

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON 2015-CP-10-6820

TRACY SMITH,)
)
 PLAINTIFF,) TRANSCRIPT OF RECORD
)
 VS.)
)
 JONATHON KESSLER,) JUNE 5-8, 2017
) CHARLESTON, SC
)
 DEFENDANT.)

B E F O R E:

HONORABLE ROGER YOUNG, JUDGE

A P P E A R A N C E S:

TRACY SMITH, PRO SE
For the Plaintiff

R. SCOTT WALLINGER, ESQUIRE
Attorney for the Defendant

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DEC 11 2017

SC Court of Appeals

* * * * *

Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

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1 (The following proceedings were held
2 June 5, 2017, Charleston County, South Carolina, @
3 11:33 a.m.)

4 THE COURT: Okay. This is the case of
5 Tracy Smith versus Jonathon Kessler. You are Mr.
6 Smith?

7 MR. SMITH: Yes, Your Honor.

8 THE COURT: You represent yourself?

9 MR. SMITH: Yes, Your Honor.

10 THE COURT: Okay. Well, the case is
11 called for trial today. Looking through the file,
12 I just swapped with Judge Jefferson earlier this
13 morning so that I can attend a funeral on Wednesday
14 because my case was going to go and take up most of
15 the week. So I was unfamiliar with the file.

16 I see you filed a motion for a
17 continuance last week. Did that get addressed by
18 anybody or is that still something you want the
19 Court to deal with or are you ready to go to trial?

20 MR. SMITH: I do not have transcripts.
21 I am pro se. I am doing the best I can, Your
22 Honor. I don't have transcripts. I have this one
23 that is sealed from the Defendant with a date of
24 the 13th when it can be unsealed. But I do not
25 have his transcripts from the deposition I took. I

1 also do not have documents that I have subpoenaed
2 from his employer principal. She has refused to
3 release those documents so I have filed a motion to
4 compel asking her to produce those documents.

5 THE COURT: Okay.

6 MR. SMITH: So, yes, I would ask for a
7 continuance if there were a way to do it.

8 THE COURT: Mr. Wallinger?

9 MR. WALLINGER: Good morning, Your
10 Honor.

11 THE COURT: Okay. What do you want to
12 tell me?

13 MR. WALLINGER: Your Honor, we oppose
14 the motion for continuance. The Court issued a
15 scheduling order in I want to say January. Judge
16 Nicholson had a hearing in January or February in
17 which he issued an amended scheduling order setting
18 this case for trial after June 1. Based on the age
19 of the case it was generally expected that it would
20 hit the top of the roster when it came back on.

21 Mr. Smith has taken two depositions
22 since that time, one of my client, one of a third
23 party named Sara Gainey that he sued in an
24 unrelated case. Mr. Smith did not ask for
25 expedited transcripts of Ms. Gainey's deposition.

1 I don't think he has any original, although we have
2 a copy because I asked for an expedited transcript
3 and I have it here in the courtroom. I don't think
4 he asked for a copy at all of Mr. Kessler's
5 transcript, or if he did he does not have a copy
6 that he purchased, but he does have a copy in the
7 courtroom that I have let him look at this morning
8 before court.

9 So insofar as the issue of transcripts
10 that he has mentioned, I don't think that's a basis
11 to ask for a continuance. Insofar as his efforts
12 to seek other discovery, he has filed a belated
13 motion to compel either this morning or Friday or I
14 got an e-mail about it over the weekend in which he
15 believes that this witness Gainey was required to
16 and failed to bring certain documents to a
17 deposition. Ms. Gainey is represented by Jack
18 Gresh and Lauren Spears and I believe Mr. Gresh is
19 out of the country right now.

20 As I understand it, the deposition when
21 it was convened by consent, he brought the subpoena
22 with him. He made some complaint at the deposition
23 about documents he wanted. Mr. Gresh objected to
24 having it there or getting them and since then Mr.
25 Smith failed to make a motion to compel that

1 production. Mr. Gresh did not make a motion for a
2 protective order and the issue is not on the
3 court's motion roster to be dealt with until this
4 past Friday.

5 I read an e-mail from Ms. Spears today
6 sent to Mr. Smith that I assume he will corroborate
7 to the effect they don't have the documents that he
8 wants because the kind of information he assumes
9 would exist doesn't. So I don't think that his
10 interest in trying to pursue his position to compel
11 or the documents that he wants is a viable basis
12 for a continuance. Conceivably if the Court wants
13 to hear that motion, the party that the motion is
14 directed to would have a right to be here and to be
15 heard about it, but I think I have relayed what
16 they would have said if they were here, which is
17 they did not have anything to give him and they
18 oppose being ordered to do any more than they have.

19 So if the Court denies that motion,
20 that's no longer an impediment to the trial of the
21 case.

22 The last two issues that would have to
23 be considered before a trial could start are that
24 Mr. Smith in the last two weeks has concluded he
25 should have a jury trial instead of a bench trial

1 even though he did not ask for one when he filed
2 the suit or for 15, 16 months. He now has made an
3 informal request for motion to have the case
4 transferred to the jury roster and my client and I
5 oppose that based upon the posture of the case at
6 this point. We want to be heard without a jury.
7 He is --

8 THE COURT: He does not or did not want
9 a jury?

10 MR. WALLINGER: My client does not want
11 a jury trial. Mr. Smith wants a jury trial as of
12 his recent filing to that effect. He did not
13 request one when the suit was filed and I believe
14 he would know whether he was seeking a jury trial
15 because this is at least the third lawsuit he has
16 brought of the operative facts of this matter.

17 The -- so that the issue of the jury
18 trial versus nonjury trial is something Your Honor
19 would need to address.

20 And lastly, Mr. Smith made in April a
21 motion to amend his complaint to add two or three
22 more causes of action. He did not attach a
23 proposed new amended complaint, but he did discuss
24 in his motion cause of action and the amendments he
25 wants to add. That motion has not been heard yet.

1 My client will oppose that motion for reasons I
2 won't get into yet, but I think the Court would
3 need to either determine whether to hear it now or
4 not before a trial. If the motion is denied we are
5 ready to proceed. If the motion is granted then he
6 is going to have to file and serve an amended
7 complaint, I'm going to have to answer and I'm
8 going to have to make a new motion to dismiss and
9 so forth.

10 So those are all things that should be
11 addressed before we start the trial. We are ready
12 to argue motions and proceed with trial if the
13 Court decides that's the right thing to do.

14 MR. SMITH: Can I reply, Your Honor?

15 THE COURT: Yes.

16 MR. SMITH: Ms. Gainey was Mr.
17 Kessler's de facto employer even though he is an
18 independent contractor. So because he's an
19 independent contractor I believe there are
20 contracts between him and Ms. Gainey. Ms. Gainey
21 has never released any documents to me ever despite
22 repeated requests. These are relevant to this
23 case. I believe I have the right to examine them.
24 I put the request for documents to her counsel and
25 on a subpoena. I have issued two subpoenas trying

1 to depose her. She would not come to the first one
2 so I had another subpoena drawn up and finally got
3 her to be deposed on the 23rd of May.

4 She may have liability in this matter
5 based upon what is in that contract.

6 THE COURT: Why did you wait until just
7 so late to do your discovery in this?

8 MR. SMITH: First of all, Mr. Wallinger
9 had scheduled a deposition of Ms. Gainey several
10 months ago at Mr. Gresh's office, but then he --
11 and I frankly have been in Louisiana most of the
12 time. I planned to go to that deposition a few
13 days before the deposition. He abruptly cancelled
14 that deposition.

15 Your Honor, I did not -- I cannot hire
16 an attorney who knows the specific rules. I know
17 that's not an excuse, but I have tried on numerous
18 occasions for over a year to get the documents from
19 Ms. Gainey. She will not produce them. I believe
20 that the Court should order them. Mr. Wallinger
21 only got documents from Ms. Gainey after obtaining
22 a court order on behalf of his client. I am not
23 asking for an -- I don't know how it works. I am
24 not asking for a long -- I am asking to get a copy
25 of the transcripts and the documents and a week or

1 two to be able to review them. I apologize if my
2 voice is shaky. I am not used to --

3 THE COURT: That's all right. Makes
4 you nervous. What's your amended complaint? What
5 is it that -- why did you need to amend your
6 complaint?

7 MR. SMITH: Because -- well, I believe
8 I will use -- he has made intentionally deceptive
9 statements. It's my understanding after learning
10 more of the law that the Unfair Trade Practices Act
11 basically to some extent lowers the burden and also
12 lowers some penalties for someone who intentionally
13 deceives or through their trade or business has
14 practices that intentionally mislead a client.

15 And I believe that's very appropriate
16 in this matter because as you'll see from some of
17 the stock forms that they use in their practice,
18 they are very I would argue deceptive and confusing
19 and misleading and I believe either Mr. Kessler or
20 perhaps Ms. Gainey have the intent to be deceptive
21 in their contracting agreements with a patient.
22 There is a doctor/patient relationship here.
23 Again, I apologize I'm not able to frame the legal
24 argument better.

25 THE COURT: So you were a patient of

1 who?

2 MR. SMITH: Well, both Sara Gainey and
3 then was in the same office referred to Mr.
4 Kessler. So I have seen both of them over
5 approximately eight sessions while I was in the
6 employment of Showa Denko Carbon.

7 THE COURT: What is that Showa Denko
8 that I'm seeing?

9 MR. SMITH: They are a --

10 THE COURT: Is that a person?

11 MR. SMITH: They are a corporation.
12 They manufacture carbon electrodes out in
13 Ridgeville. They are actually a wholly owned
14 subsidiary out of Showa Denko out of Japan. And
15 they are a fairly large manufacturing organization
16 up near the Edisto River in Ridgeville. They
17 manufacture carbon electrodes.

18 THE COURT: So you're -- what's the
19 basis for your complaint?

20 MR. SMITH: That -- that I was sent to
21 Mr. -- they have an employee assistance program
22 which Mr. Kessler either has his own employee
23 assistance program or is an employee of Sara
24 Gainey, and they intentionally deceived, they
25 breached numerous duties. They spoke to my

1 employer without my informed consent and this
2 damaged me because they re-enforced false
3 perceptions on the part of the employer that simply
4 were not true. Mr. Kessler as the evidence will
5 show in sessions would not allow me to show him the
6 e-mails and explain the situation. He was focused
7 as a licensed professional counselor on cognitive
8 behaviorial therapy rather than -- I am a
9 programmer, I'm a bit of a geek, but not really
10 focusing on I could show right there in the e-mails
11 how people were undermining my work, why this was a
12 problem. And yet Mr. Kessler nor Ms. Gainey would
13 ever entertain my version of the facts at Showa
14 Denko.

15 THE COURT: All right. So you were
16 working for Showa Denko?

17 MR. SMITH: Yes.

18 THE COURT: And Mr. Kessler worked for?

19 MR. SMITH: SAVE, Inc., the EAP that is
20 on retainer by Showa Denko.

21 THE COURT: And what do they do for
22 Showa Denko?

23 MR. SMITH: Well, that's one of the
24 reasons I want the documents, to understand their
25 agreement with Showa Denko. They are an employee

1 assistance program which I understand, I have the
2 documents that from -- Ms. Gainey is sanctioned by
3 the Employee Assistance Certification Commission as
4 a certified employee assistance professional.

5 Mr. Kessler though he acted in that
6 role, I have later found out he's not a certified
7 employee assistance professional and has little, if
8 any, knowledge of the requirements to be an
9 employee assistance professional. And I would
10 suggest that the skills needed to counsel an
11 employee, I am 54 years old, are somewhat different
12 than the work he is used to doing. And he simply
13 did not have the skills or the knowledge of what's
14 largely in this document that explain that he would
15 understand his duties to me.

16 I believe he incorrectly perceived that
17 his duties are to the corporation, to SAVE and to
18 Showa Denko and little regard for my rights in the
19 counseling session and that he has various fiducial
20 duties to me in the counseling session not to harm
21 my interests. It is --

22 THE COURT: It was counseling for what?

23 MR. SMITH: Well, I was counseled as
24 part of a disciplinary action which again I
25 dispute. We would have to get into the facts of

1 the case, but I believe I should not have been
2 disciplined. But regardless I went to these
3 counseling sessions as required as a condition of
4 employment. Met with Ms. Gainey who then had me
5 meet with Mr. Kessler. I didn't go voluntarily.

6 THE COURT: So this was -- when you say
7 counseling you mean counseling like human resources
8 kind of counseling? Or was this psychological
9 counseling?

10 MR. SMITH: That's the question
11 honestly, Your Honor.

12 MR. WALLINGER: Your Honor, could I
13 fill in a few gaps here? I don't want to interrupt
14 the Plaintiff. But I think I can clear some of
15 this up in a way that he would not disagree with.

16 What this is about is Mr. Smith was
17 hired to work in the IT department of this plant in
18 Ridgeville. He had difficulties with coworkers and
19 supervisors that went on over a year that were
20 disruptive. His supervisor in consultation with
21 the HR department decided that they would require
22 him to go to employee assistance counseling which
23 is a different kind of activity from clinical
24 counseling to try to work through and resolve the
25 issues that were causing problems in the employment

1 environment.

2 Mr. Smith did not go voluntarily, he is
3 correct about that. A condition of continued
4 employment was that he go and participate in that.
5 There is a company called SAVE, Inc. who has an
6 office in North Charleston, been around a long
7 time, that provides employment and employee
8 assistance counseling. Some companies have these
9 things inhouse called employee assistance programs.
10 Some of them hire an outside group to provide that
11 which is what we have in this instance.

12 So Mr. Smith came to SAVE, Inc. He was
13 admitted as a client. He provided information to
14 SAVE that they needed as any patient in an intake
15 process would happen. He had counseling with Ms.
16 Gainey who is the owner of the company at SAVE and
17 after a couple of sessions she decided for the sake
18 of trying to have a better fit that she would
19 transfer that counseling to my client.

20 My client did a completely new intake,
21 new forms, new disclosures, whatever.

22 THE COURT: I will get to you.

23 MR. WALLINGER: And my client then met
24 with Mr. Smith for about six times between
25 September of '12 and December of '12. At the time

1 of his last visit Mr. Smith came in and announced
2 that he had been terminated from the company and
3 that he thought my client was at fault for that and
4 that he was going to sue my client.

5 Mr. Smith thereafter sued Ms. Gainey,
6 and SAVE, Inc. also in Charleston County that has
7 since been dismissed. He has sued his employer for
8 wrongful termination and various other causes of
9 action in Dorchester County that initially got
10 removed to federal court and then there was some
11 decisions made that resulted in a remand and then
12 they did some discovery and that case was settled
13 under a confidential arrangement that I don't know
14 much about.

15 He brought the third case which we are
16 here about now in which he alleges that Mr. Kessler
17 as an employment assistance professional was
18 professionally negligent, caused intentional
19 infliction of emotional distress, and a few other
20 causes of action from them, which we have denied.

21 So the case was pending. We had a lot
22 of problems with discovery. I made two different
23 motions to compel. First one I made Judge
24 Jefferson heard and ordered Plaintiff Smith to
25 produce documents. He did not produce the

1 information needed. I had a second motion to
2 compel last winter in front of Judge Nicholson in
3 which we actually went through systematically every
4 single interrogatory and had them answered in the
5 court. Then we did more discovery and we are here
6 now.

7 Mr. Smith has identified by last
8 e-mail, I saw ten plus witnesses that he believed
9 he was going to call to testify during trial this
10 week, none of whom are under subpoena to my
11 knowledge, none of whom will show up to my
12 knowledge unless I bring them. He has no expert
13 witness who will offer any opinion my client was
14 professionally negligent which he knows he has to
15 have because Judge Jefferson told him when she
16 heard summary judgment.

17 MR. SMITH: The matter of --

18 THE COURT: You will get a chance to
19 respond.

20 MR. SMITH: He is raising lots of
21 points.

22 MR. WALLINGER: So he has done
23 discovery in the way he wanted to do without
24 counsel. We are here today ready to go to trial.
25 I have got an expert witness that is a specialist

1 on EAP counseling in Atlanta that's waiting on me
2 to call and let him know if he needs to fly or
3 drive down here to testify.

4 I have two witnesses under subpoena to
5 include Ms. Gainey and to include the gentleman
6 that fired Mr. Smith and who I believe will testify
7 that he was fired for reasons having nothing to do
8 with anything my client said, did or whatever. So
9 that's what the EAP process is. It is a flavor of
10 counseling. My client is a licensed independent
11 social worker with a clinical practice designation.

12 He is licensed and absolutely permitted
13 to do EAP. He has done it hundreds of times and he
14 is also a full-time employee of the VA hospital
15 here in Charleston. That's his main vocation is
16 taking care of vets.

17 So that's what it is about. Mr. Smith
18 does not want to have a trial this week for reasons
19 he has touched on. We are ready to go and will be
20 glad to answer any questions the Court may have.

21 THE COURT: All right. Mr. Smith.

22 MR. SMITH: First of all, I dispute
23 many of the statements Mr. Wallinger has made
24 there. The context of the counseling, I filed a
25 motion in limine that I believe frames the legal

1 question. It is whether or not a counselor in Mr.
2 Kessler's position has a fiduciary duty to a
3 patient who happens to be an employee of the
4 company that essentially contracts with him and has
5 him on retainer. And whether -- if the duty
6 exists, whether he has met the obligations of that
7 duty, further whether he has met the obligations of
8 an employee assistance professional. And whether
9 or not the disclosures made to my employer damaged
10 me.

11 THE COURT: All right. Who is it that
12 you want to get some documents from?

13 MR. SMITH: Sara Gainey who I would use
14 the term is his employer, although he is an
15 independent contractor I have come to find. We met
16 in Sara Gainey's office. Sara Gainey handled all
17 communications with Showa Denko and paid Mr.
18 Kessler directly. That has come out in deposition.
19 So I would suggest that Mr. Kessler is essentially
20 an employee of SAVE, Inc.

21 As to the matter of the lawsuit against
22 SAVE, Inc. I have appealed that matter. It was
23 dismissed because of what Mr. Wallinger alluded to
24 the so called expert affidavit requirement. But
25 there is a common knowledge exception to that

1 requirement that basically says Brower versus --
2 there's a Supreme Court South Carolina case on it,
3 that says if the subject matter is within the
4 understanding of a layperson, which I would suggest
5 to meet these standards these are designed for
6 laypersons to read. It says right here that the
7 individual clients have the right to obtain a copy
8 of this code of conduct. Therefore it must be
9 comprehensible by a layperson.

10 Regardless, the issues are easily
11 comprehended by a layperson. The basic way to
12 explain it is just because everyone does this
13 doesn't mean that it is legal. And I would suggest
14 as it is not legal and that I have been harmed by
15 illegal actions under the guise of HIPAA approved
16 releases and methods.

17 The documents I believe would shed
18 considerable light on whether the relationship is
19 between Mr. Kessler and Showa Denko, my employer,
20 former employer. I dispute that as I tried to tell
21 Mr. Kessler during sessions, I was not the cause of
22 altercations. People for a variety of reasons
23 targeted me in the IT department. I had many
24 people who I work for and accomplished good things
25 for. But regardless, I was targeted by a minority

1 of people. Mr. Kessler basically towed the company
2 line, bought the company line I was a problem,
3 refused to read e-mails and correspondence that I
4 brought -- by his own admission in his own
5 documents that I had brought to counseling sessions
6 that would have clearly demonstrated the problem.

7 Ms. Gainey has never released any
8 documents to me despite the fact that it says here
9 that I have a right to obtain copies of my own case
10 records and to have the information therein clearly
11 explained subject to applicable laws.

12 Ms. Gainey is on Mr. Wallinger's
13 witness list. I believe she should produce those
14 documents or a reasonable explanation of what the
15 relationship is rather than just saying it's an EAP
16 and she is an LLC and that it's under the umbrella
17 of her licenses as she is a licensed professional
18 counselor. Mr. Kessler is a licensed independent
19 social worker acting as a certified employee
20 assistance professional subject to these rules
21 which are available from the Employee Assistance
22 Certification Commission in North Fairfax,
23 Arlington, Virginia.

24 THE COURT: Let me ask you, Mr.
25 Wallinger, what's the story on getting this

1 deposition of Ms. Gainey I gather, it is?

2 MR. WALLINGER: Ms. Gainey is the owner
3 of SAVE, Inc. Mr. Smith took her deposition in Mt.
4 Pleasant, date and time was by consent. Mr. Gresh
5 was there on behalf of Ms. Gainey. I left the
6 deposition and ordered the transcript for expedited
7 delivery because I knew that we were going to be on
8 the trial roster on June 1 and I would need it.
9 Mr. Smith apparently ordered it in whatever he
10 said, and I don't know if he ordered it at all or
11 if he ordered it in normal course, but he said that
12 he does not have the original transcript yet which
13 he would have because he's the one who noticed it.

14 THE COURT: Her deposition has been
15 taken. I guess that's what I am getting at.

16 MR. WALLINGER: Yes, sir. She got
17 deposed for five hours about --

18 MR. SMITH: No, she did not. It was
19 about three hours, three and change, not five
20 hours.

21 THE COURT: It's over with.

22 MR. SMITH: 2:00 in the afternoon.

23 THE COURT: It was taken.

24 MR. SMITH: Yes, sir.

25 THE COURT: Did she refuse to produce

1 documents at the deposition? I'm trying to get
2 some clarity here.

3 MR. WALLINGER: Your Honor, he did not
4 issue a deposition notice, he brought a subpoena to
5 the deposition.

6 MR. SMITH: She was served.

7 MR. WALLINGER: She did not bring
8 documents to the deposition and the documents that
9 sort of he asked for on the record or in the --

10 MR. SMITH: They are under subpoena.

11 THE COURT: Mr. Smith, I have asked him
12 a question.

13 MR. WALLINGER: Mr. Smith indicated he
14 wanted certain records produced by SAVE, Inc.
15 through Ms. Gainey, the owner of the company, and
16 her lawyer indicated that they were not going to do
17 that. I don't remember any more about the reason.
18 I got an e-mail this morning which I can forward to
19 the Court which was copied to Mr. Smith in which
20 her attorney said they don't have any documents to
21 give him and that this is a moot issue. He wanted
22 to see a contract or agreement between my client
23 and SAVE, Inc. There is no dispute my client was
24 working under and for SAVE. There is no written
25 agreement. He wants to see a written agreement

1 between SAVE, Inc. and his former employer Showa
2 Denko, but the lawyers say there is no written
3 agreement. They are on retainer. They get paid
4 some amount of money a year. I don't know how
5 much, it's how many employees get sent over for EAP
6 assistance which I would assume varies. And they
7 don't have documents. That's what they have said
8 in the e-mail that Mr. Smith and I got today.

9 And I assume if we have a hearing on
10 the motion to compel they're going to come in and
11 say the same thing. That's all I know about that
12 issue, Your Honor.

13 THE COURT: All right.

14 MR. SMITH: The first I have heard
15 these documents don't exist. Ms. Gainey never
16 released any documents to me.

17 THE COURT: Did you get a copy of his
18 e-mail he was talking about?

19 MR. SMITH: No, I haven't seen it yet.
20 I left the house at a quarter to seven this morning
21 and have not seen that e-mail.

22 THE COURT: Do we have it?

23 MR. WALLINGER: It was sent to Mr.
24 Smith and me. I will be glad to forward it.

25 THE COURT: I thought you had sent it

1 to us.

2 MR. WALLINGER: I didn't send it to
3 anybody. I have received an e-mail, I think I read
4 it when I was down the hall this morning during
5 jury qualifications, but I've just seen an
6 electronic version.

7 THE COURT: Well --

8 MR. SMITH: Your Honor, can I make one
9 other point? The transcript I have, I don't know
10 the rules at what point I am allowed to break this,
11 it said 6-13-17 I can open it.

12 THE COURT: Whose deposition is that?

13 MR. SMITH: This is Mr. Kessler's
14 deposition.

15 THE COURT: You can open it. Go ahead.
16 Here's what we are going to do. We are going to
17 start the case at 2:00. It's too late to ask for a
18 jury trial. You should have done that before now.
19 As far as you amending your complaint goes, you
20 know, at this point we have the ability -- this is
21 a nonjury trial. And if I find that there's facts
22 to come that would support your causes of action,
23 well, then I can allow a complaint to be amended to
24 conform to the evidence. But, you know, these are
25 things that should have been done long before now.

1 And the case is called for trial, so we just need
2 to try it. It's a couple years old. And there is
3 just no reason to delay it any further.

4 So we will meet back here at 2:00 and
5 you be ready to call any witnesses you have. You
6 will get to call your witnesses first. And we will
7 go however long it takes us to finish it.

8 MR. SMITH: Your Honor, I'm a pro se
9 litigant. And I have read a little bit about what
10 the process may be for a pro se litigant to
11 testify. So I will be testifying on my own behalf.

12 THE COURT: You will be speaking in the
13 form of a narrative. I'm not going to do the silly
14 thing where you see sometimes people jump up, ask
15 themselves questions and then go back. We don't do
16 that.

17 Now, you will be allowed to say things
18 that you wouldn't be allowed to. For instance,
19 hearsay objections, in other words, you say what --
20 you can't say well so and so told so and so.
21 Hearsay is what this gentleman -- there's
22 exceptions to the hearsay rule. And you can say
23 what Mr. Kessler said because he's a party
24 Defendant. So you can say what he said, but people
25 that aren't here to testify you can't say what they

1 said. If you want them to testify, you have to
2 bring them in so that I can hear what they have to
3 say and then they can also cross-examine them. It
4 isn't fair to come in and say oh, well, Mr. Jones
5 said this to me. Mr. Jones needs to come in and
6 say this to me.

7 MR. SMITH: Can I present e-mails that
8 I presented to Mr. Kessler during counseling
9 sessions which he admits to not reading which I
10 have firsthand knowledge?

11 THE COURT: E-mails from who?

12 MR. SMITH: From various parties.

13 THE COURT: Those would be hearsay.

14 MR. SMITH: I am first party. They
15 were directed to me. I have firsthand knowledge of
16 them.

17 THE COURT: But they are statements
18 from other people to you. What would be the
19 difference between you saying well, this person
20 called me on the telephone --

21 MR. SMITH: Written evidence, Your
22 Honor.

23 THE COURT: -- and told me.

24 MR. SMITH: Written record and written
25 evidence is the difference.

1 THE COURT: I understand that it is
2 written. In the eyes of the law this is the same
3 thing as if they spoke it out loud. You can't say
4 this is what this person told me any more than you
5 can say this is what they wrote to me unless you
6 have some exception under the hearsay rule. And
7 this is where it gets kind of dicy of you
8 representing yourself. I'm not your lawyer and he
9 is not your lawyer. So you can either figure it
10 out or it doesn't come in.

11 But we have rules and they're designed
12 to get evidence in the best form it is and if
13 people want -- if you want to prove something then
14 you generally speaking have to get somebody in to
15 say what they said, not what you said they said.
16 Whether it is written or whether it was spoken, the
17 law doesn't really distinguish to that except under
18 certain circumstances and that's what we go to law
19 school for and you get a copy of the rule book or
20 go on line and study the evidence rules, but I
21 can't make those calls for you.

22 MR. SMITH: Can I ask Your Honor if the
23 agreements between SAVE and myself are admissible?

24 THE COURT: That would be probably
25 admissible.

1 MR. SMITH: Would the Employee
2 Assistance Certification Commission documents be
3 admissible?

4 THE COURT: Well, I don't know and I am
5 not going to go through all of these things right
6 now. Those things that -- this is where typically
7 if you are a lawyer or you had a lawyer he or she
8 would sit down with Mr. Wallinger and they would
9 iron out a lot of these. If not we have a hearing
10 over it. Otherwise we deal with it however it
11 comes up in the context of trial.

12 MR. SMITH: I have considered offering
13 to stipulate to certain facts.

14 THE COURT: You can do that.

15 MR. SMITH: Is that appropriate?

16 THE COURT: You got basically a couple
17 hours to do that because we are going to start at
18 2:00. Okay? So you can talk with Mr. Wallinger
19 when we break here and see if he will agree to your
20 stipulations. He may agree to whatever documents
21 that you want to offer. Those that you can agree
22 put in one pile and that you can't agree with put
23 them in another pile and we will deal with them.

24 MR. SMITH: Can I have access to Ms.
25 Gainey's deposition transcript that Mr. Wallinger

1 has in his possession or am I just out of luck
2 there?

3 THE COURT: Do you have an extra copy
4 you can give him to look at?

5 MR. WALLINGER: Your Honor, I will be
6 glad to let him look at mine as long as he doesn't
7 write on it.

8 THE COURT: Okay. There you go. We
9 will see you back at 2:00.

10 (Thereupon, a recess was taken.)

11 THE COURT: All right. Are we ready to
12 go?

13 MR. SMITH: Yes.

14 MR. WALLINGER: Yes, Your Honor.

15 THE COURT: Well, Mr. Smith, under the
16 way we do these things you're the Plaintiff so you
17 have the burden of proof. You get to go first. So
18 I'll allow you to make a five-minute opening
19 statement if you want. They will have the
20 opportunity to make a little brief statement and
21 then you can call your first witness which may or
22 may not be you for all I know. Okay?

23 MR. SMITH: Yes, Your Honor.

24 THE COURT: Are you ready?

25 MR. SMITH: Yes, Your Honor. Your

1 Honor, my name is Tracy Smith. I'm representing
2 myself to the best of my ability. I'm not a
3 lawyer. Do my best to follow what I understand to
4 be courtroom procedures and the court rules and if
5 I don't, please -- I will try to follow the
6 guidelines as best I can.

7 I believe the evidence will show that
8 there were intentionally deceptive representations
9 that I relied on that caused me damage. I put my
10 trust in Mr. Kessler and in good faith and suffered
11 loss as a result. And that his representations
12 were intentional and that he thought about them
13 prior to the representations.

14 I believe Mr. Kessler breached legal
15 duties, including confidentiality, and that this
16 arises from his fiducial duties as someone in a
17 dominant or superior position such as a
18 doctor/patient relationship. I believe that he
19 breached -- the evidence will show that he breached
20 I should say documented EAP standards of care that
21 are produced by the Employee Assistance
22 Certification Commission which is the organization
23 to which Sara Gainey, Mr. Kessler's employer, is a
24 member of and certified by, but which Mr. Kessler
25 is not. I believe he tortiously and wrongfully

1 interfered with my current job agreement and
2 contract and wrongfully interfered with my job
3 prospects through -- disclosures, unauthorized
4 disclosures, unauthorized false disclosures made to
5 my employer, specifically Clint Lucas of human
6 resources. I believe in total his actions amount
7 to a pattern of unfair trade practices and that
8 they have a potential to be repeated by many -- by
9 himself and many in his field to the detriment of
10 the public, to the detriment of employees who
11 honestly put their faith in a counselor who holds
12 themselves out to be an employee assistance
13 professional and having certain competencies to
14 deal with workplace issues.

15 I will say that the Court I believe
16 reviewing it, I should offer if this is appropriate
17 to withdraw my cause of action for intentional
18 infliction of emotional distress. While I believe
19 I was -- did suffer tremendous emotional distress,
20 I realize the burden of proof is difficult in this
21 case. I do not want to muddy the issues. I
22 believe my professional representation and other
23 losses that I've suffered are enough to proceed in
24 this matter. I will probably not -- Mr.
25 Kessler's -- the damages, I have lost income from

1 my job, I lost professional reputation. In fact,
2 while in the care of Mr. Kessler, I was terminated
3 at 9:00 a.m. in a crowded office in a very public
4 and humiliating fashion. I had been there for
5 close to three years and had all my books and I was
6 a computer programmer. I have a small library of
7 books as you might imagine. Was forced to remove
8 that in front of an office full of people. Was
9 forced to pile in Mr. Wing's pickup truck is the
10 only thing I could do with them. And was walked on
11 foot as Mr. Wing followed me out in the truck in
12 just a very humiliating fashion.

13 I was denied unemployment benefits for
14 reasons Mr. Wing can attest to, will attest to. I
15 request some compensation for my damages for
16 damages I suffered including exemplary damages
17 sufficient to deter similar future conduct by
18 people in Mr. Kessler's position. I believe that
19 he made -- the evidence will show that he was
20 intentionally deceptive, he intentionally omitted
21 material facts that I needed to know in order to
22 make informed decisions and that his conduct is
23 frankly reprehensible. I have no personal animus
24 towards Mr. Kessler. However, I do think the way
25 he is operating is against public policy, is unfair

1 and should not be allowed to occur in our society.

2 THE COURT: All right. Mr. Wallinger.

3 MR. WALLINGER: Your Honor, briefly.

4 May it please the Court. Jonathon Kessler is
5 married. He has children. He is a full-time
6 employee of the Veterans Administration where he
7 serves as a supervisor in social work to patients
8 at the VA hospital. For many years he has worked
9 part time for SAVE, Inc. in Charleston. It is not
10 disputed that he was working under and for SAVE and
11 the issue of his contractor status is not a
12 relevant issue here. What he did he did for SAVE
13 at the behest of SAVE just like any clinician in
14 any hospital or other health care facility would
15 do.

