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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge
DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2010-CP-40-3297
Appellate Case No. 2012-212687
Unpublished Opinion No. 2015-UP-042

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. Petitioner,

vs.

RICHARDSON PLOWDEN & ROBINSON, P.A. and
George Harold Hanlin, J.D. Respondents.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge
DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2010-CP-40-3297
Appellate Case No. 2012-212687

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. Appellant,

vs.

RICHARDSON PLOWDEN & ROBINSON, P.A. and
George Harold Hanlin, J.D.... Respondents.

RECORD ON APPEAL

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-40-3297

YANCEY ENVIRONMENTAL SOLUTIONS, LLC

RICHARDSON PLOWDEN & ROBINSON, P.A.
AND GEORGE HAROLD HANLIN, J.D.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: THE HONORABLE EUGENE C. GRIFFITH, JR.

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: denying Defendants RICHARDSON PLOWDEN & ROBINSON, P.A. AND GEORGE HAROLD HANLIN, J.D.'s Motion for for Summary Judgment.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

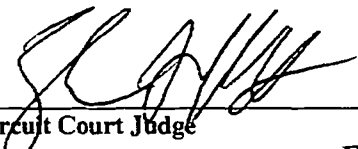
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

APPENDIX5


Circuit Court Judge2154
Judge Code2-15-12
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 22nd day of Feb., 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Susan P. McWilliams, Daniel C. Leonardi, Molly
Hughes Cherry

NEXSEN PRUET, LLC

1230 Main Street, Suite 700

Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

Thomas A. Pendarvis

500 Carteret Street, Suite A

Beaufort, SC 29902-5066

ATTORNEY(S) FOR THE DEFENDANT(S)


CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA
COUNTY OF
IN THE COURT OF COMMON PLEAS

FORM 4 APPENDIX 6
JUDGMENT IN A CIVIL CASE



CASE NO. 10 CP-403297

Yancey Environmental Solutions, LLC
Etal

PLAINTIFF(S)

Richardson, Plowden & Robinson PA
Etal

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Directed Verdict granted to defendants.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

SCMP
Circuit Court Judge

APPENDIX 7

215"
Judge Code

3-7-12
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 7th day of March, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Thomas A. Bendarris

ATTORNEY(S) FOR THE PLAINTIFF(S)

Daniel C. Leonardi
Susan Padrick McWilliams

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanelle W. Brude
CLERK OF COURT

Court Reporter:

RECEIVED MAY 14 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE CIRCUIT COURT
COUNTY OF RICHLAND	)	
	)	
Yancey Environmental Solutions, LLC,	)	Case No.: 2010-CP-40-3297
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Richardson Plowden & Robinson, P.A.	)	
and George Harold Hanlin, J.D.,	)	
	)	
Defendants.	)	
	)	

ORDER GRANTING DEFENDANTS' MOTION FOR DIRECTED VERDICT

This matter came before the Court for a jury trial on the plaintiff's claims for breach of fiduciary duty, legal malpractice, and breach of contract. The plaintiff was represented by Thomas A. Pendarvis and Catherine "Carey" B. Kerney of Pendarvis Law Offices, P.C. The defendants were represented by Susan P. McWilliams and Daniel C. Leonardi of Nexsen Pruet, LLC. After the jury was selected, the plaintiff presented its evidence from February 28, 2012 through March 5, 2012. At the conclusion of the plaintiff's case in chief, the defendants moved pursuant to Rule 50 of the South Carolina Rules of Civil Procedure ("SCRCivP"), for a directed verdict. After careful consideration and due deliberation, the undersigned respectfully denied the defendants' motion. The defendants then presented their evidence from March 5 through March 6, 2012. The plaintiff offered no rebuttal evidence. At the conclusion of all of the evidence presented in the case, the defendants renewed their motion for directed verdict pursuant to Rule 50. After additional careful consideration and due deliberation, the Court grants the defendants' motion, for the following reasons.

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STANDARD OF REVIEW UNDER RULE 50

When considering a party's Rule 50 motion for directed verdict, the trial court must view the evidence and any reasonable inferences therefrom in the light most favorable to the nonmoving party. *Eadie v. Krause*, 381 S.C. 55, 57, 671 S.E.2d 389, 390 (Ct. App. 2010); *Law v. S.C. Dep't of Corrs.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Cutchin v. South Carolina Dept. of Highways & Public Transportation*, 301 S.C. 35, 389 S.E.2d 646 (1990). However, the court cannot ignore facts unfavorable to the nonmoving party and must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts. *Hopson v. Clary*, 321 S.C. 312, 468 S.E.3d 305 (Ct. App. 1996); *Haulbrooks v. Overton*, 295 S.C. 380, 368 S.E.2d 676 (Ct. App. 1988). No jury issue is created if the evidence taken as a whole is susceptible to only one reasonable inference, however, and in such an instance, a directed verdict is proper. *Hopson*, 321 S.C. at 314, 468 S.E.2d at 307; *Whelan v. Welch*, 304 S.C. 548, 405 S.E.2d 836 (Ct. App. 1991).

STANDARD FOR LEGAL MALPRACTICE

In an action for legal malpractice, the client must prove four elements: (1) the existence of an attorney-client relationship; (2) breach of a duty by the attorney; (3) damage to the client; and (4) proximate causation of the client's damages by the breach. *Smith v. Haynsworth, Marion, McKay & Guerard*, 322 S.C. 433, 435 n. 2, 472 S.E.2d 612, 613, n. 2 (1996). Each of these elements must be proven by a preponderance of the evidence. Failure to prove any of the elements means that the claimant cannot recover damages from the attorney. *Shealy v. Walters*, 273 S.C. 330, 256 S.E.2d 739 (1979).

Moreover, the client is required to prove not only the damages alleged, but also that the attorney's alleged failure to follow generally recognized practices and procedures applicable to

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his profession under the circumstances existing at the time was the proximate cause of the client's alleged injuries. Accordingly, even if an attorney could be considered negligent in the handling of a matter or breached a duty or contract with the client, the client is not entitled to any damages where the outcome of the underlying transaction would have been the same, regardless of the attorney's actions. *Eadie*, 381 S.C. at 63, 671 S.E.2d at 392-393; *Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 657 (Ct. App. 2002); *Floyd v. Kosko*, 285 S.C. 390, 329 S.E.2d 459 (1985); *Gunnels v. Roach*, 243 S.C. 248, 133 S.E.2d 757 (1963); *King v. J.C. Penny Co.*, 238 S.C. 336, 120 S.E.2d 229 (1961); *Burnette v. Augusta Coca-Cola Bottling Co.*, 157 S.C. 359, 154 S.E. 645 (1930); *Welch v. Whitaker*, 282 S.C. 251, 317 S.E.2d 758 (Ct. App. 1984); *Hanselmann v. McCardle*, 275 S.C. 46, 267 S.E.2d 531 (1980); *Kemmerlin v. Wingate*, 274 S.C. 62, 261 S.E.2d 50 (1979).

SUMMARY OF EVIDENCE PRESENTED AT TRIAL

The plaintiff, Yancey Environmental Solutions, LLC ("YES") brought this action against its former attorneys, Richardson Plowden & Robinson, P.A. ("RPR") and George Harold "Hal" Hanlin ("Hanlin"), arising out of a proposed conservation easement on 3000 acres of a working farm in Clarendon County owned by James C. Justice, II ("Justice"), or one of his limited liability companies, known as "the Black River Farm." Justice, the majority shareholder of James C. Justice Companies, Inc., is a wealthy businessman from West Virginia with large land holdings in West Virginia and South Carolina. The owner of YES, Yancey A. McLeod, Jr. ("McLeod") proposed the placement of a conservation easement to Justice in the fall of 2007 and in connection therewith, sent at least one proposed consulting services agreement to Justice for his signature. Under the terms of the proposed consulting services agreement, Justice was required to pay YES a \$50,000 "non-refundable retainer" for its services in recommending

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contractors to perform the various tasks to complete the conservation easement, including a qualified appraiser, an environmental engineer to complete a Baseline Documentation Report, and a qualified charitable organization to receive the donation of the conservation easement. Under the consulting services agreement, Justice was not obligated to donate the property under the conservation easement. However, if he did so within two years of recording the conservation easement, and then took a charitable deduction on his tax return, he would be obligated to pay YES 5% of the conservation value of the property.¹ Justice never signed this agreement and never paid YES the \$50,000 non-refundable retainer.

McLeod described himself at trial as “the quarterback,” directing all of the contractors and other individuals involved to ensure the conservation easement was prepared correctly so as to ensure that Justice would be entitled to a charitable deduction for his donation. McLeod also testified that Justice was the ultimate decision-maker for his companies and his property, so that he would have the last word on the actual decision to place the conservation easement. This testimony was confirmed at trial by Harrah, Justice’s in-house CPA in 2007, as well as Terry Miller, the secretary of several of Justice’s companies. Both Harrah and Miller testified consistently that Justice made all the decisions in his business dealings.

RPR and Hanlin’s involvement with the proposed conservation easement began in late October, 2007, when McLeod contacted Hanlin at RPR by telephone and asked for advice regarding whether the projected value of the rejected mitigation bank proposal could serve as the “highest and best use” value for purposes of the for the proposed conservation easement on the Black River Farm. Hanlin thereafter researched a variety of tax issues related to the proposed conservation easement. Hanlin sent YES an engagement letter dated December 5, 2007 to document the retention, which McLeod signed and returned on behalf of YES.

¹ McLeod testified that this 5% was later reduced to 4% in a telephone call from Harrah.

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In November, 2007, Hanlin, McLeod, and Sue Green, then the president of an organization known as Community Open Land Trust ("COLT"), toured the Black River Farm and COLT agreed to accept the donation of the conservation easement, if Justice made it, on behalf of COLT. McLeod arranged for Mulkey Engineering to work on the Baseline Documentation Report and Dr. Darroll Hawkins of Highview Engineering to prepare the requisite appraisals for the conservation easement. Justice never signed the letter of intent COLT sent him or paid the required contribution to COLT for accepting the conservation easement. Similarly, Justice never signed the proposed agreement for engaging Hawkins to prepare the appraisal required in order for the conservation easement to qualify under the applicable provision of the Internal Revenue Code.

On December 19, 2007, McLeod's sister and administrative assistant, Mary Mohr, opened a letter from the Internal Revenue Service, which notified YES and McLeod individually that it was instigating an investigation into prior conservation easements in which YES and McLeod had been involved (and other entities not pertinent to this case). It notified YES and McLeod that they would be required to produce documentation in connection with the investigation by January 17, 2008. Mohr forwarded the letter to Hanlin on December 20, 2007 and advised him that she had not yet shown it to McLeod. Hanlin promptly called Mohr and asked her to show the letter from the IRS to McLeod. Hanlin then consulted with RPR management regarding what Hanlin perceived to be potential conflicts with YES and McLeod in light of two prior conservation easements Hanlin had handled in which he represented the landowners, not YES. Hanlin testified that based on his review of the IRS investigation notice, the two prior easements would be subject to the IRS investigation and it would be possible he would be called upon to testify either for or against McLeod. After concluding that RPR and

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Hanlin should withdraw, Hanlin called McLeod and informed him that he was withdrawing from representing YES on the proposed Justice conservation easement and all other matters. Neither RPR nor Hanlin ever sent a bill to YES for the work done to date by Hanlin on the Justice conservation easement and neither ever sought or received any money for work performed on this matter.

At some point on the same day, the 20th of December, McLeod retained and met with Crosby Lewis, Esquire concerning the IRS investigation. Hanlin followed his call on the 20th with a letter on the 21st of December. McLeod testified at trial that he did not make any attempts to find alternative counsel to replace Hanlin because he deemed it impossible to find qualified tax counsel to close the transaction with only eleven days left in the year.

On December 24, 2007, McLeod and Crosby called Justice, his in-house counsel Steven Ball, and Harrah. During the call McLeod told Justice that he had received the notice of the IRS investigation and that in light of the IRS investigation, he recommended that Justice postpone the proposed conservation easement on Black River Farm. McLeod testified that he did not, however, inform Justice of the withdrawal by RPR and Hanlin. Justice agreed to postpone the project during the call and thereafter, McLeod informed Hawkins, the appraiser, Epps, the engineer, and Sue Green of COLT that Justice had decided to postpone the project. McLeod testified that after the IRS investigation was eventually dropped in October, 2008, despite several attempts to get Justice interested in donating the Black River Farm as envisioned under the conservation easement project, he was never successful. He was able, however, to get Justice to pay Mulkey's bill and \$15,000 to YES in November of 2008 and in 2009 to pay the bill of Hawkins.

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YES filed this action in May, 2010, and asserted claims for breach of fiduciary duty, legal malpractice, and breach of contract. According to YES, RPR and Hanlin withdrew unilaterally without cause on December 20th, just days before the closing of the Justice conservation easement, leaving it unable to secure qualified alternate tax counsel for the transaction. Accordingly, McLeod testified that he was compelled to recommend in the December 24th call to Justice, Ball, and Harrah that Justice postpone the proposed conservation easement because RPR and Hanlin withdrew on December 20th.

RPR and Hanlin denied they breached their fiduciary duties to YES, committed malpractice, or breached their contract with YES. They maintained that their withdrawal was justified under the Rules of Professional Responsibility due to the potential conflict with their representation of the two landowners in the previous YES-organized conservation easements. However, even assuming that there was a genuine issue of material fact as to the propriety of the withdrawal, RPR and Hanlin maintained that they were still entitled to a directed verdict because there was not even a scintilla of evidence that the withdrawal was the proximate cause of Justice's acceptance of YES's recommendation that he postpone of the conservation easement project.

DISCUSSION

YES's theory at trial was that if RPR and Hanlin had not withdrawn from representing it on December 20, 2007, it would have changed its recommendation to Justice during the telephone conference on December 24, 2007 from "postpone" to "proceed." Because YES did not inform Justice of the fact of the defendants' withdrawal on December 20th, it is clear there is no direct evidence that the withdrawal caused Justice not to proceed. Rather, there are two possible reasons Justice did not proceed, based on the evidence offered by YES: it was either the

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disclosure of the IRS investigation or the recommendation from McLeod that Justice postpone the conservation easement. Accordingly, in order to submit its case to the jury, YES was required to offer some scintilla of evidence that, had McLeod recommended that Justice *proceed* with the proposed conservation easement in the face of the IRS investigation, rather than postpone, Justice most probably would have done so in December of 2007. *Shealy v. Walters*, 273 S.C. 330, 256 S.E.2d 739 (1979).

However, after thoroughly reviewing all of the evidence offered at trial, and after much deliberation, the Court concludes that there is no issue of fact to go to the jury regarding what Justice would have done. There is no evidence in the record before the Court that Justice ever said that had McLeod recommended on December 24th that he go forward with the transaction, he would have accepted this recommendation and done so. As this Court has noted, it was always up to Justice to decide what he wanted to do in any event. Justice's failure to participate in the trial of this matter in any way breaks any possible causal link between the loss of the fee to YES and the withdrawal by RPR and Hanlin. Indeed, Justice provided no affidavit or deposition during the lengthy discovery phase of this case and did not appear in person at trial to testify. Because YES has failed to adduce any evidence which ties these two events together; accordingly this Court must grant the defendants' motion for directed verdict.²

YES argues, however, that there is evidence in the record of Justice's intent from which the jury could conclude that it was the defendants' withdrawal which caused Justice to postpone

² Because the Court has concluded that the proximate cause link has been broken in this case, by virtue of the absence of any evidence of Justice's intent, it need not address any of the other grounds for directed verdict asserted by the defendants, including that they had fulfilled all of their obligations under the fee agreement with YES as of the date of their withdrawal, that in light of the absence of any signature by Justice to any of the agreements forwarded to him including the consulting services agreement, YES is not entitled to assert the loss of any fee as a result of the defendants' withdrawal, or that there was no reliable evidence in the record to support YES's claim for the lost consulting fee.

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APPENDIX16

the project and YES to lose its expected fee. The Court has carefully considered YES's arguments and must reject each as ineffective.

First, YES argues that the testimony of the 30(b)(6) designee of Justice Family Farms, LLC ("JFF"), Miller, testified (via videotape deposition) regarding that company's intent to complete the conservation easement on the Black River Farm in 2007. Although the evidence at trial failed to link JFF with the ownership of Black River Farm, even if it were the record owner, this Court must reject YES's argument regarding JFF. This is so because, as noted previously, Miller testified consistently with Harrah and McLeod that Justice was the ultimate decision-maker. Accordingly, what JFF might have intended is simply not pertinent.

Second, YES argues that the consulting services agreement lists the parties to that agreement as YES on the one hand as the consultant and Justice and JFF as the landowners on the other. YES argues that even though Justice never signed the agreement, such was not necessary because McLeod and Justice had "shaken hands on the deal" and had a contract, notwithstanding the lack of signatures. YES further points to the \$15,000 check written to YES in late 2008 as "proof" that Justice intended to go forward with the conservation easement, as the check identifies both YES and JFF on its face. However, just as Miller was not competent to testify as to Justice the decision-maker's intent, so also is an unsigned agreement and a check insufficient to create a genuine issue of material fact as to Justice's intent.

Finally, YES argues that there is evidence of Justice's intent in the record, through the direct testimony of YES's expert, Professor Greg Adams. Adams repeated a statement allegedly made by Justice to Miller in response to a question regarding whether he (Justice) would have gone forward with the conservation easement if it had "played out to the end." Adams testified that Justice told Miller in sum or substance, words to the effect that "we were in the boat."

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APPENDIX 17

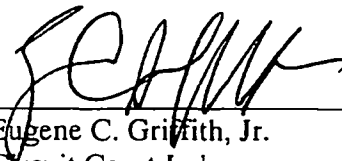
Apparently in reliance on Rule 703 of the South Carolina Rules of Evidence ("SCRE"), YES argues that Adams, as an expert, was permitted in giving his opinion to rely on this statement attributed to Justice, even though not admitted in evidence or admissible in evidence. However YES's reliance on Rule 703 is misplaced. Rule 703 does not create an exception to the rule against hearsay. Rather, the law in South Carolina is clear that although an expert may testify to evidence even though it is inadmissible under the hearsay rule, that evidence is not admitted for its truth, but only for the limited purpose of explaining the basis of the expert's opinion. *Jones v. Doe*, 372 S.C. 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2007); 2 Kenneth S. Broun, et al., *McCormick on Evidence* § 324, at 418 (2006). Thus, while it may have been proper for Adams to repeat what Justice told Miller to explain the basis of his opinions, such evidence, which is clearly hearsay, is not admissible to create an issue of fact for the jury as to Justice's intent.

CONCLUSION

Regardless of the theory of liability asserted: breach of fiduciary duty, legal malpractice, or breach of contract, YES has failed to carry its burden of creating a genuine issue of material fact for the jury regarding Justice's intent to go forward with the conservation easement on his Black River Farm in 2007, had YES recommended that he do so. Accordingly, the Court concludes that the motion for directed verdict by defendants RPR and Hanlin must be granted and it hereby orders that judgment be entered in favor of the defendants and that the plaintiff YES's amended complaint be dismissed.

AND IT IS SO ORDERED.

Newberry, SC
April 15, 2012



Eugene C. Griffith, Jr.
Circuit Court Judge

10 *Sen 10/10*

APPENDIX18

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2010-CP-40-3297

YANCEY ENVIRONMENTAL SOLUTIONS,
L.L.C.,

Plaintiff,

vs.

RICHARDSON PLOWDEN & ROBINSON, P.A.
and George Harold Hanlin, J.D.,

Defendants.

AMENDED COMPLAINT
(Jury Trial Demanded)

(Breach of Fiduciary Duty)
(Legal Professional Negligence)
(Breach of Contract)

JEANE E. W. HARRIS
P. & C.S.

2010 JUL -2 AM 9:00

RICHLAND COUNTY
FILED

Plaintiff, YANCEY ENVIRONMENTAL SOLUTIONS, L.L.C., complaining of Defendants, RICHARDSON PLOWDEN & ROBINSON, P.A. and George Harold Hanlin, J.D., would respectfully show unto the Court as follows:

SUMMARY OF THE CASE

This legal malpractice action centers upon the Defendants' breach of fiduciary duty and professional negligence when they elected unilaterally to terminate their lawyer-client relationship with Plaintiff only eleven (11) days or less before the closing on a significant conservation project by which Plaintiff's clients would have obtained \$45M in tax benefits and by which \$1.8M in fees would have been earned, \$1.2M of which would have belonged to Plaintiff and \$600k of which would have belonged to Defendants. Defendants had accepted the representation to render critical tax advice to Plaintiff as part of Plaintiff's consultation services to its clients with regard to the planned conservation easement.

Defendants' voluntary and unilateral termination of the lawyer-client relationship was a breach of their fiduciary duty to the Plaintiff and also in violation of Rule 1.16, RPC, Rule

407, SCACR, which unconditionally required Defendants to “take steps to the extent reasonably practicable to protect a client's interests.” Defendants took no steps or efforts whatsoever to protect Plaintiff’s interests. As a result of Defendants’ unilateral decision to terminate the lawyer-client relationship on the eve of the closing, the conservation easement did not take place. Plaintiff’s client made other arrangements and did not convey a conservation easement on the subject property. As a result of Defendants’ breach of fiduciary duties and negligent acts and omissions, Plaintiff sustained substantial pecuniary damages.

PARTIES

1. Plaintiff, YANCEY ENVIRONMENTAL SOLUTIONS, L.L.C., is a corporation organized and existing under the laws of South Carolina.
2. Defendant, RICHARDSON PLOWDEN & ROBINSON, P.A., is, upon information and belief, a Professional Association organized and existing under the laws of South Carolina, with its principal place of business in Richland County, South Carolina.
3. Defendant, George Harold Hanlin, J.D., is, upon information and belief, a citizen and resident of Richland County, South Carolina, and is an attorney licensed to practice law in this State.

JURISDICTION

4. This Court has jurisdiction over these matters based upon Article V of the South Carolina Constitution, S.C. CODE ANN. §§ 36-2-802 and 36-2-803 (1976), and its plenary powers.

VENUE

5. Venue is proper in Richland County as the principal place of business of Defendant, RICHARDSON PLOWDEN & ROBINSON, P.A., is in Richland County, South Carolina.

FACTS

6. Defendant, George Harold Hanlin, J.D., is an attorney and is or was a Member of Defendant, RICHARDSON PLOWDEN & ROBINSON, P.A. (collectively unless otherwise stated "RICHARDSON PLOWDEN").

7. At all times relevant hereto, Defendant, George Harold Hanlin, J.D., was acting as an agent for Defendant, RICHARDSON PLOWDEN & ROBINSON, P.A.

8. The negligent acts, omissions, and liability of Defendant, RICHARDSON PLOWDEN & ROBINSON, P.A., includes the acts and/or omissions of their agents, principals, employees and/or servants, including but not limited to those by Defendant, George Harold Hanlin, J.D., both directly and vicariously, pursuant to principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or *respondeat superior*.

9. Upon information and belief, at all times relevant hereto, Defendant, RICHARDSON PLOWDEN & ROBINSON, P.A., herein acted by and through their employees and agents, including but not limited to Defendant, George Harold Hanlin, J.D., who acted within the course and scope of his employment and/or agency with all implied, inherent, apparent and express authority to so bind his master and principal by his negligent, willful, wanton and reckless actions and/or omissions making it vicariously liable for same under the principles

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and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or *respondeat superior*.

10. On July 13, 2007, Justice Family Farms entered into a Consulting Services Agreement with Plaintiff "to conceive and design a natural resource protection and mitigation plan, secure permits and approvals from regulatory agencies as necessary, coordinate and supervise implementation, and manage, monitor and report pursuant to regulations".

11. On October 30, 2007, an e-mail was transmitted from the offices of Yancey A. McLeod, Jr. and Plaintiff, YANCEY ENVIRONMENTAL SOLUTIONS, L.L.C., (YANCEY) to RICHARDSON PLOWDEN concerning the conservation project stating, "In reference to your conversation with Yancey this morning, I am attaching a proposal, feasibility report and cost analysis on a large mitigation project."

12. On November 7, 2007, Mr. Hanlin sent an e-mail to Yancey McLeod with a copy to Fred Crawford stating,

Hey, Yancey,

This memo is to let you know the initial information that ***I will need to properly advise you*** and your client, Jim Justice, ***as to the probable tax effects of the conservation contribution*** that he contemplates before the end of this year, but also to advise Fred Crawford of the project so that we can allocate the resources to it that it deserves.

As we discussed yesterday, I looked up Justice Family Farms, ("JFF") in the SC Secretary of State's records this morning. JFF is a West Virginia LLC registered in SC on February 9, 2007. As you requested, In order to advise Jim about the tax effects of a conservation easement this year, we will need to know the following:

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- (1) whether JFF is taxed as a partnership (nearly all LLCs are, but we don't want to assume anything);
- (2) when the LLC was formed;
- (3) when the 4500 acre tract in SC was purchased, the purchase price, and when it was contributed to the LLC;
- (4) who the members of the LLC are, and their percentage interests;
- (5) I understand that if Jim sells his mining interests this year, that his income will be in the \$50 million range; also understand from you that the probability of the transaction occurring this year is high. Do we have any idea what Jim's income range would be if he does not sell his mining interests this year?
- (6) do we have any idea what percentage of the LLC's income or Jim's income is from farming/ranching vs. other sources?
- (7) some indication from the appraiser of the value of the property, with the mitigation/remediation potential factored in, of course.

I understand that although you and Jim have been discussing the possibilities for this property for quite some time, and he has now given you the go-ahead to proceed, you have not reached a definite arrangement as to the fee to charge for our consultations regarding it, and that you will want our assistance in drafting the consultation agreement. **As you know, getting all this done before the end of the year will be a challenge for everyone, and will require everyone's rapid work and attention, but I am, like you, confident that it can be accomplished. I understand that you contemplate a fee of perhaps \$4 million or so, and that our usual 2/3 - 1/3 arrangement would apply.** Please correct any errors on my part.

Yancey, as always, I count it a pleasure and a privilege to be able to work with you on a project. Thanks for allowing me to assist with this one.

(Emphasis added).

13. On November 7, 2007, Mr. Hanlin sent an e-mail to YANCEY again with a copy to Fred Crawford stating,

Hey, Yancey, Thanks for your telephone call. I understand that you intend to discuss with Jim Justice ***pricing our consulting services in this matter at 5% of the appraised value of the conservation easement.*** I also understand that you have talked with appraiser Henry Beckham about doing the appraisal work on this project, and that he is experienced in appraising mitigation/remediation projects, and is very willing to work on this project. While we will have to defer to Henry on the value of the easement, ***you have conservatively estimated the conservation value of this project in the past to be perhaps \$50 million.*** It could certainly be less or more.

As we have discussed in other projects, the appraisal is not required until the taxpayer (Jim) files his tax return for the year in question, which return can be extended until October 15th of the year following the donation, although the appraisal is acceptable under the regulations if done up to 60 days prior to the donation. Of course, any tax payment is due on April 15th, regardless of the extension, and estimated taxes might be due before that date, depending on circumstances. So Jim's tax savings as a result of this project will occur on April 15, 2008, at the latest, regardless of any extension filed, and could occur earlier.

I suggest that, since you contemplate that a preliminary appraisal would be prepared this year, and that since the conservation contribution would be made this year, that some portion of the fee, if not the majority of the fee, should be payable this year also. I'm sure that arrangement would be beneficial to your cash flow, as it would be to ours as well, and I think would be fair to Jim.

(Emphasis added).

14. On November 26, 2007, YANCEY sent a letter to Mr. Jim Justice with a copy to Mr.

Hanlin stating in relevant part,

I am very excited about your decision to place a conservation easement on the Justice Family Farms, Black River tract in Clarendon County, South Carolina. I have taken the following action in an attempt to expedite the process in order to place the easement in this calendar year:

1. **Coordination with my tax attorney, Hal Hanlin, Richardson, Plowden, Columbia, South Carolina, about various aspects of the project.** Hal is very knowledgeable about conservation matters and serves as board chairman for the Community Open Land Trust, based in South Carolina. It is my recommendation that we use this land trust to receive the gift of the easement, subject, of course, to their agreement to accept. **Since Hal is involved as an attorney in the project** he would not vote as a board member on the decision to accept. Preliminary discussions with staff members of the trust would indicate their willingness to recommend to the board acceptance of the gift. Hal and I conducted a site visit with their staff on November 16th and they seemed very excited about the project.

I have enclosed duplicate originals of a Consulting Services Agreement for your execution. As this project will require our immediate focused attention in order to place the easement this year, I would appreciate your returning the agreement, together with the initial consulting fee, as soon as possible. If you or any of your attorneys, CPA's or other advisors have any questions for me or Hal, please do not hesitate to call.

(Emphasis added).

15. Although the Consulting Services Agreement provides that the consulting fee "shall equal five (5%) percent of the conservation value of the property," Mr. Justice and YANCEY reached a verbal agreement to reduce the consulting fee to four (4%) percent.

16. On December 5, 2007, Mr. Hanlin sent a letter via e-mail to Mr. Justice subject: "Black River Farm" stating,

As you know. I have been working with Yancey McLeod in regards to the conservation easement that you contemplate on your Black River Farm near Manning, South Carolina. As we proceed, it is important that you clearly understand my relationship with Yancey Environmental Solutions, LLC ("YES") and with you. ***I have been retained as legal counsel for YES, and in that role I am providing legal and tax advice to YES.***

My law firm and I are not acting as your attorneys. Notwithstanding, I am happy to share any knowledge I might have in the tax and legal realms with Yancey and with you or your legal or tax advisors. However, it is important that you also understand that you should rely only on your own tax advisors and legal advisors, and not upon Yancey or me for your tax and legal advice. If you have any questions about this, please do not hesitate to contact me at the number above, or have your advisors contact me.

(Emphasis added).

17. By letter dated that same day, December 5, 2007, RICHARDSON PLOWDEN delivered an engagement letter to YANCEY concerning their acceptance of the representation "to assist you in the creation of a conservation easement on certain real property known as Black River Farm, near Manning, South Carolina (the "Property"). **This letter is to memorialize our agreements concerning the terms and conditions under which we will be acting as your attorneys.**" (Emphasis added). The engagement letter makes express reference to Rule 1.16, PRC, Rule 407, SCACR.

18. On December 5, 2007, around 4:07 p.m., a paralegal with RICHARDSON PLOWDEN sent an e-mail to YANCEY subject: "Jim Justice - Conservation Easement - Black River" stating,

Please find attached our firm's standard Fee Agreement and a copy of Hal's letter to Jim Justice regarding representation by Richardson, Plowden & Robinson, P.A., on behalf of YES. Please review each of these documents and return a signed copy of the Fee Agreement to either me or Hal today, and mail the original to our office at the address below. After you have reviewed the letter to Jim Justice, please call Hal with any comments you may have.

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19. A little over an hour later at 5:28 p.m. on December 5, 2007, Yancey McLeod's assistant sent a reply e-mail stating, "Please see attached fee agreement for the Jim Justice project."

20. On December 17, 2007, Phyllis Bingham with the Internal Revenue Service sent a letter to Yancey McLeod stating in relevant part,

We have reviewed materials regarding your participation in tax avoidance transactions. We are considering penalties and injunctions under Internal Revenue Code sections 6694, 6695, 6700, 6701, 7402, 7407 and 7408 for promoting and/or preparing documents relating to these transactions. In addition, we will consider issuing 'pre-filing notification' letters to the persons who have participated in these transactions.

This letter is to schedule a meeting with the examiner.

- - -

Purpose of the Appointment: At this appointment we will discuss specific procedures, such as communication methods, response times, and other general expectations. Please have the items listed on the attached Form 4564, Information Document Request, available at our first appointment.

If we conclude that penalties, injunction, and/or 'pre-filing notification' action is appropriate, you will be afforded an opportunity to present any facts or legal arguments that you feel indicate that such action should not be taken.

21. On the morning of December 20, 2007, Yancey McLeod's office received the letter from the IRS. Later that morning, around 10:52 a.m., Yancey McLeod's office sent an e-mail to Mr. Hanlin stating in relevant part,

I am attaching a very serious letter from the IRS received in the mail yesterday - Debra and I have reviewed, but, and this is important - I have not shown this to Yancey and unless you tell me otherwise, I do not want him to see this, or know about this, until after Christmas. (we are not doing well financially - we are literally at the end of the rope)

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Debra and I are most concerned about the cover letter - the documents they are requesting do not bother us so much.

Please let us know your thoughts -

22. Later that afternoon, around 2:00 p.m. on December 20, 2007, literally days before the scheduled closing on the conservation easement, Mr. Hanlin called Yancey McLeod and terminated the contract and the lawyer-client relationship between RICHARDSON PLOWDEN and YANCEY on all matters, including the Jim Justice / Black River Farms matter.

23. On December 21, 2007, again literally days before the scheduled closing on the conservation easement, Mr. Hanlin sent a letter to Yancey McLeod with a subject line of re: "**All pending matters**" stating,

As you and I discussed by telephone yesterday, **our firm has terminated all representation of you or any entity with which you are affiliated.**

We regret that this action is necessary, but the IRS notice which you received on Wednesday, December 19, 2007, pertains to projects that I have worked on as well, and ***you and I could find ourselves in a position of conflict.*** For that reason, it is best that others represent you from the beginning. ***This termination includes***, but is not limited to, ***any representation of Yancey Environmental Solutions (including the Jim Justice matter*** and the Gastineau matters), NRB (Natural Resources Based Education Centers), Inc., and representation of you personally.

I will file forms 2848 notifying the IRS of our withdrawal in the next few days in those matters where a form 2848 (Power of Attorney) has been filed.

(Emphasis added).

24. RICHARDSON PLOWDEN's improper withdrawal literally days before the closing was to take place was the reason that the Black River Farms conservation easement project did not take place.

25. Without tax counsel familiar, like RICHARDSON PLOWDEN was, with Mr. Justice's needs, the factual issues unique to the Black River Farms property, regulatory requirements, appraisals, etc., the conservation easement documents could not be prepared, executed, and recorded without a huge risk exposure that would have been unreasonable for YANCEY to accept.

26. On October 16, 2008, Ms. Bingham with the Internal Revenue Service sent a letter to Yancey McLeod stating in relevant part,

We are discontinuing our investigation into whether you are liable for a penalty under Internal Revenue Code (IRC) section(s) 6700/6701. This letter should not be construed to mean that the Internal Revenue Service (Internal Revenue Service) approves your conduct; rather, it is simply a notice that our investigation has been discontinued at this time. This investigation did not constitute an examination of your income tax return(s).

(Emphasis added).

27. YANCEY offered to Mr. Justice to continue working on the conservation easement for recording at a later date, but Mr. Justice declined, the opportunity for the conservation easement has now passed, and substantial damages to YANCEY have occurred.

28. As a direct and proximate result of RICHARDSON PLOWDEN's acts and/or omissions, YANCEY sustained substantial pecuniary losses.

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29. At the time RICHARDSON PLOWDEN unilaterally terminated the representation, YANCEY had a valuable contract with its clients that if performed would have resulted in approximately \$1.2M in fees paid to YANCEY in late 2007 or early 2008.

30. Had RICHARDSON PLOWDEN continued the attorney-client relationship and provided the tax advice they had agreed to provide and that were required as part of Yancey's conservation easement consulting services to its clients, YANCEY would have obtained approximately \$1.2M in fees.

FOR A FIRST CAUSE OF ACTION **(Breach of Fiduciary Duty)**

31. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

32. RICHARDSON PLOWDEN was in a fiduciary relationship with YANCEY.

33. RICHARDSON PLOWDEN owed YANCEY fiduciary duties of a very delicate, exacting and confidential nature, requiring a high degree of fidelity and good faith, undivided loyalty, and competence, as well as the duty to act single-mindedly in preserving, protecting, and advancing the rights and interests of YANCEY.

34. RICHARDSON PLOWDEN had fiduciary duties to avoid withdrawing from the representation of YANCEY when such withdrawal would cause or would likely cause material adverse effects on YANCEY's interests.

35. RICHARDSON PLOWDEN's voluntary, unilateral termination of the lawyer-client relationship on the eve of the closing on the Jim Justice / Black River Farms conservation easement was a breach of their fiduciary duties owed to YANCEY, which proximately caused material adverse effects on YANCEY's interests and proximately caused substantial financial losses to YANCEY.

36. RICHARDSON PLOWDEN failed to meet the minimum standard of conduct thereby breaching their fiduciary duties to YANCEY and otherwise acted in a manner inconsistent with their fiduciary duties to YANCEY.

37. RICHARDSON PLOWDEN failed to meet the minimum standard of conduct thereby breaching their fiduciary duties to YANCEY and otherwise acted in a manner inconsistent with their fiduciary duties by other such particulars as the evidence in this case may demonstrate.

38. As a direct and proximate result of RICHARDSON PLOWDEN's breach of their fiduciary duties by the actions and omissions as specified herein, YANCEY sustained actual, consequential, incidental, and special damages in an amount to be determined by the jury at the trial of this case.

39. In addition to the actual, consequential, and incidental damages suffered, RICHARDSON PLOWDEN's highly reckless, wanton, and irresponsible conduct in breach of their fiduciary duties as specified herein entitles YANCEY to an award of punitive damages.

FOR A SECOND CAUSE OF ACTION
(Legal Professional Negligence)

40. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

41. At all times relevant hereto, an attorney-client relationship existed between RICHARDSON PLOWDEN and YANCEY.

42. By virtue of their attorney client relationship, RICHARDSON PLOWDEN owed duties to YANCEY, including the duty to protect, preserve and advance the rights and interests of YANCEY by possessing and exercising that degree of care, skill, and learning which other

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reasonable and competent attorneys would be expected to possess and exercise under the same or similar circumstances.

43. RICHARDSON PLOWDEN had professional duties to avoid withdrawing from the representation of YANCEY when such withdrawal would cause or would likely cause material adverse effects on YANCEY's interests.

44. RICHARDSON PLOWDEN had professional duties to continue with the representation of YANCEY to satisfy their fiduciary obligations and to avoid causing material adverse effects on YANCEY's interests.

45. RICHARDSON PLOWDEN had professional duties to provide the tax consulting services to YANCEY that they were obligated to render within the course and scope of the lawyer-client engagement.

46. RICHARDSON PLOWDEN failed to meet the minimum standard of care thereby breaching their professional duties to YANCEY and otherwise acted in a negligent, grossly negligent, willful, wanton and reckless manner by failing to protect, preserve, and advance the rights and interests of YANCEY.

47. RICHARDSON PLOWDEN failed to meet the minimum standard of care thereby breaching their professional duties to YANCEY and otherwise acted in a negligent, grossly negligent, willful, wanton and reckless manner by failing to avoid withdrawing from the representation of YANCEY when such withdrawal would cause or would likely cause material adverse effects on YANCEY's interests.

48. RICHARDSON PLOWDEN failed to meet the minimum standard of care thereby breaching their professional duties to YANCEY and otherwise acted in a negligent, grossly negligent, willful, wanton and reckless manner by failing to continue with the representation

of YANCEY to satisfy their fiduciary obligations and to avoid causing material adverse effects on YANCEY's interests.

49. RICHARDSON PLOWDEN failed to meet the minimum standard of care thereby breaching their professional duties to YANCEY and otherwise acted in a negligent, grossly negligent, willful, wanton and reckless manner by failing to provide the tax consulting services to YANCEY that they were obligated to render within the course and scope of the lawyer-client engagement.

50. RICHARDSON PLOWDEN failed to meet the minimum standard of care thereby breaching their professional duties to YANCEY by other such particulars as the evidence in this case may demonstrate.

51. As a direct and proximate result of RICHARDSON PLOWDEN's breach of their professional duties by the actions and omissions as specified herein, YANCEY sustained actual, consequential, incidental, and special damages in an amount to be determined by the jury at the trial of this case.

52. In addition to the actual, consequential, and incidental damages suffered, RICHARDSON PLOWDEN's highly reckless, wanton, and irresponsible conduct as specified in certain causes of action in this Complaint entitles YANCEY to an award of punitive damages.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract)

53. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

54. RICHARDSON PLOWDEN entered into a contract with YANCEY, the terms of which RICHARDSON PLOWDEN agreed and contracted to provide competent and prudent legal services.

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55. YANCEY fulfilled all necessary preconditions, if any, of the contract with RICHARDSON PLOWDEN .

56. By virtue of their contract, RICHARDSON PLOWDEN owed duties to YANCEY, including the duty to protect, preserve and advance the rights and interests of YANCEY by possessing and exercising that degree of care, skill, and learning which other reasonable and competent attorneys would be expected to possess and exercise under the same or similar circumstances.

57. RICHARDSON PLOWDEN failed to meet the minimum standard of care thereby breaching their contractual duties to YANCEY and otherwise acted in a negligent, grossly negligent, willful, wanton and reckless manner.

58. RICHARDSON PLOWDEN failed to meet the minimum standard of care thereby breaching their contractual duties to YANCEY by other such particulars as the evidence in this case may demonstrate.

59. As a direct and proximate result of RICHARDSON PLOWDEN's breach of their contractual duties by the actions and omissions as specified herein, YANCEY sustained actual, consequential, incidental, and special damages in an amount to be determined by the jury at the trial of this case.

TRIAL BY JURY.

60. YANCEY demands a jury trial on all claims and issues so triable.

EXPERT AFFIDAVIT

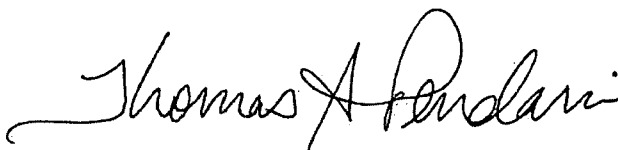
61. Pursuant to S.C. CODE ANN. § 15-36-100(B) (2006), attached hereto and incorporated herein by reference as Exhibit 1, is the affidavit of William P. Hatfield, J.D., an expert witness licensed by the Supreme Court of the State of South Carolina, and specifying at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, YANCEY ENVIRONMENTAL SOLUTIONS, L.L.C., prays for judgment against Defendants, RICHARDSON PLOWDEN & ROBINSON, P.A. and George Harold Hanlin, J.D., jointly and severally, for all actual damages, consequential damages, special damages, and incidental damages, for prejudgment interest, and for punitive damages, all in an amount to be more specifically proven at trial, and the costs of this action, and for such other and further relief as this Honorable Court may deem just and proper.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with a long horizontal line extending from the left side of the name.

Thomas A. Pendarvis, J.D. (SC Bar # 064918)
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Beaufort, SC 29902-5066
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843.524.9501 Fax.
Thomas@PendarvisLaw.com
www.PendarvisLaw.com

Attorney for Plaintiff, YANCEY ENVIRONMENTAL
SOLUTIONS, L.L.C.

Beaufort, South Carolina

June 29, 2010

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2010-CP-40-

YANCEY ENVIRONMENTAL SOLUTIONS,
L.L.C. and Yancey A. McLeod, Jr.,

Plaintiffs,

vs.

RICHARDSON PLOWDEN & ROBINSON, P.A.
and George Harold Hanlin, J.D.,

Defendants.

**AFFIDAVIT OF
EXPERT OPINION OF
WILLIAM P. HATFIELD, J.D.**

PERSONALLY APPEARED before me William P. Hatfield, J.D., who, being duly sworn, deposes and says that:

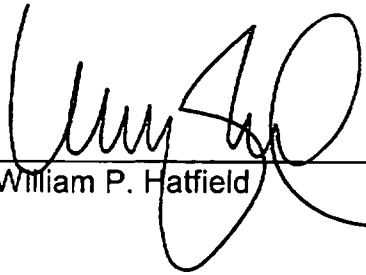
1. It is my expert opinion, held to a reasonable degree of professional certainty, that RICHARDSON PLOWDEN & ROBINSON, P.A. and George Harold Hanlin, J.D. (collectively "RICHARDSON PLOWDEN") committed malpractice – violating the standard of care of South Carolina lawyers by failing to render services and provide legal advice to their clients, YANCEY ENVIRONMENTAL SOLUTIONS, L.L.C. and Yancey A. McLeod, Jr. (collectively "YANCEY"), with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the legal profession in South Carolina – that proximately caused damages to them:
 - a. by failing to avoid withdrawing from the representation of YANCEY when such withdrawal would cause or would likely cause material adverse effects on YANCEY's interests.

2. It is my expert opinion, held to a reasonable degree of professional certainty, that RICHARDSON PLOWDEN committed violations of the South Carolina Rules of Professional Conduct (Rule 407 SCACR), including those listed below, and that this professional misconduct constitutes further evidence of RICHARDSON PLOWDEN's violations of the standard of care and their duties to YANCEY, their clients:
 - a. RICHARDSON PLOWDEN violated Rule 1.16 of the S.C. Rules of Professional Conduct, failing to "take steps to the extent reasonably practicable to protect a client's interests" when they elected unilaterally to terminate their lawyer-client relationship with YANCEY only eleven (11) days or less before the closing on a significant conservation project by which YANCEY would have earned approximately \$1.2M in fees.
 - b. Violations of this provision of the Rules that were intended to protect clients in YANCEY's position at the time of RICHARDSON PLOWDEN's violation of that Rule;
 - c. This violation was of the Rules in effect at the time of the violative conduct by RICHARDSON PLOWDEN;
 - d. This violation of the Rules of Professional Conduct was also a violation of the standard of care of a South Carolina lawyer – failures to render legal services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession.
3. RICHARDSON PLOWDEN's correspondence with YANCEY establishes that they had an attorney-client relationship with YANCEY. It is my expert opinion, held to a reasonable degree of professional certainty, that their breaches of duty outlined

above occurred within the scope of and grew out of the attorney-client relationship between RICHARDSON PLOWDEN and YANCEY, as did the damages they suffered as a proximate result of those breaches.

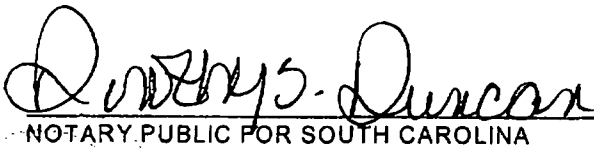
4. I have reviewed documentary evidence from RICHARDSON PLOWDEN's files from the representation of YANCEY, all of which, taken together, support the allegations of the Complaint. This evidence includes the kinds of factual sources customarily relied upon by experts in this field, and it provides factual support for the expert opinions I express in this affidavit.
5. My resume is attached as Exhibit A to this Affidavit, and sets forth my experience in the practice of law in South Carolina.
6. I have been retained as an expert witness by counsel for YANCEY. My expert opinions are based upon the evidence available to me at this time and are subject to expansion and modification as further evidence or issues develop.

Further the affiant sayeth not.


 William P. Hatfield

SWORN to before me this

4th day of May, 2010

 (L.S.)
 NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires 3/25/18

WILLIAM P. HATFIELD

The Hyman Law Firm
Post Office Box 1770
Florence, SC 29503
wphatfield@hymanlawfirm.com
(843) 662-5000

EDUCATION:

1973 Bachelor of Arts Degree in Economics and Business
Belmont Abbey, Belmont, North Carolina

1977 Juris Doctor Degree
University of South Carolina School of Law
Columbia, South Carolina

EXPERIENCE:

January 1998 Managing partner of The Hyman Law Firm
to Present

Civil Trial Litigations specializing in products liability, trucking accidents,
and insurance bad faith.

BAR ADMISSIONS:

Admitted to South Carolina Bar November, 1977 to present
SC Bar #2840

Admitted to U. S. Supreme Court (1983); U.S. Court of Appeals 4th
Circuit (1982); United States District Court and South Carolina Supreme
Court (1977).

PROFESSIONAL ORGANIZATIONS:

- Board certified Civil Trial Specialist, National Board of Trial Advocacy,
1997 to Present.
- American Association of Justice
- South Carolina Association of Justice
- South Carolina Trial Lawyers Association Board of Governors (1984 to
1990)
- American Board of Trial Advocates (2002 to Present)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Yancey Environmental Solutions, L.L.C.,
Plaintiff,

vs.

Richardson Plowden & Robinson, P.A. and
George Harold Hanlin, J.D.,
Defendants.

IN THE CIRCUIT COURT

Case No. 2010-CP-40-3297

**ANSWER AND AFFIRMATIVE
DEFENSES OF DEFENDANTS
RICHARDSON PLOWDEN &
ROBINSON, P.A. AND GEORGE
HAROLD HANLIN TO PLAINTIFF'S
AMENDED COMPLAINT**

Defendants Richardson Plowden & Robinson, P.A. ("RPR") and George Harold Hanlin ("Hanlin") (together referred to herein as "the Defendants"), for their answer and affirmative defenses to the Amended Complaint herein, allege as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of the Amended Complaint not hereinafter specifically admitted is denied and the Defendants demands strict proof thereof.

2. The Defendants deny each and every allegation contained in the Plaintiffs' "Summary of the Case."

3. Paragraph 1 of the Amended Complaint is admitted on information and belief.

4. Paragraphs 2 and 3 of the Amended Complaint are admitted.

5. Paragraph 4 of the Amended Complaint is admitted.

6. Answering paragraph 5 of the Amended Complaint, the Defendants admit only so much of said paragraph as alleges that venue is proper in Richland County and the principal place of business of RPR is also in Richland County. All other allegations of said paragraph, including that the Plaintiffs conducted "pre-filing due diligence pursuant to Rule 11," are denied.

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7. Answering paragraph 6 of the Amended Complaint, the Defendants admit only that Hanlin is an attorney and that he was employed as an associate at RPR. All other allegations of said paragraph are denied.

8. Paragraph 7 of the Amended Complaint is admitted.

9. Paragraphs 8 and 9 of the Amended Complaint are denied as alleged. The Defendants specifically deny that they or their agents committed any negligent acts or omissions, as alleged in said paragraphs, or that they are liable to the Plaintiffs.

10. Answering paragraph 10 of the Amended Complaint, the Defendants lack sufficient knowledge or information to form a belief as to the truth of said paragraph and, therefore, deny the same and demand strict proof thereof.

11. Paragraph 11 of the Amended Complaint is denied as alleged. The Defendants admit on information and belief only so much of said paragraph 12 as alleges that that on October 30, 2007, an e-mail was transmitted from Plaintiff Yancey Environmental Solutions, LLC ("YES") to RPR. The Defendants crave reference to the text of the e-mail for its contents therein. All other allegations of said paragraph are denied.

12. Answering paragraphs 12 and 13 of the Amended Complaint, the Defendants admit that on November 7, 2007, Hanlin sent two e-mails to McLeod. The Defendants crave reference to the text of the two e-mails for their content. By way of further answer to said paragraphs 12 and 13, the Defendants would show the Court that the Plaintiffs have purported to quote portions of the referenced e-mails in these paragraphs of their Amended Complaint, but have unilaterally supplied italics, bolding, and/or underlining to certain language in the e-mails. The Defendants deny that said italics, bolding, and/or underlining were in the original e-mails.

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and deny any characterization or inference the Plaintiffs may attempt to place on any language purportedly quoted in the two e-mails. All other allegations of said paragraph are denied.

13. Answering paragraphs 14 and 15 of the Amended Complaint, the Defendants lack sufficient knowledge or information to form a belief as to the truth of said paragraphs and, therefore, deny the same and demand strict proof thereof.

14. Answering paragraph 16 of the Amended Complaint, the Defendants admit that on December 5, 2007, Hanlin sent a letter via e-mail to Mr. Justice. The Defendants crave reference to the text of the December 5, 2007 letter for the information contained therein. By way of further answer to said paragraph 16, the Defendants would show the Court that the Plaintiffs have purported to quote portions of the referenced letter in this paragraph of their Amended Complaint, but have unilaterally supplied italics and bolding to certain language in the letter. The Defendants deny that said italics and bolding were in the original letter and deny any characterization or inference the Plaintiffs may attempt to place on any language purportedly quoted in the letter. All other allegations of said paragraph are denied.

15. Answering paragraph 17 of the Amended Complaint, the Defendants admit that on December 5, 2007, RPR sent the referenced engagement letter to YES and specifically deny that the referenced engagement letter was intended to or did create an attorney-client relationship between RPR and McLeod individually. The Defendants crave reference to the text of the December 5, 2007 engagement letter for the information contained therein. By way of further answer to said paragraph 17, the Defendants would show the Court that the Plaintiffs have purported to quote portions of the referenced letter in this paragraph of their Amended Complaint, but have unilaterally supplied bolding to certain language in the letter. The Defendants deny that said bolding was in the original letter and deny any characterization or

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inference the Plaintiffs may attempt to place on any language purportedly quoted in the letter. All other allegations of said paragraph are denied.

16. Answering paragraph 18 of the Amended Complaint, the Defendants admit that on December 5, 2007, a paralegal at RPR sent an e-mail to McLeod. The Defendants crave reference to the text of the December 5, 2007 e-mail for the information contained therein. All other allegations of said paragraph are denied.

17. Answering paragraph 19 of the Amended Complaint, the Defendants admit that on December 5, 2007, McLeod's assistant sent an e-mail to Hanlin. The Defendants crave reference to the text of the December 5, 2007 e-mail for the information contained therein. All other allegations of said paragraph are denied.

18. Answering paragraph 20 of the Amended Complaint, the Defendants admit on information and belief that on December 17, 2007, the IRS sent a letter to McLeod. The Defendants crave reference to the text of the December 17, 2007 letter for the information contained therein. All other allegations of said paragraph are denied.

19. Answering paragraph 21 of the Amended Complaint, the Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegation that McLeod's office received the letter from the IRS on December 20, 2007, and, therefore, deny the same and demand strict proof thereof. The Defendants admit the allegation in paragraph 21 that McLeod's office sent an e-mail to Hanlin on December 20, 2007 as alleged in said paragraph and crave reference to the text of that e-mail for its terms. All other allegations of said paragraph are denied.

20. Answering paragraph 22 of the Amended Complaint, the Defendants admit only so much of said paragraph as alleges that on December 20, 2007, Hanlin called McLeod to

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inform him that RPR would no longer be representing YES. All other allegations of said paragraph are denied, including specifically the allegation that there was a “scheduled closing on the conservation easement.”

21. Answering paragraph 23 of the Amended Complaint, the Defendants admit that on December 21, 2007, Hanlin sent a letter to McLeod concerning the termination of RPR’s representation of YES. The Defendants crave reference to the text of that letter for its terms. By way of further answer to said paragraph 23, the Defendants would show the Court that the Plaintiffs have purported to quote portions of the referenced letter in this paragraph of their Amended Complaint, but have unilaterally supplied italics and bolding to certain language in the letter. The Defendants deny that said italics and bolding were in the original letter and deny any characterization or inference the Plaintiffs may attempt to place on any language purportedly quoted in the letter. All other allegations of said paragraph are denied.

22. Paragraphs 24 and 25 of the Amended Complaint are denied.

23. Answering paragraphs 26 and 27 of the Amended Complaint, the Defendants lack sufficient information to form a belief as to the truth of said paragraphs and, therefore, deny the same.

24. Paragraphs 28, 29, and 30 of the Amended Complaint are denied.

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AS TO THE FIRST CAUSE OF ACTION
(Breach of Fiduciary Duty)

25. The reallegations of paragraph 31 of the Amended Complaint are answered hereinabove and those answers are realleged and incorporated herein by reference as if repeated verbatim.

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26. Answering paragraph 32 of the Amended Complaint, the Defendants admit only that by virtue of the attorney-client relationship between RPR and YES, the Defendants owed a fiduciary duty to YES. All other allegations of said paragraph are denied.

27. Paragraph 33 of the Amended Complaint contains legal conclusions and/or the Plaintiffs' characterization of the attorney-client relationship and, therefore, is denied as alleged.

28. Paragraphs 34, 35, 36, 37, 38, and 39 of the Amended Complaint are denied.

AS TO THE SECOND CAUSE OF ACTION **(Legal Professional Negligence)**

29. The reallegations of paragraph 40 of the Amended Complaint are answered hereinabove and those answers are realleged and incorporated herein as if repeated verbatim.

30. Paragraph 41 of the Amended Complaint is denied as alleged because the Defendants did not represent McLeod individually. Further answering paragraph 42, the Defendants would show the Court that RPR admits that it had an attorney-client relationship with YES, per the engagement letter dated December 5, 2007, until December 20 or 21, 2007.

31. Paragraph 42 of the Amended Complaint contains legal conclusions and/or the Plaintiffs' characterization of the attorney-client relationship and, therefore, is denied as alleged as alleged.

32. Paragraphs 43, 44, 45, 46, 47, 48, 49, 50, 51, and 52 of the Amended Complaint are denied.

AS TO THE THIRD CAUSE OF ACTION **(Breach of Contract)**

33. The reallegations of paragraph 53 of the Amended Complaint are answered hereinabove and those answers are realleged and incorporated herein by reference as if repeated verbatim.

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34. Paragraph 54 of the Amended Complaint is denied as alleged because the Defendants did not represent McLeod individually. Further answering paragraph 54, the Defendants would show the Court that RPR admits that it entered into a contract to provide “legal competent and prudent legal services” with YES during the time that RPR had an attorney-client relationship with YES as set forth above in paragraph 31 of this Answer. All other allegations of said paragraph are denied.

35. Paragraph 55 of the Amended Complaint is denied as alleged.

36. Paragraph 56 of the Amended Complaint contains legal conclusions and/or the Plaintiffs’ characterization of the attorney-client relationship and, therefore, is denied as alleged.

37. Paragraphs 57, 58, and 59 of the Amended Complaint are denied.

38. Paragraph 60 of the Amended Complaint requires no response. To the extent a response is required, the Defendants deny the same.

39. Paragraph 61 of the Amended Complaint requires no response. To the extent a response is required, the Defendants deny the same. By way of a further response to said paragraph, the Defendants deny that the affidavit of William P. Hatfield satisfied the requirements of S.C. CODE ANN. § 15-36-100(A) and further deny that the Amended Complaint sets forth a valid claim for professional negligence against the Defendants.

40. The Defendants deny each and every allegation set forth in the Prayer for Relief.

FOR A SECOND AFFIRMATIVE DEFENSE

41. Further answering the Amended Complaint, and as and for a further defense thereto, the Defendants allege that McLeod is not a proper Plaintiff in this action because the Defendants did not have an attorney-client relationship with McLeod individually.

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ps. 7

FOR A THIRD AFFIRMATIVE DEFENSE

42. Further answering the Amended Complaint, and as and for a further defense thereto, the Defendants allege that the Amended Complaint as to YES fails to allege facts sufficient to constitute a cause of action against the Defendants and should therefore be dismissed under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FOURTH AFFIRMATIVE DEFENSE

43. Further answering the Amended Complaint, and as and for a further defense thereto, the Defendants allege that at all times pertinent to this Amended Complaint, the Defendants' conduct conformed to the applicable standard of care in his capacity as an attorney and, therefore, to the extent that the Plaintiffs' claims herein are based on the proposition that the Defendants did not so conform, they are barred.

FOR A FIFTH AFFIRMATIVE DEFENSE

44. Further answering the Amended Complaint, and as and for a further defense thereto, the Defendants allege that the causes of action in the Plaintiffs' Amended Complaint are barred by the doctrine of estoppel.

FOR AN SIXTH AFFIRMATIVE DEFENSE

45. Further answering the Amended Complaint, and as and for a further defense thereto, the Defendants allege that no act or omission of the Defendants proximately caused any damages to the Plaintiffs.

FOR A SEVENTH AFFIRMATIVE DEFENSE

46. Further answering the Amended Complaint, and as and for a further defense thereto, the Defendants allege that the Plaintiffs are not entitled to any recovery in this action from the Defendants because they suffered no damages.

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FOR AN EIGHTH AFFIRMATIVE DEFENSE

47. Further answering the Amended Complaint, and as and for a further defense thereto, the Defendants allege that to the extent that the Plaintiffs have failed to mitigate their alleged damages in this case, the existence of which is specifically denied, they are barred from recovery of same.

FOR A NINTH AFFIRMATIVE DEFENSE

48. Further answering the Amended Complaint, and as and for a further defense thereto, the Defendants allege that if the Defendants were negligent in any respect, which is specifically denied, the Plaintiffs' own negligence equaled or exceeded any negligence of the Defendants and, therefore, the Plaintiffs' claims are barred as a matter of law. In the event there is no absolute bar to the Plaintiffs' alleged damages, if any, the existence of which is specifically denied, the Defendants specifically plead the doctrine of comparative negligence for any calculation of damages in the event the trier of fact determines that Defendants were negligent and that such negligence proximately caused the Plaintiffs' damages.

FOR A TENTH AFFIRMATIVE DEFENSE

49. Further answering the Amended Complaint, and as and for a further defense thereto, the Defendants allege that the Plaintiffs' damages, if any, which the Defendants dispute, were caused by the actions and conduct of third parties over which the Defendants had no control or authority.

FOR AN ELEVENTH AFFIRMATIVE DEFENSE

50. Further answering the Amended Complaint, and as and for a further defense thereto, the Defendants allege that there is no factual or legal basis for an award of punitive damages against Defendants and all claims for punitive damages should be stricken.

FOR A TWELFTH AFFIRMATIVE DEFENSE

51. Further answering the Amended Complaint, and as and for a further defense thereto, the Defendants aver that any award of punitive damages against them would violate the constitutional safeguards provided under the Constitution of the United States of America and the Constitution of South Carolina, in that punitive damages violate due process and equal protection guarantees, place an undue burden on interstate commerce, violate the right to assembly and petition the government and violate the proscription against excessive fines.

FOR A THIRTEENTH AFFIRMATIVE DEFENSE

52. Further answering the Amended Complaint, and as and for a further defense thereto, the Defendants allege that the affidavit of William P. Hatfield, submitted by the Plaintiffs pursuant to S.C. CODE ANN. § 15-36-100(A), is insufficient to satisfy the requirements of that statute to support a claim of professional negligence against the Defendants.

WHEREFORE, having answered the Plaintiffs' Amended Complaint herein, subject to and specifically reserving their right to have heard their motion to dismiss the Amended Complaint as to Plaintiff Yancey A. McLeod, Jr., the Defendants request that the Court dismiss the Amended Complaint in its entirety, enter judgment in favor of the Defendants, and award the Defendants such other and further relief as the Court deems appropriate.

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Attorneys for Defendants Richardson Plowden &
Robinson, P.A. and George Harold Hanlin

July 19, 2010

Columbia, South Carolina

1 GREGORY B. ADAMS, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Thank you. Please have a seat in
4 the witness stand and state your full name for the
5 record.

6 THE WITNESS: Gregory Burke Adams.

7 DIRECT EXAMINATION BY MR. PENDARVIS:

8 Q Good afternoon, Dr. Adams.

9 A Good afternoon, sir.

10 Q Would you please introduce yourself to the
11 jury, please?

12 A I'm Greg Adams, I'm a law professor at the
13 University of South Carolina.

14 Q Could you tell us a little bit more about
15 your professional history, law school and your
16 progression to the point -- are you a professor at
17 the University of South Carolina School of Law?

18 A Yes, sir.

19 Q Could you tell the jury a little bit about
20 your professional history, background?

21 A I went to law school at LSU and practiced law
22 for a couple years in Baton Rouge, when I got an
23 opportunity to become a law professor at Southern
24 University Law School in Baton Rouge, so I joined
25 the faculty at Southern University, was a law

1 professor there for two years when I got an
2 opportunity to go to graduate school at Columbia
3 University in New York.

4 I went to Columbia and spent a year, the
5 first year of a two year program at the campus in
6 New York City, at the law school, and the second
7 year in Brussels, Belgium, continuing my studies at
8 the University of Brussels and working with the
9 legal department of the Common Market, their
10 equivalent to the Department of Justice.

11 I then returned to the United States and
12 joined the faculty at the University of South
13 Carolina in 1979 and I have been a professor here
14 ever since.

15 Q Dr. Adams, could you give the jury an example
16 of some of the publications you have made?

17 A Well, I have written a number of columns for
18 the South Carolina, now called the South Carolina
19 Association of Justice, it used to be referred to
20 as the South Carolina Trial Lawyers Association. I
21 have worked as a member of the professional
22 responsibility committee of the South Carolina Bar
23 for many years and have authored reports and worked
24 on drafting these rules that govern lawyers and
25 have made presentations to the Board of, excuse me,

1 to the House of Delegates, the governing body of
2 the South Carolina Bar, about those rules. I have
3 also worked in the area of contract law and
4 corporate law and I am the lead author of the South
5 Carolina Corporate Law, Corporate Practice Manual
6 which is now in its second edition.

