to the truth of the matters
10 attested to and contained therein; that said
11 proceedings were taken by me stenographically and
12 thereafter reduced to typewriting under my
13 supervision; that the foregoing transcript is a true
14 and accurate record of the testimony given to the best
15 of my understanding and ability.

16 I further certify that I am neither counsel for,
17 related to, nor employed by any of the parties to this
18 case and have no interest, financial or otherwise, in
19 its outcome.

20 IN WITNESS WHEREOF, I have hereunto set my hand
21 and affixed my notarial seal
22 this 16th day of December, 2010.

Jacqueline K. Perli
NOT an Authorized, Certified
Copy Without RED Stamp

JACQUELINE K. PERLI
Court Reporter
Notary Public
My commission expires:
May 9, 2013

420