16 Mr. Kessler has provided at this point
17 hundreds of employee assistance counseling services
18 to people in this area. He was asked to see and
19 assist Mr. Smith who was encountering severe
20 problems in his workplace. We think that you will
21 see from the evidence and testimony of Mr. Smith's
22 supervisor which is already in the record in the
23 form of a final affidavit together with the
24 evidence and testimony of my client which is
25 already largely in the record in the form of a

1 written statement summarizing his activity that my
2 client did a good job in attempting to help Mr.
3 Smith. That my client was still in the process of
4 trying to complete that service when Mr. Smith did
5 things that my client was unaware of that caused
6 Mr. Smith to get fired.

7 In a nutshell Mr. Smith had been
8 ordered by his employer not to buy equipment or
9 software or system components. He did that anyway
10 or tried to do that without my client knowing about
11 it. He got fired for it. The evidence will show
12 that my client did a thorough job of intake, in
13 looking at information that my client felt was
14 appropriate to work on. And that Mr. Smith
15 consented to the various communications that my
16 client made and was obligated to make as part of
17 this two-party procedure.

18 The only evidence I suspect the Court
19 is going to hear about what my client communicated
20 to the employer is my client discussing that,
21 because I don't believe that the employer
22 representative will testify here during this trial
23 about that. What the Court will hear is that
24 communications were professional and were
25 appropriate in content and scope. Ultimately and

1 interestingly Mr. Smith got fired by his supervisor
2 and the supervisor made the decision before anybody
3 in HR was involved. So this wasn't a situation
4 which my client said something improper to the HR
5 contact who then something said improper to the HR
6 who then fired Mr. Smith. The chain went another
7 way and I will prove that through evidence and
8 testimony in this case.

9 This is a malpractice case. Mr. Smith
10 has attempted to articulate various theories of
11 breach of contract and breach of fiduciary duty or
12 various other breaches of legal duty. The bottom
13 line is it's a claim of alleged professional
14 negligence. Mr. Smith is not qualified to discuss
15 that. It is not as simple as looking at a
16 particular rule in a book.

17 He will not offer expert testimony on
18 this issue which is necessary and we believe he
19 won't meet his prima facie case in this case to
20 survive directed verdict. If the Court wants to
21 hear both sides of the case I will have an expert
22 witness here tomorrow late morning who is a very
23 good EAP counselor and will testify that my client
24 did not deviate from any standard of care and did
25 nothing wrong. Thank you.

1 THE COURT: All right. Mr. Smith, you
2 can call your first witness.

3 MR. SMITH: Myself, Your Honor.

4 THE COURT: Go on over to the witness
5 stand there. Take any documents that you want to
6 take.

7 MR. SMITH: Mr. Wallinger and I
8 discussed, he has an objection to a few of these
9 documents. Should I -- best way to handle that?
10 Should I -- I will take the objections up that you
11 object to.

12 TRACY SMITH

13 having been duly sworn, testifies as follows:

14 THE CLERK: State your first and last
15 name spelling your last name for the record.

16 THE WITNESS: Tracy Smith, S-M-I-T-H.

17 THE COURT: All right. Mr. Smith, what
18 would you like to tell me.

19 MR. SMITH: I would like to begin by
20 introducing Mr. Kessler's confidential work product
21 in response to litigation that has been given to
22 the expert witness who will testify tomorrow. I
23 believe this is a good indication of his mental
24 impressions and would like to read various parts of
25 it and comment if it please the Court.

1 MR. WALLINGER: No objection to
2 admissibility of the entry of the document that I
3 handed him if that's the unhighlighted version or
4 group.

5 THE COURT: Go ahead. Is that an extra
6 copy? Hand it to that gentleman. He will bring it
7 to me.

8 (Handing.)

9 MR. SMITH: In Mr. Kessler's document
10 he states that SAVE has a long-standing
11 professional relationship with employer and has
12 handled many EAP referrals from employer. Mr.
13 Kessler also states that he is familiar with the
14 standards of care of an EAP counselor. However, he
15 is not an EAP counselor or at least not certified
16 as an EAP counselor.

17 THE COURT: Why don't you tell me what
18 page and paragraph you are reading from here.

19 MR. SMITH: Okay. This is the third
20 paragraph, the second sentence and then the last
21 sentence.

22 THE COURT: Okay.

23 MR. SMITH: In the next paragraph Mr.
24 Kessler says that he did not review Ms. Gainey's
25 progress notes prior to that point so that his

1 assessment, my assessment of Smith might remain
2 independent. Those are Mr. Kessler's words. He
3 also says in two paragraphs down that I understood
4 that Smith had been referred to SAVE by employer's
5 human resources director Clint Lucas as part of a
6 disciplinary action by employer against Smith.

7 It is my assertion that those
8 statements are not consistent. It says he did not
9 review Ms. Gainey's progress notes and yet he says
10 that he understood that I have been referred as
11 part of disciplinary action. I believe that again
12 this is written for the expert witness and then Mr.
13 Kessler I would assert saw himself as a
14 disciplinarian. He said in the last paragraph on
15 September 25th, this was after Ms. Gainey had
16 referred me to Mr. Kessler, that he went over with
17 me and had me execute an authorization for release
18 of protected health information.

19 The next sentence says the agreement
20 said Smith expressly consented to my communicating
21 in person or telephonic certain information to
22 employer such as dates of my sessions with Smith,
23 progress in my sessions with Smith, Smith's
24 compliance and attendance and participation in
25 sessions and my recommendations as to Smith's

1 ability to engage in therapeutic process. That
2 signed agreement was faxed to HR employer -- I am
3 sorry -- HR director as I understand it.

4 On that date Smith in his session
5 reported to me that he was on administrative leave.
6 That is not correct. And I can produce records
7 that show that I was not on administrative leave as
8 of that date. Mr. Kessler goes on to say that he
9 understood that he was there as a result of
10 disciplinary action. Smith stated that an IT
11 department employee had overheard Smith yelling and
12 cursing at another IT department team member which
13 Smith denied doing.

14 That statement deserves some
15 clarification. Foul language was not uncommon at
16 Showa Denko. Yelling -- the idea of yelling I
17 would take issue with and further point out that
18 the person to whom I was supposedly yelling and
19 cursing did not report me for any disciplinary
20 action. I think Mr. Wing's testimony will show
21 that.

22 Smith explained he was brought in as
23 employer's IT manager to take on the role as IT
24 manager. Smith stated when he started with
25 employer Smith wanted to integrate the employer's

1 network as a personal goal, but he came to conclude
2 that he was only there for data management and not
3 for system improvements. Again I take issue with
4 those statements. It's fairly technical.
5 Integrating the employer's network is not an
6 accurate statement. I was largely tasked at Showa
7 Denko with improving the shipping process which
8 involved interfacing with a number of computer
9 systems and producing accurate data from those
10 systems. And so my actual goal was to some extent
11 -- when you are doing that with the more systems
12 you have to integrate the better chance something
13 goes wrong. If you can reduce the number of
14 connections that are required there is a much
15 higher likelihood that your processes will run
16 without problem and produce accurate results. So
17 it would be more accurate to say I intended to
18 streamline the network as a goal of improving the
19 performance of our shipping operation and the
20 accuracy of the data associated with the carbon
21 electrodes that we shipped out of the plant.

22 And again I would suggest it was not a
23 personal goal. It was a goal of the company to
24 improve that process. Mr. Kessler goes on to say
25 Smith shared evidence of his value to employer and

1 Smith presented a file folder of alleged evidence,
2 e-mails, spreadsheets, et cetera. Again I would
3 take issue with the word alleged evidence. I was
4 presenting it to show the challenges of the
5 position that I was in to Mr. Kessler, an employee
6 assistance professional, to help him understand the
7 pressures and the technical challenges that were
8 involved in meeting the goal of the job I was hired
9 for. Mr. Kessler goes on. Smith came across as
10 somewhat self-deprecating quoting me as saying I
11 tend to ramble, which I do and I hope I don't do it
12 badly here today.

13 But also as grandiose when I said I'm
14 the most qualified to act as the IT manager. That
15 statement is first taken out of context, but I
16 would also support that statement as that I do have
17 strong credentials and strong skills in that area.
18 I would suggest that Mr. Kessler's characterization
19 as grandiose shows his state his mind and perhaps
20 his lack of respect for the work that I was doing
21 and the position and challenges I faced.

22 Smith stated that outburst at work was
23 reported by a coworker and Smith minimized that
24 incident. Again, the worker who in this situation
25 that I believe is at issue here, this was a heated

1 discussion which was frequent and there was some
2 cuss words thrown back and forth, but to describe
3 it as an outburst is not accurate. It is true that
4 members of the IT team felt left out and that when
5 -- many of them -- several of them I should say had
6 targeted me and if they could find flaw in
7 something I said or did they would basically run to
8 HR or to Mr. Wing and report it. Again I suggest
9 that the conversation was actually quite common and
10 solving difficult problems under short time
11 constraints requires that you occasionally have
12 somewhat heated discussions. And again the person
13 who I had the heated discussions with did not
14 report me and did not feel that anything was out of
15 order.

16 Smith admitted to job dissatisfaction
17 and not receiving validation for his ideas and
18 technical mastery. I don't believe I ever used the
19 word technical mastery and I know how hard it is to
20 make complicated technical systems work and I would
21 not describe technical mastery in any way.

22 Our next session goal to work on his
23 interpersonal relationship and communication
24 skills. Mr. Kessler states that without a whole
25 lot of foundation and again after -- without

1 discussing the actual technical challenges of the
2 job I was in. So Mr. Kessler at that point is
3 assuming that interpersonal relationships and
4 communications skills are the root of the problem.
5 And I take issue with that.

6 I called employer and reported Smith
7 had attended the counseling the day prior. Again
8 before seeing this client I understood from my
9 coworker Ms. Gainey that Mr. Smith was on
10 administrative leave and that the referral to SAVE
11 was supervisor mandated. And I was not on
12 administrative leave during this time period.

13 The next session was on October 9th,
14 2012. Smith arrived 30 minutes late at his session
15 and reported that his quote car was on fire. Again
16 this is a document being presented to Mr.
17 Krasilovsky who we will hear from in a day or so.
18 And I believe that statement is intended to bias
19 Mr. Krasilovsky. Because I never said that my car
20 was on fire. I said that a car on the interstate
21 was on fire and traffic was backed up and that is
22 why I was late.

23 I believe that statement is indicative
24 of Mr. Kessler's state of mind at least when he
25 wrote the document and again I would tell the Court

1 that it is not an accurate statement.

2 Smith brought with him a folder
3 containing more evidence data. Again, I would not
4 characterize it as evidence data. I would
5 characterize it as e-mails and communications with
6 my coworkers which I hope to be able share with the
7 Court that showed very clearly and plainly in plain
8 writing where some of the differences of opinion
9 were and where some people were stepping over the
10 line in their interpersonal communications. They
11 were making veiled I would call them threats or
12 doing things that were detrimental to the process
13 in a relatively blatant fashion. So this was not
14 at that point certainly characterized as evidence.
15 It was simply e-mails from the many people I dealt
16 with at work that I believe would quickly and
17 easily illustrate the problems at work.

18 Again, Mr. Kessler did not want to
19 review that data in any depth because it takes a
20 fair amount of time to read and understand, the
21 history, my job history, the work environment I
22 worked in.

23 Smith was difficult to redirect during
24 the session. I asked him not to bring data to
25 future sessions in order to let us focus on

1 interpersonal skills. I again suggest that that
2 statement right there is indicative of a large
3 error in judgment and predisposed bias towards me
4 by Mr. Kessler because I would suggest that I had
5 decent interpersonal skills in the first place. I
6 have done telephone support for a number of
7 companies for example, but the idea that we needed
8 to focus strictly on interpersonal skills without
9 looking at very fundamental problems in the IT team
10 is just indicative of our inability to come to a
11 plan for solving, hopefully solving the problems at
12 Showa Denko.

13 I will skip a little bit of that.
14 Smith stated that his aspiration was to complete a
15 working product as a direct link to upper
16 management. To take from that statement is that I
17 was able to produce systems with an easy to use
18 interface that made some of the data that had been
19 hard to obtain, typically it had been obtained
20 through Excel spreadsheets through a series of
21 e-mails. I was able to very quickly present them
22 on peoples phones. And so that's what I am saying
23 in that.

24 So the idea of the direct link to upper
25 management I believe is somewhat misleading. It

1 was a direct link to anyone in the plant who needed
2 that information quickly and efficiently.

3 He stated that in two years of
4 employment the company was always in conditions of
5 recovery from an earlier incident. I would like to
6 expound that slightly. It was a very contentious
7 environment largely because of the failure of an
8 S&P system that had been purchased before I had
9 arrived and it never actually worked is a fair
10 statement, especially in terms of shipping.

11 There were several systems involved in
12 the shipping process, SAP being one of them and
13 that caused a great deal of -- the people that
14 bought SAP which included the head of the company
15 Robert Witten and included John Wing were very
16 defensive over the results and the -- of the
17 system. And so I came in with many of the
18 abilities to fix the system and also working in
19 some ways that were not specifically endorsed by
20 SAP even though they used the system that SAP had
21 sold Showa Denko, specifically Microsoft SQL
22 Server. I was able to use those quite effectively
23 to produce -- affect the -- produce the output that
24 I produced.

25 Went on about my prior work experience.

1 Mr. Kessler offered to role play at our next
2 session the part of his employer or coworker in
3 order to facilitate identification of a positive
4 communication style while alerting Mr. Smith to
5 ineffective or condescending speech. And so I have
6 no real problem with that concept of role play in
7 the document I hope to introduce in here in a
8 placement report. There are a number of questions
9 in this placement report that were put out that is
10 typical how would you answer that type of question
11 and I would have welcomed the opportunity to do
12 that.

13 The idea that my speech is
14 condescending, I'll admit to being a bit of a geek
15 programmer and from time to time may be using
16 bigger words than I should use and also writing
17 pretty lengthy documents sometimes simply as a
18 necessity of the kind of work I do. I was unable
19 to initiate interpersonal communication skill
20 building this session due to Smith's late arrival
21 and his insistence on speaking to his evidence and
22 data. Later, I notified employer HR of Smith's
23 attendance at that session.

24 The next session was October 23rd,
25 2012. I recall that Smith did not intend to

1 propose to management his ideas then to help
2 improve the company and Smith declined to
3 participate in role play. Again, I find that a
4 strange comment because intend to propose, I every
5 month produced basically a progress report that
6 included the work I had done and always included
7 ideas to improve the company and improve my part of
8 the company which is improving systems performance.
9 I generally have declined to participate in role
10 play. I don't understand that statement. I
11 believe I would have if asked.

12 Smith reported that he had a survivor
13 mentality and a nurturing solitude. I probably did
14 use those words, but in the survivor mentality, I
15 would like -- nurturing solitude I remember is a
16 word I got from the John McLaughlin Group. John
17 McLaughlin used to use that term a lot. It's
18 taking the time to think about things.

19 But the survivor mentality deserves a
20 little bit of development. If anybody has watched
21 the game of survivor they realize that very
22 frequently quickly the strong people in a tribe are
23 voted off the island because they are a threat to
24 win the game. So in general the concept of the
25 game is to eliminate the stronger people rather

1 than the weaker people because it's the stronger
2 people who have the best chance of getting to the
3 end in the game of survivor.

4 So I used that as an analogy, not as a
5 mentality because I understood the necessity of
6 breaking a lot of people who were in fact perhaps
7 not as strong as I was in certain areas and helping
8 them find their place, a place where they could
9 really contribute. And to do that you needed to
10 examine the e-mails and the specifics of the job so
11 that you can understand where people would fit and
12 where some things worked and where some things did
13 not work.

14 Smith indicated he had dated for seven
15 years, but he believed marriage was for having kids
16 and financial benefit I guess is relevant to Mr.
17 Krasilovsky. Smith's personal goals included
18 developing a professional accounting system,
19 maintaining health, having a cash cushion, growing
20 fruit trees on a farm in Louisiana. Developing a
21 professional accounting system is a bit of a
22 stretch, but that's what he heard.

23 At some point that day I spoke with
24 Clint Lucas the human resources director at
25 employer. That would have been October 23rd, 2012.

1 Lucas indicated Smith still was not forming
2 constructive relationships at employer. Smith was
3 offending people, Smith was talking down to
4 supervisors and coworkers and Smith was trying to
5 change their system.

6 I indicated to Lucas my continuing EAP
7 goal of improving Smith's interpersonal skills. By
8 doing that Mr. Kessler basically told Mr. Lucas
9 that I needed to improve interpersonal skills, a
10 fact I dispute. And would suggest that I have as
11 part of my orientation states that you are trying
12 to separate friendship from our goal because from
13 time to time there are people who are left out of a
14 particular project because of their skill set and
15 if you are to use the word too chummy with them you
16 may not be able to steer them in the right
17 direction.

18 But again I would suggest that Mr.
19 Kessler's communication with Mr. Lucas that day
20 confirmed a false stereotype about me. Further, I
21 would suggest that Mr. Lucas was in a position
22 where he didn't understand, he was the HR director,
23 but not intimately involved in IT. He didn't
24 understand the issues that were going on. There
25 were a number of people who were basically

1 targeting me because I had succeeded in areas where
2 they had not and again Mr. Lucas probably heard
3 from the squeaky wheels, the people who wanted to
4 complain, thought it was to their advantage to
5 complain and not by the couple of dozen people I
6 worked with friendly and who I helped and who
7 benefitted from my work.

8 And so Mr. Kessler by stating that the
9 continuing EAP goal was improving my interpersonal
10 skills basically told Clint Lucas that he -- what
11 Mr. Lucas believed was true when it was not true.
12 I contend it was not true. I asked Mr. Kessler do
13 you counter -- you accept Mr. Lucas's statement or
14 did you counter Mr. Lucas's statements. And in his
15 deposition it will show that he did not attempt to
16 counter or advocate on my behalf in any way.

17 I would characterize this exchange as
18 someone who is basically taking orders from their
19 corporate boss and doing what their corporate boss
20 has told them and breaching their fiducial duty to
21 me as a patient to understand my situation, to
22 understand what I really needed to improve the
23 situation and presuming that his skills as a
24 licensed independent social worker were what I
25 needed.

1 I would suggest that what I needed was
2 someone who could understand the hostilities I was
3 being subjected to at work and that management
4 should step in and discipline those who were
5 expressing hostilities toward me. And e-mails I
6 have clearly indicate this. In e-mails I have from
7 Clint Lucas he uses the word hostile in describing
8 the conduct of my coworkers.

9 MR. WALLINGER: Your Honor, I'm going
10 to object on the hearsay. I'm also going to object
11 to the witness giving essentially conclusory
12 opinions about his interpretation of the
13 information. I don't mind him reading from the
14 exhibit that I would consent to being admitted into
15 evidence. I don't mind him offering testimony as
16 to his observations by sight, hearing or any other
17 sense or memory. But I have let him kind of go
18 along and I think he is intermixing what is
19 essentially argument as opposed to observations,
20 Your Honor.

21 THE COURT: That's true. Save your
22 arguments for -- well, argument for later on.

23 MR. SMITH: I will try to separate
24 them. And if anyone wants to step in and
25 immediately tell me that, I'm trying to -- I

1 apologize. I don't know how to separate.

2 THE COURT: You are just kind of giving
3 a narrative of what was going on. You can save the
4 argument about later.

5 MR. SMITH: I apologize. So this is on
6 page 3 at the -- towards the middle end of that
7 paragraph, first paragraph. Mr. Kessler goes on to
8 say we discussed nothing that went beyond that,
9 nothing that went beyond the proper scope of such
10 an EAP plan and/or any employer feedback and he
11 discussed nothing outside the categories and
12 limitations of information Smith had authorized me
13 and SAVE to disclose to employer.

14 Again, I take issue with the idea that
15 I authorized Mr. Kessler to make those types of
16 statements to Mr. Lucas. I believe Mr. -- at the
17 time believed Mr. -- I could trust Mr. Kessler,
18 that he had my best interest at heart and that he
19 had a duty to use discretion in what he disclosed
20 to employer as I shared some of my most intimate
21 thoughts about kids and whatever. And I would
22 suggest that is a breach.

23 Again, employer's stated goal for Mr.
24 Smith was to assist him with developing better
25 interpersonal skills, more specifically to be able

1 to better articulate his ideas in a manner less
2 offensive and more palatable in order to form more
3 constructive working relationships.

4 Again, Mr. Kessler's statement was the
5 employer goal. And while I certainly have many of
6 the employer's goals at heart, I do not believe my
7 statements were offensive or not palatable. I
8 believe they were in some cases honest differences
9 of opinion about how to make systems and that, in
10 fact, I had made systems work that again large
11 amounts of money had been spent prior to me
12 arriving at Showa Denko and that when I arrived
13 they were not working. And I believe that that
14 offended some of the people who had worked
15 diligently on some of the systems, but has
16 ultimately failed. I did not make a strong point
17 of that, it was just simply easy to say when things
18 started working better. Some people similar to the
19 game of survivor perhaps want a challenge and they
20 found it offensive and perhaps threatening to their
21 job process.

22 The next session -- again, nowhere in
23 this paragraph do I read where Mr. Kessler informed
24 me that he had spoken to Mr. Lucas, nor do I have
25 any recollection informing me that he spoken to Mr.

1 Lucas, nor did he ever share the substance of what
2 Mr. Lucas said with me in counseling sessions. And
3 I contend that he should have done that as being a
4 trusted counselor in the situation.

5 I will go on and say to the next
6 session. I should point out this next paragraph
7 Mr. Kessler clearly mentions Profile XT which is
8 the next document I would like to introduce from
9 Grenell Consulting Group and that I had shown what
10 Mr. Kessler calls a professional profile and what I
11 have described is labeled a placement report so I
12 believe it is accurate to refer to this as a
13 placement report. However, I will use the term
14 Profile XT interchangeably.

15 The profile is dated 8-2-11. Profile
16 documents showed many positive traits, but also
17 that Smith was rigid and judgmental which he has
18 been of his employer and some other colleagues.
19 Again, that's an opinion of Kessler as I would
20 suggest. Smith stated I know my failures. I know
21 some of my failures. We did focus on Smith's
22 interpersonal skills, but also explored his job
23 culture and dynamics. Smith reported that employer
24 was like the TV show Survivor and that people there
25 were getting pushed out. That occasionally

1 happened, although I would suggest turnover was
2 fairly low at Showa Denko. Smith believed that it
3 would be best for employer to have a better company
4 culture but that now the best defense is offense.
5 Again, I believe that is taken out of context and
6 what I meant to communicate would be that I need to
7 keep producing results for the company in order to
8 justify my existence and to -- ultimately it
9 improves the company culture when things are
10 running smoothly and people aren't pointing
11 fingers.

12 So again I have no -- would just take
13 issue with the way that is phrased for the
14 consumption of the expert witness. Smith viewed
15 his job as a career stepping stone. Smith was not
16 open to the concept of having more willingness to
17 admit mistakes in order to gain trust with his
18 colleagues and to help build a better work culture
19 for increased productivity.

20 Again, I don't understand that
21 statement. I'm -- in many ways I'm a fairly harsh
22 critic on myself and I work the systems from a
23 position we are producing lots of error or bias
24 into a system that's producing smaller errors and
25 bias. It's a process. You have got to keep going

1 through in order to get to acceptable levels of
2 accuracy and efficiency.

3 Smith indicated that he felt he
4 inherited employer's problems. I definitely
5 inherited a system that was not working properly.
6 That's why I was hired. So I don't know what the
7 word felt has anything to do with it. Again, I
8 simply was trying to explain the challenges from
9 the system that I had inherited and so that is
10 where that statement comes in. Again, I see that
11 statement as being somewhat slanted.

12 Interpersonal skill training begins
13 with a robust education on interpersonal dynamics,
14 identification of his interactive style and
15 communication pattern which Smith would only
16 superficially explore with me. I did not to the
17 best of my recollection inform employer of this
18 session and employer did not contact SAVE to
19 inquire about whether Smith had attended the
20 session. There was no requirement I contact
21 employer. I find that odd based on Ms. Gainey's
22 statements, but we will let Ms. Gainey speak to
23 that.

24 The statement only superficially
25 explored interpersonal dynamics I would take issue

1 with. I read books from Eric Burns to "What Do You
2 Say After You Say Hello." Again, superficial? The
3 next session ws December 4th. Smith arrived on
4 time for the session and was cooperative and fully
5 participatory in the process. He reported that he
6 had initially resented EAP sessions, but no longer
7 did. I probably resented being forced to attend
8 them, but I don't -- the sessions themselves I
9 don't think I had any problem with at the time.

10 He expressed frustration with employer
11 and immediate supervisor regarding implementing
12 change. Smith wanted to remain employed for his
13 resume but he hoped to make an impact that would be
14 noticed, i.e. systems networking as I previously
15 mentioned. We reviewed the Profile XT together.
16 The profile suggested inflexibility and inability
17 to accommodate. At this time I would like to
18 introduce the Profile XT placement report if
19 there's no objection.

20 MR. WALLINGER: Before we get to that,
21 is the statement that he read from, Mr. Kessler's
22 statement, an exhibit in evidence yet, Your Honor?

23 THE COURT: I'm sorry? What?

24 MR. WALLINGER: Is the statement that
25 he's been reading from, is that an exhibit in

1 evidence yet? I wasn't sure if he offered it or if
2 I needed to.

3 THE COURT: You wanted this
4 confidential work product in response to litigation
5 into evidence, right?

6 MR. SMITH: Yes.

7 THE COURT: I thought he did and you
8 didn't have an objection so it's in.

9 (PLF. EXH. 1 admitted into evidence.)

10 MR. WALLINGER: That's Exhibit 1.

11 MR. SMITH: I have handed it to the
12 bailiff.

13 MR. WALLINGER: I don't object to the
14 admissibility of the report that he just referred
15 to. I may have an objection to the use of it after
16 this point depending on what he says.

17 THE COURT: Okay. So --

18 MR. WALLINGER: My client was shown the
19 document and we don't dispute that.

20 THE COURT: Do you have an extra copy
21 of it?

22 MR. WALLINGER: I do, Your Honor.

23 MR. SMITH: I am reading from a color
24 copy because the black and white copy is hard to
25 read.

1 THE COURT: He said he has an extra
2 copy for me.

3 MR. SMITH: Should I wait?

4 THE COURT: Just a minute.

5 (Brief pause.)

6 MR. WALLINGER: May I approach the
7 bench?

8 THE COURT: Um-hmm.

9 MR. WALLINGER: I think that's a copy
10 of what the witness is referring to. I will let --

11 THE COURT: And you are agreeing to the
12 admissibility of this placement report?

13 MR. WALLINGER: I am, Your Honor, but I
14 may have an objection as to the use of it for one
15 reason, but not another, but I'll let him refer to
16 it.

17 THE COURT: This will be Plaintiff's
18 Exhibit 2.

19 (PLF EHX. 2 admitted into evidence.)

20 MR. SMITH: So again, Mr. Kessler
21 states on page 4 in the first paragraph of his
22 confidential work product response to litigation
23 that the profile suggested -- referring to the
24 Profile XT which is the document suggested
25 inflexibility and inability to accommodate. On

1 page 10 of this document there is a measure for
2 accommodating which the author, who is Grenell
3 Consulting Group, is actually prepared by Thomas
4 Walsh who is on my witness list. He's from
5 Massachusetts or somewhere. Showa Denko had hired
6 him to produce this report. Accommodating, a
7 tendency to be friendly, cooperative, agreeable to
8 be a team person. I scored a nine out of ten on
9 the accommodation measure which seems to be in
10 conflict with Mr. Kessler's assertion that the
11 profile suggested inflexibility and inability to
12 accommodate. This Mr. Thomas Walsh, Ph.D. of
13 Grenell Consulting goes on to say Mr. Smith shares
14 a high commitment to reducing conflict and
15 establishing cooperation.

16 THE COURT: Hold on a second. What is
17 this?

18 MR. SMITH: Your Honor, it's a
19 placement report that was --

20 THE COURT: Who did it?

21 MR. SMITH: Thomas Walsh for Showa
22 Denko of Grenell Consulting.

23 THE COURT: So this was for you to get
24 the job or something?

25 MR. SMITH: This was while I was in the

1 employment of Showa Denko. They had done a
2 placement report on me because they were -- I was
3 hired under the assumption I would like -- I might
4 become the IT manager of the group.

5 THE COURT: All right. Just remember I
6 know nothing about this case. So when you hand me
7 up a report, I don't know who prepared it or why
8 they prepared or when it was prepared or what it
9 was prepared for.

10 MR. SMITH: I will try to give more --
11 try to cite -- let me read the first of it.

12 MR. WALLINGER: Your Honor, if I could
13 for the record, I consented to the admissibility of
14 the report without objection because it was a
15 document that was provided to my client and a
16 document the client used as part of the services to
17 the Plaintiff.

18 I object to the witness offering
19 specific findings of the absent author of the
20 report in an attempt to provide essentially an
21 opinion on the psychological attributes of Mr.
22 Smith at the time the report was done. I believe
23 that the report is okay to consider for purposes of
24 knowing that my client saw it and that Mr. Smith
25 had had it done and he looked at that information.

1 But I object to Mr. Smith then saying as you can
2 see from this particular finding or this particular
3 finding I was a cooperative person, I was a nice
4 person, I was a whatever. I think that goes beyond
5 the purpose here today and I would like to make
6 that objection.

7 THE COURT: If you have something that
8 you want to draw my attention to, you can draw my
9 attention to it. But it is not appropriate for you
10 to characterize it. You can do that later if we
11 get to the point where I have you make closing
12 arguments. You are not allowed to editorialize
13 during your testimony or give opinions.

14 MR. SMITH: Can I read from the
15 document and cite the page?

16 THE COURT: Sure. Just avoid this is
17 what that stands for kind of statement.

18 MR. SMITH: Yes, Your Honor. I will
19 try my best. On page ten of the placement report
20 prepared by Thomas Walsh of Grenell Consulting
21 which was a test was conducted on me in
22 consideration of my skills and qualifications to be
23 IT manager at Showa Denko Mr. Walsh, Ph.D., Thomas
24 Walsh, says that -- gives me a score of nine out of
25 ten and a scale labeled accommodating which is

1 defined in this report as the tendency to be
2 friendly, cooperative and agreeable to be a team
3 person. Those are Mr. Thomas Walsh's Ph.D., words.
4 Mr. Smith shares a high commitment to reducing
5 conflict and establishing cooperation. He is
6 comfortable working as part of a team and with
7 sharing ideas and information. Tracy tends to
8 minimize serious problems and negative information.
9 He is quick to seek solutions which are acceptable
10 to everyone. He is highly motivated by informal,
11 positive and relaxed work environment. Mr. Smith
12 is quick to accommodate others to avoid
13 interpersonal conflict.

14 I will again redirect the Court to
15 page 4 of Mr. Kessler's work product in response to
16 litigation where Mr. Kessler says the profile
17 suggested inflexibility and inability to
18 accommodate.

19 Reading again from Mr. Kessler's work
20 product response to litigation. The last session
21 was on December 18th, 2012. Smith arrived early to
22 session joined by his mother. I required his
23 mother to execute the same confidentiality
24 agreements and authorizations that Smith had
25 previously executed. Smith appeared agitated and

1 defensive. He indicated his mother was present as
2 a witness. Smith asked me to explain my role, my
3 professional background and describe EAP services
4 and my relationship with Smith's employer.

5 Your Honor, I would suggest that my
6 request for the documents from Ms. Gainey emanates
7 from this same request that occurred on
8 December 18th of 2012. Mr. Kessler goes on to say
9 I explained that EAP is neutral and my goal is to
10 promote employer/employee satisfaction and
11 productivity.

12 Your Honor, I question the EAP
13 neutrality, and again show that it is an indication
14 of to whom Mr. Kessler owed a duty of trust. Smith
15 then reported that he was fired that morning. This
16 is the episode where I was -- at 9:00 a.m. I had
17 arrived at work early that morning. Was working on
18 -- I am having a hard time remembering exactly
19 what, but diligently and Mr. Wing called me into
20 the office with him and Clint Lucas and they gave
21 me the option. Mr. Wing said I was being
22 terminated for attention to hardware. I would like
23 to point out that I was hired initially as a
24 systems engineer and that I had access to the
25 server room and administrative access on many of

1 the systems.

2 Mr. Wallinger in his statement earlier
3 said that I had made unauthorized purchases which
4 is a false statement. I had made authorized
5 purchases on a number of occasions. I also was not
6 attempting to buy any hardware or any system. I
7 frequently had to troubleshoot systems, reboot
8 systems, fix systems that had failed that were
9 causing the shipping process that I was shepherding
10 to fail or not work properly. So part of my job
11 was to pay attention to hardware because of the
12 software that I configured and wrote relied on the
13 hardware.