7 Q Professor, Dr. Adams, excuse me, could you
8 describe for the jury some of the courses you have
9 taught aspiring lawyers in law school?

10 A I teach contract law to our first year
11 students, in their first semester. I have done
12 that for 15 or 20 years. I also have in the past
13 taught corporate law and other business courses,
14 business law courses, but most of my teaching for
15 the last 10 or 15 years has been in the area of
16 professional responsibility, lawyers' ethics, the
17 rules that govern lawyers in practicing and
18 judicial ethics. I teach both the basic legal
19 ethics course, professional responsibility that all
20 of our second year students take, and I also teach
21 advanced seminars, courses on both lawyers' ethics
22 and judges' ethics.

23 Q Thank you. Professor Adams, in your practice
24 as a lawyer have you served as an expert in any
25 cases in South Carolina courts?

1 A Well, I think it is important to straighten
2 things out. I practiced law for two years full
3 time in Baton Rouge in Louisiana when I graduated
4 from law school and practiced part time for two
5 years while I was on the faculty of Southern
6 University. I don't practice law in South
7 Carolina. I do serve as an expert witness and have
8 done so in many cases.

9 Q Have you been involved in any cases in which
10 appeals have been taken and the appellate court
11 issued opinions?

12 A Yes, sir, I have.

13 Q Could you describe a few of those cases to
14 us, please?

15 A Well, Smith versus Haynesworth, Marion, McKay
16 and Gerrard, which involved issues of lawyers
17 representing investors in a business transaction in
18 which the claim was that the lawyers have not
19 protected the interest of their clients. In that
20 case the South Carolina Supreme Court held I was
21 qualified as an expert and that it was reversible
22 error not to allow me to testify as an expert in
23 that case.

24 Q Dr. Adams, were you involved in the State
25 versus Morris matter?

1 A The most recent case involving, where the
2 Supreme Court has talked about my testimony as an
3 expert was the criminal prosecution of Earl Morris,
4 the former South Carolina Treasurer who was
5 involved in the fraudulent activities of Home Gold
6 and Carolina Investors Company. That was a
7 criminal prosecution in which the Attorney General
8 of South Carolina asked me to testify as an expert
9 witness on behalf of the State, resulting in a
10 conviction of Mr. Morris who was sentenced to
11 prison. In that case the Supreme Court held that
12 allowing me to testify as an expert was
13 appropriate, that my testimony was proper and
14 affirmed that conviction.

15 Q Dr. Adams, have you given testimony regarding
16 lawyers' duties, lawyers' breach of their duties
17 and causation coming from lawyers' breach of theirs
18 duties?

19 A Yes, sir, I have, many times.

20 MR. PENDARVIS: Your Honor, I would like to
21 move to qualify Dr. Adams as an expert in duties,
22 lawyers' standard of care, breach of those duties.

23 MS. McWILLIAMS: No objection, Your Honor.

24 THE COURT: All right. Ladies and gentlemen
25 of the jury, Dr. Adams has been called as a

1 witness, he has now been asked to be qualified as
2 an expert in the field of legal ethics, duties of
3 care lawyers owe their clients, the breach of those
4 duties, and to that extent he's allowed to not also
5 present testimony about what he saw, heard or did,
6 but his opinions in that field, so it is a little
7 bit different. As an expert he can testify to an
8 opinion he may have regarding a particular matter
9 and so he's been qualified in that respect in this
10 case and I find him so qualified?

11 THE WITNESS: Thank you.

12 MR. PENDARVIS: Thank you, Your Honor.

13 BY MR. PENDARVIS:

14 Q Dr. Adams, before we move into any specific
15 opinions you may have formed in this case I would
16 like you to help the jury better understand the
17 concept of some of the issues in this case such as
18 fiduciary duty. Would you mind helping the jury
19 better understand what lawyers mean by fiduciary
20 duty?

21 A Yes, sir, I will. Our courts have held
22 repeatedly that a lawyer's relationship to the
23 lawyer's client is a fiduciary relationship which
24 is a relationship of the highest trust and
25 confidence. It means that the client can trust the

1 lawyer to do what is in the client's best interest,
2 to make recommendations to the client solely
3 considering what is good for the client and not
4 other interest or the lawyer's own personal
5 interest.

6 Maybe a good way to explain it is my wife
7 recently had cataract surgery and for a number of
8 years her eye surgeon had been telling her that
9 these cataracts in her eyes were growing and some
10 day we were going to need to have surgery, and last
11 year when she went for her annual check-up he said,
12 "We've reached the time where you should have the
13 surgery."

14 Now, we were able to trust that doctor that
15 he was telling her what his medical judgment was,
16 what he believed was best for her. It never
17 occurred to us to stop and think about whether he
18 had a child going off to college and needed to make
19 more money by doing more surgery or whether he
20 bought an expensive piece of equipment or had seen
21 a new car he wanted, we could trust him, that his
22 opinion was his honest professional opinion that he
23 was giving solely in the best interest of my wife
24 Rose.

25 You have to have those kind of fiduciary

1 relationships in certain areas of our lives because
2 we don't know enough to be able to second guess our
3 doctors or our lawyers. And so lawyers have
4 fiduciary duties in addition to their professional
5 duties and if they enter into a contract with a
6 client, contractual duties to that client, but the
7 heart of it is the lawyer has a fiduciary duty of
8 loyalty to put the client's interest first and he
9 has the duty of truthfulness, to tell the client
10 what the client needs to know in order to make a
11 decision and to handle the matter and he has the
12 duty of confidentiality, not to share the client's
13 secrets with other people.

14 Q Thank you very much. Now, there has been
15 some reference and there will be some reference to
16 the rules of professional conduct in the case. Can
17 you help the jury better understand the rules of
18 professional conduct that govern lawyers in South
19 Carolina?

20 A Yes, sir. The South Carolina Supreme Court
21 is responsible for lawyers being admitted to the
22 Bar, for the rules that govern lawyers as well as
23 the rules that govern proceedings in court, for
24 disciplining lawyers who violate the rules. And
25 under that constitutional responsibility that our

1 court has the court has adopted a set of rules, a
2 comprehensive set of rules that provide clear
3 guidance to lawyers about what they must do and
4 what they must not do in various situations, and
5 these rules in South Carolina, like many other
6 states, are based on the recommendations of the
7 American Bar Association, developed after years of
8 study.

9 The ABA has published the model rules of
10 professional conduct. In taking those model rules
11 back in the 1990's, South Carolina studied those
12 rules, I was on the committee that was involved in
13 studying them when there was a revision in 2001,
14 and we decided how those rules needed to be
15 modified to fit our state in South Carolina and to
16 govern our lawyers in our courts. It is a very
17 comprehensive set of rules formally adopted by the
18 South Carolina Supreme Court, a set of rules every
19 lawyer is familiar with, the lawyers have it at
20 hand where they can turn to them when ethical
21 issues, troubling issues come up so they can rely
22 on that guidance as to what the right thing to do
23 is.

24 Q Do the rules operate in conjunction with
25 fiduciary duties the lawyer has with clients?

1 A They are very similar. Many of the
2 principles of the rules, the principles that are
3 found in fiduciary duties and many of the fiduciary
4 duties indeed go back hundreds of years in the
5 common law.

6 Q Thank you. Now, before we get into the
7 opinions you may have developed in this case, would
8 you describe for the jury generally the types of,
9 first off, did you review the materials in this
10 case?

11 A Yes, I have. I reviewed a great deal of
12 material, many, many volumes.

13 Q Can you describe in general the types of
14 things you reviewed to develop your opinions in
15 this case?

16 A I have reviewed the attorney-client fee
17 agreement in this case between the plaintiff and
18 the defendant, I have reviewed various drafts of
19 that fee agreement and subsequent revisions to that
20 fee agreement that were being prepared and
21 considered by the law firm. I have reviewed the
22 consulting agreement between Y.E.S. and Justice
23 Family Farms, Mr. Justice. I have reviewed
24 correspondence, I have looked at the draft base
25 line report which is one of the documents that has

1 to be prepared in the course of creating a
2 conservation easement that would qualify for a
3 charitable contribution tax deduction.

4 I have looked at a draft of the easement
5 documents and I have looked at a number of emails,
6 both emails between Mr. McLeod and Mr. Hanlin and
7 emails within the law firm and some other emails to
8 Mr. Justice's people, particularly Mr. Harrah.

9 Q Have you reviewed any deposition testimony?

10 A I have reviewed the deposition transcript of
11 the sworn deposition testimony of all of the
12 principal witnesses in this case.

13 Q Thank you very much. Just so the jury is
14 clear, Dr. Adams, do you have any experience in
15 conservation easement related matters?

16 A No, sir, I do not.

17 Q Dr. Adams, have you formed any opinions in
18 this case?

19 A Yes, sir, I have.

20 Q Let's start off with, have you developed an
21 opinion whether there was an attorney-client
22 relationship between the defendants and the
23 plaintiff?

24 A Yes, I have. There clearly, there is no
25 controversy about this, there was an

1 attorney-client relationship between the plaintiff
2 and the defendant. There was also at the same time
3 an attorney-client relationship between Mr. McLeod
4 personally and the defendant law firm and Mr.
5 Hanlin.

6 Q Dr. Adams, I have passed up a copy of the
7 time and billing record. I ask you to take a look
8 at that.

9 MS. MCWILLIAMS: Your Honor, may we get ours,
10 find our copy?

11 THE COURT: All right.

12 MS. MCWILLIAMS: That's fine, Your Honor,
13 we'll find it.

14 THE COURT: Have you all pre-marked any of
15 the exhibits.

16 MS. MCWILLIAMS: We haven't yet, we may spend
17 some time tomorrow.

18 THE COURT: Ladies and gentlemen, just so you
19 all will understand, it is a little confusing at
20 first. All these documents that are going to be
21 talked about have been talked about before in
22 depositions and things like that. Some of them are
23 entitled, most of them have been marked with an
24 exhibit number or a Bates number, which you will
25 hear that number referred to, so the lawyers can

1 keep them straight.

2 As they come into this case you will have
3 whatever is introduced into evidence before you for
4 your review in the jury room in the case. Mr.
5 Young, my court reporter, will number them as they
6 come in and mark them, will keep an inventory of
7 exhibits that come in. They might not introduce
8 all them, I don't know, they will introduce what
9 they believe is relevant and pertinent to their
10 case, that is how they proceed, this is the first
11 one we have come to.

12 So, just so you hear these exhibit numbers
13 and Bates numbers, that's what the lawyers have
14 called it thus far. They will be identified as
15 Exhibit 1 or A or something along those lines, they
16 will be kept track of by Mr. Young as we get into
17 it.

18 You may continue.

19 BY MR. PENDARVIS:

20 Q Dr. Adams, have you had an opportunity to
21 take a look at the time and billing record, the
22 first page of this seven page document that is on
23 the screen for the jury?

24 A Yes, sir, I have.

25 Q Do you have an opinion about when the

1 attorney-client relationship started in this
2 matter?

3 A There is evidence that the initial
4 discussions and agreement that the firm would be
5 the lawyers for the Justice Family Farms
6 conservation easement occurred in late October of
7 2007.

8 Q There will be some times in your testimony
9 that we'll be referring to various pages. This
10 seven pages, can you describe generally what type
11 of document this is?

12 A Certainly. Richardson Plowden, like most law
13 firms, keeps track of time on a detailed basis
14 using a computer program and that is done
15 contemporaneously. Every day the lawyer will, as
16 he or she is doing something, write it down,
17 specifically what they were doing, for which
18 client, which matter it should be billed to. In
19 some cases the computer systems work, the lawyer
20 enters the time directly into the system, in other
21 cases the lawyer fills out a paper form and the
22 clerical staff enters the information. But it is
23 done contemporaneously to keep an accurate record
24 of, in this case it is to the tenth of an hour and
25 that is very typical in law firms, that it would be

1 in six minute or tenth of an hour increments.

2 So, it is a very precise thing where the
3 lawyer throughout the day will keep track of
4 everything he is working on. If he is working on a
5 matter drafting a document and a phone call comes
6 in he will have to record all of that accurately
7 and then ultimately at the end of the matter, at
8 which time he submits a bill. This information is
9 then used by the law firm to determine what to bill
10 the client.

11 Q Can you, based on simply this document, what
12 type of -- back up just a second. Can you review
13 for the jury the types of fee arrangements lawyers
14 have with clients?

15 A Certainly. There are, there are essentially
16 three different kind of fee arrangements, not
17 talking about lawyers who are employees, who are
18 paid a salary, but lawyers in private practice
19 either would bill on the basis of the time they
20 spent on a matter, an hourly basis, and that's
21 extremely common, probably the most common form of
22 billing. Lawyers also may charge a flat fee for
23 doing certain work, so a lawyer might agree to
24 prepare a will for \$250. Or a big law firm might
25 agree to do a particular transaction for a hundred

1 thousand dollars, and those are flat fees that
2 don't depend on how much time the lawyer works on
3 it and doesn't depend on what the outcome is.

4 And the third kind of a fee is called a
5 contingent fee and it is a fee that depends upon
6 how the matter turns out. It doesn't depend on how
7 hard the lawyer works, it doesn't depend on how
8 much time the lawyer put into things, it depends on
9 how it turns out, and most commonly you see that in
10 personal injury and other kind of litigation where
11 a lawyer might agree to represent somebody who has
12 been injured in a car crash, for example, for a fee
13 of one-third of any amount of recovery. But we can
14 have contingent fees in commercial transaction, we
15 can have contingent fees in any sort of a
16 transactions. We can actually even have a
17 combination of a flat fee which is contingent upon
18 some certain event or result, but usually when we
19 talk about a contingent fee we're talking about one
20 that is measured by the outcome and is only paid if
21 there is a successful outcome.

22 Q Thank you.

23 MR. PENDARVIS: Your Honor, we would like to
24 introduce this time and billing record as
25 Plaintiff's Exhibit 1.

1 MS. McWILLIAMS: No objection, Your Honor.

2 THE COURT: Without objection the billing
3 record will be identified as Plaintiff's Exhibit
4 Number 1.

5 (Billing record marked and received in
6 evidence as Plaintiff's Exhibit 1).

7 BY MR. PENDARVIS:

8 Q Dr. Adams, we'll be making references to this
9 document marked Exhibit 1 at later points in the
10 testimony, so if you want to keep that one handy.

11 A Yes, sir.

12 Q I pass to you now another document that
13 appears to be an internal record. Will you take a
14 look at that? Can you identify basically what type
15 document this is?

16 A This is a client matter form. It is a
17 typical form that law firms use to open a file for
18 a new case, a new transaction or a new client that
19 has come into the firm. It contains information
20 about the matter and the client and contact
21 information, information about the nature of the
22 billing arrangement, what the fees are going to be,
23 how often it is going to be billed, where the bill
24 should be sent, those sorts of things, and these
25 forms, they are used by the accounting department

1 and may be used in connection with conflict
2 checking and other activities in the law firm by
3 the clerical staff.

4 Q Dr. Adams, have you reviewed this document as
5 part of forming your opinions?

6 A Yes, sir, I have.

7 Q Can you tell from what is represented on this
8 document what type of fee agreement was, how this
9 matter was opened?

10 A This was opened in October, 2007. This is
11 for the conservation easement, Jim Justice, Black
12 River Farms, listing Yancey Environmental Solutions
13 as the client and it is an hourly fee agreement,
14 noting that Mr. Hanlin's rate is \$250 an hour.

15 Q What has been highlighted is not on the
16 exhibit. We have highlighted that to emphasize the
17 point you're making, Dr. Adams.

18 MR. PENDARVIS: Your Honor, we would like to
19 move this in as Exhibit 2, the plaintiff's.

20 MS. McWILLIAMS: No objection, Your Honor.

21 THE COURT: Make sure Mr. Young, he can do
22 two things pretty well but not two things at the
23 same time.

24 MR. PENDARVIS: I apologize.

25 (Client matter form marked and received

1 in evidence as Plaintiff's Exhibit 2).

2 BY MR. PENDARVIS:

3 Q Dr. Adams, turning back to Exhibit 1, can you
4 tell from this document whether this was created,
5 time and billing record, as an hourly fee or a fee
6 of some other type?

7 A This is recorded as hourly time so it appears
8 to be a billing record or time keeping record that
9 corresponds completely to this original document.
10 It is recording the time for Mr. Hanlin and toward
11 the end Miss Lummer who is his legal assistant and
12 Mr. Crawford who is a partner in the firm.

13 Q Doctor, you describe generally the nature of
14 the engagement for this representation, in terms of
15 what types of work the lawyer is going to do in
16 this case?

17 A Well, he was the lawyer for the transaction,
18 preparing the documents, giving the legal opinions,
19 handling the legal matters that needed to be
20 accomplished in order to properly create the
21 conservation easement and to make the charitable
22 donation to the appropriate charitable organization
23 so that the landowner would be entitled to the
24 deduction under the Internal Revenue Code.

25 Q I pass to you an email document. It appears

1 to be an email from early November, 2007.

2 A Yes, sir, November 7th.

3 Q Have you seen this email before, Dr. Adams?

4 A I have. I have. It is from Mr. Hanlin to
5 Mr. McLeod, Yancey Environmental Solutions, with a
6 copy to Mr. Crawford, the partner in the law firm.

7 Q Dr. Adams, did you rely on this email as
8 forming part of your opinions?

9 A Yes, sir, I did.

10 MR. PENDARVIS: Your Honor, we would like to
11 move this in as Exhibit 3.

12 MS. MCWILLIAMS: No objection, Your Honor. .

13 THE COURT: Admitted as Exhibit 3.

14 (November 7th email marked and received in
15 evidence as Plaintiff's Exhibit Number 3).

16 BY MR. PENDARVIS:

17 Q Dr. Adams, can you describe for the jury,
18 could you describe a little bit about -- I'm sorry
19 about that. Could you describe for the jury
20 basically what this exhibit you're looking at
21 demonstrates in terms of the initial engagement?

22 A Well, this is an email from Mr. Hanlin to Mr.
23 McLeod in which he is setting forth the initial
24 information that he will need to properly advise
25 Mr. McLeod and his client Mr. Justice as to the

1 probable tax effects of the conservation
2 contribution it contemplates toward the end of this
3 year. He says, "Also to advise Frank Crawford of
4 the project so we can allocate the resources." So
5 the law firm would be ready to put all the, all the
6 people that it needed and all the other resources
7 to get this done in the two months remaining before
8 the end of the year, and then he lists a number of
9 things, he's looked up Justice Family Farms, LLC,
10 in the Secretary of State's records and he has
11 learned something about that and he asks then some
12 questions about how the LLC is taxed, whether it is
13 taxed as a partnership or not, when it was formed,
14 when the 4,500 acre tract was purchased, what the
15 purchase price was, when it was contributed to the
16 LLC, who the members of the LLC are and their
17 percentage interest.

18 Then he is talking about Jim Justice's income
19 this year. There already are apparently
20 discussions of him selling his interest, he is
21 going to have a block of income, sizeable income in
22 2007 which would be a reason why a wealthy taxpayer
23 might want to do a conservation easement in a
24 particular year, to get that deduction on that
25 year's tax return, so Mr. Hanlin is expressing at

1 the outset he's aware of this and the need to get
2 this done.

3 Q Is there any reference in this email, Dr.
4 Adams, as to the timing of the transaction?

5 A "As you know, getting all this done before
6 the end of the year will be a challenge for
7 everyone and we will require everyone's rapid work
8 and attention but I am, like you, confident it can
9 be accomplished."

10 So, yes, from the very beginning Mr. Hanlin
11 and the law firm knew this had to be done by
12 December 31st.

13 Q Is there any reference in this email, Dr.
14 Adams, to the fee arrangement that would be
15 controlling this relationship?

16 A Yes, it is. Mr. Hanlin is saying that he
17 understands that Mr. McLeod's fee could be perhaps
18 \$4,000,000 or so and he says that, "Our usual
19 two-thirds/one-third arrangement would apply."

20 Q Do you have an understanding of the history
21 of relationships between Mr. McLeod and Yancey
22 Environmental Solutions and and Mr. Hanlin?

23 A Yes, sir, I do.

24 Q Would you tell the jury about that?

25 A Well, I have been told there is time on all

1 the conservation easements that Mr. Hanlin has been
2 the lawyer for, that Mr. McLeod was the
3 conservation consultant, the environmental
4 consultant on, they had had the usual arrangement
5 because it is the landowner who needs legal advice
6 and assistance, a landowner who is going to make
7 the donation, a landowner ear who is going to get
8 the tax benefit, it is the landowner who wants the
9 tax opinion and the assurance of a sophisticated
10 tax lawyer that this has been done right and that
11 it will turn out the way the landowner wants and
12 that's the arrangement they have always had.

13 Mr. McLeod had frequently recommended to his
14 clients, these landowners, that Mr. Hanlin both in
15 his previous firm and subsequently when he was at
16 Richardson Plowden, that he be the lawyer to
17 represent them and advise them, and so always in
18 those cases, up until this matter that is the
19 subject of this litigation, always Mr. Hanlin had
20 been the lawyer for the landowner and had billed
21 the landowner an hourly fee, he had not taken a
22 percentage of the tax deduction or percentage of
23 the value of the conservation easement or anything
24 like that, there had been no contingent fees in any
25 of these transactions, they had all been

1 straightforward, ordinary hourly fee arrangement
2 between Mr. Hanlin and his law firm on the one side
3 and the landowner on the other.

4 Q Could you review for the jury the document,
5 you know, the provision in this document about the
6 usual fee arrangement?

7 A I find that puzzling, that he would call
8 this, this is the first mention I have seen
9 anywhere in any of the documentation of this
10 contingent fee agreement where he's going to get
11 one-third of this \$4,000,000 fee that he
12 anticipates Mr. McLeod will earn on this
13 transaction and to call that a usual split when it
14 has never been done before, when he's never been
15 Mr. McLeod or Y.E.S.'s lawyer before puzzles me, it
16 strikes me as deceitful, misleading.

17 It reminds me of unfortunately in my youth I
18 was a life insurance salesman for a couple years
19 and one of the tricks they taught us in selling
20 life insurance is don't ever ask the customer if
21 they want to buy the insurance, ask them whether a
22 \$50,000 policy would be enough or whether they
23 think that they need \$75,000. It is kind of sort
24 of a deceitful trick, our usual
25 two-thirds/one-third arrangement, when we have

1 never ever done that before.

2 Q Dr. Adams, I have passed you another email
3 later that same day.

4 And, ladies and gentlemen, we're not going to
5 put every exhibit up, I think it would be easier
6 sometimes, these are small print, I'm not going to
7 put every exhibit up.

8 Doctor, have you had a chance to review this
9 email before today?

10 A Oh, yes, I have seen this a number of times.

11 Q And have you, do you rely on this email in
12 forming part of your opinions?

13 A Yes, I do.

14 MR. PENDARVIS: We would like to move this
15 into evidence as Exhibit Number 4.

16 MS. McWILLIAMS: No objection, Your Honor.

17 THE COURT: It will be Exhibit Plaintiff's 4,
18 without objection.

19 (November 7 email marked and received in
20 evidence as Plaintiff's Exhibit Number 4).

21 BY MR. PENDARVIS:

22 Q Dr. Adams, can you describe the essence of
23 this email for the jury? They will have a chance
24 to look at it when they take it back to deliberate.

25 A Well, it's an email, a follow-up on the

1 telephone call between Mr. Hanlin and Mr. McLeod
2 and it is again copied to Mr. Crawford, the partner
3 in the law firm, and he is talking about the size
4 of the fee, "I understand you intend to discuss
5 with Jim Justice pricing our consulting services in
6 this matter at five percent of the appraised value
7 of the conservation easement. Also I understand
8 you talked with appraiser Henry Beckham about doing
9 the appraisal work and he is experienced in these
10 matters. You have conservatively etimated the
11 conservation value of this project to be perhaps
12 \$50,000,000." Then he talks about what has to be
13 done before year end and what has to be done before
14 Mr. Justice signs his tax return April 15th, 2008.
15 And then in the final paragraph he talks about how
16 quickly they can get paid their fees by Mr.
17 Justice.

18 Q And what does Mr. Hanlin project as the time
19 for payment of the fee?

20 A Well, he is suggesting that some portion of
21 the fee, if not the majority of the fee, should be
22 payable this year, 2007, so they are going to do
23 most of the work, get the easement recorded, as I
24 mentioned, in 2007 and he would like to get the
25 bulk of the fee paid that year, too.

1 Q Dr. Adams, I have passed another email to
2 you. Have you seen this email before today?

3 A Oh, yes, sir, I have reviewed this before.

4 Q And you have relied upon it in forming your
5 opinions?

6 A Yes, sir.

7 Q Describe for the jury the essence of this
8 email?

9 A This is an internal email, November 20, 2007,
10 from Mr. Hanlin to Fred Crawford, the partner in
11 the law firm, in which he is talking about the Jim
12 Justice conservation easement and how things are
13 coming along.

14 Q How does Mr. Hanlin describe this
15 conservation easement in the first part of this
16 email?

17 A He calls it a mega conservation easement.

18 Q Is there any reference to what is happening
19 on the Justice end of the deal?

20 A Yes. He comments that they hadn't got the
21 signed consultation agreement back, or specific
22 words, "The news still seems to be all good, the
23 client Jim Justice kicked the matter to his CPA
24 yesterday, that is Mr. David Harrah. Yancey and I
25 had separate conversations with the CPA today, he

1 seems to be on board."

2 Q Thank you. Toward the bottom of the email,
3 Dr. Adams, is there any reference to again the
4 motivation for Mr. Justice to do an easement that
5 year?

6 A Yes, sir, there is. They have learned a
7 little bit more about Mr. Justice's businesses, his
8 income and the next to last paragraph says, "The
9 other good news is that Jim's bump in income does
10 not result from the sale of an asset, but from
11 ordinary income sources. Apparently the price of
12 coal has shot up this year, resulting in Jim's bump
13 in income of, say, 30 to 50 million dollars. His
14 accountant wasn't sure exactly. Nice problem to
15 have from coal mining."

16 MR. PENDARVIS: Your Honor, we would like to
17 move this email into evidence as Plaintiff's 5.

18 MS. McWILLIAMS: No objection, Your Honor.

19 (November 20, 2007, email marked and received
20 in evidence as Plaintiff's Exhibit Number 5).

21 THE COURT: Plaintiff's 5 is marked without
22 objection.

23 BY MR. PENDARVIS:

24 Q Dr. Adams, I have passed another email up to
25 you, dated November 21, 2007, the following day,

1 11:00 in the morning. Have you seen that email
2 before today?

3 A Yes, sir, I have.

4 Q And I would like to direct your attention
5 really to the first sentence and then we'll talk
6 about the very bottom part of the email. Can you
7 describe what it is Mr. Hanlin is describing to --
8 let me back up. Can you tell the jury who this
9 email is to and from?

10 A This is an email from Mr. Hanlin to Mr.
11 McLeod.

12 Q And what is he describing to Mr. McLeod?

13 A He's talking about technical tax issues, he
14 says, "Looks like we're moving toward a very
15 favorable resolution of some of the technical tax
16 questions regarding Jim Justice," and then goes
17 into a lot of technical detail about Subchapter S
18 corporations and various things.

19 Q I would like to direct your attention, Dr.
20 Adams, to the next paragraph, on the left side, it
21 begins with perhaps all quality?

22 A Yes, sir.

23 Q Is there any reference to documents that are
24 going to be created in preparing of that easement
25 that is anticipated?

1 A Yes, sir, it is. He says in that sentence,
2 "Perhaps all quality farm land will meet this test
3 under this federal Act but I want to make sure that
4 I am thinking about this correctly and that we get
5 the right language in our documents. When you get
6 a chance would you give me a call and help me think
7 this through?"

8 Q Thank you.

9 MR. PENDARVIS: Your Honor, we would like to
10 move this into evidence as Plaintiff's 6.

11 MS. McWILLIAMS: No objection, Your Honor.

12 THE COURT: Plaintiff's 6

13 (November 21, 2007, email marked and received
14 in evidence as Plaintiff's Exhibit Number 6).

15 BY MR. PENDARVIS:

16 Q Dr. Adams, I have passed to you a letter and
17 enclosure. Have you seen this letter and this
18 enclosure before today?

19 A Yes, sir, I have.

20 Q Before we start discussing the content of
21 this letter and its enclosure, have you seen any
22 materials related to how the consulting services
23 agreement is attached to this and enclosed with
24 this letter, how it was created?

25 A It was created by Mr. Hanlin.

1 Q Okay. Could you describe for the jury
2 generally what we're looking at with this exhibit,
3 this letter?

4 A The letter is a letter from Mr. McLeod to Mr.
5 Justice enclosing the consultant services agreement
6 which is the agreement between Y.E.S., Mr. McLeod's
7 company, and Mr. Justice for the environmental
8 consulting work, for putting this together. And it
9 sets out the role of various people in this process
10 because there are a number of professionals who
11 have to be involved, and one of the key things Mr.
12 McLeod is doing is gathering all of those
13 professionals, highly qualified professionals, very
14 busy people at the end of the year and getting them
15 in place on the project and he's telling Mr.
16 Justice about this.

17 Q Does he make any reference to Mr. Hanlin in
18 this letter?

19 A Yes, sir. In the very first numbered
20 paragraph, "Coordination with my tax attorney Hal
21 Hanlin, which is Richardson Plowden in Columbia,
22 about various aspects of the project. Hal is very
23 knowledgeable about conservation matters and serves
24 as Board Chairman for the Community Open Land
25 Trust. It is my recommendation we use this land

1 trust to receive the gift of the easement, subject
2 of course to their agreement to accept. Since Hal
3 is involved as an attorney in the project he would
4 not vote as a Board member on the decision to
5 accept. Preliminary discussions with staff members
6 of the Trust would indicate their willingness to
7 recommend to the Board acceptance of the gift. Hal
8 and I conducted a site visit with their staff on
9 November 16th and they seem very excited about the
10 project."

11 Q And have you had a chance to review the
12 consulting services agreement that was enclosed
13 with this letter?

14 A Yes, sir, I have. That was one of the
15 documents I relied on in forming my opinions.

16 Q The same for the cover letter?

17 A Yes, sir.

18 MR. PENDARVIS: Your Honor, I would like to
19 have this moved as Exhibit 7.

20 MS. McWILLIAMS: No objection, Your Honor.

21 THE COURT: For the record, mark it
22 separately or together?

23 MR. PENDARVIS: Together.

24 THE COURT: We'll --

25 MR. PENDARVIS: This will be collective 7.

1 THE COURT: All right.

2 (Letter marked and received in evidence as
3 Plaintiff's Exhibit Number 7).

4 BY MR. PENDARVIS:

5 Q Dr. Adams, can you generally describe the
6 compensation terms -- let me back up. What was the
7 consulting services agreement intended to do with
8 regard to this easement?

9 A It was intended to outline the scope of the
10 services that Mr. McLeod through his company Y.E.S.
11 would be providing to Mr. Justice and his farm in
12 creating this conservation easement, to gift it to
13 a qualified organization.

14 Q Was this agreement written, consulting
15 service agreement containing terms for compensation
16 for Y.E.S.?

17 A Yes, sir, it does.

18 Q And could you describe the terms of the
19 compensation that are set forth in this consulting
20 services agreement?

21 A It calls for an initial payment of \$50,000
22 not refundable retainer and an overall fee of five
23 percent of the conservation value of the property
24 as that is recorded on the IRS form 8283, which is
25 their charitable contribution form that goes with

1 an individual tax return. So, it is five percent
2 of the value of the conservation easement as
3 determined by the appraisal if it is taken by Mr.
4 Justice on his tax return as a deduction.

5 Q Now, there has been some statement to the
6 jury in opening arguments that this consulting
7 service agreement was never signed. Is there a
8 requirement for this type of transaction, an
9 agreement between Y.E.S. and Mr. Justice and his
10 companies be signed?

11 A No, sir, there is no legal requirement that
12 it be in writing or that it be signed for this kind
13 of a contract.

14 Q Do you have any experience or some way you
15 can explain to the jury how people can come to an
16 agreement on complex transactions and it not be
17 required to be reduced to writing?

18 A Well, yes, sir. As lawyers we often think
19 that everything ought to be worked out by the
20 lawyers and that you have to have detailed
21 documents with all the details worked out. But
22 oftentimes people don't do that, they make a deal
23 and they shake hands and that's good enough for
24 them. I remember when my daddy was Ed Pawley's
25 righthand man, Mr. Pawley was the one gave money to

1 UCLA for Pawley Pavillion, that wonderful
2 basketball arena out there. Mr. Pawley entered
3 into huge deals, and so many of these successful
4 businessmen's belief was you look a man in the eye,
5 you give them your word, you shake hands, you got a
6 deal, and all the evidence I have seen in this case
7 indicates that Jim Justice is that kind of guy and
8 the evidence indicates that he thought Yancey
9 McLeod was that kind of a guy, that if you looked
10 him in the eye and gave him your word and shook his
11 hand you got a deal and it was done and you could
12 forget about it, it was going to happen.

13 Q Have you reviewed any materials that deal
14 with the relationship Mr. McLeod had with Mr.
15 Justice?

16 A I have.

17 Q Tell us about that.

18 A It was a remarkable relationship and I think
19 that it grew out of the fact that Jim Justice cares
20 very deeply about our land and our natural
21 resources, beautiful rivers like the Black River
22 and the wildlife and he found Yancey McLeod to be
23 of the same spirit, he appreciated Yancey had
24 devoted his whole life to these things Mr. Justice
25 loved so much, and so they did hit it off.

1 The testimony has been that they, Mr. Justice
2 liked him and relied on him, trusted him, took his
3 recommendations, his advice and he really, it was
4 interesting to me to learn about this because here
5 is a man who has never been wealthy, never been
6 successful, never owned a lot of land, who
7 developed that kind of a close relationship with
8 this incredibly successful, wealthy man, just
9 having met him a few times and worked with him and
10 provided him with some services on this farm that
11 he and his son hold so dear.

12 Q Now, Dr. Adams, are there some types of
13 contracts that must be in writing?

14 A Oh, yes, sir. We have in the law what is
15 called the statute of frauds, and the statute of
16 frauds, which comes to us from England, requires
17 certain kind of contracts to be in writing,
18 requires they be signed by the person that you're
19 seeking to enforce the contract against. But they
20 are very specific categories of contracts that are
21 required to be signed, in writing, in the United
22 States. Most contracts are not required to be.

23 Q Thank you. Now, we're looking for an email I
24 want to show the jury but prior to that, are you
25 aware of a fee agreement being proposed from

1 Richardson Plowden to Yancey Environmental
2 Solutions?

3 A Yes, sir.

4 Q Have you reviewed any materials, internal law
5 firm emails prior to the delivery of the proposed
6 fee agreement to Yancey Environmental Solutions by
7 Richardson Plowden?

8 A Yes, I have. I have seen internal emails and
9 of course I have seen the time record both before
10 that fee agreement being sent to Mr. McLeod and
11 afterwards.

12 Q Could you tell the jury a little bit about
13 that? We'll show them the exhibit in a moment.
14 Can you tell the jury a little bit about the
15 emails, internal emails of Richardson Plowden
16 before the fee agreement was proposed?

17 A One of the partners, the tax partner in the
18 law firm was Tony Rebollo was raising some concerns
19 about the appropriateness of the fee agreement that
20 Mr. Hanlin was intending to enter into with Mr.
21 McLeod. He had warned him about particular
22 provisions of the tax law that he felt could be
23 violated by this and was concerned that they not do
24 anything that violated the IRS regulations in that
25 regard.

1 MS. McWILLIAMS: Your Honor, could we find
2 out what he is being shown?

3 Q Dr. Adams, I passed you an email we were
4 discussing. What is the date of the email?

5 MS. McWILLIAMS: Could we have a minute,
6 we're having to hunt for ours. I apologize, Your
7 Honor.

8 We have it.

9 THE COURT: All right.

10 BY MR. PENDARVIS:

11 Q Dr. Adams, this email I'm going to show the
12 jury begins at the bottom.

13 A Yes, sir. This is an email chain, it starts
14 at the bottom, it is December 4, December 4 email
15 from Mr. Rebollo to Mr. Hal Hanlin about Circular
16 230 and then there is a response from Mr. Hanlin
17 late that night of December 4th, and then there is
18 a follow-up from Mr. Rebollo to Mr. Hanlin early in
19 the morning of December 5th.

20 Q And generally what type of concerns were
21 being expressed in this email thread?

22 A Well, there is some concern --

23 MS. McWILLIAMS: Your Honor, I think he can
24 review what the document says. I think the Court
25 has already addressed this, the document speaks for

1 itself. That ends what Mr. Adams, Dr. Adams can
2 testify to.

3 MR. PENDARVIS: I asked him to give a
4 description of what is going on, not a detailed
5 opinion, to assist the jury with some of this
6 technical stuff.

7 THE COURT: I think he can give a summary of
8 what it purports to be. I will allow the question.

9 A It begins with Mr. Rebollo raising the issue
10 of prohibited fees, both unconscionable fees and
11 contingency fees, and he is warning Mr. Hanlin
12 about that prohibition in the tax regulations and
13 then subsequently in the December 5th email early
14 that morning he's raising other issues and these
15 are issues about the difficulties that are created
16 by the fact that unlike the usual situation where
17 the landowner is the firm's client, Mr. McLeod or
18 Y.E.S., his company, is the client and Mr. Rebollo
19 has already figured out that creates serious
20 problems because it is Mr. Justice who needs the
21 advice, who needs the lawyer to warn him, who needs
22 the lawyer to caution him, who needs the lawyer to
23 guide him as the landowner who is going to create
24 and donate this easement through this transaction
25 and Mr. Rebollo is expressing here uncertainty

1 about how that happens if Mr. McLeod or his
2 company, the environmental consultant is the
3 client, not the landowner.

4 Q Now, in context, Dr. Adams, what do you know
5 about the dynamics of the law firm in terms of Mr.
6 Rebollo and Mr. Hanlin and their relationship with
7 the firm?

8 A Well, Mr. Hanlin had moved over and joined
9 the law firm shortly before this had happened. He
10 is an associate in the law firm. Mr. Rebollo was a
11 partner, he was the senior tax lawyer in the law
12 firm, so he, like Mr. Crawford and later we may be
13 talking about Mr. Mack, they are all partners with
14 control of the law firm, power in the law firm.
15 Hanlin was just a salaried employee, a younger
16 lawyer in the law firm at that time.

17 MR. PENDARVIS: Your Honor, before we move to
18 the next exhibit I would like to move this email in
19 as Plaintiff's Number 8.

20 MS. McWILLIAMS: No objection, Your Honor.

21 THE COURT: Plaintiff's Number 8 is admitted.

22 (December 4 email marked and received in
23 evidence as Plaintiff's Exhibit Number 8).

24 BY MR. PENDARVIS:

25 Q Now, Dr. Adams, before we start discussing

1 the item I just passed up, can you describe for the
2 jury just generally the legal research and
3 resources lawyers use to understand the law?

4 A Well, we used to use books. When I went to
5 law school we spent a lot of time in the library.
6 And of course computers and computerized research
7 has changed that a lot. But still whether it is
8 electronic or bound volumes of books, we have books
9 that contain statutes, the laws that the
10 Legislature or Congress has enacted and we have
11 books that contain the reports of the decisions by
12 our courts that create the common law, and we have
13 treatises and journals and there are companies that
14 put out specialized publications where they analyze
15 difficult tax issues like securities law and tax
16 law and lawyers oftentimes will turn to these
17 specialized publications as a way to get a quick
18 handle on a difficult issue, an intricate problem
19 with the law.

20 Q Thank you. In the discovery in this case the
21 defendant produced an item of research I passed up
22 to you. There is no specific date on the date of
23 this piece of reserach. Have you seen this before
24 today?

25 A I have seen this before today.

1 Q Did you rely upon it in forming your opinion?

2 A I did.

3 Q Before we discuss the details of it --

4 MR. PENDARVIS: Your Honor, we would like to
5 move into evidence Exhibit Number 9.

6 MS. McWILLIAMS: No objection, Your Honor.

7 THE COURT: Plaintiff's number 9 in evidence.

8 (Excerpts from Circular 230 received in
9 evidence as Plaintiff's Exhibit Number 9).

10 BY MR. PENDARVIS:

11 Q Dr. Adams, could you describe for the jury,
12 there are some materials that were underlined in
13 this document, the little section on the lefthand
14 column. Can you describe, first tell the jury what
15 the heading of the section is and then describe
16 some of the issues that are discussed in this
17 reserach item?

18 A The heading is about fees and it's relating
19 to Section 10.27 of Circular 230, one of the IRS
20 publications, regulations. There are underlined
21 provisions in here dealing with contingent fees.
22 This is, this underlined material is all about
23 contingent fees which are prohibited under that.

24 Q How about the very first paragraph, can you
25 describe for the jury what it's discussing?

1 A It is talking about the prohibition on
2 unconscionable fees for representing a client in
3 any tax matter.

4 Q And what is, could you help the jury
5 understand the term unconscionable?

6 MS. McWILLIAMS: Your Honor, I think this
7 might be a good breaking point, I hate to interrupt
8 but I think we have a matter of law that we may
9 need to take up in any event, I was kind of hoping
10 we could take a quick break.

11 THE COURT: I think that sounds very
12 appropriate.

13 MS. McWILLIAMS: Thank you, Your Honor.

14 THE COURT: I was looking for a breaking
15 point to break. You all retire to the jury room,
16 stretch your legs, use the restroom, whatever you
17 like. Remember, do not begin discussing the case.

18 (The jury was excused from the courtroom).

19 THE COURT: All right. Miss McWilliams, do
20 you want to take a break now and then --

21 MS. McWILLIAMS: It's up to the Court. I
22 apologize for not asking before the first question
23 but I think we do need to address, we have now
24 gotten to the point where I believe the testimony
25 is about to be elicited regarding Circular 230

1 qualification. He has not been qualified as a tax
2 expert, only qualified on ethical issues. If you
3 want to take a break, but I'm prepared to be heard.

4 He is now about to ask this ethics professor
5 about the definition of unconscionability under the
6 tax code and Professor Adams has stated, "I'm not a
7 tax expert," and I don't believe it's proper for
8 him to be, he can say they underlined it and the
9 firm had a concern about it but he cannot go
10 forward and discuss either contingency fees or the
11 unconscionable fees under the tax code unless he's
12 qualified, and he is not, he's admitted he is not.

13 THE COURT: I tend to agree with you.

14 Where were you headed?

15 MR. PENDARVIS: Where I'm heading is, Your
16 Honor, first off Dr. Adams teaches contracts.
17 There is no definition in the IRS Code on
18 unconscionable. There are definitions about
19 contingency fees, I'm going to ask Dr. Adams
20 questions about unconscionability which is based on
21 the law of contracts. In fact an unconscionable
22 fee comes out of a contract for a fee and whether
23 the fee in the contract is unconscionable has been
24 defined by countless courts. In fact Professor
25 Crystal, the defense expert, when he was giving

1 opinions in his deposition and in his affidavits
2 was describing unconscionable was under contract
3 law and Dr. Adams teaches contract law regularly
4 and since the IRS code has no definition of
5 unconscionability, none whatsoever, there is a
6 lengthy provision has been modified several times
7 on contingent fees, so if we were talking about
8 contingent fees under this IRS Circular 230 --

9 THE COURT: Is this contract we're talking
10 about, is it before the IRS or is it a contract
11 between two parties that could potentially be
12 reviewed by the IRS, because the way I read it,
13 representation, representatives may charge
14 representational client on any matter before the
15 IRS, this is before the IRS.

16 MR. PENDARVIS: The question is whether it's
17 a practitioner is before the IRS, and we have
18 Curtis Elliott, the tax expert who does
19 conservation easements and has given, spoken on
20 this issue, who said in his deposition the IRS may
21 well have looked through the informalities of the
22 arrangement and considered this, and we were
23 talking at that point, Your Honor, about whether it
24 was a contingent fee or not, but the same analysis
25 would apply to whether it was an unconscionable

1 fee, and if the basis of the fee, the structure is
2 this, there was a contingency fee arrangement that
3 is proper, everyone agrees, between Y.E.S. and the
4 landowner, one is disputing that was a proper basis
5 for a fee.

6 The second component of this case deals with
7 the arrangements in the fee agreement, that is the
8 next exhibit, it is actually after this, December
9 4th, December 5th, between the defendants and
10 Y.E.S., and their fee agreement was based on a
11 percentage of the fee that Y.E.S. was getting, so
12 whether the position taken on the tax return for
13 the deduction acts as absolutely the basis for the
14 fee going to be paid to this law firm and what
15 Curtis Elliott is going to tell the jury and Your
16 Honor is that the IRS and the Office of
17 Professional Responsibility of the IRS may well
18 have looked through the informality, these lawyers
19 have set it up one step off the beaten path to
20 avoid the transaction and where this all goes to,
21 Your Honor, the motive, and they knew the IRS was
22 coming to audit Mr. McLeod and if this transaction
23 had closed you had under this fee agreement the IRS
24 may well have said wait a second, that's an
25 unconscionable fee under this provision of the IRS

1 Code and which would have repercussions with the
2 law firm and it matters not to the absolute claim
3 of the malpractice but it definitely goes to motive
4 and the point we're making, Your Honor, is Dr.
5 Adams needs to be able to explain to this jury
6 unconscionable as it is a contract term and this
7 fee comes out of the contract between Y.E.S. and
8 the defendants and especially given there is no
9 definition in the Code, how in the world is the
10 jury to determine unconscionability? It is a
11 standard contract term, it has been used by our
12 courts for years, it goes back to England,
13 unconscionability and the fairness of a contract.
14 Whether the fee from a contract is unconscionable
15 is what Dr. Adams teaches on a regular basis, I
16 can't see how in the world he is not qualified to
17 explain to the jury an undefined term in the IRS
18 Code.

19 Now, to the degree that he looked at this
20 issue with the IRS, I'm not going to ask Dr. Adams,
21 about that, that will be for the expert on the tax
22 side of this transaction but the jury is getting
23 ready to see the fee agreement and they need to
24 know what the law firm was concerned about the day
25 before they sent the fee agreement.

1 MS. McWILLIAMS: Your Honor, if I may be
2 heard. First, Mr. Elliott was never asked
3 anything, has expressed no opinion regarding the
4 unconscionability of the fee. That has not been
5 pled, that is not an allegation in the complaint,
6 that this was an unconscionable fee, so what the
7 plaintiff is attempting to do is to wave around
8 some research. We don't deny the law firm
9 prudently looked at this but what he is trying to
10 do is go beyond that and now through obviously a
11 qualified ethics, and I'm sure Professor Adams is
12 qualified in contracts as well, but the suggestion,
13 the inference he is trying to get the jury to take
14 is this was either an unconscionable fee or it was
15 an impermissible contingent fee.

16 Professor Adams cannot testify about that,
17 he's admitted he is not a tax expert. There is
18 certainly no reason why he even needs to wave
19 Plaintiff's Exhibit 9 in front of Dr. Adams if all
20 he wanted to do was elicit an opinion that it was
21 an unconscionable fee. Previously, as you know,
22 Professor Adams tried to opine and did opine and
23 then was deposed about the fact that he thought it
24 was an illegal contingent fee and was
25 unconscionable.

1 Your Honor, the fact of the matter is that
2 what they are trying to do is use tax research
3 through somebody who has admitted he is not a tax
4 expert. If they want to call Curtis Elliott and
5 try to get Curtis Elliott to say that he thinks
6 that this research is relevant for purposes of
7 unconscionability, then that may be another issue,
8 and they have said Curtis Elliott is coming but the
9 fact of the matter is Curtis Elliott never opined
10 that it was either an illegal contingent fee or
11 that it was an unconscionable fee. He doesn't have
12 those opinions.

13 I mean, this is all simply to try to cast the
14 law firm in a pejorative manner for a fee agreement
15 that was never signed by the landowner and under
16 which no fees were ever paid to this law firm under
17 the fee agreement with Mr. McLeod, so I think this
18 is linking inference upon inference to a witness
19 who is not qualified and we object.

20 MR. PENDARVIS: Brief rebuttal, Your Honor.

21 THE COURT: Very brief.

22 MR. PENDARVIS: It goes to motive, not proof
23 the fee agreement was illegal. Dr. Adams is not
24 going to declare this is an illegal fee agreement,
25 I stipulated the word illegal, I made sure Dr.

1 Adams is well aware of this, it is not going to be
2 mentioned to the jury, it all goes to motive.

3 If the law firm thought there might a concern
4 by the IRS this could be interpreted, the size of
5 this fee could be interpreted as unreasonable or
6 unconscionable under this provision, that goes to
7 motive as to why they would quit and in fact the
8 30(B)(6) designee Mr. Frank Mack for Richardson
9 Plowden testified on behalf of Richardson Plowden
10 they had concerns about the size of the fee and
11 the idea there is no correlation between the motive
12 to terminate, internal emails that the jury is
13 going to see, admissions that, you know, it just
14 goes to motive, as to whether the firm, without
15 declaring, without asking Dr. Adams to give an
16 opinion this is an unconscionable fee or is a
17 contingent fee, that is not what I'm asking the
18 jury, what I'm asking Dr. Adams to explain.

19 I'm asking Dr. Adams to explain to the jury
20 the concept of unconscionability in the law of
21 contract so they can understand what this is. He
22 is not going to give an opinion the fee agreement
23 we're going to see is absolutely unconscionable.
24 He has got some opinions it's unethical, it's
25 improper and the size of the fee and the time, you

1 know, don't correlate but, you know, the idea he
2 can't testify it's unconscionable, I believe he is
3 qualified.

4 THE COURT: Isn't the factual question of
5 whether or not an unconscionable fee is the fee
6 agreement between McLeod, and not Justice, Justice
7 is getting legal services free because McLeod is
8 paying for it under the deal, as I see it?

9 MR. PENDARVIS: Curtis Elliott says that
10 because Curtis Elliott's opinion is that the fee
11 agreeent is contingent because the Richardson
12 Plowden-Y.E.S. fee agreement was contingent upon
13 the value of the tax position taken on the Justice
14 tax return, that he said the IRS would possibly
15 look through it and it would be a valid concern
16 that the IRS, when scrutinizing this deal, would
17 look through the informality of a separate, keep in
18 mind that lawyers representing consultants, he had
19 never heard of, he did conservation easements for
20 years, has never heard of it and the IRS gets
21 involved and they did get involved in auditing
22 Y.E.S., if this deal had closed under this original
23 agreement and the IRS is looking at Jim Justice's
24 tax return, Curtis Elliott is going to say there is
25 a risk, there is a possibility the IRS is going to

1 look through --

2 THE COURT: There is nothing on his tax
3 return showing illegal fees paid to anybody on this
4 deal.

5 MR. PENDARVIS: Correct, but Yancey
6 Environmental Solutions is the one getting audited,
7 his papers are getting scrutinized, his papers
8 would show a fee payment to the law firm, and that
9 is the point, they, the law firm is going to find
10 out or does later in the chronology that the IRS is
11 not coming to look at Mr. Justice, they are coming
12 to look at Y.E.S.

13 THE COURT: What I don't understand --

14 MR. PENDARVIS: This would be a letter that
15 comes in on the 20th, you heard in opening
16 statement the IRS is coming to audit Yancey
17 Environmental Solutions and that firm has based
18 their termination on that IRS letter, the firm
19 knew, when that IRS letter hit their desk they knew
20 that the IRS was coming to look at Y.E.S. and that
21 if, they were going to come look in January and if
22 this transaction had closed under this agreement in
23 December the IRS would see it because they are
24 going to be looking at Y.E.S.'s papers.

25 It all goes to motive. Not entering into

1 this agreement itself is a breach of duty. It goes
2 to the motive of the law firm to quit. It is hard
3 to explain, you actually heard it in opening
4 statement from the defendant that this law firm
5 chose to walk away from this big fee because they
6 didn't want to have the appearance of impropriety.

7 Well, it makes a lot of sense to the jury,
8 golly, it was a good fee and genuine and it was
9 okay, they must have been doing the right thing.
10 But if it turns out there is a chance, 20 percent
11 or 90 percent, that the IRS is going to say wait a
12 minute, that might be unconscionable, the size of
13 that fee based on this amount of work, that
14 explains why this firm would walk away from what
15 otherwise would have been, Your Honor, a \$600,000
16 fee.

17 That's a pretty big piece of fee for a lawyer
18 to walk away from and to be able to have an expert
19 that teaches students, lawyers to be, about
20 unconscionability and how the courts have
21 interpreted contract and unconscionability, which
22 again is undefined in this Code, that is something
23 the jury needs to know about what motivated this
24 firm to walk away from a \$600,000 fee, and I think
25 he is certainly qualified to give his version of

1 what he believes, to explain to the jury
2 unconscionability as the law defines it, because it
3 is not defined in this IRS Code and because he
4 teaches it and if they have an expert that wants to
5 tell the jury it's not unconscionable, here is why,
6 they are certainly willing and able to do that
7 because for the same reason --

8 THE COURT: If I follow your logic, if they
9 don't walk away they are walking into a trap, they
10 get audited, they took an unconscionable fee, they
11 took the high road and said, "We can't do that,"
12 you want them to take the low road and get in all
13 this mess.

14 MR. PENDARVIS: No, sir. What Dr. Adams is
15 going to say is it would have been, they were in a
16 box at this juncture where they couldn't quit on
17 the deal without causing a material harm to the
18 client.

19 THE COURT: That is a different issue.

20 MR. PENDARVIS: I understand.

21 THE COURT: That is a different issue. I
22 think let's let Dr. Adams define unconscionability
23 and he stop there. I reviewed 230, I'm not a tax
24 expert and since there is no indication what
25 unconscionability is, I don't think he can go into

1 all that.

2 MR. PENDARVIS: That is fair. I'm asking him
3 to be able to explain to the jury the concept of
4 unconscionability.

5 THE COURT: You walk over that line and --

6 MR. PENDARVIS: Curtis Elliott can do the
7 issue with the IRS.

8 THE COURT: All right.

9 MR. PENDARVIS: But unconscionability, I
10 think Dr. Adams is qualified to do and I was going
11 to say, Your Honor --

12 THE COURT: I think it is a little misleading
13 for you to hand him Circular 230 and say it is
14 undisputed, unconscionability, I mean --

15 MR. PENDARVIS: I mean, Your Honor, the
16 internal law firm emails show, they produced these
17 documents.

18 THE COURT: Right, but why are you using the
19 Tax Code that he is not an expert in and ask him
20 something that is not defined in the Tax Code?

21 MR. PENDARVIS: Because it is defined in
22 contract law.

23 THE COURT: I got that. Ask him that.

24 MR. PENDARVIS: I will.

25 THE COURT: Leave the Tax Code alone, keep

1 him away from the Tax Code.

2 MR. PENDARVIS: We'll do that.

3 THE COURT: But to walk him right up to the
4 Tax Code and give him the book and say define
5 unconscionability, and it is not in there, that is
6 what she is fussing about.

7 MR. PENDARVIS: The defense expert in
8 explaining their view, they are going to be
9 similar.

10 MS. MCWILLIAMS: My expert is a tax, my
11 expert is, did teach tax and wrote, understands
12 Circular 230. That is one major difference but,
13 Your Honor, there is not one expert, not one,
14 Curtis Elliott, Kerry Hall, that is qualified, that
15 has said that this agreement is either an illegal
16 contingent fee or that -- he says nothing about
17 unconscionability. What Curtis Elliott said was,
18 "My opinion is not that there is any particular
19 certainty or likelihood this is a contingent fee,"
20 he was only able to say that, "I might raise an
21 issue," he said, "I don't have any basis for my
22 opinion, I'm not aware of any Circular 230
23 precedence by the Office of Profesional
24 Responsibility that has ever spoken to it." He
25 said, "I have no opinion about the likelihood."

1 What they have done is they are justifying,
2 we don't deny we looked at it but to try to put an
3 expert up to say that, the expert has got to have
4 some reliability in order for an opinion to be
5 admissible. We have no basis for Professor Adams
6 and I submit we have no basis for Mr. Elliott but
7 we'll get to that when we get to that.

8 THE COURT: All right. Define
9 conscionability and then move on.

10 MR. PENDARVIS: Got you.

11 THE COURT: All right, we'll take a break.

12 MS. McWILLIAMS: Thank you, Your Honor.

13 (Recessed at 3:55 p.m.).

14 (Resumed at 4:05 p.m.).

15 THE COURT: There is another note that the
16 jury Mr. Lewis passed up. His wife's children go
17 to kindergarten with another Pendarvis lady who
18 teaches Sunday School. This is of no consequence
19 because Mr. Pendarvis the attorney in the courtroom
20 is from Beaufort County, not Richland County.

21 MR. PENDARVIS: And my wife lives with me.

22 THE COURT: Lives with you. Miss McWillaims
23 actually knows the Pendarvis referred to in the
24 note.

25 MS. McWILLIAMS: I do, very well.

1 THE COURT: And also for the record believes
2 it's not the same person, family, distant family
3 but not immediate family.

4 All right, Miss McWilliams.

5 MS. McWILLIAMS: I want to make sure the
6 record is protected, there is nothing in the
7 amended complaint about the fees being
8 unconscionable or an illegal contingent fee. These
9 new opinions surfaced right before Christmas and
10 then were crystalized I think sometime right after
11 Christmas, after the case was continued. It was
12 over our objection but we have been allowed to
13 depose Dr. Adams about it. They did not amend the
14 complaint and I think, I want to be on the record
15 that we object to any, especially given there is no
16 qualified expert that has said it is either
17 unconscionable or a violation of Circular 230 as
18 the research the firm considered discusses those
19 terms. We understand the Court's ruling about what
20 Professor Adams would say.

21 THE COURT: Remind me, since I have not
22 reviewed the entire pleadings file, there is a
23 cause of action for potentially being in violation
24 of Circular 230, there is reference to that?

25 MR. PENDARVIS: No, Your Honor. There is a

1 claim that they breached their fiduciary duties by
2 quitting and the question of they quit is not
3 material to whether there is a claim. It explains
4 the motive to why they did what they did and there
5 is testimony, however Curtis Elliott is going to be
6 proffered, hopefully qualified, did opine there was
7 a risk and will point out and tell the jury there
8 was a risk the IRS could have interpreted it that
9 way, and I would, I surmise this is the same
10 reserach the defense has done, we can find no
11 authority ever where any attorney has been
12 sanctioned under 10.27 for unconscionable fees or
13 contingent fees. There is just simply not a court
14 opinion, district court, state court, there is not
15 a revenue ruling, there is not an internal OPR
16 ruling, Office of Professional Responsibility of
17 the IRS, nothing. So, the point, the point the
18 expert is going to make, it's a risk, that it was a
19 risk that the IRS could interpret it that way and
20 what Dr. Adams is going to explain, that the
21 animosity the IRS has against conservation
22 easements is why so many of them get audited and
23 with that type of attitude.

24 THE COURT: He's not going to testify to
25 that, he hasn't testified to that.

1 MR. PENDARVIS: Not the unconscionability but
2 the fact these easements get audited regularly.
3 There are many, many of the easements Mr. Hanlin
4 has been involved in were audited.

5 THE COURT: All right. I'm not a tax expert,
6 I have never done any work on conservation
7 easements. How is he going to fashion an opinion
8 to that effect?

9 MS. McWILLIAMS: It is all over the internet.

10 MR. PENDARVIS: It is all over the internet,
11 Your Honor, literally on the internet. In fact I
12 pulled off the internet myself a Power Point that
13 IRS agents were using to teach other IRS agents
14 about doing audits on easements.

15 THE COURT: The weather is on the internet,
16 he can read the weather but that doesn't make him
17 an expert.

18 MR. PENDARVIS: Your Honor, the point is,
19 though, that conservation easements are audited by
20 the IRS, probably a 50 percent chance. If you take
21 a contribution deduction for conservation easement,
22 50 percent or better you're going to get audited
23 common knowledge.

24 MS. McWILLIAMS: Your Honor, an audit of a
25 conservation easement is not what I thought they

1 were trying to say. What they were talking about,
2 I thought, was that the motive for the firm in
3 withdrawing was that our fee agreement might be
4 construed by the Internal Revenue Service as either
5 a violation of Circular 230 or unconscionable and
6 if Professor Adams did testify in deposition he
7 read one article in the Denver Post, I think he may
8 have looked at something else, that is not, that
9 doesn't qualify him. As a matter of fact, in any
10 event, the fact of the matter is that doesn't
11 qualify him to testify about the probability,
12 likelihood or anything else of an audit by the IRS.
13 They weren't auditing this conservation easements
14 they were going into an internal, they were doing
15 an investigation into whether or not Y.E.S., and it
16 actually lists in the IRS letter several other
17 conservation easements that Mr. McLeod had done,
18 but it was whether or not he was promoting a tax
19 avoidance scheme, it was not an easement, it was
20 not an investigation of the easement itself.

21 MR. PENDARVIS: Part of what Dr. Adams is
22 going to describe to the jury is this. If he was,
23 this matter was opened up as an hourly fee
24 agreement and during the course of the
25 representation it got changed to a contingency

1 agreement, the ABA has just issued an opinion about
2 the matters that are involved when a fee agreement
3 is modified from one to another and that part of
4 the discussion with the client when a lawyer
5 chooses to modify the terms of the fee agreement
6 deals with the scope of the engagement, and when
7 Mr. Hanlin, having represented multiple, multiple
8 landowners who may or may not get audited based on
9 his knowledge of the frequency the IRS audits
10 landowners, the fact Mr. Hanlin then chose to take
11 the representation of the consultant deals with
12 this whole conflict that they later used to say,
13 "We had to get out," and whether it was appropriate
14 and whether the advice needed to be given to Mr.
15 McLeod and Y.E.S., whether Y.E.S. could be
16 represented by Richardson Plowden, whether that was
17 going to be a potential conflict down the road
18 needed to be discussed. That is one of the issues
19 Dr. Adams is going to explain to the jury, as to
20 the circumstances that were involved for a tax
21 practitioner or any lawyer changing the fee
22 agreement, especially with a lawyer that knows and
23 has testified in his deposition that IRS audits are
24 common for conservation easements, the same lawyer
25 who knows he has represented landowners and is now

1 proposing to be the only one our people will know
2 of that is going to represent the consultant and
3 change the fee agreement, the risk of a conflict is
4 something that needs to be evaluated and discussed
5 with the client.

6 The fact this is all over the internet and
7 anybody that goes to Google can find it is
8 something that certainly a prudent lawyer needs to
9 tell his client, that, hey, these things get
10 audited and Mr. McLeod needs to know this before
11 the decision is made to accept the contingent fee
12 agreement, when the matter is opened up as an
13 hourly fee, so, we're way off the point of
14 unconscionability.

15 THE COURT: I'm trying to figure how we go
16 there. We're now into what type contract they
17 signed originally and modified it on the fly. You
18 changed on me.

19 MR. PENDARVIS: I'm ready whenever the jury
20 is ready.

21 THE COURT: All right. Define
22 unconscionable. I don't want him interpreting the
23 IRS Code since you all seem to agree he is not a
24 tax expert nor has he taught tax classes or
25 prepared any conservation easements. Is that

1 correct?

2 MR. PENDARVIS: That is correct.

3 THE COURT: All right. He can define
4 unconscionable as pertains to contracts and then
5 where you go from there we'll see.

6 MR. PENDARVIS: Thank you, Your Honor.

7 THE COURT: Ready for the jury?

8 MS. McWILLIAMS: Yes, Your Honor.

9 THE COURT: Bring the jury for me.

10 BAILIFF: I will be glad to, Your Honor.

11 (The jury returned to the courtroom).

12 BAILIFF: The jury is all present, Your
13 Honor. .

14 THE COURT: Excellent. All right, ladies and
15 gentlemen of the jury, for you all's understanding,
16 we're ready to proceed with Dr. Adams' testimony.
17 I received a note from one of the jurors regarding
18 his relationship with one of the lawyers of
19 someone, and for the record the lawyers on this
20 team live in Columbia, the lawyers on that team
21 live in Beaufort, married, reside down there and
22 don't have households in Columbia. They do and
23 they don't. So, it's not a concern regarding the
24 issue presented, not the same people.

25 All right, you may continue.

1 MR. PENDARVIS: Thank you, Your Honor.

2 BY MR. PENDARVIS:

3 Q Dr. Adams, before we took our break I was
4 going to ask if you could for the jury, we were
5 looking at this research item and there is a
6 reference to the word unconscionable,
7 unconscionable fee. Could you help the jury
8 understand how courts have interpreted
9 unconscionable fee?

10 A Yes, sir. Unconscionability is a concept
11 that actually comes from contract law and the idea
12 is that some contracts or maybe part of contracts
13 would be unconscionable and because they were
14 unconscionable the court wouldn't enforce them. It
15 is actually a doctrine that goes back several
16 hundred years to England. It was at first applied
17 almost exclusively in terms of what we call price
18 unconscionability, and the same kind of idea was
19 common in Europe in the civil law countries that
20 had civil code and in England with the common law
21 which then became our law. And the idea is that
22 some contracts, some provisions are just so one
23 sided, so unfair that we can't imagine that anybody
24 of their own free will understanding what it was
25 that was in the contract would actually agree to

1 that.

2 As a result, the courts have looked at two
3 aspects of unconscionability and one is the process
4 of entering into the contract, what is sometimes
5 call procedural unconscionability. Now, we're all
6 familiar with boilerplate contracts that nobody,
7 not even contract professors read. You know, they
8 are just filled with so much stuff that you
9 couldn't figure out and you would go blind trying
10 to read them, so we don't.

11 And sometimes people are tricked into
12 entering into contracts and sometimes they are
13 badgered and forced to enter into contracts and
14 sometimes they don't have any choice. One of the
15 famous cases involves the lady who in the middle of
16 the summertime late in the afternoon she's got to
17 go get her kids, pick them up at daycare and bring
18 them home and the air-conditioning doesn't work and
19 she's called an air-conditioning repair man and he
20 comes and he tells her it's going to be hundreds
21 and hundreds of dollars to fix it and he won't
22 start fixing it until she writes him a check. And
23 the Court says she was over a barrel, it was unfair
24 the way he entered into that contract and the price
25 he charged her was several times what any fair

1 repair man would have charged for those repairs and
2 so that was unconscionable because the contract was
3 entered into in a way in which she did not have any
4 choice, she didn't understand she had choices.

5 So, that is the idea of unconscionability on
6 the one hand, something on the one hand, something
7 has happened that doesn't seem fair or right in
8 entering into the contract, somebody doesn't
9 understand what they are entering into or they're
10 over a barrel and they don't have a choice and the
11 terms aren't fair and so it is that combination of
12 something that just wasn't right about the way the
13 contract was made and something that just wasn't
14 fair about the terms of the contract and when that
15 happens the Court will declare the contract or that
16 provision to be unconscionable and won't enforce
17 it.

18 Q Thank you very much. Dr. Adams, I'm going to
19 another exhibit for you to look at. Dr. Adams, I
20 have passed you a letter, a copy of a letter dated
21 December 5th, 2007, a three page letter. Have you
22 seen this document before today?

23 A Yes, sir, I have seen this version of it and
24 versions without all the signatures on it, yes,
25 sir.

1 Q Streamlining things to the more important
2 provisions, could you describe what this document
3 is to the jury, please?

4 A This is the agreement between the law firm
5 and Y.E.S., Mr. McLeod's company, in which they
6 formally set forth the fee agreement between them.

7 Q Have you relied upon this document in forming
8 the opinions you have expressed in this case?

9 A Oh, yes, sir.

10 MR. PENDARVIS: Your Honor, we would like to
11 move this document in as Plaintiff's Number 10.

12 MS. MCWILLIAMS: No objection, Your Honor.

13 THE COURT: Plaintiff's 10 without objection.

14 (December 5, 2007, letter marked and received
15 in evidence as Plaintiff's Exhibit 10).

16 BY MR. PENDARVIS:

17 Q Dr. Adams, before we get into any specifics
18 of this agreement, can you help the jury understand
19 the circumstances at the time this fee agreement
20 was presented to Y.E.S. for execution?

21 MS. MCWILLIAMS: Your Honor, I object on the
22 ground of vague.

23 MR. PENDARVIS: Ground what?

24 MS. MCWILLIAMS: Vague.

25 THE COURT: Be more specific, please,

1 rephrase your question.

2 BY MR. PENDARVIS:

3 Q Prior to December 5th, 2007, what was your
4 understanding of the fee agreement relationship
5 with, between Yancey Environmental Solutions and
6 Richardson Plowden?

7 A It was an hourly fee agreement.

8 Q Does the, this fee agreement, for reference
9 marked as Exhibit 10, is it an hourly fee
10 agreement?

11 A No, sir. It's a contingent fee agreement.

12 Q Is there any -- what is involved when a
13 lawyer proposes to change the terms of a fee
14 agreement with a client?

15 A When a lawyer in the middle of the
16 representation proposes changing the fee agreement
17 it is subject to special scrutiny because of course
18 the client is often in the middle of a case or in
19 the middle of a transaction, he feels like he
20 doesn't have any choice, he has got this lawyer
21 representing him, this lawyer advising him, this
22 lawyer helping him with the transaction and you
23 don't want to change lawyers in the middle of a
24 deal and particularly if there are time pressures
25 sometimes you will see lawyers who take advantage

1 of clients because a week or two before a trial
2 they will want a much better fee agreement, a more
3 lucrative fee agreement and the the client
4 thinking, "I can't get another lawyer with a trial
5 coming up in a few weeks," so they get special
6 scrutiny because of that and because of the fact
7 that at the outset, in the beginning the lawyer is
8 free to agree to represent a client or not, there
9 is no bond between them, the client is free to hire
10 the lawyer or not.

11 But once the lawyer and the client have
12 agreed and the lawyer has begun representing the
13 client there is a fiduciary duty that we talked
14 about earlier that requires the lawyer to take the
15 best interest of the client into account and not
16 just do things that benefit the lawyer and harm the
17 client. So, sometimes we'll see fee agreements
18 change when it's in the best interest of both of
19 the parties, the lawyer and the client, and
20 sometimes we'll see fee agreements change when it's
21 in the best interest of the client but not really
22 the best interest of the lawyer but the lawyer
23 proposes that they do that because he thinks it's
24 the right thing to do.

25 But with this special scrutiny of changing

1 the fee agreement when there is a fiduciary
2 relationship there, when the client may not feel
3 free to say no, requires that the lawyer take
4 special steps to make sure that the client
5 understands everything the client needs to know
6 about this proposed change and that the client's
7 consent is truly that. So one of the things a
8 lawyer has to tell the client, for example, is,
9 "You don't have to agree to this in order for me to
10 continue to be your lawyer, I would like for you to
11 agree to this, I wish you would but if you don't
12 think it's right, if you don't think it's fair, if
13 you don't think it is in your best interest that's
14 okay, I'll go ahead and represent you under the
15 original agreement that we had, on the basis of
16 that original fee I'll take care of you, I'll
17 protect you."

18 And so we have, we have the requirement that
19 it be entirely fair, that the new terms be fair and
20 reasonable to the client, that they not be
21 significant and less advantageous to the client
22 unless there has been some change in circumstances
23 which of course can happen, sometimes things don't
24 turn out the way the lawyer and the client expected
25 and it's a different, it's a whole different thing,

1 it is much more complicated, much more difficult,
2 much riskier, takes a lot more work. And when
3 there is unexpected change in circumstances, then
4 we can understand how it might be reasonable to
5 change the fee agreement but where there has been
6 no change in circumstances the fee agreement has
7 got to be fair to the client and changing it so it
8 benefits the lawyer at the expense of the client is
9 usually not considered fair, it's got to be done in
10 a way that the lawyer takes the initiative and tells
11 the client what the client needs to know,
12 including, "You don't have to agree to this, I'll
13 still be your lawyer even if you say no."

14 Q Dr. Adams, with regard to the fact that the
15 Yancey Environmental Solutions, the conservation
16 consultant is going to be the client in this
17 agreement, is there, as compared to the prior
18 representation, is there any obligation to discuss
19 or talk about that with the client when it concerns
20 the fee agreement?

21 A Absolutely, because the lawyer has a general
22 obligation to the client to tell the client
23 everything the client needs to know to make an
24 informed decision. In this case Mr. Hanlin
25 proposed to Mr. McLeod that instead of being the

1 landowner's lawyer, Jim Justice's lawyer, instead
2 of advising him directly, instead of giving him
3 services directly, instead of being paid by Mr.
4 Justice an hourly fee, that he wanted to be Mr.
5 McLeod's lawyer, Y.E.S.'s lawyer, and we see the
6 problems that creates throughout this, we see how
7 the law firm is struggling throughout dealing with
8 this strange attorney-client relationship in this
9 transaction and the difficulties that it creates.

10 Now, those difficulties surely were obvious
11 to Mr. Hanlin back in October and November and
12 December when he was proposing this strange
13 relationship instead of representing the landowner.
14 He obviously had a fiduciary duty, the ethical duty
15 to tell Mr. McLeod, "If we do this it's going to be
16 really cumbersome, it's going to be strange because
17 I won't be advising Mr. Justice although he is the
18 one who needs the advice, and I won't be preparing
19 the documents directly for him even though he's the
20 one who is going to have to execute the documents
21 and they are going to affect his land," and without
22 that warning Mr. McLeod would not have been able to
23 make an informed decision about whether he was
24 willing to go forward as the client in this new
25 unusual arrangement or whether what he really

1 preferred was the traditional arrangement where Mr.
2 Hanlin would be Mr. Justice's lawyer, advising him
3 and providing him legal services for him directly.

4 Q Dr. Adams, I'm sure you know and there were
5 statements in opening statement about Mr. McLeod
6 being a lawyer. My question is, does that change
7 the circumstances and the duties you have described
8 for Richardson Plowden, the fact the principal of
9 their client was a lawyer?

10 A It doesn't change, it doesn't change the
11 duty. It may change what information a lawyer has
12 to convey to the client and it is true sometimes
13 we'll have a client who is a sophisticated business
14 man and we don't have to explain some things that
15 person knows, that we know they know, the way we
16 would have to explain it if we were talking to a
17 retired schoolteacher.

18 The same thing is true where the client is
19 represented, is a lawyer or is represented by a
20 lawyer, has a lawyer, then the information we have
21 to convey is dependent upon the knowledge of that
22 lawyer, the sophistication of the matter involved.
23 If Mr. Hanlin had been representing Y.E.S. in a
24 contract matter, ordinary law, ordinary legal
25 principles everybody studies in law school he

1 could certainly rely on Mr. McLeod knowing a great
2 deal about that.

3 On the other hand, if he is advising him in
4 very intricate matters of tax law that even very,
5 very well trained highly experienced lawyers don't
6 know much about or don't know a lot about or aren't
7 competent to handle, then you would have to explain
8 a lot more. Conservation easement is kind of like
9 neurosurgery, you know, you wouldn't want your
10 family physician to operate on your brain. Mr.
11 McLeod is not a tax specialist competent to do the
12 legal work on conservation easements in spite of
13 the fact he is an environmental consultant, he had
14 worked on dozens of these, he was really good at
15 that, in looking at the land and figuring out what
16 all of the professionals needed to be doing,
17 coordinating everything, that was his role, and the
18 fact he had gone to law school and had even
19 practiced law for a little while early in his
20 career doesn't make him competent to handle
21 conservation easement tax questions.

22 Q Thank you very much. Let's talk now a little
23 bit about the scope of this agreement, what this
24 agreement involved, the words that are on this
25 paper. Can you describe for the jury what the

1 scope of this agreement involves?

2 A Well, there are two different parts of this
3 that really talk about a different scope. There is
4 that beginning sentence that says that Richardson
5 Plowden is going to be Mr. McLeod or Y.E.S.'s
6 lawyers to assist in the creation of a conservation
7 easement on certain real property known as Black
8 River Farms.

9 So, there is this broad opening letter that
10 says, "We're going to be lawyers assisting you in
11 doing this." And in context of course that makes
12 sense because of course Mr. Hanlin was the only
13 lawyer who was acting as lawyer in connection with
14 this entire matter. He was the lawyer for the
15 transaction, for the conservation easement.

16 But then in paragraphs one and two, if they
17 are read technically in a narrow way they seem to
18 provide specific tax service. Specific services to
19 be provided involve legal tax advice and
20 consultation with tax advisers to Mr. Justice.
21 And, so, in this case there have been contentions
22 that this is really a narrow scope of this
23 undertaking, that all the law firm agreed to do
24 here was to provide legal tax advice and to consult
25 as requested with Mr. Justice's advisers. There

1 had been interpretations of this that the broad
2 language at the beginning and the circumstances
3 meant that the responsibility was to do what needed
4 to be done to bring this conservation easement into
5 existence before the end of the year so that Mr.
6 Justice would be able to make the donation and get
7 the tax deduction in 2007.

8 Q Help us a little bit here, Dr. Adams, with
9 section two, about services not included.

10 MS. McWILLIAMS: Your Honor, I object, I ask
11 he ask a better question.

12 Q Sure. I'm sorry, I will ask a better
13 question.

14 Dr. Adams, can you explain to the jury the
15 import of this section that says services not
16 included?

17 A Yes, sir. It says that the law firm will not
18 be responsible to pursue any additional matters
19 beyond those stated in this agreement. And that's
20 pretty typical language in a retainer agreement
21 because the difficulty of a matter is something
22 lawyers think about, it's this transaction, it's
23 this case, it's this trial, it's this will, and so
24 when we enter into a fee agreement with a client
25 we're agreeing to handle this matter but the fact

1 that we're your lawyer for this matter doesn't mean
2 that we're your lawyer for everything that comes
3 along.

4 So, if we're drafting a will for you, if you
5 get a DUI, the fact we've got a retainer agreement
6 as your lawyer doesn't mean we have to represent
7 you in the DUI. Matter is a very specific concept
8 for lawyers and so what this means is, what this
9 means is we're going to do what we're required to
10 do under this agreement but that doesn't mean that
11 we are obligated to handle other things such as,
12 for example, on December 20 the firm was provided
13 with the IRS investigation letter, this agreement
14 did not obligate the firm to undertake to represent
15 Mr. McLeod in that other matter.

16 Q Let's turn our attention now to section
17 three, entitled fee for services rendered. Can you
18 explain to the jury the type of fee agreement set
19 forth in paragraph three?

20 A Yes, sir. This is a contingent fee
21 agreement. It's contingent both as to whether a
22 fee will be due and also as to the amount of the
23 fee. It provides that the fee will be one-third of
24 any fees paid to Y.E.S. by Jim Justice for doing
25 the consulting work, which takes us back to the

1 earlier, those earlier discussions where if Y.E.S.
2 gets two million dollars in fees, then a percentage
3 of that would go to Richardson Plowden. You know,
4 at one point we saw a figure that was even higher
5 than that, \$4,000,000 fee to Y.E.S. would result in
6 a 1.3 million dollar legal fee to Richardson
7 Plowden.

8 On the other hand, because as we saw in the
9 consulting agreement, Y.E.S. only got paid if the
10 deal closed, if the conservation easement was
11 created and Mr. Justice took the tax deduction,
12 then if he didn't do that Y.E.S. would not get paid
13 a fee and Richardson Plowden would not get paid a
14 fee here.

15 Q Dr. Adams, in light of the, what Richardson
16 Plowden and Mr. Hanlin knew at the time of December
17 5th, 2007, in terms of the potential value of the
18 easement, value of the fee that would be paid to
19 Y.E.S., do you have an opinion as to whether the
20 work that would be necessary to accomplish the
21 services under this agreement was reasonable?

22 A Yes, sir, I do. This is an unreasonable fee
23 prohibited by Rule 1.5 of our rules of professional
24 conduct. Up until this point Mr. Hanlin and
25 Richardson Plowden had been working on an hourly

1 fee basis. The sum total, you take the work they
2 did then and the work that was shown on the time
3 record after that, up through December 20, and
4 assume that they had stayed to the end and had
5 gotten this deal done, their fee would have been
6 somewhere in the 30 to 35 thousand dollar range on
7 an hourly fee basis.

8 This was a fee agreement that they envisioned
9 was going to create a 600 or 700 thousand dollar
10 fee instead of the 30 or 35 thousand dollar fee
11 they were entitled to under their hourly fee
12 agreement. It's outrageous, it's ludicrous. If
13 you work out the hours, it is like \$4,000 an hour
14 for Mr. Hanlin who is an associate in the law firm.

15 Q And am I correct you were essentially
16 doubling the number of hours that are listed on
17 Exhibit 1 that shows the law firm had worked 73.6
18 hours, to reach the number you reached?

19 A I'm assuming Mr. Hanlin would have worked
20 from December 20 to December 31st full days doing
21 nothing but working on this, including on Christmas
22 and New Year's Eve to get to those numbers. If he
23 worked hours similar to what he had worked before,
24 then of course the hourly fee would have been in
25 the 20, 25 thousand dollar range and it is even

1 more staggering.

2 Q Do you have an opinion on whether the law
3 firm obtained Y.E.S.'s informed consent to this
4 agreement?

5 A Yes, I do. There was no informed consent to
6 this agreement.

7 Q Do you have an opinion on whether obtaining
8 this type of agreement from a client was in
9 violation of the fiduciary duty the law firm had to
10 their client?

11 A It was a blatant violation of their fiduciary
12 duty they had to their client. It was not done in
13 the proper way. Maybe that doesn't matter. I'm
14 not sure there is any way in the middle of this
15 representation with only three weeks to go in the
16 year before it had to be done, I'm not sure there
17 was any way you could get the client to really
18 voluntarily agree to increase the fees from \$30,000
19 to 600 or 700 thousand dollars. That just staggers
20 the mind to think that anybody understanding what
21 that agreement is, what that disparity is,
22 understanding that they have a choice to say yes or
23 no and that their lawyers will stay in it and
24 finish the deal even if they say, "No, I want to
25 pay you the hourly fee," which is going to total

1 \$30,000 maybe, who would agree to that,
2 understanding that? It goes back to what we were
3 talking about earlier about that common law
4 doctrine of unconscionability.

5 Q Do you have an opinion on whether the letter,
6 fee agreement letter we'll call it, marked Exhibit
7 10 unreasonably restricts the services to be
8 rendered or not?

9 A I have an opinion that it does not
10 unreasonably restrict them because I agree with all
11 of the other lawyers who have testified about this
12 agreement, that it required Mr. Hanlin to do
13 everything that needed to be done to bring that
14 easement into existence and to accomplish that
15 donation. If it means what the defendants claim
16 that they only had to give tax advice, they didn't
17 have to draft any documents, they didn't have to
18 make arrangements for surveys or appraisals or
19 anything else, then it does unreasonably restrict
20 the scope of this, it is a violation of Rule 1.2 of
21 our rules of professional conduct.

22 Our rules allow a lawyer to agree with a
23 client to do less than is normal in handling a case
24 or matter but that requires informed consent of the
25 client and there is a floor below which the lawyer

1 can't go. The lawyer can't get the client to agree
2 that the lawyer will do less than the bare minimum
3 needed to accomplish the task.

4 Here the defendant's interpretation of this
5 agreement is all to Mr. Hanlin who was the only
6 lawyer in the deal, he didn't have to do the things
7 that he usually would have done that would have
8 allowed the deal to go forward. All he had to do
9 was to give tax advice, he didn't have the
10 obligation to draft documents, to make sure that
11 all the documents were right, that they were
12 recorded properly, they were executed properly, and
13 if that is indeed what this means it is an
14 unethical fee agreement, violating Rule 1.2 as well
15 as violating Rule 1.5 prohibiting unreasonable
16 fees.

17 Q Thank you, Dr. Adams. I passed up to you
18 another letter also dated December 5, 2007. Have
19 you seen this document before?

20 A Yes, sir.

21 Q And did you rely on this in forming your
22 opinions?

23 A Yes, sir, I did.

24 Q Can you describe for the jury -- well, I'm
25 just going to tell you quickly this is a letter

1 from Mr. Hanlin to Mr. Justice in care of Mr.
2 Justice's CPA David Harrah. Can you describe for
3 the jury the import of this letter?

4 A This letter is telling Mr. Justice that Mr.
5 Hanlin and Richardson Plowden are not his lawyers
6 but that they are the lawyers for Y.E.S., working
7 with Yancey McLeod in order to bring about this
8 conservation easement.

9 Q Toward the middle of this document there is a
10 statement that says, "Notwithstanding, I am happy
11 to share my knowledge I might have in the tax and
12 legal realms with Yancey and with you or your legal
13 or tax advisers."

14 Do you see that?

15 A Yes, sir.

16 Q Would you explain to the jury any
17 complications or problems that come out of that
18 sentence?

19 A Well, the huge complication that comes out of
20 that sentence is at this point Mr. Hanlin knows
21 that the point person for Mr. Justice on this is
22 David Harrah, not a lawyer, but a CPA. It's not a
23 situation in which Mr. Justice has gone and gotten
24 a sophisticated tax lawyer familiar with
25 conservation easements and Mr. Hanlin is going to

1 be working with an equally sophisticated
2 experienced tax lawyer for Mr. Justice. He knows
3 in fact there is no other lawyer involved, that he
4 is dealing with the in-house CPA, a guy who is the
5 treasurer, who oversees everything for the Justice
6 Industries, not somebody with any knowledge or
7 sophistication of the, in the conservation easement
8 business, so to say, "I'm going to consult with you
9 but I'm not going to be your lawyer, I'm not going
10 to advise you but I will consult with you," what
11 does that, that is very confusing and as a result,
12 it's a result of the fact they set up this bizzare
13 attorney-client relationship where instead of Mr.
14 Hanlin representing Mr. Justice and advising him
15 directly as is normal, as is universal, as is
16 always done, he set up this strange relationship
17 that ends up having the partners in the law firm
18 puzzled as to what they're doing and how they're
19 going to be able to do it.

20 Q Are you aware of whether Mr. Hanlin told
21 anyone that Mr. Justice needed an attorney to
22 represent him and his companies' interest in this
23 matter?

24 A I have seen no evidence, I have not heard, I
25 have read no testimony that he ever did so.

1 MR. PENDARVIS: Your Honor, the plaintiffs
2 move, the plaintiffs move to introduce this letter
3 dated December 5 as Exhibit 11.

4 MS. McWILLIAMS: No objection, Your Honor.

5 THE COURT: Plaintiff's Exhibit 11 admitted
6 without objection and will be so marked.

7 (Letter dated December 5, 2007, received in
8 evidence as Plaintiff's Exhibit Number 11).

9 BY MR. PENDARVIS:

10 Q Dr. Adams, have you reviewed any testimony
11 about the operation of Richardson Plowden as a law
12 firm, in terms of how it's operated and what
13 committees or what have you govern the firm?

14 A Yes, sir.

15 Q Can you describe for the jury what you have
16 learned in reading that material?

17 A Well, there's an executive committee of the
18 partners that makes the major strategic and
19 important decision for the law firm and there is a
20 chairman of the executive committee or managing
21 partner who is like the CEO of the law firm.

22 Q I have passed to you some minutes that have
23 been produced from the Richardson Plowden executive
24 committee meeting on December 6, 2007. Have you
25 seen this before today?

1 A Yes, sir.

2 Q Have you relied upon this in forming your
3 opinions?

4 A Yes, sir.

5 MR. PENDARVIS: We would like to move in
6 Exhibit 12.

7 MS. McWILLIAMS: No objection, Your Honor.

8 THE COURT: Exhibit 12 without objection.

9 (December 6, 2007, committee minutes received
10 in evidence as Plaintiff's Exhibit 12).

11 BY MR. PENDARVIS:

12 Q Dr. Adams, describe for the jury what the
13 minutes from this executive committee involves.

14 A This is a meeting on the day after the fee
15 agreement was sent to Mr. McLeod and the letter we
16 just discussed was sent to Mr. Justice saying the
17 executive committee had met to review information
18 regarding contingent cases relating to conservation
19 easements, concerns raised regarding fee
20 arrangements and documentation of legal issues and
21 advice, Mr. Mack as the chairman of the committee,
22 will continue to work with GHH, Mr. Hanlin, in
23 resolving the issues that have been raised.

24 Q From this executive committee note does it
25 appear the law firm is concerned about the

1 propriety of the fee agreement?

2 A Apparently so.

3 MS. McWILLIAMS: Objection to form, Your
4 Honor, calls for speculation.

5 THE COURT: I sustain that objection.

6 MR. PENDARVIS: Sustained?

7 BY MR. PENDARVIS:

8 Q In your experience, Dr. Adams, is it routine
9 for executive committees, committees of law firms
10 to meet to discuss day to day fee agreement
11 arrangements with clients?

12 MS. McWILLIAMS: Objection, Your Honor,
13 speculative.

14 MR. PENDARVIS: Let me rephrase the question.

15 THE COURT: All right. I'm going to sustain
16 the objection as long as you rephrase your
17 question.

18 BY MR. PENDARVIS:

19 Q Based upon the testimony in the depositions
20 of the designee for Richardson Plowden is it
21 ordinary for the law firm, this law firm, to meet
22 to discuss day to day activities, day to day fee
23 agreements with their clients?

24 A No, not at all. They only meet to discuss
25 major issues, strategic issues. Testimony was they

1 never meet to discuss a fee arrangement in a
2 particular case.

3 Q Dr. Adams, I have passed up a document, an
4 undated document, it appears to be a draft
5 document. Have you seen this document before
6 today?

7 A Yes, sir.

8 Q Can you describe for the jury the content,
9 without going into fully, but generally what this
10 document is explaining to Mr. McLeod? He is
11 referenced in the first sentence.

12 A Well, I'm not sure --

13 MS. McWILLIAMS: I object -- I withdraw my
14 objection.

15 Q I'm sorry, working with, explaining to
16 whoever this is they are working with Yancey
17 McLeod?

18 A Correct. It is a letter that is sent to
19 someone who Mr. McLeod is working with as the
20 conservation expert and environmental consultant,
21 in which he is laying out the intricacies of the
22 tax requirement for a conservation easement to be,
23 to result in a tax deduction for the landowner.

24 Q Okay.

25 MR. PENDARVIS: Excuse me, Your Honor, I'm

1 trying to clear up some housekeeping matters.

2 MS. McWILLIAMS: Your Honor, may we be heard
3 briefly on this, may we approach?

4 THE COURT: Sure, you may.

5 (Unrecorded bench conference).

6 MS. McWILLIAMS: Just a moment, Your Honor.

7 THE COURT: Are you all okay? It is my
8 normal practice, I will talk while they talk with
9 their client, it is my normal practice to bring a
10 basket of candy for the jury, my law clerk is up in
11 North Carolina taking the North Carolina Bar exam,
12 she's not with me or she would remind me. I will
13 have some tomorrow for you all, I eat hard candy
14 sitting up here, I will have some tomorrow.

15 Ladies and gentlemen, I'm going to explain to
16 you what is about to happen. The lawyers came up
17 and talked to me, one page of this document has
18 some computer information. It is all that hidden
19 stuff behind the document you create behind a Word
20 Perfect or Microsoft Word that shows changes and
21 all that sort of stuff. It also tells you when the
22 document was originally written.

23 The parties have agreed this document they
24 are talking about was written or drafted on
25 December 12th, 2007, which is my birthday also.

1 Anyway, the document, you all are going to see the
2 document but not all meta data stuff hidden in the
3 computer because all that is up unnecessary for
4 purposes of today's hearing.

5 BY MR. PENDARVIS:

6 Q Now, Dr. Adams, you have stated the draft of
7 this document was created December 12, 2007. I
8 want to put that in context with another exhibit.

9 MR. PENDARVIS: Let me get some foundation on
10 both these, Your Honor, I will move them both in
11 together.

12 THE COURT: Very well.

13 Q Dr. Adams, I passed to you a second document
14 which appears to be another executive committee
15 meeting minutes. Have you seen that?

16 A Yes, sir.

17 Q And have you reviewed both of these
18 documents?

19 A Yes, sir, I have.

20 MR. PENDARVIS: Your Honor, I would like to
21 move them into evidence as Exhibit 13 for the draft
22 and 14 for the minutes.

23 MS. McWILLIAMS: No objections, Your Honor.

24 THE COURT: Exhibits 13 and 14 without
25 objection.

1 (Draft letter marked and received in
2 evidence as Plaintiff's Exhibit 13).

3 (Meeting minutes marked and received in
4 evidence as Plaintiff's Exhibit 14).

5 BY MR. PENDARVIS:

6 Q Doctor, explain to the jury a little bit of
7 what is intended by Exhibit 13, the draft letter,
8 what message is trying to be conveyed to the client
9 of Y.E.S.?

10 MS. McWILLIAMS: Objection, foundation.

11 THE COURT: Sustained.

12 Q Doctor, is this a letter to a conservation
13 client of Yancey Environmental Solutions, a draft
14 letter?

15 A It appears to be, yes.

16 Q Is the author of this document Mr. Hal
17 Hanlin?

18 A Yes, sir.

19 Q What is Mr. Hanlin conveying to a client of
20 Yancey Environmental Solutions by this draft
21 letter?

22 MS. McWILLIAMS: Same objection, foundation.

23 Q Let me ask it this way. Is Mr. Hanlin
24 offering tax advice to the recipient if this letter
25 had been sent to a client of Yancey Environmental

1 Solutions?

2 MS. McWILLIAMS: Objection, calls for a legal
3 conclusion.

4 MR. PENDARVIS: Your Honor, he's an expert.

5 THE COURT: I'm going to allow that question.
6 I understand your objection, Miss McWilliams.

7 MS. McWILLIAMS: Thanks.

8 A Yes, he is explaining the tax law limitations
9 on the deductibility and he is also explaining the
10 penalties that are available if there is tax fraud
11 involved on one of these transactions.

12 Q Now let's turn our attention to Exhibit 14,
13 the executive committee notes. Would it appear
14 that the executive committee was reviewing draft
15 letters from Mr. Hanlin, from the notes and the
16 minutes of this executive committee marked as
17 Exhibit 14?

18 A I can't tell that for sure. It just says
19 they reviewed revised information regarding the
20 conservation easement files.

21 Q Doctor, I'm going to pass up three separate
22 documents we're going to mark separately. Doctor,
23 I'm going to ask you, I passed up to you an email,
24 internal law firm email from December 13 and two
25 attachments to the email and I would ask first have

1 you seen these documents before?

2 A Yes, sir, I have.

3 Q Have you relied upon them in forming your
4 opinions?

5 A Yes, sir.

6 MR. PENDARVIS: I would like to move these
7 into evidence as Exhibit 15, 16 and 17.

8 MS. McWILLIAMS: No objection, Your Honor.

9 THE COURT: Exhibit 15, 16 and 17 without
10 objection.

11 (Email marked and received in evidence as
12 Plaintiff's Exhibit 15).

13 (Draft fee agreement marked and received in
14 evidence as Plaintiff's Exhibit 16).

15 (Hal Hanlin email marked and received in
16 evidence as Plaintiff's Exhibit 17).

17 BY MR. PENDARVIS:

18 Q Dr. Adams, this appears to be an email from
19 Hal Hanlin to Frank Mack and copies to other
20 members of the law firm enclosing a new proposed,
21 I'm reading here from the first sentence, a new
22 proposed fee agreement for Yancey Environmental
23 Solutions which it might be prudent to furnish to
24 Mr. Justice's tax adviser.

25 Have you reviewed the draft fee agreement

1 attached to this email?

2 A Yes, sir, I have.

3 Q What type of fee agreement is contemplated in
4 this draft document marked as Exhibit 16?

5 A It's an hourly fee agreement.

6 Q And the second exhibit is, how would you
7 describe the second exhibit?

8 A Well, it's called Mr. Hanlin's email, and I
9 think it is a fair characterization, alert letter
10 that would go to Mr. Justice or his advisers, it
11 includes a cover letter, cover letter of a
12 publication by the South Carolina Department of
13 Revenue about taxation aspects of conservation
14 easements.

15 Q Looking toward the middle of the second
16 paragraph, Exhibit 15, the email, is there any
17 advice or concerns about offering advice to Mr.
18 Justice referenced in this email?

19 A Well, there is concern that they need to
20 provide advice to Mr. Justice but that because he's
21 not their client that advice would not be protected
22 by the attorney-client privilege and therefore it
23 might be available to the IRS or in the event of
24 litigation to other parties in that litigation,
25 whereas if he were, if Mr. Justice were the law

1 firm's client that advice would be protected by the
2 attorney-client privilege and the IRS could not get
3 it.

4 Q Toward the end of, actually the last sentence
5 of the second full paragraph it says, "This letter
6 intentionally offers little advice other than
7 suggestions to consult with SCDOR," and I take that
8 to mean South Carolina Department of Revenue,
9 "conservation easement publication which would be
10 attached to the letter and is included, attached to
11 this email, and other authorities." Have you seen
12 that?

13 A Yes, sir.

14 Q Why isn't Richardson Plowden able to offer
15 advice to Mr. Justice or his companies?

16 A Because under this bizzare arrangement he is
17 not their client although he is the one who needs
18 their advice.

19 Q And below that, do you see the letter, the
20 sentence in the third pull paragraph that begins
21 with Sandra?

22 A Yes, sir.

23 Q And does it appear from this letter that Mr.
24 Hanlin is working on preparing some information to
25 Mr. McLeod about the concerns about this

1 conservation easement?

2 A Yes.

3 Q Dr. Adams, I have passed up an email, a
4 pretty healthy attachment. Have you seen this
5 email dated December 14th, 2007, from Yancey
6 Environmental Solutions to Mr. Hanlin and copied to
7 Mr. Jim Lewis, Lewis Wildlife? Have you seen this
8 document before?

9 A Yes, sir, I have.

10 Q Could you describe for the jury -- let me
11 back up a second. Have you relied on this in
12 forming your opinions?

13 A Yes, sir, I have, indeed. I testified about
14 this, I think it was my second deposition.

15 MR. PENDARVIS: Your Honor, I would like to
16 move this in as Plaintiff's Exhibit 16 -- wait a
17 minute.

18 THE COURT: 18.

19 Any objection?

20 MS. MCWILLIAMS: No objection, Your Honor.

21 THE COURT: No objection, Plaintiff's 18
22 without objection.

23 (December 14, 2007, email marked and received
24 in evidence as Plaintiff's Exhibit 18).

25 BY MR. PENDARVIS:

1 Q In essence what is Mr. McLeod asking -- is
2 Mr. McLeod asking Mr. Hanlin to do anything about
3 this, with the attachment to this email?

4 A Yes. He's sending a draft of the document
5 that is called base line documentation on Justice
6 Farm which is one of those essential documents that
7 has to be created at the time the conservation
8 easement is being done in order for it to qualify
9 for a tax deduction and this is a draft of that
10 report which was done by Mr. Lewis who is the
11 expert in these kind of analyses. This is a
12 hydrological and natural resources report for
13 Justice Family Farms. Mr. Hanlin is, excuse me,
14 Mr. McLeod is asking Mr. Hanlin, "To review and
15 confirm your opinion as to conformity with
16 requirements of 170(H) of the IRC," Internal
17 Revenue Code. "If you deem the report adequate and
18 satisfactory I will have Jim, Mr. Lewis, retitile to
19 base line documentation report, put it in final
20 form for you to forward to Sue Green at COLT for
21 their review and approval."

22 Q Am I correct this is about halfway into the
23 month of December?

24 A The 14th, Friday the 14th, yes.

25 Q In the review of all the materials presented

1 to you in this case and in the testimony you have
2 read have you seen any indication Mr. Hanlin
3 responded to Mr. McLeod, the request Mr. McLeod
4 made in this email on December 14th?

5 A No, sir, I have seen no email indicating he
6 responded, I have seen no time entry on the
7 comprehensive time records at the law firm
8 indicating he responded with an email to Mr. McLeod
9 or that he reviewed this draft report.

10 Q Dr. Adams, I have passed up a portion of an
11 email we marked earlier as Exhibit 15, we had seen
12 Mr. Hanlin's email to Mr. Mack enclosing the draft
13 agreement from him, the draft document we looked
14 at. This appears to be Mr. Mack's reply dated
15 December 16, 2007. Have you seen this document
16 before?

17 A Yes, sir.

18 Q Did you rely upon it in forming your
19 opinions?

20 A Yes, sir.

21 MR. PENDARVIS: Your Honor, we would like to
22 move this into evidence as Exhibit 17.

23 THE COURT: 19.

24 MR. PENDARVIS: 19, I'm sorry.

25 THE COURT: Plaintiff's Exhibit 19.

1 MS. MCWILLIAMS: No objection.

2 THE COURT: Without objection.

3 (December 16 email marked and received in
4 evidence as Plaintiff's Exhibit 19).

5 BY MR. PENDARVIS:

6 Q Dr. Adams, does it appear Mr. Mack has
7 reviewed the materials, the draft materials Mr.
8 Hanlin has sent to him two days earlier?

9 A Yes, it does. He says that he has looked at
10 them and he's got detailed comments about them.

11 Q Does this email address any concerns Mr. Mack
12 is raising about the content of the draft
13 documents?

14 A Yes, it does. Again it is dealing with this
15 bizzare arrangement where they are not representing
16 the person who needs the representation and advice
17 and he is expressing concern that if they give the
18 advice that Mr. Hanlin wants to give to Mr. Justice
19 who needs it that that might create an
20 attorney-client relationship with Mr. Justice and
21 that they should be careful and not do that because
22 they want to protect their relationship being only
23 with Y.E.S., Mr. McLeod's company.

24 Q Do you see the reference in that first bullet
25 point where it says, the email says, "This makes

1 us, quote, aider, close quote, or abetter, close
2 quote, if things go bad," question mark?

3 A Yes, sir. It's referring to that language in
4 the retainer agreement, this new hourly fee
5 agreement that Mr. Hanlin has drafted but it is
6 also the same language as in the contingent fee
7 agreement that we discussed earlier that the law
8 firm is assisting in creation of the conservation
9 easement.

10 Q In legal terms what does aider or abetter
11 mean?

12 A Well, if somebody is an aider or abetter it
13 means they are responsible for the bad acts of some
14 other person. Oftentimes it refers to criminal
15 behavior where somebody might commit a crime by
16 aiding and abetting a criminal in that criminal
17 conduct itself but it also can have application in
18 terms of civil liability. If somebody is engaged
19 in fraud, for example, an aider or abetter could be
20 jointly and severally liable with the person who
21 actually perpetrated the fraud directly.

22 Q We have looked, Dr. Adams, at the December
23 5th fee agreement marked as Exhibit 10 and you
24 described for the jury the provisions and the scope
25 of services section that described consultations

1 with the provision of legal tax advice and
2 consultations with tax advisers to Jim Justice. Do
3 you remember that?

4 A Yes.

5 Q In reference to this email marked as Exhibit
6 19, are there opinions Mr. Mack is making about the
7 import of that language, as to whether there is
8 going to be a possible claim that was an
9 attorney-client relationship with Justice based on
10 that language?

11 MS. McWILLIAMS: Object to the form of the
12 question, foundation.

13 MR. PENDARVIS: It's in both documents.

14 THE COURT: Rephrase it.

15 Q Is Mr. Mack expressing any opinions about the
16 second bullet point on paragraph, second paragraph
17 of the email?

18 A Yes, sir, he is.

19 Q Can you describe those opinions he expressed?

20 A Well, he is expressing concern that if as is
21 required in the December 5th fee agreement and
22 would be required in the new proposed hourly fee
23 agreement, if they were consulting with Y.E.S.'s
24 client's tax adviser, that is Mr. Justice's tax
25 adviser, "This makes us the tax adviser's lawyer

1 and therefore Y.E.S.'s client's lawyer." He is
2 saying, "If we advise Jim Justice's lawyer or tax
3 adviser who we know is David Harrah, CPA, that
4 makes us Mr. Justice's lawyers, too. It needs to
5 be clear we're only providing advice to Yancey and
6 no one else."

7 Q The same question for the second section that
8 addresses the alert letter draft that we saw
9 attached to the prior email, and the alert letter,
10 as to the alert letter, is Mr. Mack expressing any
11 opinions in that paragraph?

12 A Yes, sir. He's expressing concern that the
13 letter would provide legal advice to Mr. Justice's
14 tax adviser. He provides a copy of the booklet
15 with the suggestion it be reviewed by the tax
16 adviser and Y's client's attorneys. "As you say in
17 your email, the letter offers little advice but
18 once we start offering any advice we are on the
19 hook for the whole thing."

20 Q And below that is there another opinion
21 stated below the paragraph you just read?

22 A "With respect to the assisting language, the
23 letter also says, as does the agreement, that you
24 were assisting in the establishment of the
25 easement. That raises the same concern as the

1 retainer letter. It sounds like we're in a joint
2 venture with Yancey."

3 Q Dr. Adams, if you turn back to Exhibit 15
4 which is the -- well, actually do it on this one
5 right here. At the bottom portion of this email it
6 shows that Mr. Hanlin sent the earlier part of this
7 email thread to Mr. Mack and there were copies to
8 Fred Crawford and Tony Rebollo. Do you find --
9 what is your opinion about the decision Mr. Mack
10 made to include all the executive committee members
11 as copied on his comment to Mr. Hanlin's draft
12 documents?

13 MS. MCWILLIAMS: Object to form, calls for
14 speculation.

15 MR. PENDARVIS: I will rephrase it.

16 THE COURT: I think you can phrase a
17 hypothetical question.

18 MR. PENDARVIS: I will rephrase it.

19 BY MR. PENDARVIS:

20 Q The executive committee was dealing with
21 extraordinary matters, is that your prior
22 testimony?

23 A That is what the testimony in this case was,
24 that is what they did routinely, was dealing with
25 extraordinary matters.

1 Q Does it appear that Mr. Mack considered the
2 content of these letters something extraordinary
3 for the law firm by the fact that he included all
4 of the executive committee members as copied on his
5 email?

6 A Yes, it does.

7 Q Dr. Adams, I have passed an email to you
8 dated a few days later, the email thread begins on
9 the second page, in response to the email we just
10 looked at. Can you see on the second page an email
11 from Mr. Hanlin responding to Mr. Mack and all the
12 other executive committee members? Do you see
13 that?

14 A Yes, sir, on the 16th, 7:25 p.m.

15 Q Yes, sir, and it apparently has another set
16 of revisions to the document, to the draft document
17 as referenced in the email?

18 A That is what he says, yes.

19 Q I want to focus more on the follow-up to
20 that. Have you seen the follow-up response Mr.
21 Tony Rebollo made on December 17th, 2007?

22 A Yes, sir, I have.

23 Q Based on this email?

24 A Yes, sir.

25 Q And have you relied upon it in forming your

1 opinions in this case?

2 A Yes, sir, I have.

3 MR. PENDARVIS: I would like to move into
4 evidence Exhibit 20.

5 MS. McWILLIAMS: No objection, Your Honor.

6 THE COURT: Exhibit 20 without objection.

7 (December 17, 2007, email marked and received
8 in evidence as Plaintiff's Exhibit 20).

9 BY MR. PENDARVIS:

10 Q Could you describe for the jury --

11 THE COURT: Wait a minute.

12 MR. PENDARVIS: I'm sorry.

13 THE COURT: You're quick.

14 Q All right. Can you describe for the jury,
15 Dr. Adams, read to the jury the first sentence,
16 please?

17 A "I still don't fully understand RCPR's role."

18 Q And can you describe, without having to take
19 us through every sentence of this email, the
20 general concerns that Mr. Rebollo is expressing in
21 this email?

22 MS. McWILLIAMS: Objection, Your Honor,
23 foundation and the document speaks for itself.

24 MR. PENDARVIS: Your Honor, the document
25 speaks of many regulatory matters and detailed tax

1 issues, legal issues that we have an expert that
2 can explain to the jury in more simple form that is
3 referenced in this email.

4 THE COURT: Rephrase your question one more
5 time.

6 MR. PENDARVIS: Sure.

7 BY MR. PENDARVIS:

8 Q Dr. Adams, is Mr. Rebollo concerned about the
9 nature of this representation, the structure of the
10 relationship, this representation for Y.E.S., as
11 reflected in this email?

12 MS. McWILLIAMS: Object to form, calls for
13 speculation.

14 THE COURT: I think I sustain that objection
15 because the letter speaks for itself.

16 Q Is Mr. Rebollo asking whether Mr. Hanlin or
17 any other members of the law firm have researched
18 various issues that are germane to the
19 representation?

20 MS. McWILLIAMS: The same objection, Your
21 Honor, the letter reads as it is.

22 THE COURT: I agree with her, I sustain that
23 objection.

24 Q Okay, let's do it this way. Is Mr. Rebollo
25 concerned that Richardson Plowden may have some

1 exposure based on the nature, exposure as to
2 liability based on the nature of the relationship
3 between Y.E.S. as the conservation consultant and
4 Richardson Plowden as its lawyer in a transaction
5 that deals with some of the tax issues addressed in
6 this letter?

7 MS. McWILLIAMS: Objection, speculative and
8 leading.

9 THE COURT: Sustained as to leading.

10 Q Here is what we'll do. Are you aware, Dr.
11 Adams, of anyone, Mr. Hanlin or any other member of
12 Richardson Plowden ever discussing with Yancey
13 McLeod any of the concerns addressed in this
14 lengthy email?

15 A No, sir, I am not.

16 Q Do you have an opinion whether they had an
17 obligation to discuss with Yancey Environmental
18 Solutions concerns expressed in this email?

19 A Yes, sir, I do, because the concerns being
20 expressed here are that there are very serious
21 issues generated by the fact that Mr. Justice is
22 not the firm's client and all of these technical
23 tax problems that Mr. Rebollo as the senior tax
24 partner in the firm is concerned about, he doesn't
25 know how they are going to be able to warn Mr.

1 Justice, how they are going to be able to advise
2 Mr. Justice about this. He keeps asking over and
3 over and over again has anybody advised him, is
4 anybody going to advise him. These are things that
5 he feels the firm has an obligation to do but he
6 can't see how the firm is going to be able to do
7 it. It goes back to that first sentence. "I
8 still," on the 17th of December, "don't fully
9 understand our role, I'm still scratching my head
10 trying to figure out why we're representing Y.E.S.
11 and not the landowner here who needs our advice."

12 MS. McWILLIAMS: Objection, Your Honor, that
13 is a mischaracterization of the document itself.

14 THE COURT: Sustained.

15 Q Dr. Adams, in your understanding of Yancey
16 McLeod's, you know, role as a lawyer, if this
17 information had been conveyed to Mr. McLeod do you
18 believe Mr. McLeod has the experience and
19 competence necessary to accurately convey the
20 concerns to Jim Justice and the companies that own
21 the farm?

22 A Oh, no.

23 MS. McWILLIAMS: Objection, speculative.

24 Q Would Mr. McLeod be able to ask the questions
25 and obtain the type information that would be

1 necessary to respond to the questions raised in
2 Exhibit 20?

3 A I don't see how. These are questions about
4 reportable transactions, covered opinions and all
5 sort of things that he wouldn't know what the ins
6 and outs of that was. When we ask a question of
7 the client usually we get an answer back that
8 requires a follow-up question and we dig a little
9 bit deeper, and if you don't understand the issues
10 you're dealing with you have no idea whether you
11 just got an answer that is useful or whether you
12 have to pursue it further and ask more questions
13 and get more information. He couldn't do that.

14 Q Is there any risk in having Mr. McLeod relay
15 information from the landowner back to the law firm
16 so that advice could be rendered?

17 MS. McWILLIAMS: Object to form, Your Honor,
18 without foundation, any facts in this case.

19 THE COURT: I will sustain the objection.
20 You can ask a different question.

21 Q If Mr. McLeod had been asked, if Richardson
22 Plowden had asked Mr. McLeod and Yancey
23 Environmental Solutions to pose these questions to
24 Mr. Justice and the people in the company,
25 representatives, would there be a risk that there

1 would be a communication relayed back to the law
2 firm to render legal advice would be not accurate?

3 A Of course, and that is not the only risk.
4 There is a risk that if they put Mr. McLeod in the
5 position of a conduit between Mr. Hanlin who is
6 doing the analysis and applying the law and giving
7 the advice and Mr. Justice who is receiving it, if
8 Mr. McLeod as a lawyer is asked to relay that
9 advice and to question Mr. Justice and come back
10 with the information there is a danger that he's
11 now become Mr. Justice's lawyer for these tax
12 questions that he's not competent to handle. If
13 something goes wrong it might well be that Mr.
14 McLeod would have malpractice liability to Mr.
15 Justice because of the untenable position Mr.
16 Hanlin would have put him in in that hypothetical.

17 Q Dr. Adams, before we move to this next
18 exhibit, have you seen any emails or letters or
19 other forms of communication between Mr. Hanlin and
20 Yancey Environmental Solutions suggesting that
21 there may be problems in getting the easement
22 closed before December 31st?

23 A No, sir, none at all.

24 Q As the lawyer for Yancey Environmental
25 Solutions do you have an opinion on whether Mr.

1 Hanlin would have an obligation or duty to convey
2 that information if he had concerns that the
3 easement would not close that year?

4 A Oh, absolutely. Rule 1.4 as well as our
5 fiduciary duty, rule 1.4 of the rules of
6 professional conduct require us to keep the client
7 apprised of any important developments in a matter.
8 They require us to give the information to the
9 client the client needs to make any decisions and
10 in this case if there was a serious risk it won't
11 get closed during 2007 and Mr. Justice won't get
12 the tax deduction that year Mr. McLeod under the
13 consulting agreement has an obligation to let Mr.
14 Justice know that and so certainly Mr. Hanlin has
15 an obligation to Y.E.S., to tell Mr. McLeod if he
16 doesn't think that it's going to get closed or if
17 he thinks there is a significant risk that he can't
18 get everything done to close the transaction by the
19 end of the year.

20 Q Now, I passed up an exhibit to you that is
21 going to be, that is a draft letter that is dated
22 December 19, 2007. Have you seen this draft
23 document before today?

24 A Yes, sir.

25 Q Have you relied upon it in forming your

1 opinions in this case?

2 A Yes, sir.

3 MR. PENDARVIS: Your Honor, I would like to
4 offer into evidence Exhibit 21.

5 MS. MCWILLIAMS: No objection, Your Honor.

6 THE COURT: Exhibit 21 without objection.

7 (December 19, 2007, letter received in
8 evidence as Plaintiff's Exhibit 21).

9 BY MR. PENDARVIS:

10 Q Dr. Adams, if there was a material concern
11 that the transaction would not close by the end of
12 the year would it be proper for a lawyer to spend
13 time and effort drafting an opinion letter or
14 addressing concerns about the transaction?

15 A I'm sorry, I don't understand your question.

16 Q What would be the purpose of a lawyer
17 drafting a three page, almost four page letter if
18 the transaction being contemplated was not going to
19 close in the calendar year?

20 A I don't know what purpose it would have if
21 the transaction wasn't going forward.

22 Q I want to direct your attention to the first
23 full paragraph. Does it appear from the leading
24 paragraph in this document that Mr. Hanlin is
25 conducting detailed tax research with regard to the

1 Justice conservation easement?

2 A Yes, it does.

3 Q Let me ask you this for the jurors' benefit.

4 Can you describe generally what the analysis Mr.

5 Hanlin is applying to the facts of this case and

6 the purpose for this analysis --

7 let me rephrase that question. Can you

8 generally describe the purpose of the analysis Mr.

9 Hanlin is conducting and expressing in this letter?

10 MS. McWILLIAMS: Objection, foundation.

11 Q Let me rephrase the question. Does this

12 letter express or apply the application of various

13 aspects of the law to the facts of the conservation

14 easement that is contemplated on the Justice

15 project?

16 A Yes, it does.

17 Q What would be the purpose of expressing

18 comment about the law as applied to the facts of

19 this case if the easement wasn't going to close in

20 the year 2007?

21 MS. McWILLIAMS: Object, calls for

22 speculation.

23 THE COURT: I sustain the objection.

24 Q Fair enough. Let's go to the last page, Dr.

25 Adams. I direct your attention to the first full

1 paragraph, four lines down, that begins with since
2 that time.

3 A I'm sorry, what paragraph?

4 Q The sentence that starts since that time?

5 A Yes, sir, I see that.

6 Q Mr. Hanlin states in this sentence, "Since
7 that time our best information for Mr. Justice's
8 advisers is that while the property might be titled
9 in the name of a limited liability company, this
10 and other property may have been treated by Mr.
11 Justice's tax advisers as if they had been
12 contributed to an S corporation several years ago."

13 Do you see that?

14 A Yes, sir.

15 Q Does this provide the jury with an example of
16 the problem caused by the structure of the
17 relationship in this scenario?

18 MS. McWILLIAMS: Objection, leading.

19 THE COURT: Sustained. Let me see the
20 attorneys real quick.

21 (Unrecorded bench conference).

22 THE COURT: Do you need a break?

23 JUROR: They want to leave.

24 THE COURT: They want to go home. That makes
25 two of us, thirteen of us, fourteen of us.

1 Okay. They're ready for a break, this is a
2 good time to break this evening, you can bring Dr.
3 Adams back in the morning.

4 MR. PENDARVIS: I've got two documents left
5 that should be fairly short.

6 THE COURT: Can you all handle that?

7 MR. PENDARVIS: Take a break.

8 THE COURT: Do your two documents and then
9 we'll break and do cross tomorrow.

10 (Unrecorded bench conference).

11 THE COURT: All right. I'm going to let you
12 all go home for the evening. Now, here is what I
13 want to know. These lawyers will be here when I
14 tell them to. How early do you all want to start
15 working tomorrow? Do you want to start at 9:00?

16 JUROR: We all decided to start at 9:00.

17 JUROR: No later.

18 THE COURT: I was the first judge in the
19 courthouse this morning at 8:25 and Miss Perry got
20 me parked. I will come at 8:30 if you all want to
21 come at 8:30. The lawyers will be here when I tell
22 them to. The courthouse doesn't really unlock, the
23 bailiffs get here to unlock the doors about 8:00
24 but they don't unlock the courtroom, the lawyers
25 have a lot of stuff to get in here at 8:30. 8:45

1 is probably a more predictable time to come in and
2 get to work. I have school drop off, I don't know
3 what you all's obligations are.

4 JUROR: 9:00.

5 THE COURT: 9:00 o'clock, all be in the jury
6 room at 9:00 and we'll get started 9:00 sharp. I
7 will have candy with me. You all are done for the
8 day, leave your pad in the seat, leave them in your
9 seat. They may have that jury room fixed by then.
10 You all have better accomodations now, I
11 understand. So, you all leave your pad here. You
12 cannot begin discussing the case, we'll see you all
13 in the morning first thing.

14 (The jury was excused from the courtroom).

15 THE COURT: All right. Mr. Pendarvis, do we
16 need to proffer anything before in the morning
17 about these documents right now? Do we need to do
18 that? Do you need to be heard on that?

19 MS. McWILLIAMS: I'm not sure exactly what
20 the documents are, Your Honor.

21 MR. PENDARVIS: Do you want me to talk to her
22 about this?

23 MS. McWILLIAMS: Your Honor, I think we need
24 to be heard briefly on this, if I understand what
25 the proffer is.

1 THE COURT: Give me a summary of what the
2 proffer would be.

3 MR. PENDARVIS: The proffer is going to be
4 that on Mr. Hanlin's computer on December 19th,
5 with modification date by meta data on December
6 19th, the day before they terminated their
7 relationship Mr. Hanlin had a draft conservation
8 easement. He had a client Yancey Environmental
9 Solutions he is representing and Dr. Adams is going
10 to testify about the obligations a lawyer has to a
11 client, when they terminate the relationship, to
12 deliver to the client information. This is all
13 Rule 1.16. On terminating a relationship they have
14 a duty to assist the client, giving the client
15 papers. Dr. Adams is going to talk in this case
16 these documents weren't produced until way in the
17 litigation and is part of the sanctions motion.
18 The fact this lawyer had this document on his
19 system and never told the client about it and the
20 fact we didn't even get it until --

21 THE COURT: You got it.

22 MR. PENDARVIS: My point is he didn't
23 disclose it to his client when he terminated the
24 relationship is material to the claim, the duty,
25 fiduciary duty and the duty of a lawyer and the

1 duty under Rule 1.16 that Dr. Adams is well
2 qualified to testify about, whether this lawyer had
3 a duty to do it and if he did, whether that was a
4 breach of the duty and the consequences and those
5 things.

6 MS. McWILLIAMS: Well, Your Honor, if in fact
7 the deal had not closed because nobody could find
8 the easement, nobody had an easement prepared.
9 That sort of things, then it might be a different
10 case. that is not what happened. What happened
11 was on the 19th or whenever these documents were on
12 the system, but on the 20th, on the 19th we get the
13 IRS notice, it comes to us and on the 24th Y.E.S.,
14 is that correct, Y.E.S. postponed the transaction.

15 There is no evidence anywhere the transaction
16 was held up or could not close because no easement
17 was ready. In fact what COLT will testify, Sue
18 Green, the executive director, she drafted it, she
19 was working on it and then she got word from Mr.
20 McLeod that Mr. Justice had postponed the
21 transaction. So, this doesn't have anything to do
22 with anything. If there were some evidence that,
23 gee, if we had only had a draft easement document
24 we could have closed it, but that's not this case.

25 THE COURT: Tell me, Mr. Pendarvis, how is it

1 Mr. Hanlin's work product or something he owes to
2 his client, if he didn't draft it but it was sent
3 to him and he made modifications to it in some
4 fashion, and I don't know how sophisticated the
5 modifications were but it was represented to the
6 Court earlier there was just very insubstantial
7 changes like paragraph numbers or something of that
8 sort. I don't know that to be the fact but that is
9 what was represented to the Court in earlier motion
10 this morning.

11 MR. PENDARVIS: It matters not, Your Honor,
12 because the duty the lawyer has when terminating,
13 I'm reading from 1.16, upon terminating, "Upon
14 termination of representation a lawyer shall take
15 the steps to the extent reasonably practicable to
16 protect the client's interest. Such as giving
17 reasonable notice to the client, allowing time for
18 employment of other counsel, surrendering papers
19 and property to which the client is entitled." It
20 goes on.

21 Well, if this law firm is retained to
22 represent Y.E.S. on the conservation easement and
23 the lawyer has a conservation easement document --

24 THE COURT: Hang on. Is the factual question
25 going to be was the scope of the representation to

1 only provide tax advice? That is what we were
2 getting to a minute ago, "All we got to do is
3 provide tax advice and I don't see anything else.
4 We don't have to prepare any documents," that was
5 just discussed a moment ago. What did Richardson
6 Plowden have to do for Y.E.S., and now you're
7 adding to it something additional?

8 MR. PENDARVIS: No, Your Honor, I'm not
9 adding a thing.

10 THE COURT: It is changing on me.

11 MR. PENDARVIS: No, it's not at all. Dr.
12 Adams said this was the lawyer who did the
13 transaction. If you believe that, the defendant's
14 interpretation, because the first sentence in that
15 entire fee agreement letter says, "To assist you in
16 the creation of a conservation easement on this
17 property."

18 THE COURT: I agree with that but I thought
19 there was testimony moments ago as to the concern
20 of Richardson Plowden, "All we're doing is giving
21 tax advice, we don't have anything else to do, is
22 that really all we're doing? Hadn't you created
23 that question of fact, what we were supposed to be
24 doing?"

25 MR. PENDARVIS: The lawyers, the internal

1 lawyers are concerned about the problems with the
2 relationship and the information they do not have
3 because they're not representing the real, the
4 beneficiary of all their work and the idea this
5 lawyer has this conservation document and doesn't
6 give it to his client is material to whether he
7 satisfied his fiduciary duty, it is material to
8 whether he satisfied the rules of conduct 1.16 in
9 terminating this representation. Dr. Adams
10 believes this is a very material item of evidence
11 that should have been, as a fiduciary, disclosed to
12 the client that, "I've got it, maybe this will help
13 you, I'm quitting, here, we have this conflict."

14 THE COURT: You need to call COLT who
15 prepared it.

16 MR. PENDARVIS: Well, then there is a
17 question on whether it has been prepared by Mr.
18 Hanlin.

19 THE COURT: I didn't think there was a
20 question about that. I thought you all -- I have
21 heard so much I'm trying to keep clear as --

22 MR. PENDARVIS: There is testimony from Sue
23 Green that says, "I began drafting it but to the
24 extent this lawyer has got it and is prepared to
25 assist," and on top of that, remember he is on the

1 Board of COLT, so he's got several hats going on
2 here. If COLT prepared it and he didn't assist in
3 it maybe that, Dr. Adams will talk about the
4 unauthorized practice of law, if this
5 representation --

6 THE COURT: We're not going there.

7 MR. PENDARVIS: Well, Your Honor, what I was
8 going to say is this. If this lawyer was going to
9 allow COLT to prepare and record an easement
10 document and say, "We don't have to draft
11 anything," and allow COLT to prepare a recorded
12 document that's the unauthorized practice of law.

13 THE COURT: I'm not disputing that but I
14 thought that is what you were saying a moment ago
15 as to the scope of the representation, was that
16 Richardson and Plowden was concerned that the only
17 thing they were doing was providing tax advice. I
18 agree with you they probably were going to prepare
19 a conservation easement, it appears to me from what
20 I have heard thus far they didn't, somebody else
21 did and they reviewed it and maybe made some
22 changes to it but they didn't prepare it. Maybe
23 they were going to scrap that one and do a whole
24 new one, I don't know.

25 MR. PENDARVIS: Candidly this is a very

1 preliminary draft, a lot of work needed to be done
2 on this document. The point being the law firm had
3 it and keeping in mind, too, the client's view on
4 the scope of the representation that is reasonable,
5 that is what the lawyer recognizes, the lawyer
6 can't say, "No, no, I interpret it this way." So
7 having it from the client's perspective, relying on
8 their fiduciary they trusted to help finish this
9 deal and the lawyer had this document, I really
10 can't see how it can't be material to Dr. Adams'
11 opinions and whether they satisfied their duty and
12 sent it to his client.

13 MS. MCWILLIAMS: Your Honor, this client
14 postponed the transaction. There is no evidence
15 anywhere, that is like saying, "Gee, I should have
16 done all this stuff but as a matter of fact I'm
17 going to postpone the transaction." Mr. McLeod
18 postponed the transaction with Justice without any
19 input, influence or otherwise and there is no
20 evidence --

21 THE COURT: They had already backed out.

22 MS. MCWILLIAMS: We were already gone and he
23 made the decision and there is no evidence he said,
24 "Oh, I had to postpone it because I didn't have the
25 easement document." That is not what the testimony

1 is. What he said was, "I told Mr. Justice about
2 the IRS investigation," nothing about his lawyers,
3 there is not one bit, and every witness, Mr. Harrah
4 who was on the phone said the same thing, he never
5 said anything about his lawyers not being there or
6 his lawyer has dropped him or his lawyer abandoned
7 him or nothing.

8 THE COURT: What I believe is this. If this
9 was a document prepared or modified by Mr. Hanlin I
10 believe that's part of the file that Mr. McLeod
11 should have gotten upon termination and I think for
12 that purpose Professor Adams can testify to it. As
13 to the scope of what all it should contain and all
14 that sort of thing --

15 MR. PENDARVIS: We're not going there, Dr.
16 Adams isn't going to say paragraph three should
17 have had this, the second page should have had
18 that.

19 THE COURT: The fact it is a draft, I do not
20 want to get too deep into that, saying, "It is a
21 draft and not very good work," I can't get there
22 because if they had stayed on I'm certain there
23 would have been more work, there would have been
24 work done up to the day it was signed. I have done
25 enough real estate closings to know you work on

1 then, print them out the day of closing, I have
2 done it.

3 MR. PENDARVIS: I would agree.

4 THE COURT: I don't want to impose a
5 responsibility and saying this is just an original,
6 an initial draft, it is really not very good, I
7 don't want to get into that.

8 MR. PENDARVIS: We're not. It is the idea,
9 Dr. Adams isn't going to be give any opinions on
10 the details of the conservation easement. His
11 opinions in terms of this and responsibility of his
12 lawyer to disclose this document, give it to his
13 client, advise him about it, and Rule 1.16 clearly
14 obligates him to surrender every paper.

15 MS. McWILLIAMS: He has to surrender papers
16 if he asks for it. He doesn't just have to turn
17 over the file. Mr. McLeod never asked for this
18 file. He got word that it was terminated and then
19 he turned around, hired a new lawyer and postponed
20 the transaction. There is no evidence anywhere
21 that, you know, once he hired counsel, you know,
22 three years later, that is a different story, but
23 there is no evidence that the existence or
24 non-existence of that easement, I mean, Sue Green
25 has had it in her file the entire time. They just

1 never asked for it. In any event, there is no
2 evidence that that has anything to do with why the
3 transaction did not close.