14 Going on, Smith stated his intention to
15 retain an attorney. I probably did say that at
16 that time. The remainder of our session was not
17 particularly productive. I will tell the Court
18 that we actually at that time reviewed this very
19 document, the Profile XT placement report, and Mr.
20 Kessler pointed out some of the summary statistics.
21 Probably not that important, but we with my mother
22 present walked through a number of the measures
23 that appeared quite favorable.

24 I don't recall much more about that
25 session. I recall being very distraught and angry.

1 I don't believe I cursed at Mr. Kessler one time.

2 Mr. Kessler said I have had no further
3 sessions with Smith. Mr. Kessler goes on to say
4 overall I conclude that Smith had difficulty with
5 interpersonal interaction and had poor insight into
6 that problem.

7 It is my testimony, Your Honor, that I
8 had considerable insight into the problem at Showa
9 Denko and I tried to share them with Mr. Kessler
10 and Mr. Kessler was unwilling to listen to my
11 rendition of the problems at Showa Denko because
12 they contradicted the impressions he had -- and
13 directive he had been given by Clint Lucas at Showa
14 Denko. It goes on to say he instead focused on his
15 sense of technical superiority and his need to
16 leave a legacy at Showa Denko Carbon, Inc.

17 I would like to characterize that
18 statement as being inaccurate. I have no desire to
19 leave a legacy. Smith received no validation and
20 upon termination he experienced abandonment.

21 Upon my termination I experienced being
22 thrown out of my office basically at 9 a.m. in a
23 crowded office what I would characterize as a
24 retaliatory firing because I had refused to quit at
25 Showa Denko after basically being pressured to quit

1 in that very session. And as I look back I clearly
2 see even being sent to SAVE and the comment that
3 Mr. Lucas made was an attempt to encourage me to
4 quit voluntarily for whatever reason and that Mr.
5 Kessler acted as a tool for lack of a better word
6 of the management there which he should have --

7 MR. WALLINGER: Objection, Your Honor.

8 THE COURT: Sustained.

9 MR. SMITH: I believe Mr. Kessler had a
10 duty, fiducial duty to me.

11 MR. WALLINGER: Objection.

12 MR. SMITH: As a patient of Mr.
13 Kessler's I assumed Mr. Kessler had my best
14 interest at heart, that he was a trusted confident
15 and that out of that trust is a fiducial duty.

16 MR. WALLINGER: I object.

17 THE COURT: Fiduciary I think is the
18 word you are looking for.

19 MR. SMITH: No, it's not, Your Honor.

20 THE COURT: I've never heard of
21 fiducial, but fiduciary is what we typically use,
22 but if you want to use the other.

23 MR. SMITH: Your Honor, I am a finance
24 major and I have some understanding of trust
25 arrangements.

1 THE COURT: Okay.

2 MR. SMITH: In my -- I have submitted a
3 motion in limine that cites authority that says
4 that doctor/patient relationships, inherent to them
5 are the concept of trust and fiducial duty.

6 Mr. Kessler goes on. He says he
7 received no such validation. On his termination he
8 experienced abandonment. He perceived others to be
9 the root cause of his problems. That attitude and
10 behavior in my opinion similarly is what Smith is
11 engaging in by suing me and blaming me and SAVE for
12 his job termination.

13 Mr. Kessler goes on to say in my
14 opinion I have not deviated from any standard of
15 care applicable to my professional EAP services,
16 nor have I done anything improper or unethical. My
17 limited communications with Smith's employer were
18 proper in scope and were with Smith's express
19 permission. My services to him appear to have no
20 nexus to the reasons that Smith was terminated from
21 his employment. I was not made aware of his
22 termination until Smith told me after the
23 termination occurred.

24 Your Honor, I would like to introduce
25 -- it is proper to say the Court or Your Honor?

1 There are two documents labeled SAVE, Inc. Employee
2 Assistance Program Authorization For the Release of
3 Protected Health Information.

4 I would like to show SAVE's EAP.com
5 promotional document that was given to me at the
6 start of my counseling and read a few of the
7 excerpts from the document. Should I provide this
8 to the --

9 THE COURT: Give it to the bailiff and
10 he will bring it up here.

11 MR. SMITH: I would like to read and
12 then provide it. Is that the appropriate way to do
13 it?

14 THE COURT: Sure.

15 MR. SMITH: The cover reads SAVE,
16 strategy to assist valued employees and again with
17 an emphasis on employee. Says your employee
18 assistance program. A confidential consultation
19 counseling and referral program for employees and
20 their dependents. Nowhere does it mention employer
21 on that page.

22 Opening the brochure it says
23 confidential assistance for problems of any kind.
24 It says contact us, emergency coverage 24 hours a
25 day seven days a week, provides their phone number.

1 Goes on to say an EAP or employee assistance
2 program provides short-term counseling, resources
3 and problem solving techniques to help with work
4 life balance, wellness, work related and personal
5 concerns of any kind. Services are free,
6 confidential and available to employees and their
7 dependents. Goes on to list problems addressed.
8 Call for an appointment. All counselors are
9 especially trained to provide an initial assessment
10 of your issue and help you select the most
11 appropriate assistance available to you.

12 At the top of the fold out on
13 page three confidential in big red letters, SAVE
14 complies with all state and federal laws governing
15 privacy. Information about a client's problem
16 cannot be released without the individual's written
17 consent. Confidentiality is the most important
18 element in the counseling relationship. Program
19 cost. There is no cost to you and your dependents.
20 The fee for EAP has already been paid by your
21 company. If you and your counselor decide
22 additional services are needed you will be
23 responsible for any cost not covered.

24 Again, I would stress that it said
25 confidential. Confidentiality is the most

1 important element in the counseling relationship.
2 And I believe that he was -- Mr. Kessler was my
3 counselor and not an arm of Showa Denko and that he
4 had a duty to protect my interests primarily. It
5 was never disclosed to me there was a dual
6 obligation to SAVE or Showa Denko along with
7 myself.

8 I assumed that Mr. Kessler was my
9 counselor who I could trust and confide in and that
10 there would be reasonable professional discretion
11 that goes along with the fiducial duty of a
12 counselor in Mr. Kessler's position.

13 (Handing.)

14 SAVE EAP is owned by Sara Gainey who
15 also goes under -- her company is SAVE, Inc. Sara
16 Gainey is certified as a certified employee
17 assistance professional by the Employee Assistance
18 Certification Commission.

19 MR. WALLINGER: Objection.

20 THE COURT: What's the objection?

21 MR. WALLINGER: He has no personal
22 knowledge. He is referring to something else and I
23 can't tell what it is.

24 THE COURT: What are you referring to?

25 MR. SMITH: The Employee Assistance

1 Certification Commission standards of practice
2 which state that individual clients have the right
3 to obtain a copy of the CEAP code of conduct which
4 is what this is.

5 THE COURT: Where you did get that?

6 MR. SMITH: Off the internet, Your
7 Honor, because they did not actually provide it to
8 me as they should have according to this document,
9 but it is available on the internet. This is the
10 same group to whom Mr. Krasilovsky belongs.

11 THE COURT: I am trying to figure out
12 -- you're trying to establish what with this
13 document?

14 MR. SMITH: That there were duties that
15 are owed by an employee assistance professional and
16 that he breached those duties.

17 THE COURT: All right. And I would say
18 that normally you would need to bring in an expert
19 to say well, if we have a professional, these are
20 the duties of a professional. And they may say
21 this particular document is evidence of that or
22 they may say well, these other documents are
23 evidence of what people in that profession, their
24 standards are.

25 But I don't know how you just go

1 pulling something off the internet makes that the
2 standard that governs this kind of case.

3 MR. SMITH: You are asking for
4 arguments at this point?

5 THE COURT: Well, we are arguing a
6 point of law. He is saying it is not proper for me
7 to let you put that document into evidence and I am
8 -- because you're not a lawyer going okay, this is
9 layman terms. This is what he is trying to say is
10 you're trying to set up a standard of expertise
11 vis-à-vis the document and you just basically said
12 I found it on the internet.

13 MR. SMITH: I didn't just find it on
14 the internet, Your Honor. I found it because I
15 knew Sara Gainey, they refer to themselves as an
16 EAP. In Mr. Kessler's work product it says that he
17 is familiar with the standards of care of an EAP
18 counselor. These are the client bill of rights and
19 standards of care produced by this is a private
20 accrediting authorization. There's no state
21 sanction behind it, but people who belong to this
22 to use Mr. Kessler's words are -- know the
23 standards of care expected of the EAP counselor.
24 This is the best documentation of those standards
25 of care.

1 THE COURT: That's something that they
2 agree that they are bound by? That's a standard?

3 MR. SMITH: Yes, in order to be an EAP
4 --

5 THE COURT: How do you know -- is there
6 something that he said that, that's the
7 organization they belong to?

8 MR. SMITH: By listing themselves as a
9 certified employee assistance professional and
10 calling themselves an EAP, this is the organization
11 which accredits.

12 THE COURT: They are a member of that
13 organization?

14 MR. SMITH: Yes, Sara Gainey is a
15 member -- there is an organization that meets in
16 Columbia that is the state chapter of the Employee
17 Assistance Professional Association.

18 THE COURT: Do you want to respond?

19 MR. WALLINGER: All right. There is
20 more than one set of professional standards that
21 govern employment assistance professionals because
22 it is a non-governmental sanctioned certification.
23 There are also laws that govern social workers,
24 statutes and regulations. There are also standards
25 that are not codified and are not on the internet,

1 but that a person practicing EAP would know to do
2 or not do.

3 What Mr. Smith wants to do is to offer
4 a piece of what may be an amalgam of standards that
5 could govern some activity of an EAP professional.
6 Even if he offers it and says I found this, I think
7 this is authentic, I think this has some
8 application to how Mr. Kessler did his job, Mr.
9 Smith is not qualified to discuss through his own
10 observation or testimony whether that piece of a
11 standard was met or not.

12 And my view is that since he can't do
13 it and since he has already told the Court several
14 times he is not going to have expert testimony, we
15 are embarking on looking at that information at
16 this point that is not relevant for which a proper
17 foundation has been laid.

18 MR. SMITH: Your Honor, this is written
19 in layperson's terms and is intended for someone
20 exactly in my situation to understand what the
21 requirements of an employee assistance professional
22 are and does not take an expert to interpret what
23 is required of an employee assistance professional.
24 This is clearly within the ambit of common
25 knowledge of a layperson without any specialized

1 training. If you look at the requirements to be an
2 EAP you will find that they are quite low frankly
3 and being a member of an organization you agree to
4 uphold the terms of the organization in order to
5 use the label and in order to gain the
6 certification. These are written in laymen's
7 terms. Says right on the document individual
8 clients have the right to obtain a copy of the CEAP
9 code of conduct and one would assume has the right
10 to expect someone holding themselves out as an EAP
11 counselor to adhere to these standards of code of
12 conduct and standards of practice.

13 THE COURT: Well, it's a nonjury trial.
14 I will allow it in for now and decide how much
15 weight to give it.

16 MR. SMITH: Sure. Thank you, Your
17 Honor.

18 THE COURT: What else you got?

19 MR. SMITH: I'm going to read certain
20 -- I can go on. I don't mean to --

21 THE COURT: You need to take a break?

22 MR. SMITH: I can go on or tell me how
23 long -- I can talk for a long time. I apologize.

24 THE COURT: Why don't we take ten
25 minutes. It's 3:15. All right. Be back at 3:30.

1 MR. SMITH: Thank you, Your Honor.

2 (A recess transpired.)

3 (PLF. EXH. 1-3, were marked for
4 identification.)

5 THE COURT: Are you ready to resume?

6 MR. SMITH: Yes, Your Honor. Your
7 Honor, I filed a motion in limine with the court
8 this morning. I don't know if you have seen it.

9 THE COURT: I haven't. What is it?

10 MR. SMITH: It's regarding Mr.
11 Krasilovsky's testimony. He mailed it to Mr.
12 Wallinger. I think he has a copy of it.

13 THE BAILIFF: (Handing.)

14 THE COURT: Thank you. Okay.

15 MR. SMITH: So I would like to read
16 parts of the standards of practice from the
17 Employee Assistance Certification Commission.

18 THE COURT: Wait a minute. If you are
19 going to set yourself up as an expert you are going
20 to run into a problem. Your argument that has any
21 appeal to the Court is that you don't need an
22 expert. This is just a layperson thing. So if you
23 want to refer me back to standards that an expert
24 in his area have to rely upon or follow, then you
25 are going to have to bring that in through an

1 expert, not through something you found out on the
2 internet. Because I again don't know that it
3 applies. I need an expert to tell me in this
4 profession this is the standard of care that --
5 listen to me. This is the standard of care
6 somebody has to follow. You as a layperson are not
7 permitted to set up or tell me what the standard of
8 care is of an expert in a professional in that
9 field. The only thing that you can do is say,
10 Judge, you don't need to consider what the standard
11 of care is as set forth by an expert because it's
12 the kind of thing that just good old common sense
13 says he shouldn't have done. Okay?

14 So you want to go back to this document
15 that you just offered and you want to go on and say
16 well, he didn't do this, he didn't do this. The
17 only thing I can consider that is if an expert says
18 I'm an expert in this field and this is the
19 standard of care that he should have followed.
20 You're not an expert in that field.

21 MR. SMITH: I am a client to someone
22 whose supposed to have expertise in that field.
23 This document is labeled client bill of rights and
24 individual clients have the right to obtain a copy
25 of the CEAP code of conduct which is what this

1 document is. I don't have a right to know the
2 rules under which I am being counseled is what I
3 believe Your Honor is telling me.

4 THE COURT: No, you are trying to say
5 that these are the rules that he should have
6 followed as an expert in that field.

7 MR. SMITH: I contend that he is not an
8 expert because he's not certified in that field,
9 Your Honor.

10 THE COURT: Then you don't need a
11 standard of care to tell me that he didn't do
12 something that he was supposed to do. You can't
13 have it both ways.

14 MR. SMITH: You are suggesting I make a
15 common sense argument. Again, I would --

16 THE COURT: Are you trying to say that
17 he was an expert that deviated from the standard of
18 care or are you saying that he wasn't an expert?

19 MR. SMITH: He wasn't an expert and his
20 deviation from the standards should prove that he
21 wasn't an expert. Prove that he should have, for
22 example, consulted other authorities when he did
23 not have the skills to address my situation.

24 THE COURT: But if he wasn't an expert
25 then he didn't deviate from any standard of care to

1 do what you're saying he should have done.

2 MR. SMITH: He held himself out as an
3 expert. He never told me that he was not an
4 employee assistance professional. He never shared
5 his credentials when he was referred by Ms. Gainey
6 of SAVE EAP and I assumed he was an EAP, had a
7 trust relationship, doctor/patient trust
8 relationship and that he would follow the
9 guidelines as in this document, which is a document
10 for client consumption.

11 THE COURT: Don't you see you're now --
12 that's just a backdoor way of saying he really was
13 an expert in that field and this is what he didn't
14 do that an expert in that field should have done.

15 MR. SMITH: I am, Your Honor, alleging
16 intentional misrepresentation.

17 THE COURT: Okay. That's got nothing
18 to do with being an expert.

19 MR. SMITH: That I relied on his
20 expertise.

21 THE COURT: You just told me you didn't
22 think he was an expert.

23 MR. SMITH: I know now that he was not
24 an expert, Your Honor. I did not know at the time
25 that he was not an EAP and have the right skills to

1 assist me. This is learned after this has
2 happened. Your Honor, at the time I assumed he was
3 an EAP working for SAVE EAP as an employee of SAVE
4 EAP because we had all the sessions in the office.
5 There was never any indication to me that he was
6 not an EAP employee by SAVE EAP.

7 THE COURT: You are conceding now that
8 he wasn't an EAP?

9 MR. SMITH: I have since learned he
10 held himself out to be, that's right.

11 THE COURT: Be if he wasn't one then
12 you can't hold him to the standard of care of being
13 one.

14 MR. SMITH: As a counselor he has a
15 fiducial duty to me as I have argued in that
16 motion. That is I would say that is --

17 THE COURT: That may be, but that is
18 separate and apart from professional negligence of
19 being an expert in this field of being an EAP.

20 MR. SMITH: I am not strictly arguing
21 -- first of all, Your Honor, I am arguing several
22 theories of this case. There are several ways to
23 interpret this case and he may have been negligent,
24 but he also intentionally misrepresented himself.
25 He was also negligent in various areas so there are

1 multiple causes of action and multiple --

2 THE COURT: I'm not saying that there
3 isn't. But I'm saying that if you are suing him
4 for professional negligence which is a special
5 little breed of negligence, listen to me, if you
6 are going to sue him for being an expert EAP then
7 that is a -- negligence is there's a duty, there's
8 a breach of that duty and you got damaged as a
9 result of that breach of that duty.

10 Now, in a professional negligence case
11 the duty has this little thing that we call
12 standard of care. And a lawyer or a doctor or some
13 professional owes a duty based on the deviation
14 from a standard of care. So if you want to say he
15 was an expert and he deviated from that standard of
16 care and was therefore committing malpractice,
17 which is another way of saying professional
18 negligence, then you have to show that he was an
19 expert in that field. That doesn't mean you can't
20 still sue him for negligence, but you can't sue him
21 for professional negligence if he wasn't an expert.
22 Because then he would just be some guy doing his
23 job.

24 MR. SMITH: I would suggest in many
25 ways, Your Honor, he is just some guy doing his job

1 because he doesn't have these credentials, but --

2 THE COURT: Then it's irrelevant that
3 he doesn't have those credentials if he's not an
4 expert. That's the point. We do not need to waste
5 any time on you sitting there going well, he should
6 have followed these standards and he didn't follow
7 those standards if he wasn't an expert and wasn't
8 required to follow those standards. That's the
9 point.

10 MR. SMITH: I think I understand, Your
11 Honor.

12 THE COURT: So is it again your
13 contention that he was or was not an expert EAP or
14 he was an EAP certified counselor?

15 MR. SMITH: After the fact I have
16 learned that he was not an EAP.

17 THE COURT: Okay. Well, then if he was
18 not then you cannot sue him for being
19 professionally negligent just like you can't sue
20 him for not being a lawyer because you can't sue
21 somebody for not being something that they are not.

22 MR. SMITH: I am suing him for
23 intentional misrepresentation.

24 THE COURT: You can. That's got
25 nothing to do with what we just talked about.

1 MR. SMITH: I think I understand where
2 you're going, Your Honor, and I understand that he
3 misrepresented and intentionally misrepresented
4 himself, it's a strong word but it's fraud. And I
5 relied on his representations. I relied that he
6 would know the rules that someone in that position,
7 the dominant person in that position should follow.
8 And I was damaged as a result of that.

9 THE COURT: Okay. But that's not
10 professional negligence. You may still attempt to
11 sue him for making a negligent misrepresentation or
12 an intentional misrepresentation which would be
13 fraud, but you can't sue him for being something
14 that he really wasn't. If you are saying he wasn't
15 an EAP then it's not proper to sue him for
16 deviation from the standard of care as an EAP.

17 So the line of questioning about what
18 the standards you found off the internet say he
19 should or shouldn't have done, they're irrelevant.

20 MR. SMITH: Your Honor, I just will
21 make the statement and I won't go further down this
22 document. But he is a counselor and someone who is
23 a counselor also has some of the exact same
24 standards understandable by a layperson which are
25 articulated in the document that we can go back to

1 ancient times and ancient versions of the
2 hippocratic oath that explain in very layman terms
3 if you need help go get some help. You have a duty
4 as someone in a dominant position to adhere to
5 those standards.

6 THE COURT: Those standards of being a
7 quote unquote counselor come from what?

8 MR. SMITH: They are legal standards.

9 THE COURT: You're -- this is your day
10 in court. Prove it, because I don't know it.

11 MR. SMITH: In my motion in limine I
12 just presented --

13 THE COURT: That's for you trying to
14 keep out their expert.

15 MR. SMITH: The argument in that
16 document that basically shows the fiducial duty of
17 someone in a dominant position. When you put your
18 trust in someone they have the duty to be
19 trustworthy to have a reasonable degree of
20 discretion what -- in his situation to put it
21 bluntly they rely on this document which is an
22 authorization for the release of protected health
23 information and then they say that because anything
24 said in counseling is health information they can
25 disclose it to anyone.

1 I would like to -- from there let me go
2 to the answer defense filed in response to my suit
3 and to the eighth defense.

4 THE COURT: You can sue somebody for
5 breach of fiduciary duty if they have a fiduciary
6 duty owed to you, but that is separate from a cause
7 of action of suing somebody for professional
8 negligence.

9 And so I am trying to suggest to you
10 that you are beating a dead horse by trying to sue
11 him for being an EAP if you, in fact, are conceding
12 that he is not an EAP. All right? That doesn't
13 mean you can't sue him for breach of fiduciary
14 duty. You are still going to have to prove that he
15 owed a fiduciary duty, but he may owe a fiduciary
16 duty. I'm not saying he does or he doesn't without
17 being an EAP.

18 But to say, Judge, you have got to hold
19 him to the standards of an EAP, and by the way I am
20 not maintaining that he was an EAP, is a waste of
21 your time and my time. Follow that?

22 MR. SMITH: I do.

23 THE COURT: I know it's not what you
24 want to hear.

25 MR. SMITH: I know that he has argued

1 and stated in deposition, Mr. Kessler's deposition
2 that you don't need any certification to act as an
3 EAP.

4 THE COURT: But we are in court. We
5 are not doing pretrial stuff. We're at your point.
6 And the point is that you want to follow this line
7 of testimony that says I'm going to show you that
8 he deviated from these standards that apparently
9 don't apply to him because you are not saying that
10 he was either certified or an expert as an EAP.

11 MR. SMITH: They are standards that
12 would apply to anyone with a fiducial relationship
13 in the context of our doctor/patient or
14 counselor/patient.

15 THE COURT: But he is not a doctor, is
16 he?

17 MR. SMITH: He's a health provider. He
18 was in a dominant position. I trusted him with
19 sensitive information. Your Honor, can I have a
20 minute of latitude? Let me read a couple things.
21 If I am still beating a dead horse -- I would like
22 to go through his defense where he says Plaintiff
23 gave an express consent to any actions of
24 Defendant. Is that a true statement? Plaintiff
25 gave express consent to any actions of Defendant.

1 Does this release give Mr. Kessler consent to any
2 actions? All actions, are there any limitations on
3 the actions Mr. Kessler should be allowed to make
4 on my behalf?

5 THE COURT: I have no idea what that
6 document is that you have. I have never seen it
7 before so it is not -- I don't know where we are
8 going with it.

9 MR. SMITH: Let me enter it into
10 evidence. This is SAVE, Inc. Employee Assistance
11 Program Authorization for the Release of Protected
12 Health Information. It was --

13 THE COURT: Well, when you say release,
14 that's usually something that they probably got you
15 to sign to say, you know what? This is normally
16 confidential, but you are authorizing us to let
17 somebody else see it who shouldn't otherwise
18 normally see it. That would be my guess, but again
19 I haven't seen it.

20 MR. SMITH: Your Honor, you are right
21 -- in my opinion you are right on the right point
22 is that they are using as a guise that they have
23 the right to then say anything if you sign this
24 document because it's a release. Rather than
25 getting truly an informed consent from you as a

1 patient to say hey, I'm going to talk to Clint
2 Lucas about this and are you okay with me
3 discussing that. Mr. Kessler never even told me he
4 was going to talk to Mr. Lucas. He never told me
5 what Mr. Lucas said. He was essentially acting as
6 an agent of the corporation in a disciplinarian
7 capacity even though he had a fiducial duty as a
8 counselor to me to uphold and protect my interests,
9 not strictly the interests of the company.

10 And if you look in the transcript you
11 will see that both he and Ms. Gainey are saying
12 that there is no -- there is a dual obligation.
13 There's no obligation to the client to maintain
14 confidentiality, to use discretion. By that
15 statement they believe they could say anything on
16 my behalf.

17 THE COURT: Maybe, I don't know, we
18 will get that somewhere down the road, but right
19 now you just need to tell me what went on in
20 essence, because if there were a jury here I would
21 be saying to them we don't let people that are lay
22 people give their opinion about things. They are
23 telling us what they heard, they saw, they touched,
24 they felt, they smell, that sort of thing. What
25 you think the standard of care is for somebody,

1 well, you're not an expert so you don't get to say
2 yourself what the standard is. As your own lawyer
3 you can make an argument based on other evidence in
4 the record, but based on the line of questioning
5 that you and I have just had in the last couple
6 minutes, you're in essence conceding he's not an
7 expert in EAP. So any testimony that you want to
8 offer to me about what the standards are that an
9 EAP should follow in the eyes of the law is
10 irrelevant because he's not an EAP and you're
11 stating that you don't believe he was. You thought
12 he was at one point, but he's not.

13 So I don't need to know what the
14 standards are for something that he wasn't and
15 isn't being sued for. Now, you may say he told me
16 he was and that's fraud, but that's a different
17 cause of action and doesn't really need all these
18 other things that you are talking about.

19 MR. SMITH: So in my complaint I do
20 allege that he breached his fiduciary duty as I
21 described it. I have since come to learn that it's
22 probably better to use the term fiducial because of
23 the implication that fiduciary has to do with
24 financial, but, in fact, it has to do with trust.

25 THE COURT: Exactly. So you can use

1 fiducial if you want to. You are the only person
2 in the 33 or 34 years that I have been out of law
3 school that I have ever heard use it, but if it
4 brings you comfort and joy well then I will let
5 you. It's the same thing. We just typically say
6 fiduciary, but if you want to use fiducial, then
7 that's --

8 MR. SMITH: Because the typical
9 transaction between in financial we entrust say a
10 broker with your money that he may have given you
11 but --

12 THE COURT: It may mean that to you as
13 a layperson. It does not mean that to me as a
14 judge. It could be fiduciary and it has nothing to
15 do with money.

16 MR. SMITH: Right. I agree with you.
17 I am just saying the common understanding is that
18 it has to do with money and I realize that is not
19 correct. The -- can I ask a question that the
20 motion I have made, motion in limine, at some point
21 is that argued?

22 THE COURT: Yes, it is directed toward
23 keeping his expert out. That's what it appears to
24 be, motion in limine limiting, qualifying or
25 preventing Arthur Krasilovsky from testifying. So

1 we don't need to deal with that now because I'm
2 listening to your testimony, not Mr. Krasilovsky.
3 We will save that for later.

4 MR. SMITH: Make one quick comment if I
5 can. Deep in that article that I site the Maryland
6 court that explains the fiducial duty of doctor and
7 patient or anyone in a dominant position so that is
8 where my argument is coming from.

9 THE COURT: Probably the same as South
10 Carolina law. Okay? What else do you want to tell
11 me?

12 MR. SMITH: I would like to enter the
13 authorization for release of protected health
14 information, two of them, into evidence.

15 THE COURT: Any objection?

16 MR. WALLINGER: No objection.

17 (PLF. EXH. 3 in evidence.)

18 THE COURT: Okay. Are these actually
19 in blue or are they just in blue color?

20 MR. SMITH: These were finally obtained
21 from Sara Gainey after Mr. Wallinger got an order
22 from her to produce these documents and they are
23 blue copies obtained from defense counsel that Sara
24 Gainey finally released.

25 THE COURT: Okay. We don't usually see

1 blue documents.

2 MR. SMITH: They are hard to see as you
3 may see and I would like to have one to briefly
4 read from.

5 THE COURT: You don't have an extra
6 copy for --

7 MR. SMITH: No, Your Honor.

8 THE COURT: Go ahead and read from it.
9 Give it to me after you are finished.

10 MR. SMITH: Is it okay to stand or
11 should I remain seated?

12 THE COURT: Seated is fine.

13 MR. SMITH: So what these documents
14 show, they are authorization for the release of
15 protected health information from one is Sara
16 Gainey to Clint Lucas HR Showa Denko and it
17 basically is what Mr. Kessler refers to as being
18 expressed consent to the conversation that he had
19 with Clint Lucas based on the document.

20 What it will show is that I asked Sara
21 Gainey not -- I did not want Sara Gainey talking to
22 my coworkers until I felt she had a better
23 understanding from my perspective again because I
24 believed I should be able to trust her and I did
25 not believe that what would essentially be

1 gossiping with my fellow coworkers was in my
2 interest at that time. I believe that she needed
3 to listen. I know I have talked for a long time
4 this afternoon, but she needed to listen to me
5 about various situations with different coworkers
6 so she could understand the challenges I faced.
7 And so with Ms. Gainey I did not consent to
8 anything other what she said I had to consent to in
9 order to stay in her care and I had to stay in her
10 care in order to meet the terms of my job or else
11 basically be terminated.

12 So basically I had to sign something
13 like this in order to be offered services by SAVE
14 EAP which were written into my contract. Ms.
15 Gainey said that they don't do that, but I have got
16 proof that they do that. So with Sara Gainey I
17 only asked for dates of session and compliance.
18 Jonathon Kessler's interestingly enough and again I
19 question why there is a second document needed,
20 because they are from the same organization, they
21 all or several of the checked boxes are checked and
22 I contend I would have consented to Mr. Kessler
23 making the representations he made to Showa Denko.
24 I have not consented to the disclosures he made to
25 Showa Denko. All it would take is to write a

1 checkbox in one of those checks here to say that I
2 did consent. We never discussed what would be
3 disclosed to Clint Lucas, whether or not that would
4 be in my interest or not. There are certain
5 confidences that people keep from time to time. I
6 might not like the color of someone's hair for
7 example, and that doesn't need to be disclosed.
8 They're certain personal information that I don't
9 need disclosed. I have waived it because I think
10 the document is frankly so ridiculous I see it as
11 having very little credibility, but the idea that I
12 thought children were only for marriage or that I
13 came to session late because I had to put my car
14 out -- put a fire out on my car. That's what I am
15 dealing with.

16 Again, there are two copies. Mr.
17 Kessler had one that now has in reference to the
18 following information progress and compliance,
19 telephone exchange and recommendations checked. He
20 is acting as an agent of the corporation, not in my
21 interest. He never had my interest at heart. He
22 was just an employee doing what he thought he
23 should do with little regard for the duties that
24 someone who takes on the role of counselor/patient,
25 doctor/patient, dominant patient -- principal and

1 he did not appreciate those responsibilities either
2 intentionally or negligently. So I will introduce
3 these two. One has the -- there's a Plaintiff on
4 one of them.

5 THE COURT: These are two separate
6 ones. There are --

7 MR. SMITH: One is -- they are both
8 from SAVE. One is one Mr. Kessler had signed and
9 one is the one Sara Gainey had signed.

10 THE COURT: The one marked -- I have to
11 for the record -- Plaintiff's Exhibit 6 is the one
12 Ms. Gainey signed, the one Mr. Kessler signed is
13 not marked. Mark that one 6B.

14 Let me take a look at these.

15 (PLF. EXH. 6-6B, were marked for
16 identification.)

17 (Brief pause.)

18 THE COURT: Okay. What else?

19 MR. SMITH: Your Honor, am I at this
20 point addressing their -- can I address their
21 affirmative defenses or am I not supposed to do
22 that at this point?

23 THE COURT: Go ahead.

24 MR. SMITH: So for a fifth defense
25 Defendant states that Defendant did not deviate

1 from any generally accepted standard practices and
2 proceedings exercised by similar competent
3 professionals in the field acting under the same --
4 under the same or similar circumstances.

5 I believe that again this document, the
6 one that we are arguing about, basically says that
7 he did. That's why I -- if I were allowed to read,
8 I know you're probably of tired hearing me talk, I
9 understand that.

10 THE COURT: I'm not tired of hearing
11 you talk. I am a little confused and some of it
12 comes from I understand that you are not a lawyer.
13 And so they raised a defense to you suing him for
14 professional negligence. And basically they just
15 said by what you read to me we don't believe that
16 we deviated from any standard of being a
17 professional. Okay? That's what that says.

18 So you have conceded that he was not an
19 EAP counselor. So professional negligence is kind
20 of out. So we don't really need to get into that.
21 We just had this discussion again. So unless you
22 have changed your mind that you want to sue him as
23 an expert EAP, again, we are right back to where we
24 started. Just not a relevant document.

25 MR. SMITH: Maybe the confusion -- he

1 wears multiple hats. We have a licensed
2 independent social worker who represents himself as
3 being an EAP. And I understand there's an argument
4 that as an EAP -- that whether or not you have to
5 have any kind of counseling credentials like a
6 licensed independent social worker to be an EAP or
7 not. But there are like overlapping standards
8 basically and so in order to defeat that defense I
9 need to be able to present here is the standards an
10 EAP would follow, here's the standards an LISW
11 would follow and there's a lot of overlap between
12 them, but there are differences between.