4 MR. PENDARVIS: And that is not what we're
5 asking, dealing with, Your Honor. This has nothing
6 to do with causation. What we're asking, what this
7 deals with, if you look at Rule 1.16 there is
8 absolutely no requirement of the client to ask, it
9 says the lawyer shall, a lawyer shall, final steps,
10 including, and it goes on to say, surrendering of
11 papers, lawyer shall, it doesn't require the client
12 to make an affirmative request, they don't require
13 the client to go inquire of third parties from
14 which the lawyer got materials, the client ought to
15 be able to rely on the lawyer saying, "Here is your
16 file, I'm terminating this representation, you
17 know, I'm going to assist you and make sure there
18 is no adverse consequences."

19 THE COURT: You know, there is kind of a
20 double edged sword you're working on. Surrender
21 papers, I always envisioned that being a client
22 came to me and says, "Look, here is everything I've
23 got for my divorce, this is my will, deed to my
24 house," things like that which is the client's
25 possessions, not created by the lawyer. What is

1 the risk to Mr. Hanlin, he says here is the draft
2 of an easement. Mr. McLeod, he is not very bright,
3 so he just takes it over there to Justice and
4 Justice sees it and it is not very good, then the
5 owner throws out the whole thing. I know it didn't
6 happen, that isn't the scenerio you want to go
7 down. I don't want to get into all these scenerios
8 how bad it could have gone, it could have gone
9 terrible.

10 MR. PENDARVIS: The whole point, it is not
11 the substance of this easement document.

12 THE COURT: But you keep stepping a little
13 closer.

14 MR. PENDARVIS: The point I'm making is, this
15 statement in Rule 1.16 doesn't say surrendering
16 papers the client brought the lawyer, it says to
17 which the client is entitled, and if the client
18 isn't entitled to a conservation easement document
19 that --

20 THE COURT: A draft, you mischaracterized it,
21 it's a preliminary draft.

22 MR. PENDARVIS: It's not a recorded
23 conservation easement, obviously it's got word
24 processing marks, blanks all through it, but the
25 point being the lawyer had this document material

1 to the transaction. Dr. Adams, I believe is going
2 to testify the client was entitled to know about
3 it and receive a copy, at least say, "Oh, by the
4 way, I do have a draft Sue Green sent me," but he
5 didn't say that, he didn't produce the document and
6 it wasn't until way late in this litigation we got
7 it.

8 THE COURT: We're not getting back into that.

9 MR. PENDARVIS: I understand that but I'm
10 saying the reality is in terms of whether the
11 lawyer produced it, he didn't, and the fact he
12 didn't is material to whether he satisfied his
13 duties, which is exactly what Dr. Adams is going to
14 be testifying about.

15 THE COURT: All right. I have ruled I'm
16 going to let you do it for that limited purpose but
17 I don't want to get a dispute, very far afield.

18 MR. PENDARVIS: Thank you.

19 THE COURT: We're really narrow on this hair
20 splitting.

21 All right, see you all in the morning.

22 MS. MCWILLIAMS: Start at 9:00?

23 THE COURT: Yes, ma'am. I will be here at
24 8:30, 8:45.

25 (Recessed at 6:07 p.m., February 28, 2012).

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2
3
4 I, the undersigned Henry P. Young, Official
5 Court Reporter for the Eighth Judicial Circuit of
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate, and complete
8 transcript of record of all the proceedings had and
9 evidence introduced in the trial of the captioned
10 case in the Circuit Court for Richland County,
11 South Carolina, on the 28th day of February, 2012.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14 October 8, 2012
15
16
17

18 Henry P. Young

19 Court Reporter
20
21
22
23
24
25

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2010-CP-40-3297

2 COUNTY OF RICHLAND

3
4 YANCEY ENVIRONMENTAL)
5 SOLUTIONS, LLC, ET AL,)

6
7 -vs-)

8 RICHARDSON PLOWDEN &)
9 ROBINSON, ET AL,)
10 Defendants.)

11 February 27-March 6, 2012

12 B E F O R E:

13 HONORABLE EUGENE GRIFFITH, JR.

14
15 A P P E A R A N C E S:

16 THOMAS A. PENDARVIS, Esquire
17 CAREY KERNEY, Esquire
Attorneys for the Plaintiffs

18 SUSAN P. McWILLIAMS, Esquire
19 DANIEL C. LEONARDI, Esquire
Attorneys for the Defendant

20
21 Henry P. Young

22 Court Reporter

23
24
25 VOLUME II of V

1 (Reconvened at 9:00 a.m., February 29, 2012).

2 MR. LEONARDI: Your Honor, we would like to
3 make an additional record on the hearsay issue.

4 THE COURT: I promised the jury 9:00 o'clock.
5 You all weren't ready when I got here.

6 MR. LEONARDI: I'm ready, Your Honor.

7 THE COURT: Go ahead.

8 MR. LEONARDI: Yesterday the plaintiffs
9 handed up Pope versus Heritage Communities, that is
10 a case directed to amalgamation of entities and in
11 that case it stands for the proposition there are
12 certain circumstances under which you can ignore
13 corporate entities if they have common interest but
14 there has to be information in the record regarding
15 the relationship between those entities, and in
16 this case we have no information regarding the
17 relationship between Black River Farms, Justice
18 Farms, LLC, and James C. Justice Companies. All we
19 know for sure is the record owner of the property
20 is Black River Farm, LLC, and Mr. Miller was
21 deposed as the designee for Justice Family Farms,
22 LLC, which is a different entity that is not
23 referenced in the records for who owns that
24 property.

25 Furthermore, the reference yesterday to

1 disregarding entities, that is entites that are
2 disregarded for tax purposes, that doesn't mean
3 they don't exist altogether, as Your Honor pointed
4 out.

5 Now, the primary issue that the defendant
6 feels is the important one here is the hearsay
7 issue, not necessarily the identity of the
8 entities. Now, yesterday the plaintiffs
9 acknowledged that Mr. Justice's statements that Mr.
10 Terry Miller repeated during his deposition should
11 be excluded as hearsay. Now, we believe that that
12 should go a step farther for a couple reasons.
13 What the plaintiffs would like is Mr. Miller to be
14 able to testify as to the intent of Justice Family
15 Farms.

16 Now, Mr. Miller made a couple things clear
17 in his deposition. One was that Mr. Justice makes
18 all the decisions for the Justice entities. He was
19 asked the question, "Mr. Justice, II, is the
20 ultimate decision maker in these --"

21 THE COURT: Hold on a second. Is Mr. Justice
22 coming?

23 MR. PENDARVIS: I have not gotten any news
24 from that, I still don't have a commitment. I made
25 the request, Your Honor, I can't control the man.

1 THE COURT: I understand.

2 MR. LEONARDI: And Mr. Miller responded,
3 "He's the majority owner, that's correct, and the
4 ultimate decision maker. Question. The buck stops
5 with him, so to to speak? That's correct."

6 The first point is Mr. Justice makes the
7 decisions for those entitites. The second point is
8 Mr. Miller made it clear during his deposition that
9 the basis for his testimony regarding the intent of
10 Justice Family Farms was based solely on his
11 conversation with Mr. Justice.

12 THE COURT: Let me ask this. I understand
13 your motion. Can we get to that right before the
14 witness, a break time? I really want the jury in
15 here.

16 MR. LEONARDI: Yes.

17 THE COURT: I hate to interrupt you. Once we
18 get the jury working I want them working, they said
19 9:00 o'clock, I promised them. You all make a liar
20 out of me, I don't like that.

21 MR. LEONARDI: I understand.

22 THE COURT: I understand your motion but I'm
23 not ready to listen to that. You will be heard.

24 All right.

25 THE CLERK: Ready for the jury?

1 THE COURT: Yes, ma'am.

2 MR. PENDARVIS: Call Dr. Adams back up to the
3 stand?

4 THE COURT: You may.

5 (The jury returned to the courtroom).

6 BAILIFF: All the jurors are present, Your
7 Honor.

8 THE COURT: All right, ladies and gentlemen,
9 I was a little bit late getting you in here,
10 traffic was worse on I-26 this morning than it was
11 yesterday, so it took me an hour and 20 minutes
12 from my house, drop my son off and get here, so I
13 was a few minutes late. That would be my apology
14 to you.

15 All right. Dr. Adams is still testifying
16 and he's still under oath.

17 You may continue.

18 MR. PENDARVIS: Your Honor, may we approach
19 quickly for the document we were talking about
20 yesterday, to be sure everybody is clear?

21 THE COURT: Yes.

22 (Unrecorded bench conference).

23 BY MR. PENDARVIS:

24 Q Good morning, Dr. Adams.

25 A Good morning, sir.

1 Q Did you have a good evening?

2 A I did indeed, thanks.

3 Q Dr. Adams, I passed up to you a document
4 styled conservation easement. Have you seen this
5 document before today?

6 A Yes, sir, I have.

7 Q And have you relied upon it in forming your
8 opinions?

9 A Yes, sir, I did.

10 Q I will represent to you this document was
11 produced by the defendant in the course of
12 discovery from their file server and in their
13 computer. Have you developed any opinions about
14 any duties Mr. Hanlin had with regard to this
15 document?

16 A Yes, sir, I have. There are several opinions
17 that I have with regard to this. First, it of
18 course indicates that he was drafting documents.
19 This is the, this is the document for the creation
20 of the conservation easement in order to avail Mr.
21 Justice to take the tax deduction. There is
22 evidence that Mr. Hanlin had not only possession of
23 this but had made edits of it, as we would expect,
24 reviewed it, which of course would be absolutely
25 necessary. The law is crystal clear that a

1 document such as this must be created by or created
2 under the supervision of a lawyer, that it would be
3 illegal for a lay person --

4 MS. McWILLIAMS: Objection, Your Honor,
5 beyond the scope of what the Court has already
6 ruled. May we approach?

7 THE COURT: Yes.

8 (Unrecorded bench conference).

9 BY MR. PENDARVIS:

10 Q Thank you, Dr. Adams. I have a question.
11 Here is the question. Did Mr. Hanlin have any
12 duties about disclosing or discussing this document
13 with his client Y.E.S.?

14 A Of course.

15 Q Can you elaborate further?

16 A As I said, this is the central document of
17 the project, it is the crucial document that has to
18 be executed and recorded to create the easement to
19 allow the donation to take place. The lawyer has a
20 duty to keep his client apprised of significant
21 developments in the representation and certainly
22 this being a key step, perhaps the single most
23 important step, Mr. Hanlin would have an obligation
24 to make sure Y.E.S. was aware of this document
25 being drafted, progressing forward, and more

1 importantly if things had not been going forward
2 with this document, if it had not been drafted, if
3 Mr. Hanlin was not working on it he would have the
4 obligation to tell Mr. McLeod, to tell his client
5 Y.E.S., "I don't have this document, not working on
6 it, I'm the lawyer in this, I don't know where the
7 document is, somebody has got to get it to me,
8 we're in danger of not being able to do this by
9 December 31st if I don't have this document."

10 So, the obligation works whether it's a
11 reassurance, "Everything is going smoothly, I've
12 got the key document, I'm working on it," or
13 whether the necessity is to sound a warning, "This
14 is a problem we need to take care of right away,
15 time is running short."

16 Q Are you aware of any communications between
17 Mr. Hanlin and his client Y.E.S. with regard to
18 this particular conservation easement draft
19 document?

20 A No, sir.

21 Q Were there any duties -- you described the
22 duties -- let me ask this. Are you aware of any
23 delivery of this document by Mr. Hanlin at
24 Richardson Plowden to Y.E.S. after they terminated
25 their relationship?

1 A No, sir, they didn't return anything
2 whatsoever to their client after they terminated
3 the relationship so abruptly.

4 MR. PENDARVIS: Your Honor, I would like to
5 move this document in as Plaintiff's Number 22, is
6 the next number.

7 MS. McWILLIAMS: No objection, Your Honor.

8 THE COURT: 22, Plaintiff's Exhibit without
9 objection.

10 (Easement marked and received in evidence as
11 Plaintiff's Exhibit Number 22).

12 BY MR. PENDARVIS:

13 Q Dr. Adams, I have passed to you an email with
14 an attachment dated December 20, 2007. Have you
15 seen this document before today?

16 A Yes, sir, I have.

17 Q Have you relied upon it in forming your
18 opinions?

19 A Yes, sir, I have.

20 Q Can you describe what this letter -- let's
21 take a moment. Who is the letter from, who is the
22 email from?

23 A The email is from Mary Mohr who is Mr.
24 McLeod's sister, one of the employees of Yancey
25 Environmental Solutions.

1 Q Can you read for the jury, we'll pull a copy
2 up, can you read for the jury the content of the
3 email? It's fairly short.

4 A It is. It is to Mr. Hanlin, it says, "Good
5 morning, Hal. I'm attaching a very serious letter
6 from the IRS received in the mail yesterday.
7 Deborah and I have reviewed it," and this is
8 important, "I have not shown this to Yancey and
9 unless you tell me otherwise I do not want him to
10 see this or know about it until after Christmas.
11 Paren, we are not doing well financially, we are
12 literally at the end of the rope, close paren.
13 Deborah and I are most concerned about the cover
14 letter. The documents they are requesting do not
15 bother us so much. Please let us know your
16 thoughts. Mary."

17 Q Have you reviewed the attachment?

18 A Yes, sir, I have.

19 Q Can you explain to the jury what the attached
20 letter is?

21 A The attached letter --

22 MS. McWILLIAMS: Objection, Your Honor,
23 foundation.

24 THE COURT: Sustained.

25 Q Have you developed any opinions from the

1 attachment to this email?

2 A Yes, sir.

3 Q What are those opinions, please, sir?

4 A It's my opinion that this letter from the IRS
5 to Mr. McLeod announcing a wide ranging
6 investigation of all of his activities with
7 relation to conservation easements was the trigger
8 that resulted in the law firm violating its duties
9 to Y.E.S. and precipitously without warning or
10 discussion terminating the representation and
11 thereby destroying this project.

12 MS. McWILLIAMS: Object to that answer, Your
13 Honor, and ask it be stricken.

14 MR. PENDARVIS: Your Honor, the response is
15 his opinions.

16 THE COURT: I think he can provide his
17 opinion, I'll let it stand.

18 MR. PENDARVIS: Your Honor, we move to
19 introduce this exhibit as Plaintiff's 23.

20 MS. McWILLIAMS: No objection.

21 THE COURT: Plaintiff's 23 admitted without
22 objection.

23 (Email marked and received in evidence
24 as Plaintiffs Exhibit Number 23).

25 MS. McWILLIAMS: May we approach, Your Honor?

1 Beg your pardon, Your Honor, just a minute.

2 THE COURT: Okay.

3 MS. McWILLIAMS: Yes, we found it, Your
4 Honor.

5 THE COURT: All right, very well.

6 BY MR. PENDARVIS:

7 Q Dr. Adams, I have passed up a copy of an
8 email mail to you. Have you reviewed this email
9 dated December 20, 2007, in forming your opinions?

10 A Yes, I did.

11 Q Have you formed any opinions after reviewing
12 this letter, this email?

13 A Yes, sir, I have formed opinions based on
14 this. This is an email from Mr. Hanlin to Frank
15 Mack, the managing partner of the law firm, with
16 copies to Fred Crawford and Tony Rebollo, two other
17 partners in the firm, in which he is forwarding the
18 email we just discussed from Mary Mohr, enclosing
19 the letter from the IRS and making four
20 recommendations to the firm about how the firm
21 should react to receipt of this letter.

22 My opinions are that these recommendations
23 are recommendations which if implemented would
24 violate the firm's fiduciary duties to Y.E.S.,
25 would violate the firm's ethical duty, violate the

1 rules of professional conduct and if they had done
2 these things that were recommended by Mr. Hanlin it
3 would result in torpedoing this project and ending
4 any opportunity for Mr. McLeod and Y.E.S. to
5 receive the 1.8 million dollars they were entitled
6 to under the contract with Mr. Justice.

7 Q Dr. Adams, can you assist us in the
8 evaluation the law firm was making in paragraphs
9 two and three as it relates to the rules of
10 professional conduct?

11 A Yes, sir, I can. Paragraph two relates
12 directly to this investigation by the IRS and he
13 says, "I have some involvement in some of the
14 transactions being reviewed. Yancey needs to
15 retain other counsel to assist him with this. I
16 may be conflicted out at some point if not
17 immediately and Yancey would be better served to
18 have other counsel from the beginning and I have
19 advised Mary of this."

20 So, that paragraph is dealing with this new
21 matter that is created by this IRS letter and my
22 opinion is there is nothing wrong with this advice,
23 indeed this is good advice, that with regard to
24 this new matter there is a potential for a conflict
25 developing down the road and it is always wiser for

1 a client to start out with a lawyer who doesn't
2 have that hanging over his head and it certainly
3 was good advice to Mr. McLeod that he should get
4 other counsel to represent him in responding to the
5 IRS letter.

6 The third paragraph simply says without any
7 explanation, justification, reasoning at all, "We
8 should terminate any involvement with these
9 projects." This is talking about terminating their
10 existing representation of Mr. McLeod and Y.E.S. in
11 all of the things that the firm is working on,
12 including this Jim Justice matter. What strikes me
13 about this is Mr. Hanlin gives no reason at all why
14 they should do that and indeed in my opinion there
15 was no reason why they should do that and they were
16 forbidden to do that by rule 1.16 of the South
17 Carolina Rules of Professional Conduct and their
18 fiduciary and contractual duties to their client
19 Y.E.S. Violating your fiduciary duty is violating
20 one of the requirements of our profession you don't
21 do without serious reasons and analysis, and here
22 he just recklessly with no reason whatsoever
23 recommends they terminate all the work on the
24 Justice matter which is in such a crucial point,
25 less than two weeks from the end of the year, ten

1 days. It's just an appalling recommendation in
2 paragraph three.

3 Q Dr. Adams, are there any provisions in the
4 rules of professional conduct which would permit a
5 withdrawal of representation at this point in time?

6 A No, sir. Rule 1.16 is very, very clear.
7 That is the rule that governs ending a
8 representation, particularly in the middle of the
9 representation, before you finish the case or the
10 transaction, and it deals with two kinds of
11 situations.

12 The first is what is called the mandatory
13 withdrawal, where something has happened where the
14 lawyer has to withdraw. And there is no
15 application of that provision to this situation at
16 all. Rule 1.16 in that regard says that the
17 representation will result in a violation of the
18 rules of professional conduct, not might, but will.
19 That certainly wasn't the case here. There was no
20 analysis, no argument and I can think of no reason
21 why it would have necessarily resulted in violation
22 of the rules of law.

23 Secondly, the lawyer's physical or mental
24 condition materially impairs the lawyer's ability
25 to represent the client. Mr. Hanlin's physical and

1 mental condition were just fine, a very competent
2 tax lawyer, knowledgeable in this area, perfectly
3 capable of continuing this transaction, drafting
4 the final documents and closing the deal and
5 getting it in place before the end of the year. Or
6 the lawyer is discharged. Those are the only three
7 situations in which withdrawal is mandatory, the
8 lawyer is required to withdraw. None of those
9 existed.

10 Then paragraph B provides situations in which
11 a lawyer may choose to withdraw. It has seven
12 numbered paragraphs, I'm not going to go through
13 two through seven, none of them apply. The only
14 possible one that could be argued to apply here is
15 B(1), and that requires withdrawal only in a
16 situation where the withdrawal can be accomplished
17 without material adverse effect on the interest of
18 the client, without harming the client, without
19 affecting the client's interest in some serious
20 way.

21 Here is the situation we're ten days before
22 the end of the transaction, the deadline for
23 getting the deal done, the only lawyer in it
24 withdraws. I think losing a 1.8 million dollar
25 fee, I think killing the deal is obviously, anybody

1 can see that is a material, serious harm to the
2 interest of the client.

3 Excuse me. So, there is just absolutely no
4 doubt in my expert opinion that this recommendation
5 was one that would result in violating Rule 1.16,
6 Mr. Hanlin's and the law firm's duties under that.

7 Their fiduciary duties were parallel, duty to
8 put the interest of the client first, protect the
9 interest of the client when possible, when
10 reasonable to do so. And then the contractual
11 obligation. They had specifically put in their
12 contract with Y.E.S. that they would only withdraw
13 in conformity with the requirement of Rule 1.16.
14 They expressly identified this rule as determining
15 whether they had a contractual right to end the
16 representation before completing the deal.

17 So, they not only violated the rule, but
18 they violated the contract by violating the rule
19 and they violated their fiduciary duties and they
20 did so with no reason whatsoever, no analysis.
21 This is not, what strikes me is, as troubling as it
22 is, there is no lawyerly analysis of the situation,
23 no investigation of the facts, no research of what
24 the law requires of them. At the time they did
25 this and later in their depositions none of these

1 lawyers seemed to know what 1.16 requires of them
2 but the first thing a competent lawyer does is to
3 pick up the law book and look at the rule, look at
4 the law to see what it requires.

5 Q Do you have an opinion on whether there was a
6 conflict of interest referenced in the earlier
7 paragraph at the time this letter arrived on --

8 A There was no conflict of interest whatsoever
9 in this situation with regard to the ongoing
10 representation with regard to the Justice matter.
11 For example, they got the letter from the IRS which
12 indicated that thirty days later in January of 2008
13 they wanted to talk to Mr. McLeod and they wanted
14 all these documents. The Justice matter was due to
15 be closed before the end of 2007, so no matter what
16 happened in the IRS investigation in 2008 or 2009
17 it wasn't going to have any impact on the
18 representation with regard to Justice Family Farms.
19 That representation would be over, done, the deal
20 would be finished, the representation would have
21 concluded naturally.

22 If there had been any problems arise in 2008
23 or 2009 in connection with the investigation that
24 wouldn't have gone back and affected what was done
25 in 2007 in completing the Justice Family Farms

1 conservation easement. No, sir, there was no
2 conflict at all with regard to that.

3 Unlike paragraph two where Mr. Hanlin does
4 accurately describe a potential for a conflict in
5 regard to representing Y.E.S. and Mr. McLeod in the
6 IRS investigation and that makes sense that they
7 should not have undertaken this new representation
8 and they had no obligation to undertake the new
9 representation, that is one of the things we talked
10 about yesterday, the fee agreement expressly says,
11 "We don't have to undertake a new matter for you."

12 Q Do you have an opinion on whether this was a
13 mistake by the lawyers or intentional conduct or
14 reckless conduct?

15 A It was reckless conduct. I don't know that
16 they intended to harm Mr. McLeod, they just didn't
17 care. I mean, there was no evidence whatsoever in
18 the testimony or in all the emails that they ever
19 thought about the interest of their client. There
20 was just utter disregard of his rights, there was
21 utter indifference to what the law required of
22 them, to what their duties were through the use of
23 due care. Just astounding recklessness in the way
24 they handled this.

25 MR. PENDARVIS: Your Honor, we move this

1 exhibit in as Plaintiff's 24.

2 MS. McWILLIAMS: No objection, Your Honor.

3 THE COURT: Plaintiff's 24 without objection.

4 (December 20, 2012, email marked and received
5 in evidence as Plaintiff's Exhibit 24).

6 MS. McWILLIAMS: Beg the Court's indulgence,
7 Your Honor.

8 I apologize, Your Honor. We're ready, Your
9 Honor.

10 THE COURT: All right.

11 BY MR. PENDARVIS:

12 Q Dr. Adams, I passed up a letter to you from
13 Mr. Hanlin to Mr. Yancey McLeod dated December 21,
14 2007. Have you seen this letter before today?

15 A Yes, sir, I have.

16 Q Have you formed any opinions from this
17 letter?

18 A Yes, sir.

19 Q Would you please describe to the jury your
20 opinion of what this letter is and the opinions you
21 derived from it?

22 A This is the letter from Mr. Hanlin to Mr.
23 McLeod terminating all of the law firm's
24 representation of Mr. McLeod and Y.E.S. It is an
25 implementation of Mr. Hanlin's recommendations in

1 the email that we just discussed from the day
2 before. He starts off by saying that he's
3 confirming the telephone conversations which
4 occurred on the 20th, "As you and I discussed by
5 telephone yesterday, our firm has terminated all
6 representation of you or any entity with which you
7 are affiliated." And then it goes on and explains
8 with regard, "We regret this action is necessary
9 but the IRS notice you received on Wednesday,
10 December 19th pertains to projects I have worked on
11 as well and you and I could find ourselves in a
12 position of conflict. For that reason it is best
13 that others represent you from the beginning."

14 And then it goes on to describe specifically
15 that this termination includes the Jim Justice
16 matter and others, and the final paragraph he says
17 he will file forms with the IRS notifying the IRS
18 of this.

19 The middle part of this is taken directly
20 from paragraph two of his email the day before but
21 what he has done is he has mixed it up, marked up
22 the paragraph two and paragraph three materials so
23 that it's, there is a reason for not agreeing to
24 represent Mr. McLeod in the new matter, the new IRS
25 investigation, he kind of mixes that all together

1 with the termination of these existing
2 representations, although any potential conflict
3 only applies to the new representation, the new
4 matter and couldn't possibly apply to the Jim
5 Justice matter which was to be finished before the
6 IRS investigation really got started.

7 Q Are you aware of whether Mr. Hanlin met with
8 Mr. McLeod to discuss the termination issues
9 addressed in this letter?

10 A No, sir, he did not. Even the phonecall was
11 very, very brief, no real explanation of why, no
12 discussion of what the impact of that was going to
13 be, no discussion of any concern that it was going
14 to kill this deal and destroy the ability to finish
15 this conservation easement for Mr. Justice in that
16 year.

17 Q Are you aware of any effort on behalf of Mr.
18 Hanlin or Richardson Plowden law firm to assist Mr.
19 McLeod in the transition of this Justice project?

20 A No, sir, none at all.

21 Q Do the rules of professional conduct -- let
22 me rephrase that. What do the rules of
23 professional conduct require of a lawyer who is
24 attempting to terminate or terminating
25 representation?

1 A Rule 1.16 that we have talked about earlier
2 that deals with terminations requires that the
3 lawyer surrender papers, property, turn over the
4 client's file, and has to take steps to the extent
5 reasonably practicable to protect the client's
6 interest. That is lawyers' speech for do what you
7 can reasonably do to help the client out during
8 this transition, to help to cushion the blow of
9 withdrawing and that often requires the lawyer to
10 continue to do some of the work on the matter for a
11 few days or a few weeks, maybe file a request for
12 an extension if it is a trial that is coming up or
13 something like that.

14 So the obligation is to try to, as fiduciary,
15 to try to help the client as much as reasonable in
16 this transition once you have terminated the
17 representation and to turn over everything that the
18 client needs that you've got, things like drafts of
19 documents that are essential to the transaction
20 going forward.

21 Q In your opinion was there any way for Mr.
22 Hanlin or Richardson Plowden to prevent any harm to
23 the client after they made the decision to
24 terminate?

25 A I don't know that there is anything they

1 could have done after they terminated
2 representation. Nobody, no other lawyer could have
3 stepped in and finished this transaction.

4 MS. McWILLIAMS: Objection, Your Honor,
5 foundation.

6 THE COURT: Sustained.

7 Q Dr. Adams, you have expressed a number of
8 opinions today and yesterday. Were those opinions
9 held to a reasonable degree of professional
10 certainty?

11 A Yes, sir.

12 MR. PENDARVIS: Dr. Adams, thank you very
13 much for your time on this matter. Please answer
14 any questions the defense may have.

15 THE WITNESS: Thank you.

16 MS. McWILLIAMS: Your Honor, could we maybe
17 put the screen down at this point?

18 THE COURT: Sure.

19 THE WITNESS: Mr. Pendarvis, do you want
20 these documents back?

21 MR. PENDARVIS: Your Honor, we move, the
22 plaintiffs move this last exhibit Dr. Adams
23 reviewed in evidence as 25.

24 THE COURT: Any objection?

25 MR. PENDARVIS: Move this last letter.

1 MS. McWILLIAMS: No, Your Honor, no
2 objection.

3 THE COURT: Exhibit 25 without objection.
4 (December 21, 2007, letter marked and
5 received

6 in evidence as Plaintiff's Exhibit 25).

7 THE WITNESS: Mr. Pendarvis, that needs to
8 come up here as the exhibit. That is my copy.

9 MS. McWILLIAMS: Beg the Court's indulgence.
10 Your Honor, could we approach? I do have one
11 issue.

12 THE COURT: All right.

13 (Unrecorded bench conference).

14 THE COURT: All right, I've got to make a
15 record on something. I will ask you all to step
16 back in the jury room and I will get you back out
17 here as quick as I can.

18 (The jury was excused from the courtroom).

19 MR. PENDARVIS: Your Honor, the request has
20 been made --

21 THE COURT: Wait a minute. Let Miss
22 McWilliams put on the record where she intends to
23 go, then you put your objection on the record.

24 MR. PENDARVIS: All right.

25 THE COURT: Miss McWilliams, in a bench

1 conference you made a comment you wish to
2 cross-examine Dr. Adams regarding some income in
3 past years.

4 MS. McWILLIAMS: Could we have the witness
5 step out in case the Court rules I may be allowed
6 to do this?

7 THE COURT: Okay, we can do that.

8 MS. McWILLIAMS: Oh, I don't care, that's
9 fine, he can stay, Your Honor.

10 THE COURT: You can step back.

11 MS. McWILLIAMS: Your Honor, the picture that
12 was painted yesterday of Mr. McLeod by Dr. Adams
13 was that he had never made much money, and I don't
14 have the official transcript, Your Honor, I have
15 just what the court reporter has kindly given me,
16 and the suggestion is throughout the testimony that
17 Mr. McLeod really has lived very simple. I think
18 the jury is entitled now to know what, the fact
19 that in 2004 Mr. McLeod had income of \$204,516,
20 this is off their tax returns, it is nothing
21 confidential about something put on the tax return.
22 In 2005 \$68,829. 2006 \$270,000, more than a
23 quarter million just the year before this, and so I
24 think -- that is as far as I want to go but I think
25 it is unfair, I did not want to run afoul of the

1 Court's ruling, you told us to tell you if we were
2 going to go into this.

3 I will not offer the exhibit but I will be
4 happy for the Court to see it because this
5 information was given from Yancey, from Mr. McLeod
6 and Y.E.S. to Crosby Lewis. All Crosby Lewis files
7 were produced to us and since we are defending
8 ourselves against a legal malpractice case I think
9 the suggestion that we now somehow have some duty
10 of confidentiality, and it's from a tax return,
11 that is just not confidential.

12 For the record, Your Honor, our transcript
13 says what Dr. Adams said, he had never been
14 successful, never owned a lot of land, never been
15 wealthy. I think I should be allowed to ask him
16 that.

17 MR. PENDARVIS: Your Honor, in response,
18 first of all Yancey Environmental Solutions, LLC,
19 is not the taxpayer on the tax returns she's making
20 reference to, so we say that Mr. McLeod's tax
21 returns simply aren't relevant. Yancey
22 Environmental Solutions reported income, corporate
23 income of whatever, we absolutely agree it would be
24 relevant. The door had been opened as to that, but
25 these are individual tax returns, this is an

1 individual representation of Yancey McLeod and
2 Robin McLeod by Mr. Hanlin, the communications.
3 So, in terms of that aspect of the privilege issue,
4 rule 1.6, the rules of professional conduct
5 requires that a lawyer shall not reveal information
6 relating to the representation of a client unless
7 the client gives informed consent. We have no
8 informed consent by Mr. McLeod.

9 Now, the suggestion that the fact that this
10 same information was delivered by Mr. McLeod
11 individually to Crosby Lewis, another attorney,
12 doesn't change the analysis, 1.6 absolutely applies
13 to communications to Mr. Lewis. Mr. Lewis pursuant
14 to a subpoena issued in this case was compelled to
15 produce documents to the defendants. Counsel for
16 Mr. McLeod, myself, looked at it, I understood that
17 this information that Mr. Lewis had subject to 1.6
18 was being delivered, the same information was being
19 delivered to the original source attorney that
20 still has a 1.6 obligation to maintain the
21 confidentiality of that information, so there was
22 no concern that this information could be disclosed
23 to a non lawyer that didn't have an attorney-client
24 representation of Mr. McLeod individually.

25 So, as to Mr. McLeod, who is a client of

1 mine, separate and apart from this litigation, Mr.
2 McLeod has informed me he has not given informed
3 consent to allow this information to be revealed
4 and so relevance is our first objection. The
5 second objection is that the owner of this
6 confidential information, the client, has not given
7 consent for it to be disclosed and the pathway this
8 information has traveled has been protected by Rule
9 1.6 all the way, so we certainly have no objection
10 to any information about Yancey Environmental
11 Solutions that was reported on a tax return or
12 otherwise income, 1099 or W2 or anything of that
13 sort that would relate to income for the
14 corporation to be discussed and explained to the
15 jury.

16 THE COURT: I see conflicting positions.
17 When it comes to Jim Justice everything is good,
18 all the corporations, whoever shows up can testify
19 to what he is thinking and in this case you all put
20 me in a box, I'm going to rule one way or the
21 other, everything comes in or everything stays out.

22 MR. PENDARVIS: Your Honor, our point would
23 be this. If it comes in the information on the tax
24 return would be the limit of it, the idea this was
25 an investigation by the IRS or anything of that

1 sort is subject to our motion in limine and if the
2 Court is going to rule it comes in we would ask
3 that it be limited to the amount of income reported
4 on Mr. McLeod's individual tax return.

5 MS. McWILLIAMS: Furthermore, Your Honor,
6 Professor Adams yesterday said not one thing about
7 this is Y.E.S.'s income, he was testifying about
8 Mr. McLeod. To suggest now that we can't defend
9 against this expert giving all these opinions about
10 Mr. McLeod who by the way is the only owner of the
11 LLC and everybody knows that an LLC's taxation goes
12 down to the individual, there is no separate
13 corporate tax return, it goes all to the individual
14 taxpayer.

15 But furthermore, this issue of privilege is
16 the first I have ever heard that they were taking
17 the position that documents produced to me in
18 discovery, including communications with counsel,
19 with Carey Hall, with Crosby Lewis, somehow now you
20 have a duty of confidentiality. We're in
21 litigation, we're trying to clear our name for
22 these lawyers and to suggest that, and furthermore,
23 I just want this on the record, when I served the
24 subpoena on Mr. Lewis he properly contacted Mr.
25 McLeod's counsel, I think they provided that email

1 saying, or he may have contacted Mr. McLeod, "We
2 need to discuss, I have been subpoenaed, am I going
3 to turn over the files or not?"

4 They all came, everything came and to suggest
5 now that I can't use these documents because there
6 is some kind of attorney-client privilege, the
7 privilege is waived when we get sued, that is why
8 we have been allowed to testify or we will be
9 allowed to testify. All our documents, they've got
10 every one of them and there just suddenly cannot
11 possibly be a suggestion that these documents are
12 confidential, we're in litigation, and even if they
13 were they know what to do, I know Mr. Lewis and Mr.
14 Pendarvis know how to assert the privilege. That
15 is what you do when you get a subpoena. If your
16 client, if there is something confidential that is
17 what is called you give me notice, I'm not going to
18 give it to you, it's privileged. That is the
19 procedure under Rule 45, none of which was
20 followed. They just shipped it over from Crosby
21 Lewis and he has testified and attempted to portray
22 Mr. McLeod as somehow unsophisticated, doesn't know
23 what he is doing, he has never made much money,
24 never been wealthy. Yes, he has, at least by some
25 people's standards and, you know, of course he is

1 extremely intelligent, everybody knows that. He's
2 done 22 of these conservation easements, 22, and so
3 the suggestion that Professor Adams has somehow
4 painted, he opened the door, he's the one that said
5 he has never been wealthy, never owned any land.
6 The door is open.

7 THE COURT: Anything else?

8 MR. PENDARVIS: Your Honor, just if the Court
9 is going to allow it in it be limited to the tax
10 returns, income and no reference whatsoever to any
11 investigation by the IRS, and she's not talking
12 about the investigation, so I'm not sure why we
13 have to spend time on that. If that is going to be
14 the Court's ruling, provided it is limited to the
15 amount of income reported on Mr. McLeod's return,
16 let's move on.

17 THE COURT: I think that was her intent, at
18 least at the bench conference that is what I
19 gleaned.

20 MS. McWILLIAMS: That is what I stated.

21 MR. PENDARVIS: My limitation was provided we
22 don't go into the IRS investigation.

23 THE COURT: All right. The IRS investigation
24 is not an issue in this trial.

25 MS. McWILLIAMS: No, and he certainly

1 testified about it, so the suggestion there is any
2 confidentiality of that, in fact Mr. McLeod
3 explained how it all happened, he was being
4 personally audited for his income. I mean, it is a
5 little difficult to say we dropped him on all these
6 matters and then have the jury not understand what
7 we were asked to represent him on. I don't concede
8 that. I think at the appropriate time I can bring
9 that up with the Court if we get to that and I
10 think we will when Mr. Hanlin testifies but --

11 MR. PENDARVIS: Well, Your Honor, are you
12 going to go ahead and rule on that now?

13 THE COURT: No. I'll do it when he comes up.
14 I want to get this one done, take a brief break and
15 keep moving.

16 MS. McWILLIAMS: All right, thank you.

17 (Recessed at 10:00 o'clock a.m.).

18 (Resumed at 10:20 a.m.).

19 THE COURT: Ready?

20 MS. McWILLIAMS: We're ready, Your Honor.

21 (The jury returned to the courtroom).

22 BAILIFF: The jury is all present, Your
23 Honor.

24 THE COURT: Very well, thank you.

25 MS. McWILLIAMS: Your Honor, I moved over

1 here, I hope that is all right.

2 THE COURT: That will be fine.

3 CROSS EXAMINATION BY MS. McWILLIAMS:

4 Q Good morning, Dr. Adams.

5 A Good morning.

6 Q You testified yesterday that a lawyer has a
7 duty of loyalty, duty of truthfulness and a duty of
8 confidentiality, right?

9 A Yes, those are the three principal fiduciary
10 duties a lawyer has.

11 Q And you gave as an example, I think, to the
12 jury you and your wife consulting with a doctor and
13 the fact the doctor had superior knowledge with
14 respect to an operation or treatment or whatever.
15 Is that right?

16 A Yes, sir.

17 Q And the doctor had the obligation to do what
18 was best for her, right?

19 A Right. And to tell her honestly what his
20 opinion was, medical opinion about what was in her
21 best interest.

22 Q All right. And in that example, since you
23 and your wife are not medically trained and of
24 course he or she is, then that's the basis on which
25 you could rely that the doctor was telling you what

1 she or he believed was in your wife's best
2 interest, right?

3 A I have to rely, sure.

4 Q But here we're talking about legal advice,
5 right?

6 A Well, we are talking about legal advice here.

7 Q And in fact Mr. McLeod is a lawyer, right?

8 A That's correct but I don't think that an eye
9 surgeon can lie to a family practitioner about the
10 need for cataract surgery any more than he can lie
11 to my wife.

12 Q All right. But my point is when we're
13 talking about training and equal footing, if you
14 will, Mr. McLeod is legally trained, right, he's
15 been a lawyer since 1971, right?

16 A Yes, ma'am.

17 Q All right. And he's in the lawyers desk
18 book, right?

19 A Correct.

20 Q If someone wanted to find a lawyer, he is in
21 here?

22 A Right.

23 Q So, your suggestion he wouldn't be in a
24 position to understand the legal relationship
25 between Y.E.S. and Richardson Plowden just isn't

1 the same as your example, is it?

2 A No, I guess it really is more like the
3 example of a family physician going to see an eye
4 surgeon but there again I think the eye surgeon has
5 the fiduciary duty to tell the family practitioner
6 the truth.

7 Q All right.

8 A He can't lie to the family practitioner just
9 because he's a doctor, he can't make a
10 recommendation to the family practitioner that he
11 have unnecessary surgery or that he use a
12 prescription drug because the doctor is being paid
13 by the pharmaceutical company, it makes no
14 difference whether the patient is a doctor or not.

15 Q Once again I believe we're far afield because
16 those things didn't happen. People aren't supposed
17 to lie to one another, are they?

18 A No, they're not.

19 Q Lawyers specifically can't lie to one another
20 and can't lie to people, right, to clients, to
21 people they deal with?

22 A Exactly.

23 Q They have a duty of candor, right?

24 A Certainly.

25 Q And that duty of candor applied to Richardson

1 Plowden and Mr. Hanlin and Mr. McLeod, right?

2 A I don't understand how you think the duties
3 of a lawyer in representing a client applied to Mr.
4 McLeod. He wasn't functioning as a lawyer in this
5 circumstance.

6 Q All right. Well --

7 A Certainly the moral duties we all have to
8 tell the truth applied to him, and so many of our
9 rules, as you well know, applies specifically to
10 when a lawyer is representing a client. Since Mr.
11 McLeod doesn't practice law and hasn't for a long,
12 long time and wasn't representing a client in this,
13 none of those specific rules govern him.

14 Q No matter how you refer to Mr. Justice, that
15 was his client, right?

16 A Right, as an environmental consultant, not
17 his client as a lawyer.

18 Q In this instance, as of December 5th -- well,
19 let me strike that. Mr. McLeod did not represent
20 Mr. Justice. Correct?

21 A As a lawyer, no, he did not.

22 Q All right. And neither did Richardson
23 Plowden, right?

24 A Correct.

25 Q All right. And in fact it would have been

1 improper for Richardson Plowden to take on both Mr.
2 Justice and Mr. McLeod because they could have
3 conflicting requirements, right?

4 A It would have been a conflict that could have
5 been cured by the informed consent of the two
6 clients. It was certainly not a non consentable
7 conflict but there would have been a concurrent
8 conflict.

9 Q I asked you if there would be a conflict and
10 in fact it is improper under our rules for a lawyer
11 to assume that he represents somebody when he
12 hasn't been retained or she hasn't been retained,
13 right?

14 A Absolutely.

15 Q All right. And, so, it would have been
16 improper for Mr. Hanlin and Richardson Plowden to
17 just assume that Mr. Justice had retained them,
18 right?

19 A That's true after they had created this
20 bizzare relationship with the environmental
21 consultant but it would not have been at all
22 improper for Mr. Hanlin to have suggested to Mr.
23 McLeod in October, "We should do this the way it's
24 always done, the way we have always done it, we
25 should represent Mr. Justice if he wants us to or

1 he should get another tax lawyer who is competent
2 to handle conservation easement matters to
3 represent him, he needs a sophisticated tax lawyer
4 who can give him the advice, I will be glad to do
5 it or he should get one," but there was nothing
6 wrong with them saying to Mr. McLeod, "Let's do it
7 the way it's always done."

8 Q Okay. Well, let's talk about that. First of
9 all, you testified yesterday that Mr. McLeod really
10 had never made any money, he wasn't wealthy, and
11 that's not true, isn't that right?

12 A Well, I understand, I have learned this
13 morning that there were some years in which he made
14 more money than I was aware of.

15 Q Okay.

16 A But he certainly never made anything like the
17 1.8 million dollars he was standing to make in this
18 transaction.

19 Q All right. In this transaction the 1.8, if
20 he had made it, if Mr. Justice had done it, Mr.
21 McLeod could have gotten two-thirds of it, right?

22 A Under the improper, unethical fee agreement
23 that Mr. Hanlin had persuaded him to sign in the
24 middle of the representation.

25 Q All right.

1 A But a reasonable fee would have been in the
2 30, 35 thousand dollar range, so he would have
3 gotten 1.75 million.

4 Q Okay. 1.75 million for Mr. McLeod?

5 A Yes.

6 Q Who is not representing anybody, he's a
7 consultant?

8 A As a lawyer. He is a consultant bringing the
9 entire thing together, having the idea about how
10 this can be done in a way that produces a
11 significant tax advantage to Mr. Justice.

12 Q Isn't it true, Professor Adams, you have now
13 been made aware in 2004 Mr. McLeod's IRS 1040
14 adjusted gross income was 204,000 and change, is
15 that right?

16 A That is what I heard this morning.

17 Q And then in '05 it was 68,000, is that
18 correct?

19 A That's right, yes, ma'am.

20 Q And in '06 it was over a quarter million
21 dollars, 270,000 and change. Right?

22 A Right.

23 Q All right. So, your suggestion to this jury
24 that Mr. McLeod somehow was unsophisticated is
25 simply not true, is it?

1 A Well, he is certainly not unsophisticated.

2 Q Thank you.

3 A He is very knowledgeable as an environmental
4 consultant.

5 Q Thank you very much, that is exactly right.

6 A He has had some modest success, as I have
7 become aware this morning, but never any million
8 dollar projects, to my knowledge.

9 Q But by most people's standards a quarter
10 million dollars is a little bit more than modest.

11 Be that as it may. Now, Professor Adams,
12 he's been involved, you talked yesterday, told the
13 jury that there had been all these conservation
14 easement projects in which it had always been done
15 a certain way, right, between Mr. Hanlin and
16 Y.E.S.?

17 A Yes, ma'am.

18 Q Did you say that?

19 A Yes, ma'am.

20 Q And in fact Mr. McLeod has been involved in
21 some 22 conservation easements, right?

22 A That's my understanding.

23 Q But with respect to conservation easements
24 where Mr. Hanlin was involved with a Y.E.S. client,
25 there have been only two before this one, isn't

1 that right?

2 A I don't know the exact number.

3 Q All right. Well, when you said yesterday it
4 has always been done a certain way, we're talking
5 about two times, is that right?

6 A I will take your word for it. I'm sure
7 you're correct.

8 Q Isn't that something you would have wanted to
9 look at before you became an expert in this case
10 and find out exactly how many times Mr. Hanlin had
11 represented a landowner?

12 A I looked at it generally. It was not
13 something that was important. Whether it was two
14 times or three times or four times, you know, my
15 opinion wouldn't have changed if it had been three
16 times instead of two, so I try to focus on the
17 things that are important for the opinions I'm
18 asked to give.

19 Q Okay. Well, you certainly didn't leave this
20 jury the impression it was only three yesterday,
21 that wasn't your intent, was it, you said all these
22 many times it has always been done. That suggests
23 more than two, doesn't it?

24 A I think I was talking generally not just
25 about deals that Mr. Hanlin had been involved in,

1 all the deals that Mr. McLeod had been involved in
2 over the years, but also relying upon the testimony
3 of Mr. Hall, these other lawyers who have been
4 involved in these, also Mr. Elliott, they all said
5 they never heard of a lawyer representing the
6 environmental consultant, the lawyer always
7 represents the landowner.

8 Q If he's retained by the landowner or she's
9 retained by the landowner, is that right?

10 A Certainly.

11 Q And Mr. Justice didn't retain Richardson
12 Plowden?

13 A Because Richardson Plowden never suggested
14 that that was the appropriate relationship.
15 Instead, they suggested to Mr. McLeod that they
16 establish this bizzare attorney-client relationship
17 which then caused so much consternation throughout
18 the month of December among the partners of the law
19 firm, "What in the world are we doing representing
20 Yancey McLeod's company Y.E.S. instead of the
21 landowner who is the one who needs all this advice
22 and warnings," and Mr. Rebollo goes on and on about
23 that, that continues to bother him for weeks.

24 Q Now, you're not suggesting, Professor Adams,
25 that what should have happened is even though Mr.

1 Justice didn't contact Mr. Hanlin, he should have
2 just reached out to him and said, "Hey, you need
3 some representation with respect to this proposed
4 conservation easement," you're not suggesting that,
5 are you?

6 A I'm not suggesting he do that directly.

7 Q It wouldn't have been appropriate for Mr.
8 Hanlin to solicit it from Mr. McLeod, either?

9 A It would have been appropriate for him to
10 suggest to Mr. McLeod as they had done in the past,
11 which was the pattern, the typical relationship,
12 Mr. Justice needed a lawyer who was sophisticated
13 in conservation easement tax matters to give him
14 advice and oversee this. If he had done that Mr.
15 McLeod probably would have represented to Mr.
16 Justice that Mr. Justice retain Richardson Plowden
17 and Mr. Hanlin.

18 Q Now, Professor Adams, if it always had been
19 done that way, then Mr. McLeod knew that, so when
20 he got this bizzare proposal from Mr. Hanlin all he
21 had to say was, "We've never done it this way
22 before, I'm calling Jim Justice, you need to be Jim
23 Justice's lawyer," he could have done that,
24 couldn't he?

25 A He could have done that.

1 Q All right. I mean, it is not any big secret,
2 based on what you have just said, a lawyer always
3 represents the landowner, okay, then Mr. McLeod
4 would know that, right?

5 A He would have known that that's the way they
6 had done it, certainly.

7 Q Your suggestion that Mr. Hanlin, when he
8 sends him an engagement letter and says, "You asked
9 us," and by the way, it is true that Mr. McLeod
10 asked Mr. Hanlin first, right?

11 A Yes, ma'am.

12 Q All right.

13 MS. McWILLIAMS: If we may, Your Honor, we
14 made copies of a couple of the exhibits that the
15 plaintiff marked yesterday so the jury could
16 actually see them and the Court could see them
17 rather than trying to do this thing. May I hand
18 that out, please?

19 THE COURT: These are exhibits that have been
20 introduced?

21 MS. McWILLIAMS: Yes, Your Honor.

22 THE COURT: Absolutely. As long as they are
23 properly identified for the record.

24 MS. McWILLIAMS: I will do that.

25 BY MS. McWILLIAMS:

1 Q Professor Adams, before we get to that, I'm
2 going to hand out this engagement letter, but isn't
3 it a fact that the rules that you have been
4 testifying about specifically also govern
5 solicitation of business?

6 A Yes, ma'am.

7 Q So we don't have any dispute here, there was
8 no obligation on the part of Mr. Hanlin or
9 Richardson Plowden to be soliciting the business of
10 Mr. Justice. Right?

11 A Correct.

12 Q Under the proposed consulting agreement, in
13 fact one of the things that Mr. McLeod, one of the
14 services that Mr. McLeod would have been doing
15 would be to try to find Mr. Justice a lawyer if he
16 needed one, right?

17 A Under the agreement that Mr. Hanlin drafted,
18 yes.

19 Q Now let's get to that. I would like to ask
20 you about that agreement.

21 MS. MCWILLIAMS: Beg the Court's indulgence.
22 We'll get to that in a minute. Your Honor, if I
23 may, this is Plaintiff's Exhibit 10. May we hand
24 it out, please?

25 THE COURT: Yes, ma'am. Miss Meyer, what

1 we're doing, what the lawyer is doing, all the
2 exhibits have been introduced, Mr. Young keeps
3 track of them, I have copies of them, you will have
4 a copy in your hand rather than show it on the
5 screen, that is the only difference, for your
6 review as they're talking about it.

7 BY MS. McWILLIAMS:

8 Q All right. So, let's look at Plaintiff's
9 Exhibit 10, I'll come back to your statement.

10 Isn't it a fact, Professor Adams, that the
11 original draft of the -- I'm sorry, I will give the
12 jury a minute.

13 Isn't it a fact that Mr. Hanlin didn't come
14 up with the initial consulting agreement, did he?
15 When you just testified that he drafted it --

16 A That was my recollection.

17 Q All right. Okay. So if, for example,
18 actually it originally came from Y.E.S. to him, you
19 don't recall seeing that, is that right?

20 A I do not recall.

21 Q Okay, we'll check on that in just a minute.

22 A I do recall him sending it to Mr. McLeod.

23 Q Okay. But you don't recall that in fact Mr.
24 McLeod sent it to him first?

25 A I do not remember.

1 Q All right. Now, in fact you were aware that
2 before Y.E.S. ever contacted Mr. Hanlin about this
3 proposed Justice conservation easement Mr. McLeod
4 had been trying to work on a different deal with
5 Mr. Justice. Is that right?

6 A Yes. There was a wet lands mitigation bank
7 project they were working on.

8 Q A completely different project in that it
9 didn't involve any charitable deduction, per se,
10 correct?

11 A Correct.

12 Q Under a mitigation bank, so in connection
13 with that mitigation bank project there were
14 consultant service agreements proposed to Mr.
15 Justice then, too, right?

16 A Correct.

17 Q He never signed those, right?

18 A I don't believe so.

19 Q Okay. So that was the genesis of the
20 consulting service agreement with Mr. Justice,
21 right?

22 A I don't know that but I know it had occurred
23 before the consulting services agreement for this
24 conservation easement.

25 Q All right, we'll look at it in just a minute,

1 but looking, if you will, Professor Adams -- do you
2 have Plaintiff's Exhibit 10 there in front of you?

3 A Yes, ma'am, I'm got it, thank you.

4 Q Now, you said that this was a bizzare
5 arrangement, I think those were your words, is that
6 right?

7 A Yes, ma'am.

8 Q All right. And there is certainly no
9 language in here that would suggest to Mr. McLeod,
10 a lawyer, that in fact Richardson Plowden was
11 proposing to act as a lawyer for Mr. Justice,
12 right?

13 A Correct.

14 Q All right. It says in here, "We will be
15 acting as your attorneys," and this is addressed to
16 Yancey Environmental Solutions, right?

17 A Correct.

18 Q So, there is no dispute that as of December
19 5th, 2007, Mr. McLeod would have been aware that
20 Richardson Plowden was representing him. Right?

21 A Yes, ma'am.

22 Q And not representing Mr. Justice, right?

23 A Right.

24 Q Because in fact along with this letter a
25 separate letter went to Mr. Justice December 5th

1 telling him. Remember we looked at it? Let's look
2 at it.

3 A Number 11.

4 Q Have you got the number?

5 A Yes, ma'am.

6 Q Number 11. And under Plaintiff's 11 --

7 MS. McWILLIAMS: With your permission, Your
8 Honor, may we publish that to the jury as well,
9 it's in evidence?

10 THE COURT: Yes, ma'am.

11 Q Mr. Hanlin specifically said, "I have been
12 retained as legal counsel for Y.E.S." Right?

13 A Yes, ma'am.

14 Q All right. And so all your testimony about
15 the person that really needed tax advice was Mr.
16 Justice, right, he was desperate for tax advice in
17 this transaction?

18 A He is not desperate because he doesn't know
19 that he needs the tax advice. Mr. McLeod doesn't
20 know about these issues. All these issues are
21 being discussed within the law firm, not with the
22 client and not with Mr. Justice. Mr. Hanlin, Mr.
23 Rebollo never told either Mr. McLeod or Mr. Justice
24 about all of these issues that are troubling Mr.
25 Rebollo so in these lengthy emails who is going to

1 advise Mr. Justice about this, who is going to warn
2 him about that? That was never conveyed, so Mr.
3 Justice was never told that Y.E.S.'s lawyers,
4 Hanlin and Richardson Plowden indeed were not
5 protecting his interest, were not doing everything
6 he needed done and instead of having his in house
7 CPA involved in this he needed to get a tax lawyer
8 to work with him to provide him with that advice
9 because they weren't.

10 Q Well, now, let's be clear about this. If Mr.
11 Hanlin is representing Y.E.S. he has no duty to
12 advise Mr. Justice about his tax advice other than
13 what he actually did in his letter of December 5th,
14 right?

15 A That is not what Mr. Rebollo thought. Mr.
16 Rebollo was concerned that under the tax
17 regulations the role of the law firm imposed on
18 them obligations to make sure that the taxpayer,
19 Mr. Justice, had certain warnings and advice and
20 they knew that because of this bizzare relationship
21 they had created there was nobody giving him that
22 advice. Mr. Rebollo is asking the very week they
23 pulled the plug on this deal, "Who's doing this,
24 we've got an obligation here and I don't see
25 anybody fulfilling that obligation and it troubles

1 me," and they never resolved that quandry.

2 Q They never resolved it? Lawyers lots of
3 times disagree about a lot of provisions about the
4 law in a law firm, right, that is why you talk to
5 each other about it, right?

6 A Of course.

7 Q And in this case Mr. Justice is not here
8 saying, "Nobody told me that I might have tax
9 consequences from a conservation easement," is he?

10 A No, he's not.

11 Q That is not even what we're talking about,
12 Mr. Justice. In fact let me ask you this. Did you
13 see any communication of any kind from Mr. Justice
14 to anybody, either Mr. McLeod, Mr. Hanlin, anybody
15 saying, "What are you talking about, you're not my
16 lawyer"? Did you see anything like that?

17 A No, ma'am.

18 Q No, not at all, because let's talk a little
19 bit about Mr. Justice here and how he needed all
20 this tax advice. What do you know about Mr.
21 Justice?

22 A I know about his business in general terms, I
23 know from the testimony of some people who worked
24 with him, Mr. Miller and Mr. Harrah, the way he
25 operates, I know about his relationship with Yancey

1 McLeod and the fact that he was a big picture guy
2 and Yancey recommended this, he decided to do it,
3 he said, "Yancey, take care of it," and that he was
4 kind of, sort of a hands off guy who would do that,
5 he would entrust something to somebody who had the
6 expertise and had his trust, "And then bring me the
7 easement, the document I need to sign late in
8 December and we'll do it."

9 Q Okay. This is the big picture guy that never
10 signed a consulting agreement, right?

11 A Right.

12 Q Never signed the agreement with COLT, the
13 qualified organization?

14 A Right.

15 Q To have the thing go through, right?

16 A Right.

17 Q All right. So, you testified all about this
18 crucial document, the conservation easement, Mr.
19 Justice never even gave or anybody on his side ever
20 gave any input under what the landowner might want
21 the restrictions to be, did he?

22 A No. He trusted Mr. McLeod completely.

23 Q So in other words, is it your testimony that
24 Mr. Justice was just going to let simply Mr. McLeod
25 put in any terms he wanted, anything in the

1 easement that he thought was okay?

2 A He trusted Mr. McLeod with producing a
3 document that when he recommended that he sign it
4 that it was fine.

5 Q So all Mr. McLeod really had to do was take
6 an easement, he could have gotten one from his son
7 who was in law school, or anything like that,
8 right, if he thought it was okay, send to it Mr.
9 Justice and get the signature, right?

10 A Mr. McLeod was concerned about getting a
11 conservation easement in place before the end of
12 the year that would entitle Mr. Justice to a tax
13 deduction and would withstand the audit that was
14 likely to happen. He wasn't going to just slap
15 something together like a general practice lawyer,
16 he wanted the expertise of a Hal Hanlin to look
17 over everything to make sure that the details in
18 that base line report were accurate, to make sure
19 that the requirements of the Internal Revenue Code
20 and all the regulations and all the interpretations
21 were met in the easement, to make sure that all
22 those highly technical details were properly taken
23 care of because he knew that an easement of this
24 size was likely to be audited and the IRS was going
25 to look carefully to make sure that every i had

1 been dotted, every t had been crossed and so it
2 would have been foolish for a lawyer with Mr.
3 McLeod's experience to draft the documents and not
4 to rely on somebody like Mr. Hanlin.

5 Q Okay, but what I asked you was, I appreciate
6 all that and I'm going to come back to that, but my
7 question was what do you know about Mr. Justice?
8 Isn't it true, Professor Adams, that Mr. Justice is
9 a billionaire, at least as of 2011, right?

10 A Yes.

11 Q He owns the Greenbrier, some big resort in
12 West Virginia, right?

13 A Right.

14 Q In fact he bought it in 2009 after he sold
15 his coal company to the Russians, right?

16 A Right.

17 Q He made some \$400,000,000 and stock and that
18 sort of thing, right?

19 A Right.

20 Q All that information is readily available on
21 the internet, isn't it?

22 A Correct.

23 Q In fact Mr. Justice just donated \$25,000,000
24 to the Boy Scouts of America, right?

25 A I hadn't seen that but I'm pleased to know

1 that.

2 Q Certainly, as am I, the mother of three Eagle
3 Scouts, I think it's great.

4 But let me ask you this. Did do you any
5 research into the sophistication of Mr. Justice in
6 preparation for your testimony as an expert here?

7 A Sophistication in what respect?

8 Q In any respect.

9 A I did general background reserach about Mr.
10 Justice. I read what the people who were closest
11 with him had to say about him.

12 Q But you didn't talk to Mr. Justice, right?

13 A I did not.

14 Q All right. Did you even try to talk to him?

15 A No.

16 Q All right. Now, in fact wouldn't one,
17 wouldn't it be a fair assumption for somebody who
18 had a net worth of 1.1 billion to have some tax
19 advisers, some tax lawyers on hand?

20 A It would certainly be reasonable to assume he
21 has a tax lawyer, sure.

22 Q And in fact he had employees that you say you
23 have read their depositions, they said, "Yes, we
24 employ a local law firm there in West Virginia,"
25 didn't they?

1 A Yes, ma'am.

2 Q All right. So he had counsel if he wanted it
3 but let's go, before we leave that, you described
4 David Harrah, the in-house CPA yesterday, you
5 remember your testimony about him?

6 A I remember testifying about him.

7 Q All right. Didn't you describe Mr. Harrah as
8 like a bookkeeper, isn't that what you said?

9 A No, he's more than a bookkeeper. I think I
10 went on and described him as the treasurer, he held
11 financial offices and was at some point the CFO, I
12 believe, of the Justice Companies.

13 Q You did use the word bookkeeper, didn't you,
14 to describe him?

15 A To describe his accounting responsibilities,
16 in house.

17 Q He kept the books for a billionaire, right?

18 A Right. Very unsophisticated accounting but
19 accounting.

20 Q He was a Certified Public Accountant, right?

21 A Certainly.

22 Q In fact you saw the correspondence where Mr.
23 Hanlin was directed to deal with Mr. Harrah, right?

24 A Yes.

25 Q So he is not just dealing with anybody, he

1 was specifically told deal with this Certified
2 Public Accountant in house to Mr. Justice, right?

3 A Correct.

4 Q All right. And then Mr. Justice gets a
5 letter from Mr. Hanlin saying, "I don't represent
6 you," in fact that letter went directly to,
7 Plaintiff's Exhibit 11, went directly to Mr.
8 Harrah, right?

9 A Correct.

10 Q So it is just not going to be any confusion
11 on the part of the people in West Virginia that
12 they don't know who is representing them or that
13 they have any illusion that Richardson Plowden
14 represents them, isn't that right?

15 A Correct.

16 Q So if they need tax advice one would think
17 somebody who could buy a resort like the Greenbrier
18 might understand if they are going to do a
19 conservation easement they might need tax advice,
20 not the same scale, certainly?

21 Right?

22 A Right.

23 Q Okay. Now, you testified, and in a minute
24 I'm going to, I think they are making some more
25 copies, Your Honor, I apologize, we're talking just

1 a little bit about that, but you testified
2 yesterday and a little bit this morning that,
3 looking at Plaintiff's 10, you described it as
4 causing all sort of problems and bizzare
5 relationship between Mr. McLeod or Y.E.S. and
6 Richardson Plowden, right?

7 A Correct.

8 Q And isn't it a fact that well before this
9 transaction Mr. McLeod and Mr. Hanlin had discussed
10 percentage fees, right?

11 A They had in connection with another set of
12 easements.

13 Q All right. So your suggestion that when this
14 agreement with a one-third/two-thirds came in that
15 somehow Mr. McLeod would have been surprised or
16 shocked, I mean, they had been discussing this,
17 right?

18 A Correct.

19 Q Right. And you don't have any quarrel with
20 parties entering into a contingency fee agreement,
21 under the rules that's permitted in this type
22 transaction, right?

23 A It is as long as it is a reasonable
24 contingent fee agreement, yes, ma'am.

25 Q Well, let's talk a little bit about

1 contingent fees. Now, isn't it a fact, you say you
2 have written for the Trial Lawyers Association,
3 there are lots of lawyers in South Carolina and
4 everywhere that use a contingency fee agreement
5 when the lawyer is undertaking something risky and
6 you don't know whether or not there will be any
7 recovery, right?

8 A Right.

9 Q That is in fact the whole point of a
10 contingency fee agreement, there is a risk but it
11 is imposed on the lawyer, "I'm going to undertake
12 to represent you, I may not get anything," right?

13 A Correct, and often times in those
14 arrangements the lawyer actually incurs all of the
15 expenses of the litigation, which could be
16 substantial, so he is not only investing his time
17 but he is also investing money in pursuing the
18 case.

19 Q All right. And in fact in a contingency fee
20 agreement under our rules it has to be in writing,
21 right?

22 A In writing, signed by the client, it isn't
23 enforceable until it is.

24 Q All right. And there is nothing in the rule
25 that says it's got to be there the minute the

1 client calls, right?

2 A No.

3 Q It doesn't have to be signed that instant,
4 right?

5 A Not that instant but it needs to be signed
6 very early on in the representation.

7 Q Okay. There is nothing in the rule about
8 that, is there, Professor, nothing?

9 A No, but there is an ABA opinion about that
10 last year and it is generally understood that the
11 lawyer should get that contingent fee agreement
12 signed at the outset and if you don't get it signed
13 until well into the representation then in fact you
14 are changing the legal basis of the fee.

15 Q What if you just don't have any agreement up
16 until the time you get it signed, you just finally
17 arrive at a percentage, they arrive at an
18 agreement, there is nothing wrong with that, is
19 there?

20 A If there has not been any agreement prior to
21 that but there is, that is a change, of course,
22 because the lawyer, prior to the signing of the
23 agreement the lawyer is not doing that for free.

24 Q How do you know that, how do you know that?
25 Did you see any bill from Richardson Plowden that

1 went to Mr. McLeod?

2 A No.

3 Q No. So in essence he was working for free,
4 right?

5 A Well, that is the way it turned out after
6 they threw him under the bus.

7 Q Okay, all right. Now let's look at, again I
8 call your attention to Plaintiff's Exhibit 10,
9 that's the fee agreement, right?

10 A Yes, ma'am.

11 Q December 5th. And you say that it was not
12 entered into until the 5th but you have now
13 admitted they had been talking about percentage
14 fees before, right?

15 A They had been talking about it but this fee
16 agreement was not entered into and didn't become
17 enforceable until December 5th.

18 Q And you didn't see any other fee agreement,
19 right?

20 A Well, I have seen other fee agreements.

21 Q That was signed by Mr. McLeod to be
22 enforceable, what you just said?

23 A No. This is the only signed fee agreement I
24 have seen.

25 Q And it is the only fee agreement they had,

1 right?

2 A Yes, ma'am.

3 Q All right. So your suggestion to the jury
4 yesterday that this new client matter form,
5 Plaintiff's Exhibit 2, somehow constituted an
6 agreement for hourly, that isn't a fee agreement,
7 is it?

8 A No, it's not a fee agreement but it
9 represents the nature of the billing arrangement at
10 the time it was entered into.

11 Q Well, you know, it doesn't say that, does it?
12 All it is is an administrative matter for
13 Richardson Plowden to open the file, right?

14 A That's Exhibit 2?

15 Q It is.

16 A Let me take a look at that.

17 MS. McWILLIAMS: With your permission, Your
18 Honor?

19 A It says billing agreement, standard fee
20 schedule.

21 THE COURT: Hold on a second.

22 Q All right, this says new client matter form,
23 right?

24 A Yes.

25 Q That's the title, it is not a fee agreement.

1 A Right, it's not a fee agreement but it
2 reflects the law firm's understanding of what the
3 fee is at this time. It says fee schedule GHH,
4 \$250 an hour. It hasn't got contingency checked,
5 it hasn't got non billable checked, we're going to
6 do this for free checked. It's standard, an hourly
7 free agreement to be billed quarterly.

8 Q It is not a fee agreement, Professor Adams,
9 it's a file opening document, isn't that right?

10 A That is what I just said.

11 Q No, you said it was a fee agreement.

12 A No, ma'am, I said it reflected the law firm,
13 the basis on which the law firm undertook the
14 representation in October of 2007. I did not say
15 it was a fee agreement.

16 Q All right. But did you see any
17 correspondence of any kind from Mr. McLeod to
18 Richardson Plowden saying, "I want to hire you on
19 an hourly basis"?

20 A No, ma'am.

21 Q Nothing like that. Right?

22 A No.

23 Q All right. And, so, if in fact what Mr.
24 Hanlin was trying to do was simply get the file
25 open so he could start keeping track of his time,

1 that is what this document is, correct?

2 A Right.

3 Q The purpose of it?

4 A Right. My testimony is simply this document
5 together with the time records correspond exactly
6 with the legal rights of the law firm prior to
7 December 5th, which were to recover the reasonable
8 value of their services which would typically be
9 measured on an hourly basis, so \$250 an hour Mr.
10 Hanlin was recording was the only fee the law firm
11 was legally entitled to up until the time this fee
12 agreement was signed on the 5th.

13 Q Well, based on your testimony, they wouldn't
14 even be entitled to the hourly fee because they
15 didn't have an agreement with Mr. McLeod to bill
16 him on that, right?

17 A I think they had implied they were
18 contracted, he would pay their usual rates.

19 Q Let's go to this Plaintiff's Exhibit 1, we
20 can hand that up, which is the actual time record
21 that you testified about yesterday. Do you
22 remember that?

23 A Yes, ma'am.

24 Q All right. There is nothing unusual about
25 someone with a contingency fee arrangement keeping

1 track of the time and the hours they spend, is it?

2 A No, not at all.

3 Q Plaintiff lawyers do that all the time,
4 lawyers that enter into contingency fee agreements,
5 so they know how much time they have spent?

6 A Absolutely.

7 Q And it keeps track of whatever they have been
8 doing, correct?

9 A Of course, which is important in a large
10 firm, particularly for an associate to show he has
11 been productive.

12 Q All right. And furthermore, if there were a
13 situation where the lawyer wanted to recover some
14 kind of court fee, it is not the situation here,
15 then any lawyer has got to be able to justify what
16 I did, how did I keep my time, right?

17 A Exactly, or if the contract were terminated
18 and the lawyer were only entitled to quantum
19 meruit, it would be beneficial to have that, or if
20 the lawyer as in this case was contemplating
21 transferring the fee agreement back to an hourly
22 fee agreement, of course having these records would
23 be invaluable.

24 Q All right. Now, do you see any evidence of
25 any kind where Mr. McLeod or Y.E.S., anybody from

1 Y.E.S. contacted Mr. Hanlin and said, "What the
2 heck is this," this Plaintiff's Exhibit 10, "this
3 is bizzare, you're supposed to be representing Jim
4 Justice"? There wasn't anything like that, was
5 there?

6 A No.

7 Q Okay. So you also agree with me that Mr.
8 McLeod is a very intelligent person, right?

9 A Right.

10 Q Certainly college educated, not to suggest
11 that all lawyers are smart, I don't want to suggest
12 that, but the fact of the matter is Mr. McLeod had
13 done 22 of these, right?

14 A Correct.

15 Q If he had any question he knew how to email
16 or pick up the phone, right?

17 A He certainly did.

18 Q All right. Now, Professor Adams, did you see
19 any evidence in this case of closing date?

20 A Other than the agreement that it had to be
21 done before the end of the year, no.

22 Q That is not my question. My question was did
23 you see any evidence of any kind that a closing
24 date had been set?

25 A No. Mr. Hanlin never set a closing date.

1 Q Mr. Hanlin didn't and neither did Mr. McLeod,
2 right?

3 A He wasn't the closing lawyer, you wouldn't
4 expect him to set it.

5 Q Wait a minute. I thought we had already
6 established under this Plaintiff's Exhibit 10 Mr.
7 Hanlin wasn't the closing lawyer either.

8 A Of course he was.

9 Q Okay. Then didn't you tell me that you had
10 told the jury that you read the deposition of Carey
11 Hall and Curtis Elliott?

12 A Yes.

13 Q All right. And didn't they both say that --
14 well, let me strike that. Curtis Elliott testified
15 that it was the landowner's lawyer who closed the
16 deal, right?

17 A Who often times did.

18 Q All right.

19 A And he talked about where the land was
20 located, because of course there would be a problem
21 if Mr. Elliott is licensed in North Carolina, South
22 Carolina, if the land was not in one of those two
23 states he of course could not be the closing lawyer
24 just as in this case obviously Mr. Justice's West
25 Virginia lawyers could not be the closing lawyers

1 for this tract of land in South Carolina.

2 Q He would have to hire local counsel, right?

3 A Right.

4 Q Something presumably he has done before,
5 right?

6 A Obviously.

7 Q But there is certainly no -- your
8 pronouncement that Mr. Hanlin was the closing
9 attorney is simply your interpretation of this
10 agreement, right?

11 A Of course. He was the only lawyer in the
12 picture. Until a closing lawyer was retained to do
13 that job it obviously fell on his shoulders..

14 Q Okay. Well, what makes you think Mr. Justice
15 wasn't going to retain a closing lawyer?

16 A I don't know that anyone has ever told him he
17 needed to do that.

18 Q Okay. Well, in fact what happened was,
19 Professor Adams, on the 24th of December Mr. McLeod
20 called Mr. Justice, right?

21 A Yes.

22 Q And he disclosed the IRS investigation,
23 right?

24 A Right.

25 Q And that was something, you think that was

1 proper, don't you?

2 A Certainly.

3 Q It was absolutely proper for him to disclose
4 that because in that event arguably Mr. McLeod was
5 in a conflicting position, he is trying to close a
6 conservation easement and the IRS is coming to look
7 at it, right?

8 A Well, looking at the ones he has done before
9 and would likely look at the Justice one as well if
10 it were consumated.

11 Q Okay. And in fact -- well, even if it were
12 just in process do you think the IRS couldn't look
13 at it?

14 A Well, as I testified earlier, it was going to
15 either be completed by the end of the year before
16 this investigation really got going or it would
17 have been derailed before that.

18 Q Okay. Well, once it got, let's just assume
19 for purposes -- well, strike that.

20 Professor Adams, you hadn't ever closed a
21 conservation easement?

22 A No.

23 Q You're not a tax lawyer?

24 A No.

25 Q We'll save these questions for somebody else.

1 Now, isn't it a fact that at least you saw no
2 closing date, right, not on any calendar, not on
3 anything, right?

4 A Correct.

5 Q All right. And you saw nothing -- let me ask
6 you this. You said that it was the intent of the
7 parties to close by the end of the year, right?

8 A Yes.

9 Q All right. But there was nothing from Mr.
10 Justice saying, "This thing has got to be done by
11 12/31, guys," right?

12 A No. The clearest statement of that actually
13 comes from Mr. Hanlin in an email he sent that, "We
14 now know Mr. Justice has even greater incentive to
15 get this closed before the end of the year."

16 Q That was his perception of what he thought
17 Mr. Justice's income might be, right?

18 A Right.

19 Q All right. And in fact Mr. Justice had a far
20 higher income in '08 and '09, right, when he sold
21 his business?

22 A Right, but that is long term capital gains
23 which as Mr. Hanlin pointed out in that email I
24 just referenced is taxed at a lower rate so the
25 value of a deduction such as a conservation

1 easement deduction would be less when it was
2 applied against long term capital gains than it
3 would be when it is applied against ordinary income
4 such as the ordinary income from his coal
5 operations in 2007 when the price of coal had gone
6 up and he had this terrible problem of 30 or 40 or
7 50 million dollar bump in his income.

8 Q All right. You didn't get any of that from
9 Mr. Justice, right?

10 A No, I got it from Mr. Hanlin.

11 Q That email from Mr. Hanlin, fair or not, was
12 before the December 20 IRS notice, right?

13 A Right.

14 Q Before he perceived a conflict, right?

15 A Who perceived?

16 Q Mr. Hanlin.

17 A Oh, before Mr. Hanlin, yes.

18 Q Okay. And going back to the conversation on
19 the 24th of December that Mr. Justice, excuse me,
20 Mr. McLeod and his lawyer Crosby Lewis had with Mr.
21 Justice, you know about that, right?

22 A Yes, ma'am.

23 Q All right. And you just said you thought
24 that was appropriate. In fact on the phone with
25 Mr. Justice were his own lawyer in house, Steven

1 Ball, right?

2 A Correct.

3 Q And Mr. Harrah?

4 A Correct.

5 Q His bookkeeper, right?

6 A Accountant.

7 Q Okay. And it was appropriate for Mr.

8 Justice, excuse me, for Mr. McLeod to tell Mr.

9 Justice about the IRS investigation, right?

10 A Certainly.

11 Q And it was also appropriate for him, as he

12 has testified, to let Mr. Justice make the

13 decision, right?

14 A Correct.

15 Q All right. And Mr. Justice decided to

16 postpone it, right?

17 A Right, because Mr. McLeod recommended they

18 not go forward.

19 Q That wasn't my question and that is not his

20 testimony, Professor Adams. You know that what Mr.

21 McLeod testified, or do you, that he testified it

22 was up to Mr. Justice to make the decision?

23 A He also, my recollection is he testified that

24 he recommended that they not go forward.

25 Q He agreed with it, he had the IRS to deal

1 with, right?

2 A Right. The only lawyer in the deal had
3 pulled out, they couldn't possibly do it with any
4 safety at that point.

5 Q Any safety, so they were worried about the
6 IRS, right?

7 A No, they were worried about getting it right,
8 and with Mr. Hanlin abandoning them at the last
9 minute and the impossibility of getting another
10 lawyer with familiarity with this who would be able
11 to take it over, you don't close a conservation
12 easement without a tax lawyer who is familiar with
13 that and competent to advise about that and review
14 the documents. Mr. McLeod gave the only prudent
15 advice he could possibly give, "Since our lawyers
16 have abandoned us," he is thinking, "We can't go
17 forward." The fact he didn't tell, that he didn't
18 tell on Mr. Hanlin and the law firm in his
19 discussion with Mr. Justice doesn't mean that
20 wasn't the reason. Of course that was the reason
21 Y.E.S. recommended they not go forward.

22 Q But you agree with me that it was Mr.
23 Justice's decision?

24 A It was, absolutely.

25 Q It was Mr. Justice's decision to even do the

1 deal, right?

2 A Certainly. It's his land.

3 Q Under the consulting agreement that he never
4 signed, had he signed it, he still retained the
5 right to walk away?

6 A Of course.

7 Q At anytime?

8 A Even after the conservation easement was
9 done?

10 Q Oh, no, no, I'm talking about Mr. Justice, he
11 didn't have to do it, right?

12 A He did not have to do it and he had the right
13 not to claim the deduction and not to pay the fee
14 under the consulting agreement.

15 Q He didn't have to do anything if he didn't
16 want to, right?

17 A Absolutely.

18 Q And one would presume somebody that is worth
19 1.1 billion has made quite a few decisions on his
20 own before, right?

21 A I'm sure he has.

22 Q He was the individual who could make up his
23 mind whether he even wanted to do the deal, right?

24 A Certainly.

25 Q Now, you're not suggesting to the jury, with

1 all due respect to my client, that he is the only
2 lawyer in South Carolina that can close a
3 conservation easement, right?

4 A No, certainly. There are a few others.

5 Q A few others. Now, you're aware, are you
6 not, you're familiar with the lawyers desk book in
7 South Carolina?

8 A Yes, ma'am. I've got my copy on my computer.
9 It's easier than carrying it around.

10 Q Well, I probably should have that, too, but
11 the jury wouldn't be able to see it.

12 Now, Professor Adams, there is actually a
13 section of the Bar that they specialize, they are
14 certified specialists in tax, right?

15 A Certainly.

16 Q All right. And Carey Hall, the lawyer that
17 Mr. McLeod hired to help him with the IRS, he is
18 one of those, right?

19 A Certainly.

20 Q They are actually listed in the Bar book that
21 we're talking about right now?

22 A Right.

23 Q So if one had to just say, "Gee, I wonder if
24 there are any other certified tax specialists,"
25 there is at least a fairly quick way to find out,

1 it's right here in the back, you don't have to flip
2 through all the lawyers, you can go straight to the
3 certified tax specialists, right?

4 A And that will tell you the ones that are
5 certified tax specialists. It won't tell you the
6 ones who have competence in conservation easements.

7 Q All right. Professor Adams, I want you to
8 assume for purposes of my next question that in
9 fact everything had been done on this project as of
10 December 20 and you were days away from closing.

11 Right, assume that?

12 A Yes, ma'am.

13 Q All right. In that instance, then the
14 withdrawal doesn't have anything to do with it
15 because all you got to do is have somebody handle
16 the closing, right?

17 A Right.

18 Q No due diligence, no drafting, everything has
19 been done, right?

20 A If everything has been done, if all the
21 documents have been drafted in their final form
22 ready for execution, if all the opinions had been
23 given, if all the due diligence has been
24 accomplished, if all the go ahead have been given
25 and all that remains to be done is execution of

1 those documents, then certainly you're correct.

2 Q Yes, and you could probably find a lawyer in
3 South Carolina with eleven days left in the year if
4 you, if everything had been done and you were days
5 from closing, right?

6 A Right. If there was no tax advice, no
7 drafting of documents, that would be easy to do
8 within eleven days.

9 Q That is what I ask you to assume, assume that
10 everything has been done and you're ready for
11 closing, right?

12 A Right.

13 Q That is assuming the IRS hadn't sent a notice
14 but just as of the 20th, if everything has been
15 done, then another lawyer could easily step in,
16 right, assuming he or she is qualified?

17 A Yes, you could be correct in that situation.

18 Q All right. Isn't it true that on the 20th of
19 December when Mr. McLeod find out that Mr. Hanlin
20 has a conflict, or perceived he had a conflict, I
21 understand you just agree he said he had a
22 conflict, but if he perceived he had a conflict --

23 A A conflict about the Justice matter?

24 Q Correct.

25 A Mr. Hanlin never says, "I have a conflict

1 about the Justice matter," he doesn't say that in
2 the email to Mr. Mack.

3 Q But he said it in his deposition and you read
4 his deposition, didn't you?

5 A I did. He said lots of things.

6 Q He said it in his letter when he told on the
7 21st, right, you said back just a few minute ago he
8 said he had a conflict, right?

9 A He said he had a conflict, it was not clear.
10 He had obviously block copied that out of his
11 earlier email, the same language and the language
12 in the email clearly in a separate paragraph refers
13 to this new tax matter.

14 Q All right.

15 A Now, maybe he thought that somehow having one
16 conflict about one future matter meant that he had
17 a conflict about everything but that's certainly
18 not what the rules require, no competent lawyer
19 would do that.

20 Q All right. Well, the fact of the matter is
21 that all of your testimony about how Mr. Hanlin
22 should not have withdrawn because he had a duty of
23 loyalty to Mr. McLeod, do you remember all that
24 testimony?

25 A Yes, ma'am, and to Y.E.S.

1 Q And when a lawyer has duties to two clients
2 the lawyer has got to think about more than just
3 one, right?

4 A Certainly.

5 Q That's what a classic conflict is, right?

6 A Certainly.

7 Q All right.

8 A And at that point you look at what the rules
9 require and what the standards are and you make an
10 analytical decision like a lawyer, which never
11 happened in this case.

12 Q Of course if Mr. Hanlin and Richardson
13 Plowden had the rules on their computer like you
14 just said you did, you don't have to go pull it
15 out, you can pop it up on your computer but the
16 fact of the matter is --

17 A They could or they could pick up the rule
18 book that virtually every South Carolina lawyer has
19 in their office.

20 Q All right.

21 A And look at them.

22 Q In fact isn't it true you -- do you have
23 Plaintiff's 24 there in front of you?

24 A I have all of them. Let me find it.

25 Q All right, you talked about that this

1 morning, didn't you?

2 A Yes, ma'am.

3 Q In fact what Mr. Hanlin said is under
4 paragraph four. Do you have that there?

5 A Yes.

6 Q All right. He says, "I should inform any of
7 my clients who might be affected by this notice."

8 Do you see that?

9 A Yes.

10 MS. MCWILLAIMS: We'll get copies made, Your
11 Honor.

12 Q So, in this instance Mr. Hanlin had more than
13 one client to worry about at this point. Right?

14 A Certainly, with regard to the IRS
15 investigation.

16 Q All right. Well, in fact, you have already
17 testified you're not really familiar with the other
18 conservation easements that he had worked on with
19 Mr. McLeod, right?

20 A I certainly didn't study all the details of
21 them, no.

22 Q All right. But if in fact Mr. Hanlin
23 potentially could give testimony favorable to
24 Y.E.S. but unfavorable to another client concerning
25 these conservation easements that he had worked on

1 that might be a problem, right?

2 A It might become a problem in 2008 or 2009.

3 It was not a problem in December of 2007. That is
4 sheer speculation.

5 Q Okay. Well, you're speculating, too. Isn't
6 it a fact that what you're suggesting to this jury
7 is Mr. McLeod, excuse me, Mr. Hanlin should have
8 got in it for the money, "Let's go ahead and get
9 our fee, let's get the fee and then if a conflict
10 arises later, well, you know, we'll worry about it
11 then," is that correct?

12 A No. I'm suggesting he should have had some
13 concern as should the partners in the firm about
14 the client. Instead of making a decision with no
15 concern whatsoever, no discussion whatsoever about
16 what killing this deal was going to do to their
17 client, they should have thought about their
18 client's interest, not about earning a fee. About
19 the client, that is what a fiduciary does.

20 Q But under your scenerio, in order to think
21 about the client as the way you said it, they've
22 got to earn the fee and possibly provide harmful
23 testimony later to these other clients, in which
24 case don't you think those other clients may say,
25 "Wait a minute, you mean you stayed in to help him

1 and get his fee and now you're going to come in
2 front of the IRS?" In fact of the matter, what the
3 lawyer has to do is step back, let them go get
4 separate counsel, that's what he said, "I should
5 inform my clients of this notice." He may have to
6 withdraw from all of them, right, that is what a
7 lawyer does when there is a conflict?

8 A When a conflict develops, but that conflict
9 had not developed at this point.

10 Q Well, it was in his mind, so do you think you
11 should wait until you're in the thick of the IRS
12 investigation? We would have to wait eight months,
13 right?

14 A His concern was about being called to give
15 testimony.

16 Q Isn't it true it went on like eight months,
17 the investigation?

18 A Yes, it went on for eight months.

19 Q All right. So, in fact you're suggesting you
20 just simply wait it out, go ahead and get the money
21 now and let's just worry about it later, that
22 simple, that may not put Mr. McLeod at risk but put
23 his other clients at risk, right?

24 A I can't see how it could possibly put his
25 other clients at risk. You're spinning a tail that

1 has no basis in the facts or evidence of this case.

2 Q All right. In fact let's talk about that.

3 Isn't it a fact that this deal didn't get blown up,

4 Mr. Justice decided to postpone it. Right?

5 A Because, excuse me, because Mr. McLeod

6 recommended that they not go forward because there

7 was no lawyer, no tax lawyer to draft the document

8 and approve the document and give the final

9 opinions, it could not be done prudently before the

10 end of the year, so Mr. McLeod recommended to Mr.

11 Justice that the deal be postponed because it's

12 impossible to do it properly because Mr. Hanlin and

13 Richardson Plowden have withdrawn on the eve of

14 finishing the deal.

15 Q As a matter of fact that isn't what he told

16 Mr. Justice, is it? He never told Mr. Justice

17 about there being --

18 A It is widely recommended that they not go

19 forward because the, because it is crystal clear,

20 because if they went through, Mr. McLeod

21 recommended to Mr. Justice they not go forward, and

22 because Mr. McLeod recommended that Mr. Justice not

23 go forward, he decided to postpone it and

24 ultimately has never decided to do the conservation

25 easement. I believe it is crystal clear.

1 Q Except of course we don't have any evidence
2 from Mr. Justice on that, do we, Professor Adams?

3 A We have evidence from the Justice Companies,
4 but certainly the kind of evidence that an expert
5 on evidence that would rely upon and so my opinions
6 stand on firm footing on the evidence, the sworn
7 testimony, the affidavits in this case, that there
8 is an unmistakable causal link between their
9 wrongful withdrawal on the 20th of December and the
10 fact that the deal did not get done and Mr. McLeod
11 did not earn his 1.8 million dollar fee.

12 Q But the fact of the matter is we have no
13 testimony of any kind, no affidavit, no deposition,
14 nothing from Mr. Justice that the reason he
15 postponed is because Mr. McLeod recommended it, you
16 have this whole idea about a recommendation from
17 Mr. McLeod's testimony, don't you?

18 A From Mr. McLeod's testimony.

19 Q And Mr. McLeod also said in his deposition,
20 "But I left it up to Mr. Justice," so Mr. Justice
21 had free will, if you will, to say, "You know what,
22 I don't care about the IRS investigation, I'll do
23 it anyway," he could have done that, couldn't he?

24 A He could have.

25 Q That is what happened, isn't it?

1 A No, that is not what happened. He relied on
2 Mr. McLeod's recommendation that was given because
3 Hal Hanlin had abandoned him on December 20 and
4 could not in good conscience prudently recommend
5 that Mr. Justice go forward and take the risk of a
6 \$50,000,000 contribution might or might not result
7 in a tax savings to him.

8 Q All right. And in fact, though, Mr. Justice
9 was never given the information that, "The reason
10 I'm telling you, my recommendation is postpone it,
11 it is up to you but I recommend it," he never told
12 him because the lawyer wasn't there, there is some
13 risk the conservation easement might not be done,
14 he said, "I've got an IRS investigation," isn't
15 that right, that is what he told him?

16 A That is all he needed to tell him to convince
17 him not to go forward but his recommendation was
18 don't go forward. We don't know what would have
19 happened if Mr. Justice had said, "But you know
20 what, Yancey, I want to go forward on this," maybe
21 at that poin he would have told him the rest of the
22 story, that the lawyer had abandoned them and they
23 really weren't in a position to be able to go
24 forward.

25 Q All right. But he didn't tell him, did he?

1 A No. You know, Mr. McLeod is one of those
2 nice guys who is just not going to say something
3 nasty about another person if he doesn't have to.

4 Q Well, is it nasty to say the lawyer has got a
5 conflict, lawyers, people, clients have to get
6 lawyers?

7 A He didn't have a conflict, he just abandoned
8 them.

9 Q I understand that is your position but
10 lawyers quite frequently have conflict, it is not
11 something they want to have to tell a client they
12 have had for a long time but lots of times, "I
13 can't handle this for you, you're going to have to
14 get another lawyer," that happens all the time?

15 A It does happen all the time.

16 Q There is nothing negative --

17 A It doesn't happen very often on the eve of a
18 big transaction that the lawyer has been working on
19 for months where the lawyer jeopardizes the very
20 transaction taking place and it certainly shouldn't
21 ever happen when there is not really a conflict and
22 there is no analysis whatsoever has been done for
23 the lawyers not acting like a lawyer whatsoever in
24 reaching this conclusion but just panicking.

25 Q How about if the IRS on the eve of the

1 transaction should send a notice, you agree with
2 me, Professor Adams, no one has any control over
3 what the IRS decides and when they want to do it,
4 right?

5 A Well, that's true we don't have any control
6 over it but they do operate under rules and
7 regulations.

8 Q So what you're saying, then, as I understand
9 it, is that the IRS notice comes in, Y.E.S. says
10 we've got a very serious, isn't that what Mr.
11 McLeod's sister said, "Hal, we've got a very
12 serious letter from the IRS," isn't that what she
13 said?

14 A Yes, everybody has testified this is a
15 serious matter, this investigation.

16 Q She didn't even want to tell Mr. McLeod about
17 it, she wanted him to go enjoy his Christmas,
18 right?

19 A Sure.

20 Q So the fact of the matter is what Mr. Hanlin
21 says, "No, you need to tell him about it, you need
22 to tell Mr. McLeod about it," and she did
23 presumably, right?

24 A Right.

25 Q Because that day, that day he had a lawyer

1 and was meeting with him about the IRS
2 investigation, right?

3 A Right.

4 Q And yet he never at anytime in this time
5 period between the 20th and the 31st or until much
6 later did he ever even contact another lawyer to
7 handle the Justice transaction, did he?

8 A No. He knew it was not possible to get
9 another lawyer. Tax lawyers are very busy at the
10 end of the year because so many transactions take
11 place in order to get the tax effects during the
12 year, and he also knew how complex this was and he
13 knew with Hal Hanlin abandoning him on the 20th it
14 was pointless, it would have been a waste of time.
15 He could have made two calls, ten calls, a hundred
16 calls, he was never going to get another lawyer who
17 could step in and complete this deal before the end
18 of the year.

19 So with other deals that he was working on,
20 where with normal attorney-client relationships and
21 the landowners had tax lawyers, he turned his
22 attention prudently to those, realizing that Mr.
23 Hanlin had killed this deal for 2007.

24 Q All right. Mr. Hanlin killed the deal but
25 isn't it a fact, Professor Adams, that if in fact

1 we were at a crucial time period when all this
2 thing needed to be done, there is no evidence that
3 we were going to get an agreement from Mr. Justice,
4 a signed agreement, he never signed anything,
5 right, he didn't sign a single one of the
6 consulting agreements, anything, we have
7 established that, right?

8 A Right.

9 Q Your testimony is that the withdrawal
10 torpedoed the deal completely ignores the fact that
11 the deal might not have even been capable of being
12 done at that time because they didn't have Mr.
13 Justice's commitment, did they?

14 A They believed they had it and I think that
15 was a reasonable belief. I think all the testimony
16 in this case has shown, with not a single
17 contradiction, that he was firmly committed. He,
18 as the testimony said, he was in the boat, he had
19 made that decision, he was going to do it, when the
20 package of documents came for the closing he was
21 going to sign them, they were going to be recorded.
22 The only thing that derailed this was Mr. Hanlin
23 abandoning Y.E.S. on the 20th of December.

24 Q There is not one bit of testimony in this
25 case that all that had to be done was for Mr.

1 Justice, "All they had to do was present the papers
2 in front of me and I would have signed them," is
3 there, not one bit of testimony about that?

4 A No, but that is the understanding.

5 Q That's what you just said?

6 A That Mr. Hanlin had, that Mr. McLeod had,
7 that everybody was working on it until Mr. Hanlin
8 killed the deal on the 20th.

9 Q All right. Now, Professor Adams, isn't it
10 true, you said Mr. Justice was in the boat, isn't
11 it true Mr. Justice didn't sign any of the
12 consulting agreements that were sent to him?

13 A Sure.

14 Q Didn't pay the nonrefundable retainer?

15 A No.

16 Q He did not sign anything with COLT, didn't
17 make any commitment with the very organization that
18 was going to accept his donation?

19 A No.

20 Q Had no agreement with them about that?

21 A Correct.

22 Q All right. So, let's just assume, if we
23 will, that Mr. Hanlin had not withdrawn, okay?

24 A Okay.

25 Q What was it, did Mr. Hanlin have to get on

1 the plane to West Virginia and go shake Mr. Justice
2 by the coat and say, "Sign these agreements, we've
3 got a deal, we've got to get it done by the 31st,"
4 did he have that obligation?

5 A No, of course not.

6 Q Okay. The fact of the matter is if you're
7 going to have an agreement you've got to have
8 everybody on the same page, right?

9 A Right.

10 Q And so part of that process, what Mr. McLeod
11 testified was that he needed to have a consulting
12 services agreement, he needed to have an agreement
13 with the landowner, the landowner had to have an
14 agreement with the entity COLT, right, and neither
15 of those documents was signed?

16 A All of those things were desirable. None of
17 them were necessary.

18 Q Okay. Now, isn't it true that -- well,
19 strike that.

20 This property, you don't deny that the
21 property involved was owned by Mr. Justice,
22 correct, or some corporate entity?

23 A One of his entities, right.

24 Q But there is no denying that Mr. Justice was
25 the final decision maker, right?

1 A Of course.

2 Q Right, and under the agreement that we looked
3 at --

4 MS. McWILLIAMS: I'm sorry, Your Honor.

5 Q Under the consulting services agreement that
6 was sent to Mr. Justice, I believe it was November
7 26th -- I'm sorry, Professor Adams, let me see if I
8 can find it, Plaintiff's Exhibit 7.

9 THE COURT: We've been going about an hour
10 and ten minutes.

11 MS. McWILLIAMS: I'm sorry.

12 THE COURT: Not your problem, I try to go
13 about an hour, hour and 15. A good time for a
14 break while you look for that.

15 MS. McWILLIAMS: That will be great.

16 THE COURT: You all step in the jury room,
17 stretch your legs, get something to drink, come
18 back, continue the case, go about an hour then
19 we'll break for lunch. Don't discuss the case.

20 (The jury was excused from the courtroom).

21 THE COURT; All right, we'll stand at ease
22 for about ten minutes.

23 MS. McWILLIAMS: Sorry, Your Honor.

24 THE COURT: No problem. You gave me an
25 opportunity to interrupt.

1 (Recessed at 11:31 a.m.).

2 (Resumed at 11:41 a.m.).

3 THE COURT: All right, go get them.

4 (The jury returned to the courtroom).

5 BAILIFF: The jury is all present, Your
6 Honor.

7 THE COURT: Very well. Be seated, please,
8 I'm sorry.

9 MS. McWILLIAMS: Thank you.

10 BY MS. McWILLIAMS:

11 Q Professor Adams, if I could have you look at
12 Plaintiff's Exhibit 11 one more time, that is the
13 December 5th letter from Mr. Hanlin to Mr. Justice.
14 Do you see that, Plaintiff's Exhibit 11?

15 A Yes, ma'am, I have it here.

16 Q All right. Do you, do you see the last line
17 of that letter says, "If you have any questions
18 about this please do not hesitate to contact me at
19 the above number or have your advisers contact me."

20 Do you see that?

21 A Yes, sir.

22 Q All right. You're not aware of either Mr.
23 Justice or any of his advisers ever contacting Mr.
24 Hanlin saying what's going on here or what does
25 this letter mean, none of that, right?

1 A Right.

2 Q All right. Now, the sentence right before
3 that specifically tells Mr. Justice, "You should
4 rely on your own tax advisers and legal advisers
5 and not upon Yancey or me for your tax or legal
6 advice," right?

7 A Right.

8 Q And Mr. McLeod got a copy of this letter,
9 right?

10 A Yes, he did.

11 Q All right. So if in fact Mr. Hanlin were
12 just somehow misguided and Mr. McLeod thought,
13 "Wait a minute, yes, he's going to rely on you for
14 tax and legal advice," he certainly could have
15 pointed that out to Mr. Hanlin, right?

16 A He certainly could have, the same way Mr.
17 Mack pointed it out to Mr. Hanlin.

18 Q All right. So in fact Mr. McLeod who has
19 done this for over twenty years didn't have any
20 questions, right?

21 A I see no evidence that he had any questions,
22 no.

23 Q All right. We were talking before the break,
24 Mr. Adams, I don't think I had Plaintiff's Exhibit
25 7 before me, and I believe the jury has Plaintiff's

1 Exhibit 7, and in that consulting agreement --

2 A The agreement, not the cover letter?

3 Q Correct. Let's back up, since you mentioned
4 the cover letter, Professor Adams. In the next to
5 last paragraph Mr. McLeod sends to Mr. Justice, he
6 says, "I have enclosed duplicate originals of a
7 consulting services agreement for your execution."

8 And we know that didn't happen. Right?

9 A Right.

10 Q All right. But the next sentence says --

11 MS. MCWILLIAMS: Oh, I apologize, Your Honor,
12 I hadn't passed that up. I apologize.

13 THE COURT: All right.

14 Q Under this letter dated November 26, 2007,
15 Mr. Hanlin, excuse me, Mr. McLeod has forwarded on
16 the consulting services agreement to Mr. Justice,
17 right?

18 A Right.

19 Q Directly to Mr. Justice?

20 A Correct.

21 Q All right. And I was calling to your
22 attention the next to last sentence in the last,
23 next to last paragraph. It says, "As this project
24 will require our immediate focused attention in
25 order to place the easement this year," do you see

1 that?

2 A Yes, ma'am.

3 Q "I would appreciate your returning the
4 agreement together with the initial consulting fee
5 as soon as possible." Right?

6 A That's what it says.

7 Q All right. And in fact that's something that
8 Mr. McLeod wanted Mr. Justice to do and he never
9 did, right?

10 A Correct.

11 Q All right. And Mr. Justice knows as early as
12 November 26th who the tax attorney is, is for
13 Y.E.S., that is how Mr. McLeod describes Hal,
14 "Coordination with my tax attorney Hal Hanlin,
15 Richardson Plowden," right?

16 A Right.

17 Q Okay. Now, you were asked yesterday -- could
18 you turn to Exhibit 18, Professor Adams? You
19 identified this document, did you not, yesterday?

20 A Yes, ma'am, I have this.

21 Q All right. This is the base line
22 documentation report. Do you see that?

23 A The draft.

24 Q The draft?

25 A Yes.

1 Q That is what is the first part of this,
2 correct, and in the email from Yancey to Hal, that
3 is how it is described, is December 14th, he says,
4 "Please review and confirm your opinion as to
5 conformity with requirement of 170(H) of the IRC."
6 Correct?

7 A That's what it says, yes.

8 Q It says, "If you deem the report adequate and
9 satisfactory I will have Jim retitle, change the
10 name of this document to base line documentation
11 report and put it in final form for you to forward
12 to Sue Green for her approval.

13 Correct?

14 A Yes, you read that right.

15 Q And if in fact you keep turning the pages,
16 also part of this exhibit, Exhibit 18, I apologize,
17 Dr. Adams, is what happened, base line
18 documentation report, it is about halfway through,
19 so in fact -- are you there? If you look at the
20 little Bates number down at the bottom it says
21 McLeod 271, I think, Professor Adams.

22 A Yes, ma'am.

23 Q All right. So, in fact the draft did get
24 placed into, or certainly the title has been
25 changed and it says Jim Justice and it has a date

1 of December 8th. Right?

2 A It does, six days before this email, when it
3 was sent to Mr. Hanlin for his review and approval.

4 Q So we can presume, can we not, these two
5 documents, one was the draft, one with the title
6 change, were ready to go, right?

7 A I don't understand why you would presume it
8 was ready to go. There is no evidence whatsoever
9 that Mr. Hanlin ever did what was requested a week
10 after the date of these documents.

11 Q Well, in fact a week after the 14th the IRS
12 notice came in, right, that this document was ready
13 to go, assuming everybody thought it was fine, Mr.
14 McLeod thought it was right and ready to go?

15 A Yes, he did. You all have produced no
16 evidence whatsoever that Mr. Hanlin ever reviewed
17 this, ever gave his opinion it was in conformity
18 with Section 270(H), no time record that he
19 reviewed this, no email or no notation that he had
20 okayed it, so, no, it wasn't ready to go. It was
21 still waiting the lawyer's review and approval.

22 Q But assuming that approval had occurred, it
23 was ready to go, right?

24 A Once a qualified lawyer reviewed it and
25 approved it, which Mr. Hanlin never did.

1 Q Well, you aren't suggesting that Mr. McLeod
2 is not qualified to review and approve it?

3 A I certainly am.

4 Q Okay. Even though he has testified that he
5 could do that?

6 A He obviously is relying upon Mr. Hanlin's
7 expertise as the tax lawyer with sophisticated
8 knowledge of the conservation easement regulations.
9 This email doesn't say, "I've reviewed it and it's
10 fine." It says, "I believe it's accurate, I want
11 you to review it and make sure it conforms to the
12 IRS regulations."

13 Q You're aware that Curtis Elliott has
14 testified in this case, correct?

15 A Yes, ma'am.

16 Q And what he said was the expert on base line
17 documentation reports was Mr. McLeod, right?

18 A Right.

19 Q Okay. Now, if you would, Professor Adams,
20 look at Plaintiff's Exhibit 3.

21 A Yes, ma'am, I have that.

22 Q You have that? Let me make sure the jury
23 gets it first.

24 If you look at Plaintiff's Exhibit 3, you
25 testified about this yesterday. Correct?

1 A Yes, ma'am.

2 Q And in the very first paragraph Mr. Hanlin
3 describes to Mr. Justice, he says, "Your client Jim
4 Justice, as to the probable tax effects of the
5 conservation contribution that he contemplates
6 before the end of the year," that is Jim Justice,
7 right?

8 A Right, he is saying that he's, he Mr. Hanlin
9 is going to advise Mr. McLeod and Mr. Justice about
10 the tax effects.

11 Q And we know that as of December 5th, a month
12 later, that was not what he was going to do, right?

13 A No, he has changed the scope of his
14 undertaking in the middle of the project.

15 Q Right.

16 A To reduce the advice that he's giving so that
17 Jim Justice is left without a tax adviser in this
18 transaction.

19 Q Well, in fact you say he was left without but
20 I think we have already established he had lots of
21 tax lawyers, right?

22 A There is not one cintilla of evidence in this
23 case that he had any tax lawyers, any tax advisers
24 with the experience or competence in conservation
25 easement matters.

1 Q There is no evidence he didn't have, either,
2 right?

3 A Correct.

4 Q You already testified he had lots of lawyers,
5 right? In that regard, let me be sure we're clear
6 on this, Plaintiff's Exhibit 10, when you say, "We
7 just changed the scope," that's the engagement
8 agreement between Y.E.S. and Richardson Plowden.
9 Have you got that?

10 A Yes, ma'am.

11 Q In point of fact you teach contracts, you
12 understand in South Carolina and probably most
13 other states before somebody signs an agreement
14 that they are going to be bound by they have a duty
15 to understand it, if they want to read it, they
16 don't have to but if they don't read it and don't
17 understand it they are still bound if they go ahead
18 and sign it, right?

19 A That is correct and that is a rule that is
20 only modified in the context of an agreement
21 between a fiduciary and a beneficiary, such as this
22 December 5th agreement which is entered into in the
23 middle of the representation where Mr. Hanlin has
24 fiduciary and had ethical duties to explain this
25 and to make sure it is entirely fair to Mr. McLeod,

1 or rather, to Y.E.S., the client.

2 Q Are you suggesting that Mr. McLeod, a lawyer
3 since 1971, was not capable of understanding this
4 fee agreement? You're not, are you?

5 A No.

6 Q You're not telling the jury that, okay?

7 A No. What I'm suggesting is he did not
8 understand all of the ramifications, the
9 implications of this, he had no idea of the things
10 that filled the emails within the law firm during
11 the month of December with the concerns Mr. Mack
12 raised, the concerns Mr. Rebollo raised and
13 particularly those technical tax concerns about the
14 way the regulations would impact this transaction
15 and this bizzare attorney-client relationship
16 established.

17 Q I'm sorry to interrupt you, Professor.

18 MS. McWILLIAMS: Your Honor, I move to strike
19 the answer, not qualified, not been qualified as a
20 tax expert, he is just loading his answer with
21 testimony about tax issues.

22 THE COURT: I think the qualification the
23 doctor had early on he was an expert in the field
24 of attorney-client duties, fiduciary relationship
25 between attorney-client, that sort of thing but not

1 in the field of tax advice and or conservation
2 easement, so to the extent his answer was not
3 responsive in that field we'll strike it.

4 MS. McWILLIAMS: Thank you.

5 THE COURT: However, he is allowed to give
6 testimony regarding the duties an attorney owes to
7 his client, which he has done.

8 MS. McWILLIAMS: Thank you, Your Honor.

9 THE WITNESS: Thank you.

10 BY MS. McWILLIAMS:

11 Q Now, I'm jumping around a little bit, I'm
12 trying to get through, Dr. Adams, but going back to
13 Plaintiff's Exhibit 3, which is what we were
14 looking at, dated November 7th?

15 A Yes, ma'am, I've got it.

16 Q From Hal to Yancey, that is how it is
17 described. I call to your attention, you read to
18 the jury the next to last, excuse me, the last
19 sentence and in the next to last paragraph which
20 says, "I understand that you contemplate a fee of
21 perhaps four million or so and that our usual
22 two-thirds/one-third arrangement would apply."
23 Right?

24 A Yes.

25 Q All right. That is not where the email

1 stops, right?

2 A No, it isn't.

3 Q What he said is, what Mr. Hanlin says is,

4 "Please correct any errors on my part." Right?

5 A Right.

6 Q So he's saying, "Look, if I got this wrong,

7 if I'm wrong about the size of the fee, if I'm

8 wrong about your contemplation, our contemplation

9 of two-thirds/one-third tell me." Did he ask him

10 that?

11 A He does.

12 Q And this is one lawyer talking to another,

13 right?

14 A A lawyer talking to a client who happens to

15 be a lawyer but yes.

16 Q That's right. And did you see any evidence

17 of any kind that Mr. McLeod said, "Wait a minute,"

18 emails back, calls him back and says, "You're wrong

19 about that, it isn't a \$4,000,000 fee and we don't

20 have any two-thirds/one-third?

21 A No, never have.

22 Q This is as early as November 7th, right?

23 A Right.

24 Q This suggestion that the two-thirds/one-third

25 sort of sprang up in the middle of the

1 representation, it did get memorialized on December
2 5th but they were talking about it long before that
3 with respect to this deal, right?

4 A They were talking about it before that but
5 what my testimony was, it only became the fee in
6 this matter on December 5th. Prior to that the fee
7 was not one-third/two-thirds contingent fee.

8 Q It hadn't been reduced to writing, correct?

9 A It wasn't enforceable under our law.

10 Q Right, and no one tried to enforce it at that
11 point, did they?

12 A No.

13 Q In fact they never tried to enforce it,
14 Richardson Plowden has not tried to enforce that
15 fee?

16 A Of course they haven't, they killed the deal,
17 Mr. McLeod never got a fee for them to take a third
18 of it.

19 Q Let me ask you about that. There is nothing
20 in the record that would have prevented Mr. Justice
21 from doing this deal in '08, is there?

22 A No.

23 Q Nothing to prevent him from doing it in '09?

24 A No.

25 Q '10?

1 A No.

2 Q 2011? In fact we're here in 2012, he can
3 still do it, right?

4 A He can still do it.

5 Q All right. Now, so when you keep saying he
6 killed the deal, that is just not right, is it, Mr.
7 Justice could do this deal today if he wanted to
8 with Mr. McLeod or anybody else, right?

9 A He could resurrect the deal but the deal is
10 dead right now.

11 Q But Mr. McLeod in fact got another lawyer,
12 right, in 2008?

13 A He did.

14 Q And they actually called Jim Justice, didn't
15 they?

16 A Right.

17 Q And Jim Justice wasn't interested, right?

18 A He was not for whatever reason, whatever his
19 tax situation was at the time. The time when he
20 had the critical need for it in 2007 had come and
21 gone.

22 Q And before he actually talked with Mr.
23 Justice Mr. McLeod told David Harrah, "I'm not
24 quite ready to recommend this deal to Mr. Justice
25 because I still have the IRS, I want to bring

1 closure," isn't that right?

2 A Correct.

3 MS. McWILLIAMS: Beg the Court's indulgence,
4 Your Honor.

5 THE COURT: Yes, ma'am.

6 MS. McWILLIAMS: That's all the questions I
7 have, Professor Adams, thank you.

8 THE WITNESS: Thank you so much.

9 THE COURT: Any redirect?

10 MR. PENDARVIS: Very brief, Your Honor.

11 REDIRECT EXAMINATION BY MR. PENDARVIS:

12 Q Dr. Adams, briefly turn your attention to
13 Exhibit 10, the letter, December 5th letter from
14 Mr. Hanlin to Mr. Harrah.

15 A Yes, sir. Which exhibit?

16 Q This is the, I'm sorry, Exhibit 11, I'm
17 sorry, Exhibit 11.

18 A I've got it now.

19 Q Mr. Hanlin to Mr. Justice.

20 A I've got it.

21 Q In the middle -- there was some questions
22 posed about responses from Mr. Harrah or Mr.
23 Justice about tax matters. Did you, I direct your
24 attention to the middle portion of that one
25 paragraph in the letter. It says, "I'm happy to

1 share any knowledge I might have in tax or legal
2 matters with Yancey and with you or your legal or
3 tax advisers"?

4 A Yes, sir, I saw that.

5 Q Did you see any evidence that Mr. Hanlin did
6 in fact share information, tax or legal information
7 with Mr. Harrah or Mr. Justice?

8 A No, I did not.

9 Q There were some questions about the events
10 inside the law firm after they received the notice
11 of the IRS letter and the IRS investigation of
12 Yancey Environmental Solutions and you were
13 directed to the mail chain from Mr. Hanlin to Mr.
14 Mack saying, "We may need to get in touch with our
15 other clients."

16 Did you see any evidence that Mr. Hanlin ever
17 spoke with the two other easement clients that he
18 represented in the past?

19 A I saw no evidence that he did do that.

20 MR. PENDARVIS: Thank you again, Dr. Adams.

21 THE WITNESS: You're welcome.

22 THE COURT: Any recross?

23 MS. McWILLIAMS: One second, Your Honor.

24 We don't have anything further, thank you.

25 THE COURT: You may step down.

1 (Witness excused).

2 MR. PENDARVIS: May we approach?

3 THE COURT: Sure.

4 (Unrecorded bench conference).

5 THE COURT: Miss Meyer, ladies and gentlemen
6 of the jury, the attorneys tell me their next
7 witness will, won't be brief but perhaps a little
8 longer than an hour, and we have a little less than
9 an hour until lunch. It would suit them to go on
10 and go to lunch now. Would that suit you all just
11 as well, go on to lunch now and come back in an
12 hour and 15 minutes, hour and half? If we break
13 now, it is a few minutes after 12:00, so break
14 until 1:30, give you an hour and 20 minutes. All
15 right? Be back in the jury room at 1:30.

16 Remember, you can't discuss the case, leave
17 your stuff in your seat.

18 (Jury was excused from the courtroom).

19 THE COURT: All right, we'll stand at ease,
20 return at 1:30.

21 (Recessed at 12:13 p.m.).

22 (Resumed at 1:30 p.m.).

23 THE COURT: Are you all ready to get going?

24 MR. PENDARVIS: Yes, Your Honor.

25 (The jury returned to the courtroom).

1 BAILIFF: The jury is all present, Your
2 Honor.

3 THE COURT: Excellent.

4 All right, Mr. Pendarvis, you may continue.

5 MR. PENDARVIS: Thank you, Your Honor. The
6 plaintiff calls Mr. Curtis Elliott to the stand.

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1 CURTIS ELLIOTT, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Have a seat in the witness stand
4 and state your full name for the record.

5 THE WITNESS: Curtis Elliott.

6 DIRECT EXAMINATION BY MR. PENDARVIS:

7 Q Mr. Elliott, good afternoon.

8 A Hello.

9 Q Could you introduce yourself to the jury,
10 please?

11 A I'm Curtis Elliott, I'm an attorney in
12 Charlotte, North Carolina.

13 Q And, Mr. Elliott, could you describe a little
14 bit of your education and background?

15 A I attended college and law school at the
16 University of South Carolina here in Columbia and
17 worked for a few years in Charlotte with an
18 accounting firm in the tax department, then I went
19 back and got an LLB in taxation from George
20 Washington University in 1984, I have been in
21 Charlotte working since.

22 Q Are you practicing as a lawyer?

23 A Yes.

24 Q What kind of law do you practice?

25 A Our firm is a tax and corporate law firm and

1 we do a lot of tax planning for clients, we do a
2 lot of estate planning, corporate work and tax work
3 associated with that. We represent clients that
4 have disputes against the Internal Revenue Service
5 and we represent clients in tax incentive
6 transactions.

7 Q Do you have any experience in conservation
8 easement matters?

9 A I do. Me and my firm have implemented and
10 defended conservation easements.

11 Q Approximately how many?

12 A I guess I have been involved in maybe five to
13 seven or eight conservation easements. Most of
14 those have been implementation of those easements.
15 We have had a handful of conservation easements
16 that we defended against the Internal Revenue
17 Service either on audit or appeal, administrative
18 appeal with the IRS.

19 Q We'll come back to the conservation easements
20 in a moment. Let's talk a little bit about have
21 you received any awards or recognitions as a
22 lawyer?

23 A I'm active in the American Bar Association
24 tax section and I'm a member of the Council for
25 that body, tax attorneys in the country, and I have

1 been recognized for some tax work I have done in
2 the past.

3 Q Have you ever served on any committes with
4 the tax court?

5 A Well, with the ABA tax section I have chaired
6 the court procedure and practice committee, I have
7 been chair of the committee for recommendations to
8 the U.S. Tax Court and I have been a member of the
9 Council as well, on the Board of Directors.

10 Q Have you ever spoken to other attorneys about
11 tax matters?

12 A Yes, I have, I have done that fairly
13 frequently.

14 Q Can you tell us a little bit about, give us
15 some samples of the speaking engagements you have
16 done talking to tax lawyers?

17 A I have spoken on tax court practice before
18 the ABA tax section, last fall I gave a national
19 telephone conference on IRS enforcement matters and
20 representing clients in front of the IRS. I have
21 spoken on conservation easements. Back in 2004, I
22 think it was, in Baltimore I was on a panel of
23 practitioners that were engaged in conservation
24 easements, had a panel put on by the American Bar
25 Association tax committee.

1 Q Mr. Elliott, have you ever published articles
2 or written any treatises or ever involved in any
3 publications about tax matters?

4 A Yes, I have done that. I'm co-author of a
5 handbook that was published by Callihan, that was
6 called Valuation Practice, Estate Planning and
7 Litigation. But I have published articles from
8 time to time on various types of tax topics,
9 published an article in the Journal of Taxation
10 about business expenses under Section 162. I have
11 not published an article on conservation easement
12 per se but I have participated in some panels.

13 Q Thank you. Mr. Elliott, have you ever served
14 as an expert witness before?

15 A I have.

16 Q Would you tell us a little bit about the
17 nature of the testimony you gave?

18 A I served as a tax expert once on a case, it
19 was a shareholder litigation involving a merger of
20 two poultry companies, one in North Carolina and
21 one in Virginia. I testified about the tax
22 consequences of that merger. I have testified on
23 tax matters before the U.S. Bankruptcy Court
24 before, I have been deposed on a case involving tax
25 losses regarding the use of a spousal trust in a

1 state probate litigation in North Carolina.

2 Q As part of your tax practice have you had the
3 need to evaluate IRS regulations such as IRS
4 Circular 230?

5 A I'm familiar with Circular 230.

6 Q have you considered matters such as the fees
7 allowed pursuant to the provisions of Circular 230?

8 A Yes.

9 Q Could you describe a little bit of what your
10 review and involvement in the analysis of Circular
11 230 was?

12 MS. McWILLIAMS: I hate to interrupt but I
13 think this is a matter we probably have covered but
14 I would like to cover it again with the Court.
15 Could we approach briefly?

16 THE COURT: Yes, you may.

17 (Unrecorded bench conditions).

18 THE COURT: Miss Meyer, I need to take
19 something up and put it on the record so I will ask
20 you all to step back in the jury room. I will call
21 you back in in a few moments.

22 (The jury was excused from the courtroom).

23 MS. McWILLIAMS: Your Honor, may I be heard?

24 THE COURT: You may be heard.

25 MS. McWILLIAMS: All right, thank you. We

1 had previously objected to any proffer of testimony
2 that the fee agreement between Y.E.S. and
3 Richardson Plowden violated Circular 230 or was
4 illegal or anything like that, and we included as a
5 basis of that in our motion both the testimony from
6 Professor Adams who clearly was not qualified to
7 render it and then we also included Curtis, Mr.
8 Elliott, not because he is not a qualified tax
9 expert but because of what he testified, that he
10 couldn't say that. I have, I just think it might
11 be an issue.

12 I understand, I would be happy, if I may,
13 Your Honor, to hand up, Mr. Elliott was identified
14 twice, basically he has given two opinions he might
15 testify about, the first was the likelihood they
16 could obtain new counsel. That is the third
17 supplemental response. And then on January 19th I
18 received a supplemental identification for Mr.
19 Elliott in which in addition to there was not
20 reasonable time to obtain replacement counsel,
21 there is another answer or opinion that was given,
22 is that based on the terms and content of the fee
23 agreement and based upon the terms and content of
24 the consulting services agreement there was a
25 material risk that the Office of Professional

1 Responsibility of the IRS would have considered or
2 could have construed defendant's contingency fee
3 agreement with Y.E.S. concerning the Justice Family
4 Farms conservation easement project as a contingent
5 fee prescribed by IRS Circular 230. That is what
6 they said he was going to say.

7 As our memo points out, what Mr. Elliott, who
8 was very candid about this, said is, "I think it
9 might be an issue. I don't have, I have written no
10 articles, done no research, I know Circular 230,
11 but with respect to whether or not," his only
12 opinion in this regard was regarding whether or not
13 it violated Circular 230, and he said he was, you
14 know, "My opinion is not that there is any
15 particular certainty or likelihood this is a
16 contingency fee." He was only able to say it might
17 raise an issue, and we have cited the testimony on
18 that.

19 Now for the first time today I find out they
20 are going to ask him about whether or not it is an
21 unconscionable fee. That was never identified.
22 That was never identified, we have had no notice
23 and we object, Your Honor.

24 I would like, for the record, to hand up
25 these two supplements, if I may, to make the record

1 clear. It is the plaintiff's third and fourth
2 supplementation of experts and I can make them an
3 exhibit or if the Court just wants to look at them.

4 THE COURT: I'll just look at them.

5 All right, Mr. Pendarvis, I will hear you on
6 that issue.

7 MR. PENDARVIS: Your Honor, the issue is
8 whether the IRS might have been concerned about the
9 content of this fee agreement. It violates
10 Circular 230, 30 CFR 10.27, it contains
11 prohibitions on unconscionable fees that we have
12 already heard about, the jury has already heard
13 about from Dr. Adams and also contains prohibitions
14 on contingency fees, and Mr. Crystal, I mean Mr.
15 Elliott is prepared, as he said in his deposition
16 testimony, to give testimony that there is a risk.

17 The problem in the whole circumstance of this
18 matter is the same problem we have been facing,
19 there is no published opinions, no IRS revenue
20 rulings, no internal anything to describe how the
21 IRS treats fees under this section. There are
22 prohibitions and there is a lengthy provision, CFR,
23 and the whole point is not, and we are certain that
24 Mr. Elliott is not going to offer testimony
25 concluding that this fee agreement was in violation

1 of Section 10.27, concluding it is a violation of
2 Section A on unconscionability and Section B
3 prohibition on contingency fee.

4 The point is he is going to testify that in
5 his research the highest paid fee of the top shelf
6 tax practitioners in the country is \$3,000 an hour
7 and that based on the record in this case, on some
8 assumptions assuming he is qualified as an expert,
9 based on the time committed in this matter as
10 applied to the fee that would have been generated
11 based on the evidence in this case it would have
12 been a fee equal to \$4,285 an hour and he is going
13 to testify there is a risk that the IRS having
14 evaluated this would consider it to be prohibited
15 by Circular 230 either as a contingent fee, and
16 there are some concerns, this 10.27, this provision
17 has been amended several times, there were some
18 amendments that were being considered, there was a
19 publication came out in September of 2007 effective
20 March of 2008, there have been some earlier
21 prohibitions, it was a matter of concern and
22 discussed among tax counsel but there is no
23 authority that any tax lawyer could rely on to say,
24 to say yes or no, but that the whole point of his
25 testimony on that limited issue is that there was a

1 risk and he is not going to conclude or tell the
2 jury it is absolutely unconscionable, absolutely
3 contingent fee, absolutely prohibited by 230. He
4 is just going to say there was a risk the IRS would
5 have raised an issue with it, just as we stated in
6 our discovery response.

7 MS. McWILLIAMS: Well --

8 THE COURT: And I think he can say there is a
9 risk inherent with dealing with conservation
10 easements which project or utilize tax deductions
11 because of their dislike from the IRS. The IRS
12 doesn't like them. I don't know that but I haven't
13 heard otherwise that they enjoy them and generally
14 give them a cursory review and pass them on
15 through, it is something that gets scrutinized.

16 Now, I guess what bothers me is whether or
17 not it's a contingent fee. Contingent fee has been
18 used over and over, and now we come to trial, that
19 term has not been used until we come to trial and
20 Dr. Adams used it in terms of a contract. Now
21 you're getting, we keep inching closer and closer.
22 I do think it is fair, he has already given a
23 deposition, wasn't he deposed twice?

24 MR. PENDARVIS: He was deposed once but two
25 interrogatory responses, and Miss McWilliams was

1 able to take his deposition after the second
2 disclosure.

3 MS. McWILLIAMS: There is not even one word
4 of unconscionable, I have read his deposition, he
5 never even brought the word up because that wasn't
6 one of his opinions, it was only, he was only
7 identified as, that there was a material risk that
8 it could be considered an illegal contingency fee
9 and that is not what he admitted. What he said
10 was, I don't have that, "It is just a risk," he
11 says nothing about probability or likelihood. Now
12 we're on to unconscionability. If I had had any
13 notice whatsoever, and I got none, and this is
14 trial by ambush and it is not fair.

15 THE COURT: What I don't like is plaintiff's
16 Exhibit Number 9, it says, "No indication is given
17 as to what constitutes an unconscionable fee." It
18 says, "We haven't defined it, we don't have any
19 indication of it," but yet that is where we're
20 focusing on this trial, that to me is confusing to
21 the jury, it is confusing to me. Why are we
22 focused on an unconscionable fee when it is not
23 defined in Circular 230, why are we hemmed in,
24 focused on that word when it wasn't focused on
25 until yesterday?

1 MR. PENDARVIS: There was, in opening
2 statements there were statements to the effect that
3 the defendant chose the right path rather than take
4 the fee and there were several times on Dr. Adams'
5 cross-examination today, rather than take the fee
6 they took the high road, "We opted out because of
7 this potential conflict," and I submit, Your Honor,
8 that if the jury hears that there was a risk,
9 material, minor, major, anywhere in between, that
10 explains why a law firm would walk away from a
11 \$600,000 fee, and --

12 THE COURT: The reason is, the terminology
13 used, there was an inherent risk of getting audited
14 utilizing these sort of vehicles and there was a
15 potential risk that this contract may be considered
16 a contingent fee but that has not been defined,
17 unconscionable hasn't been mentioned. I think
18 bringing that in is very confusing and very unfair
19 to everybody. I mean, it hasn't been done, I don't
20 understand why we're going there.

21 MR. PENDARVIS: Well, again it discusses
22 motive, Your Honor, it has something to do, it just
23 explains why this law firm would have done the way
24 they did.

25 THE COURT: And it was explained throughout

1 discovery, explained as a potential contingent fee
2 which may violate Circular 230. That
3 characterization of the potential audit, a
4 contingent fee agreement, that characterization has
5 been explored throughout discovery. The definition
6 and utilization of the term unconscionable hasn't
7 been used at all. Tell me if it has. I have read
8 everything you all have given me but I haven't seen
9 that term until we got to court.

10 MR. PENDARVIS: That's fine.

11 MS. McWILLIAMS: Circular 230 did not come up
12 until December 30 when I got served with a new
13 identification and the Court has it now that
14 Professor Adams was going to say something about
15 Circular 230 and a violation of a contingent fee
16 and it is true that Dr. Adams says he thought it
17 was unconscionable and that is why the Court, I
18 believe, let that in, not in the context of a tax,
19 but just in context of he's a contract
20 professional. This is all new.

21 I have been completely, I don't mean any
22 disrespect to Mr. Elliott whatsoever, but the fact
23 of the matter is if Mr. Pendarvis was intending to
24 elicit that sort of opinion he could have put it in
25 there. He deliberately didn't put it in there or

1 chose not to put it in there and now we're being
2 ambushed. All this is new, the whole calculation
3 about the highest paid hourly rate for a tax
4 attorney, that is all new. I would have obviously
5 explored it with Mr. Elliott if I knew he was going
6 to offer it. They have never identified it.

7 Furthermore, Your Honor, I think you hit on
8 it, we are way beyond the whole issue of, the Court
9 has said that whether or not it is an illegal
10 agreement or violates Circular 230, you were not
11 going to let it in. This way they attack the law
12 firm improperly, something that hasn't been
13 determined based on the research they have put in,
14 can't be determined, at least not by the IRS,
15 nobody really knows, and they didn't receive a fee
16 under it.

17 MR. PENDARVIS: Let's save some time. I'm
18 not going to go there. Let's go, let's bring them
19 out. I'm not going to the issue of Circular 230, I
20 will leave Mr. Elliott's testimony on couldn't find
21 a lawyer this time of the year, that much time left
22 in the year, that's fine.

23 THE COURT: All right.

24 All right, bring the jury in.

25 (The jury returned to the courtroom).

1 BAILIFF: The jury is all present, Your
2 Honor.

3 THE COURT: Very good.

4 All right, you may continue.

5 MR. PENDARVIS: Your Honor, at this point I
6 move to have Mr. Curtis Elliott qualified as an
7 expert with expertise as a lawyer, with expertise
8 in representing clients involving conservation
9 easements and expertise on the requirements
10 necessary to represent a client seeking a
11 conservation easement.

12 MS. McWILLIAMS: No objection, Your Honor.

13 THE COURT: All right, ladies and gentlemen.
14 As Dr. Adams was qualified as an expert, likewise
15 Mr. Elliott has been qualified as an attorney, as
16 an expert in the field of tax law, for the
17 preparation and imposition of conservation
18 easements on property and utilization of the tax
19 deduction created therefrom as a charitable gift as
20 defined under our Tax Code.

21 All right.

22 MR. PENDARVIS: Yes, sir. Thank you, Your
23 Honor.

24 BY MR. PENDARVIS:

25 Q Mr. Elliott, before we get into your

1 opinions, do you know Yancey McLeod?

2 A I do.

3 Q How long have you known Mr. McLeod?

4 A Ten, twelve years.

5 Q Have you ever been involved with conservation
6 matters in which Mr. McLeod or his company Yancey
7 Environmental Solutions were involved?