13 THE COURT: Well, you just introduced a
14 new term, this LS --

15 MR. SMITH: He's a licensed independent
16 social worker.

17 THE COURT: Okay. Again, my powers of
18 omniscience are somewhat limited. So I know you
19 have been living with this for a couple of years,
20 but I haven't. I'm only -- I only know what I know
21 about this case in the couple of hours that we have
22 been together now. So if you are going to sue him
23 for deviating from the standard of care of a
24 licensed social worker or some other thing, that's
25 a different issue. We were just dealing with this

1 EAP thing. And you seem to indicate to me that you
2 were conceding that he was not an EAP, a term I had
3 never heard of prior to today.

4 MR. SMITH: Your Honor, I have to say
5 I'm honestly unclear as to whether or not he is
6 actually -- can wear the EAP label or not.

7 THE COURT: Well, if you don't know
8 then I don't know.

9 MR. SMITH: But does anyone know might
10 be the question because if you look at the
11 standards of the body and the way the body operates
12 those who accredit the standards seem very vague
13 which is why in that motion there I argue that it's
14 more basic than that. You held yourself out as
15 someone I can trust. And then you violated my
16 trust. It's as simple as that really.

17 THE COURT: Well, I guess we need to go
18 take it one step further back and that's one of the
19 problems that you have with you doing this on your
20 own without a lawyer. And you're saying well, I'm
21 not sure if he is or he isn't. Okay? If he is
22 then you're going to have to bring in an expert and
23 say he is and these are the standards that he's
24 held to if he is. You as a layperson computer
25 programmer, that's outside of your field of

1 expertise, and it's outside of the scope of a
2 layperson to say he's an EAP and we are going to
3 hold him to those standards. That requires expert
4 testimony. So if you want to shift and go well, he
5 may be an EAP do you have an expert that is
6 prepared to say that?

7 MR. SMITH: Your Honor, I don't believe
8 I do need an expert.

9 THE COURT: Well, trust me on this one.
10 You will.

11 MR. SMITH: 15-36-100.

12 THE COURT: What?

13 MR. SMITH: Are you familiar with
14 statute 15-36-100?

15 THE COURT: I didn't memorize the whole
16 code. So what is that?

17 MR. SMITH: This is a code that says
18 that in order to sue an expert you need an expert
19 witness unless if you go down to 15-36-100 (c).

20 THE COURT: I am familiar with that
21 one. And let me tell me you are misreading that
22 one. That's the kind of one where you say you are
23 suing a doctor for malpractice. All right?
24 Typically the law says, the one you just quoted
25 says, if say you are suing your doctor. And you

1 have to prove normally that what they did deviated
2 from the standard of care. You have to show before
3 you can sue them, get an affidavit from a
4 professional, another doctor saying he was a brain
5 surgeon, delivered babies or whatever. And he
6 didn't -- and he didn't follow the standard of
7 care. All right? That's in order to sue a doctor
8 or a lawyer or some professional.

9 However, the law says except if it's
10 the kind of thing that's so egregious that you
11 don't need to have an expert like oh, they left a
12 sponge in him. Or they took the left ear off when
13 they should have taken -- supposed to take the
14 right ear off. Because everybody knows that's the
15 kind of thing you shouldn't do and you don't need
16 an expert for it. All right? That's what that
17 exception is about.

18 You're saying in a case like that he --
19 I don't need to prove that he was an expert or what
20 the standard of care is for an expert in that field
21 because this is the kind of thing that everybody
22 knows you shouldn't have done.

23 MR. SMITH: Right.

24 THE COURT: We get back to your
25 statement 30 minutes ago now that I don't believe

1 he's an EAP. I thought he was, but I don't believe
2 he is. So you can't sue him for being something or
3 not following the standards of a profession that
4 he's not a member of.

5 MR. SMITH: There is no licensure for
6 an EAP. This is a private creating body. But as
7 an individual shouldn't I be able to rely on their
8 standards of practice?

9 THE COURT: No, because it's like the
10 sort of thing that everybody should know and you're
11 wanting to prove a common sense sort of argument by
12 referring to a document that sets out professional
13 standards, and that I am telling you as a matter of
14 law you cannot do. It's circular reasoning.
15 You're saying I want to say it's common sense, but
16 look, here's a document that says everybody in that
17 profession should have done this and I can't allow
18 you to do that. Even though I try to bend over
19 backwards to help a layperson who is representing
20 themselves to have you come in and say, Judge, this
21 is a common sense exception to the rule on expert
22 testimony and here's the standards that an expert
23 in that field should have followed and therefore
24 it's a common sense exception, it is not going to
25 work that way. All right?

1 MR. SMITH: The Supreme Court of South
2 Carolina fairly recently Sisters -- there's a case
3 where they basically apply common language to
4 15-36-100. And they say unless it's understandable
5 by a layperson.

6 THE COURT: Okay.

7 MR. SMITH: And I would suggest that
8 these -- the reason this organization exists is so
9 that the public can have some confidence in people.

10 THE COURT: That organization -- he's
11 not a member of it.

12 MR. SMITH: His employer is.

13 THE COURT: Well, but he's not a member
14 of it. And you have already told me I don't think
15 he is an EAP.

16 MR. SMITH: I know that he claims that
17 he doesn't have to have an EAP certification to be
18 an EAP. That's another point of fact that I think
19 has to be determined. So I am trying to address
20 all those issues while I'm on the stand here before
21 I close my testimony to -- otherwise you tell me I
22 can't come in here and make that case. So these
23 are overlapping claims here and there is
24 overlapping duties here. There's -- is it the red
25 cardinal is the one that says you should be

1 penalized for offering multiple theories of the
2 case. There are multiple theories.

3 THE COURT: I am not trying to stop you
4 from -- I have tried to tell you that you have
5 multiple theories of the case all of which can go
6 forward except for the one about professional
7 negligence because you have conceded to me that he
8 is not an expert in a particular field, just a
9 counselor or whatever that is. You're stating I am
10 not going to hold him to being an EAP, but then you
11 keep wanting to come back in and say I want to put
12 in evidence that this is what an EAP does and he
13 should have done it.

14 MR. SMITH: Your Honor, let me question
15 -- this is -- I have pondered exactly what you're
16 talking about in writing the motion in limine and
17 so did that get argued or is that --

18 THE COURT: Well, we have pretty much
19 been arguing some form of it. But your motion that
20 you handed me a few minutes ago is directed towards
21 their witness, their expert witness, not you. So
22 what you keep trying to do, Mr. Smith, is to say I
23 concede that he is not an EAP, but I want to hold
24 him to those standards anyway under a common sense
25 kind of exception. And you cannot have it both

1 ways. To say I don't need -- it's just common
2 sense, but here's the particular things that he
3 did, but he's not one of those. I want you to hold
4 him to those standards anyway.

5 MR. SMITH: Your Honor --

6 THE COURT: I am just telling you we go
7 back to beating a dead horse. We have been beating
8 it now for 30 going on 45 minutes.

9 MR. SMITH: Certainly I don't want to
10 be on the judge's bad side. I apologize.

11 THE COURT: You can still sue him for
12 something else. And you have sued him for many
13 other things.

14 MR. SMITH: Maybe I'm being too
15 rigorous, but I am trying to establish that
16 breaches of duty and I suggest breaches of duty
17 extend to many professions, anyone who is -- they
18 extend to child and parents in many situations, if
19 someone is in a position of dominance and who the
20 subordinate trusts and you have a right as a
21 subordinate to trust in the person in many of
22 these.

23 THE COURT: All of which go to a breach
24 of fiduciary cause of action, not a professional
25 negligence cause of action. They are two separate

1 things and apparently you have sued him for both.

2 MR. SMITH: I have sued him for both,
3 yes.

4 THE COURT: So just let that
5 professional negligence go because you conceded
6 that one you wanted to sue him for he's not under
7 the professional negligence theory.

8 MR. SMITH: Okay.

9 THE COURT: Doesn't mean you still
10 can't go for breach of fiduciary duty.

11 MR. SMITH: I am trying to understand.
12 I apologize for -- am I allowed at this point to
13 introduce his words at deposition or should I not
14 do that at this point, Mr. Kessler's words?

15 THE COURT: From the deposition? You
16 can publish parts of his deposition if you would
17 like.

18 MR. SMITH: What I will find here in a
19 minute is the statement that --

20 THE COURT: Let me make a suggestion to
21 you. Because you are on the stand. You are the
22 witness. Why don't you study that part that you
23 have his deposition that you want to offer in and
24 you offer them tomorrow. Because there are rules
25 that say if you want to do what you are asking me

1 to do you are supposed to let them know three days
2 ahead of time what it is that you want to do, but
3 I'll bend that rule. Okay? And I will let you
4 designate those parts, but you don't do that during
5 your testimony. You are the witness right now. So
6 tell me what you want me to know that can only come
7 through you.

8 MR. SMITH: Well, I know for a fact
9 that he -- again, the communication with Clint
10 Lucas interfered with my job and my job prospects.
11 For example, had I not been terminated in the
12 manner I was terminated there's a strong likelihood
13 I could have obtained work as a contractor with
14 different people in the plant because I had a good
15 enough relationship with them that they would have
16 hired me as a subcontractor rather. But as a
17 result my reputation was so damaged that's
18 basically not an option. So that is why I had made
19 also for tortious interference with my job and with
20 prospective contractor relations.

21 I suggest the comment that he made to
22 Clint Lucas which encouraged them to take kind of
23 action against me thinking there would be -- no one
24 would stand up for me basically. Caused that to
25 happen, at least contributed to that loss of

1 reputation. He breached the legal duties of
2 confidentiality. I put trust in him. I had trust
3 that he wouldn't disclose things that were damaging
4 to me and he disclosed things that were damaging to
5 me without informed consent, without discussing
6 with me. He should have asked me do you mind if I
7 speak to Clint Lucas on your behalf and say such
8 and such and such and such rather than taking a
9 call from Mr. Lucas basically directing him to work
10 on my interpersonal skills.

11 I want to be thorough. I don't
12 understand the rules when you can dismiss things.
13 I apologize for not knowing more.

14 THE COURT: Legal matters we will deal
15 with when you're finished testifying. But you are
16 the witness. So tell me what you heard, saw,
17 touch, felt, smelled, that sort of thing, factual
18 matters. Don't worry about the legal argument.
19 You have to get in the record facts now or
20 otherwise you're going to lose on your legal
21 arguments because there will be no facts in the
22 record to support them. So you need to concentrate
23 on telling me facts right now.

24 MR. SMITH: So back to facts regarding
25 my placement report I will -- read through this

1 report.

2 THE COURT: It's in the record and you
3 pointed out something to me about that. So unless
4 there is something else new or different about
5 that, why don't put this aside because you'll argue
6 the legal significance of that later.

7 MR. SMITH: I would like to -- the one
8 thing I would put in here is that this is the page,
9 the profile for thinking style on page two which
10 Mr. Kessler and my mother was present at that last
11 session went over and it shows good scores in the
12 categories of learning index, verbal skill, verbal
13 reasoning, numeric ability and numeric reasoning.
14 On that this document says 60 percent match with
15 thinking style pattern for industrial production
16 manager and that I have a 64 percent overall match
17 for the industrial production manager position. I
18 contend that this showed -- had Mr. Kessler looked
19 at this prior to December 18th and followed the
20 line of the plan for my treatment, if you will, we
21 would have spent more time looking at the issues
22 with different people and understanding the things
23 I could do with other people that would be in their
24 interest, but we didn't do that.

25 Some of these things would have been to

1 report getting supposedly a neutral third party
2 which was what SAVE and Jonathon Kessler
3 represented to vouch that what I was saying was
4 true, had someone taken time to read e-mail because
5 no one had taken the time to read the e-mails.

6 Now, Mr. Wallinger has suggested that I
7 can't introduce e-mails and you as well because Mr.
8 Kessler did not read them.

9 MR. WALLINGER: Objection. That's not
10 my position.

11 THE COURT: I don't know what documents
12 you are trying to refer to. The one we talked
13 about pretrial specifically we didn't talk about
14 any. But I just told you generally e-mails that
15 you got from other people you need to bring those
16 people in to testify about them because it's things
17 that people said to you and that makes them hearsay
18 to come in and say this is what someone else told
19 me.

20 Again, there's some limitations to --
21 there are exceptions to every rule, but generally
22 speaking, they're hearsay. E-mails that you got
23 from Mr. Kessler, well, those are statements of a
24 party and there is exceptions to the hearsay rule
25 about party opponent statements made outside of

1 court. But just statements that other people made
2 out of court generally speaking are considered to
3 be hearsay.

4 MR. SMITH: Which I tried to introduce
5 to Mr. Kessler. Mr. Kessler as I have read would
6 not review those documents and I suggested the -- I
7 don't want to use the word standard, but I will,
8 that he should have followed as documented in
9 several places required him to take a history of
10 those documents. Mr. Krasilovsky --

11 THE COURT: Are these things you gave
12 him while you were seeing him?

13 MR. SMITH: Yes, and I showed them to
14 him. He basically said put them away, don't bring
15 that folder anymore. It is -- I read it into the
16 record earlier. It's here in his work product in
17 response to litigation where he says don't bring
18 those folders. Let's work on interpersonal skills.
19 If I am able to introduce e-mails it shows that the
20 people -- Clint Lucas described their conduct
21 toward me as hostile. The e-mails clearly show
22 they were hostile. Like a lot of computer geeks
23 they are somewhat lengthy. But they clearly show
24 the hostility and the -- I was subjected to as a
25 condition of employment at Showa Denko.

1 Mr. Kessler could have stepped in and
2 helped me and he did not help me. He refused to
3 listen to my side of the story and read those
4 e-mails. He refused to listen to my side of the
5 story. Instead he bought the company line as
6 articulated by Sara Gainey and Clint Lucas and
7 anybody and refused to listen and read the
8 information that I am trying to get into evidence
9 here. Nobody will read it and so what am I to do?
10 Try to subpoena half of Showa Denko from 75 miles
11 away, bring them to -- 50 miles away down here.
12 That's what I have to do. I tried to do it. If we
13 can take a brief recess and I guess try to
14 introduce them and let him object to it? Is that
15 the way I do that?

16 THE COURT: If you want. Is there
17 anything else that -- because we are going to take
18 a break. But he gets to cross-examine you. Are
19 you finished with your --

20 MR. SMITH: I would like to introduce
21 these e-mails into evidence.

22 THE COURT: Well, why don't you give
23 them to me and let me see what you are talking
24 about.

25 MR. SMITH: Your Honor, can I have a

1 few minutes?

2 THE COURT: Let's take ten minutes. We
3 will come back.

4 (A recess transpired.)

5 THE COURT: What are the e-mails that
6 you want to offer?

7 THE BAILIFF: (Handing.)

8 THE COURT: (Reading.)

9 Let's deal with them one by one. First
10 is one from Clint Lucas to Linda Clemmons, Debbie
11 Peek and courtesy copied to Greg Ruffing, Daniel
12 Pascazio and Jim Kahl. And it says Mr. Tracy Smith
13 accepted the position of IT systems. This is dated
14 March the 10th, 2010. Why are you offering this?

15 MR. SMITH: It shows, Your Honor, that
16 I was hired as a systems engineer and that I had
17 this same level as someone who had been -- Greg
18 Spires who had been there quite some time and I
19 attest that Greg Spires exhibited hostility towards
20 me and basically the other e-mails will show helped
21 turn people against me because I was competition
22 for him.

23 THE COURT: You object?

24 MR. WALLINGER: I do.

25 THE COURT: Pardon?

1 MR. WALLINGER: I object to the
2 e-mails, Your Honor.

3 THE COURT: On what grounds?

4 MR. WALLINGER: Hearsay.

5 THE COURT: All right.

6 MR. SMITH: I tried to present those.
7 I will say not that particular piece there, the
8 other e-mails I tried to present to Mr. Kessler in
9 session and I believe he may have held them once or
10 twice, but we did not talk about them in length.
11 Tried to do that for purposes of diagnosis of the
12 problem.

13 THE COURT: All right. The second
14 group that you have here is looks to be a thread
15 starting around October the 10th of 2011, or if you
16 read backwards they start September 12th, 2011, and
17 then work their way forward to October 10th and
18 like look they are between you and somebody named
19 Greg Spirés.

20 MR. SMITH: Right. He's on the other
21 sheet.

22 THE COURT: Why are you offering these?

23 MR. SMITH: Because they show the
24 hostile work environment I was subjected to and I
25 tried to show those to Mr. Kessler to say here's

1 the problem, how can I resolve this. And I will
2 point out the dates there, the date of the
3 placement report here is August 13th, 2011, so
4 these e-mails happened right after this placement
5 report was performed on me. And if you look at it
6 you will see Greg Spires started the thread. I had
7 been chosen to at least take the placement report
8 for industrial production manager which essentially
9 would have been IT manager and he had not been and
10 he knew that and therefore he started a campaign to
11 discredit me and to turn other people against me.

12 I tried to show that to Mr. Kessler and
13 discuss it at length in session and we never got to
14 that point because we needed to discuss my
15 cognitive behavioral therapy in Mr. Kessler's
16 opinion.

17 THE COURT: All right. So you want --
18 did you show these to Mr. Kessler?

19 MR. SMITH: Yes. That's what he refers
20 to in the confidential work product in response to
21 litigation it says -- he describes them as evidence
22 in data folders, but no, I had a series of e-mails
23 and those in particular I was trying to get him to
24 see and hope that he would help Clint Lucas
25 understand what the problem was.

1 Again, you have to read them a little
2 bit to understand what's going on, but if you
3 understand that Greg Spires had not been chosen for
4 IT manager you understood the demeanor of Mark
5 Little and you understand the comments made in
6 those e-mails, it's easy to understand that they
7 have targeted me at that point. I am --

8 THE COURT: Then you got another set
9 here between October 10th of 2011.

10 MR. SMITH: To explain that I realized
11 I was being targeted at that point. What I did --
12 those are -- the e-mails start, that's the same
13 e-mail thread that starts. I had sent a copy of it
14 to human resources Clint Lucas and so that is where
15 Clint Lucas' reply comes from and also I sent it to
16 Dan Pascazio who is the more -- he was actually
17 above Greg Ruffing who had been copied on that
18 e-mail basically asking him what to do and if I can
19 read them I can explain them. I know -- but
20 basically the way I would have summarized it is
21 that first of all, Greg Spires has told Mark Little
22 basically to target me and to start an e-mail
23 thread complaining about something I put in a
24 routine monthly report that went to Greg Ruffing.

25 And then what happened is basically if

1 you read they say that they feel left out is what I
2 believe you could interpret that e-mail to say.
3 And so I went to Dan Pascazio and I was asking him
4 if we could bring them in a little bit perhaps they
5 would -- this is after I'm -- they know that I am
6 being -- at least having a report done on me for
7 the IT manager, if we could have brought them and
8 they make the comment that I seem to have an agenda
9 that doesn't include them.

10 Well, that's not true. But if you read
11 Dan Pascazio's e-mails telling me basically not to
12 tell them anything about he calls it DARTS 3, it's
13 really just an enhancement to the existing system.
14 But he tries to put a barrier between me and my
15 coworkers which is hard to overcome and again these
16 are office politics. I realize you deal with it,
17 but when it is affecting your livelihood and your
18 work it's of course very important to you.

19 And so I also show you from Clint Lucas
20 who read them and correctly identified them as
21 being hostile to me but also when Clint Lucas asked
22 why would I want to be the one to tell them
23 anything about DARTS 3, I had never told anything
24 about DARTS 3. He was misinterpreting the e-mails.
25 They're not terrible easy to understand, but

1 basically I'm being accused of leaving people out
2 when I'm not leaving people out by my coworkers and
3 then I am being told by Dan Pascazio I don't want
4 you saying anything about this new system which is
5 frankly just a play on Dan Pascazio's part. And
6 then I am told by Clint Lucas that there's hostile
7 resistance and basically why would I want to have
8 anything to say to these people about DARTS 3. The
9 answer is because they are really asking to be
10 brought in on the loop about some of the work that
11 I am doing.

12 THE COURT: Here's what I will do.
13 Because there is -- argument that you could make
14 about well, if you showed these to Mr. Kessler in
15 an attempt to get him to assist you in counseling
16 then that wouldn't be hearsay. That would be --

17 MR. SMITH: Exception. I am sorry.

18 THE COURT: It would not be hearsay
19 because it's not being offered to prove the truth
20 of the matter asserted, that is, what's in them is
21 true, but that you were attempting to get Mr.
22 Kessler to assist you.

23 MR. SMITH: My book says that for
24 diagnosis --

25 THE COURT: You're better off if you

1 let me just finish the train of thought, okay? So
2 I'll just -- I want to take these home. I'm going
3 to take this file home. I'm going to study it
4 tonight because again I haven't had the opportunity
5 -- I was planning on trying another case today.
6 And so I'll take it under advisement, come back in
7 the morning and we will go from there. So let's
8 break for the day. It's almost 5:00. And we will
9 come back in the morning and we will finish with
10 your testimony. I will let you know what I think
11 of your argument on these because I'll go through
12 the file and familiarize myself with it a little
13 bit more. And then after you finish with your
14 direct testimony Mr. Wallinger will have the
15 opportunity to cross-examine you and then we will
16 hear any other witnesses that you have if you have
17 any and then we will go from there.

18 Now, I don't know whether or not we
19 will finish tomorrow. I don't know where -- how
20 many people you plan to call and they plan to call.
21 But I think I mentioned the reason why I swapped
22 was I'm going to a funeral in Greenville on
23 Wednesday. So if we don't finish tomorrow we will
24 resume on Thursday because this funeral is one of
25 our retired judges died and we are -- it is set for

1 2:00 and it's a three-hour drive. So it
2 effectively takes out Wednesday. So we will see
3 where we get tomorrow and whether or not we need to
4 finish on Thursday. That work for you?

5 MR. WALLINGER: Your Honor, it does. I
6 have two fact witnesses that are under subpoena
7 that I planned to have here late morning tomorrow.
8 My expert witness is flying in to arrive midday,
9 would like to fly home tomorrow night because --

10 THE COURT: He probably will.

11 MR. WALLINGER: I would just like to
12 point out if for some reason things run long I
13 would like to try to take him out of order.

14 THE COURT: We can accommodate you on
15 that because it is not jury so I won't be as
16 confused as the jury might be.

17 MR. WALLINGER: Thank you.

18 THE COURT: Okay. Let's resume back
19 tomorrow at 9:30.

20 (These proceedings were adjourned at
21 4:51 p.m., June 5, 2017, Charleston County, South
22 Carolina.)
23
24
25

1 (The following proceedings continued June 6,
2 2017 at 9:30 a.m.)

3 THE COURT: All right. When we left
4 yesterday, we had Mr. Smith on the stand who was on
5 direct examination. He asked about admitting some
6 documents in over objection. I had said I wanted
7 to read them, but I am inclined to let them in as
8 not being offered for the truth of the matter
9 asserted, and I conclude that that's still why they
10 should be allowed in. So I will allow those in.

11 (PLF. EXH. 6-6B in evidence.)

12 Now, do you have anything else that you
13 want to say on your direct examination?

14 MR. SMITH: Yes, Your Honor, I do have
15 a few more.

16 THE COURT: All right. You need to go
17 back on the witness stand then. You are still
18 under oath. What would you like to say?

19 MR. SMITH: Good morning. I would like
20 to introduce the SAVE, Inc. Your Rights Under the
21 Health Insurance Portability Act of 1996. I'll
22 read and then submit them.

23 THE COURT: What is this?

24 MR. SMITH: These are contracts as the
25 patient that I received when getting counseling

1 from SAVE and Jonathon Kessler.

2 THE COURT: This is a contract between
3 you and who?

4 MR. SMITH: And SAVE, Inc.

5 THE COURT: Okay. Do you have any
6 objection to it coming into evidence?

7 MR. WALLINGER: I don't, Your Honor. I
8 actually have the entire file that SAVE maintained
9 on Mr. Smith which I am planning to introduce at
10 whatever point I offer evidence and that is part of
11 that information so...

12 THE COURT: Okay. It's admitted into
13 evidence then as Plaintiff's Exhibit number --
14 what's the next number then? Do you have it
15 premarked?

16 MR. SMITH: No, I don't.

17 THE COURT: We can do 4 and 5 or 7. Do
18 you have a 4 and 5 you had already premarked?
19 Okay. Let's make that Plaintiff's Exhibit 4. Give
20 it to the court reporter so she can put one of her
21 stickers on it.

22 MR. WALLINGER: Your Honor, could I see
23 the document to make sure that that's what I think
24 it is?

25 THE COURT: Sure. Go ahead.

1 MR. SMITH: The actual original is a
2 yellow copy and I'm fine with submitting either
3 one. I just had that copy.

4 THE COURT: It doesn't matter as long
5 as it's a copy of it and not a fake. That's where
6 we are going.

7 (PLF. EXH. 4 was marked for
8 identification and admitted into evidence.)

9 THE COURT: Plaintiff's Exhibit 4 is
10 now in evidence. All right. What do you want to
11 tell me about it.

12 MR. SMITH: Again, I don't want to read
13 the entire thing. Let me try to jump to the most
14 relevant parts. It states -- and I'm not exactly
15 sure of the order. These are two pages. They're
16 the same exhibits. Under confidentiality. SAVE,
17 Inc. will not voluntarily share any information
18 concerning your use of the EAP with anyone at your
19 job, your home or any other person and/or
20 organization without your prior knowledge or
21 written consent except if one of the following
22 apply: And including that is a mandatory referral
23 by a supervisor or manager.

24 So my case was a mandatory referral as
25 I understand it. Says see below. Supervisory.

1 Employees that had been required or mandated by
2 their supervisor or human resources department to
3 contact us are considered supervisory referred.
4 The following protocol applies. The supervisor
5 generally calls Save, Inc to inform of the pending
6 supervisor referral. After the initial appointment
7 supervisor or HR contact will be informed of
8 whether or not the appointment was kept and --

9 THE COURT: Hold on a second. Can you
10 read a little bit slower because people read really
11 fast and she has got to keep up with it.

12 MR. SMITH: I do apologize, Your Honor.

13 THE COURT: Okay.

14 MR. SMITH: After the initial
15 appointment the supervisor or HR contact will be
16 informed whether or not the appointment was kept
17 and if a plan to resolve the problem has been
18 formulated. Personal information shared during the
19 appointment will not be discussed with your
20 employer. Supervisory referred employees
21 acknowledge and accept that the EAP will notify the
22 referring person of the kept or missed appointment
23 and whether a plan to solve the problem has been
24 devised.

25 All information revealed by you to our

1 therapist or in your records is considered
2 protected health information under HIPAA unless
3 otherwise noted below and cannot be distributed to
4 anyone else without your informed and voluntary
5 written consent.

6 THE COURT: All right.

7 MR. SMITH: And reading from Jonathon
8 Kessler's deposition, which I can enter -- I am
9 sorry.

10 THE COURT: When you are finished with
11 your testimony you can enter that in. But you're
12 testifying now.

13 MR. SMITH: So his statement or Sara
14 Gainey's statements I can't introduce even though
15 I'm a first party to them?

16 THE COURT: That's his deposition,
17 right?

18 MR. SMITH: Yes, it is.

19 THE COURT: All right. When you finish
20 testifying you can put that into evidence. But you
21 don't put it into evidence while you're testifying.
22 You just tell me your side of the story, what you
23 want me to know. Later on you will have the
24 opportunity to put that deposition in or whatever
25 parts of it you want and then on argument you can

1 say well, here's what I say, here's what he says,
2 here is where they differ.

3 MR. SMITH: I am trying to prove what
4 the document says and what Mr. Kessler says are
5 different.

6 THE COURT: Well, you don't get to
7 refresh your testimony based on his deposition.
8 That's a separate piece of evidence.

9 MR. SMITH: I will -- it is my personal
10 knowledge and belief that he did not follow the
11 terms of the contract as I have just described,
12 just read in this document.

13 THE COURT: Tell me what you think he
14 did.

15 MR. SMITH: He believed that I had
16 informed and consented to the disclosures that he
17 made to my employer and I did not receive the
18 appropriate explanation. There was no plan agreed
19 to as to what the course of a treatment should be
20 before he discussed things with Clint Lucas. I
21 never consented to the disclosures he made to Clint
22 Lucas.

23 I would like to introduce a document
24 from the exempt orientation I took with Showa Denko
25 on March 29th, 2010. This is a part of the -- I

1 believe this came from Mr. -- the personnel file
2 you obtained from Showa Denko, Mr. Wallinger
3 obtained from Showa Denko.

4 THE COURT: Any objection?

5 MR. WALLINGER: I'd just like to see
6 it.

7 THE COURT: All right.

8 (Handing.)

9 MR. WALLINGER: Your Honor, I don't
10 have any objection. I don't know if those are all
11 the pages of the document, but it appears to be a
12 copy of something I have seen before.

13 (PLF. EXH. 5 was marked for
14 identification.)

15 MR. SMITH: This is a document that has
16 a number of statements as Clint Lucas explained to
17 me in person regarding what my duties were and
18 expectations in taking the job at Showa Denko. And
19 let me just jump to the important point again.
20 Under the heading supervisor manager most important
21 duties which has a check box here, No. 1 is safety
22 of colleagues and 2 is to accomplish company
23 objectives through people separating your
24 responsibility from friendship.

25 And Mr. Lucas explained a fair little

1 bit about that to me and I would like to tell the
2 Court what my understanding was.

3 MR. WALLINGER: Objection, hearsay.

4 THE COURT: Who is Mr. Lucas?

5 MR. SMITH: The HR director who has
6 been cited on the e-mails who told me what my job
7 responsibilities were.

8 THE COURT: All right. Well, he is not
9 a party. So for you to tell me what he said would
10 be hearsay.

11 MR. SMITH: Can I tell you what I
12 understand?

13 THE COURT: You can tell me what you
14 understand.

15 MR. SMITH: Right.

16 THE COURT: You can't say this is what
17 somebody told me.

18 MR. SMITH: I am simply saying that
19 this was --

20 THE COURT: You can tell me what your
21 understanding is of that document.

22 MR. SMITH: Right. And Clint Lucas
23 gave me this document.

24 THE COURT: It may be. I am trying to
25 explain to you you can't just tell me what somebody

1 else said because they have the right to
2 cross-examine and they can't cross-examine that
3 person if he's not here.

4 MR. SMITH: Um-hmm. Clint Lucas gave
5 me this document. My understanding of this
6 document is that and the statement I just read was
7 that the organization had suffered a bit from group
8 think. Another way to describe that is from peer
9 pressure on making technical decisions rather than
10 simply looking at the problem and assessing the
11 technical needs of the company. There was a fair
12 amount of group think as a word I would like to
13 use, peer pressure into what decision would best
14 suit a peer of people rather than the company
15 itself.

16 And this goes to the statement that Mr.
17 Kessler makes in his work product to Mr.
18 Krasilovsky that I stated that I play the course
19 and not the people. I would suggest it was my
20 understanding that was what the company needed and
21 wanted was someone who would rather objectively
22 look at the problems the company was having in its
23 IT systems and not be overly influenced by peer
24 pressure as the document describes separating your
25 responsibility from friendship.

1 Now, in the subject of an e-mail if I
2 have written the e-mail, I can attest this is the
3 document I have written and sent?

4 THE COURT: Correct.

5 MR. SMITH: Okay. So I would like to
6 introduce this e-mail as the next exhibit. Does
7 Mr. Wallinger need to review this?

8 MR. WALLINGER: I do, Your Honor. I
9 don't know what he is talking about.

10 THE COURT: Okay.

11 MR. SMITH: These were in the white
12 notebook.

13 THE COURT: Normally if you were the
14 lawyer you would just be standing there and you
15 hand it to him before so that there is no
16 surprises, but we don't have that.

17 MR. SMITH: I am sorry for being
18 difficult.

19 THE COURT: That's okay.

20 MR. SMITH: This may be somewhat
21 favorable towards for what it's worth -- Mr.
22 Wallinger.

23 MR. WALLINGER: Your Honor, this is a
24 four page document that includes some e-mails sent
25 by Mr. Smith to others. There is a reply e-mail on

1 the page numbered two from Mr. Sneed back to Mr.
2 Smith and copied to Mr. Wing that I contend would
3 be hearsay. I would object to the middle e-mail
4 being considered as evidence. Subject to that I
5 have no objection to the document.

6 THE COURT: It is admitted.

7 MR. SMITH: The portion I sent is right
8 there.

9 THE COURT: It's admitted. Okay. Go
10 ahead.

11 (PLF. EXH. 7 was marked for
12 identification and admitted into evidence.)

13 MR. SMITH: So on Monday September 17,
14 2012, at 9:04 a.m. I sent an e-mail to Warren Sneed
15 and copied John Wing. The subject of the e-mail
16 was thanks for re-enabling ping on the 103 network.
17 The e-mail I sent reads, "Warren, thanks for
18 re-enabling ping on the 103 network. This makes it
19 much easier for me to insure that machines are
20 available and are communicating with each other.
21 Can you notify the IT team when you make these
22 types of changes? Both Bob and Stan thought it was
23 working also until I showed the time outs." And it
24 includes that one is hard to read, a graphic that
25 showed the network communication between several

1 machines was not working properly and I will attest
2 that that caused problems with some of my work,
3 some of the systems that I wrote that depended on
4 this particular system.