8 A I have, yes, I have participated in several
9 conservation easement projects with Mr. McLeod.

10 Q Any recently?

11 A We completed one in December, 2011.

12 Q Has Mr. McLeod referred clients to you?

13 A He has.

14 Q Does your past relationship with Mr. McLeod
15 have any bearing on the opinions you intend to
16 express today?

17 A No.

18 Q For the jurors' benefit, Mr. Elliott, could
19 you describe what you reviewed to reach your
20 opinions we will be talking about today?

21 A I reviewed correspondence that was included
22 in the record and that your office had furnished me
23 as well as a deposition of Yancey McLeod and
24 reviewed the fee agreements that were part of the
25 case. That is primarily what I reviewed.

1 Q Did you review any internal lawyer emails or
2 draft fee agreements?

3 A Just what was part of my notebook, the record
4 you provided to me.

5 Q In your experience how much time is involved
6 on the lawyer's behalf to adequately prepare to
7 handle a conservation easement all the way to
8 closing?

9 A Well, I mean, it can vary. It depends on
10 sort of how pressing the time frame is. The
11 typical type of time frame is normally probably at
12 least three to six months if you started just from
13 a stone cold start and didn't have any background
14 or information about it at all. So, I mean, the
15 number of hours that would be involved by a lawyer
16 working on it would be probably anywhere from 50,
17 maybe to 100 or 150 hours. It just depends on the
18 project, what you're required to do.

19 Q And what parties, could you describe for the
20 jury the parties to a conservation easement?

21 A Well, typically you have a landowner that
22 owns the land and then you have an organization
23 that is a qualified organization under 501(C)(3) of
24 the Internal Revenue Code which is qualified to
25 accept a conservation easement donation because

1 they have certain environmental monitoring
2 obligations on an ongoing basis once they receive
3 the easement donation.

4 Q And have you represented parties in
5 conservation easements?

6 A I represented taxpayers and landowners that
7 made donations of a conservation easement.

8 Q Can you describe to the jury what a lawyer
9 representing a client considering a conservation
10 easement needs to do, the task necessary to do it?

11 A A lot of it is due diligence. Every
12 conservation easement has its sort of own unique
13 characteristics, but there is a pretty extensive
14 amount of due diligence required with regard to
15 finding out what the, you know, the physical
16 condition of the property is, so you have to site
17 visit and inspect the property, look at it.

18 Then there is due diligence involved in
19 figuring out exactly what the state of the title of
20 the property is and that is sort of a two fold type
21 of analysis that you have got to go through.
22 Sometimes somebody may have a related party that
23 owns the conservation easement deed, their
24 corporation may own it, they may have a limited
25 liability company own it and sometimes there is

1 some pre-transferring of title that needs to be
2 done to get the title to the grantor for the proper
3 person to take the tax write-off on the deduction.

4 So, you've got title preparation issues as
5 far as who has title to the property and then the
6 second subtitle, things that you have to analyze
7 are sort of what are the easements of record on the
8 property before you grant a conservation easement,
9 and I'm talking about like utility line easements,
10 sewer easements, road rights of way, cell phone
11 tower easements. I mean, you go through 15 or 20
12 types of easements like that and you have to sort
13 of fly speck all those easements of record and
14 evaluate whether those easements are going to have
15 any kind of negative effect on the qualification of
16 the property as a conservation easement property.

17 For example, if you had, if you had a
18 property that had a state or federal right of way
19 to run an interstate through it and there were
20 plans by the federal transportation agency to run,
21 you know, an interstate through that property you
22 would have to analyze whether that was going to
23 basically destroy the conservation value of that
24 property. You have sort of got to do that.

25 You might be okay to have a cell phone tower

1 or two on a piece of farm land but if you have 15
2 cell phone towers or a wind generater for
3 electricity, if you've got five of those you get
4 into having to analyze all those easements of
5 record to make sure your property is not encumbered
6 or sort of boxed up, so to speak, so that it loses
7 its conservation value.

8 Q You mentioned the word fly speck, I want to
9 make sure the jury understands, would you describe
10 a little bit more what you mean by that?

11 A That means you have to get into the state of
12 the property and work with either, sometimes we, we
13 have our own real estate lawyers in our firm that
14 will do the title search and evaluate the
15 restrictions and easements of record, sometimes
16 we're working with a local real estate attorney or
17 the landowners, normal real estate attorney, you
18 know, to get all that stuff, evaluate it.

19 Q Does a lawyer need to look at anything -- we
20 heard discussion in this case about base line
21 report.

22 A Well, the base line document report is
23 basically a description, it is a report, a
24 contemporaneous report at the time the conservation
25 easement is donated and it basically is almost like

1 a handbook that describes the environmental
2 condition of the property at the time it is given
3 away. That way you have a contemporaneous record
4 that the IRS can review if they audit it,
5 describing what the property was like at the time
6 it was given away, you know, plus the inventory of
7 wildlife on the property, what kind of, you know, a
8 200 year old building might be on the property,
9 that would be worth preserving. You would look at
10 things on the property that would be worth
11 preserving from an environmental standpoint.

12 So, the attorney doesn't normally draft the
13 base line document report but a lot of times there
14 can be a review of it by the attorney, a draft of
15 it as it is being prepared. Someone like Mr.
16 McLeod who does environmental consulting normally
17 would draft the base line document report.

18 Q And then what happens as far as the lawyer is
19 concerned after the draft has been prepared? What
20 does the lawyer -- does the lawyer review it or --

21 A The parties review it, everybody would sign
22 off on it to make sure it is an accurate
23 description of the condition of the property.

24 Q Are there any other documents or other
25 information needed for the lawyer to evaluate

1 before this easement is recorded?

2 A Well, a lot of the times in a large tract of
3 land like a large piece of farm land or something,
4 sometimes those properties are not, they don't have
5 a current survey and a lot of times the survey is
6 required to describe the property. If there is a
7 home site on the property that is actually not
8 going to be a part of the easement or there is some
9 other reason like rights of way, power line
10 easement and so forth that have to be taken out of
11 the easement, all those things need to be described
12 and ideally you have a surveyor in there surveying
13 all that out so that you've got to do title.

14 Q Is the survey a necessary requirement for a
15 conservation easement deduction?

16 A I think it is certainly sound practice.

17 Q If the lawyer believes a survey is necessary
18 what should the lawyer do?

19 A Coordinate with everybody to make sure there
20 is a good one in place.

21 Q Mr. Elliott, what is the latest time of the
22 year in which you have gotten involved on a
23 conservation easement for the landowner?

24 A Probably from start to finish, maybe the
25 middle of, the first to middle of November, one

1 that we did this past year we started in November,
2 45, 60 days.

3 Q Did you give any advice to the client -- I
4 don't want you to mention the client or specific
5 advice, but did you give any advice to the client
6 about the timing of the easement, that being early
7 November?

8 A That particular time?

9 Q Yes.

10 A I told the client we would do everything we
11 could on best effort, we basically could not
12 guarantee we could get it done by the end of the
13 year.

14 Q Mr. Elliott, do you have an opinion on
15 whether a lawyer experienced handling conservation
16 easements can become involved with only ten days
17 left in the year and adequately represent the
18 client?

19 A I have an opinion about that.

20 Q Excuse me?

21 A I have an opinion about that.

22 Q Could you please explain that to the jury?

23 A I think that a good tax lawyer worth their
24 salt is going to need, you've got to independently
25 get your head around all the aspects of the

1 conservation easement and go do the title, go
2 through the easements of record, fly speck all
3 that, find out what the condition of the survey of
4 the property is, go to the property and visit it,
5 do a visual inspection of the property, then you've
6 got to jump into the regulations of the Internal
7 Revenue Code, Section 170, and analyze and identify
8 what the, what is the basis of the conservation
9 easement.

10 There is four or five different ways you can
11 qualify a property as an easement, preserving a
12 natural habitat, preserving wildlife, educational
13 benefits to the public, scenic views to the public,
14 can the public view the property, does it provide a
15 panoramic view, is there water quality that is
16 going to be preserved or does it prevent runoff?
17 You get in all these type of conservation purposes
18 and you analyze the property in light of that. So,
19 my view is that you step down in a large
20 conservation easement transaction, I don't think a
21 good tax lawyer can do that inside ten days.

22 Q Mr. Elliott, if Yancey McLeod had called you
23 on December 20, 2007, and explained the
24 circumstances and asked you to take over the
25 representation on this Justice Farms project what

1 would have been your response?

2 A I would have told him we couldn't take it on.
3 December is a busy time of year for tax lawyers but
4 whether we would have been busy at the end of the
5 year or not, you don't have enough time to do
6 independent review and do due diligence inside ten
7 days. It would be sort of like, you know, the
8 preparation time, you just have preparation time.

9 The other thing I didn't mention is you've
10 got to have the time to actually draft the
11 conservation easement deed and circulate that so
12 everybody can review it and have comment. A lot of
13 times the landowner will reserve the right to cut
14 timber on the property and then you've got to
15 analyze how extensive a timber cutting right can
16 they retain and the conservation easement still be
17 good as far as the IRS is concerned. They will let
18 you do selective timber cutting but they won't let
19 you go in and wholesale clean out a forest.

20 So, you have to craft that very carefully to
21 walk the tight rope. There is a lot of tight rope
22 type drafting you have to do where the landowner
23 wants to retain certain rights. They might want to
24 retain a right to build a log cabin or hunting
25 lodge, they might want to hunt on the property.

1 Again, you have to draft that deed very carefully
2 and tailor it to the particular circumstances.

3 My experience is normally it takes, you know,
4 a couple weeks at least just to circulate the deed
5 among the donee organization and the landowner and
6 the lawyers involved to try to get the language
7 worked out just right.

8 Q Mr. Elliott, in your opinion did Y.E.S. have
9 the reasonable ability to retain counsel to take
10 over this project beginning on December 20, 2007,
11 to complete this \$45,000,000 conservation easement
12 on the Justice property?

13 A I don't think they had adequate time to hire
14 a new tax lawyer.

15 MR. PENDARVIS: Let me check with my
16 co-counsel for a second.

17 No further questions. Thank you for your
18 time.

19 THE COURT: Miss McWilliams.

20 CROSS EXAMINATION BY MS. McWILLIAMS:

21 Q Good afternoon, Mr. Elliott. Now --

22 MR. PENDARVIS: Your Honor, one thing to
23 finish up up for clarity.

24 MS. McWILLIAMS: Certainly.

25 MR. PENDARVIS: Mr. Elliott, just for the

1 record, you expressed an opinion today. Are the
2 opinions you expressed held to a reasonable degree
3 of professional certainty?

4 THE WITNESS: They are.

5 MR. PENDARVIS: Thank you very much. Sorry
6 about that.

7 MS. MCWILLIAMS: May it please the Court.

8 THE COURT: Yes, ma'am.

9 BY MS. MCWILLIAMS:

10 Q Mr. Elliott, do I understand your testimony
11 to be -- well, let me ask it this way. In all of
12 your experience, in your conservation easement
13 experience that you have described, the seven or
14 eight plus the ones you have defended, you have
15 always represented the landowner, right?

16 A Yes.

17 Q All right. And so all of the questions that
18 Mr. Pendarvis just posed to you were spoken or
19 expressed in terms of having represented the
20 landowner. Correct?

21 A That's true, although I would say anybody
22 that is being hired as a tax lawyer in a
23 conservation easement is being hired to look at the
24 tax issues of it and to complete it.

25 Q Right, to complete it but your duties run to

1 the landowner, correct?

2 A Yes.

3 Q All right.

4 A Yes.

5 Q And haven't you previously told me that you
6 don't represent any other party in a transaction
7 when you represent the landowner, right?

8 A It hasn't been our firm's practice to do
9 that.

10 Q All right. And you were asked about some of
11 the prior conservation easements, the fact you had
12 been referred clients by Mr. McLeod, correct?

13 A Right.

14 Q You have never represented Mr. McLeod and the
15 landowner in any of those transactions, have you?

16 A No.

17 Q In fact in each of those transactions you
18 only represented the landowner, right?

19 A That's right.

20 Q And Mr. McLeod either could have his own
21 counsel or didn't have counsel, right?

22 A Right.

23 Q All right. And that would be true with
24 respect to the donee organization, they might or
25 might not have counsel, correct?

1 A Right.

2 Q And in fact you had situations where you
3 represented a client, conflict arises by virtue of
4 something with respect to the IRS and you have had
5 to withdraw before, right?

6 A That's happened.

7 Q All right. Now, you were asked about, by Mr.
8 Pendarvis, about how much time might be involved by
9 a lawyer working on a conservation easement and you
10 said, my understanding, it may depend on the
11 conservation easement itself, is that fair?

12 A Yes. I mean, I have, I have worked on
13 conservation easements before, make a site visit on
14 the property where I had a very comprehensive file
15 or photograph or maps that led me to believe it
16 was, you know, sort of a straightforward type of
17 easement donation.

18 Q And you have worked on conservation easements
19 before where there were other lawyers involved,
20 perhaps for a corporation, somebody in house?

21 A Right, I have.

22 Q And in those instances when you were asked
23 about, for example, circulating a draft
24 conservation easement would the in house lawyers
25 for the landowner look at it as well as you? Is

1 that right?

2 A Yes, if there were other attorneys involved
3 they would look at it, too.

4 Q All right. And in your prior experience have
5 you always circulated the easement to Mr. McLeod to
6 review or as I understand it you circulated it to
7 the donee organization and the landowner, right?

8 A To Mr. McLeod, the organization, the
9 landowner and the landowner's other advisers.

10 Q The landowner is the one that makes the
11 ultimate decision on these restrictions, you said
12 you had to be very careful about how you drafted it
13 sometimes and wanted to reserve the right for a
14 hunt club, that sort of thing?

15 A Right.

16 Q That is your responsibility as counsel for
17 the landowner, right?

18 A Right.

19 Q In terms of drafting the terms of the
20 easement?

21 A Right, right.

22 Q Or revising it if the landowner looks at it
23 an says, "Wait a minute, I'm going to carve out a
24 portion of it," isn't that fair?

25 A That's right.

1 Q Now, you were asked by Mr. Pendarvis if a
2 base line, you were asked about some of the
3 documents involved and the base line documentation
4 report. You said it was sort of like a handbook,
5 is that right?

6 A It is describing the environmental condition
7 of the property at the time it is donated.

8 Q And I thought I understood you to say that if
9 it ever got challenged afterward that might be
10 something the IRS would look at?

11 A Well, it is in the regulations, you actually
12 have to have it as part of the file for
13 conservation easements Whether the IRS ever looks
14 at it or not it has to be part of the official
15 record.

16 Q The IRS would look at it, I assume, after it
17 was closed and some question ever arises?

18 A That's right.

19 Q So the fact a conservation easement might
20 close in December of one year, be recorded, the
21 taxpayer takes the tax deduction, the IRS might
22 look at it later, is that fair?

23 A They might look at it later if they ever look
24 at it.

25 Q If they ever look at it at all. Now, who is

1 it that is responsible -- let me strike that and
2 ask it this way. You testified about survey and
3 how the surveyor might go out and actually figure
4 out what easements might be on the property that
5 might have to be taken care of before you could put
6 the conservation easement, correct?

7 A Right.

8 Q All right. And the landowner hires the
9 surveyor, right?

10 A Sometimes Mr. McLeod working as the
11 landowner's agent might go hire the surveyor.

12 Q Who pays them?

13 A Typically it's the landowner.

14 Q You talked a little bit about the appraiser.
15 You've got to have an appraisal for a conservation
16 easement, correct?

17 A Right.

18 Q All right. And a landowner pays for that?

19 A Normally, yes.

20 Q All right. And when you were asked by Mr.
21 Pendarvis if Yancey McLeod had called you and asked
22 you to step into the transaction involving the
23 proposed transaction for Mr. Justice, do you
24 remember that?

25 A Right.

1 Q And you said, "I would have told him we
2 couldn't take it on, not enough time." What
3 exactly was the status of that proposed transaction
4 on December 20? You don't actually know, do you?

5 A Whatever the status of it was, I don't think
6 we could take it on in ten days.

7 Q So you wouldn't take on the representation as
8 a tax lawyer for the landowner with ten days left
9 in the year, is that fair?

10 A That's fair because it is a due diligence
11 item. I just feel like we've got to independently
12 do our own analysis of everything from start to
13 finish regardless of what the stage of completion
14 for that project would have been.

15 Q If Mr. McLeod had said to you, "Everything is
16 done and we just need to close it," could you do
17 that in ten days?

18 A No.

19 Q You couldn't do it in ten days but some
20 lawyers could, right?

21 A I wouldn't do it.

22 Q You wouldn't do it, I understand that. Based
23 on your testimony here, you are telling me what you
24 would do, right?

25 A A real estate lawyer could certainly take a

1 deed that has already been drafted and record that.
2 If you wanted a tax lawyer to look at it and look
3 at it from a tax standpoint as well as record the
4 deed, I don't think a good tax lawyer would do
5 that.

6 Q Right. But if the landowner was satisfied
7 that her or his tax lawyer had looked at it and the
8 deed, everything was ready to go just days before
9 closing, you're saying that a real estate lawyer,
10 for example, could put together all the papers and
11 go record it, right?

12 A You couldn't hire a tax lawyer then.

13 Q You were asked if Y.E.S. had reasonable
14 ability to hire a lawyer, your answer was they
15 couldn't hire a new tax lawyer?

16 A Yes.

17 Q All your experience that you just testified
18 about today, you were the tax lawyer to the
19 landowner, right?

20 A Right.

21 Q And in the proposed Justice transaction the
22 taxpayer was Jim Justice, correct?

23 A Right.

24 Q And do you know anything about Mr. Justice's
25 financial where with all, the fact he owns the

1 Greenbrier, I think we talked about that?

2 A I just have the same general knowledge and
3 understanding about that as anybody else would.

4 Q All right.

5 A I don't have any, I'm not privy to any kind
6 of, his personal tax profile or anything like that.

7 Q Right. You know he's worth quite a bit of
8 money?

9 A I do, yes.

10 Q And you don't have any doubt in your mind
11 that if he wanted to put together a conservation
12 easement and needed a tax lawyer to represent
13 himself he could get one, that's fair?

14 A I don't think he could do it on December
15 21st.

16 Q All right. But what if he had one the whole
17 time, he can do that, couldn't he?

18 A Yes, if he had had a tax lawyer working with
19 him for six months, yes, sure.

20 Q In fact in this case you don't even have any
21 idea whether Mr. Justice had a tax lawyer involved,
22 do you?

23 A I don't know.

24 Q All right.

25 MS. McWILLIAMS: Thank you. I don't have

1 anything further.

2 MR. PENDARVIS: Briefly redirect, Your Honor.

3 THE COURT: Sure.

4 REDIRECT EXAMINATION BY MR. PENDARVIS:

5 Q Have you ever heard of a tax lawyer
6 representing a conservation consultant in a
7 conservation matter?

8 A Well, I mean in this case I have.

9 Q I was going to say other than this case have
10 you ever heard of it before?

11 A No, I hadn't normally run across that.

12 Q I understand you might have run across it,
13 have you ever heard of it, read about it, had
14 discussion with a lawyer where they described a
15 conservation consultant, where the lawyer was
16 representing the conservation consultant?

17 A No, I hadn't.

18 Q In your opinion does Yancey McLeod have the
19 competency as a lawyer to represent a landowner
20 with regard to the legal issues involved in a
21 conservation easement?

22 MS. McWILLIAMS: Objection, beyond the scope.

23 MR. PENDARVIS: She opened the door.

24 MS. McWILLIAMS: And foundation.

25 THE COURT: I don't think she did.

1 MR. PENDARVIS: Well, all right.

2 BY MR. PENDARVIS:

3 Q How frequent are conservation easements
4 audited by the IRS?

5 A They have attracted a good amount of audit or
6 hostility by the IRS in the past four or five
7 years. I don't know what the percentage is. I
8 would say it is probably somewhere between 50 and
9 60 percent, probably over half the time. The IRS
10 does not audit all conservation easements but they
11 audit a good number of them.

12 Q There was a distinction that was being made
13 as to whether a landowner, that you had represented
14 only landowners in your experience. If you had
15 gotten a call to take over the representation on a
16 conservation easement matter with regard to
17 representing a conservation consultant would that
18 have changed any opinions you have expressed today

19 MS. MCWILLIAMS: Objection, foundation.

20 MR. PENDARVIS: Yancey McLeod is a
21 conservation consultant, I asked him if --

22 MS. MCWILLIAMS: Mr. Elliott has testified he
23 always represent the landowner, so no basis for
24 asking about it.

25 THE COURT: I'm going to let you ask the

1 question. Overruled.

2 BY MR. PENDARVIS:

3 Q If you had gotten a call from a conservation
4 consultant with ten days left in the year, that
5 asked you to represent it in a conservation
6 easement closing would you have accepted the
7 representation?

8 A No. That would have shortened the time. As
9 a tax lawyer I'm still going to have to do due
10 diligence on it because again I'm assuming my work
11 would be to analyze the tax consequences and
12 carrying it through to completion.

13 MR. PENDARVIS: Thank you, Mr. Elliott.

14 MS. MCWILLIAMS: Well, I have just a couple.

15 THE COURT: Sure.

16 RECROSS EXAMINATION BY MS. MCWILLIAMS:

17 Q You said you would still analyze the tax
18 consequences for the conservation consultant, is
19 that right, if you got a call?

20 A Yes.

21 Q If that is of course what you were hired to
22 do, right?

23 A Right.

24 Q You agree that lawyers can agree to, can
25 reach agreements with their client to limit the

1 scope of what they want to do, right?

2 A Yes, that's true. There are certain things a
3 lawyer has to do or must do and should do if they
4 are that tax lawyer working on a conservation
5 easement.

6 Q All right. I didn't mean to interrupt your
7 answer, but as a matter of fact you were asked
8 about representing Mr. McLeod, the environmental
9 consultant, correct?

10 A Right.

11 Q That is something you have never done, right?

12 A No, I haven't.

13 Q All right. And in fact you don't know the
14 details of what had been done and what the status
15 was of the Justice, proposed Justice transaction as
16 of December 20, right, when this hypothetical call
17 might come in, right?

18 A Not in this specific case.

19 Q All right. Well now, Mr. Elliott, it is
20 true, isn't it true that you are not aware, you
21 have not been made aware of a specific date by
22 which the proposed Justice conservation easement
23 was to be closed, isn't that right?

24 A Well, I think everybody anticipated it was
25 going to close by 12/31/07.

1 Q All right. But of course then there was an
2 IRS investigation, correct?

3 MS. McWILLIAMS: Your Honor, that is way
4 outside the scope of redirect, IRS investigation,
5 anything like that.

6 THE COURT: I sustain that, I believe that's
7 right.

8 MS. McWILLIAMS: All right, I will withdraw
9 that.

10 BY MS. McWILLIAMS:

11 Q And, Mr. Elliott, is it true in your, one of
12 the reasons you don't want to get involved at the
13 end of the year if there is not enough time to do
14 due diligence, sometimes you actually tell clients,
15 "Look, we'll do our best to try to close it by the
16 end of this year, it may be the next tax year,"
17 right? Isn't that what you just testified that you
18 told a client in the 2011?

19 A The 2011, we were engaged but we held up the
20 retainer letter with a whole bunch of caveats and
21 explained why we couldn't get it done by the end of
22 the year.

23 Q Then the result was the landowner could do it
24 the next year, right, if they wanted to?

25 A That particular situation they could have

1 done it the next year but it would have been a huge
2 tax loss to them. These people were farmers and
3 they had 100 percent write-off instead of the 50
4 percent write-off because the law changed.

5 Q The law changed on that but doesn't it always
6 depend on what the income of a taxpayer is?

7 A The benefit, yes, the benefit of a
8 conservation easement could vary, depending on what
9 your tax profile is from one year to the next.

10 Q That's right, and if the income went up the
11 next year or next year the tax benefits of the
12 conservation easement could be much better two or
13 three years down the road, right?

14 A Better or worse, yes.

15 Q Better or worse, okay.

16 MS. McWILLIAMS: Thanks. I don't have
17 anything further.

18 MR. PENDARVIS: One question.

19 REDIRECT EXAMINATION BY MR. PENDARVIS:

20 Q Mr. Elliott, are you aware of any tax
21 consequences to a conservation consultant, tax
22 consequences, deductions or anything available to a
23 conservation consultant arising from its
24 involvement or his involvement in a conservation
25 easement?

1 A No.

2 MR. PENDARVIS: Thank you. Thank you for
3 your time today.

4 MS. McWILLIAMS: Nothing further, Your Honor.

5 THE COURT: All right, Mr. Elliott, thank you
6 very much.

7 (Witness excused).

8 MR. PENDARVIS: Your Honor, the plaintiffs
9 call Dr. Darroll Hawkins.

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1 YANCEY McLEOD, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Please have a seat in the jury
4 box and state your name.

5 THE WITNESS: My name is Yancey McLeod,
6 M-c-L-e-o-d.

7 DIRECT EXAMINATION BY MR. PENDARVIS:

8 Q Good afternoon, Mr. McLeod.

9 A Good afternoon.

10 Q Could you introduce yourself to the jury,
11 tell them a little bit about your family?

12 A I will be glad to. My name is Yancey McLeod,
13 I'm a life long resident of Richland County, I'm
14 married to my high school sweetheart who is seated
15 right over there behind Miss Carey, we have been
16 married 43 years, we have three wonderful children,
17 Margaret is the oldest, who is sitting next to my
18 sister Mary. Margaret has a Master's in social
19 work and she has three little boys, my only
20 grandchildren.

21 Her younger brother Yancey is a biologist,
22 he's been working with me all his life and at age
23 30 he walked into mine and Mary's office and said,
24 "Dad, I'm ready to go to law school," and so he
25 just finished law school down in Charleston, the

1 new law school in Charleston. While he was down
2 there he decided we try for another degree so he
3 went to Vermont Law School simultaneously so he has
4 now a degree in biology, a law degree and a
5 Master's in environmental legal services from
6 Vermont Law School. I'm very proud of him.

7 Margaret and Yancey's young brother Gordon is
8 28 and he just got his Master's in historic
9 preservation at Tulane University in New Orleans
10 and has fallen in love with New Orleans and has
11 told us he is planning to live down there. I wish
12 him well.

13 I was educated at Columbia public schools, A.
14 C. Flora, Craven and A. C. Flora, then I went to
15 Walker College like I was always told McLeods were
16 supposed to do and to please my dad who was a trial
17 attorney I went on to law school at the University
18 of South Carolina.

19 Q Mr. McLeod, when did you graduate law school?

20 A 1971.

21 Q And did you practice law after you graduated?

22 A I did for about a year, then my dad died and
23 so I was devastated, needless to say, having looked
24 forward to doing that with him.

25 Q What did you do after -- did you cease

1 practicing law after your father passed away?

2 A Well, I tried to practice law a little bit.
3 While I was in law school I was a clerk at the
4 senate judicial committee and I knew a lot of
5 people down at the General Assembly so I went back
6 down and asked if I could have a part-time job to
7 try to ensure that Robin and I could feed Margaret
8 and they gave me a job drafting legislation, which
9 I did part time and so that worked out real well.

10 Q After that what did you do professionally?

11 A Well, I had sort of lost the will to practice
12 law and shortly, a few years later I got a call
13 from First National Bank, a dear friend of mine Pat
14 Dorn was heading up the trust department and he
15 said, "Yancey, we would like to talk to you about
16 coming to the trust department at First National
17 Bank and doing estate planning and business
18 development." So I thought that would be a
19 wonderful opportunity for me so I did that for
20 about eight years, I believe it was.

21 Q And after that what did you do?

22 A I had a short stint at New York Life doing
23 estate planning and business development and I was
24 still downtown and one Saturday morning I got a
25 phone call from a gentleman who said, "Yancey, I

1 just bought 500 acres on the Santee River and I
2 would like for you to come design a wildlife
3 management plan for me and implement the plan and
4 then manage the plan for me." And I said to the
5 gentleman, "Gosh, I would love to do that but that
6 would be full-time work." And he said, "Well, I
7 know." And so I literally made a decision after
8 talking with Robin and left downtown, I left my
9 desk and my chair and my books and contacted all my
10 clients and told them what I was going to be doing
11 and that is what I have been doing ever since, that
12 kind of work with the land.

13 Q Let's go through that. After you started in
14 the wildlife management job how long did that last?

15 A Well, at first I was trying to make a living
16 as a wildlife habitat consultant and while I adore
17 doing that and still do today, I still get calls
18 from people that want me to come help them with
19 their land and create man made wildlife habitats
20 and manage God's habitat. I realized pretty
21 quickly it is kind of hard to make a living doing
22 that, as much as I loved it, and I had a little
23 company called Yancey McLeod Wildlife Services that
24 I operated while doing that, and I started getting
25 a lot of calls from people that wanted me to do

1 more complicated work with conservation on land and
2 so gradually I realized that the kind of work I was
3 doing which involved watershed management and
4 wetland and storm water management, sediment
5 reduction, things like that, probably deserved a
6 name for a company that better described what I was
7 doing and so Robin and Mary and I, since my name is
8 Yancey, which is a little unusual, it starts with a
9 Y, it didn't take us long to figure out that an
10 adequate description of what we could be doing
11 would be described by Yancey Environmental
12 Solutions which happens to spell Y.E.S., which we
13 thought was pretty cool, which is what we did.

14 Q You mentioned Mary. Who is Mary?

15 A Mary is my sister and my long time, 22 year
16 executive assistant. I will be honest with you
17 all, I don't use computers, I know I'm a dinosaur,
18 but that is who I am. I have found in my life I
19 don't need computers in the woods and Mary is quite
20 able with computers and proficient, capable, and so
21 I'm smart enough to understand I need computers and
22 emails in my life but I just don't choose to do it
23 myself.

24 Q So tell us, when was Yancey Environmental
25 Solutions formed?

1 A 2007.

2 Q And before we get into some of the details
3 about Yancey Environmental Solutions and things
4 that led to this lawsuit, can you describe for the
5 jury your background with organizations in South
6 Carolina and nation wide, about dealing with
7 natural resource issues?

8 A Sure. I devoted my whole life to
9 conservation and the outdoors and education, it is
10 just my passion, and I have been blessed to have
11 places where I could learn to love the land and I
12 wanted to give my time, volunteer with boards and
13 commissions that wanted to serve, and so over time
14 I have served on a lot of boards and commissions,
15 natural resources and education. A few of those, I
16 served on the Richland Conservation Commission as
17 an elected official. Actually there are five
18 conservation commissioners in every county of
19 America, and Richland Conservation Commission has
20 five commissioners and I was one of those for
21 eighteen years.

22 I also served as president of the South
23 Carolina Association of Conservation Districts for
24 three years and I have also served on the South
25 Carolina Department of Natural Resources Board, on

1 their Law Enforcement and Boating Advisory Board, I
2 served on the DNR Board for eighteen years. I have
3 served on the Clemson University Public Service
4 Advisory Board, on the Clemson Agricultural and
5 Fisheries Board and on their Forest and Natural
6 Resources Board.

7 I have also served on the University of South
8 Carolina Prince George Advisory Committee. I have
9 served on the State Committee of Ducks Unlimited.

10 I was the area chairman in Columbia for Ducks
11 Unlimited, which is the world's largest
12 conservation organization, primarily dedicated to
13 preserving and protecting American's wetlands, and
14 I also am proud to say while I was giving my time
15 to Ducks Unlimited I was the chairman of the Green
16 Teen in South Carolina, and we had the largest
17 Green Teen chapter in America, which I enjoyed
18 doing so much.

19 I was a founding board member of Congaree
20 Land Trust, which is a qualified organization like
21 you have been hearing a little bit of testimony
22 about in connection with conservation easements. I
23 served on the State Board of the American Cancer
24 Society and I was actually state cancer crusade
25 chairman. I have, I have also, I currently serve,

1 continue to serve on the South Carolina
2 Conservation Foundation Board. I serve on the
3 Carolina Wildlife Care Board and I serve on the
4 Hills Creek Watershed Conservation Board.

5 Q Have you spoken about natural resource and
6 conservation matters before?

7 A Well, I'm always anxious to speak when
8 somebody asks me to on subjects about which I'm
9 passionate, and that is only about four, but I have
10 made a lot of talks in my life and I love to share
11 my passion for the outdoors, like these gentlemen
12 today, for that matter. I have been sitting here
13 for several days like you all, very anxious to get
14 in here and talk because I was very much involved
15 in this, intimately involved and so I have been
16 anxious to introduce myself to you all.

17 Recently I have been on a Clemson University
18 national broadcast, a Master's tree planting
19 program, entitled Preparing for the Next Owner,
20 which is advising landowners about how to plant for
21 the future. I also was on a national Clemson
22 seminar held at Clemson on horse trails and forest
23 ecology, that was an interesting one. I have
24 spoken recently at two functions put on by the
25 South Carolina Landowners Association, one in

1 Columbia and one in Greenville, just talking to the
2 public about land and natural resources and
3 development.

4 Part of my living is showing developers how
5 to blend conservation and development and perhaps I
6 will get into that a little bit more later. I also
7 spoke at the Southeastern Watershed Conference
8 recently, I have been moderator of several wetland
9 seminars and functions put on by the Soil and
10 Conservation Society. I spoke at the 55th annual
11 Georgia Land Conference recently and also spoke at
12 the Georgia Environmental Conference and last year
13 I spoke down in Georgia at the National Association
14 of Environmental Professionals.

15 I have made keynote speeches at a lot of land
16 trust annual meetings. I have spoken to many, many
17 civic clubs and church groups and garden club type
18 groups. One recent opportunity to speak is sort of
19 an ongoing process. Dr. Jim Morris at the
20 University of South Carolina is a nationally known
21 and respected biologist, scientist, and he is one
22 of the world's leading authorities on coastal
23 marsh, tidal ecology and he has perfected a model,
24 computer model for accurate measurement of carbon
25 sequestration, and I know that we all have heard

1 about carbon in the atmosphere, atmospheric
2 conditions, but I worked at his request with his
3 graduates in a class last year on coastal tidal
4 marsh land and helped them devise, develop a model
5 of a business model for carbon sequestration, which
6 was a whole lot of fun and I was enamored with the
7 students and how smart they were.

8 Q You mentioned -- have you had any involvement
9 with the Richland School District and children?

10 A I started a course for teachers back in 1981
11 and Dr. Wade Batson who is a South Carolinian and
12 one of the finest and most respected botanists in
13 America, he is 99 right now, still alive and doing
14 well. I asked Dr. Batson to help me and we put on
15 a course for area teachers, public school teachers
16 for 15 consecutive years in my home down on the
17 Wateree River and we had 25 or 26 teachers every
18 summer for three weeks and I had recruited 26
19 instructors and they taught the teachers different
20 subjects about natural resources every day for
21 those three weeks and the blessing of having gotten
22 Dr. Wade Batson in my home and him teaching me
23 along with the teachers for those fifteen years was
24 remarkable. Being a lawyer and making my living as
25 a natural resource consultant, I had to learn

1 virtually everything that I do to make my living on
2 my own and I don't have degrees in the subject
3 about which I tell people what to do and so people
4 like Dr. Batson are some of the people that taught
5 me.

6 And then I began to think at the end of that
7 fifteen years there that it would be neat to teach
8 children. Robin has been teaching, she is now
9 retired as a professional grandmother, she taught
10 30 yhears middle school children and helped Mary
11 and I develop a course for children and for ten
12 years we worked with the public schools in Richland
13 County and we had third graders down five times
14 over the school year and we taught math and English
15 and history using natural resources as the base and
16 we had absolutely a blast doing that. I will never
17 get over how much I learned from those children and
18 the teachers told us it was a wonderful experience
19 for them.

20 Q Before we get directly into Yancey
21 Environmental Solutions, are there any other
22 corporations, companies, LLC's you have been
23 involved in that deal with natural resource
24 management and protection?

25 A Yes. By the way, I misspoke a while ago, I

1 said Y.E.S. was created in 2007, I think I said
2 that. It was 1997, but in 2005, in my capacity as
3 a state chairman of the South Carolina Association
4 of Conservation Districts, My old friend Jim Lewis
5 who was the State biologist for USDA NRCS and I had
6 opportunity to work together and Jim had retired
7 officially as state biologist and Mary and I were
8 at a conference and we started talking about the
9 need to maybe get together and create a company to
10 specialize in stream and wetland compensatory
11 mitigation and so we did that, we combined Yancey
12 Environmental Solutions and Lewis Wildlife Service
13 and Wetland Consulting and we have been working
14 together doing stream and wetland compensatory
15 mitigation projects for a number years.

16 Q And what is the name of that organization?

17 A Natural Resource Protection and Mitigation,
18 NRPM.

19 Q All right. Let me get back to Yancey
20 Environmental Solutions. You mentioned it was
21 formed in 1997. What type services does it
22 provide?

23 A Gosh, we do everything from wildlife habitats
24 and giving the landowners advice about their land,
25 we do a lot of advice to landowners about

1 conservation, storm water management, sediment
2 reduction, conservation farming techniques. I have
3 done a lot of farming in my life. We work with a
4 lot of developers and show them how to get a
5 reasonable return on their investment and their
6 land by combining conservation with development.

7 As a passionate conservationist, there is
8 appropriate development and inappropriate
9 development. I believe the way you determine that
10 is site by site. That is how our watersheds have
11 become so degraded, we look at a proposed
12 development as if it exists in a vacuum, and of
13 course it is all connected and we need to start
14 thinking about development in terms of how it
15 affects our down grade or down stream resources as
16 well.

17 Q Yancey -- I'm sorry.

18 A Sure. In fact my grandchildren call me
19 Yancey.

20 Q It is hard to do Mr. McLeod. Who owns Yancey
21 Environmental Solutions?

22 A Just me.

23 Q And how does Yancey Environmental Solutions
24 come about getting clients?

25 A 100 percent of all projects that we have ever

1 done have resulted from somebody calling me or
2 contacting me. I have never even sent out a letter
3 to anybody, much less fancy marketing, so it is
4 very pleasing to me and Mary that people appreciate
5 what we try to do for them and a lot of our
6 business comes from referrals.

7 Q Let's get to the topic for our jury, let's
8 start talking about conservation.

9 A Okay.

10 Q Yancey Environmental Solutions. Explain to
11 the jury how Yancey Environmental Solutions got
12 involved with this conservation easement.

13 A As Yancey Environmental Solutions gradually
14 evolved into more complex land use and planning
15 issues and people started asking us to do more
16 complicated work on their property and with
17 different conservation vehicles and as a result of
18 some of the positions I held with the South
19 Carolina Association of Conservation Districts,
20 that is a close relationship that conservation
21 districts in each county have with local county
22 government as well as the USDA NRCS, Natural
23 Resource Conservation Service, I just had a lot of
24 relationships with federal government people
25 involved with natural resources and water, aquatic

1 resources, and people started asking us to assist
2 them with different kinds of easements

3 There are a lot of different kind of
4 easements and one of them is WRP, which is Wetland
5 Reserves Program, federal government type easement.
6 And then you have the kind of esement we're talking
7 about in connection with this matter you all are
8 here to volunteer your time, called 170(H) under
9 the Internal Revenue Code. We work with the
10 landowners. I have negotiated a power line right
11 of way easement, you all might have read over the
12 last few years about some lady who had a tract of
13 land out near Blythewood and cut down a bunch of
14 hundred your old cedar trees, they asked me to help
15 them rectify that matter, which is kind of hard to
16 do once the trees are already cut. But anyway, we
17 just do a lot of different kind of conservation
18 consulting.

19 Q And how far back in time was it that Yancey
20 Environmental Solutions first started with
21 conservation easements specifically?

22 A Early 2000.

23 Q And for the jurors' benefit, how many have
24 gone all the way from the initial contact by a
25 landowner, to the easement being recorded?

1 A Well, can I call you Thomas?

2 Q You certainly can.

3 A I have had hundreds of people call me asking
4 me for help with conservation from all over the
5 country. We have done conservation easements in
6 Florida, Virginia, North Carolina, Georgia. I have
7 been asked to go to or gone -- California, I
8 haven't done it yet. Much of my work has been pro
9 bono. I have never told anybody who asked me to
10 help them with land or conservation matters, Mary
11 and Robin frequently have to remind me that in
12 addition to trying to help people with conservation
13 I'm also trying to make a living, I have told many,
14 many landowners after talking to them and then
15 perhaps even taking a trip to see them, meet them
16 and see their land, I have advised many landowners
17 not to do a conservation project because I did not
18 think it was proper.

19 As far as conservation easements that
20 started out with a phone call or letter or whatever
21 that resulted in an actual placement of
22 conservation easement, I have been involved in 24.

23 Q Let's describe for the jury the process. You
24 mentioned you went out, you go out to the property
25 to determine if it's appropriate for a conservation

1 easement. Can you describe for the jury what is
2 involved in qualifying land?

3 A You know, in thinking about testifying before
4 you all about this matter, I have got a lot of
5 experience teaching third graders and I have also
6 taught a lot of groups of adults, too, and people
7 ask me frequently, "What do you do to change what
8 you talk about when you are teaching adults and
9 when you're teaching children," and I say, "Well,
10 the truth is I don't change anything," because in
11 the world in which we live there are not many
12 people that really understand a whole lot in depth
13 about natural resources and management and so
14 forth, and I would like to try to explain to you
15 all what my perspective is about a conservation
16 easement in terms you can understand. I know some
17 of the testimony in this case has probably been
18 somewhat confusing.

19 MS. MCWILLIAMS: Your Honor, I hate to
20 interrupt. I'm going to object to the narrative
21 about what other people may have testified or what
22 the jury may understand or not understand.

23 Q Yancey, let's bring it back to what is
24 involved in qualifying the easement.

25 A Step number one, all right, is to meet the

1 landowner and understand what the landowner or his
2 or her family's long and short term objectives for
3 the land are. I need to understand that. Then I
4 will advise them as to whether I think there are
5 conservation vehicles that will allow them to place
6 the conservation easement on their land and
7 accomplish their objectives.

8 If a conservation easement, 170(H) easement
9 is appropriate to help accomplish their objectives,
10 which is the kind of easement we're talking about
11 in this matter, conservation easements can really
12 be divided into two parts. Step one is
13 qualification. Under 170(H), under the Revenue
14 Code there are certain conservation values that
15 Congress has reduced to writing and described very
16 generally that they have felt would be appropriate
17 public benefits to allow a taxpayer and landowner
18 to receive a tax deduction for placing a
19 conservation easement on land and ensuring those
20 values forever. The word is called perpetuity in
21 the law.

22 And so step one is a qualification, will the
23 property qualify, and that's my expertise. I have
24 been busy with land and natural resources all my
25 life and I feel very comfortable and competent to

1 go on a tract of land after talking to the
2 landowner and give them advice as to whether I
3 think a placement of a conservation easement
4 subject to the terms of the easement would advance
5 the conservation values expressed in 170(H) and be
6 appropriate.

7 Once we get to that step, then the next step
8 is to assemble a group of professionals necessary
9 to accomplish the conservation easement that we are
10 going to place on the land. As a part of that
11 process one of the professionals will be the
12 appraiser or two appraisers in some cases. And the
13 second important part of the process is
14 qualification, so the major parts are
15 qualification, if it won't qualify you don't need
16 to go the the next step because you can't do it.

17 Q And once the property is qualified what is
18 the next step?

19 A Well, you qualify it first and the
20 qualification is part of the overall process. The
21 next step would be for Yancey to begin the process
22 of selecting, identifying appropriate professionals
23 to recommend to the landowner for implementation of
24 the project, doing the due diligence necessary to
25 ensure it is appropriate.

1 Q Who are the other typical professionals, just
2 categories that are involved in the process?

3 A Well, a tax attorney, biologist, engineer
4 sometimes, if it's a type of land that has an
5 obvious highest and best use for development like
6 imagine a ten acre tract up in the Irmo area,
7 northeast Columbia, you know, that would be the
8 kind of tract where we probably -- you are entitled
9 to the value before the easement, based upon its
10 highest and best use. That is the function for the
11 appraisers. But if it is going to be highest and
12 best use of development the federal law allows what
13 is known as a subdivision analysis and so you might
14 need engineers to actually lay out a development
15 plan for the property, so sometimes we need
16 engineering, not all the time.

17 We also need, in addition, tax attorneys,
18 biologists. Biologists, by the way, will be doing
19 the base line documentation report which is a
20 requirement of 170(H) of the Internal Revenue Code.
21 Sometimes we need surveyors, although surveyors are
22 not a requirement of 170(H). And of course we need
23 appraisers, we need qualified appraisers. And
24 another essential part of the easement process is
25 we have to have a donee organization. That is an

1 organization that will receive the gift. Another
2 name for them is a qualified organization, and
3 typically they would be a 501(C)(3), a charitable
4 organization under the Internal Revenue Code and
5 they would be, just because they are 501(C)(3)
6 doesn't necessarily mean they are a qualified
7 organization that can take easements. They have to
8 be a 501(C)(3).

9 One of my favorite organizations to accept
10 conservation easements is the county conservation
11 district which I served open as a commissioner for
12 eighteen years. We just placed, Mr. Elliott told
13 you all about an easement we did at the end of 2011
14 and I was able to get York Conservation District to
15 agree to accept that easement of a thousand acre
16 cattle farm up at the edge of Rock Hill.

17 Q Yancey, you're a lawyer. Does Yancey
18 Environmental Solutions, with your skills as a
19 lawyer, provide legal services to clients,
20 landowners that want to do a conservation easement?

21 A No, we do not. I hadn't practiced law in
22 over, since daddy died or shortly thereafter, and
23 so we do not provide legal services, we act as
24 conservation, natural resource, wildlife habitat
25 consultants.

1 Q Let's get to Mr. Justice.

2 A Okay.

3 Q How did you meet Mr. Justice?

4 A I met Mr. Justice in 2005. I knew of him and
5 I was asked to help Mr. Justice with placement of
6 an easement on a portion of his 4,500 acre tract of
7 land in Clarendon County. I knew about the tract,
8 it was a huge tract of land, and so I went and met
9 Mr. Justice and he's about six foot seven, 350
10 pounds and he is a trip, he is just a jolly old --
11 he is as much the nicest person you ever want to
12 meet.

13 And we got to talking, he loves fishing and
14 the outdoors, he likes quail hunting. He told me
15 about West Virginia. Well, I did go to West
16 Virginia and watch North Carolina beat my Gamecocks
17 one time but I had really never been to West
18 Virginia for sightseeing. But anyway, we got to
19 talking and we ended up doing a WRP easement on a
20 portion of Mr. Justice's farm, on 1,100 acres, I
21 believe it was.

22 And a WRP easement is a cash easement. That
23 is the federal government paying landowners to
24 place a highly restrictive easement on their lands
25 to protect aquatic resources, particularly rivers

1 and major streams, and we were able to put that
2 easement together for Mr. Justice, working with
3 NRCS, the federal government and their biologists,
4 including Jim Lewis, as a matter of fact. That was
5 before Jim and I were working together, and Mary,
6 but Jim was the biologist for NRCS at the time and
7 I worked with Jim on that project.

8 Q I have a copy of that easement. Mr. McLeod,
9 is this a copy of the WRP easement recorded on Mr.
10 Justice's property in Clarendon County?

11 A It appears to be.

12 Q Is that Mr. Justice's signature on the
13 signature page?

14 A Yes, sir.

15 Q And were you -- did Mr. Justice pay you for
16 your services in the WRP easement?

17 A He did.

18 Q Tell us a little bit about the process that
19 led to the recording and the payment for services.

20 A Well, I met with Mr. Justice and we rode
21 around the farm the first day, I went back a couple
22 more times and over the ensuing several months we
23 met on the property and I went around the property
24 a few times with his farm manager Randy, and of
25 course the federal government biologist got

1 involved and the appraisers got involved and so
2 forth and we never did have a formal agreement, Mr.
3 Justice said he wanted me to go --

4 MS. McWILLIAMS: Your Honor, objection, a
5 narrative. I would appreciate it if Mr. Pendarvis
6 would actually ask questions so I may have --

7 MR. PENDARVIS: I asked him how he got paid.

8 MS. McWILLIAMS: And we're now, the witness
9 is volunteering about their agreement.

10 MR. PENDARVIS: That's fine.

11 THE COURT: Rephrase your question.

12 Sustained.

13 BY MR. PENDARVIS:

14 Q Mr. McLeod, was there a formal agreement
15 which Mr. Justice signed, formal agreement between
16 Yancey Environmental Solutions and Mr. Justice or
17 any of his companies that was signed and that led
18 to the recording of this WRP easement?

19 A No, sir.

20 Q How did you come to terms on payment with Mr.
21 Justice?

22 A I told him the first time I met with him that
23 I would do it for a fee and he said do it so we did
24 it.

25 Q After the easement was recorded in 2005 did

1 you have occasion to meet with Mr. Justice again?

2 A I did.

3 Q And when was that?

4 A It was the spring of 2007 and I got a call
5 from Randy, his farm manager, and he said, "Yancey,
6 Mr. Justice --"

7 Q I tell you what, Mr. McLeod, let's don't talk
8 about what someone said.

9 A Okay.

10 Q What were you called to do, what were you
11 asked to do when this call came in?

12 A Meet with Mr. Justice to discuss the
13 conservation project.

14 Q And did that meeting take place?

15 A It did.

16 Q And after the meeting what were you, what
17 happened?

18 A After the meeting Jim Lewis and Mary and I
19 embarked upon a process of a phase one analysis of
20 the Justice Family Farms, called Black River Farms,
21 tract for a potential stream and wetland
22 compensatory mitigation bank.

23 Q And was that in part what we heard Dr.
24 Hawkins tell us about, the mitigation, the same
25 property, same features that you were describing?

1 A That's correct.

2 Q And what happened after the meeting, about
3 the mitigation?

4 A Well, initially -- you mean when we presented
5 the analysis?

6 Q Yes, sir. Start with this.

7 MR. PENDARVIS: Your Honor, before we move to
8 this next exhibit I would like to move in the
9 warranty and easement deed as Plaintiff's 27, I
10 believe.

11 MS. McWILLIAMS: No objection, Your Honor.

12 THE COURT: No objection, it will be Exhibit
13 27.

14 (Easement deed marked and received in
15 evidence as Plaintiff's Exhibit 27).

16 BY MR. PENDARVIS:

17 Q Mr. McLeod, I passed to you a letter, this is
18 dated May 15th, 2007, it is on James C. Justice
19 Companies letterhead, it is a letter from Mr. Ball
20 and it appears to have a letter of intent and
21 agency agreement signed. Describe for the jury
22 what this letter of intent and agency agreement was
23 about.

24 A When we do a stream mitigation project we
25 have to deal with several agencies, the Corps of

1 Engineers, U.S. Fish and Wildlife, DHEC, DNR. What
2 we typically do is we give our client a letter of
3 intent and an agency agreement that will indicate
4 to anybody with whom we were speaking on their
5 behalf evidence that the landowner has given us
6 authority to speak for them and so that is what
7 these documents are.

8 Q And you sent this letter of intent to Mr.
9 Justice and this is a signed copy?

10 A Yes, that's correct.

11 Q After this agreement was received, or before,
12 let's talk, what were you doing while this was,
13 this letter of intent was being circulated?

14 A We were commencing work on our phase one
15 assessment, analysis of the stream and wetland
16 compensatory mitigation potential on this tract of
17 land.

18 Q Describe for the jury with a little more
19 clarity what it is that mitigation potential and
20 the process was for this Clarendon County tract and
21 how that might have benefitted Mr. Justice.

22 A This 4,100 acre tract of land is perhaps the
23 most uniquely suitable tract I have ever seen for a
24 compensatory stream and wetland mitigation project.
25 It is, it is headwaters of the Black River, I-95,

1 Clarendon County, it had been prior converted a
2 hundred years ago, there were canals dug through it
3 to convert the wetlands into farm land. They
4 literally channelized the Black River into canals
5 long, long ago, and so the mitigation project
6 basically would have been designed to restore to
7 the extent possible the natural hydrological
8 conditions of the property.

9 Q Did you wait to receive the letter of intent
10 before you started work?

11 A No, sir.

12 Q And why not?

13 A That's just who I am, you know, and I had
14 already done work with Mr. Justice and I trusted
15 him and so we just started work.

16 Q After you started work did you develop any
17 plans for the property?

18 A We did.

19 Q Before we talk about that I would like to
20 move this letter dated May 15th into evidence.

21 MS. MCWILLIAMS: No objection, Your Honor.

22 THE COURT: No objection, Plaintiff's Exhibit
23 28 without objection.

24 (May 15, 2007 letter marked and received in
25 evidence as Plaintiff's Exhibit Number 28).

1 BY MR. PENDARVIS:

2 Q Describe the work that was done after, during
3 the spring and summer of 2007.

4 A Well, a lot of the work is site specific. We
5 have to be on the tract and take measurements and
6 soil samples and understand the dynamics of the
7 existing conditions relating to the aquatic
8 resources on the property. But a lot of our work
9 in the preliminary phase one analysis can be
10 accomplished with national wetland inventory maps,
11 hydrologic maps, topographic maps.

12 In this day and time, even though Yancey
13 doesn't use computers, my partner Jim is like Mary,
14 very adapted to computers and it is amazing what
15 they can produce with the use of computers in terms
16 of mapping. And so we were able to on site and by
17 computer generate a projected mitigation project,
18 including the restoration, enhancement and
19 preservation credits and the approximate value of
20 those credits based on current market conditions.

21 Q Was anyone working with you outside yourself
22 as Yancey Environmental Solutions? Was anyone else
23 working with you?

24 A I'm sorry, I didn't understand.

25 Q Was anyone else other than Yancey

1 Environmental Solutions even working on this
2 project, the wetland mitigation project?

3 A The work we were doing at that particular
4 time was NRPM, Natural Resource Protection
5 Mitigation.

6 Q Was that the time it was performed, in 2007?

7 A We created it in 2005 so we hadn't been
8 working long together but I certainly couldn't have
9 done this project as Yancey Environmental
10 Solutions. Jim Lewis is a real biologist, I'm a
11 pretend biologist.

12 Q I notice the letter of intent has Lewis
13 Wetland Consulting and Yancey Environmental
14 Solutions.

15 A Oh? Well, I don't know the answer to that
16 question. I thought we had created Natural
17 Resources Protection Mitigation in '05. If we
18 signed it as -- I suppose we were in the process of
19 creating NRPM.

20 Q We will be looking for something else with
21 NRPM on it. I will see if we can get that in
22 context.

23 MS. McWILLIAMS: Beg the Court's indulgence.

24 Q Mr. McLeod, did you meet with Mr. Jim Justice
25 during the summer of 2007?

1 A During the summer?

2 Q I'm sorry, you were looking down.

3 A Yes, we did.

4 Q When did you meet with Mr. Justice?

5 A I believe August, 2007.

6 Q And could you -- who else -- you attended the
7 meeting with Mr. Justice?

8 A Yes.

9 Q Anyone else?

10 A Jim Lewis.

11 Q Did Mr. Justice have anyone?

12 A Did he? He had Randy his farm manager and
13 Jay his son and maybe Joyce, the person who really
14 runs the operation.

15 Q I have passed to you a 20 something page
16 document. Can you describe for the jury, is this a
17 true and correct copy of this report?

18 A Yes, it is.

19 Q Is this a document you helped create?

20 A That we created?

21 Q Yes.

22 A Yes, it certainly is.

23 Q What did you do, what did you do with this
24 report?

25 A We presented it to Mr. Justice and Jay in

1 August of 2007. We were very excited about this
2 project, a huge project, a very significant project
3 and so we went and discussed it with them and told
4 them what we had determined.

5 The report, do you want me to say what the
6 report indicates?

7 Q I was going to ask you what was the purpose
8 of the report?

9 A This was to give them a sense of the
10 magnitude of the potential project. Based upon
11 current market conditions in August, 2007, and the
12 number of credits we would anticipate generating,
13 the gross value was about \$63,000,000. The net we
14 projected was 45,000,000.

15 Q And, Mr. McLeod, how does the process operate
16 if a property that is available for mitigation, the
17 process begins, what is involved for the payment --
18 let me step back. Does the landowner receive a
19 payment if they do a mitigation project?

20 A Do you want me to kind of summarize how the
21 process works?

22 Q Briefly, yes.

23 A Okay. Under the Clean Water Act which is a
24 federal law, I think Dr. Hawkins mentioned -- well,
25 he mentioned Section 404 of the Clean Water Act,

1 but the Clean Water Act requires anyone or any
2 entity, Department of Transportation,
3 Stewart-Mongo, Centex, Pulte, developers, Walmart,
4 an individual, if they impact enough, a stream or
5 wetland, any entity or individual that impacts
6 jurisdictional wetland or streams is required under
7 that law to present to the District Corps of
8 Engineers office a plan to compensate the public
9 for the loss of those wetlands.

10 So if they put pipes in streams in a
11 subdivision or if D.O.T. is going to do that they
12 have to compensate for that loss. And so what we
13 do with landowners who have tracts of land that are
14 appropriate for mitigation is we show them the
15 potential, as we did with this analysis, and then
16 if they want to go forward we begin the design of
17 the plan to present to the Corps of Engineers and
18 what is known as the IRT group, interagency review
19 team, which is composed of the Corps, EPA, U.S.
20 Fish and Wildlife, DNR, DHEC and so forth, and we
21 prepare a perspectus, which is a conceptual plan to
22 get their tentative approval. The process from
23 start to finish to actually get a mitigation bank
24 permitted and credit released for sale takes a
25 couple years, eighteen months to two years.

1 Q So, if the landowner says let's proceed what
2 happens next?

3 A Then we start the process of working on the
4 perspectus. We have already done this work and so
5 we take the information, the due diligence we did
6 in connection with the analysis, preliminary
7 analysis, and we start work on the actual design
8 sufficient to get us to the perspectus stage.

9 Q And what was the value, the net value to Mr.
10 Justice presented in this feasibility report dated
11 August1, 2007?

12 A \$45,276,870.

13 Q Did you present this to Mr. Justice?

14 A I did.

15 Q And did Mr. Justice instruct you to proceed
16 with this compensatory mitigation bank plan?

17 A Unfortunately he did not. He was very
18 excited about it but his son Jay started talking
19 about --

20 Q You can't say what was said, you can just
21 tell me how, what the results were of the
22 conversation.

23 A As a result of the conversation, it wasn't
24 that day but shortly thereafter, they decided not
25 to go forward with the mitigation project.

1 Q What was your understanding of why they
2 decided not to go forward with the mitigation?

3 A They wanted to continue the farming operation
4 that they had on that property for a long time.

5 Q Were you disappointed?

6 A I certainly was. It was a project beyond my
7 dreams and so -- but the landowner makes the
8 decision, so that is what he decided.

9 Q And did Natural Resource Protection and
10 Mitigation, LLC, your company that you formed with
11 Mr. Hawkins, submit an invoice to Mr. Justice for
12 services it rendered?

13 A I don't recall whether we did or not. If
14 Mary told me to I did.

15 Q I have your permission, I can call you
16 Yancey. Yancey, is this a copy of an email
17 transmitted to Mr. Justice in October of 2007 with
18 an invoice listing activities you had done and
19 requesting payment of \$15,000?

20 A It is.

21 Q Does this list out the different activities
22 you had begun or you and Mr. Lewis had done on the
23 property?

24 A It does.

25 Q Did Mr. Justice pay or his companies pay this

1 invoice?

2 A Yes, they did.

3 MR. PENDARVIS: Your Honor, we ask to move
4 this into evidence as Plaintiff's 29. Let me back
5 up and be sure. First off let me backtrack. We
6 move the mitigation bank feasibility report in
7 evidence.

8 MS. MCWILLIAMS: No objection.

9 THE COURT: No objection. Make the
10 mitigation banking feasibility report 28.

11 (Mitigation bank report marked and received
12 in evidence as Plaintiff's Exhibit 29).

13 THE COURT: And the email 30?

14 MS. MCWILLIAMS: No objection.

15 THE COURT: That will be Plaintiff's 30.

16 (October, 2007 email marked and received
17 in evidence as Plaintiff's Exhibit 30).

18 BY MR. PENDARVIS:

19 Q Mr. McLeod, this invoice, Exhibit 30,
20 contains some references to Justice Family Farms,
21 homeplace, August 4th, Jim and Yancey, Beckley,
22 West Virginia, tour homeplace for conservation
23 easement?

24 A Yes, sir.

25 Q Did you go to Beckley, West Virginia, Mr.

1 McLeod?

2 A I did.

3 Q What did you do?

4 A We spent a couple days on this 16,000 acre
5 homeplace. It blew me away. By the way, West
6 Virginia is very pretty and, wow, it was just an
7 incredible opportunity. He also is an avid small
8 mouth bass fisherman, he has several small mouth
9 bass lakes up there, he took us fishing and we just
10 had a great time. That is what we did, we looked
11 at it for his conservation easement potential.

12 Q Did Mr. Justice retain you or others, Jim
13 Lewis, to do a conservation easement project on his
14 homeplace in West Virginia?

15 A No, never got around to that.

16 Q After October of 2007 did anything change the
17 status of what was the mitigation bank project?

18 A Well, in a conversation, a telephone
19 conversation with Mr. Justice a couple months later
20 and him having made it very clear to us that, you
21 know, they loved their farm, I suggested to Mr.
22 Justice that under 170(H) of the Internal Revenue
23 Code that we could do a conservation easement on
24 the farm and protect it as a farm landscape and
25 active farming operation forever and as a

1 result of that conversation he said, "Let's do it."

2 Q Did you discuss what was being considered for
3 the highest and best use value for the Clarendon
4 County property?

5 A Mitigation, we knew by then that the highest
6 and best use of the property obviously was
7 mitigation.

8 Q Okay. And once you got the go ahead to
9 proceed with the project what did you do next?

10 A Well, the first thing I did was assemble all
11 of our documentation and maps and work that we had
12 done in connection with the mitigation project and
13 I talked to Jim Lewis about the necessity of a base
14 line documentation report and a friend of mine
15 Clinton Epps was then with Multi-Engineering and we
16 had done a lot of work with them and I notified
17 Clinton Epps who is now the Blood Bank manager for
18 Richland County that we were going to be moving
19 forward on the conservation easement project and it
20 was a very large project and we were going to have
21 to all work diligently to get it all done.

22 And I called Hal Hanlin and talked to him
23 about it, told him that I would need a tax attorney
24 on the project, and I called Darroll Hawkins who I
25 felt was uniquely suitable as an appraiser to

1 appraise a project like this, and I also called
2 Henry Beckham, who is another appraiser in South
3 Carolina, Myrtle Beach, who I knew because on
4 another project I had worked with him, I knew Henry
5 Beckham had knowledge, expertise and experience
6 doing an appraisal where mitigation was the highest
7 and best use.

8 Q We may be looking at an email from Mr.
9 Beckham, but why did you need two appraisals?

10 A Well, it is a very large project, the IRS
11 doesn't like conservation easements and I felt like
12 one of this magnitude would certainly be audited
13 and the more professional advice and consultations
14 you have, the better prepared you are to defend
15 your work and protect the landowner's interest.

16 Q Was there a different type appraisal process
17 Mr. Beckham was doing, separate and apart from what
18 Dr. Hawkins would be doing?

19 A Henry Beckham would have done a traditional
20 appraisal but they both would have been using
21 mitigation as the highest and best use and
22 sometimes, though, we use another appraiser for
23 what we call a, you do an appraisal and you do
24 another appraisal to look at that appraisal and
25 make comment about the appropriateness and form and

1 methodology, comparables that they used and so
2 forth but in this case we probably would have
3 gotten Henry just to do another self contained
4 appraisal just because of the size of the project.

5 Q And before we move into the lawyer that is
6 going to be involved in this process, were there
7 any other professionals that were contacted as part
8 of the team that was going to do the project?

9 A Let's see. I had Hal Hanlin, I had Jim
10 Lewis, I had Clinton Epps, I had Darroll Hawkins, I
11 had Henry Beckham.

12 Q Were there any considerations about the
13 grantee organization that was being considered in
14 the early part -- let me step back. When was this
15 going on?

16 A Oh, late October, early November. I knew Hal
17 was chairman of the Board of Community Open Land
18 Trust and so I don't recall exactly when it was but
19 Hal and I talked about can Community Open Land
20 Trust serve as the donee organization to accept the
21 gift.

22 Q Had you worked on projects in which Mr.
23 Hanlin had been involved in prior to November,
24 2007?

25 A Yes.

1 Q Tell us a little bit about those, very brief.

2 A One I referred to Hal, I believe that was
3 Senator John Land and his wife Marie in Clarendon,
4 actually the county line ran right through the
5 property, and the other one was an island in
6 Beaufort that was owned by David Bryant, and Hal
7 referred that one to me.