5 • Again, Warren Sneed acknowledges
6 receipt of this and copies John Wing back on this
7 e-mail. Is it okay to read his e-mail?

8 THE COURT: Is there some reason why
9 you want me to know it?

10 MR. SMITH: Yes.

11 THE COURT: What's that?

12 MR. SMITH: It has to do with the
13 e-mails you have from -- the other e-mails that you
14 have; it shows that people made changes without
15 communicating that they were making changes on a
16 routine basis.

17 THE COURT: Let me help you out here
18 just a second. I'm not interested in getting down
19 into the weeds about the difficulties you were
20 having.

21 MR. SMITH: No one seems to be, Your
22 Honor.

23 THE COURT: Pardon? It is no reason --
24 I can't adjudicate whether or not you were properly
25 fired, whether or not you really were justified in

1 your feelings. The lawsuit that you have here is
2 about your allegations with Mr. Kessler, not all of
3 those things about whether or not you were right or
4 wrong in your disputes with your other employees.
5 I know it's a problem for you. But it's not why
6 you're here. I can't resolve those problems. I
7 can only deal with your lawsuit with Mr. Kessler so
8 we are --

9 MR. SMITH: Yes, I presented this to
10 Mr. Kessler as well as tried to discuss it. It is
11 moderately technical in nature, but --

12 THE COURT: Again, I can't resolve that
13 dispute. If you have got something that you said
14 he did wrong, then we will go with that. But I
15 don't really need to get down into the weeds about
16 whether or not you were really justified in how you
17 felt about your fellow employees.

18 MR. SMITH: Can I address Mr.
19 Krasilovsky's written opinion at this point or
20 should I wait until Mr. Krasilovsky appears in
21 court?

22 THE COURT: That would be the
23 appropriate time.

24 MR. SMITH: Your Honor, in Mr.
25 Kessler's can I call -- the document has a long

1 title, work product document for Mr. Krasilovsky,
2 Mr. Kessler describes my assertion that I'm best
3 qualified to be the IT manager as grandiose and to
4 address I would like to submit a couple of
5 documents which are my college diploma and my
6 Microsoft certified systems engineering
7 certification which were obtained through -- these
8 are the copies that Showa Denko gave to Mr.
9 Wallinger.

10 THE COURT: This is something that you
11 want to offer into evidence?

12 MR. SMITH: Yes, to refute Mr.
13 Kessler's statement that I was grandiose for
14 believing --

15 MR. WALLINGER: No objection.

16 THE COURT: It is admitted as
17 No. 8.

18 (PLF. EXH. 8 was marked for
19 identification and admitted into evidence.)

20 MR. SMITH: I have to wait to address
21 Sara Gainey's statements until Sara Gainey is here
22 from the deposition?

23 THE COURT: You can offer something
24 about it later, but you don't put it in during your
25 testimony.

1 MR. SMITH: My understanding from my
2 relationship with SAVE and Ms. Gainey was that they
3 had a duty to me as an individual patient and that
4 there was a doctor/patient relationship. I will
5 leave it at that for now. I would like to offer
6 another e-mail that I sent on September 6th, 2012,
7 to John Wing and Clint Lucas.

8 THE COURT: Have you seen this?

9 MR. SMITH: These documents are
10 attached -- let me tear this one off.

11 MR. WALLINGER: No objection.

12 THE COURT: Admitted. Plaintiff's
13 Exhibit 9.

14 (PLF. EXH. 9 was marked for
15 identification and admitted.)

16 MR. SMITH: Your Honor, I do appreciate
17 the Court's attention to this matter and I
18 apologize if I'm not particularly proficient at it.
19 It's just --

20 THE COURT: A lot of lawyers aren't so

21 --

22 MR. SMITH: This was an e-mail that I
23 sent and this had occurred after the -- where I had
24 been reported to -- this is where I had been
25 reported to HR regarding my conversation with

1 Robert Park where I do admit we used some foul
2 language and that was the reason I was referred to
3 SAVE, mandated that I go to SAVE.

4 To John Wing and Clint Lucas, feedback
5 regarding the conversation among you, myself and
6 Warren. John, if possible, I would like some
7 feedback regarding the conversation among you,
8 myself and Warren that occurred at 2:00 p.m. on
9 9-6-2012 in the 730 conference room. Larry
10 Weathers also expressed very similar sentiments
11 towards me. I would have to describe Warren's tone
12 as hostile. Much of his commentary during this
13 conversation used the strong man take to
14 misrepresent my views and generally not allow me to
15 respond or converse in a reasonable civil manner.
16 Much of this discussion could have been
17 characterized as a rant. I did not raise my voice
18 and tried hard to find points of substantive
19 agreements so we could ratchet the discussion down
20 to a more civil tone. Warren seemed unwilling to
21 converse on these terms. I am sorry that Warren
22 dislikes me. I will do the best to work -- my best
23 to work with him at SDKS. That was September 6th,
24 2012.

25 The reason this is important is it

1 occurred right after I basically had come back to
2 work after being written up and was trying to have
3 a discussion with Warren and Warren basically
4 exploded on me. He threw papers on the floor
5 literally and stomped out of the room and slammed
6 the door. I was calm and collected and just
7 reported it to the best of my ability to my
8 immediate supervisor and to HR. I presented this
9 and Mr. Kessler never took the time to read and
10 understand it.

11 There is one more, Your Honor, if I can
12 put my hands on it. SAVE. Once I leave the
13 testimony I won't be submitting any documents after
14 that; is that true?

15 THE COURT: Pardon?

16 MR. SMITH: Once I leave this stand
17 here I cannot submit any more documents into
18 evidence?

19 THE COURT: No, if you had other
20 witnesses you could put them in through them.

21 MR. SMITH: When I am cross-examining
22 one of Mr. --

23 THE COURT: Then you could put it in if
24 it is relevant at the time.

25 MR. SMITH: Okay. I feel like this is

1 my last shot. I don't mean to drag things on. I
2 am trying to be as thorough as I can.

3 THE COURT: It's your day in court.

4 MR. SMITH: Thank you, sir, Your Honor.
5 I will introduce one other document. Areas of
6 responsibility for the IT department. Department
7 is spelled wrong. This was a document actually
8 obtained through Nexsen Pruet's counsel in the
9 matter of Smith versus Showa Denko. Mr. Wallinger
10 may want to look at it. It basically just shows
11 the systems I was responsible for.

12 THE COURT: Hold on. He wants to look
13 at it.

14 MR. SMITH: Okay.

15 MR. WALLINGER: No objection.

16 THE COURT: All right. It is No. 10.
17 Marked and admitted.

18 (PLF. EXH. 10 was marked for
19 identification and admitted into evidence.)

20 MR. SMITH: Basically this just shows
21 that I was responsible for various systems
22 including hardware systems and would highlight and
23 I have little dashes on the side of ones that have
24 my name there. But that SDKC net and SDKC comp.com
25 were systems that I was intimately familiar with,

1 maintained both hardware and software and the
2 programming code that allowed them to run. And
3 this document was prepared by John Wing although
4 his name does not appear on it. I attest it was
5 given to me at a point in time by John Wing, but I
6 actually received a copy again through Nexsen Pruet
7 in that matter. I believe this document is
8 legitimate.

9 Your Honor, I am hesitant to ask, I'm
10 going to ask. Is it -- I received a settlement
11 offer from -- not this -- not Mr. Kessler, but Mr.
12 Gresh who represents Sara Gainey. As a layperson
13 first of all, I know there is a settlement
14 agreement that I have agreed not to disclose with
15 myself and Showa Denko. I frankly have no problem
16 with the terms being disclosed, but I'm not
17 supposed to disclose any of the terms of the
18 agreement. I have read recently a little bit about
19 compounding agreements and some of that so I am
20 doing the best I can to salvage my reputation and I
21 have no problem with that agreement being reviewed
22 by the Court, I just want to state that first of
23 all.

24 Second of all, this agreement presented
25 to me, and I understand that had it come from Mr.

1 Wallinger it would probably be something I
2 shouldn't even talk about here; it came from the
3 counsel of Sara Gainey. Is there -- should I not
4 -- should I introduce a document like that?

5 THE COURT: What's its relevance to
6 this lawsuit? Is it with another party?

7 MR. SMITH: It doesn't release Mr.
8 Kessler.

9 THE COURT: Okay. They aren't claiming
10 that they are bound by a release, are you?

11 MR. WALLINGER: I think he is talking
12 about two issues. The first is that after Mr.
13 Smith sued Showa Denko in Dorchester County, what
14 appears to have been fairly protracted litigation
15 frankly, they settled the case under a confidential
16 agreement and dismissed that case with prejudice.

17 I don't foresee me seeking to offer any
18 particular evidence about that agreement now he
19 just mentioned so I don't have any position on that
20 yet. With regard to the settlement gesture or
21 offer or whatever it is that was made by Ms.
22 Gainey's lawyer to him relative to an effort to
23 settle the separate case he brought against Ms.
24 Gainey in Charleston County, while I can't speak
25 for Mr. Gresh who is not here or Ms. Gainey who I

1 don't represent, my position would be it's
2 irrelevant and that beyond it being irrelevant it
3 is I suspect a Rule 408 protected communication and
4 I haven't seen what he's referring to. My position
5 is that it is not something the Court needs to
6 consider for purposes of what we're litigating
7 here.

8 THE COURT: Typically settlements are
9 -- they're not -- between other parties are not
10 relevant to our lawsuit and so for evidentiary
11 value I don't know what it would be. She is not a
12 party. He's a party. It's his. I said this was
13 your day in court. It is also his day in court and
14 the fact that you settled with somebody else that
15 he sued or that you sued shouldn't be held for or
16 against him.

17 MR. SMITH: I did not settle, first of
18 all, with the party. And the document specifically
19 excludes Mr. Kessler personally from being covered
20 by the settlement agreement.

21 THE COURT: Okay. So why would it
22 possibly be relevant in this lawsuit then?

23 MR. SMITH: I don't know this -- who
24 protects him, who his insurer is and whether or not
25 his insurer has his best interest.

1 THE COURT: That's between him and his
2 insurer, but there's no reason for a settlement
3 between another party to come in evidence in this
4 courtroom in this case.

5 MR. SMITH: Okay. So I won't bring it
6 in but, Your Honor, the question of whether or not
7 these parties are separate, I believe if you --
8 when we made opening statements yesterday I believe
9 Mr. Wallinger said that and Ms. Gainey admitted
10 that she was Mr. Kessler's direct supervisor, all
11 funding went through Mr. Kessler and I question
12 whether or not they are separate parties.

13 THE COURT: Well, they are because you
14 haven't sued her in this case.

15 MR. SMITH: Well, I am suing Mr.
16 Kessler because I assumed at the time he is a
17 separate party. I still don't know if he's not a
18 separate party when it comes down to the issue.

19 THE COURT: You brought the lawsuit.
20 You only sued him.

21 MR. SMITH: That's right. That's
22 right.

23 THE COURT: So let's just move on to
24 something else because I don't see where you are
25 going with the settlement and it is not relevant.

1 MR. SMITH: Sara Gainey was his direct
2 supervisor and handled all relationships between
3 Mr. Kessler and my employer from a contractual
4 standpoint and that's why I have been trying to
5 find out if there was documents related to that
6 contractual relationship. Sara Gainey also says
7 that she is bound by this document that the Court
8 so far has discouraged me from putting into
9 evidence.

10 I believe that she says that she was
11 bound by this document from the Employee Assistance
12 Certification Commission and as I've asserted
13 before, I believe Mr. Kessler is bound by this
14 document. I would like to introduce this document
15 into evidence or have a ruling that it cannot be --

16 THE COURT: This is the settlement?

17 MR. SMITH: This is the standard, the
18 clients bill of rights from the Employee Assistance
19 Certification Commission which was presented to Ms.
20 Gainey during deposition and which Ms. Gainey says
21 governs her practice.

22 THE COURT: Mr. Wallinger, do you have
23 an objection?

24 MR. WALLINGER: Is that the document
25 that the Court decided overnight would be admitted

1 for whatever purpose or is that --

2 MR. SMITH: I don't know that we have a
3 ruling on it.

4 THE COURT: He's asking I guess to have
5 it introduced into evidence.

6 MR. WALLINGER: I object for the same
7 reasons I gave as to the internet source standards
8 of care that were discussed yesterday.

9 MR. SMITH: This document presented --

10 THE COURT: Can you get the document
11 from him?

12 THE BAILIFF: Yes, sir.

13 MR. SMITH: This is a document that
14 according to the document should have given to me
15 by Sara Gainey. I think they used the term made
16 available to me as when I was at SAVE. It is
17 written in layperson terms and designed as a kind
18 of general --

19 THE COURT: Let me ask you this: Are
20 you still offering an expert?

21 MR. WALLINGER: Yes, sir.

22 THE COURT: Okay. Why don't you just
23 save this for cross-examination of that person.

24 MR. SMITH: Okay, Your Honor.

25 THE COURT: You are trying to bootstrap

1 yourself into expertise and saying this is the
2 standard of care when you are going to have an
3 expert who is going to say what the standard of
4 care is and you can cross-examine him as whether or
5 not that document is or is not, okay?

6 MR. SMITH: Okay. Thank you, Your
7 Honor. Again, I finish by saying that it is my
8 belief that when I was being treated by Mr. Kessler
9 and at SAVE and the offices of SAVE that they had a
10 duty to me to protect my interests, to be loyal, to
11 be -- to be trustworthy, to show reasonable
12 discretion in any disclosures that they made. As
13 the form says, the standard is informed consent and
14 I was not given informed consent.

15 I also state Mr. Kessler had a duty to
16 take an adequate history and have an adequate
17 understanding of my work environment in his role as
18 an employee assistance professional and that he
19 breached that duty, that he decided what the plan
20 of action, plan of care should be without my
21 informed consent and then I was damaged as a result
22 of those breaches. I believe he was acting as an
23 employee assistance professional wearing that hat
24 and that he is therefore bound by the standards of
25 an employee assistance professional as a matter of

1 law.

2 Should I introduce -- statues don't
3 have to go into evidence, right? I don't need to
4 introduce a statute into evidence?

5 THE COURT: What statute is that?

6 MR. SMITH: It's about the Unfair Trade
7 Practices Act.

8 THE COURT: No, you don't have to put
9 that into evidence.

10 MR. SMITH: Okay. I of course have
11 asked for leave to amend my complaint to include a
12 claim for unfair trade practice act under the
13 Unfair Trade Practice Act which basically any
14 deceptive and my understanding of the law is it
15 does not have to be intentionally deceptive. I
16 assert that he was intentionally deceptive, but
17 that statute requires a pattern of deception that
18 is repeatable and I believe that the evidence in
19 total and his general mode of practice is unfair
20 and damaging to people in a situation like I found
21 myself at Showa Denko. I'll -- do I rest? Is that
22 what I say?

23 THE COURT: Well, he gets to
24 cross-examine you. Why don't we take about 10
25 minutes so that you can compose yourself and use

1 the restroom and come back in ten minutes and he
2 can begin cross-examination.

3 (A recess transpired.)

4 THE COURT: The package of e-mails
5 along with Linda Clemmons and thread that I told
6 you I was taking under advisement yesterday that I
7 let in this morning I don't believe ever got
8 marked. So we will mark those as Plaintiff's
9 Exhibit 11 collectively.

10 (PLF. EXH. 11 was marked for
11 identification and admitted.)

12 THE COURT: Ready for cross?

13 MR. WALLINGER: Yes, Your Honor,
14 briefly.

15 THE COURT: Yes, sir.

16 CROSS-EXAMINATION

17 BY MR. WALLINGER:

18 Q. Mr. Smith, you applied to work at Showa
19 Denko Carbon in 2010; is that correct?

20 A. I believe that's correct, yes.

21 Q. I would like to mark this exhibit
22 please, two pages.

23 (DFT. EXH. 1 was marked for
24 identification.)

25 MR. WALLINGER: Your Honor, may I

1 approach?

2 THE COURT: Yes. You don't have to ask
3 permission.

4 BY MR. WALLINGER:

5 Q. Mr. Smith, I'm going to hand you what's
6 been marked as defense Exhibit 1 which is a two
7 page document, is a copy of the application for
8 employment. Would you please look at that briefly
9 and tell me if you recognize that as being
10 application you made to Showa Denko Carbon?

11 A. Yes, it does appear legitimate, yes.

12 Q. And the second page at the bottom, does
13 that have your signature?

14 A. Yes.

15 Q. All right. If we look at the second
16 page down at the bottom, there are some paragraphs
17 just above your signature that start where I am
18 pointing here and go all the way to the area right
19 above your signature; do you see that?

20 A. I do. I'm not sure I can read them
21 actually, but I do see that.

22 Q. Okay. If you will hand that back to me
23 very briefly. I realize that it is small, but I
24 would like you to read the last sentence I'll call
25 it that's right above the date March 29, 2010, that

1 starts with I understand that this.

2 A. This is hard to read. "I understand
3 that this is not a contract for employment. I
4 understand and agree that if hired my employment is
5 at will for no definite period and may regardless
6 of the date of payment of my wages and salary be
7 terminated at any time without any prior notice at
8 the company's sole discretion."

9 MR. WALLINGER: Your Honor, I would
10 offer that.

11 THE COURT: All right. Defendant's
12 Exhibit 1. Do you have any objection?

13 MR. SMITH: No, other than it's
14 probably the first time I ever read that paragraph,
15 it's so small.

16 THE COURT: It is admitted.

17 (DFT. EXH. 1 in evidence.)

18 MR. WALLINGER: I would like to mark
19 Defendant's Exhibit 2.

20 (DFT. EXH. 2 was marked for
21 identification.)

22 BY MR. WALLINGER:

23 Q. Mr. Smith, I'm going to hand you a
24 three page document that's been marked as
25 Defendant's Exhibit 2. The first page is a letter,

1 the second and third pages appear to be what I
2 would call work history. Could you look at that
3 and tell me if you recognize those three documents,
4 please.

5 A. (Witness complies with request.) Yes,
6 I believe this is my letter probably sent to Showa
7 Denko, sure. Kind of a skills page and then a list
8 of work history, right.

9 Q. All right. So the first page is a
10 letter that you provided Showa Denko expressing
11 essentially an interest in applying for employment
12 among other things; is that right?

13 A. Yes, um-hmm.

14 Q. The second and third pages are part of
15 a summary of your experience, in particular your
16 employment background at the time that was
17 submitted; is that correct?

18 A. Yes.

19 Q. Can we agree that your employment with
20 the College of Charleston in 1995 and 1996 is not
21 listed among the positions that you described in
22 chronological order?

23 A. Does not appear to be.

24 Q. All right. Thank you. Could I have
25 that back. All three pages. Your Honor, I would

1 offer this.

2 THE COURT: Any objection?

3 MR. SMITH: No objection.

4 THE COURT: Admitted.

5 (DFT. EXH. 2 in evidence.)

6 BY MR. WALLINGER:

7 Q. Mr. Smith, you worked for the College
8 of Charleston in the mid 90's, correct?

9 A. I did. I worked after I worked at SCRA
10 as I recall, um-hmm.

11 Q. And you were terminated by the College
12 of Charleston when you worked there in IT; isn't
13 that correct?

14 A. Yes, um-hmm.

15 (DFT. EXH. 3 was marked for
16 identification.)

17 BY MR. WALLINGER:

18 Q. I have here a two page document. The
19 first page is a business record produced to me by
20 the College of Charleston which I have previously
21 produced to you and the second page is a letter
22 from general counsel for the College of Charleston
23 produced to me with this document discussing this
24 is a regularly conducted inside record. I would
25 ask you to review the first page which is the

1 matter under concern and you recognize that
2 document, don't you?

3 A. Honestly I am reading it now. I have
4 not reviewed it.

5 Q. Sure, go ahead.

6 A. (Reading document.) It's not signed by
7 anyone.

8 Q. Let me know when you have finished
9 reading it.

10 A. Okay.

11 Q. All right. Now, I would expect you
12 will testify that you will take issue with the
13 reason you were terminated by the College of
14 Charleston and that you do not believe you were
15 terminated for any problem in your performance; is
16 that true?

17 A. Can you repeat what you just said?

18 Q. All right. Let's just strike and start
19 over. I'm going to hold this and try to stand over
20 here next to you so we can work off one document.

21 THE COURT: Are you offering that into
22 evidence?

23 MR. WALLINGER: I will after I get him
24 to --

25 MR. SMITH: It is not signed by anyone.

1 THE COURT: It's an unsigned letter
2 from somebody else to you? How is it not hearsay?

3 MR. SMITH: Thank you, Your Honor.

4 THE COURT: Let me deal with this.

5 MR. WALLINGER: Parts of this letter
6 are not hearsay under 803 (6).

7 THE COURT: It's a business record?

8 MR. WALLINGER: Yes, sir.

9 THE COURT: It's something that's put
10 in his personnel file? Who is it from and to?

11 MR. WALLINGER: I will let Your Honor
12 look at it. It is from the director of
13 administrative computer services.

14 THE COURT: Who is it to?

15 MR. WALLINGER: It look likes it's a
16 memo file to someone in the college as best I can
17 tell. I want to ask the witness whether the
18 witness agrees with the reason that the witness was
19 terminated from that position.

20 THE COURT: You can ask him what his
21 reason was. But unless you got somebody here to
22 authenticate that as a business record it's a --

23 MR. SMITH: It is not signed.

24 MR. WALLINGER: It's authentic.

25 THE COURT: It's on a piece of letter,

1 doesn't even say who sent it.

2 MR. SMITH: Par for the course, Your
3 Honor. Sorry.

4 THE COURT: I don't know how I can say
5 that's part of a business record when it's
6 addressed to a Marcia Moore and not signed. It is
7 never signed by anybody. So unless you can get
8 somebody from the College of Charleston here that
9 can enlighten me on that, that's not a business
10 record.

11 MR. WALLINGER: All right. Well, I
12 haven't offered it yet. What I would like to do is
13 ask the witness some questions based upon his
14 understanding of what that information is
15 regardless whether or not he agrees with it.

16 THE COURT: You may.

17 BY MR. WALLINGER:

18 Q. All right. Mr. Smith, the fact is you
19 were terminated by the College of Charleston
20 because you were not able to work effectively as
21 part of the team there; isn't that correct?

22 A. No, I would disagree with that. As I
23 recall, I was terminated -- should I give more of
24 an explanation?

25 Q. Please.

1 THE COURT: Well, you can if you want.
2 Right now he is asking questions and on
3 cross-examination you answer his question yes or
4 no. If you need to explain your answer you can do
5 that. Otherwise you will have the opportunity when
6 he is finished to testify on redirect and explain
7 anything that you feel like you need to address as
8 a result of what he brought up.

9 MR. SMITH: Yes, Your Honor.

10 THE COURT: Okay?

11 BY MR. WALLINGER:

12 Q. All right. Mr. Smith, briefly explain
13 why you believe you were terminated by the College
14 of Charleston?

15 A. I recall it was right before I was one
16 year into -- after I would have passed one year, I
17 would have had a type of tenure as I recall it.
18 And I believe they terminated right before that
19 period so that I wouldn't have a -- tenure is not
20 the right word, but there was a -- same way at
21 MUSC. There was a period of time which you cannot
22 be easily terminated and had some other job
23 security. I would have to research to tell the
24 truth, but that is my recollection. I realize it
25 happened right before a one year anniversary.

1 Q. Can we agree that you did not tell
2 Showa Denko Carbon when you applied for employment
3 there that you had previously been terminated by
4 College of Charleston?

5 A. It is not on my resume so I probably
6 didn't tell them. I didn't verbally discuss many
7 of the assignments that I would stipulate. I don't
8 know that every assignment I have ever done is on
9 that resume either.

10 Q. All right. Now moving on.
11 (DFT. EXH. 4 was marked for
12 identification.)

13 MR. SMITH: Your Honor, can I ask that
14 letter be introduced? Is it introduced into
15 evidence, the --

16 THE COURT: The one that we talked
17 about? It is not in evidence.

18 BY MR. WALLINGER:

19 Q. I want to fast forward to September of
20 2012. I'm going to hand you a two page document
21 that's entitled Showa Denko Carbon, Inc. positive
22 discipline procedure and ask you if you recognize
23 that document.

24 A. Yes, I do.

25 Q. And does that document have writing by

1 you on the first page at the bottom?

2 A. Yes.

3 Q. Okay. And can we agree that back at
4 the time that document was first shown that you
5 looked at it and read what is on it?

6 A. Yes.

7 Q. And does that document indicate the
8 reason that you were being asked by your employer
9 to seek counseling through SAVE?

10 A. It indicates a reason, that they stated.
11 I would -- I do not agree that that was the actual
12 reason.

13 Q. Could I have it back briefly?

14 A. (Witness complies with request.)

15 Q. On the second page of the document did
16 you sign it on September 9th, 2012?

17 A. I believe that is September 4th, 2012.

18 Q. Okay.

19 MR. WALLINGER: Your Honor, I will
20 offer that.

21 THE COURT: Any objection?

22 MR. SMITH: No objection.

23 THE COURT: It is admitted as No. 4.
24 Three was your previous one from the College of
25 Charleston and was not admitted.

1 MR. WALLINGER: That's correct. That
2 will be marked for identification.

3 (DFT. EXH. 4 in evidence.)

4 BY MR. WALLINGER:

5 Q. Mr. Smith, you went to SAVE, Inc. in
6 2012, correct?

7 A. Yes.

8 Q. And you initially had two meetings with
9 Ms. Gainey at SAVE, Inc.; is that correct?

10 A. That sounds -- yes, that sounds right.

11 Q. And then your meetings transitioned to
12 meeting with my client, Mr. Kessler; is that right?

13 A. Well, Sara Gainey suggested after I did
14 not sign the form that authorized the -- I
15 basically only authorized the attendance as was
16 required by my employer and after that time Ms.
17 Gainey -- did not want to see me it appeared to me
18 and referred me to Jonathon Kessler in their
19 office.

20 Q. Okay. So you then met several times
21 with Mr. Kessler?

22 A. Right. I believe a total of six times
23 through 12-18-2012.

24 Q. And at the last meeting that you had
25 with Mr. Kessler, you told him that you were going

1 to get an attorney and take legal action and sue
2 him, correct?

3 A. I told him I was getting an attorney.
4 I don't really recall telling him I was going to
5 sue him. I told him I was going to get an attorney
6 and research this situation as the best of my
7 recollection. I do not believe I told him at that
8 time I was going to sue him.

9 Q. Now, some time ago you were deposed in
10 this case, do you remember?

11 A. I do.

12 Q. And in the deposition you were asked
13 why you were terminated. I'm going to --

14 THE COURT: This is the witness's
15 deposition?

16 MR. WALLINGER: Yes, sir.

17 BY MR. WALLINGER:

18 Q. I'm going to show you page 68 of the
19 deposition that you gave on April 25, 2017. I will
20 ask you to look at and read to yourself quietly
21 lines nine through -- lines 12 through 16. Do you
22 recognize that?

23 A. Yes.

24 Q. Okay. And as you testified in your
25 deposition under oath, you indicated that you

1 believed that you were terminated to make it
2 possible for Mr. Park to be the IT manager?

3 A. Yes, I would agree in large part. Yes,
4 I stand by that statement.

5 Q. Okay. Your termination from Showa
6 Denko was done by Showa Denko, right?

7 A. Yes, Clint Lucas and Mr. Wing.

8 Q. And after your termination you sued
9 Showa Denko, correct?

10 A. Yes.

11 Q. And then eventually the case was
12 dismissed by agreement of you and Showa Denko with
13 prejudice, correct?

14 A. It was dismissed with prejudice
15 stipulating an agreement, yes.

16 (DFT. EXH. 5 was marked for
17 identification.)

18 BY MR. WALLINGER:

19 Q. I'm going to hand you a one page
20 document that's marked as Defendant's Exhibit
21 No. 5, a copy of the stipulation of dismissal filed
22 in the Court of Common Pleas in Dorchester County.
23 Do you recognize that document?

24 A. I do.

25 Q. Okay. And that's your signature on

1 behalf of yourself, correct?

2 A. Yes.

3 MR. WALLINGER: Your Honor, I would
4 offer that.

5 THE COURT: Admitted.

6 (DFT. EXH. 5 in evidence.)

7 BY MR. WALLINGER:

8 Q. I believe you testified on direct exam
9 that there were times when you worked at Showa
10 Denko that you used profanity; is that right?

11 A. Yes, it was fairly common between
12 myself and other people. They used it as well,
13 yes.

14 Q. Can we agree there were times at Showa
15 Denko when you had agreements with your coworkers
16 -- disagreements with your coworkers?

17 A. Yes.

18 Q. Can we agree there were times at Showa
19 Denko when you had disagreements with the people
20 that supervised you?

21 A. Differences of opinion is the way I
22 would describe that.

23 Q. Okay. Now, there was a time in the
24 fall of 2012 when you had communication with some
25 representative of Dell computing to discuss

1 products or services they potentially could provide
2 to Showa Denko; is that right?

3 A. I talked to a number of hardware
4 vendors throughout my tenure at Showa Denko so it
5 is quite possible.

6 Q. There was a meeting, communication you
7 had with Dell though that was of concern to your
8 superiors, correct?

9 A. I do not recall such -- anything being
10 brought to my attention, no.

11 Q. Mr. Smith, is it correct that you did
12 not believe that back in 2012 in the fall that you
13 had done anything in your work performance that was
14 deficient or that was any basis for you to have to
15 go through EAP counseling as a condition of
16 employment; is that right?

17 A. Yes. I felt I was singled out, yes.

18 Q. There were no mistakes by you, correct?

19 A. Essentially that's not true. Everyone
20 makes mistakes and I certainly make my share of
21 mistakes so I do not agree with that statement.

22 Q. But your work performance was all from
23 your perspective exactly what you had been hired
24 and were expected to do and you did it; is that
25 your testimony?

1 A. The word exactly is strong. As best
2 efforts can deliver I did the best work I could for
3 the company.

4 Q. And your position is that the company
5 should not have had to send you to EAP counseling
6 at all; is that right?

7 A. Right. I don't believe it should have
8 been a condition of employment. And as I said, I
9 believe I was singled out because other people
10 basically used the same type of language without
11 being disciplined.

12 Q. All right. And your position continues
13 to be to this day that Showa Denko should not have
14 terminated your employment; is that right?

15 A. Yes. I believe I added significant
16 value to the company and it was not in the
17 company's best interest to terminate me.

18 Q. And lastly, you believe that your
19 interpersonal skills and communicational skills and
20 ability to work in a team environment in the fall
21 of 2012 were all not only adequate but good,
22 correct?

23 A. I would say good, yes.

24 MR. WALLINGER: That's all I have.

25 THE COURT: Do you want to testify to

1 anything in response to the questions he asked in?

2 MR. SMITH: Other than can I dispute
3 the College of Charleston letter, but I'm not going
4 to --

5 THE COURT: It is not into evidence.

6 MR. SMITH: Right. All right.

7 THE COURT: Okay. You can step down
8 then. Mr. Wallinger, you had asked about having a
9 witness taken out of order. What time does his
10 flight leave?

11 MR. WALLINGER: Your Honor, can I
12 indulge the Court?

13 THE COURT: Sure.

14 (Off-the-record conference.)

15 MR. WALLINGER: Your Honor, just to
16 deal with traffic and the usual unknowns I would
17 like to have the witness out of court about 4:00
18 today. And I can have him testify between now and
19 any point you want to make that happen.

20 One of my other witnesses, Ms. Gainey,
21 is here, indicated to me in the hall during the
22 break that she has to be at an airport at 2:30 for
23 a commitment of hers and so I would like to
24 actually try to accommodate that if I can, but it's
25 -- I don't know any more about it at this point.

1 THE COURT: Mr. Smith, do you intend to
2 offer any other witnesses?

3 MR. SMITH: Not at this time, Your
4 Honor.

5 THE COURT: Did you -- at one time had
6 expressed an interest in publishing some of Mr.
7 Kessler's deposition. Did you still want to do
8 that?

9 MR. SMITH: Yes.

10 THE COURT: Are you resting?

11 MR. SMITH: I would like to publish
12 some of Mr. Kessler's deposition.

13 THE COURT: What portions of that? Did
14 you go over that or give him the pages or are you
15 wanting to do the whole thing?

16 MR. SMITH: Right here?

17 (Off-the-record conference.)

18 MR. SMITH: Can we have a brief break?

19 THE COURT: Sure, let's take ten
20 minutes.

21 (A recess transpired.)

22 THE COURT: What did you decide?

23 MR. SMITH: Yes, I do have some
24 excerpts I would like to read into the record.

25 THE COURT: Well, this is nonjury so

1 you don't need to sit here and read them to me. I
2 am perfectly capable of reading them.