8 Q Who did Mr. Hanlin represent in both of those
9 conservation easements?

10 A He represented Senator Land and Marie and
11 represented David Bryant.

12 Q Both of them were landowners?

13 A Yes.

14 Q So, when was your first conversation with Mr.
15 Hanlin about the Justice Farms property?

16 A It would have been probably toward the end of
17 October, I believe.

18 Q I'm going to ask you to pull out Exhibit 3
19 that has been previously marked, to your right.

20 You told us -- did you see a copy of what is
21 marked as Exhibit 3, this email from Mr. Hanlin?

22 A I did.

23 Q You told us you didn't do computers. Did
24 Mary print this out for you?

25 A She certainly did.

1 Q There had been some conversation with Mr.
2 Hanlin before this email?

3 A Yes.

4 Q Tell us about your discussion with Mr. Hanlin
5 about this project, what his role was going to be.

6 A Well, generally that I needed his expertise
7 and experience as a tax attorney to handle the
8 project and obviously on a project like this with
9 the complexities involved and the size of the
10 project and the client, I wanted, obviously I
11 wanted to do the very best job I can for all of my
12 clients but it is kind of a, kind of awe inspiring
13 to be working with Jim Justice, you know. I talked
14 to Hal about let's get it going, let's do the
15 project, and so he was, you know, by email just
16 gave me some of the things he was going to be
17 needing to put together.

18 Q And did you discuss the basis, the concept of
19 the highest and best use that would be part of this
20 conservation easement?

21 A Oh, absolutely. The first conversation I was
22 real excited about that. You know, I was saying
23 earlier I love fishing, teaching children of all
24 ages about natural resources, conservation, and I
25 didn't plan what I do, I intended to practice law

1 with my dad but he died and so my life, my
2 experience is pretty unique. I never will forget,
3 if you will bear with me for a second, James Henry
4 Bledsoe died last year, he was a contractor from
5 Saluda, and I was standing on a pond site with him
6 one day and he said, "Mr. McLeod, are you a
7 lawyer?"

8 MS. McWILLIAMS: Your Honor, I hate to
9 interrupt but I think we're getting a little bit
10 off course here.

11 Q We'll get to that, maybe.

12 A Okay.

13 Q Yancey, the last big paragraph, not the last
14 paragraph, next to last paragraph, the very last
15 portion discussing it, Mr. Hanlin says, "I
16 understand you contemplate a fee of perhaps
17 4,000,000 or so"?

18 A Uh-huh (Affirmative).

19 Q Do you see that part? Before we get to the
20 rest of that sentence, tell me about your
21 discussions with Mr. Hanlin about the value of the
22 conservation project and how your fee would be
23 calculated.

24 A Well, I think he must have misunderstood
25 anything I might have said about that because I

1 don't think I ever said that, but I knew it would
2 be a very substantial fee because of the size of
3 the project and, I mean, I felt like a reasonable
4 fee for me, for Yancey Environmental Solutions on a
5 project like this, given the complexities and the
6 unique approach and the valuation, highest and best
7 use concept and so forth, it was a project that I
8 could certainly very reasonably think that, you
9 know, five percent fee would be appropriate.

10 Q And how is the five percent, five percent of
11 what?

12 A It would be five percent of the appraised
13 value as reported, charitable gift value as
14 reported on the IRS form, which I already knew at
15 this point it was going to be, I mean, likely the
16 appraisal, although I don't do the appraisal, what
17 it looked like is the appraisal would be something
18 in the \$45,000,000 range because the highest and
19 best use was clearly mitigation and we had already
20 done the analysis and so, you know, give or take,
21 five percent of that.

22 Q Up until November, 2007, had you ever been
23 asked, had you been asked to be involved in a
24 conservation easement project that would have
25 generated fees in the nature of five percent of

1 \$45,000,000?

2 A No.

3 Q This was the largest easement you had worked
4 on, conservation easement?

5 A It wasn't the largest easement in terms of
6 the value I had ever worked on but all of my fees
7 prior to this had just been lump sum sort of fees
8 based on my best educated guess on time and effort
9 and so forth that I would have to put in. This was
10 the first time that I felt comfortable charging a
11 five percent fee on a project like this. I had
12 done a 67,000,000 conservation easement where my
13 fee was 40, 50 thousand dollars but those were just
14 straightforward easements that weren't complex.

15 The appraisal was, you know, subdivision
16 analysis, and in my life I have always tried very
17 hard to be fair and this was the first time in my
18 life that I felt like a deal like this was fully
19 justified and reasonable. I had had people for
20 years say, "Yancey, why in the world do you do work
21 for these people that have these tracts of land
22 with conservation easements and provide them
23 millions of dollars of tax benefit and you charge
24 30, 40, 50 thousand dollars?" I said, "Well, that
25 is what I feel comfortable doing."

1 Q Up until 2007 what would be the typical
2 annual income you had made? We heard a little bit
3 about that on cross-examination of Dr. Adams this
4 morning. What was your annual income in this time
5 period?

6 A I was shocked when I heard what I heard this
7 morning in court. I had no idea what I made. I
8 know that sounds silly, I'm 66 years old and I'm a
9 lawyer, educated, but I just don't know, you know.
10 I was trying to educate three children, make sure
11 Mary had food on the table. I would say that, you
12 know, average would be, you know, 75, 80 thousand
13 dollars, something like that. I don't know.

14 Q Who handles all those aspects of your life?

15 A Mary and Robin.

16 Q So let's get back to this project. When was
17 the first conversation with Mr. Hanlin about how
18 Mr. Hanlin was going to be paid for his work on
19 this project?

20 A I'm sorry, would you please --

21 Q When was the first conversation between
22 yourself and Mr. Hanlin about how Mr. Hal Hanlin
23 was going to be compensated for his legal services
24 on this project?

25 A Conversation?

1 Q Yes, sir.

2 A I think Hal and I talked generally about, a
3 little bit about that before this email. I don't
4 recall talking about two-thirds/one-third. I had
5 never done that with him before this, so I don't
6 know, but on the project I worked with him before
7 he was representing the landowner.

8 Q Without going into a whole lot of details,
9 were you working with Mr. Hanlin on another matter,
10 the Gastono matter?

11 A Yes.

12 Q Did you discuss any fees in that matter as
13 well, how he would be paid?

14 A Yes, I think so.

15 Q Did the Gastono project ever go forward?

16 A No, it did not.

17 Q Why was that, why did it not go forward?

18 A That was a gentleman from Ohio who with his
19 wife came and sat on --

20 Q Yancey, I hate, I want to just kind of get to
21 the, did the landowner decide to proceed?

22 A He decided not to go forward.

23 Q It had nothing to do with you?

24 A No, no.

25 Q So you had discussed fees, sharing fees in

1 the Gastono matter, am I correct?

2 A Yes.

3 Q This is the next time you were involved with
4 a matter with Mr. Hanlin?

5 A Yes, the Justice matter.

6 Q When you got this email that has this last
7 phrase, "I assume our usual two-thirds/one-third
8 arrangement would apply." The next sentence says,
9 "Please correct any error on my part," what did you
10 do?

11 A Mr. Pendarvis, the only way I know how to
12 answer that is that I had a high degree of respect
13 for Hal, I still do actually. We had worked
14 together before, we were friends, I had referred
15 business to him, he had referred business to me, I
16 really enjoyed working with him, he was one of the
17 only tax attorneys I know who speaks English and
18 can communicate very complex things to clients. I
19 really liked working with him.

20 And I'm just the kind of person that when I
21 get a letter like this from somebody like Hal
22 Hanlin I don't frankly pay much attention to it.
23 If Hal says this is what needs to be done, then
24 that's fine with me, I wouldn't ever question this,
25 I would never email him or call him and say, "Hal,

1 that's too much money for you." I mean, if he
2 thinks this is the right way to do it then that's
3 fine, that is why I'm hiring him, you know, to help
4 with these projects, he's a tax attorney, so
5 anyway, that's just the truth.

6 Q At this point in the process was there any
7 discussion between Mr. Hanlin and yourself as to
8 who was going to be the client for Mr. Hanlin?

9 A Mr. Pendarvis, again the only way I know how
10 to answer that is that I had to have a tax attorney
11 to be the lawyer in this very complex transaction
12 involving a whole lot of money and a strategic tax
13 planning for a very important man and when I called
14 Hal and talked to him about it he was very excited,
15 he should have been, he loves conservation and
16 appreciates conservation, he serves as chairman of
17 the Community Open Land Trust, so unlike most
18 attorneys, tax attorneys, he really does care and
19 he was excited about the project, too, protecting
20 this much land, and I just assumed that Hal would
21 be the tax attorney for the project and that's the
22 only way I know how to answer that. So, he would
23 be representing the transaction, he would be the
24 attorney to do whatever was necessary.

25 Q Did you have that conversation with Mr.

1 Hanlin where there was an agreement that he was
2 going to be the attorney for the transaction?

3 A I don't recall that specifically. It was
4 just an assumption I made when I talked to him
5 about helping me with the project, that is what he
6 would be.

7 Q Did Mr. Hanlin ever speak with you about
8 there needed to be some clarity as to exactly who
9 his client is going to be in this transaction?

10 A Sure, yes. I mean, you know, he talked
11 about, you know, representing me and Y.E.S., and
12 then I started seeing emails where, you know, he
13 was sending them to David Harrah and Justice
14 saying, "We represent Y.E.S., not you." It didn't
15 occur to me that there was anything amuck about
16 that. I mean, Hal, whatever is appropriate is what
17 we would do.

18 Q But you're a lawyer and you have been in
19 these 20 something conservation easements up to
20 this point. Did it concern you that you were going
21 to have a lawyer that is going to represent your
22 organization and not the landowner?

23 A Absolutely not. It was Hal Hanlin, I trusted
24 him explicitly to do the right thing for me, for
25 Mr. Justice, for the project, make it happen, make

1 sure it was all right, appropriate, consistent with
2 the terms of 170(H) and Internal Revenue Code.
3 Golly, I worked with tax attorneys all over the
4 country, we did a project for Walmart folks out in
5 Arkansas, they had so many lawyers I can't remember
6 all their names, but Mr. Justice, you know, asked
7 me to do this project and he trusted me with it and
8 I was doing my very best to put together a group of
9 professionals to carry out his wishes.

10 Q Did you consult with Mr. Justice about which
11 particular professionals, whether he approved the
12 professionals you retained to do the project?

13 A When you work with Mr. Justice and he says go
14 you go. He's not the kind of person that you pick
15 up the phone and say, "Jim, what do you think about
16 this?" I mean, that is not just who he is, he
17 trusts me so I was just trying to do the project.

18 Q And there has been some discussion about the
19 consulting services agreement that was sent to Mr.
20 Justice. Do you remember that?

21 A Oh, sure.

22 Q Did Mary prepare the initial consulting
23 agreement and send it to Mr. Hanlin?

24 A Typically Yancey writes out on a legal pad,
25 you know, clauses and things like that and of

1 course I got out an existing services agreement and
2 modified it for this project and handed it to Mary
3 and she typed it up. Likely she sent it to Hal for
4 his review. That is how that was started.

5 Q I wonder whether or not I need to clutter up
6 all the exhibits with another one. Did Mary show
7 you copies of things before she sent them to Mr.
8 Hanlin?

9 A Sometime yes, sometimes no. Generally she
10 would show me something before she sent it to
11 somebody, yes. Her desk was literally in my
12 office, I don't use computers, I would be on the
13 phone, she would make it seem I was smart, computer
14 savvy.

15 Q Was there ever a time --

16 THE COURT: Mr. Pendarvis, can we take a
17 break?

18 MR. PENDARVIS: Sure.

19 THE COURT: The jury needs one. So, take a
20 short break, step in the jury room, stretch your
21 legs, use the restroom, whatever you need. I'll
22 have you back out here in a few minutes. Remember
23 you can't discuss the case.

24 (The jury was excused from the courtroom).

25 (Recessed at 4:44 p.m.).

1 (Resumed at 5 :05 p.m.).

2 (The jury returned to the courtroom).

3 BAILIFF: The jury is all present, Your
4 Honor.

5 THE COURT: Very well.

6 BY MR. PENDARVIS:

7 Q Mr. McLeod, we're into November in this
8 project and there is, we heard some references in
9 the testimony about a gentleman named David Harrah.
10 Who is Mr. Harrah?

11 A Mr. Harrah was Jim Justice's in house CPA,
12 accountant, bookkeeper, just financial guy.

13 Q And how did Mr. Harrah get into the picture
14 for this conservation easement?

15 A Jim Justice told me that David would be kind
16 of the point guy to, you know, deal with on the
17 project so that is what Hal and I did.

18 Q Did Mr. Justice or Mr. Harrah ever tell you
19 that they had a tax lawyer that will be involved in
20 the conservation project?

21 A No.

22 Q Did they tell you anything about the lawyers
23 that represent Mr. Justice?

24 A No. At some point in the process I knew
25 there was a gentleman named Steven Ball who was an

1 attorney up there that represented Jim in some
2 capacity but he didn't know much about conservation
3 easements.

4 Q I think Mr. Ball is the gentleman who signed
5 the cover letter.

6 Did you ever go visit the site -- let me back
7 up just a second before we get there. Was there a
8 determination that the Community Open Land Trust,
9 COLT, would be the donee organization?

10 A Yes. Sue Green was very excited and I had
11 worked with Sue before and so this was, you know,
12 my gosh, I think after, I don't know how many years
13 of existence, they only had a handful of easements,
14 you know, she was very excited about this easement.

15 Q Was there ever, did you ever do a site visit
16 involving COLT?

17 A Yes. We did a site visit with Sue Green and
18 Hal Hanlin was present and Randy the farm manager
19 was riding us around in a pickup truck and her
20 assistant, I never can remember her name, she's
21 really nice but I can't remember her name, I never
22 can.

23 Q And when was that site visit on the Clarendon
24 County property?

25 A November 16, 2007.

1 Q Prior to November 16, 2007, had you priced
2 your services for the project to Mr. Justice and
3 his people?

4 A Yes. Hal and I had a conversation and I told
5 Hal that I was going to be talking to David Harrah
6 about what our fee would be in the project and I
7 did talk to David and told him that I thought a
8 reasonable fee would be five percent and so, yes,
9 we had that conversation about that.

10 Q Did anything, anything unusual happen during
11 the site visit you want to tell the jury about?

12 A Yes. I was in the back of the pickup truck
13 with Hal and my cell phone rang, it was David
14 Harrah and --

15 MS. MCWILLIAMS: Your Honor, object, he is
16 eliciting hearsay.

17 MR. PENDARVIS: He's describing who he got
18 the phone call from, he is not saying what he said.

19 THE COURT: To the extent it is hearsay it is
20 sustained, to the extent it is not it's overruled.

21 BY MR. PENDARVIS:

22 Q What did you learn from that phone call?

23 A I learned that we --

24 MS. MCWILLIAMS: Objection, Your Honor. That
25 is the same thing, hearsay.

1 MR. PENDARVIS: That is not an out of court
2 statement offered for the truth of the matter
3 asserted, it is asking what this gentleman learned
4 from the conversation.

5 THE COURT: I think he is allowed to testify
6 what he learned.

7 THE WITNESS: I learned that we had an
8 agreement on the fee.

9 BY MR. PENDARVIS:

10 Q And what was the agreement?

11 A The agreement was four percent.

12 Q Instead of the five that you had proposed?

13 A That's correct.

14 Q Mr. McLeod, did you make any notes about your
15 conversation with Mr. Harrah?

16 A I did. I made a handwritten note.

17 Q Is this a copy of the handwritten note you
18 made after your conversation with Mr. Harrah?

19 A It is.

20 Q Would you read that to the jury?

21 MS. McWILLIAMS: Give me time to find it.

22 MR. PENDARVIS: Certainly, I'm sorry.

23 MS. McWILLIAMS: Your Honor, may it please
24 the Court.

25 THE COURT: Yes.

1 (Unrecorded bench conference).

2 BY MR. PENDARVIS:

3 Q After your conversation what was the fee
4 Yancey Environmental Solutions was expecting to
5 earn after this conservation easement was moved
6 forward?

7 A Four percent of the amount of the appraised
8 value of the charitable gift.

9 Q Mr. McLeod, I would ask you to look in the
10 exhibit pile and see if you can retrieve Exhibit
11 Number 7, the letter dated November 26, 2007.

12 A Okay, I have it.

13 Q And that telephone call that led to your
14 agreement to accept the four percent fee for your
15 services instead of five took place in the pickup
16 truck on November 16th while you were on the
17 property?

18 A Right.

19 Q The jury has had a chance to look at this
20 cover letter for the consultant services agreement,
21 Mr. McLeod. The consultant services agreement has
22 a five percent number on the second page of the
23 agreement. Can you explain that?

24 A Obviously I failed to indicate to sister Mary
25 we had agreed to four and she and I inadvertently

1 sent the services agreement with the original five
2 percent.

3 Q No doubt in your mind it was the number four?

4 A Yes, it was four.

5 Q Now, did you talk with Mr. Hanlin -- let me
6 back up. This letter was sent to Mr. Justice, this
7 letter marked as Exhibit 7, is that correct?

8 A Yes, sir.

9 Q Did you speak with Mr. Hanlin about the
10 content of this letter before it was sent?

11 A The content of this letter?

12 Q Yes, sir.

13 A I don't remember.

14 Q In particular the paragraph number one, the
15 first sentence says -- well, the first sentence of
16 the first paragraph says, "I have taken the
17 following action"?

18 A Yes.

19 Q "-- to expedite the process in order to place
20 the easement in this calendar year," and the first
21 paragraph is what I want to ask you about. Your
22 conversations with Mr. Hanlin, did you speak with
23 Mr. Hanlin about what is in the first sentence?
24 The first numbered paragraph says, "Coordination
25 with my tax attorney, with Mr. Hanlin, Richardson

1 Plowden in Columbia about the various aspects of
2 this project"?

3 A Sure. At this point Hal and I were, you
4 know, in full gear, moving forward, we now had a
5 tentative preliminary acceptance or recommended
6 acceptance by Community Open Land Trust that had
7 recently done site visit with Sue Green.

8 Q Again, was there a specific conversation
9 about who Mr. Hanlin would be representing in this
10 transaction?

11 A Yancey, me, was still operating, with regard
12 to this project, as far as quarterback, Hal as tax
13 attorney for the project. It mattered not to me
14 whether he technically represented A or B, so --

15 Q He's copied on the letter, correct?

16 A Yes.

17 Q Now, farther down two more sentences down
18 that begins about midway on the righthand side,
19 "Since Hal is involved as attorney for the
20 project"?

21 A Right.

22 Q Is that what you're describing in terms of
23 the --

24 MS. McWILLIAMS: Your Honor, objection,
25 leading.

1 MR. PENDARVIS: I am leading.

2 Q What was your understanding of Hal's role --
3 let me rephrase that. What did you mean by since
4 Hal is involved as the attorney in the project?

5 A I meant that Hal is the attorney in the
6 project and also I'm going on to say he's an
7 attorney representing and on the board of Community
8 Open Land Trust.

9 Q Thank you. Let's turn our attention to the
10 consultant services agreement again and let's go
11 back to page 2.

12 A I have just got the cover letter.

13 Q There should be another portion.

14 A Okay.

15 Q Could you describe for the jury generally the
16 types of payment obligations that this consulting
17 service agreement contemplates?

18 A Sure. You mean payment to us?

19 Q Yes, how were you to be paid?

20 A There is \$50,000 nonrefundable retainer and
21 then it says five percent but it should have said
22 four percent of the appraised value of the
23 charitable gift as reported on the 8283, so we
24 wouldn't get paid anything on that portion of it
25 unless he took the tax deduction.

1 Q Mr. McLeod, there has been reference in some
2 exhibit shown to the jury on a number of agreements
3 like this consulting services agreement and the
4 letter of intent from COLT that were submitted to
5 Mr. Justice and never were returned signed. Did
6 you have any conversations with any of the Justice
7 people about requiring the signing of an agreement
8 with Y.E.S. so you could proceed with this?

9 A Did I have any conversations?

10 Q Make any calls about that.

11 A I don't recall specifically. You know, I
12 just don't recall specifically having any
13 conversations about that but if I talked to David
14 Harrah I might have mentioned it.

15 Q During November and early December what were
16 you doing for the project?

17 A During early November --

18 Q Of 2007, excuse me, late November 2007, early
19 December, 2007, what were you doing on the Justice
20 project?

21 A I was full speed trying to make sure that all
22 the parts got put together and all the
23 professionals that we had employed were hard at
24 work doing their respective part on the project and
25 the base line documentation report and, you know,

1 making sure everything -- I had three other
2 projects we were working on that calendar year as
3 well.

4 Q This is a good opportunity to talk about
5 that. Could you briefly describe the name, how you
6 named the three projects? What were the three
7 projects you were working on?

8 MS. McWILLIAMS: Could we approach? Excuse
9 me.

10 THE COURT: Yes.

11 (Unrecorded bench conditions).

12 THE COURT: All right, we'll make a short
13 record of this.

14 All right, Miss Meyer, does 9:00 o'clock in
15 the morning suit you all?

16 JUROR: Yes.

17 THE COURT: You all go for the evening, leave
18 your stuff in the seats, enjoy your evening. You
19 can't begin discussing the case. See you at 9:00
20 o'clock in the morning.

21 (The jury was excused from the courtroom).

22 THE COURT: Leave Mr. McLeod there for a
23 moment in case you want to proffer some testimony.

24 All right, for purposes of the record, Mr.
25 Pendarvis, go ahead and ask your next question,

1 then I want to hear the objection, I want to see
2 where this is going.

3 MR. PENDARVIS: The question would be, Mr.
4 McLeod, was Yancey Environmental Solutions working
5 on other conservation easement matters in the
6 November, December time period, 2007?

7 At a late point in the testimony, I'm trying
8 to keep this chronological for the jury, but at a
9 point in time in late December there is evidence
10 these other easements were recorded, the easements
11 went through and Mr. McLeod --

12 BY MR. PENDARVIS:

13 Q Let's fast forward to that point. Mr.
14 McLeod, you received, this is in context of after
15 having received the IRS letter, after Richardson
16 Plowden had withdrawn, Mr. Hanlin had withdrawn,
17 did you communicate to your other clients any
18 information about the IRS letter?

19 A I called all four clients with whom I was
20 working on conservation projects in the year 2007
21 after receiving the IRS letter and told each of
22 them about the letter.

23 Q Did any of those four easements close in the
24 year 2007?

25 A Three of them did.

1 Q And which easement did not close in the year
2 2007?

3 A Mr. Justice.

4 Q Did you relay the same information about the
5 IRS letter to all four of those landowners?

6 A I did.

7 Q And notwithstanding the information about the
8 IRS letter, did the other three easements close?

9 A Yes, sir.

10 Q I would like to show you a copy of, I have a
11 couple, the letters that memorialize recording or
12 recorded copies of the easements.

13 MR. PENDARVIS: And I will proffer those as
14 exhibits.

15 THE COURT: All right. Your objection was as
16 to the next question?

17 MS. MCWILLIAMS: Well, my objection is --

18 THE COURT: The first question was proper, I
19 believe.

20 MS. MCWILLIAMS: What prompted this, Your
21 Honor, we have been told that Mr. Justice, excuse
22 me, Mr. McLeod, I apologize, Mr. McLeod called all
23 of these four projects and told them about the IRS
24 investigation or notice he had gotten, we're not
25 sure what he told them but he told them, but then

1 with respect to the other three he said, "I told
2 them to keep going because there was a tax lawyer.
3 In this one I didn't have my tax lawyer so I did
4 not recommend it to Mr. Justice."

5 So what he is trying to suggest, though, is
6 that, "Had I had my tax lawyer I could have
7 recommended to Mr. Justice and he would have done
8 it because the other ones did it." So, in other
9 words, he is trying to prove the intent, some
10 decision of Mr. Justice based on the fact of the
11 other, the other three projects. I mean, he has
12 already, the plaintiff has already moved to exclude
13 any evidence of any other transactions, nothing
14 about the IRS, no other investigations, but now he
15 wants to bring in three different transactions that
16 were different pieces of property, that had been
17 going on for different length of time, different
18 landowners, all of whom had tax counsel, they are
19 completely different. It is hearsay.

20 I guess he can probably get an easement
21 that's been recorded, I guess the Court could take
22 record of that but it is not proof of anything.
23 Under 401 it has got to be relevant to an issue in
24 this case. In all of those cases those three
25 landowners or tax attorneys or whoever he talked

1 to, you know, for whatever reasons they may have
2 had, including they may have been done, their work
3 may have all been done, I don't know, but Mr.
4 Hanlin was not involved in any of those
5 transactions, so what the jury is being asked to
6 speculate about is, "Well, we know that three other
7 people in three separate deals with separate
8 lawyers, separate facts and circumstances made
9 their decision to go ahead and record, that means
10 Mr. Justice would have," and that is, you no, Your
11 HOnor, that is not admissible to show what Mr.
12 Justice would have done.

13 The case we handed up for summary judgment,
14 Your Honor, on the lost opportunity, he can't prove
15 Mr. Justice's intent by what someone else did based
16 on a different project, different set of
17 circumstances, and we're basically opening up a
18 whole new case, I'm going to then have to cross
19 examine Mr. McLeod on every one of those
20 transactions. We have been given some of the
21 documents for them but that's it. It is not
22 admissible.

23 We have gone way far afield but I understand
24 he said he is suggesting to the Court, "Well if the
25 other people decided to do it, then Mr. Justice

1 probably would have, too, might have, too." They
2 are different circumstances. Mr. Hanlin wasn't
3 involved in them and we object to it. I think it
4 unnecessarily complicates and confuses the jury and
5 I think it is not relevant to the issue and it is
6 eliciting hearsay. I understood from Mr. Pendarvis
7 he has a few letters he wants to put in or emails
8 that talk about the fact that the deal was
9 recorded. Well, that's also hearsay.

10 MR. PENDARVIS: The document he received is
11 not hearsay. If he received it, a recorded
12 easement, it is not hearsay. There is a specific
13 exception, public record, to show that this
14 easement was recorded. She can challenge what was
15 said if she wants to open that door, but Mr. McLeod
16 is going to say, "Here is what I told them." It is
17 relevant to show whether the information in this
18 IRS letter had a causation effect on the other
19 landowners' decision to proceed on the same
20 information. In addition, there is going to be
21 testimony to the jury --

22 THE COURT: Isn't the distinguishing thing on
23 those three deals he didn't have the hesitation of
24 knowing his lawyer wasn't behind him because he
25 relied on their lawyer?

1 MR. PENDARVIS: Exactly, Your Honor, and the
2 reason, which is the total causation for this case,
3 he couldn't make that same recommendation to Mr.
4 Justice.

5 THE COURT: No, no, I'm saying he didn't make
6 the recommendation, he made disclosure, "There is
7 an IRS investigation and audit coming on me, you
8 know easements are not favored by the IRS, I got to
9 disclose that to you." What we can't get into or I
10 don't think we can get into is what that client did
11 in conversation with its lawyer making a decision
12 or how they came to that decision.

13 MR. PENDARVIS: Agreed, but with the
14 information, regardless of what other factors any
15 other landowner was thinking about, regardless of
16 that, the information about the IRS letter that
17 they want to say, they said to this jury was a
18 serious thing and it merits postponing the project
19 and that the landowner made the final decision.
20 Well, this serious thing that caused Mr. Justice to
21 postpone the project, that same information, the
22 same, Mr. McLeod says, "I could not make the
23 recommendation because I didn't have a tax lawyer
24 to proceed." Let's go through the process. All
25 four landowners got the information about the

1 serious IRS letter, all three landowners got it.
2 Mr. McLeod would say -- the next step is what
3 recommendations was Y.E.S., Mr. McLeod, able to
4 make after delivering, disclosing this IRS
5 investigation. Mr. McLeod is going to say, "I want
6 to recommend," his statement, not hearsay, why is
7 he able to recommend --

8 THE COURT: Why is he able to make the
9 recommendation without a lawyer in three cases, why
10 can't he make it in this case?

11 MR. PENDARVIS: Well, because there was --

12 THE COURT: He is without representation in
13 three, without representation in this one, that's
14 the same thing.

15 MR. PENDARVIS: Exactly, and the other three
16 landowners had sophisticated conservation easement
17 tax lawyers that could take the information from
18 Mr. McLeod about the severity of this IRS letter,
19 make their own decisions about whether to proceed
20 or not and they elected to proceed and whatever
21 that was, it was. The bottom line was this. Mr.
22 McLeod is going to say, "I couldn't make that
23 recommendation to Mr. Justice because I knew there
24 was no sophisticated tax counsel on the Justice end
25 of this deal, I knew that the sophisticated tax

1 counsel that was employed for the transaction," per
2 his testimony, had withdrawn and he could not
3 recommend to this landowner on the biggest
4 conservation easement that he had been involved in
5 proceed with this thing without a tax lawyer.

6 THE COURT: I understand that is what he is
7 thinking. What I'm telling you is doesn't it
8 create all kind of problems for us saying the
9 conduct, decision making in three other
10 transactions that are similar, the facts are a
11 little bit distinguishable, but why is that
12 relevant to the decision Justice made because he's
13 not here to say that is why he made the decision?

14 MR. PENDARVIS: There is going to be
15 testimony of Justice's people that says, the
16 Justice Companies say, "If Mr. McLeod had
17 recommended we proceed we would have done it." The
18 plan was to record the conservation easement, there
19 was a tax reason, this is all in the testimony,
20 there was a tax based reason to record it in 2007,
21 his income supported the whole decision, "We were
22 relying on Mr. McLeod," and because Mr. McLeod, and
23 the trust and the faith they had in Mr. McLeod,
24 when he recommended they not proceed they didn't.
25 Mr. McLeod was able to recommend to the other

1 landowners they proceed because they had tax
2 counsel, and the whole point --

3 THE COURT: Remind me, I'm not certain I have
4 heard Mr. McLeod made a recommendation to proceed,
5 I thought he made no recommendation.

6 MR. PENDARVIS: No, he recommended, there
7 will be testimony he recommended they not proceed.

8 THE COURT: Do what you want to do is
9 different than I don't think you should do this,
10 that is a total different statement.

11 MR. PENDARVIS: Well --

12 THE COURT: I mean, you all have got -- in
13 making my ruling, it is troubling because I get
14 characterizations of what was said in depositions,
15 I have read two or three you all gave me, I haven't
16 read them all, I'm working on --

17 MR. PENDARVIS: Your Honor, the real crux of
18 the defense's case is that Mr. McLeod did not say
19 after saying, or as part of saying, "I don't
20 recommend you proceed because I don't have a tax
21 attorney," that second phrase, Mr. McLeod is going
22 to testify he did not say that. Dr. Adams said on
23 the witness stand that he had, he was too civil to
24 say that about Mr. Hanlin.

25 THE COURT: You haven't answered my question

1 yet. What was said, "I recommend you not proceed,"
2 or, "You need to make a decision because I've got
3 to inform you --"

4 MR. PENDARVIS: Mr. McLeod said, "My
5 recommendation was you don't proceed but it's your
6 decision." Mr. Justice and his folks, upon
7 accepting Mr. McLeod's, or hearing Mr. McLeod's
8 recommendation that they not proceed, they elected
9 to agree with that and not proceed, called off the
10 dogs and he called the professionals and said it's
11 been postponed.

12 But the same recommendation, excuse me, the
13 same disclosure of the IRS letter was made and the
14 ability of Mr. McLeod to make a recommendation to
15 proceed was available in the other three because
16 they had tax counsel. Mr. McLeod couldn't make
17 that same recommendation to Mr. Justice because
18 there was no tax attorney so he said, "I recommend
19 you do not proceed," but he says, his testimony in
20 the deposition was, Your Honor, after making that
21 recommendation, you know, he said words to the
22 effect, again, words to the effect, "It's your
23 decision, now, Mr. Justice, if you want to proceed,
24 you know, we'll see."

25 THE COURT: All right. What do you all say?

1 MS. McWILLIAMS: My point is, Your Honor,
2 this is the highlight of the proximate cause
3 argument that we have made throughout, the decision
4 to recommend or not recommend, that is what he's
5 going to testify. "I recommended to the other
6 three, I chose not to recommend to Mr. Justice
7 because of Mr. Hanlin withdrawing." If we had
8 evidence that he recommended to Mr. Justice even
9 without counsel and said, you know, "I think we
10 ought to go forward, I don't have my lawyer but I
11 think we ought to go forward, Mr. Hanlin has
12 withdrawn," or, "I don't have Mr. Hanlin anymore,"
13 whatever he says, and then if Mr. Justice had said,
14 "Oh, no, I'm not going forward now," then perhaps
15 Mr. McLeod might be able to say, "Look, I wanted
16 Mr. Justice to go forward and he wouldn't do it
17 because I didn't have Hal."

18 In those other three cases he told them to go
19 forward and they did. If he told Mr. Justice to go
20 forward, that he didn't have Hal and he refused,
21 then you have at least some proximate cause. In
22 this case he is trying to rely on decision making
23 of three other people to say, well, since three
24 went forward. He didn't even tell them the same
25 thing.

1 THE COURT: Well, here is the other thing
2 that is troubling for me. The other deals were
3 hundred dollars, thousand dollars, hundred thousand
4 dollars. Forty million, this is the big one, these
5 are small ones, the risk is a little different.

6 MR. PENDARVIS: Your Honor, can I defer to my
7 client?

8 He had a \$35,000,000 easement involving North
9 Carolina State University and a huge tract of
10 property in North Carolina that went down, those
11 with lawyers, a bunch of lawyers. With information
12 from Mr. McLeod that their conservation consultant
13 was being investigated by the IRS, they made
14 decisions.

15 The point of this whole position that Mr.
16 Hanlin put Mr. McLeod in, and Y.E.S., was Mr.
17 McLeod knew that there was no lawyer involved in
18 this transaction. As a conservation consultant
19 with duties to these people, to these conservation
20 easements and the way they need to be accomplished
21 to satisfy the objectives of a tax deduction and
22 the environmental objectives, he had an obligation
23 to make sure that there was going to be tax
24 attorneys available to make the decisions and
25 finish the papers.

1 Your Honor --

2 THE COURT: All right, stop.

3 MR. PENDARVIS: I'm sorry.

4 THE COURT: What bothers me is this whole
5 thing got put together by people other than
6 Justice, the arrangement of the parties. Justice
7 had lawyers, everybody has admitted that, Justice
8 didn't come across a billion dollars by being a
9 ding-a-ling, he got a lot of good advice, he had a
10 good bookkeeper. Why is that same assumption not
11 good, David Harrah or the other guy, Ball, are not
12 doing the exact same thing that three other lawyers
13 are doing in the other three deals?

14 MR. PENDARVIS: You're exactly right, Your
15 Honor, you're exactly right. There was competent
16 people and let's just assume Mr. Justice is at the
17 top of the peak of that competence on that side of
18 the transaction. They got a recommendation from
19 the environmental consultant they relied on to put
20 together this whole transaction, that it not
21 proceed, and with that information those smart
22 people decided, you know, "I'm going to follow his
23 recommendation, we're not going to do it."

24 THE COURT: What's bothering me is this, is
25 that Hanlin is giving advice on a conservation

1 easement, that advice won't change because it was a
2 good idea if you want a \$40,000,000 tax deduction.
3 What created the problem was not a bad idea. What
4 created the problem, there was a conflict of some
5 type and a big mess in the legal relationship of
6 the two. Not it wasn't good tax advice, it is
7 still good tax advice from what I understand, he
8 gave advice and he gave good advice, the
9 relationship between them is what caused the
10 problem.

11 MR. PENDARVIS: We have had an expert tell
12 the jury --

13 THE COURT: I need a break.

14 MR. PENDARVIS: Okay.

15 THE COURT: I've heard enough today, it's
16 been steady on, fiduciary, fiduciaries, I have
17 heard enough and I need to stop listening today,
18 okay, I cannot continue listening today. It is
19 late in the afternoon, I'm caffeine deficient, I'm
20 without a law clerk, I've been doing it all. I
21 just signed an order letting a girl out of jail in
22 Greenwood, the lawyer drove down here to get her
23 out tonight because she has a sick baby in the
24 hospital, that is what I did a minute ago. Let's
25 stop so I can listen appropriately in the morning

1 early. I mean, you all are beating on a very
2 narrow issue, it is probably the issue in the case,
3 I don't want to decide late in the afternoon, okay?

4 MS. McWILLIAMS: What time would you like us
5 to be here?

6 THE COURT: You all be here ready to go at
7 8:45, we'll start discussing this again. Okay? I
8 want to think about it. I don't want to decide it
9 in a hurry.

10 MS. McWILLIAMS: Thank you, Your Honor.

11 THE COURT: It is not a simple decision for
12 me either way.

13 MR. PENDARVIS: If I can say one thing, Your
14 Honor, to think about overnight. Legal malpractice
15 cases all hinge on things that didn't happen and
16 always having to prove, in a litigation matter, a
17 case within a case, and in a transaction matter,
18 "We would proceed if proper advise had been given,"
19 we're always in hypothetical land.

20 THE COURT: All right, you've said enough.
21 All right, thank you all.

22 MS. McWILLIAMS: Thank you, Your Honor.

23 (Recessed at 5:40 p.m.).
24
25

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2
3
4 I, the undersigned Henry P. Young, Official
5 Court Reporter for the Eighth Judicial Circuit of
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate, and complete
8 transcript of record of all the proceedings had and
9 evidence introduced in the trial of the captioned
10 case in the Circuit Court for Richland County,
11 South Carolina, on the 28th day of February, 2012.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14 October 8, 2012
15
16
17

18 Henry P. Young

19 Court Reporter
20
21
22
23
24
25

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2010-CP-40-3297

2 COUNTY OF RICHLAND

3
4 YANCEY ENVIRONMENTAL)
5 SOLUTIONS, LLC, ET AL,)

6
7 -vs-)

8 RICHARDSON PLOWDEN &)
9 ROBINSON, ET AL,)

Defendants.)

10
11 February 27-March 6, 2012

12
13 B E F O R E:

14 HONORABLE EUGENE GRIFFITH, JR.

15 A P P E A R A N C E S:

16 THOMAS A. PENDARVIS, Esquire
17 CAREY KERNEY, Esquire
Attorneys for the Plaintiffs

18
19 SUSAN P. McWILLIAMS, Esquire

20 DANIEL C. LEONARDI, Esquire

21 Attorneys for the Defendant

22
23
24 Henry P. Young

25 Court Reporter

1 VOLUME III of V

2 (Reconvened 8:45 a.m., March 1, 2012).

3 THE COURT: All right, folks. Are we ready
4 to summarize our positions on these other three
5 conservation easements that were about to be gone
6 into by Mr. McLeod? Is he here?

7 MR. PENDARVIS: Yes.

8 THE COURT: Okay. Do you want him in here?

9 MR. PENDARVIS: It matters not.

10 THE COURT: Okay.

11 All right, I think I want to first hear from
12 Miss McWilliams and then I will hear from Mr.
13 Pendarvis.

14 MS. MCWILLIAMS: Thank you, Your Honor, if it
15 please the Court.

16 THE COURT: Yes, ma'am

17 MS. MCWILLIAMS: The three other easements
18 are being offered, as I understand it, as proof of
19 the likelihood that had counsel, had the defendant
20 not withdrawn in the Jim Justice transaction,
21 proposed transaction, and Mr. McLeod had made the
22 same disclosure he disclosed to all three, he
23 supposedly spoke to all four, I don't mean
24 supposedly, but his testimony is he disclosed to
25 all four the existence of the IRS investigation.

1 His testimony has been that as to three that
2 are not part of this case, that have other
3 landowners, other counsel, other deadlines, other
4 facts and circumstances surrounding those
5 transactions, including the length of time it might
6 have been in the works, as to those three he
7 disclosed the existence of the IRS investigation
8 but recommended they go forward. With respect to
9 Mr. Justice his testimony is that he disclosed the
10 existence of the IRS investigation but made a
11 recommendation Mr. Justice not go forward.

12 His testimony further is that, "I would have
13 made the same recommendation that I made to the
14 other three if only I had Mr. Hanlin but I did not
15 disclose to Mr. Justice, I just said I recommend we
16 not go forward." So, the only information the
17 decision maker, that Mr. Justice had in this
18 transaction is, "There is the existence of an IRS
19 investigation and the consultant is telling me not
20 to go forward."

21 There is nothing that ties that in any way to
22 the withdrawal of Richardson Plowden and Mr.
23 Hanlin, and so as I understand it, Mr. McLeod wants
24 to offer the decisions of others who got different
25 information about differ projects to prove that

1 more likely, "It is more likely than not if I had
2 made that same recommendation to Mr. Justice he
3 would have gone forward."

4 There are several problems with this
5 proffered evidence. Number one, it is clearly
6 hearsay because what he's trying to prove is the
7 decisions of people who are not here and not
8 testifying. He can certainly say what he told them
9 but the problem is he wants not just to stop there
10 but to go ahead and introduce action or conduct
11 that was made on the basis of that recommendation.
12 Those people aren't here, we don't have any idea
13 what their decision making process was and so for
14 that reason they are just simply dissimilar.

15 The second problem is that if you believe,
16 and I don't mean to say we don't believe it, but
17 based on his testimony, his testimony now is, "All
18 I had to do was recommend to Mr. Justice and he and
19 I would have gone forward but I didn't feel
20 comfortable doing that." The problem with that is
21 he should have done that because the fact it didn't
22 close is at the basis of his own hand and yet he
23 now wants to come in and change the motivation and
24 say, "Well, it was because I didn't have Mr.
25 Hanlin."

1 There is nothing that links the failure to go
2 forward with withdrawl other than Mr. McLeod's own
3 motivation or personal decision making. If, for
4 example, he had made the same recommendation that
5 he did with the others, and as I said this last
6 night, Your Honor, this would be a different case
7 if he had also said, "Mr. Justice, I've got this
8 IRS investigation, I don't have Mr. Hanlin anymore
9 but I still recommend we go forward," and Mr.
10 Justice had said, "Oh, no, I'm not going forward if
11 Mr. Hanlin is not here," or, "I don't feel
12 comfortable going forward, Mr. McLeod, if you don't
13 have counsel," and that would be a different. Then
14 there would at least be some inference, the
15 defendants would still argue, look, the problem
16 with the IRS investigation, that is what the
17 evidence will show, Your Honor, we submit that that
18 is exactly what, at least until this lawsuit, that
19 is the motivation for which Mr. McLeod attributed,
20 that he had the IRS hanging over him and he just
21 couldn't recommend going forward.

22 We don't know why he recomended to other
23 people other than what he now says, that there were
24 tax lawyers. He didn't have counsel in those
25 transactions and didn't have counsel in this

1 transaction. So, the second argument is, or the
2 second reason that this evidence should not come
3 in, they are too dissimilar and the causal link is
4 simply broken by Mr. McLeod's decision not to
5 recommend that Mr. Justice go forward, because what
6 he says now is, "Oh, I feel certain he would have,"
7 and that brings me to the third point, and that
8 really doesn't have to go specifically to the other
9 three decision makers but it is almost like a
10 statistical argument.

11 He is saying, "Mr. Justice would have done
12 it, I feel certain," and they have offered the
13 testimony of some unrelated corporate designee to
14 try to prove that but the problem is we don't have
15 any testimony from Mr. Justice and he is the
16 decision maker, no testimony from Mr. Justice, we
17 really have no testimony from Mr. Justice, but it
18 is a separate corporation, someone that doesn't own
19 the property wants to testify, "That I feel certain
20 he would have gone forward if we had the
21 recommendation." That is hearsay.

22 If, for example Mr. Justice were to walk in
23 and --

24 MR. PENDARVIS: Excuse me, Your Honor. We're
25 getting a little far afield. We're dealing now

1 with the Justice Family Farms testimony. Can we
2 just go one at a time?

3 THE COURT: I understand the different
4 issues, I agree with you.

5 MS. McWILLIAMS: All right. Those are my
6 points, Your Honor. I think this is so far afield
7 and so dissimilar it does not meet the definition
8 or the admissibility standard under Rule 401.

9 MR. PENDARVIS: Good morning, Your Honor, may
10 it please the Court.

11 THE COURT: Yes, sir.

12 MR. PENDARVIS: Let's start with what this
13 argument does not involve. This argument does not
14 involve an issue of relevancy. This evidence is
15 relevant to prove the causation issue in this case
16 and it is material. It is also not evidence of
17 hearsay because there is not one thing Mr. McLeod
18 is going to say is a statement by another person
19 out of court offered to prove what that person said
20 or did. Mr. McLeod is going to say only what he
21 said in his recommendations.

22 Number three, every, every name that I could
23 find in Mr. McLeod's notes that related in any
24 fashion to these three easements was disclosed in
25 discovery, the materials for these three easements,

1 every piece of paper we had in our possession was
2 produced and these issues as to the central point
3 of causation were available. The information that
4 led to this question was available to the
5 defendants the entire time.

6 They could have taken every deposition of
7 every party involved in those other three
8 easements, a substantial part of which were in
9 South Carolina or North Carolina. That information
10 was available. This issue of proximate cause and
11 material issue as to proximate cause is clearly
12 within the province of the jury, Eddy versus
13 Crouse, a case I had, that the issue that I lost on
14 was foreseeability and was it foreseeable. The
15 evidence to support the foreseeability issue, it is
16 a mandatory requirement in a legal malpractice case
17 much to my chagrin in that case, the issue of
18 foreseeability as to Mr. Hanlin and Richardson
19 Plowden's decision to terminate, as to whether this
20 would affect Mr. McLeod's handling of his
21 conservation easement matter, would it close or
22 would it not, because they were the only attorneys,
23 the issue is whether the other three easements this
24 company Y.E.S. was working on, the issue of whether
25 they closed with the same information, it was

1 foreseeable for this law firm when they made this
2 decision.

3 The argument, most of what you heard were
4 arguments counsel can make to the jury in closing
5 as to why there is no causal link, but the issue
6 that the facts, the truth of what happened, the
7 jury can decide all this. This is, this evidence
8 of similar acts, similar transactions to prove a
9 special relationship between the acts and facts
10 that are at issue in the case and similar instances
11 is admissible under the laws of this state.

12 JKT Company versus Hardwick, 265 Southeastern
13 2nd 510, it is a discretion call for the Court, as
14 you may know, but there are, the summary is similar
15 happenings or conditions of transactions
16 sufficiently similar have probative value as it
17 relates to the condition for facts in question.
18 They have, there is cases that allow evidence of,
19 again this is evidence that includes or shows a
20 party's knowledge of the foreseeability, citing
21 again the JKT case, evidence to show another
22 person's subsequent conduct. There is evidence,
23 that deals with real estate matters, Your Honor,
24 where the issue of value, condemnation matters and
25 real estate cases where tract A didn't close or it

1 was an issue on the price value of tract A. The
2 courts have allowed in evidence of similar
3 properties in the neighborhood and similar
4 conditions to prove the price of the contract or
5 the value of the property that didn't sell.

6 We have exactly that scenario here. We have
7 a conservation consultant providing consulting
8 services to four easement owners or landowners that
9 are considering conservation easements. We have
10 similar, I mean, statement from counsel, almost
11 identical statement --

12 THE COURT: Let me stop you there. Why is
13 Mr. McLeod, who I would deem to be an expert in
14 this field of environmental conservation and
15 conservation easement, his career over a period of
16 12, 13 years he has been doing conservations, he
17 has done 22, that is what he said.

18 MR. PENDARVIS: Yes, sir.

19 THE COURT: That's not very many, I mean,
20 your analysis about a similar lot nextdoor, I
21 closed thousands of real estate deals for houses.
22 I mean, to me, a conservation easement is a very,
23 very specialized deal, very particular. I mean,
24 I'm not certain he's the only one in the state
25 doing them.

1 Buying and selling houses, comparing the
2 value of a piece of property to the value of
3 another piece of property, that is a little more
4 simple in terms of because there is so much more of
5 it, transactions buying and selling houses happen
6 all the time, not recently in the real estate
7 market, but it used to be real estate lawyers would
8 close 50, 60, 70, some a 100 a week. This is 22 in
9 ten years.

10 MR. PENDARVIS: Well, Your Honor, you have
11 heard one of the top experts in the southeast, Mr.
12 Curtis Elliott has only done a handful himself.
13 What we're talking about is those people, the
14 decision makers in this process, the counsel that
15 handle these transactions were similarly situated,
16 knowledgeable about the IRS Code and conservation
17 easements, and the point being that this
18 information about the IRS investigation was
19 consistent that Mr. McLeod disclosed to all the
20 parties, all four.

21 There is no dispute and there is no
22 disagreement, or the testimony is that Mr. McLeod
23 said, as to the IRS letter, essentially the same
24 communications to all four parties, so we have
25 similar if not almost identical communications to

1 these four affected conservation easement project
2 clients of Y.E.S. As to whether there is a causal
3 link on the damage, the error, the mistake that
4 we're contending this law firm made when it
5 withdrew, with this information Mr. McLeod is going
6 to be able to say without saying one word about
7 what anybody on those other three transactions
8 said, not offering one out of court statement to
9 prove his point, he is going to show a recorded
10 deed, a letter, both of which meet the hearsay
11 exceptions, they are public records and business
12 records that have been available.

13 And again, if the defense wanted to depose
14 these people to ascertain the truth of what was in
15 those people's mind, which we're not offering,
16 we're not saying, well, this is what this person
17 thought, we're not saying one word except, "Here is
18 an easement, I gave this one this information and
19 this one closed, I gave the same recommendation to
20 Mr. Justice, the same information about this IRS
21 letter to Mr. Justice but I wasn't able to
22 recommend because there was no tax counsel."

23 Without saying, you know, he is going to be
24 able to testify. The recorded easement materials
25 or letters from these attorneys, they had their own

1 counsel, but that is not the point. This
2 information is relevant, this information is
3 material to the jurors' decision on whether there
4 is proximate cause and the proximate cause of the
5 entire issue, that is what this jury is here to do,
6 and to withhold information from them that might
7 influence their decision one way or the other is
8 improper. From what we have heard, there is no
9 evidentiary basis to exclude the evidence. It is
10 not hearsay, she admitted that, she acknowledged it
11 is not hearsay. She's just concerned it is not
12 helpful to her case.

13 THE COURT: You mean prejudicial.

14 MR. PENDARVIS: There you go, and 403, if
15 it's a 403 argument, how could this be prejudicial
16 when the withdrawal of this lawyer certainly as to
17 the Justice project was causally related. Our
18 contention is it was causally related to everything
19 in the process and the suggestion for closing
20 argument --

21 THE COURT: Let me ask you this. Why do you
22 need it? Why can't you say, "Mr. McLeod, what
23 would have been your recommendation if they're
24 still behind you?"

25 MR. PENDARVIS: I will say that.

1 THE COURT: I mean, why do you need that?

2 MR. PENDARVIS: Because this is more evidence
3 of proof that the IRS letter itself didn't stop
4 business at Y.E.S.. The IRS letter itself allowed
5 business to proceed with parties that were in the
6 circumstance, which I know Your Honor indicated you
7 were sort of concerned about the dynamics of the
8 relationship, but our contention was, as Mr.
9 Elliott told the jury, in the typical circumstance
10 if Mr. Hanlin had been representing Justice we
11 would contend it would be the same result. Mr.
12 Hanlin knows Mr. Justice, Mr. Hanlin knows Mr.
13 Justice doesn't promote. The whole issue, the
14 whole issue of what the IRS letter was about was
15 whether Mr. McLeod was a promoter.

16 Mr. Hanlin has experience, of all the
17 attorneys in these four projects that would have
18 known he was not a promoter, it was Mr. Hanlin, and
19 if Mr. Hanlin had been counsel for Justice our
20 contention is all four of these project would have
21 gone forward. So, the point being this information
22 shows the jury that the IRS letter itself, it
23 wasn't, "Everybody run for cover, get away from
24 Y.E.S., they are an illegal operation."

25 This goes to show the exact opposite, which

1 is so consistent with certainly my belief about Mr.
2 McLeod's character. With this knowledge of the IRS
3 letter, decisions were made by people with
4 sophisticated counsel that could make these kind of
5 decisions about the IRS and its impact on a 170(H)
6 deduction without using one bit of hearsay. I'm
7 using public records and no out of court statements
8 and we see this is clearly within the JKT Company
9 versus Hardwick analysis on similar transactions
10 that prove or disprove a causation issue that is in
11 dispute and this jury is smart enough they figure
12 this out.

13 THE COURT: All right. I want to bring the
14 jury in here, they're antsy.

15 MS. MCWILLIAMS: This is just a back door way
16 of trying to introduce speculation about what Mr.
17 Justice might have done. The reason these
18 transactions are not similar and shouldn't be
19 admissible is because they weren't Mr. Justice's
20 transactions and Mr. Hanlin was not involved in
21 them, and the only link apparently is Mr. McLeod,
22 and for the record, Your Honor, Mr. Mark Buyck is
23 one of the lawyers, we don't know about Mr. Knox,
24 he did one of the transactions, he is deceased, the
25 fact of the matter is, and the other is a lawyer

1 that I think it is Carol Hahn, she is not at the
2 firm where she was, but it is not our obligation to
3 try to make his hearsay admissible, so it's his job
4 to do that.

5 I understand he says he wants to offer a
6 deed. Well, the deed doesn't prove anything except
7 that someone who is not part of this transaction,
8 who is under different circumstances, different
9 time constraint, different piece of property.
10 We're going to literally, I mean, this case will go
11 all the way through next week because if this comes
12 in I'm going to be entitled to introduce all of
13 these documents that came in extraneously, I'm not
14 required to go try to make things admissible
15 because they are not relevant.

16 Then I heard Mr. Pendarvis say he was going
17 to offer a letter. A letter, I don't know, a
18 letter from whom and to whom? But the fact of the
19 matter is if it involved my client and it's an
20 admission against interest it's hearsay. If he
21 wants to call Mr. Mark Buyck in here and Mark Buyck
22 were to say, "Yes, I heard it and my landowner who
23 I advised," you are talking about different legal
24 advice, Your Honor, he has admitted there are
25 different lawyers representing different

1 landowners. We don't have that here.

2 The only person who can testify about what
3 Jim Justice would have done, this is not disputed
4 he is the decision maker, is Jim Justice and if
5 they want to bring Jim Justice, we have heard every
6 day he might come, he might come. I'm still
7 waiting. I happen to know on the internet he
8 coaches his daughter's basketball team there in
9 Beckley. I'm not sure, maybe he's going to make it
10 down here.

11 But this is not evidence. The evidence of
12 other decision makers about other transactions is
13 simply not pertinent or relevant, it doesn't make
14 what Mr. Justice might have done more likely than
15 not. And, you know, it is interesting because the
16 other dissimilarities, he didn't tell them the same
17 thing, he did not tell them the same thing. He
18 said to those other three go forward. To Mr.
19 Justice he recommended don't go forward.

20 Okay, he's got to say, to prove his case he's
21 got to say, "I told Mr. Justice to go forward and I
22 told him that I didn't have any lawyers," and if we
23 had that similarity, "I told him to go forward and
24 he didn't go." But even then you've still got the
25 dissimilarity of the decision makers but there is

1 just no way that those other, what other people
2 did, unless of course everything is identical, and
3 it's not it's not, because in our case he told Mr.
4 Justice don't go forward.

5 Now, it just seems a little bit inequitable
6 to say, "I didn't tell him everything, I didn't
7 tell him I didn't have my lawyer," but now to come
8 back and say, "Well, what really was the case was I
9 know I told him it was the IRS but really what it
10 was, I didn't have a lawyer." That is just not
11 fair, but certainly it is not possible for us to
12 defend this case when we have now got three more
13 cases we're going to have to look at the decision
14 makers, what was said, and I hadn't put my case in
15 yet so I can assure you that if we are going to have
16 to defend those three decisions, you know, I guess
17 I will be issuing subpoenas at least to Mr. Buyck
18 and I said Mr. Knox from Augusta, our information
19 is that he's deceased and I don't know where Miss
20 Hahn is.

21 MR. PENDARVIS: Brief response. They had all
22 had similar deadlines, 2007. On top of that, Mr.
23 Buyck, I have spoken to Mr. Buyck, they called him,
24 he has told them exactly what was said, they know
25 about it, they can get him up here if they want him

1 here or they can at least go get his deposition, so
2 if they want to bring Mr. Buyck in here, they have
3 had, they have called him, they have called the
4 other people, we know they have called all these
5 people. They have called us back saying, "These
6 people are calling us and here is what we told
7 them."

8 They have had this information, this is a
9 little disingenious to suggest they hadn't known
10 about it. It is a simple point, there is no
11 evidentiary objection, the probative value of this
12 is extreme, it shows exactly what this, the effect
13 this IRS letter had on people that had counsel and
14 it shows exactly what effect this IRS letter had on
15 people that didn't have counsel. That is what the
16 case is about, we think it is admissible all day
17 long. There is no evidentiary objection other than
18 relevance and this is, these are almost identical
19 transactions with identical deadlines, i.e.,
20 January 31, 2007.

21 MS. McWILLIAMS: I didn't say I didn't talk
22 with them. What I said was it is not my job to
23 make it admissible.

24 THE COURT: All right, this is what I think.
25 Understanding the peculiar or unique nature of the

1 conservation easements, and there is not a lot of
2 them out there, they are an uncommon animal. I
3 think that under Rule 403, that although relevant,
4 this is going to create confusion to the jury.
5 That is what I think. It is too much information.

6 Other deals, we're talking about this deal
7 with Justice, this relationship with Richardson
8 Plowden and Mr. McLeod. The motivation of the
9 other parties, having other counsel, the landowners
10 having counsel, the size of the easement, the time
11 of the easement, the preliminary work that had been
12 done, all that is unknown to me and to the jury as
13 to the timing of the other easement, the timing of
14 the other preliminary work or the base line studies
15 and all that sort of stuff, that seems to me to be,
16 I find that would be confusing to the jury on the
17 issue of this deal when Mr. McLeod has the ability
18 to say, "Had Richardson Plowden not backed out I
19 would have made a different recommendation." He
20 has that ability and I'm trusting or assuming that
21 is what he is going to say. I don't think, it is
22 my ruling that we not bring those other three deals
23 into this trial because of the, my belief is the
24 relevance would be outweighed by the confusion and
25 misleading the jury as to these decision makers

1 that had to make such an unusual type conservation
2 easement. I mean, they are very, very unusual, it
3 is not, they are not a common thing in our society.
4 I mean, they are very sophisticated and not
5 traditional in the sense of transactions, so
6 therefore --

7 MR. PENDARVIS: Can I take it to the next
8 step because I know what is coming in the defense
9 case. When this happened, when this IRS letter
10 came and when Richardson Plowden and Mr. Hanlin
11 quit Mr. McLeod retained Crosby Lewis and there is
12 going to be a substantial amount of evidence I
13 expect is going to be offered by the defense about
14 things that took place during the IRS investigation
15 and there is going to be, I mean, one of the very
16 first things, the focus of Mr. Crosby Lewis'
17 efforts to represent Y.E.S. in regards to this
18 easement, the work from the first days of the
19 representation dealt with advising all the clients
20 of Y.E.S., all four of them, Mr. Lewis was in on
21 the telephone call to Mr. Justice and Mr. Lewis
22 made instructions they developed to make sure Mr.
23 McLeod made full disclosure to all these easements,
24 and similar to a limine motion, we move that all
25 the evidence about the IRS investigation and what

1 happened as to their activities to defend the IRS
2 investigation be excluded from the defense case
3 because it is all involving these other easements
4 as well and that is the same confusing issue that
5 we will be dealing with here.

6 I think this case basically stops in
7 December, December 31. You know, there is an IRS
8 letter later when they discontinued the
9 investigation but all the activities that dealt
10 with all these different easements, what happens,
11 and they want to open the door, I would submit we
12 will be able to come back in rebuttal with this
13 very same evidence because what they had to submit
14 to the IRS was all the information from these
15 easements, I mean, bunches of it.

16 THE COURT: I have not heard very much
17 proffer from the lawyers about what the IRS
18 investigation was but the IRS believed Mr. McLeod
19 to be a promoter and advertising how to avoid tax
20 schemes on the internet or by advertising and he
21 doesn't advertise, doesn't have a business card,
22 has a cell phone and a yellow pad, so he is not
23 what they thought he was and he was cleared of it
24 eventually. Is that more or less --

25 MR. PENDARVIS: That is more or less it.

1 They were on a rampage. It wasn't just Mr. McLeod,
2 it was anybody near a conservation easement got
3 these same investigations, he was just in the
4 group. And my point, though, is all these other
5 clients, all these other prior conservation
6 easements which would include the ones that closed
7 in 2007 that I'm trying to get in evidence, I
8 understand Your Honor's ruling, my point is if they
9 go into all that in their case I submit they are
10 opening the door. I ask it not happen because we
11 have to streamline this trial and get this case to
12 the jury but if they go into that I'm going to, I'm
13 going to ask for the Court to exclude that evidence
14 but if they are allowed to present that evidence
15 I'm going to need to come back and present what
16 will include these easements because they can't
17 conveniently give the jury the bad part of what
18 they consider the bad part of what was given to the
19 IRS and not show them these easement, so --

20 MS. McWILLIAMS: May I be heard on that?

21 THE COURT: Yes, ma'am.

22 MS. McWILLIAMS: We don't intend to go into
23 these other transactions but just for the record,
24 we can tell from the IRS investigation, they did
25 not even look at the three, well, one of the three

1 he didn't disclose to the IRS, based on what we can
2 tell. We didn't intend to go into that. There are
3 a few post December 31, 2007, letters and emails
4 and that sort of thing and we will do our best, all
5 we want to prove is that after this happened Mr.
6 McLeod continued to take the position that they
7 postponed it because of the IRS investigation and
8 we have some documentation to that, and the Court,
9 the IRS did look at some other entities that Mr.
10 McLeod was involved in and I think they looked at a
11 number of things. They did not look at the
12 easements that Mr. McLeod is trying to offer and we
13 don't intend to go into that.

14 To the extent there is any extraneous
15 reference to, for example, NRB was the educational,
16 I mean, he has already testified about it
17 yesterday, he has already introduced to the jury,
18 "Oh, yes, I had this NRB," I may not use the right
19 initials, but he had one organization that hadn't
20 been active for a long time and the IRS looked at
21 that. We weren't planning to go into that, we
22 weren't planning to go into these other easements.
23 If the Court wanted to find out what the IRS looked
24 at, there is a great deal of information.

25 The only other thing we want to show Your

1 Honor is some of the correspondence goes to
2 damages. We are not trying to try any of those
3 other cases and we will make, if there is a
4 reference to an unrelated -- well, it is mostly all
5 Justice we want to put in. There is at least an
6 example letter from one of his counsel saying, "We
7 don't have to produce the, the easements that we're
8 abandoning. That would include blank, blank, and
9 Jim Justice." You know, obviously we don't think
10 that's relevant. He told his lawyer, "We abandoned
11 that." But we will be very careful about that if
12 we have to go there.

13 THE COURT: Well, we'll see how it plays out.
14 You all be anticipating, if we get close let me
15 know.

16 MS. McWILLIAMS: All right.

17 THE COURT: All right.

18 MR. PENDARVIS: The next one, with the
19 Court's permission, I might as well go into it, our
20 plan is to finish with Mr. McLeod and then play the
21 30(B)(6) deposition video for the jury and then
22 we'll be resting.

23 THE COURT: All right.

24 MR. PENDARVIS: We have already discussed
25 that.

1 THE COURT: That will be a good time for a
2 break, Mr. McLeod is not going to be a fifteen
3 minute witness to finish up.

4 MR. PENDARVIS: No.

5 THE COURT: We'll do that after Mr. McLeod.
6 I want to get the jury to working a little bit.
7 They are already complaining I don't have any
8 candy. Their question is, they are worried about
9 the weekend already.

10 MS. McWILLIAMS: They are worried about what?

11 THE COURT: The weekend. Let's get the jury.
12 (The jury returned to the courtroom).

13 BAILIFF: The jury is all present.

14 THE COURT: All right, thank you. Sorry for
15 the delay, and for your information my law clerk is
16 back, you all haven't met her yet, she's on an
17 errand for your benefit and she will be back
18 shortly. As soon as she's back we'll pass it
19 around, and we'll discuss something with you at the
20 next break about schedule, I can answer those
21 questions also.

22 So, with those comments, Mr. McLeod is still
23 under oath and Mr. Pendarvis still has his witness.

24 MR. PENDARVIS: Thank you, Your Honor, if it
25 please the Court, ladies and gentlemen of the jury.

1 BY MR. PENDARVIS:

2 Q Mr. McLeod, we were finishing up with your
3 testimony, at the point we broke yesterday we were
4 putting together some pieces of the team you were
5 putting together for this appraisal. Do you
6 recall, I'm just trying to bring this back to where
7 we were, do you recall speaking about Mr. Henry
8 Beckham, the appraiser?

9 A Yes, sir.

10 Q Did you communicate with Mr. Beckham and
11 formally engage him to work on the project, the
12 Justice project?

13 A Well, I knew Henry and had done some work
14 with him before and I knew, as I said yesterday, I
15 mean, I testified that he was the only appraiser I
16 really knew who had actual experience and
17 understood compensatory mitigation as a highest and
18 best use of a tract of land, and so he was ideal as
19 a second appraiser and I did discuss the project
20 generally with Henry. Henry actually was familiar
21 with the property and so I didn't formally engage
22 him but he stood prepared to assist us with a
23 second appraisal.

24 Q I have passed up a letter dated November 28,
25 2007, from Beckham Appraisal Services, addressed to

1 you. Do you recall receiving this letter?

2 A Yes, sir.

3 MS. McWILLIAMS: Excuse me, Mr. Pendarvis,
4 I'm looking for your exhibit.

5 Q While Miss McWilliams looks for the exhibit I
6 have a question for you. Would you remind the jury
7 about the concept that was being used for the
8 highest and best use value of the Justice property?

9 A Sure. With a conservation easement project
10 on any tract of land where you have determined that
11 the property will qualify and you can create one of
12 the federal conservation values, one of the
13 requirements of the easement process is to have an
14 appraisal, and the appraisal is very much like a
15 condemnation appraisal when the government, the
16 Highway Department, for instance, takes land for a
17 highway or some other purpose for public benefit
18 and use.

19 The appraisal methodology is for the
20 appraiser to appraise the property being taken
21 before the taking and then appraise the same tract
22 of land after the taking, and with an easement
23 project the methodology is exactly the same. The
24 appraiser appraises the property at its highest and
25 best use, whatever that is before the easement is

1 placed, and then the appraiser appraises the
2 property for its highest and best use after the
3 easement is placed. And so in this case the
4 highest and best use was obviously mitigation and
5 the after value best use would have been
6 agricultural.

7 Q In this letter that you received from Mr.
8 Beckham did he show you any other examples of
9 circumstances on conservation easements that uses
10 similar strategy?

11 A I'm sorry, I didn't follow that.

12 Q Did Mr. Beckham's letter show you an example
13 of other property where he had given appraisals
14 where they used a similar strategy, mitigation
15 value?

16 A Yes. Actually I was involved in that
17 project, too. There was a bottom land hardwood
18 tract in fairly close proximity to Mr. Justice's
19 farm in the Black River basin and it was a cut over
20 tract that the timber all had been cut, and Mr.
21 Larry Fortenbury owned the tract, as mentioned in
22 this letter from Mr. Beckham, and Larry had asked
23 me to help him with that project, actually, because
24 he owned the tract and the Highway Department
25 wanted to work with Larry to create a compensatory

1 mitigation bank on that subject tract which I
2 believe was 4,000 acres and Larry asked me to help
3 him with it. Mr. Beckham actually ended up doing
4 the appraisal for Mr. Fortenbury on that tract, so
5 that is the tract he was referring to in his
6 letter, Mr. Pendarvis.

7 Q And does this letter from Mr. Beckham reflect
8 any agreement with regard to the Justice project?

9 A Yes. He indicated that he can do, do an
10 appraisal for the Justice easement program for
11 \$5,500. I said yesterday a desk review would be
12 another appraiser looking at the appraisal of the
13 first appraiser and making sure that it was in
14 conformity with the IRS regulations and Appraisal
15 Institute guidelines and protocol.

16 Q Around this time of this November 28
17 letter --

18 MR. PENDARVIS: Before we do that, Your
19 Honor, I would like to move that letter into
20 evidence as Exhibit Number 31.

21 MS. MCWILLIAMS: No objection, Your Honor.

22 THE COURT: 31 admitted without objection.

23 (November 28, 2007, marked and received in
24 evidence as Plaintiff's Exhibit 31).

25 BY MR. PENDARVIS:

1 Q Mr. McLeod, we're in the time range here in
2 late November, early December of 2007. What was
3 your involvement with the conservation grant
4 organization that was going to accept this, COLT?
5 Late November, early December, were you involved in
6 the process to bring COLT into the project?

7 A Sure. We had had that site visit with Sue
8 Green and Hal Hanlin and Randy the farm manager and
9 myself and they were excited about the project and
10 accepting the gift of the easement.

11 Q What did COLT do after, as far as you know,
12 after the idea that they would accept this gift?

13 A Sue notified me that she had presented the
14 project to her Board and that the Board had
15 approved the project and agreed to accept the gift.

16 Q Was there anything else COLT did after that,
17 after the Board had accepted it, as far as any type
18 of letter of intent or something like that to show
19 they were interested?

20 A She sent me a letter confirming that they
21 were excited and ready to accept the gifted
22 easement.

23 Q Are you aware of COLT submitting a letter of
24 intent to Mr. Justice?

25 A Yes.

1 Q Would you tell the jury a little bit about
2 that?

3 A That would be standard for the qualified
4 organization to send a letter of intent to the
5 landowner acknowledging that the qualified
6 organization had agreed to accept the gifted
7 easement.

8 Q And are you aware of a letter from COLT being
9 transmitted to Mr. Justice?

10 A Yes.

11 Q Was that letter ever signed?

12 A I don't think so.

13 Q Did the letter request Mr. Justice pay fees
14 or stewardship contribution?

15 A Oh, yes.

16 Q Things like that?

17 A Sure.

18 Q Did Mr. Justice ever pay those fees?

19 A No.

20 Q Mr. McLeod, I'm going to ask you to retrieve
21 Exhibit 10.

22 A Okay.

23 Q Do you recall receiving this letter from
24 Richardson Plowden?

25 A Yes.

1 Q Did you read it -- well, we can see on the
2 last page, that is your signature on the last page?

3 A Yes, it is.

4 Q Did you read the letter before you signed it?

5 A Yes, I read it.

6 Q Was there anything remarkable in it, when you
7 read it, that caused you any concern?

8 A Well, you know, splitting the fee
9 one-third/two-thirds is something we had never done
10 before but Hal and I talked about that and that was
11 fine with me. If he had wanted 50 percent of it it
12 was fine with me. I had asked Hal to help me with
13 the project and he agreed to help and it was his
14 letter and the informality of entering into a fee
15 agreement, I signed it when my secretary handed it
16 to me and sent it back to him.

17 Q We had this discussion a little bit about
18 the, one of the early November emails but this was
19 a little unusual that Mr. Hanlin was going to be
20 representing your organization, wasn't it?

21 A Yes, but you know, my commitment to Mr.
22 Justice was to make the project happen and I needed
23 a tax attorney and Hal and I were friends and had
24 done work together before and once Hal said he was
25 excited about working with me on it, it was fine

1 with me for him to handle the relationship any way
2 he wanted to as long as he was involved in the
3 project.

4 Q You didn't call Mr. Hanlin and ask him any
5 questions about it?

6 A No, sir.

7 Q Mr. McLeod, we have heard from Dr. Hawkins
8 who came yesterday and told us a little bit about
9 his activities.

10 A Right.

11 Q Who was handling interaction between Dr.
12 Hawkins, excuse me, and the project? Were you
13 involved in coordinating with Dr. Hawkins?

14 A Well, sure. I would have, originally, once
15 Mr. Justice asked me to go forward with the project
16 I would have been the one that had contacted Dr.
17 Hawkins and told him a little bit about the project
18 and he accepted the project and came down for a
19 site visit. Dr. Hawkins doesn't fly so he and his
20 wife always drive wherever they go. Hal and I
21 talked about anticipation of Dr. Hawkins arriving
22 for the site visit, you know, meeting him on the
23 site and introducing him to the folks on the farm,
24 and I don't know exactly how that came down but I
25 was the one that met Dr. Hawkins on the site. I

1 had given Dr. Hawkins our phase one mitigation
2 analysis project, I thought it would be helpful to
3 him, and also had given him the base line
4 documentation for Jim Lewis and Quinton Epps, which
5 would be helpful to him from the hydrological
6 analysis and so forth.

7 Q I would ask you if you could, please,
8 retrieve Exhibit 18.

9 A I don't have to look, that is the big one, I
10 can pull that out.

11 Q I know we remember your testimony yesterday
12 that Mary does the typing but is this an email you
13 sent to, you had Mary send for you to Mr. Hanlin?

14 A Yes, sir, it is.

15 Q And --

16 A I don't dictate, by the way, I just write
17 things out on a yellow pad.

18 Q And you received this base line report, this
19 attachment to the email, from Mr. Lewis the same
20 day you sent it to Mr. Hanlin?

21 A Correct.

22 Q Did you review the base line report?

23 A Sure.

24 Q Have you created base line reports in the
25 history of your work?

1 A I'm trained as a lawyer but I make my living
2 as a natural resource conservation and wildlife
3 consultant. Over many, many years, you know,
4 people like Jim Lewis and Dr. Batson have given me
5 my education related to what I do for a living and
6 so while I know a lot about natural resources and
7 wetland and land and soils and so forth, I'm not a
8 biologist but I do participate with Jim, Quinton,
9 whoever is doing base line and I'm very comfortable
10 on land, I spent my life on land, farming, doing
11 wildlife management, so he frequently will ask me
12 to do part of the base line documentation.

13 Frequently, for instance, I photograph the
14 site for the base line. That is one of the, the
15 language in 170(H) regarding the requirement of the
16 base line documentation report is what we call in
17 the law preparatory, it doesn't say you shall this,
18 this, it says may include, and of course what we
19 try to do with each base line report on every
20 project is to compile a report that is an accurate
21 representation of existing physical, biological and
22 scientific chemical conditions on site at the time
23 of the placement of the easement because this
24 document will become the benchmark from which to
25 measure any changes in condition in years going

1 forward. And so frequently Jim would ask me to
2 help him with those but I have never put a whole
3 base line together, I wouldn't feel competent to do
4 that. There is a lot of language in here that, you
5 know, I hardly understand.

6 Q Did you review this before you transmitted it
7 on to Mr. Hanlin?

8 A Yes, sure. And I do know that when Jim first
9 sent the draft to me he had the word hydrological
10 and natural resources report and, you know, I
11 wanted it to conform exactly with the language in
12 170(H) of the Internal Revenue Code and I later
13 asked Jim to correct that cover page to say base
14 line documentation report.

15 Q And that, I'm not sure, it is hard to tell
16 from this email, but if you go about halfway in the
17 document there is what appears to be a cover page
18 that says that?

19 A Right, yes.

20 Q Now, as to the content of the email to Mr.
21 Hanlin, is a lawyer's critique or review of a base
22 line report necessary?

23 A Sure. You know, a conservation easement is
24 very site inclined specific but with a conservation
25 easement you need to be sure that while, you know,

1 the appraisers and the biologists and me are out
2 there on the site doing the work necessary to do
3 the due diligence and put together the whole
4 project, once you get, you know, the scientific and
5 biological and physical characteristics of the
6 property reduced into the base line the lawyer has
7 to be sure that it conforms in all ways with the
8 technicalities of 170(H) and so this letter of
9 transmittal of the draft is simply, as I always
10 would do, to give the base line draft to the
11 attorney to be sure that it conforms in all
12 particulars with the law, the regulations, IRS
13 regulations.

14 Q Did you receive a response from Mr. Hanlin to
15 your email marked as Exhibit 18?

16 A No. No, I did not.

17 Q How about response by email, did you get an
18 email response to this email?

19 A I don't believe I got any kind of response
20 from Mr. Hanlin on the request to review the report
21 and be sure it was in conformity with the
22 regulation.

23 Q In circumstances in other matters where the
24 base line reports have been reviewed by the
25 attorney, what happens to the base line report

1 next?

2 A Then we put it in final form and it is then
3 transmitted to the grantor, the landowner, and a
4 grantee organization that is going to accept the
5 gift of the easement for them to review the
6 document to be sure that they both agree that it is
7 an accurate representation of existing conditions,
8 because they have to sign a form to acknowledge
9 that the base line documentation report is an
10 accurate representation.

11 Q Was that form ever signed for the Justice
12 project?

13 A No.

14 Q By the grantor?

15 A No.

16 Q Was it ever signed by the grantee, the
17 prospective grantee, COLT?

18 A No. I never got it back to put it in final
19 form to send it. This letter asked Hal once this
20 is in the proper form to give it to Sue for her
21 review.

22 Q Did you ever call Mr. Hanlin -- the jury has
23 all heard about what happened on the 20th of
24 December, between the 14th of December and December
25 20th. Did you ever call Mr. Hanlin to ask about

1 his review of this base line report?

2 A I don't recall calling him about it.

3 Q Mr. McLeod, if you don't mind, let's turn to
4 Exhibit, pull out Exhibit 23, please. During the
5 break I'm going to get them in numerical order
6 because somebody has messed them up.

7 A Okay.

8 Q Now, I'm passing to you another email. Take
9 a moment to look at that, we're going to talk about
10 this. On December 20 some big news came into
11 Yancey Environmental Solutions. The jury has seen
12 this Exhibit 23 letter, but you didn't see that --

13 A No.

14 Q -- when it came in. You didn't see the IRS
15 letter that morning?

16 A No.

17 Q The exhibit I have just passed to you is an
18 email later that morning. Exhibit 23 shows it to
19 be a 10:52 email from Mary to Mr. Hanlin.

20 A Uh-huh, yes.

21 Q And the second email that I passed to you is
22 an email from Mary to Mr. Hanlin setting up a
23 conference call.

24 A Right.

25 Q Describe for the jury what you were told,

1 what you learned about this IRS letter when you
2 first heard about it. You don't need to say what
3 you said but I want you to describe for them what
4 you heard, what information you got and your
5 reaction.

6 A I guess my first reaction was anger, how dare
7 they, how dare the government accuse me of being a
8 bad person. They ought to have me on the payroll.
9 I have counseled people that call me and spend my
10 time talking to them about their land and projects,
11 what they wanted to do and advised them not to do
12 something on a conservation project. So, it was, I
13 guess incredulous would be a fancy word, I was just
14 shocked that they would accuse me of wrongdoing. I
15 knew that I hadn't done anything wrong I knew of,
16 so long term I wasn't particularly, I wasn't scared
17 about it. I was just shocked.

18 Q Did Mary tell you anything about her
19 conversation with Mr. Hanlin?

20 A Well, she told me -- can I say this?

21 Q Well, what did you take from her phone call?

22 A That he considered it serious and we needed
23 to talk.

24 Q And the only copy of this exhibit we have has
25 a sticky note apparently right on the letter but

1 you apparently were on a conference call of some
2 sort?

3 A I was, yes, I called Hal after I got off the
4 conference call.

5 Q Before we get into that conversation I want
6 to turn back to Exhibit 23 and the email. The last
7 part of the first paragraph in that email says,
8 "We're not doing well financially, we are literally
9 at the end of the rope"?

10 A Right.

11 Q Can you describe -- was that accurate?

12 A If Mary says so. You know, my whole life has
13 been an absolute roller coaster of income. When I
14 told you all yesterday that I was surprised to hear
15 the testimony yesterday about my income in a couple
16 years, I had no clue what that was. You all might
17 think me kind of dumb to not know what my income is
18 but that is who I am, I just never think about
19 that. I did notice some testimony yesterday it
20 went from way up to way down consecutive years.

21 MS. McWILLIAMS: Your Honor, I move to strike
22 that. That is not responsive to the question.

23 MR. PENDARVIS: I asked him about his
24 financial circumstances.

25 MS. McWILLIAMS: I mean, he can testify, he

1 can answer the question but not testify about what
2 we heard yesterday and that sort of thing.

3 THE COURT: Rephrase your question.

4 BY MR. PENDARVIS:

5 Q This comment, to the best of your knowledge,
6 was accurate when it was made, when she said you
7 were not doing well financially?

8 A Yes, sir.

9 Q Now let's turn to the phone call. This one
10 you can tell the jury exactly what was said. I
11 want you to do the best you can, repeat the
12 conversation as best you remember it.

13 A Okay. I remember it well. I was just
14 shocked, my whole world was crashing around me with
15 this letter, I was furious to think they would
16 accuse me and I was getting ready to call Hal and I
17 thought I was getting ready to discuss what are we
18 going to do, how are we going to approach this and
19 explain to my clients what's happened, and I called
20 Hal and instead of discussing how we were going to
21 approach it and disclose the information about the
22 letter, obviously I needed to tell my clients,
23 particularly those I was working on projects for
24 that year, about the letter but instead of
25 discussing it and the strategy Hal said, "Yancey,

1 I'm sorry to tell you this but my law firm has
2 directed me to immediately terminate all
3 relationships with you." The conversation lasted
4 about 48 seconds. I mean, I could not believe what
5 he had told me. And so I hung up the phone -- do
6 you want me to go on?

7 Q Well, I mean, let me ask, did you say
8 anything in response?

9 A You know, I probably said, you know, "Hal I'm
10 so sorry," or something. I don't really recall
11 what I said.

12 Q How did you feel?

13 A I was, I was absolutely shattered. I could
14 not believe what he had just told me.

15 Q What did you do next?

16 A I turned to Mary, her desk is literally, my
17 office wasn't that big, about as big as the corner
18 of the jury box, and I said, "Mary, Hal just told
19 me that Richardson Plowden had terminated all
20 relationships with me immediately, I don't have any
21 choice but to call Jim Justice and recommend he
22 postpone this project." That's what I said.

23 Q Mr. McLeod, if you don't mind, pull Exhibit
24 25.

25 A I'm sorry?

1 Q Exhibit 25, I want to ask you about it.

2 MR. PENDARVIS: Before I get into that, Mr.
3 McLeod, I would like to move the email from Miss
4 Mohr to Mr. Hanlin that I just showed you that had
5 the note on it, Exhibit 32.

6 THE COURT: Any objection?

7 MS. MCWILLIAMS: May we approach, Your Honor?

8 THE COURT: You may.

9 (Unrecorded bench conference).

10 THE COURT: 32 is in.

11 (December 20, 2007 email marked and received
12 in evidence as Plaintiff's Exhibit 32).

13 BY MR. PENDARVIS:

14 Q Mr. McLeod, did you receive this letter from
15 Mr. Hanlin dated December 21, 2007?

16 A I did.

17 Q Did you do anything when you read it? I'm
18 sure you did that?

19 A Sure.

20 Q Did you, after you got the phone call the day
21 before, the phone call was December 20?

22 A Yes, sir.

23 Q What did you do after that, and after you,
24 you have already told us what you said to Mary but
25 what action, if anything, did you do after

1 receiving that phone call?

2 A Well, I set upon the task of figuring out how
3 to defend my integrity and reputation and I needed
4 to, you know, to think about my clients and what
5 was in their best interest and I called an old
6 friend, Crosby Lewis, who is an attorney, still is
7 an attorney, and I told him what had happened, I
8 told him I needed to see him, that I needed to talk
9 to him. I'm in a state of shock.

10 Q Did you talk to him or meet with him?

11 A I did. That evening, and Crosby is a very
12 good attorney, 70ish, he was good friends with my
13 dad, Mary and I went to Crosby's office and sat
14 down with him and I told him what was going on.

15 Q Did you go see Mr. Lewis to take over the
16 Justice project?

17 A No, no. Crosby, it would take me six months
18 to fight the IRS, to get Crosby up to speed on
19 conservation.

20 Q He doesn't handle conservation easement
21 matters?

22 A No.

23 Q Did you start looking for an attorney to
24 replace Mr. Hanlin?

25 A No, sir.

1 Q Why not?

2 A Well, I have been in conservation projects a
3 long time and this is a \$45,000,000 conservation
4 easement, I just felt it would be pointless and
5 impossible to find a qualified competent attorney
6 to step in with ten days to go in the year. If I
7 had tried to find an attorney to step in with ten
8 days to go in the calendar year on a \$45,000,000
9 conservation easement with a very unique approach
10 to valuation, if one had said yes I wouldn't have
11 wanted him to represent me and Justice. I don't
12 believe a competent attorney would have, they
13 would have responded, "Yancey, have you lost your
14 mind?" I mean, that is what I really believe.

15 So, I did all that I could do, which was to
16 talk to Crosby about making calls to Jim Justice to
17 tell him what my recommendation was.

18 Q Did you in fact do that, did you all set up a
19 call and make a call too Mr. Justice?

20 A Certainly did, on Christmas Eve, 2007.

21 Q Do you remember that phone call?

22 A I was scared to death. I was humiliated, I
23 was mortified. I mean, my gosh, I'm dealing with
24 this Donald Trump kind of guy. For all I knew he
25 was going to be furious, and I didn't think so

1 because of our very good relationship but I was
2 scared, and he had Steven Ball, his attorney, and
3 Dave Harrah, the CPA, on the call. I just told
4 him, you know, about the IRS letter and I said,
5 "Jim, I think we need to postpone the project." Of
6 course the reason I told him that, I didn't, I was
7 mortified by having to tell him the IRS accused me
8 of being a bad person, I didn't see the need
9 ethically to tell him my attorney had quit, too.
10 That was embarrassing, I make my living on people
11 like Jim Justice referring people to me and I was
12 doing my very best to fulfill my duty, fiduciary
13 duty to, ethical duty to Mr. Justice by
14 recommending what I thought was the best course of
15 action. So, he could not have been nicer. I just,
16 I just melted, literally tears came to my eyes when
17 he said, "Yancey, don't worry about it."

18 MS. McWILLIAMS: Your Honor, I object.

19 A I'm sorry.

20 THE COURT: Sustained.

21 Q You where emotional during the phone call?

22 A Oh, my gosh.

23 Q Did you make any recommendations to Mr.
24 Justice?

25 A I recommended to him that we postpone the

1 easement project.

2 Q Were there any plans developed to restart it
3 2008 or a later date?

4 A No, not at that time. Over the ensuing
5 months of 2008 I wrote him several times over the
6 next year or two or three, you know, saying that,
7 you know, "I successfully defended myself against
8 the IRS and it opened my whole life up, they
9 humiliated me but after they looked at every square
10 inch of my professional life they decided I hadn't
11 done anything wrong."

12 Q Yancey, if Mr. Hanlin hadn't quit what
13 recommendation would you have made to Mr. Justice?

14 A To move forward with the project. I would
15 have made that recommendation. You know, when Hal
16 quit I just, as I said, I turned to Mary and said,
17 "I've got to recommend postponing the project, I
18 don't have any choice." If he hadn't quit I would
19 have been perfectly willing to move forward with
20 it, I knew I hadn't done anything wrong.

21 Q Let's rewind a little bit. Did Mr. Hanlin
22 ever tell you anything about COLT not intending to
23 proceed with the easement?

24 A No.

25 Q Did Mr. Hanlin tell you anything about

1 whether a surveyor was going to be needed to survey
2 Mr. Justice's project before the easement was
3 properly done?

4 A No. We had survey work done. Surveys aren't
5 required for 170(H)'s. The federal government had
6 done a survey on the 1,100 acre tract and we had
7 boundry surveys, we just needed a legal description
8 for the conservation easement, which would have
9 been, you know, taken from the deed of the various
10 parcels that were purchased to put the property
11 together, less the WRP portion of the property,
12 which would have been the easement property.

13 Q What did Mr. Hanlin tell you, if anything,
14 about whether COLT was not going to proceed with
15 the easement because Mr. Justice hadn't signed the
16 letter of intent?

17 A No, that was not unusual at all in
18 conservation easement projects, you know, not to
19 have documents actually signed. You know, the
20 truth is as complicated as easements can be and
21 this one certainly had some parts that were very
22 unusual and unique, you know, the conservation
23 easement document obviously is critical and you
24 have to have a base line documentation report but
25 you have to make sure the parties agree that

1 represents the existing conditions but that's
2 really all you have to have to close. The
3 appraisal actually doesn't even have to be finished
4 until 60 days after the gift.

5 Q What did Mr. Justice, excuse me, what did Mr.
6 Hanlin tell you, if anything, about whether COLT
7 would not accept the conservation easement gift
8 because Justice hadn't paid his stewardship fee?

9 A Nothing.

10 MS. MCWILLIAMS: I object to leading.

11 MR. PENDARVIS: I asked him, "What did he
12 tell you, if anything?"

13 THE COURT: Rephrase it. It was leading.

14 BY MR. PENDARVIS:

15 Q Did you have any conservations with Mr.
16 Hanlin about Justice's nonpayment of the
17 stewardship fee?

18 A No.

19 Q Did he ever discuss that with you?

20 A No.

21 Q What was Mr. Hanlin's relationship with COLT?
22 Just remind the jury what his relationship was.

23 A He was chairman of the Board of COLT.

24 Q Did you have any conversations with Mr.
25 Hanlin about concerns about the project going

1 forward because Mr. Justice hadn't signed the
2 consulting services agreement?

3 A No.

4 Q Did Mr. Hanlin ever discuss with you any
5 concerns about whether Mr. Justice intended to go
6 forward?

7 MS. MCWILLIAMS: Objection, Your Honor, calls
8 for speculation.

9 MR. PENDARVIS: I asked if Mr. Hanlin had
10 discussed this with him, it is not speculation.

11 THE COURT: You can answer that question.

12 A No.

13 Q Did Mr. Hanlin ever, did you discuss with Mr.
14 Hanlin the concept, this highest and best use
15 concept being mitigation value?

16 A Yes, I did.

17 Q Did Mr. Hanlin give you any advice about
18 whether that was an appropriate methodology to
19 calculate the value of this easement?

20 A Yes.

21 Q What did he tell you?

22 A Well, he had done some research and we
23 discussed it and felt like it was a perfectly
24 proper thing to do.

25 Q Did you ever, once you entered, I'm bouncing

1 around a little bit trying to clear up some issues
2 on the easement, after you introduced Dr. Hawkins
3 to the property were you involved in Dr. Hawkins'
4 evaluation process to reach his appraisal numbers?

5 A No.

6 Q Did you have any communications with Dr.
7 Hawkins about the values and issues he was
8 reaching, while he was in this appraisal process?

9 A No.

10 Q Did Mr. Hanlin discuss with you about
11 anything remotely related to converting a
12 contingency fee to an hourly fee?

13 A No.

14 Q Did Mr. Hanlin voice any concern that it was
15 anticipated if this easement closed it would be too
16 high or too much money?

17 A You mean too much for him?

18 Q Yes, sir.

19 A No.

20 Q Did Mr. Hanlin discuss with you any concerns
21 about whether this contemplated Justice
22 conservation project would create problems for Mr.
23 Justice or his companies as a reportable
24 transaction under the IRS code and regulations?

25 A No.

1 Q Did Mr. Hanlin discuss with you any concerns
2 about whether this Justice conservation easement
3 might be considered a, well, the report of
4 transaction may cause problems for Y.E.S.?

5 A No.

6 Q Did Mr. Hanlin discuss with you any concerns
7 about whether the Justice conservation project
8 would create problems for Mr. Justice or his
9 companies as a listed transaction?

10 A No.

11 Q The same question for Y.E.S., would it cause
12 problems to Y.E.S. as a listed transaction?

13 A No, no discussion whatsoever about any of
14 that.

15 Q I have to go through some of these things,
16 these are technical IRS terms. I'm going to ask
17 you again, did Mr. Hanlin ever discuss with you any
18 concerns about whether this Justice project would
19 create problems for Mr. Justice or his companies
20 about a loss transaction?

21 A No, sir.

22 Q The same question for Y.E.S., would this
23 project have created a loss transaction for Y.E.S.,
24 any problems about that?

25 A No, sir.

1 Q Bear with me. Did Mr. Hanlin ever discuss
2 with you whether this contemplated Justice project
3 would create any concerns or issues for Mr. Justice
4 or his companies as a transaction of interest under
5 the IRS laws and regulations?

6 A No, sir.

7 Q Same question for whether this project would
8 create a problem for Y.E.S. as a transaction of
9 interest under the IRS laws and regulations?

10 A No, never had any such conversation.

11 Q Did Mr. Hanlin ever tell you or discuss with
12 you anything, any concerns about whether this
13 Justice project would be considered as an IRS tax
14 shelter disclosure, subject to the IRS tax shelter
15 disclosure regulations?

16 A No, sir.

17 Q Did Mr. Hanlin ever discuss with you any
18 concerns about whether this contemplated Justice
19 conservation easement would create problems for
20 Y.E.S. as an aider and abettor under the IRS laws
21 and regulations?

22 A No, sir. Hal knew full well that Yancey
23 McLeod is not an aider or abettor or promoter.

24 Q Did Mr. Hanlin ever discuss with you any
25 concerns about whether Richardson, he or Richardson

1 Plowden would be subject to any of the concerns we
2 have discussed, including reportable transaction,
3 listed transaction, loss transaction, transaction
4 of interest or a transaction subject to the tax
5 shelter disclosure regulations?

6 A No, sir.

7 Q Did Mr. Hanlin ever discuss with you any
8 concerns about whether Y.E.S. or you, Yancey
9 McLeod, would be considered a material adviser, a
10 material adviser under the IRS laws and
11 regulations?

12 A No, sir.

13 Q Were you relying on Mr. Hanlin to advise you
14 on tax concerns and tax consequences of Y.E.S.'s
15 involvement in this conservation?

16 A Of course I was. It never occurred to me I
17 needed any such advice but he was the transaction
18 attorney so he was going to be doing all the tax
19 and legal work for the whole thing, including me,
20 keep us straight, make sure we were doing it
21 exactly right.

22 Q Were you relying on Mr. Hanlin and Richardson
23 Plowden to advise you about issues, tax issues as
24 they may concern Mr. Justice or any of Mr.
25 Justice's companies?

1 A Of course.

2 Q Did Mr. Hanlin ever speak with you or discuss
3 conversations and discussions he was having
4 internal about, discussions he was having about
5 this Justice matter that were going on inside
6 Richardson Plowden with the other attorneys that
7 were there?

8 A Not one word.

9 Q Did Mr. Hanlin or Richardson Plowden, I'm
10 really going to go back to the December 20 phone
11 call, did you ever receive, other than the letter
12 we looked at, did you ever receive any materials
13 from the file?

14 A No, nothing.

15 MR. PENDARVIS: Your Honor, this is a good
16 time for a break?

17 THE COURT: All right.

18 All right, Miss Meyer, you all step in the
19 jury room, take a few minute break, we'll have you
20 right back out here. Don't discuss the case.

21 (The jury was excused from the courtroom).

22 THE COURT: We'll stand at ease for a few
23 minutes.

24 (Recessed at 10:21 a.m.).

25 (Resumed at 10:41 a.m.).

1 THE COURT: What have we got?

2 MR. PENDARVIS: A few more, Your Honor.

3 THE COURT: Sorry, I thought there was
4 something --

5 MR. PENDARVIS: No, we're happy, I guess.

6 THE COURT: All right, get the jury, then.

7 MR. PENDARVIS: Unless you want to use this
8 break for the argument, I believe, or wait until
9 after Mr. McLeod is finished.

10 THE COURT: That will be perfect.

11 (The jury returned to the courtroom).

12 BAILIFF: The jury is all present, Your
13 Honor.

14 THE COURT: Very good.

15 All right, you may continue.

16 BY MR. PENDARVIS:

17 Q Mr. McLeod, a few housekeeping matters before
18 we get on what happened after December 24th. Was
19 there ever a closing date set for the Justice
20 project, where you sit down and sign papers?

21 A No.

22 Q Is that unusual?

23 A No, not at all. I have completed and
24 recorded 24 easement projects and until December,
25 2011, we had never had a closing, a formal closing

1 like you sit around the room and sign papers, both
2 the purchaser and, seller and buyer are sitting
3 around the room with the lawyer, I never had a
4 formal closing in a conservation easement project
5 until December, 2011, just sent the easement and
6 papers around to the parties and they signed them
7 and the lawyer gets them and records them.

8 Q Now, after the IRS letter arrives did you
9 communicate with any of your clients about the fact
10 that the IRS was going to be investigating Yancey
11 Environmental Solutions?

12 A All of them.

13 Q What did you tell them?

14 A I told them I had gotten a letter and that I
15 was furious and hurt and shocked, I hadn't done
16 anything wrong, I don't have any control over what
17 the IRS says.

18 Q Okay. Now, did you have any similar
19 communications with professionals involved in Mr.
20 Justice's project, the Justice Companies, about --

21 A Oh, yes, I did.

22 Q Mr. McLeod, is this an email I'm showing you
23 that you sent to Miss Green, representative for
24 COLT?

25 A Yes, sir, December 27. By the way, I see Sue

1 Green's assistant is Brenda. I can't think of her
2 name, I wrote her name down in this letter.

3 Q It's a short email. Would you mind reading
4 it to the jury?

5 A Sure. December 27, Thursday, December 27.
6 Sue. "Thanks to you, Brenda and Hal for taking
7 time for the site visit on the Justice Family Farms
8 tract on the Black River in Clarendon County, South
9 Carolina. Hal informed me that the Community Open
10 Land Trust Board approved receipt of the gift. I
11 am writing to inform you that Mr. Justice has
12 decided to postpone the project. I will keep you
13 advised as to decisions by Mr. Justice regarding
14 the project. Thanks so much, Yancey." Copies to
15 Jim Lewis, Mr. Justice -- Jim Lewis? Yes, I guess
16 that was Jim Lewis, Mr. Justice and Mr. David
17 Harrah. Maybe that is Crosby. That is what that
18 was, Crosby Lewis, my new attorney.

19 Q I know we started talking about this, would
20 you describe for the jury what this email I just
21 handed to you is?

22 A It's dated Thursday, December 27, apparently
23 I spent a lot of time at my desk with my legal pad
24 that day. To Jim Justice and David Harrah. Do you
25 want me to read it?

1 Q This is important enough, let's read it, I
2 would like them to hear what you said to Mr.
3 Justice.

4 A Okay. "I cannot properly express my
5 gratitude and appreciation for your response to our
6 recent conversations regarding the IRS letter I
7 received. My attorney Crosby Lewis, Columbia,
8 South Carolina, commented to me that Jim Justice
9 and his advisers must be people of the highest
10 quality, you are very fortunate, Yancey, to have
11 clients of this caliber. All the work that has
12 been in progress on the Black River Farm tract will
13 be used in a conservation project at the
14 appropriate time. Following our conversations by
15 phone on December 24th I advised the appraiser Dr.
16 Darroll Hawkins and our biologist working on the
17 required base line report to cease work at this
18 time and forward statements for work to date. As
19 soon as I receive them I will forward to you. I
20 also am advising the qualified organization which
21 had received Board approval to receive the gift
22 that the project will not close this year. I have
23 attached our statement for the initial consulting
24 fee in connection with the project and appreciate
25 so much your commitment to pay this. As I

1 mentioned above, all of the work and work product
2 completed to date will be used when we recommence
3 the project. I hope you and your family have had a
4 wonderful Christmas. I will keep you informed as I
5 defend my honor, character and reputation. I can
6 assure you that I am very proud of each and every
7 conservation project in which I have been honored
8 to participate and I will defend the
9 appropriateness of each one they care to question
10 with every ounce of my heart and mind. Thank you
11 for your trust, confidence and friendship.
12 Sincerely, Yancey." Copies to Crosby Lewis.

13 Q And the second page, the attachment to this
14 email is what?

15 A It's a statement for professional services of
16 \$50,000.

17 MR. PENDARVIS: Your Honor, I would like to
18 move these last two emails in, email to Miss Green
19 as 33 and email to Mr. Justice would be 34.

20 MS. McWILLIAMS: No objection, Your Honor.

21 THE COURT: 33, a one page email. And a two
22 page email, 34. Admitted without objection.

23 (Email to Sue Green marked and received in
24 evidence as Plaintiff's Exhibit 33).

25 (Email to Jim Justice marked and received in

1 evidence as Plaintiff's Exhibit 34).

2 BY MR. PENDARVIS:

3 Q For housekeeping here, Yancey, I passed you
4 two emails. Would you describe the first one I
5 handed you to the jury, please?

6 A Yes. It's dated Friday, December 28, Jim
7 Lewis and Clinton Epps. I was just following up on
8 a message I had left on their respective phones
9 advising them that Mr. Justice had decided to
10 postpone the project, please present me their
11 statement for services rendered. Actually I'm
12 asking that they send them directly to David
13 Harrah.

14 Do you want me to tell you what the second
15 one is?

16 Q Yes, sir, please.

17 A It is also dated December 28 and it is a
18 similar letter to Dr. Hawkins.

19 Q Asking that he --

20 A Asking him to, advising him what is going on
21 and advising him to send a statement.

22 MR. PENDARVIS: Your Honor, I move to have
23 these admitted at 35 and 36.

24 MS. McWILLIAMS: No objection, Your Honor.

25 THE COURT: 35, which one is going to be 35?

1 MR. PENDARVIS: 35, Your Honor, will be the
2 one to Mr. Epps.

3 THE COURT: Okay.

4 MR. PENDARVIS: And 36 is the one to Dr.
5 Hawkins.

6 THE COURT: Very well, they're admitted
7 without objection.

8 (Email to Quinton Epps and Jim Lewis marked
9 and received as Plaintiff's Exhibit 35).

10 (Email to Darroll Hawkins marked and received
11 in evidence as Plaintiff's Exhibit 36).

12 BY MR. PENDARVIS:

13 Q Now, Mr. McLeod, to try to keep this as
14 chronological as I can, maybe you have them in
15 order, this is Number 26. I ask you to please pull
16 that out.

17 A Okay.

18 Q The jury has heard Dr. Hawkins describe his
19 email to you on the bottom of the first page of
20 Exhibit 26. Do you remember that?

21 A Correct.

22 Q Can you describe for them, why did you
23 forward this email? The top of it shows you
24 forwarded this to Mr. Justice. Is that correct?

25 A Correct.

1 Q And why did you do that?

2 A Well, I wanted Mr. Justice to see what the
3 preliminary numbers were from the appraiser,
4 hopefully to interest him, once everything settled
5 down, to resume the project.

6 Q Did you get a response from Mr. Justice to
7 this email?

8 A No, sir.

9 Q What would the fee to Y.E.S. have been if the
10 easement had closed and the values, Dr. Hawkins'
11 values had been used as the deduction value?

12 MS. MCWILLIAMS: Object to form, Your Honor.
13 This calls for speculation. He can't base it on
14 speculation. We would like to be heard, if we may.

15 THE COURT: All right. Miss Meyer, I need to
16 make a record of this, I will let you all step back
17 to the jury room. You all take a few minutes back
18 there, as soon as we get ready we'll call you back
19 out. Do not begin to discuss the case.

20 (The jury was excused from the courtroom).

21 THE COURT: All right, Miss McWilliams.

22 MS. MCWILLIAMS: Yes, Your Honor. Yesterday
23 Dr. Hawkins testified that this was one of these
24 rush, up in the air jobs and he gave a best guess
25 in the change in value for the 30,000, excuse me,

1 3,028 acres, loss value of over 45,000,000 but he
2 also testified that you have to back out of that
3 the cost of returning it to mitigation, and there
4 is no evidence regarding that, so, with all due
5 respect to Mr. McLeod, he has said, "I have nothing
6 to do with the appraisal, I don't have anything to
7 do with that," properly so, that is not his role.
8 There is not sufficient evidence in the record or I
9 would submit based on his very extensive background
10 for him to testify what his fee would have been
11 because in order to get his fee he has got to have
12 the conservation value that Mr. Justice might have
13 earned had he placed the easement. There is just
14 insufficient evidence, totally speculative and I
15 think it is improper.

16 Now, I know there is a lot of South Carolina
17 law about where an owner may testify about the
18 value of his own property. That is not what we're
19 talking about here and so we object to the attempt
20 here to back door some evidence of the value of the
21 conservation easement when it was never reached.
22 They could have asked Mr. Hawkins but he very
23 candidly said he had a best guess and he hadn't
24 even finished it. He said, "I determined there
25 were 15 unique wetlands and I had only gotten a

1 preliminary value on one," the bottom land
2 woodland. He said there were 14 more and he just
3 sort of estimated some of the farm land is going to
4 go down as low 7,700 or 7,500 an acre and the other
5 might be up to 11,000. We're even one step beyond
6 his testimony about value because now Mr. McLeod
7 has told the jury, "I don't have anything to do
8 with value," and the only way he could say what his
9 fee is if he knew the value of the conservation
10 easement. We never got a value and he can't
11 estimate it and we have no evidence of it.

12 MR. PENDARVIS: That ignores the mitigation
13 report that Mr. McLeod has testified he gave to Dr.
14 Hawkins that shows an 18,600, it shows a very
15 specific amount for the cost to mitigate the
16 property. This number is being very conservative.
17 He doesn't say -- by the way, in the second
18 sentence, best guess, then he says or a loss value
19 of over 45 million, and people could do the math,
20 we have the acreage. This is an absolute bottom
21 number that would be available to this jury.

22 On top of all that, during the discovery we
23 disclosed, I qualified Yancey McLeod as a
24 consultant, I have qualified Mr. McLeod on his
25 experience as a conservation expert, consulting

1 expert, so Mr. McLeod is certainly able to say at a
2 minimal, at a minimum. We're not asking him to
3 speculate over the 45,000,000 number, it stays, or
4 a loss value of over 45,000,000. Mr. McLeod is
5 going to be saying 45,000,000, and he can give the
6 number, and that is also based on his experience in
7 countless other conservation easements. He has
8 already told the jury the final completed appraisal
9 isn't due for 60 days after the closing per IRS
10 regulations, which would mean --

11 THE COURT: You all tie the two together.
12 There was a mitigation bank appraisal, highest and
13 best use. That's not this one, this is a separate
14 appraisal done by Dr. Hawkins.

15 MR. PENDARVIS: That's correct, but he was
16 basing it on the same concept, what would be the
17 mitigation value, and if you look at it, it is
18 awful interesting they are almost, very, very close
19 in numbers, they are both at 45,000,000. They
20 changed the values, they are a little different but
21 they both have a \$45,000,000 number and this is a
22 very conservative number. My anticipation is Mr.
23 McLeod is not going to say it would have been
24 45,790,000 or some number, it is going to be at
25 least 45,000,000, and he can give the number from

1 that point.

2 It is also no speculation as to the
3 calculation of the fees, it is a flat four percent,
4 based upon the testimony, so four percent of this
5 number, and the numbers available to Mr. McLeod are
6 certainly readily ascertainable in the record
7 already, it is a simple math equation. And number
8 two, if there is any concern I'm certainly able to
9 have Mr. McLeod qualified in front of the jury as
10 an expert on this.

11 THE COURT: Maybe I'm missing something.
12 Now, highest and best use, 45,000,000 is mitigation
13 value. The comparison number is property burdened
14 with the conservation easement, that you cannot
15 develop in the future?

16 MR. PENDARVIS: No, sir, that is what you
17 might be missing.

18 THE COURT: That is what I'm missing.

19 MR. PENDARVIS: What Yancey has told the jury
20 and what the concept was is that if this property
21 could have been developed as a shopping center,
22 let's say it had a \$220,000,000 value as a shopping
23 center but a mitigation bank, if the property had
24 been mitigated for wetlands, we know from the
25 feasibility study and the conversations and the

1 work that was done with the mitigation bank, to get
2 this number of what credit, actually a check, as
3 Mr. McLeod testified, it would take eighteen months
4 to do this giant project, filling in dips, there
5 would have been a check for \$45,000,000 written to
6 the owner of the property. So when the owner
7 decided not to do that, instead of making it a
8 swamp again, saving it as a farm and putting the
9 conservation easement on it, instead of getting a
10 \$45,000,000 check he was going to get a \$45,000,000
11 tax deduction.

12 So what they did --

13 THE COURT: Let me tell you my understanding.
14 The mitigation bank was the highest and best use,
15 45,000,000 less the burden value, it had to be
16 something deducted, it is not \$45,000,000, and the
17 property is worth less on a conservation easement.
18 It is worth something. I did a lot of condemnation
19 work for the D.O.T. I remember landowners would
20 profess that the property would be valueless after
21 the road came near it, but 45,000,000 is the
22 mitigation value. There has got to be another
23 value. The value can't be zero because 4,000 acres
24 of land is worth something. The difference in the
25 value is the deduction. Am I wrong on that? I

1 think I'm right.

2 MR. PENDARVIS: Your Honor, the numbers are
3 going to be greater than that because the
4 \$45,000,000 number in the mitigation feasibility
5 report is greater than 45, so we know there is
6 going to be a seven, eight, I don't have the math
7 in front me, there is going to be value. This is
8 the 45, not 45,700,000 or 45,900,000.

9 THE COURT: I'm with you on the highest and
10 best use is 45,000,000, but 45,000,000 is not the
11 tax deduction. The IRS is not going to let you use
12 45,000,000 potential value. There is something got
13 to be taken away, as I understand the concept, and
14 we're talking, my understanding of the deduction is
15 a landowner gets an incentive to donate the
16 property to the conservation, natural resources,
17 and the incentive is you get a tax deduction. To
18 calculate your tax deduction you need a good tax
19 lawyer, as everybody has been saying. Highest and
20 best use has got to be determined by the
21 appraisers. In this case the highest and best use
22 would be a \$45,000,000 wetland mitigation bank.

23 What is the worst case use, the property as
24 it sits, the burdened property after the imposition
25 or conservation easement, which means nothing can

1 be done to the property other than a hunting cabin
2 or fishing rights for the property. It will be
3 undisturbed from then on. You can't build houses,
4 you can't build a shopping center, you can't do
5 anything but hunting and fishing and enjoy it. It
6 is worth something in that state. That state may
7 be \$10,000,000. 45,000,000 less 10,000,000 is a
8 \$35,000,000 loss to the landowner.

9 Am I not right on that?

10 MR. PENDARVIS: I think you are. Your Honor,
11 if you will indulge us can I speak to my client
12 just a moment?

13 THE COURT: Yes. I think I understand it but
14 I don't think I'm hearing it.

15 MR. PENDARVIS: Your Honor, Mr. McLeod has
16 done this exact circumstance, he gave testimony for
17 the Faulkenbury tract, exactly there the same
18 thing, he is going to be able to say the number
19 based on his experience. We want to proffer him as
20 an expert consultant. He has done these things, he
21 is able to tell this number.

22 THE COURT: I don't know if he has been
23 deposed as an expert.

24 MR. PENDARVIS: He hasn't.

25 THE COURT: If he were you would have a

1 difficult time in not calling him as an expert
2 because I don't know anybody has done more than him
3 in this field. I have no idea if he was named in
4 that fashion.

5 MS. MCWILLIAMS: He was not. He was
6 identified as an expert in hiring counsel at the
7 end of the year, how it would have been impossible.
8 I did ask him about that. But he specifically has
9 testified over and over, and if we're going down
10 this road one of the things the IRS wanted to know
11 was is Mr. McLeod involved in appraising, is he
12 involved, they asked all the customers they
13 contacted, "Do you know whether Mr. McLeod was
14 talking with the appraisers," no evidence that he
15 did, he is very adamant about that. "I don't have
16 anything to do with the appraisal," it is what it
17 is, is supposedly what Mr. McLeod always says when
18 it comes to value, and so for now to try to back
19 door in damages by now trying to qualify him and
20 saying, number one, he didn't produce the
21 feasibility report, it is not even a valuation they
22 are trying to base the 25,000,000 on, but in any
23 event, that is not the cost, that is not the value.
24 Even if we accept that is the value for the
25 mitigation bank, which was never, remember, Justice

1 never approved it, Justice didn't agree to do it.
2 He had to go get all the approvals from the federal
3 government --

4 THE COURT: As I understand it, they did the
5 feasibility study and said, "Let's create a
6 mitigation bank and we will have to recommit the
7 property to wetland," and they decided not to do it
8 but had they done it it would have generated a
9 \$45,000,000 asset to Mr. Justice to sell off over a
10 period of time.

11 MS. McWILLIAMS: He had a pay-out, that's
12 correct, Your Honor.

13 THE COURT: He decided not to do that but
14 again they did a, "If we do a conservation
15 easement, what is the highest and best use? Guess
16 what we have already done, we already figured,
17 highest and best use is right here in mitigation
18 bank," they don't have to do it, he can say it
19 could be done.

20 MS. McWILLIAMS: Then they've got to have the
21 other appraisal.

22 THE COURT: A burdened piece of property,
23 4,000 acres with an easement, conservation easement
24 is worth something. Mr. Justice retains ownership,
25 he can sell the burdened piece of property and the

1 appraiser can value that. Has that been done?

2 MR. PENDARVIS: It has, on the joint tract it
3 is \$1,500 an acre, this number is going to be the
4 45,000,000. The actual number would have been
5 north of that based on the numbers Dr. Hawkins
6 used, it would, similar to the Faulkenbury tract,
7 Mr. McLeod was identified as an expert with twenty
8 years experience in consulting and conservation
9 matters and handling, you know, consulting with all
10 these people, including the appraisers, he has
11 watched it happen, he has been involved in the
12 matters where the exact circumstance, where
13 mitigation value was placed on the property and a
14 residual agriculture value at 1,500 an acre
15 remained, the same expert, Henry Bekcham in this
16 case.

17 THE COURT: There is a difference in
18 donation.

19 MR. PENDARVIS: Right. The 1,500 was the
20 remainder. That is what he is going to testify, he
21 has been doing it 20 some years.

22 THE COURT: That is the whole concept this
23 thing is based on.

24 MR. PENDARVIS: And so that is essentially
25 what he's prepared to testify on, and the whole

1 point, I guess the essence of this is he is using
2 the bottom number, it actually would have been a
3 higher number had he based it on this estimate, a
4 preliminary appraisal had been used from the past,
5 he is well qualified to do it, I can put him up as
6 an expert, she is welcome to voir dire him on that
7 if she wants to.

8 MS. MCWILLIAMS: It would have been nice to
9 have a little notice about that, Your Honor. He
10 was not named for that purpose.

11 MR. PENDARVIS: I just read it, and it was
12 served December 21st and you took his deposition on
13 this, after you took his deposition in July you
14 took his deposition again in December based on the
15 disclosure of Mr. McLeod under interrogatory, the
16 same interrogatory identifies Dr. Adams,
17 interrogatory number one, their third set of
18 interrogatories, he is listed right behind Dr.
19 Adams and right ahead of Curtis Elliott.

20 MS. MCWILLIAMS: I don't deny he was named,
21 he was named as having an opinion regarding how
22 hard it would be to hire new counsel when the
23 lawyer withdraws, that is it, and it was based on
24 his experience in dealing with lawyers all over the
25 country. I did that, I deposed him, we went

1 through all that. There has never been, not one
2 word in this case until today that Mr. McLeod may
3 be offered as an expert to testify as to the value
4 of the 3,000 acre Jim Justice tract once it had
5 been burdened with a conservation easement, never,
6 and he has in fact testified as a 30(B)(6) designee
7 for Y.E.S. that he never gets involved with
8 valuation, that always has to be done by an
9 appraiser and it is true the appraisal doesn't have
10 to be finalized by 12/31. But he says the
11 landowner has got to have some idea of value before
12 they can decide whether or not to place the
13 easement on it.

14 We never got that far, no one has done that
15 valuation, and with all due respect, Mr. McLeod
16 cannot and has never done an appraisal of any
17 property, I would submit. That is exactly what he
18 says, he never gets involved in, he is not an
19 appraiser. If they wanted to call as an appraiser
20 they could have done that, they could have named an
21 expert and said, "Well, I wasn't hired to do it but
22 I have gone ahead and done it anyway and this is
23 what the appraised value of the conservation
24 easements would have been." They didn't do that.
25 He testified at length that he had Henry Beckham,

1 who is his good friend, is familiar with this other
2 property. Again, Mr. Beckham was never named as an
3 expert. To suggest now that I have to, to suggest
4 now that we're going to become qualified as an
5 expert on property, he testified --

6 MR. PENDARVIS: Your Honor, we're not
7 proffering him as an expert on property. We're
8 asking him to give a number of the value of his fee
9 out of this project based on the opinion of the
10 expert appraiser, and I have, I'm asking him to
11 give a value on his fee. I'm not asking him to
12 give an appraisal value on the property. He should
13 be able to correlate his fee based on his
14 experience and based on Dr. Hawkins' appraisal.
15 That is why he's not a promoter, that is why he
16 doesn't get in trouble on these easements, because
17 he doesn't get involved in the appraisal. He is
18 certainly qualified, with his experience, to take
19 the appraiser's value and his knowledge of how to
20 calculate the fee based on the agreement and get
21 out a calculator and give the jury a number.

22 MS. McWILLIAMS: May I read a question and
23 answer from the second deposition where Mr. McLeod
24 had been named as an expert on hiring counsel at
25 the end of the year? I asked him, "Do you have any

1 testimony you intend to offer with respect to the
2 preparation or consultation you may have had with
3 respect to property valuations?" "I don't have, I
4 don't, I have never had anything to do with
5 property valuation." I said, "How about
6 appraisal?" "No. I mean, I have recommended
7 appraisers to clients and I have met appraisers and
8 showed them around a tract of land but I have never
9 had anything to do with the appraisal."

10 I would be glad to hand that up. For the
11 record, that is the December 28, 2011, deposition
12 of Mr. McLeod, page 41, and if the Court would like
13 to see that page I will be happy to hand up our
14 copy of this.

15 MR. PENDARVIS: Your Honor, he's basing his
16 numbers off the appraiser's numbers, he's not
17 giving an appraisal, he is not involved in the
18 appraisal process, he can use a calculator, he
19 knows how his fee is to be calculated for his
20 company. I think he is certainly entitled to tell
21 the jury what would have been earned on the value
22 the appraiser developed that he sent on to Mr.
23 Justice for this man to consider about proceeding
24 with this easement, and in an effort to mitigate
25 his damages from the lawyer bailing out on him and

1 trying to get the easement closed in the next year,
2 this is a 2008 email, I think he is certainly well
3 qualified. If we need to qualify him as an expert
4 I'm happy to do that, he is certainly qualified and
5 I believe he is capable of putting a value on his,
6 what the fee would have been and if counsel wants
7 to argue that that wasn't an accurate number or
8 whatever that is certainly within their rights but
9 he is certainly capable of giving this jury a value
10 based on the number he sent on to his client Mr.

11 Justice to encourage him to proceed with this
12 easement. As a professional you have to believe
13 that with his experience and his integrity he's not
14 going to send a number to a billionaire Jim Justice
15 that isn't going to be at least available for --

16 THE COURT: That's closing argument. It's a
17 very interesting case. Off the record.

18 (Off-the-record discussion).

19 THE COURT: We're going to take a brief
20 break.

21 (Recessed at 11:15 a.m.).

22 (Resumed at 11:30 a.m.).

23 THE COURT: All right, you all be seated.

24 Question. The email summary from Dr. Hawkins --

25 MR. PENDARVIS: Yes, sir.

1 THE COURT: Will you proffer some testimony
2 from Mr. McLeod as to how that tells him and/or Mr.
3 Justice the after value, the residual value of the
4 property when it is burdened? Explain that to me,
5 I'm not certain I'm clear on that.

6 BY MR. PENDARVIS:

7 Q Mr. McLeod, in your experience in
8 conservation easements, after you received this
9 email marked Exhibit 26, December 27, 2007, you
10 forwarded it to Mr. Justice?

11 A Yes.

12 Q Give us testimony why you didn't give Mr.
13 Justice a value. Was this how you have calculated
14 the value to Mr. Justice for his tax deduction,
15 based on the value Dr. Hawkins published in the
16 email on December 27th?

17 A Well, two ways. One, Mr. Hawkins make it
18 clear that at a minimum the value will be
19 45,000,000. And secondly, of all the easements
20 that I have completed, that actually went to
21 recordation, where the after value was timberland
22 land and farm, agriculture and farm land and timber
23 land, without exception the after residual value
24 was approximately \$1,500 an acre and so it would be
25 fairly easy to calculate what the after value would

1 be, and I wouldn't, you know, tell Mr. Justice to
2 expect one penny more than the minimum that he
3 stated in his letter, although I think from
4 experience it would be more but I wouldn't
5 speculate on that.

6 Q Are you confident in your experience that the
7 170(H)) deduction Mr. Justice would have been able
8 to place on his tax return had the easement closed,
9 based on Dr. Hawkins' value, would have been at
10 least 45,000,000?

11 A Well, I feel like it would have been at least
12 45,000,000 but I would say that, you know, to err
13 on the side of caution we would multiply 3,000
14 acres times 1,500 and come up with whatever that is
15 and subtract that from the \$45,000,000.

16 Q So if we gave you a calculator you would take
17 the specific acreage shown in the feasibility
18 report marked Exhibit 29 -- let me rephrase it.
19 Would the information contained in Exhibit 29
20 assist you in calculating the final tax deduction
21 number from the appraised value Dr. Hawkins set
22 forth in his email?

23 A Which one is 29?

24 Q It's the compensation.

25 A Absolutely.

1 Q You should have a copy there.

2 A Sure. They were almost identical.

3 Q But the acreage, the specific acreage in
4 terms of the affected property are all set forth in
5 this mitigation feasibility report?

6 A That's correct.

7 Q And in conjunction with Dr. Hawkins' value
8 and all the work that had been done on the
9 mitigation report are you confident you can come to
10 an accurate number as to the deduction for Mr.
11 Justice?

12 A Very, very close.

13 Q And from that a four percent percentage for
14 the fee earned?

15 A Correct, yes, sir.

16 Q Is there anything further, Mr. McLeod, the
17 Court needs, anything that the Court needs to
18 understand how this value would be calculated?

19 A That is basically how it would work.

20 MS. McWILLIAMS: Your Honor, may I ask
21 questions?

22 THE COURT: Yes, ma'am, I offer you free
23 opportunity

24 MS. McWILLIAMS: All right.

25 BY MS. McWILLIAMS:

1 Q Now, Mr. McLeod, you have testified
2 repeatedly you don't ever have anything to do with
3 value, correct?

4 A That's correct.

5 Q Valuation. And you have just testified that
6 the \$1,500 an acre that you came up with is based
7 on all the other farm land and timber land and all
8 the other easements you have ever done. Correct?

9 A Yes, ma'am.

10 Q And didn't you also tell this jury that the
11 Black River farm was a very unique piece of
12 property?

13 A Yes, ma'am.

14 Q All right. And so you have no experience in
15 valuing either that property or any of the property
16 in any easement you have been involved in, correct?

17 A Well, as far as the timber land value it
18 would be site related and fertility and soil, the
19 after value is adding, that is what it is.

20 Q But isn't it true that for every 170(H)
21 deduction, for every qualified easement,
22 conservation easement where a taxpayer is entitled
23 to take a 170(H) deduction there must be a final
24 appraisal from a qualified appraiser?

25 A Yes, ma'am. It's called self contained.

1 Q We have no self constained appraisal in this
2 case, correct?

3 A Because Hal Hanlin quit.

4 Q None was ever done, that was my question?

5 A That's correct.

6 Q All right. And you have absolutely no, we
7 didn't even get a preliminary appraisal other than
8 this email from Dr. Hawkins, correct?

9 A That's correct.

10 Q You didn't have Mr. Beckham do anything,
11 correct?

12 A That's correct.

13 Q All right. And so the only basis on which
14 you have just testified is that you simply multiply
15 3,000 times, I think you said 3,000 times 1,500?

16 A Well, it is a few more acres over 3,000 but
17 yes.

18 Q That would be, that would be what -- what
19 value would that be?

20 A Residual value, the after value.

21 Q All right. And then the top number, this
22 45,000,000, at least 45,000,000 that you're trying
23 to base this on, this is on a feasibility report
24 for a mitigation bank, correct?

25 A It is also Dr. Hawkins' opinion it would be

1 at least 45,000,000.

2 Q All right. Now, he didn't say it was his
3 opinion, did he?

4 A I'm sorry?

5 Q He didn't say it was his opinion, did he?

6 A I really don't recall exactly what he did say
7 yesterday.

8 Q Do you have Plaintiff's 26 in front of you?

9 A Yes, ma'am.

10 Q You see the email. What he said is best
11 guess is the change in value from existing to fully
12 mitigated will average at least 15,000 an acre,
13 right?

14 A Right, but he is also saying his best guess
15 is at least 45 million, so that indicates to me
16 that in his professional opinion it would be a
17 minimum.

18 Q Do you understand the difference between a
19 best guess and a professional opinion?

20 A Of course, I do, yes, ma'am.

21 Q And he didn't give his professional opinion,
22 did he?

23 A I think this is his professional opinion.

24 Q Well, didn't he testify yesterday that he
25 never finished, he was instructed to stop his work?

1 A Oh, yes, ma'am.

2 Q All right. And so he could, an appraiser
3 cannot give a self contained appraisal that has not
4 been finished?

5 A That's correct.

6 Q And with respect to the proposal, that
7 mitigation bank, I guess it is called a feasibility
8 study, right?

9 A Yes, ma'am.

10 Q All right. That also was never finalized,
11 that was a best guess, was it not?

12 A Yes, ma'am.

13 Q All right.

14 A Projected value.

15 Q It was just projected values, correct?

16 A Based on a lot of experience.

17 Q Granted that, Mr. McLeod, but the fact of the
18 matter, this was just a preliminary, you just
19 wanted to get, to see if Mr. Justice was
20 interested, that this was the projection of what
21 the project would take, I think you said it would
22 be a 15 to 18 month project to restore it to a
23 compensatory mitigation bank, correct?

24 A Yes, ma'am.

25 Q And from the 45,000,000 you have to, you have

1 to have some cost subtracted out. Remember Dr.
2 Hawkins testified to that?

3 A Yes, ma'am.

4 Q We don't know what those costs are, right?

5 MR. PENDARVIS: Yancey, could you back up a
6 little bit from the microphone, it is interfering
7 with the audio.

8 Go ahead, I'm sorry.

9 Q We don't know what those costs are?

10 A What I would have told Mr. Justice is based
11 on our experience with 100 percent of our
12 mitigation projects that our preliminary analysis
13 and projected values are always 20 to 30 percent
14 under what the actual values will turn out to be,
15 that is a fact. We did not exaggerate anything
16 with this analysis, we take our work very seriously
17 and we feel like this is a minimum type of
18 projection of realistic values based on the market
19 conditions for mitigation credit at that time.

20 Q But isn't it true, Mr. McLeod, that this is
21 just, the 45,276,000 figure that is in this
22 feasibility report is simply a projected net profit
23 to the landowner over some 20 years? Isn't that
24 right?

25 A Again, it is, it's 63 gross on our analysis.

1 Q But that's just a projected profit over,
2 excuse me, eight years?

3 A That's correct.

4 Q All right. So it is not a valuation of the
5 property?

6 A It is not intended to be an appraisal, no.

7 Q All right. But you did not prepare the
8 feasibility report, correct?

9 A Well, certainly I was involved with the
10 preparation of the feasibility report and it became
11 the basis of a professional projection of
12 mitigation and potential values that became the
13 basis of an appraisal because that would be the
14 highest and best use.

15 Q I guess my point is, is that correct, you
16 sent this, you and Mr. Lewis worked on this, right?

17 A That's correct.

18 Q You sent it along to Mr. Justice and it was
19 never accepted, right?

20 A Well, he determined not to go forward with
21 the mitigation project.

22 Q He determined not to go forward with it and
23 then you sent it to Dr. Hawkins to look at if he
24 wanted to use it, right?

25 A Sure.

1 Q But there is no testimony that he did use
2 this, right?

3 A Well, he did testify that his projected
4 values were based on mitigation potential.

5 Q Right. But he has a completely different
6 methodology, don't you remember his testimony that
7 he had the very unique way of doing it? He wasn't
8 basing it on that, was he?

9 A They are virtually identical, his values and
10 the mitigation potential, and the reason is because
11 the extrinsic value of wetlands and streams and the
12 natural functions they provide are reflected in the
13 market place of the mitigation market.

14 Q But isn't it true, Mr. McLeod, what Dr.
15 Hawkins says, "I have a very, very unique way of
16 valuing, valuing wetlands for mitigation." Didn't
17 he testify to that?

18 A Yes, ma'am.

19 Q And there is nothing in this best guess,
20 nothing, that he even looked at the compensatory
21 mitigation bank? I will grant you the two figures
22 come close but they aren't even based on each
23 other, are they?

24 A I don't know that.

25 Q All right. Well, he didn't say that, did he?