3 MR. WALLINGER: Your Honor, I told him
4 that he would be able to do that. So he's just
5 following my suggestion, but I have given the
6 pages. The lines --

7 THE COURT: Why don't you just submit
8 those to me with a copy of it. What we do on
9 nonjury you put in your evidence, he puts in his
10 evidence, I usually give the parties 30 days rather
11 than do closing arguments, give you time to
12 prepare, send a proposed order in which in essence
13 is your closing argument so we are just putting it
14 into evidence. And you'll get to make arguments
15 about the evidence in writing to me so you will
16 have time to compose your thoughts and things like
17 that. So I'll read that later.

18 MR. SMITH: Your Honor, my own fault, I
19 have had a little difficulty getting these, I just
20 broke the seal on it yesterday. If I find a few
21 more pages I would like to introduce into
22 evidence --

23 THE COURT: You have until the end of
24 the day.

25 MR. SMITH: Okay.

1 THE COURT: You will need to give me
2 the actual copy, a copy of the deposition at some
3 point in time.

4 MR. SMITH: I will have to get a copy.

5 THE COURT: Because otherwise just
6 sending me a little piece of paper that says this
7 line and this page, if I don't have a copy of it,
8 it doesn't do anything for me. You will need to
9 make a copy of the deposition and give me the
10 original or you give me a copy, doesn't matter.

11 MR. SMITH: Yes, Your Honor.

12 THE COURT: Okay? So we have got that.
13 Do you have any other witnesses?

14 MR. SMITH: I can't call the Defendant;
15 is that correct?

16 THE COURT: You could, but you're
17 publishing his deposition so unless there is
18 something else that you wanted to ask him.

19 MR. SMITH: I would like to hear his
20 response to a few questions if it please the Court.

21 THE COURT: All right. Do you mind if
22 we do this out of order and the one lady needed to
23 be on a airplane so again because it is nonjury I
24 can figure out the flow of it. It won't confuse me
25 like it would a jury so you have Ms. Gainey.

1 MR. WALLINGER: Yes, Your Honor.

2 THE COURT: Do you want to call her?

3 MR. WALLINGER: Defense calls Sara
4 Gainey.

5 SARA GAINNEY

6 having been duly sworn, testifies as follows:

7 DIRECT EXAMINATION

8 THE CLERK: Give your full name and
9 spell your last name, please, for the record.

10 THE WITNESS: Sara Lynn Gainey,
11 G-A-I-N-E-Y.

12 BY MR. WALLINGER:

13 Q. Ms. Gainey, we have met before. My
14 name is Scott Wallinger. I represent Jonathon
15 Kessler in this lawsuit. I'm going to ask you a
16 few questions and I will ask that you give clear
17 responses to each question so that the court
18 reporter and the Court and the parties can hear
19 you, okay?

20 A. Yes.

21 Q. As I understand it, you are a licensed
22 professional counselor?

23 A. That's correct.

24 Q. How many years have you had that
25 certification?

1 A. Since '86.

2 Q. And where did you graduate from
3 college?

4 A. College of Charleston.

5 Q. Did you get a masters or a doctorate?

6 A. Got a masters from the Citadel.

7 Q. In?

8 A. Counseling.

9 Q. Have you in the course of your career
10 also provided what I'll call EAP counseling or
11 employee assistance or employment assistance
12 counseling?

13 A. Employee assistance programs.

14 Q. All right. And employment assistance
15 program is sometimes called an EAP; is that right?

16 A. Correct.

17 Q. Do some companies have those inhouse?

18 A. Yes.

19 Q. Do some companies hire outside entities
20 to provide those services?

21 A. Yes.

22 Q. Is that what SAVE, Inc. does?

23 A. Yes.

24 Q. And SAVE, Inc. is a corporation?

25 A. Yes.

1 Q. Are you the officer and owner of SAVE,
2 Inc.?

3 A. Yes.

4 Q. Were you that in 2012?

5 A. Yes.

6 Q. And did you have occasion to provide
7 EAP services to businesses and their employees as
8 an owner of SAVE?

9 A. Yes.

10 Q. Did that include providing services to
11 Showa Denko Carbon and its employees at times?

12 A. Yes.

13 Q. Do you believe that you are qualified
14 to provide EAP services?

15 A. Yes.

16 Q. I gather you have done that on hundreds
17 of occasions?

18 A. Yes.

19 Q. And did there come a point in which
20 Jonathon Kessler, my client, became affiliated with
21 SAVE to assist in providing EAP services?

22 A. Yes.

23 Q. Did you meet with and decide to have
24 Mr. Kessler come do that for SAVE?

25 A. Yes.

1 Q. And did you find him qualified based on
2 his experience and education and any other factors
3 to do that?

4 A. Extremely so.

5 Q. And was Mr. Kessler either prior to or
6 upon coming to SAVE able to acquire the skills and
7 the expertise necessary to do EAP services to
8 companies and their employees?

9 A. Yes. His clinical skills are
10 excellent.

11 Q. Mr. Kessler was an independent
12 contractor of SAVE, Inc.; is that right?

13 A. Yes.

14 Q. And he worked part time for SAVE, Inc.?

15 A. That's correct.

16 Q. He had a full-time job as well?

17 A. Correct.

18 Q. Is it correct that while he was an
19 independent contractor of SAVE he did what he was
20 supposed to do for SAVE under the supervision of
21 SAVE?

22 A. Yes.

23 Q. He was not a separate entity that had
24 no relationship to SAVE, right? Let me strike that
25 and start over. SAVE controlled who Mr. Kessler

1 saw and what Mr. Kessler did?

2 A. Correct.

3 Q. Now, was there a time that you came to
4 handle an employer referral from Showa Denko Carbon
5 involving the Plaintiff, Mr. Smith?

6 A. Yes.

7 Q. And were you the first counselor to
8 review the referral and to meet with Mr. Smith?

9 A. Yes.

10 Q. Did there come a point in time after
11 your meeting with Mr. Smith that someone else at
12 SAVE took over services to the employer and Mr.
13 Smith?

14 A. Yes.

15 Q. And was my client, Mr. Kessler, the
16 person on behalf of SAVE that took over that
17 activity?

18 A. Yes.

19 Q. Showa Denko Carbon paid some kind of
20 retainer to SAVE to take referrals from Showa
21 Denko; is that right?

22 A. Correct.

23 Q. And the clinician, whether it was you
24 or Mr. Kessler, did not make itemized bills based
25 on the number of hours spent working on a

1 particular referral?

2 A. That's correct.

3 Q. So regardless of how many hours
4 Mr. Kessler spent with Mr. Smith it did not affect
5 how much money Showa Denko paid to SAVE?

6 A. That's correct.

7 Q. However, Mr. Kessler was paid an hourly
8 professional rate for services that was paid by
9 SAVE to Mr. Kessler, correct?

10 A. Correct.

11 Q. And so Showa Denko did not pay money
12 directly to Mr. Kessler; is that right?

13 A. That's right.

14 Q. And Mr. Smith did not pay money
15 directly to Mr. Kessler; is that right?

16 A. That's right.

17 Q. Briefly why did you have Mr. Smith
18 shift from seeing you for EAP services to seeing
19 Mr. Kessler for EAP services?

20 A. I thought that it would be a better fit
21 for Mr. Smith which is not unusual in the clinical
22 field. Not every shoe fits every foot in any
23 profession and I thought that it would serve Mr.
24 Smith better to see Mr. Kessler.

25 Q. All right. And is that an acceptable

1 thing to do, to refer someone to a different
2 colleague or clinician to do that?

3 A. It is not unusual.

4 Q. All right. So once Mr. Kessler took
5 over EAP services to Smith and to the employer you
6 were no longer actively involved in any clinical
7 role; is that right?

8 A. That's correct.

9 Q. I would like to mark an exhibit, Your
10 Honor.

11 (DFT. EXH. 6 was marked for
12 identification.)

13 THE COURT: Is there any objection to
14 this coming in?

15 MR. SMITH: No.

16 THE COURT: It is admitted.

17 MR. WALLINGER: I offer it. Thank you.

18 (DFT. EXH. 6 in evidence.)

19 BY MR. WALLINGER:

20 Q. You have been deposed in this case,
21 correct?

22 A. Yes.

23 Q. And, Ms. Gainey, from what you know
24 about SAVE, Inc.'s EAP services to Showa Denko and
25 to Mr. Smith do you have any criticism of anything

1 that my client, Mr. Kessler, did in his role as an
2 EAP professional?

3 A. None whatsoever.

4 Q. Now, Mr. Smith has separately sued you
5 in an unrelated case; is that correct?

6 A. Yes.

7 Q. As of today is that case over?

8 A. It's in the court of appeals I think.

9 MR. WALLINGER: Those are all the
10 questions I have, Your Honor.

11 THE COURT: Cross-examination.

12 MR. SMITH: Yes, Your Honor.

13 MR. SMITH: I may wish to refer to some
14 of the exhibits she mentioned. We can put the
15 exhibits out on the table?

16 THE COURT: Well, this one here is --
17 they are right here. She has got some over there.

18 MR. SMITH: So I can refer to exhibits?

19 THE COURT: Anything that's been in
20 you're welcome to it. These are things got put in
21 yesterday and today. That's what got put in over
22 there.

23 CROSS-EXAMINATION

24 BY MR. SMITH:

25 Q. Let me start and have you describe the

1 typical clinical skills Mr. Kessler used.

2 A. He used his skills developed as a
3 licensed independent social worker, clinical
4 practice. They're numerous skills that an
5 individual can use, very eclectic.

6 Q. Can you tell me any of them?

7 A. Cognitive behavioral therapy.

8 Q. What is that?

9 A. Cognitive means thinking. Behavioral
10 means behavioral therapy of changing behavior, a
11 person realizes that they have to change behavior
12 and they do so for the better.

13 Q. Did he act as an employee assistance
14 professional?

15 A. He was not a CEAP, but he did clinical
16 work for SAVE.

17 Q. Did he act as an EAP professional?

18 A. He was a clinical person who worked for
19 SAVE. There are about four CEAPs in Charleston.
20 And many people who are not CEAPs work for employee
21 assistance program throughout the country.

22 Q. Did Mr. Kessler consider himself an
23 employee assistance professional?

24 A. I don't know what he considered
25 himself.

1 Q. Did you supervise Mr. Kessler?

2 A. In so much as his working hours when he
3 was there. Mr. Kessler did not need supervision
4 clinically. He was a professional. He has been
5 licensed by the state since 2003 and has maintained
6 that license in good standing since then.

7 Q. Does that license cover his work as an
8 employee assistance professional?

9 A. It covers his work clinically.

10 Q. Clinically. Can you give me a little
11 more --

12 A. Cognitive behavioral therapy as I
13 explained to work with clients who in this case who
14 may have been referred by his organization. The
15 organization delineates the issues that the person
16 is having, work issues that they would like to be
17 addressed.

18 Q. Do you believe he was not working as an
19 employee assistance professional?

20 A. He was doing his job.

21 Q. Was his job as an employee assistance
22 professional?

23 A. He was not a CEAP.

24 Q. Did he believe he was an employee
25 assistance -- do you believe he worked in the

1 capacity of an employee assistance professional?

2 A. He was not a CEAP. He was a clinician
3 which many EAPs hire clinicians throughout the
4 country.

5 Q. What would be the difference between an
6 EAP -- you're a certified employee assistance
7 professional; is that correct?

8 A. That is correct.

9 Q. What are the differences between a
10 certified employee assistance professional and a
11 clinician?

12 A. You have special skills that are
13 related to interactions with organizations,
14 industries, municipalities in order to develop
15 employee assistance programs.

16 Q. In order to develop employee assistance
17 programs; is that correct?

18 A. That's correct.

19 Q. Is it a marketing position?

20 A. Partially, can be.

21 Q. What is a clinician?

22 A. A clinician is someone who uses skills
23 to assist individuals with addressing issues in
24 their lives that we want to improve.

25 Q. Could it also be just one who works in

1 a clinic?

2 A. I don't understand your question.
3 There are a lot of clinicians.

4 Q. If someone works in a clinic would they
5 consider themselves a clinician?

6 A. Depends on the qualifications of their
7 licensure and their training.

8 Q. What qualifications does it take to
9 call oneself a clinician?

10 A. That depends on where you work. If you
11 work in a seizure clinic you have information about
12 neurology and epilepsy. If you work in a
13 cardiology clinic as a social worker you have
14 information about those issues.

15 Q. If you work in an EAP program as a
16 clinician what requirements does that person need?

17 A. Good clinical skills that are
18 documented by your training and by your licensure.

19 Q. Is there licensure for an employee
20 assistance professional?

21 A. It's a certification, it's a national
22 certification.

23 Q. And who provides that certification?

24 A. Employee Assistance Professionals
25 Association.

1 Q. And you're a member of this
2 association?

3 A. Yes.

4 Q. Is Mr. Kessler a member of that
5 association?

6 A. I don't think so.

7 Q. What are the requirements to be a
8 member of this association?

9 A. There are no requirements.

10 Q. No requirements?

11 A. No. You have to be working in the
12 field. People can be in the field and not be a
13 CEAP and be a part of the association.

14 Q. And not be deceived?

15 A. Correct.

16 Q. How do you know they are not deceived?

17 A. I am sorry. I don't understand.

18 Q. Are there published guidelines so that
19 one knows what to expect of an employee assistance
20 professional?

21 A. Yes.

22 Q. Where are those published?

23 A. They are with EAPA, Employee Assistance
24 Professional Association.

25 Q. And do you publish those -- do you tell

1 your employees about this trade organization --
2 tell your patients about this trade organization
3 when they seek services from EAP?

4 A. No, not necessarily.

5 Q. Do you have any duty to disclose what
6 an EAP really is to a -- someone who has been
7 referred to an EAP from their employer?

8 A. That information is usually available
9 with the company. The company has information on
10 their EAP and they talk to individuals whom they
11 refer to the EAP about what they do, what the EAP
12 does in their role.

13 Q. Your Honor, I would like to get an
14 exhibit. Would it be best to put them on table so
15 I can see them here?

16 THE COURT: Which are you referring to?

17 MR. SMITH: The SAVE exhibit, that
18 brochure there.

19 THE COURT: That right there?

20 MR. SMITH: Yes, Your Honor.

21 THE COURT: Go ahead. You can move all
22 those.

23 MR. SMITH: Tell me what to do.

24 THE COURT: Just put them all over
25 there. That way you don't have to keep coming back

1 up here. There is no chance I will bite you.

2 MR. SMITH: I'm trying to show as much
3 respect as I know how to, Your Honor.

4 BY MR. SMITH:

5 Q. Is this one of your brochures?

6 A. Yes, it is.

7 Q. Are you familiar with the contents of
8 the brochure?

9 A. Yes.

10 Q. Can I ask you to read a few items from
11 the brochure? Is that appropriate, Your Honor?

12 THE COURT: Go ahead.

13 Q. Can you find the word "employer" in
14 that document, and if so, how many times?

15 A. I can't see it, but the word "employee"
16 is mentioned numerous times and it's assumed that
17 if you are an employee there's an employer and it
18 addresses the relationship of employees to the
19 employer.

20 Q. Does it address the relationship to
21 employees with employers in that document?

22 A. It addresses the issues that employees
23 have and if the employee has an employer it will
24 address those issues.

25 Q. Does it address the employee/employer

1 issues?

2 A. Work related issues, right here,
3 retirement, communication.

4 Q. Can you read the section that includes
5 work related issues?

6 A. Problems addressed. Family, marital
7 issues, birth of a child, parenting, relocation,
8 bereavement crisis, alcohol, drug problems,
9 emotional, psychological adjustments, legal,
10 financial problems, retirement, work related
11 issues, communication and stress management.

12 Q. What type of work related issues might
13 an employee come to SAVE about?

14 A. They could come about stress, work.
15 They come about family stress. They could come
16 about needing to understand communication skills
17 and how to make things better at work. Our focus
18 is to work with the individual to change what they
19 are doing to make the situation at work better.

20 Q. Would you agree that you do have an
21 obligation if you feel that problems are beyond
22 your control, beyond your influence to refer that
23 someone to somebody other than an EAP?

24 A. I think if the problems are on this
25 list, say communication, that is something we deal

1 with all the time.

2 Q. And you could handle it?

3 A. Absolutely.

4 Q. In other words, so in my situation how
5 well did you handle it?

6 A. That's an opinion.

7 Q. I am open to opinions.

8 A. We offered services to you.

9 Q. What were those services?

10 A. In that regard.

11 Q. Clinical?

12 A. I think I recall from Mr. Kessler's
13 affidavit that he had offered to help you do role
14 play to work on the communication, and there was
15 not a lot of interest in your doing that.

16 Q. Did he offer to read documents that I
17 brought to him from my employer?

18 A. I don't know. He offered to stay on
19 the subject of communication to help you develop
20 better communication because that issue was one of
21 the issues that your employer outlined in the
22 document that you brought to my deposition. That
23 was the first on the list, it was communication
24 with your coworkers and your behavior and that's
25 what he addressed.

1 Q. So did you feel that you had an
2 obligation to the employer?

3 A. We have -- our obligation is to help
4 someone keep their job and that helps everybody.

5 Q. Do you have an obligation to the
6 employer?

7 A. If the employer can keep somebody
8 working that's an obligation. If the employee can
9 stay working that's an obligation.

10 Q. Do you have any other obligations to
11 the employer?

12 A. No.

13 Q. Do you have an obligation to tell an
14 employer about the impact it may have on the
15 employer's organization?

16 A. Can you rephrase that, please.

17 Q. I would like to get another exhibit,
18 Your Honor, and this is the Employee Assistance
19 Commission document. This is a document from the
20 Employee Assistance Certification Commission that
21 we used during your deposition. Can I hand it?

22 THE COURT: Go ahead.

23 MR. SMITH: Do I need to introduce it?

24 THE COURT: If you want it admitted.

25 MR. SMITH: Yes, I would like to enter

1 this into evidence.

2 THE COURT: Is this something you have
3 seen?

4 MR. WALLINGER: I don't know what it
5 is, Your Honor.

6 MR. SMITH: (Handing.)

7 MR. WALLINGER: It is highlighted as
8 handwriting on it. I would ask that a clean
9 version be used unless there's a reason it has to
10 be offered in that way and at this point it hasn't
11 been authenticated. So I object to those two
12 issues beyond that.

13 THE COURT: What is this?

14 MR. SMITH: This is the Employee
15 Assistance Certification Commission standards of
16 practice that govern certified employee assistance
17 professionals which is what Ms. Gainey is and what
18 Mr. Kessler acted as an employee assistance
19 professional.

20 THE COURT: You can ask her if she's
21 familiar with it. If it gets admitted you can
22 submit a clean copy.

23 MR. SMITH: We have an expert witness
24 that might give us the most current one.

25 THE COURT: If she's familiar with it.

1 BY MR. SMITH:

2 Q. Are you familiar with this document
3 that was shown to you at your deposition?

4 A. I think I have seen copies of that.

5 Q. So I will ask you a few questions about
6 it.

7 THE COURT: I couldn't hear what you
8 said.

9 THE WITNESS: I am familiar -- I am
10 sorry. I am familiar with that document. It's
11 produced by the Employee Assistance Professionals
12 Association, the national group.

13 THE COURT: And you are a member of
14 that group?

15 THE WITNESS: Correct.

16 THE COURT: Okay. That can come in
17 then. It is admitted.

18 (PLF. EXH. 12 in evidence.)

19 BY MR. SMITH:

20 Q. So this document is labeled standards
21 of practice. Section 1 is labeled client bill of
22 rights. Is it best to ask her questions from the
23 document or have Mr. Wallinger standing beside me,
24 however I should do that?

25 THE COURT: Let me ask you, what's your

1 purpose in asking her about this document?

2 MR. SMITH: There is several
3 obligations this document outlines. I would like
4 to her ask her if she agrees with it or complies
5 with these guidelines.

6 THE COURT: All right. Go ahead.

7 BY MR. SMITH:

8 Q. Individual clients have the right,
9 number letter A, to expect a CEAP has met the
10 minimal qualifications as required by EACC. You
11 agree with that statement?

12 A. Yes.

13 Q. To obtain a copy of the CEAP code of
14 conduct, would you agree with that statement?

15 A. Yes.

16 Q. Did you provide me with a CEAP code of
17 conduct?

18 A. No.

19 Q. Were you obligated to provide me with a
20 CEPA --

21 A. Not necessarily. That was on my wall
22 in my office and no one has ever asked for that
23 that I have seen in 30 years. No one.

24 Q. This entire document is on your wall?

25 A. No, the CEPA certification.

1 Q. Is there anything that says that you
2 have the right to obtain a copy of the CEPA code of
3 conduct?

4 A. No.

5 Q. Is there a disciplinary body for CEAPs?

6 A. Not to my knowledge.

7 Q. Is it an individual client's right to
8 obtain copies of their case records and to have the
9 information clearly explained subject to applicable
10 laws?

11 A. Applicable laws are the HIPAA laws
12 which override that.

13 Q. So you do not agree with?

14 A. I just said applicable laws and the
15 HIPAA law is applicable and overrides that.

16 Q. So an individual client does not have
17 the right to obtain their own case records and to
18 have the information in there clearly explained?

19 A. By HIPAA law.

20 Q. Subject to applicable -- can you
21 override HIPPA law?

22 A. No.

23 Q. You cannot provide an individual copies
24 of their case records?

25 A. That's what the HIPAA law says.

1 Q. Why would the CEAP put that in their
2 document if the HIPAA law prevents an individual
3 from getting their case records?

4 A. I can't speak for HIPAA.

5 Q. I requested documents from you numerous
6 times, Ms. Gainey, didn't I? Did I request
7 documents from you numerous times?

8 A. Once.

9 Q. When was that?

10 A. You appeared in my office with your
11 mother and you requested your records and I
12 explained to you why I could not give you your
13 records.

14 Q. What was that explanation?

15 A. HIPAA laws.

16 Q. Any chance you said it was because I
17 had signed a release?

18 A. I don't understand the question.

19 Q. Did you tell me that you couldn't give
20 me the records because I had signed a release?

21 A. You read a statement of understanding
22 that explained the HIPAA laws and that we couldn't
23 release certain records. And you read it and
24 signed it when you first came into the office
25 before you ever saw anyone.

1 Q. What could you -- did I ever obtain any
2 other documents from you?

3 A. We offered you a designated record set.
4 I'm not sure you ever came to get it.

5 Q. And do you have any recollection of
6 that designated record set?

7 A. I don't have it verbatim. It says the
8 number of times you have been seen, diagnosis. I
9 don't remember. It's a one page document.

10 Q. Do you recall at all what the diagnosis
11 in my case was?

12 A. Occupational problem.

13 Q. What type of occupational problem?

14 A. As outlined by your employer, your
15 communication with your coworkers, your behavior at
16 work, item No. 1 in the document you provided at my
17 deposition.

18 Q. So that was -- came strictly from the
19 employer?

20 A. That's right. You were referred by
21 your employer.

22 Q. So any representation I made during
23 counseling would not have affected what was on the
24 designated record set; is that correct?

25 A. You were referred by your employer. It

1 was very specific about the issues that were
2 impairing your work and that was communication and
3 your interaction with your coworkers. That's what
4 they wanted you to address so that you would be
5 back in good standing with your employer.

6 Q. Was that explained to me as clearly as
7 you just explained to me, that basically I had to
8 do what the company said to be in good standing, is
9 that the way --

10 A. I did. I explained that to you when I
11 first saw you about your behavior and the changes
12 that need to happen.

13 Q. So any input that I had into the
14 problem really didn't matter; is that fair to say?

15 A. We addressed the issues that were a
16 problem for you on your job and were a problem for
17 your employer.

18 Q. Again, any representations I made were
19 basically ignored?

20 A. No.

21 Q. How were they addressed?

22 A. I saw you twice. And I think I
23 indicated to you that the main reason you are there
24 was your behavior, throwing chairs, not getting
25 along with your coworkers, and that was what we

1 were going to focus on. And then when you
2 transferred to Mr. Kessler that's what he addressed
3 as well.

4 Q. Did I ever throw a chair to your
5 knowledge, personal knowledge?

6 A. I read that. I was told that.

7 Q. Do you have any personal knowledge that
8 I ever threw a chair?

9 A. I did not see you throw a chair.

10 Q. First of all, in the document that
11 you're referring to does it ever use the word
12 "threw"?

13 A. I don't have that document.

14 Q. Let's present that document if we can
15 find it. It's from John Wing. That I was throwing
16 chairs, is that correct, is your testimony?

17 A. My testimony is that it was
18 communicated to me by Clint Lucas when he referred
19 you that you had thrown a chair.

20 Q. You just a moment ago said I was
21 throwing a chair; is that a fair statement?

22 A. Let me correct what I'm saying. That
23 you had thrown a chair and that was unacceptable
24 behavior on the work site.

25 Q. Was I ever accused of throwing a chair?

1 A. I have no idea. I don't know that was
2 discussed with you. I think it was discussed with
3 you at work. I don't know. It was communicated to
4 me.

5 Q. Is there a presumption of guilt or
6 wrongdoing of an employee when they come into your
7 organization?

8 A. No, not the word guilt. Word of
9 changing behaviors that will help you get along
10 better at work as delineated by your employer in
11 the referral.

12 Q. To help me stop throwing chairs?

13 A. Help you in your behavior,
14 interpersonal behaviors.

15 Q. And again how did you learn that I had
16 been throwing chairs?

17 A. We typically get referrals from a lot
18 of organizations. When they refer an individual
19 about three percent of the people we see are
20 management referrals or referrals for work issues.
21 That referral came by telephone from Clint Lucas to
22 outline your behavior that was troublesome to the
23 workplace.

24 Q. Is there a presumption that the
25 employer's statement is true?

1 A. Our work focuses on the things that are
2 impediments to the person being accepted as a
3 worker who is productive.

4 Q. Ms. Gainey, please answer my question.
5 Is there a presumption that the employer's
6 statement is true?

7 A. We work on the reason that a person has
8 been referred to help that person change the
9 behaviors that were impediment to productive work.

10 MR. SMITH: Your Honor, the witness is
11 not answering the question.

12 THE COURT: You can if -- answer yes or
13 no, but you can explain. Now, having said that,
14 you are suing Mr. Kessler. You are cross-examining
15 her. Why don't you -- if you have anything that
16 you need to ask her about Mr. Kessler, then that's
17 where you need to spend your energies, otherwise
18 you had a lawsuit with her, I gather it's on
19 appeal, so I'm not really sure what the purpose is
20 of cross-examining her about --

21 MR. SMITH: Your Honor, she just
22 testified that I was throwing chairs which --

23 THE COURT: I get that. But you are
24 not suing her.

25 MR. SMITH: She then communicated to

1 Jonathon Kessler so I am trying to make it clear
2 that --

3 THE COURT: Then get to that. Okay?

4 MR. SMITH: I am trying, Your Honor, I
5 apologize.

6 BY MR. SMITH:

7 Q. You have no direct knowledge that I was
8 throwing chairs?

9 A. I did not see you throwing chairs.

10 Q. So you based that assertion you just
11 made in court on people from Showa Denko, the
12 employer?

13 A. Yes.

14 Q. And you presumed that they were
15 correct?

16 A. Our function is to help address
17 behaviors that are not productive in the workplace
18 and that's what we were doing.

19 Q. Your Honor, she's not answering the
20 question. Does an employee have the right to --
21 does an individual client have the right to be
22 informed of any relevant policies regarding
23 confidentiality?

24 A. I believe those policies are in the
25 statement of understanding that you read and signed

1 before you ever saw anybody.

2 Q. What type of consent is needed for you
3 to release information to an employer?

4 A. The individual has to sign a release of
5 confidential information which you did sign.

6 Q. Is this a copy of that release, the two
7 releases in fact?

8 A. Yes.

9 Q. Is there anything else that goes along
10 with that agreement?

11 A. I don't quite understand what you're
12 asking. Goes along with this release? I don't
13 understand what you're asking.

14 Q. Is there any other document that
15 explains what that release is?

16 A. The release is self-explanatory. I
17 think.

18 Q. Self-explanatory?

19 A. Yes. And if you had questions the time
20 to ask those would be when you read it.

21 Q. It's the patient's duty to ask the
22 questions?

23 A. If you're concerned or do not
24 understand what you are reading, yes.

25 Q. Are you familiar with the concept of

1 informed consent?

2 A. Yes.

3 Q. Can you tell me what informed consent
4 means?

5 A. That the person reads and understands
6 whatever they are signing.

7 Q. Is there any more to it than that?

8 A. That's my understanding.

9 Q. Is there a difference between that
10 document and informed consent?

11 A. This is an informed consent document.
12 It explains what it is.

13 Q. Can you explain what it is?

14 A. Basically --

15 MR. WALLINGER: Objection, asked and
16 answered.

17 THE COURT: Sustained.

18 BY MR. SMITH:

19 Q. Let me show you another exhibit. Are
20 you familiar with this document, your copy is
21 generally yellow?

22 A. Yes.

23 Q. What is the difference in an employee
24 mandated referral, is that a fair way to say it?
25 When an employee mandates that he sees you?

1 A. When the employee mandates?

2 Q. I mean if the employer mandates that an
3 employee see you?

4 A. When an employee mandates.

5 Q. When the employer mandates that he sees
6 you?

7 A. Employer mandate.

8 Q. Right.

9 A. Okay. Basically that is the company's
10 decision in terms of what the terms are that you
11 utilize the program. Company makes that decision.

12 Q. Is it proper for the employer to
13 mandate that you see SAVE or else be terminated?

14 A. It is their right to mandate that.

15 Q. Is it your policy to accept those type
16 of referrals?

17 A. We accept referrals, yes.

18 Q. Did you answer the question differently
19 in deposition?

20 A. I don't think so.

21 Q. Your Honor, I will have to dig
22 something out of deposition to show that Ms. Gainney
23 said in the deposition they do not accept.

24 THE COURT: Well, get a copy of it and
25 refer to the page and line number.

1 Q. I will come back. So it is your policy
2 you do accept mandatory referrals from an employer
3 as a condition of employment?

4 A. We don't make the conditions of
5 employment. We accept mandatory referrals.

6 Q. Are the duties to an organizational
7 client any different than the duties to the
8 individual client?

9 A. No, they're not.

10 Q. An organizational client has the right
11 to full and open disclosure of any potential
12 conflicts of interest, organizational impacts or
13 similar negative effects from services rendered?

14 A. Could you explain that, please.

15 Q. Organizational clients have the right
16 to full and open disclosure of any potential
17 conflict of interest, organizational impact or
18 similar negative effects from services rendered?

19 A. That's correct.

20 Q. What would be an example of that?

21 A. I don't have one right at hand.

22 Q. What potential conflicts could occur?

23 A. There were no conflicts here.

24 Q. Was there a dual obligation to both
25 company and employee?

1 A. Yes.

2 Q. And so was there a trust relationship
3 between your organization and the employee?

4 A. I would hope so.

5 Q. You would hope so?

6 A. Yes.

7 Q. Do you feel obligated to respect the
8 trust an employee puts in your organization?

9 A. We are obligated to do our job which we
10 do.

11 Q. And do you see the brochure in front of
12 you?

13 A. Yes.

14 Q. How many times does confidentiality
15 appear in that brochure?

16 A. I see three times on this page and once
17 on this page.

18 Q. So four times?

19 A. Yes.

20 Q. Is confidentiality the most important
21 trade of a counseling -- how did you say it in your
22 brochure? Confidentiality is the most important --
23 can you find on your brochure where you talk about
24 how important confidentiality is.

25 A. Most important element in the

1 counseling relationship.

2 Q. The most important element in the
3 counseling relationship?

4 A. Correct.

5 Q. And why is that?

6 A. Because it's important when a person is
7 telling something and they understand that there
8 are certain restrictions on confidentiality that
9 those are observed.

10 Q. And those restrictions on
11 confidentiality would be?

12 A. It depends on whether the other person
13 gave a release to be released, whether the
14 individual signed a release that was on whatever
15 was on -- the release that they wanted to be
16 released and to whom it was released.

17 Q. So should a person know what is going
18 to be released to another person to the employer?

19 A. Absolutely.

20 Q. They should know the specific -- what
21 is going to be said to the employer before it is
22 released?

23 A. That is on the release that you signed.
24 The information that was released was on the
25 release checked to whom you were to release it and

1 what was to be released. You read that and signed
2 that.

3 Q. Do you believe that the release gives
4 to you as a counselor the right to say anything
5 about a person?

6 A. No.

7 Q. What would be --

8 A. One must stick to the release and what
9 is outlined in the release. That's what we did.

10 Q. Did you have any other duties besides
11 what is designated on that release to the employee?

12 A. To the employee?

13 Q. Yes. To the employee?

14 A. No.

15 Q. You have a duty to maintain a
16 confidence?

17 A. The release indicates that. The only
18 information that will be released is what you have
19 read, you have signed and you have indicated on the
20 release.

21 Q. So for example, on this release what
22 could you not say as a result of that release? Is
23 there anything you could not say according to your
24 reading of that release?

25 A. What we could say is --

1 Q. That's not my question. I am asking
2 what can you not say?

3 A. Information that is in the clinical
4 session that is not noted on the release.

5 Q. Such as?

6 A. Any information. Many things are
7 discussed in a counseling session and the only
8 thing that can be released is what you have checked
9 on your release and you signed the release.

10 Q. Is there a doctor/patient relationship
11 with an EAP counselor?

12 A. There is a trust relationship,
13 confidential relationship. We are not M.D.'s.

14 Q. Is there a fiduciary duty?

15 A. No.

16 Q. What is a fiduciary duty?

17 A. Means money for something.

18 MR. WALLINGER: Objection to the
19 question, Your Honor.

20 THE COURT: I am sorry, what?

21 MR. WALLINGER: I object to the
22 question.

23 THE COURT: On what grounds?

24 MR. WALLINGER: He is asking her to
25 give a legal opinion on what fiduciary means which

1 is a legal definition. It's a question of law.

2 THE COURT: Overruled.

3 BY MR. SMITH:

4 Q. Can you give me a little more
5 specifics?

6 A. Can you give me specifics when you use
7 the word "fiduciary" exactly what you mean, please?

8 Q. In the context of your care and
9 treatment what fiduciary duties do you have in the
10 context of care and treatment that occurs at your
11 clinic?

12 A. To give care and treatment as indicated
13 to our professional ability. It is not based on
14 any kind of financial basis.

15 Q. So do you really know what the word --
16 it is a legal term of art, you are right. Would it
17 be proper to disclose damaging personal information
18 to an employer even if the employee had signed that
19 release?

20 A. No, it would not be.

21 Q. How would you determine that it wasn't
22 proper?

23 A. We would try to discuss the information
24 with the individual about doing that. We will not
25 release information that would be damaging.

1 Q. You have read Mr. Kessler's work
2 product in response to litigation. You referred to
3 it earlier today. Have you read that document?

4 A. I think I read his affidavit.

5 Q. He called it anyway his explanation of
6 the situation. And does he admit to disclosing
7 information?

8 A. He disclosed information that you gave,
9 a release of information to be disclosed based on
10 what you read and signed.

11 Q. Did he disclose information just -- he
12 did disclose information would you agree?

13 A. He indicated in his notes that he
14 disclosed information when he had contact about
15 your --

16 Q. Had I made an informed consent about
17 that disclosure?

18 A. You signed the release.

19 Q. On the same day of the disclosure, on
20 the same week of the disclosure?

21 A. I really don't know.

22 Q. So because I signed the form with the
23 checks he can say whatever he cares to say to the
24 employer without even telling me what he said to
25 the employer?

1 A. You indicated on the release the
2 information he could give the employer in terms of
3 attendance, the dates you came. That depends on
4 when he could get the employer on the phone to make
5 that disclosure. It might not be the day that you
6 happened to be there, but you gave release for that
7 information.

8 Q. Did I give informed consent to that
9 release?

10 A. You read --
11 MR. WALLINGER: Objection, asked and
12 answered.

13 THE COURT: Overruled.
14 BY MR. SMITH:

15 Q. Did I give informed consent?

16 A. You read and signed the release that
17 had been -- you checked what would be released on
18 the release of confidential information that could
19 be released. You were informed.

20 Q. Did I check the boxes?

21 A. You were with him. If you didn't --
22 you were with Jonathon Kessler when they were
23 checked. You read it and signed it and he signed.

24 Q. Did I check -- there's two releases
25 there, is that correct, that were signed in your

1 clinic, one when I met with you?

2 A. Correct.

3 Q. And then one Mr. Kessler has when I met
4 with him?

5 A. That's correct.

6 Q. Is there a difference between those
7 two?

8 A. It's the same release, same form.

9 Q. Is there a difference between the
10 content of those?

11 A. Different information is checked.

12 Q. Just checking a box, that did it, huh?

13 A. Checking a box and reading and signing
14 it.

15 Q. In your opinion that is informed
16 consent?

17 A. If a person can read it's informed.

18 Q. It's a blue form? How much time would
19 a person -- was it a condition of your service to
20 sign that form? Would you have seen me if I
21 refused to sign that form?

22 A. We would have seen you, but then we
23 couldn't release that information if you had not
24 signed.

25 Q. So I could have not signed that form?

1 A. That's right. You could have refused
2 to sign it.

3 Q. Did you have any duty to tell a person
4 what you were going to release to an employer
5 before you tell, in other words, the subject matter
6 of what you are going to release to the employer?

7 A. That is on the release.

8 Q. What is -- can you tell me which part
9 of the release actually allows the release of the
10 information that Mr. Kessler released to employer?

11 A. Tracy Smith authorizes a release of
12 information by Save, Inc., Jonathon Kessler to
13 Showa Denko Carbon, Clint Lucas in reference to the
14 following information. Dates of sessions,
15 progress, telephone exchange, recommendations,
16 compliance, attendance and participation and your
17 signature is on here.

18 Q. Which of those are not checked?

19 A. Test results, diagnostic, symptoms,
20 other.

21 Q. So diagnosis is not checked?

22 A. Correct.

23 Q. And the diagnosis you made was that I
24 had occupational problems; is that correct?

25 A. That was internal.

1 Q. That would never have been released to
2 the employer, but that was what the employer said;
3 is that correct, earlier in your --

4 A. That was the reason the employer
5 referred you, was occupational issues.

6 Q. We will move on. Regarding competence.
7 Unprofessional conduct includes but is not limited
8 to the following, practicing in an EAP content area
9 in which the CEAP has not obtained adequate
10 professional training. Do you agree that
11 unprofessional conduct includes acting in an area
12 where you have not obtained adequate professional
13 training?

14 A. Yes.

15 Q. Would Mr. Kessler be bound by that
16 statement?

17 A. No, he has professional training. He
18 has adequate clinical skills and that's what he was
19 using.

20 Q. Has he been trained in EAP content area
21 -- what training has Mr. Kessler had in EAP
22 content?

23 A. He understands confidentiality.

24 Q. Does he have any other training in an
25 EAP content area to your knowledge?

1 A. Would you like to name the content area
2 about which you are speaking?

3 Q. I am asking what skills he has.

4 A. There are a lot of content areas. You
5 mentioned content area. Tell me what content area
6 you are talking about.

7 Q. May I ask you what content areas might
8 be within?

9 A. Confidentiality is one.

10 Q. What else?

11 A. Professional training.

12 Q. Can you be more specific?

13 A. No, I can't, I am sorry.

14 Q. Would he know anything about production
15 processes for example, in an employee?

16 A. That is not our role.

17 Q. What does he know about an employment
18 environment?

19 A. Our role is to address the issues that
20 are presented to us as being obstacles to the
21 person being productive in their work setting.
22 That's what we were doing, was addressing your
23 behavior.

24 Q. Presented to you by the employer?

25 A. Exactly. Because you were referred by

1 your employer.

2 Q. But so an employee has no input from
3 your perspective?

4 A. You had input in session.

5 Q. Did I?

6 A. I assume you talked. You sat there for
7 an hour and didn't say anything? I don't know.

8 Q. Did you actually supervise Mr. Kessler?

9 A. Not clinically. Mr. Kessler is a
10 professional. He has adequate training, more than
11 adequate training and experience. I supervised his
12 time at work.

13 Q. Had he had EAP training in the area of
14 content area of confidentiality?

15 A. Exactly.

16 Q. Would failing to seek appropriate
17 professional consultation for clients whose
18 problems are outside the CEAP's competence be
19 unprofessional conduct?

20 A. We had confidence in the area for which
21 you were referred, communication.

22 Q. That's not my question.

23 A. Yes. You are right.

24 Q. It would be unprofessional. Would it
25 be malpractice?

1 A. No.

2 Q. Why not?

3 A. Because we were not focusing on
4 anything other than your communication and your
5 work performance.

6 Q. If someone acting as an EAP failed to
7 seek appropriate professional consultation for
8 clients whose problems are outside the CEAP's
9 competence, would that be malpractice?

10 A. We did not see problems that were
11 outside of our competence.

12 Q. You contend you made a -- took a
13 complete history of my work situation?

14 A. Yes.

15 Q. Did Clint Lucas ever describe the work
16 environment or use the word "hostile" in describing
17 the behavior of my coworkers?

18 A. I think it was in some document. I
19 can't remember. It was presented to me at the
20 deposition and I had not seen it before.

21 Q. Had I attempted to tell you that in
22 session?

23 A. I don't recall.

24 Q. Had I shown you documents that I
25 thought showed what the hostile work environment

1 was like at Showa Denko?

2 A. Mr. Smith, our job was with you.

3 Q. That's not my question.

4 A. You were a client and you are --

5 Q. That's not my question.

6 A. We were not to assess the climate of
7 your employer and your work setting. That was not
8 our job.

9 Q. How can you make a diagnosis of the
10 problem?

11 A. We deal with what we are presented
12 with.

13 Q. By the employer?

14 A. Exactly.

15 Q. Would engaging in dishonesty, fraud,
16 deceit or misrepresentation while performing
17 professional activities be unprofessional conduct?

18 A. Yes.

19 Q. Would it be illegal?

20 A. Would be unprofessional.

21 Q. Would it be illegal?

22 A. I don't know. I'm not a lawyer.

23 Q. Would it be malpractice?

24 A. I'm not a lawyer.

25 Q. So failing to seek -- failing to obtain

1 continuing professional education, training,
2 knowledge, personal awareness and relevant
3 techniques necessary to assist clients be
4 unprofessional conduct?

5 A. Yes.

6 Q. What training does Mr. Kessler --
7 continuing education does he have related to being
8 an EAP?

9 A. He has excellent clinical skills is
10 what he needed in this situation.

11 Q. Clinical skills?

12 A. Yes.

13 Q. Would failing to seek appropriate
14 professional assistance for CEAP's own personal
15 problems or conflicts be unprofessional?

16 A. Please repeat that slowly.

17 Q. I am sorry. Would failing to seek
18 appropriate professional assistance with a CEAP's
19 own personal problems or conflicts when they are
20 likely to contribute to inadequate services to the
21 client be unprofessional conduct?

22 A. Yes.

23 Q. We are almost done, Your Honor, I
24 promise. Would failing to make full disclosure of
25 the functions, purposes, range of services and

1 limitations of any services or activities be
2 unprofessional conduct?

3 A. Yes.

4 Q. So it is important to make a full
5 disclosure what the functions, purposes and range
6 of services were at SAVE; is that correct?

7 A. And that was done.

8 Q. Would failing to recognize professional
9 limitations and to act outside the scope of
10 established professional competence be a violation?

11 A. Yes.

12 Q. What professional limitations might you
13 have in working with someone like me?

14 MR. WALLINGER: Objection. Relevance.

15 THE COURT: Sustained. This is about
16 Mr. Kessler.

17 BY MR. SMITH:

18 Q. What professional limitations might
19 Mr. Kessler have in working with me?

20 A. He has none. He has excellent clinical
21 skills in working with you to address your
22 interpersonal relationships and your communication.

23 Q. Mr. Kessler's undergraduate degree is
24 in?

25 A. I don't have his resume in front of me.

1 Q. Do you think it is music; is that
2 correct?

3 A. I don't have his resume in front of me.

4 Q. Would failing to make or recommend
5 referrals to other professional technical or
6 administrative resources when such referral is in
7 the best interest of the client be unprofessional
8 conduct?

9 A. Yes.

10 Q. Would it be malpractice?

11 A. I don't know.

12 Q. Would failing to uphold the welfare of
13 the client be unprofessional?

14 A. Yes.

15 Q. Unprofessional conduct includes but is
16 not limited to revealing confidence of a client?

17 A. Yes.

18 Q. What is a confidence?

19 A. Confidence is information that the
20 client has not given you permission to release.

21 Q. So would the idea that the document
22 says -- uses the term protected health information,
23 is that correct; that release is to release health
24 information?

25 A. No. If you read further it says that

1 we are not required to release our notes and
2 protected health information by HIPAA.

3 Q. But you said -- what is protected
4 health information?

5 A. Protected health information is a lot
6 of things. You could read the HIPAA law and it
7 would explain it.

8 Q. Is there anything that is said during
9 session not protected health information?

10 A. Anything that you have given a release
11 of information to be released, that could be
12 protected health information, but you have given a
13 release of information to release that information
14 to a particular person.

15 Q. Any information?

16 A. What information that you have
17 specifically delineated to be released and that's
18 what was released.

19 Q. Including confidences?

20 A. Not if you didn't give permission to
21 release.

22 Q. So that document in your opinion allows
23 you to release to -- tell a confidence to the
24 employer; is that what you're saying, right? If I
25 have signed that document anything that might be

1 considered a trusted statement such as my idea of
2 how the role of marriage for example?

3 A. No, it does not give a blanket release
4 to release anything you said. What is given is a
5 release to release what is written on the release
6 and checked and signed by you.

7 Q. It is not a blanket release?

8 A. No. It is not a blanket release.

9 THE COURT: Mr. Smith, how much longer?

10 MR. SMITH: I will ask one more
11 question, Your Honor. Thank you for --

12 THE COURT: I like to give the court
13 reporter a break every now and then.

14 MR. SMITH: I understand.

15 BY MR. SMITH:

16 Q. Failing to protect the confidences of
17 the clients from disclosure by employees,
18 associates, family members and others, would that
19 be unprofessional conduct?

20 A. Read again, please.

21 Q. Failing to protect the confidences of
22 the client from disclosure by employers,
23 associates, family members and others?

24 A. We don't disclose anything that is not
25 -- you have not signed a released to be disclosed.

1 Q. And you -- you do not disclose
2 confidences, trusted confidences to a counselor; is
3 that true?

4 A. Who does not disclose?

5 Q. Does the counselor release trusted
6 confidences as a result of that release?

7 A. If it is not on the release information
8 is not released.

9 Q. Last question. You have a dual
10 obligation to employee and employer and you see
11 those obligations -- do you have a dual obligation
12 to employee and employer, correct?

13 A. That's correct.

14 Q. Are they equal obligations?

15 A. I don't know by what standards you're
16 saying.

17 Q. Are they different obligations?

18 A. They are different.

19 Q. Can you briefly tell us what the
20 differences are.

21 A. The similarities are being honest and
22 remaining with the laws of confidentiality and that
23 basically governs the information to be released.

24 Q. Are differences in the rights of the
25 patient? Do the rights of the patient differ from

1 the rights you owe to the employer?

2 A. The rights of the patient given what
3 the patient has said in confidence is basically
4 what's given to the patient. The company is not
5 the client sitting in the session.

6 Q. The company is --

7 A. The company is the referring entity.

8 Q. Is the patient the client or is the
9 company the client?

10 A. Both.

11 Q. If I come to you involuntarily am I a
12 client?

13 A. Yes.

14 Q. How do you --

15 A. It's just a matter of terms. You could
16 be a patient.

17 Q. Am I a patient?

18 A. Some clinics use the word patient. We
19 use the word client.

20 MR. SMITH: Nothing further, Your
21 Honor.

22 THE COURT: Redirect?

23 MR. WALLINGER: No, Your Honor.

24 THE COURT: You may step down. Okay.
25 Why don't we take till 1:30 for lunch and we will

1 come back with your other witness who needed to be
2 for --

3 MR. WALLINGER: Yes, sir. Could I ask
4 one question? I know the court reporter is ready
5 to stop. I can't really figure if the Plaintiff
6 has rested or not and I want to protect --

7 THE COURT: He hasn't rested because we
8 are calling out of order, but he sounded like he
9 was getting to, but before we will make it clear at
10 some point that you will make your motions.

11 MR. WALLINGER: Exactly. I didn't want
12 to forget about that.

13 THE COURT: You are protected on that.
14 All right. See you all at 1:30.

15 MR. SMITH: Your Honor, may I ask one
16 quick question? If I file a motion in limine
17 related to Mr. Krasilovsky's testimony?

18 THE COURT: We will deal with that when
19 we come back.

20 MR. SMITH: Thank you.

21 THE COURT: All right.

22 (A luncheon recess transpired.)

23 (PLF. EXH. 12 was marked for
24 identification.)

25 THE COURT: All right. Mr. Smith, you

1 have a motion to exclude the testimony of Arthur --

2 MR. SMITH: Krasilovsky.

3 MR. WALLINGER: I may have just said it
4 wrong too.

5 THE COURT: Mr. Smith.

6 MR. SMITH: Yes, Your Honor. As I set
7 forth in my brief, I believe the statements that
8 Mr. Krasilovsky has made in his professional
9 opinion address issues that are matters of law and
10 not matters of custom. He should not be able to
11 testify as to those -- whether or not these duties
12 exist or don't exist. That's a matter of law. And
13 I suggest that the way by his statement is worded,
14 therefore Mr. Smith granted permission to provide
15 your clients -- your client provided periodic
16 communication to his employer and therefore there
17 is absolutely no indication your client violated
18 any HIPAA confidentiality and no indication your
19 client breached any fiduciary duty brings into
20 question, and this is the objection Mr. Wallinger
21 made earlier, that fiduciary duty calls for a legal
22 opinion and Mr. Krasilovsky is not a legal -- he's
23 not a lawyer.

24 THE COURT: Didn't I overrule his
25 objection?

1 MR. SMITH: Yes.

2 THE COURT: Just like I spent yesterday
3 afternoon telling you you don't need to try to
4 establish the level of expertise of an EAP if you
5 are maintaining that Mr. Kessler was not an EAP.
6 Nevertheless, you brought that back up for the last
7 witness. So you brought it back up. Why don't
8 they get to follow up with their witness?

9 MR. SMITH: Your Honor, I just --

10 THE COURT: Yesterday I kept it out.
11 It would have been fair to say he is not an expert
12 in that field, why do you need an expert to tell me
13 what the standards are? But you brought it back up
14 for that last witness so you opened the door as we
15 say.

16 MR. SMITH: Yes, Your Honor. I would
17 simply state that it is a matter of law, that the
18 duties owed are a matter of law and not matters of
19 custom and that the custom, even though he may
20 testify as what the customs are, that those do not
21 constitute law.

22 THE COURT: I don't know any statutes
23 that state what the duties are of a counselor.

24 MR. SMITH: I agree, Your Honor, it is
25 vague.

1 THE COURT: It is not as a matter of
2 law. It's a matter of somebody's got to tell the
3 Court what those duties are. And if they're not
4 statutory, then they are either code of ethics
5 maybe or custom.

6 MR. SMITH: Rulings by an appeals
7 court, Your Honor, or even a higher court. There
8 are rulings related to the statute we were
9 discussing, the 15-36-6100 that appear to greatly
10 diminish its use in various lawsuits. I can
11 furnish that to you. It's the -- it may be a
12 matter for the Court to rule on as to what
13 constitutes legal duties in the context of a
14 counselor relationship. That is a matter of law
15 that may need to be determined, Your Honor.

16 THE COURT: Well, that would be me.

17 MR. SMITH: Yes, Your Honor. That's
18 why I am here with all due respect. I greatly
19 respect you and I appreciate your time in hearing
20 my case.

21 THE COURT: Would you like to respond?
22 What's your purpose in offering this witness?

23 MR. WALLINGER: He is going to
24 establish the standards of care and what
25 information is pertinent to that analysis. He will

1 also in my anticipation say there are some statutes
2 and regs that create sort of an ethical floor as
3 part of the consideration. I also expect he is
4 going to testify that some of the standards Mr.
5 Smith spent so much time talking with Ms. Gainey
6 about are not the standards.

7 THE COURT: All right.

8 MR. WALLINGER: My client is a licensed
9 independent social worker. He provides a very
10 technical licensed professional service. It is my
11 position based on law I won't recite that it is
12 beyond the scope of a layperson to decide whether
13 he did that professional judgment and service
14 correctly or not and that an expert has to opine
15 about that issue in establishing whether there was
16 negligence, whatever flavor it be.

17 THE COURT: Okay.

18 MR. SMITH: Your Honor, I do have -- I
19 can perhaps offer this opinion after Mr.
20 Krasilovsky has testified. It is a Supreme Court
21 South Carolina opinion.

22 THE COURT: What's the name of it?

23 MR. SMITH: Brower.

24 THE COURT: I have read it. I read it
25 again last night.

1 MR. SMITH: Okay.

2 THE COURT: Okay? All right.

3 Overruled. So we will let the witness testify.

4 Come on up.

5 ARTHUR KRASILOVSKY

6 having been duly sworn, testifies as follows:

7 THE CLERK: Give us your full name and
8 spell your last name.

9 THE WITNESS: My name is Arthur Mark
10 Krasilovsky, K-R-A-S-I-L-O-V-S-K-Y.

11 DIRECT EXAMINATION

12 BY MR. WALLINGER:

13 Q. Mr. Krasilovsky, where do you live?

14 A. My address is 389 Ormond Street,
15 Atlanta, Georgia, 30315.

16 THE COURT: Did you say Atlanta?

17 THE WITNESS: Yes.

18 THE COURT: Off the record.

19 (DFT EXH. 7 was marked for
20 identification.)

21 BY MR. WALLINGER:

22 Q. I am going to hand a document that is
23 Defendant's Exhibit 7. Does that appear to be a
24 copy of your professional vitae?

25 A. Yes, it is.

1 Q. I would like to quickly go through
2 that. Your Honor, may I stay at the lectern?

3 THE COURT: Yes.

4 MR. WALLINGER: Thank you.

5 BY MR. WALLINGER:

6 Q. When and where did you get your
7 undergraduate degree?

8 A. Ohio University, Athens, Ohio.

9 Q. Where did you get your masters degree?

10 A. Case Western Reserve University School
11 of Applied Social Sciences in Cleveland, Ohio.

12 Q. What is your masters in?

13 A. Masters in Social Science
14 Administration which is the equivalent of a masters
15 in social work.

16 Q. And if we just kind of go looking at
17 your vitae from the back working toward the front,
18 can you describe what your work entailed going
19 forward, please?

20 A. My first job after graduating from Case
21 Western Reserve was at Hill House which is psycho
22 social rehabilitation agency. I was there for
23 three and-a-half years and worked with the
24 chronically mental ill. After I left there I
25 worked at Huron Road Hospital on a psychiatric

1 the mental health substance abuse unit at the Free
2 Medical Clinic in Cleveland. And I continued in
3 private practice work there which during that
4 private practice time I also was doing employee
5 assistance program work as an LISW, licensed
6 independent social worker in Ohio.

7 Q. What year did that start?

8 A. The State of Ohio started licensure in
9 1986. So I was grandfathered in as a -- because I
10 was -- I belonged to the Academy of Certified
11 Social Workers.

12 Q. Okay. Then you were with Magellan
13 until 2011; is that right?

14 A. That's correct.

15 Q. And did they have a contract with any
16 government agencies?

17 A. Magellan had a contract initially with
18 Federal Occupational Health and their -- that
19 contract was overseeing the employee assistance
20 program for the United States Postal Service.
21 Their contract was renewed directly not through
22 FOH, but between Magellan and the United Postal
23 Service for many years.

24 Q. So you provided EAP services to postal
25 employees during that time?

1 A. That's correct.

2 Q. That was in Atlanta, correct?

3 A. That was in Cleveland originally and
4 then I relocated to Atlanta and I started working
5 in the Atlanta office as well.

6 Q. And then in 2011 you began doing what?

7 A. I started working at Home Depo at their
8 international headquarters as basically overseeing
9 their employee assistance program there. I
10 provided there was not direct services, but rather
11 management consultation to the employee assistance
12 program as well as the management of Home Depo.

13 Q. Was there an EAP inhouse?

14 A. No, there was not. We had a contract
15 with a private company and they provided EAP
16 services for Home Depo associates. My role -- the
17 role of the associate services manager was to make
18 sure that they did what we wanted them to do for
19 our associates.

20 Q. Do you continue to be affiliated in
21 that role with Home Depo?

22 A. No, I left there -- this is old. I
23 left there April 2014 and then I went to Emery
24 University where I do part of Emery University's
25 employee assistance program. We provide EAP

1 services to the university as well as health care
2 and there I do direct services.

3 Q. And Emery is an inhouse program?

4 A. Yes, it is.

5 Q. And you have done that since October
6 2014?

7 A. Yes.

8 Q. Have you ever testified in a forensic
9 setting?

10 A. I have not.

11 Q. What licensure do you currently have
12 with any state or federal agency?

13 A. I'm a licensed clinical social worker
14 in the State of Georgia.

15 Q. How long have you been a licensed
16 social worker in whatever state?

17 A. Since 1986, 31 years.

18 Q. All right. And are you familiar with
19 EAP and EAP certifications that may be available to
20 individuals?

21 A. I am. I am a certified employee
22 assistance professional.

23 Q. How long have you had that destination?

24 A. Since 2002.

25 Q. Is it necessary for a clinician

1 participating or providing EAP services to have a
2 CEPA designation to do that?

3 A. No, there's not. As I mentioned
4 earlier, in the 80's and 90's I was doing private
5 practice work and that included EAP work and there
6 I served as an affiliate for over 20 EAP companies
7 with an LISW or LCSW and I did not have a CEAP
8 until 2002.

9 Q. Now, you were retained by my firm on
10 behalf of my client some time ago to review various
11 records; is that right?

12 A. Yes, I was.

13 Q. And as far as the financial
14 arrangement, are you being paid an hourly rate to
15 review records and consult and testify?

16 A. Yes, I am.

17 Q. Could you tell the judge what your rate
18 is to testify in court today?

19 A. I believe it's \$100, but it may be a
20 little bit more. I actually was looking for the
21 schedule of fees last night. I could not find it,
22 Mr. Wallinger.

23 Q. Somewhere around a hundred, maybe a
24 little more?

25 A. Yes.

1 Q. And upon my firm's engaging you did you
2 receive a variety of records from my firm?

3 A. Yes, I did.

4 Q. Do you know -- Your Honor, I don't know
5 if I actually offered that professional vitae. I
6 would do that at this time.

7 THE COURT: You are talking about
8 Defendant's Exhibit 7? THE COURT: Okay.

9 (DFT EXH. 7 was admitted.)

10 BY MR. WALLINGER:

11 Q. Before we get the information you
12 reviewed, are you by virtue of your work in this
13 case familiar with the standards or professional
14 standards that my client, Mr. Kessler, would have
15 been obligated to abide by in the course of
16 providing or participating in EAP services in
17 Charleston in 2012?

18 A. I am.

19 Q. Do you believe that you have sufficient
20 educational experience, training, certifications or
21 other expertise which would enable you to give an
22 opinion to a reasonable degree of certainty within
23 your field concerning the matters that we're here
24 about today involving my client?

25 A. I believe so, yes.

1 MR. WALLINGER: Your Honor, I'm going
2 to tender the witness as an expert in the field of
3 social work, in particular licensed independent
4 social worker-clinical practice and in EAP
5 services. And if the Court would like to inquire
6 or if Mr. Smith needs to voir dire the witness I
7 would --

8 THE COURT: Do you have any objection
9 to his being qualified as an expert?

10 I know you don't want him to testify,
11 but this is as to his qualifications and expertise
12 in the field of being a licensed social worker.

13 MR. SMITH: As an expert EAP I would
14 have no objection. The ruling on my motion was
15 denied.

16 THE COURT: He is being allowed to
17 testify. It is now he's offered him as an expert
18 in this field. You can object or not.

19 MR. SMITH: For the record I will
20 object.

21 THE COURT: All right. It is
22 overruled. He is admitted as an expert.

23 (DFT. EXH. 8 was marked for
24 identification.)

25 BY MR. WALLINGER:

1 Q. I am going to hand you what's marked as
2 Defendant's Exhibit 8. It's a two page letter
3 dated August 7th, 2016, addressed to and signed,
4 but I will ask you briefly if you recognize that
5 document?

6 A. Yes. I wrote this document and signed
7 it.

8 Q. Okay. For the Court's benefit, I
9 believe that document is already filed in the court
10 record as an exhibit in support of a past motion
11 for summary judgment. Can you just explain based
12 upon whatever reference to that you would like to
13 make what information you had received and
14 considered by the time that document was created.

15 A. I reviewed the EAP standards on
16 professional guidelines. It was the 2010 edition
17 as well as the 2008 NASW, that's the National
18 Association of Social Worker Code of Ethics.

19 Q. Okay. As far as documents that my firm
20 provided, can you relate what you have seen and
21 reviewed?

22 A. Could you repeat the question.

23 Q. Sure. Hand me the exhibit. I'll see
24 if I can --

25 A. (Witness complies with request.)

1 Q. If you will look at paragraph one where
2 it's discussing the scope of the engagement, I
3 think the second or third sentence, there's a list
4 of information you received and reviewed?

5 A. The records include the lawsuit
6 complaint, your firm's response to the lawsuit,
7 Showa Denko Carbon, Inc. file on Mr. Smith, the
8 clinical file from SAVE on Mr. Smith, Mr. Kessler's
9 statement and supervisor John Wing's affidavit
10 dated February 12th, 2016.

11 Q. Okay. Now, with regard to the Kessler
12 statement, I believe that that is already in
13 evidence as Plaintiff's Exhibit 1. Can you tell me
14 if you recognize that as being that document?

15 A. Yes, I do recognize it.

16 Q. Did you receive the records of SAVE,
17 Inc. concerning Plaintiff Tracy Smith?

18 A. Yes, I did.

19 Q. I'm going to hand you what's been
20 marked as Defendant's Exhibit No. 6. It's a packet
21 of documents. And ask you if you will just verify
22 that that was information you received.

23 A. It is information I received.

24 (DFT. EXH. 9 was marked for
25 identification.)

1 BY MR. WALLINGER:

2 Q. Hand you what's been marked as Exhibit
3 No. 9 which is a nine page affidavit of John Wing
4 filed in the Dorchester County case of Smith versus
5 Showa Denko. Can you tell me if this was a
6 document that you received and reviewed?

7 A. It is.

8 Q. Your Honor, Mr. Wing is in the
9 courtroom because I'm taking this witness out of
10 order. This document has not yet been
11 authenticated; however, I anticipate that Mr. Wing
12 is going to both verify the information and read it
13 in its entirety if necessary. I would ask that it
14 be admitted at this time.

15 THE COURT: Go ahead.

16 (DFT. EXH. 9 in evidence.)

17 BY MR. WALLINGER:

18 Q. Now, subsequent to your receipt of the
19 information that you have just related, did you
20 have occasion to receive additional information
21 from me subsequently in the course of your
22 consulting and your assistance?

23 A. Yes, I did receive additional files
24 from you.

25 Q. Can you recall whether you received the

1 transcript of the deposition of Tracy Smith, the
2 Plaintiff?

3 A. I did receive it.

4 Q. Can you recall if you received the
5 transcript of the deposition of Jonathon Kessler?

6 A. I did.

7 Q. Can you recall if you received the
8 transcript of the deposition of Sara Gainey?

9 A. Yes, I did.

10 Q. Did you review all of those?

11 A. I did.

12 Q. With regard to those transcripts have
13 you been able to essentially update -- don't give
14 me your opinion -- have you essentially updated
15 your opinion subsequent to receiving that
16 information? Not written, but are you --

17 A. I did update my opinion.

18 Q. All right. Your Honor, I'm going to
19 offer all those in the record at this time.

20 THE COURT: Go ahead.

21 (DFT. EXH. 10-12 were marked for
22 identification.)

23 (DFT. EXH. 10-12 in evidence.)

24 BY MR. WALLINGER:

25 Q. Were you in the courtroom today when

1 Sara Gainey testified at the request of the
2 Defendant?

3 A. I was.

4 Q. Did you see all of her testimony? I
5 didn't see when you came in.

6 A. Yes, I did.

7 Q. Have you been able to consider the
8 testimony that she gave today to help you to
9 consider any opinion you may give today?

10 A. Yes.

11 Q. There was some discussion by Ms. Gainey
12 in response to questions by the Plaintiff about
13 codes of ethics promulgated by the Employee
14 Assistance Certification Commission in Virginia
15 relating to certified employee assistance
16 professional conduct; do you recall that?

17 A. Yes, I do.

18 Q. And I believe the Plaintiff has
19 admitted into evidence already that document,
20 although his version is different so I am going now
21 to offer to mark --

22 MR. SMITH: Mine is 2009.

23 (DFT. EXH. 13 was marked for
24 identification.)

25 MR. WALLINGER: I will also mark the

1 CEAP client bill of rights whatever version I have.
2 It's the newest version.

3 (DFT. EXH. 14 was marked for
4 identification.)

5 BY MR. WALLINGER:

6 Q. I'm going to hand you Defendant's
7 Exhibit 13 and 14. That is the Employee Assistance
8 Certification Commission standards of practice and
9 the CEAP client bill of rights. I will just have
10 you identify those. Do you recognize those?

11 A. Yes, I do.

12 Q. I will also hand you Plaintiff's
13 Exhibit 12 which is another version of what appears
14 to be Exhibit 13. Do you recognize that exhibit?

15 A. Yes.

16 Q. Okay. Can we agree that in 2012 at the
17 time that my client, Mr. Kessler, was providing
18 services to Plaintiff to Showa Denko Carbon that my
19 client was not as far as you know a certified
20 employee assistance professional within the CEAP
21 designation as indicated in those exhibits?

22 A. That's correct.

23 Q. Can you tell us in your opinion to a
24 reasonable degree of certainty within the field of
25 licensed social work and EAP services whether those

1 standards set by the Employee Assistance
2 Certification Commission are the standards that my
3 client was obligated to follow?

4 A. Mr. Kessler is not a member of -- he's
5 not certified as an employee assistance
6 professional, therefore, he is not bound by those
7 -- that type of code of conduct. He would be --
8 he's obligated to follow the NASW codes of ethics.

9 Q. We will get to that. The answer is no?

10 A. The answer is no.

11 Q. All right. Now, there is also an EAPA
12 code of ethics; you're aware of that?

13 A. Yes.

14 Q. I will hand that you. Bear with me
15 while I mark it.

16 (DFT. EXH. 15 was marked for
17 identification.)

18 MR. WALLINGER: Before I get ahead of
19 myself, Your Honor. I will offer Exhibit 13 and
20 14, the certification commission exhibits that are
21 already marked that he just testified about.

22 MR. SMITH: Can I briefly look at the
23 newer version?

24 THE COURT: Without objection admitted.

25 (DFT. EXH. 13-14 in evidence.)

1 BY MR. WALLINGER:

2 Q. I'm going to hand you what's been
3 marked as Exhibit 15 which is the EAPA code of
4 ethics dated August 2009. Multipage document. I
5 will ask you if you have seen that before?

6 A. Yes, I have.

7 Q. Okay. And I need to understand in your
8 opinion does Exhibit 15, if that's the right number
9 there, does that create a minimum standard of care
10 that my client, Mr. Kessler, would have been
11 expected to follow and meet in 2012?

12 A. A minimum standard of care?

13 Q. Was that the standard he was obligated
14 to follow?

15 A. No, it is not.

16 Q. All right. I will take that back.

17 MR. SMITH: Which document was referred
18 to?

19 MR. WALLINGER: Exhibit 15. Your
20 Honor, I will offer that.

21 THE COURT: Admitted.

22 (DFT. EXH. 15 in evidence.)

23 BY MR. WALLINGER:

24 Q. So now we are interested to know what
25 standards of care do apply to the actions of

1 Mr. Kessler in his role at SAVE, Inc. in providing
2 professional services and EAP services to Mr. Smith
3 and to his employer.

4 What I now want to do is to ask you
5 first off are there statutes and/or regulations in
6 South Carolina that govern some aspects of the
7 professional activity of a licensed independent
8 social worker with a clinical practice designation?

9 A. Yes, there are.

10 Q. I'm going to hand you an unmarked
11 document which is a packet of statutes, just ask
12 you to tell me if you recognize those statutes?

13 A. Yes, I do.

14 Q. Okay. And is that Title 40 Chapter 63
15 Section 5 et sequitur of the South Carolina Code of
16 Laws?

17 A. Yes, it is.

18 Q. Now, I want to hand you an unmarked
19 document which is South Carolina Code of
20 Regulations 110-1 et sequitur and ask you if you
21 recognize that?

22 A. Yes, I do.

23 Q. And do you have an opinion as to
24 whether those regulations are a standard that a
25 licensed independent social worker with a clinical

1 practice designation would have to comply with in
2 their professional services including EAP services?

3 A. Yes.

4 Q. I'm going to now hand you an unmarked
5 document which is a copy of South Carolina code of
6 laws 19-11-95. Do you recognize that law?

7 A. Yes, I do.

8 Q. And do you have an opinion as to
9 whether the sections of that statute relate to a
10 health care provider's disclosure of confidential
11 information and set a standard as to a licensed
12 independent social worker's standard of care?

13 A. Yes.

14 Q. Now, beyond those, you had mentioned
15 something about NASW. I would like you just to
16 explain what that authority or information is,
17 please.

18 A. NASW is the National Association of
19 Social Workers and social workers are obligated to
20 abide by their code of conduct and code of ethics.

21 Q. Now, you brought with you today a
22 packet of documents that I'm going to hand you and
23 is not yet marked. Is that the group of rules or
24 authorities that you are referring to?

25 A. That's the code of ethics that I am

1 referring to.

2 Q. Okay.

3 THE COURT: What exhibit number was
4 that?

5 Q. I have not given it an exhibit number
6 yet, but I am getting ready to. Among the
7 information that you brought is there additional
8 paperwork that relates specifically to those
9 standards or is that it?

10 A. That's it.

11 Q. Will you hand those to me and let me
12 mark it. Thank you.

13 (DFT. EXH. 16 was marked for
14 identification.)

15 MR. WALLINGER: Your Honor, that is
16 Exhibit No. 16.

17 BY MR. WALLINGER:

18 Q. Insofar as EAP services, is there a
19 requirement in South Carolina for a clinician to
20 have a CEAP designation in order to provide EAP
21 services?

22 A. There is no requirement.

23 Q. Can you explain to the judge how
24 generally EAP services to a client and its employer
25 differ from sort of the traditional clinical

1 counseling services that a person may walk in and
2 receive for whatever issue or problem they may
3 have.

4 A. So if a client comes into a counseling
5 office and just is asking for some counseling they
6 may be paying for this service or through their
7 insurance company. Most of the time the services
8 are not time limited in terms of sessions. And the
9 provider of those services is providing counseling
10 services and you could go on from one session, may
11 go on for 52 or even more sessions in one year.
12 Just depends on that particular individual and that
13 client.

14 EAP services are time limited. There's
15 usually a maximum number of sessions. That's one
16 difference. It's assessment and referral. And the
17 third piece is that the EAP services are paid for
18 by the employer.

19 Q. Now, a person can have EAP services
20 without a referral from an employer; is that right?

21 A. That's correct. The majority of EAP
22 services are self referred.

23 Q. And if an employer refers an employee
24 for EAP services is the employer considered to also
25 be some kind of client of the EAP entity?

1 A. Yes.

2 Q. Is it permissible during EAP services
3 to an employee for the EAP counselor to provide
4 information to the employer if it is within the
5 scope of any written permission given by the
6 employee?

7 A. Yes.

8 MR. SMITH: Your Honor, can I object?
9 I think this is a question of law.

10 THE COURT: He's an expert. He is
11 entitled to give his opinion on that.

12 BY MR. WALLINGER:

13 Q. Let us assume in a hypothetical sense
14 that an EAP counselor has had a referral by the
15 employer of the employee, that the employee comes
16 in for counseling. And that the employee manifests
17 or reports issues that are of a psychiatric or
18 psychological nature. And that the counselor
19 determines those need to be dealt with through
20 someone or some other level of care.

21 Just to add to the hypothetical,
22 employee is referred for counseling regarding a
23 disagreement over where their office is in the
24 building and it is learned in counseling that the
25 employee is having a severe major depressive

1 episode, should be admitted to a hospital for care.

2 All right?

3 A. Okay.

4 Q. I gather the EAP clinician can refer
5 the employee to someone to have treatment for that;
6 is that right?

7 A. Yes, that's correct.

8 Q. If the clinician meets with an employee
9 and does not perceive there to be a health issue
10 that is either beyond the scope of the clinician's
11 ability to manage or that is not part of what the
12 EAP referral is about, does the clinician have
13 discretion to either deal with him or her or not
14 deal with it if that is not required to be dealt
15 with?

16 A. Can you clarify that again?

17 Q. All right. To put a finer point on it,
18 if an employee comes in who has been referred
19 because they are having interpersonal communication
20 difficulties and are having compliance with
21 directions and difficulties and are having problems
22 with getting along with others in the workplace,
23 and if that employee reports I am an unhappy person
24 because I know more than all my coworkers about
25 software, but I am not being recognized for that,

1 does the EAP have the discretion not to spend time
2 and focus on that issue that the employee wants to
3 talk about if it is not what the employer perceives
4 as the issue or what the EAP perceives is the
5 issue?

6 A. Yes, they do.

7 Q. Now, you have reviewed the SAVE file
8 and the various interactions that Mr. Smith had
9 with initially Ms. Gainey and then with
10 Mr. Kessler, correct?

11 A. Yes.

12 Q. And you have reviewed Mr. Kessler's
13 unsworn narrative that discusses his observations
14 during various times?

15 A. Yes.

16 Q. Correct? Do you have an opinion to a
17 reasonable degree of certainty within the field of
18 licensed independent social worker on EAP services
19 as to whether the actions that Mr. Kessler took
20 during the entire continuum from when he first met
21 Mr. Smith until he ceased any services met the
22 standard of care expected of a person at that time?

23 A. I do.

24 Q. And what is that opinion?

25 A. I believe Mr. Kessler's services met

1 the standard of care.

2 Q. There has been some discussion during
3 the trial and before about the allegation that
4 Mr. Kessler communicated confidential information
5 to the Plaintiff's employer that was either false
6 or was exceeding the scope of whatever written
7 authorization was given by the Plaintiff
8 previously. Are you aware of that issue?

9 A. I am aware of that.

10 Q. Have you seen any information in the
11 records you have been given to this point to
12 indicate that Mr. Kessler gave any false
13 information to the Plaintiff's employer?

14 A. I did not.

15 Q. Have you seen any information to
16 indicate that Mr. Kessler at any time conveyed any
17 information to the Plaintiff's employer that was
18 beyond the scope of any authorization the Plaintiff
19 had given?

20 A. I did not.

21 Q. Have you seen any information to
22 indicate that Mr. Kessler conveyed any information
23 to the Plaintiff's employer that either may have
24 been within the scope, but that was for whatever
25 reason improper for the Plaintiff to know -- for

1 the employer to know about?

2 A. I did not.

3 Q. From the information you have seen and
4 the standards you're aware of, do you have an
5 opinion as to whether Mr. Kessler made appropriate
6 communications to the employer at any time that he
7 did so?

8 A. Yes.

9 Q. What is that opinion?

10 A. I believe his communications seemed to
11 be appropriate.

12 Q. There is some ambiguity about what the
13 lawsuit alleges in the way of breaches of care and
14 so I will just ask another general question. Was
15 there anything in the actions of Mr. Kessler that
16 he did relative to Mr. Smith that you found to be
17 inappropriate and a deviation from any standards of
18 care?

19 A. Absolutely not.

20 Q. From your review of information was
21 there anything that Mr. Kessler did not do at that
22 point but that in your opinion he should have and
23 needed to do in order to meet the standards of
24 care?

25 A. No.

1 Q. From your knowledge of the information
2 provided to you, do you have an opinion as to
3 whether Mr. Kessler at any point either was
4 required to try to get the employer to do something
5 that it was not doing or to get the employer to
6 stop doing something that it was doing during the
7 period that Mr. Smith was coming to see
8 Mr. Kessler?

9 A. I did not.

10 Q. From the information available to you
11 do you have an opinion about whether Mr. Kessler at
12 any point was obligated to obtain a peer
13 consultation from any other professional whether
14 within or outside SAVE to enable Mr. Kessler to
15 perform his professional services?

16 A. I don't believe so.

17 Q. Do you have an opinion as to whether
18 Mr. Kessler was ever required or obligated under
19 any standard to refer the Plaintiff either to
20 another clinician of some credential or to a lawyer
21 or to any other governmental or nongovernmental
22 body outside of SAVE, Inc. for services while Mr.
23 Smith was coming to see Mr. Kessler?

24 A. I don't believe he needed referral, no.

25 MR. WALLINGER: Your Honor, I would

1 offer into the record his report, Exhibit No. 8,
2 dated August 7, 2016.

3 THE COURT: It is what?

4 MR. WALLINGER: Exhibit 8, Defendant's
5 Exhibit 8, which was the report of the expert in
6 August of last year.

7 THE COURT: By this witness. All
8 right. Any objection? It is the report, written
9 report.

10 MR. SMITH: I do object to the
11 admission of this as an expert affidavit. I do not
12 believe -- I believe for the reasons I have stated
13 in my motion.

14 THE COURT: Well, I understand you have
15 a standing objection to his being qualified as an
16 expert.

17 MR. SMITH: Yes, objection, yes, on the
18 record.

19 THE COURT: The document can come in
20 over your objection.

21 MR. SMITH: Yes, sir.

22 (DFT. EXH. 8 in evidence.)

23 BY MR. WALLINGER:

24 Q. Insofar as Mr. Smith's termination from
25 his employer Showa Denko Carbon in or around

1 December of 2018, have you seen and received any
2 information to indicate that his termination was
3 because of anything that Mr. Kessler said to
4 anybody at Showa Denko?

5 A. Can you clarify the date of the
6 termination?

7 Q. December 18th of 2012. I apologize if
8 I misspoke.

9 A. Repeat the question I believe.

10 Q. I will strike the question and reask
11 it. Have you seen any information that would be --
12 through to this point to indicate anything
13 Mr. Kessler communicated verbally or in writing to
14 Showa Denko Carbon had any causal relationship to
15 Mr. Smith's termination?

16 A. I did not see anything.

17 Q. Now, are there times when an EAP
18 professional counsels a client for some period and
19 despite those efforts the client still gets fired
20 by their employer?

21 A. Yes.

22 Q. There is no guarantee in the world of
23 EAP services then that the EAP can resolve whatever
24 the workplace issue is to prevent the client from
25 being fired by the employer?

1 A. That's correct.

2 Q. The goal is to try to minimize to the
3 extent practical the cessation of the
4 employer/employee relationship; is that right?

5 A. The cessation of the relationship?

6 Q. The goal of the EAP is to help the
7 client try to avoid getting fired?

8 A. Yes.

9 Q. But that is not always successful?

10 A. It is not always successful.

11 Q. Are there times when the EAP
12 professional is not aware of things going on in the
13 workplace other than what was already reported by
14 the client or the employer that are affecting the
15 employer's willingness to keep the employee
16 employed?

17 A. Yes.

18 Q. That is not an unusual thing, is it?

19 A. I would say no.

20 Q. Are all of the opinions that you have
21 offered today to a reasonable degree of certainty
22 within the field of licensed independent social
23 worker and clinical practice in EAP services?

24 A. Yes.

25 MR. WALLINGER: Those are all the

1 questions I have, Your Honor.

2 THE COURT: Cross.

3 CROSS-EXAMINATION

4 BY MR. SMITH:

5 Q. Mr. Krasilovsky, I am glad you made it
6 here to South Carolina from Atlanta.

7 A. Thank you.

8 Q. And I hope this is a good afternoon
9 spent for you. Looking at your documents you made
10 the comment that there is absolutely no indication
11 Mr. Kessler violated any HIPAA confidentiality and
12 no indication your client breached any fiduciary
13 duty; is that correct?

14 A. That's correct.

15 Q. What is a fiduciary duty in your
16 opinion?

17 A. Fiduciary communication you said?

18 Q. Fiduciary duty.

19 A. Duty. It's a legal term and has to do
20 with how -- the role of the EAP provider and the
21 services that they are providing.

22 Q. Is it limited to an EAP provider?

23 A. No.

24 Q. Can you clarify what a fiduciary duty
25 in general is?

1 A. In what way?

2 Q. Trying to understand that you know the
3 definition of a fiduciary duty.

4 A. I have already explained it.

5 Q. What is a fiducial relationship?

6 A. I do not know that.

7 Q. What is a trust relationship?

8 A. A trust relationship? I would say a
9 trusting relationship is when two parties or more
10 believe in each other and feel there's a bond
11 between those two or more people.

12 Q. What is a confidence?

13 A. Confidence is a relationship or is an
14 -- I will say it's an adjective I believe to
15 describe a relationship between two parties and
16 they talk to each other and one party trusts the
17 other person, trusts the other person.

18 Q. Trusts the other person to?

19 A. Not reveal information without the
20 other person's permission.

21 Q. And what type of permission might be
22 needed before such a person would disclose such
23 information?

24 A. It's between the two parties. It could
25 be between two lovers, between two friends, between

1 an employee.

2 Q. In a doctor/patient or
3 counselor/patient relationship?

4 A. In a counselor relationship the
5 counselor would not release information without the
6 client's permission.

7 Q. And can you be more specific about what
8 type of permission would be needed?

9 A. If we are talking about a licensed
10 counselor or a licensed social worker or a licensed
11 psychiatrist, mental health professional, it would
12 be a written statement.

13 Q. Would consent be a word you would use?

14 A. Yes.

15 Q. What type of consent?

16 A. Written consent unless there's an
17 emergency.

18 Q. Is there a type of consent that is
19 often used in a health care setting that is more
20 descriptive that you can think of?

21 A. It would be a release of information.

22 Q. Is there a specific type of consent
23 that is generally needed before a trusted -- before
24 a fiducial relationship can be -- use the word
25 violated, but can be -- before someone can release

1 confidential information which is potentially
2 damaging to his subordinate?

3 A. Most -- to release that information you
4 should follow the HIPPA compliant regulations.

5 Q. And are the HIPAA regulations, do they
6 address the fiduciary relationship, the fiduciary
7 duty in the relationship?

8 A. I believe so.

9 Q. Can you please tell me how?

10 A. The HIPAA regulations discuss the role
11 of the professional and the role of the client or
12 patient and it clearly delineates onto what
13 circumstances release of information can be -- can
14 occur.

15 Q. What is the purpose of the HIPAA law?

16 A. I believe it's almost three to
17 four inches thick so I cannot tell you what the law
18 reads.

19 Q. What does the acronym HIPPA stand for?

20 A. I believe, I'm not positive, it's
21 health information -- information portable there,
22 and I don't remember the other P -- protected.

23 Q. And the last letter A?

24 A. I believe act, but I'm not positive.

25 Q. So it's your expert testimony that

1 HIPAA stands for Health Information Portable
2 Protected Act?

3 A. I believe so, but I'm not absolutely
4 certain.

5 Q. Is it possible that HIPAA stands for
6 the Health Information Portability and Privacy Act?

7 A. Yes.

8 Q. Do you know what Congress' intent with
9 that law was?

10 MR. WALLINGER: Objection, Your Honor.

11 THE COURT: Sustained.

12 MR. SMITH: Can I ask the basis of the
13 objection?

14 THE COURT: How would he know what
15 Congress' intent is?

16 MR. SMITH: By reading the law.

17 THE COURT: Then it would -- you don't
18 need his interpretation of what Congress' intent
19 was.

20 MR. SMITH: He's relying on the law and
21 I would suggest the intent of the law with all due
22 respect is an important issue. But I will not
23 dwell on this issue.

24 BY MR. SMITH:

25 Q. Was HIPAA designed to make medical

1 records and billing easier?

2 A. That's one of the purposes of the
3 HIPAA.

4 Q. So you agree that is one of the
5 purposes. Is there another purpose it is worth
6 telling the Court?

7 A. Eventually one of the goals of HIPAA
8 was to make access of medical information easier
9 not just within the city, but nationwide.

10 Q. So that if one person wanted to go from
11 one position or medical practice to another his
12 records weren't held hostage by one of the doctors?
13 They would be easy to port in a private manner over
14 to another health care facility; would that be a
15 fair statement?

16 A. No, it would not be.

17 Q. Explain why.

18 A. The patient would need to sign a
19 release of information for that medical information
20 to be transported.

21 Q. Assuming that signature was valid?

22 A. Yes.

23 Q. So does it establish data formats and
24 different methods of handling data so that it could
25 be transferred relatively easily between different

1 health care practitioners; would you agree with
2 that statement?

3 A. Yes.

4 Q. So it's fair to say that it's over --
5 and by doing so to do it in a relatively private
6 manner so that for example, data would not be sent
7 over the internet unencrypted and could therefore
8 be ascertained by a snooper? It is designed to
9 provide a reasonable degree of privacy as that data
10 was to move from health care practitioner to health
11 care practitioner; would you agree with that?

12 A. Yes.

13 Q. I am just an IT guy.

14 A. Um-hmm. I follow that.

15 Q. Anything else you would tell me about
16 HIPPA before we move on? It seems it is relied on
17 quite heavily. In fact, let's take a look at the
18 SAVE, Inc. and Jonathon Kessler's statements
19 release as they call them, authorization, I am not
20 sure to what call it. I am showing Mr. Krasilovsky
21 Exhibit 6A and Exhibit 6. What can you tell me
22 about those documents?

23 A. These are pretty standard authorization
24 release records.

25 Q. And do they appear to be HIPAA

1 compliant?

2 A. They appear to be, but I'm not a
3 medical attorney so I cannot tell you with absolute
4 certainty.

5 Q. That would be a legal question, is that
6 what you're --

7 A. No.

8 Q. Well, then I am asking your expert
9 opinion.

10 A. I would say they are.

11 Q. To more of specific matters of this
12 case, can you see any differences between those two
13 documents?

14 A. Yes.

15 Q. And what are those differences?

16 A. First difference is that Exhibit No. 6
17 authorizes Sara Gainey to release information to
18 Clint Lucas and 6A authorizes SAVE, Inc. Jonathon
19 Kessler to release information to Clint Lucas.

20 Q. Anything else?

21 A. Yes. Exhibit 6 indicates Sara Gainey
22 is allowed to release the date of service and
23 whether the client, yourself, has complied
24 regarding attendance with SAVE, Inc. 6A is for one
25 you signed with Jonathon Kessler, indicates you

1 granted him permission to release the date of
2 service, progress, recommendations, compliance,
3 which consists of attendance and participation and
4 also allowed him to have a telephone exchange of
5 information with Clint Lucas.

6 Q. And what type of consent does it appear
7 I gave to those documents?

8 A. I want to add one more thing to that
9 earlier question. The one with Jonathon Kessler,
10 you also indicated it was -- the purpose of it was
11 for continuity of care and follow up and progress.
12 And on to Sara Gainey you did not -- those were not
13 there. Can you repeat the question again.

14 Q. The -- would you agree that those were
15 basically intended to make it easier to --
16 portability and privacy -- they are complying with
17 the portability and privacy act so that one
18 practitioner can transfer to another practitioner;
19 is that the primary purpose of those forms?

20 A. No, I would -- I don't -- I would say
21 no.

22 Q. In your speaking with Mr. Wallinger
23 earlier you talked about how an EAP program is
24 frequently funded by in your experience a health
25 insurance company or an employer?

1 A. A hundred percent employer, never a
2 health insurance company.

3 Q. An EAP program is never funded through
4 a health insurance company?

5 A. Correct.

6 Q. It is always paid for by an employer?

7 A. Yes.

8 Q. Is that what defines it as an EAP?

9 A. That's one of the major definitions,
10 yes.

11 Q. Tell me what the major definitions of
12 EAP are if you can.

13 A. The purpose of an employee assistance
14 programs are they are employer based and they --
15 the employer contracts with the employee assistance
16 company to provide mental health, emotional
17 services, wellness services for their employees and
18 very often for their members of their family to
19 basically provide coping services before things get
20 worse and to help the -- to improve the work for
21 that employer for whatever reason.

22 Q. And why isn't it ever paid for by
23 insurance companies? Isn't that what you told me,
24 that insurance companies do not pay for them?

25 A. Correct.

1 Q. Why is that?

2 A. If an insurance company wants -- an
3 insurance company would not want -- has no need to
4 provide free counseling unless they are the
5 employer itself.

6 Q. So the EAP services is not actually a
7 health care service?

8 A. Some EAPs do view themselves as a
9 health -- as a benefit, others don't. It -- the
10 field is very much in flux about that issue.

11 Q. Can you elaborate?

12 A. The EAPA basically do not want EAPs to
13 market themselves as a health care benefit, but
14 rather as an employer based service.
15 Unfortunately, many employers when they are talking
16 to their employees say basically this is the EAP.
17 They are a benefit, one of your health insurance
18 benefits. And the EAP companies have no control
19 over what the company does in terms of how they
20 market to their employees.

21 Q. Let's look at that issue just a little
22 bit. You say the EAP has no control of how the
23 company markets it to their employees; is that what
24 you just said?

25 A. That's correct.

1 Q. Why is that?

2 A. They are a separate entity.

3 Q. Can their contract specify?

4 MR. WALLINGER: Your Honor, I'm going
5 to object. This is far afield considering that his
6 employer does not have any inhouse EAP. That's not
7 the model of what this case is about right here.
8 This is a fishing expedition into what seems to be
9 a really future industry thing that we don't need
10 to deal with right now.

11 THE COURT: What's the relevance?

12 MR. SMITH: Relevance, that's why I was
13 asking for the contracts from Sara Gainey, Your
14 Honor, to understand the relationship between the
15 EAP and the employer. This is what I am asking Mr.
16 Krasilovsky about what are the customs about how
17 the EAP entity contracts with the employer entity
18 and contracts with this other entity over here. I
19 believe it's extremely relevant to this case.

20 MR. WALLINGER: We are not in
21 discovery. He has got the burden to prove what the
22 relationship was. It is my witness and he is
23 asking about things that aren't even related to
24 Showa Denko Carbon. I don't think it is relevant.

25 THE COURT: You just need to keep it to

1 this case, not what the industry wide is. If he
2 has got any evidence that's about the relationship
3 of this Defendant and that and your employer then I
4 will let you go there, but as to industry standards
5 I don't see the relevance on that.

6 MR. SMITH: He is here to testify on
7 the customs of the industry, but I will move on.

8 BY MR. SMITH:

9 Q. Have you ever seen an employer to be at
10 fault in an EAP setting?

11 A. How would you define that?

12 Q. Let me just ask you to answer the
13 question as you would answer it. Have you ever
14 seen an employer at fault in an EAP setting?

15 A. I can't answer the question because I
16 don't understand what you mean by at fault.

17 Q. Is it possible for an employer to be at
18 fault in an EAP setting?

19 MR. WALLINGER: Objection, vague.

20 THE WITNESS: I can't answer. I am
21 sorry. If you could be more specific that will
22 help me.

23 THE COURT: The EAP is standards that
24 apply to people that are members of that group that
25 are on the social workers side. They are not

1 employers.

2 MR. SMITH: Because he said that the
3 employers fund it, that it cannot be funded through
4 health insurance.

5 THE COURT: So?

6 MR. SMITH: I am trying to get the
7 testimony, Your Honor. I won't keep this too long.
8 I promise. I am trying to get the testimony.

9 THE COURT: If you got a point make it.
10 But it's escaping me.

11 BY MR. SMITH:

12 Q. In your experience has an EAP ever
13 referred an employee to worker compensation or to
14 OSHA or to any other similar government agency?

15 A. Has an EAP ever done that?

16 Q. Yes.

17 A. I would say no.

18 Q. Would you agree that for an EAP failing
19 to make a recommended referral to other
20 professional, technical or administrative resources
21 when it is in the best interest of the client would
22 be a misconduct? Would it be against the EACC
23 rules?

24 A. Yes.

25 Q. So someone acting as an EAP would have

1 a duty if it was in the client's best interest to
2 refer the client to some other professional,
3 technical or administrative resource; is that true?

4 A. Under the EACC, yes.

5 Q. Someone holding themselves out to be an
6 employee assistance professional, would they have
7 the same obligation?

8 A. No.

9 Q. Why not?

10 A. Because they are not a CEAP.

11 Q. Would a licensed independent social
12 worker have a duty to make a -- to recommend a
13 referral to another professional, technical or
14 administrative resource if it was in the client's
15 best interest?

16 A. Yes.

17 Q. So they overlap basically?

18 A. Yes.

19 Q. What are the differences? Where do
20 they not overlap? Can you give me a general major
21 -- what is different about an EAP than a licensed
22 independent social worker? Why not just call
23 yourself a licensed independent social worker when
24 marketing your services to the employer?

25 A. An EAP is an entity. A social worker

1 is an individual mental health provider.

2 Q. An EAP is a marketing construct; is
3 that a fair statement?

4 A. A marketing construct?

5 Q. It's a --

6 A. It's an -- it would be either an agency
7 or an entity. I wouldn't call it a marketing
8 construct.

9 Q. Do you belong to a trade organization,
10 you're the secretary of the Georgia -- tell me
11 again?

12 A. The Georgia Employee Assistance
13 Professional, yes.

14 Q. Are you an advocate for employee
15 assistance professionals?

16 A. Yes.

17 Q. And so is marketing part of being an
18 advocate for employee assistance professionals?
19 Have you ever tried to sell an EAP program to an
20 employer?

21 A. I have not.

22 Q. But do people do that?

23 A. Yes.

24 Q. And do they -- how do they market it
25 typically. Like SAVE has marketed here?

1 A. That would be one way for them to do
2 it.

3 Q. What other ways do they do it?

4 A. Usually be through an RFP, request for
5 proposal.

6 Q. Why is that in the employer's interest?

7 A. Companies usually are able to save
8 money by having EAPs. It's basically viewed that
9 for every dollar spent, the business spends on EAPs
10 they get seven to eight dollars back in return, so
11 their return investment is very high.

12 Q. The same services could be gotten
13 through the health care system; isn't that true?
14 You could go to a counselor if your health
15 insurance would pay for it; is that true?

16 A. They can go to their counselor if they
17 so wish.

18 Q. And so for example a self-insured
19 entity, they cannot be -- insurance won't pay for
20 an EAP, but then in the case of a self-insured
21 entity or the company paying for it directly they
22 can get reimbursed or paid through the company
23 whereas the insurance company will not pay for
24 something called an EAP; is that correct?

25 MR. WALLINGER: Objection. The

1 question is vague, Your Honor.

2 Q. Will a health insurance company pay for
3 EAP services?

4 A. Absolutely because many -- most
5 insurance companies do have an employee assistance
6 program for their employees.

7 Q. In a third party reimbursement
8 arrangement?

9 A. Absolutely not.

10 Q. Right. So in a reimbursement
11 arrangement health insurance won't pay for EAP,
12 third party EAP, but in an employer sponsored plan
13 they will pay for an EAP? I think you have
14 answered. I am just trying to make sure I
15 understand.

16 MR. WALLINGER: Your Honor, I object to
17 him testifying, asking the witness to agree to it.
18 I guess we need a response.

19 THE COURT: It is overruled. I'm not
20 sure what the relevance of it is. But just in an
21 attempt to move along the testimony.

22 MR. SMITH: I appreciate the Court's
23 attention to this matter. I apologize.

24 BY MR. SMITH:

25 Q. Would disclosing damaging information

1 without informed consent be a breach of fiduciary
2 duty?

3 A. Would disclosing --

4 Q. Damaging?

5 A. Information without permission?

6 Q. Without informed consent be a breach of
7 fiduciary duty?

8 A. Yes.

9 Q. And what is informed consent?

10 A. That -- may I show you this?

11 Q. Is that informed consent in your
12 opinion?

13 A. Yes. The reason why I would say it is
14 informed consent is you signed it. You appear to
15 be a very intelligent and insightful individual and
16 because of that you come across as an individual
17 who would not sign things without understanding the
18 form and what is involved in it.

19 Q. Do I come across as the type of
20 individual who might click on a button on a web
21 site to get past a lengthy agreement so that I
22 could access the services without taking
23 considerable time to read the agreement?

24 MR. WALLINGER: Object.

25 MR. SMITH: Your Honor --

1 THE COURT: Sustained.

2 MR. SMITH: Your Honor, he asked if --
3 he testified that I seem to be the type of
4 individual who would have read an agreement like
5 that thoroughly and signed it and I am asking
6 questions to prove that I would not necessarily
7 have read it in its entirety.

8 THE COURT: How would this witness know
9 whether you read it in its entirety?

10 MR. SMITH: He just said that I seem
11 like the type of person who would have -- I was
12 intelligent enough to understand the agreement is
13 what he basically said and therefore that would
14 mean informed consent. And I am challenging that
15 assertion.

16 THE COURT: That you are not
17 intelligent or what?

18 MR. SMITH: Well, that I can -- I'm not
19 that bright sometimes either, Your Honor. So
20 don't --

21 THE COURT: You signed it. The law
22 says if you signed it you are charged with reading
23 it. So I'm not sure what your --

24 MR. SMITH: Informed consent, Your
25 Honor, in a trusted relationship. It is not -- it

1 is up to the dominant party with whom I have trust
2 to acquire the informed consent certainly before
3 making detailed potentially damaging statements to
4 an employer. He should simply say I want to speak
5 with Clint Lucas. Do you mind if I speak with
6 Clint Lucas and is it --

7 THE COURT: That would be an argument
8 that you would make.

9 MR. SMITH: Okay.

10 THE COURT: Okay?

11 MR. SMITH: So I just -- I believe that
12 informed consent is more detailed. I am trying to
13 also understand what the expert witness knows about
14 informed consent as a representative of the people
15 who are doing employee assistance programs and so I
16 don't mean to sit here and -- appreciate the
17 Court's latitude there.

18 BY MR. SMITH:

19 Q. Did you review the replacement report
20 on me that was part of my SAVE file?

21 A. Replacement report?

22 Q. The placement report.

23 A. What was the title of that report?
24 Called placement?

25 Q. It was a placement report.

1 A. Could you show it to me?

2 Q. I can, but let me ask you in your
3 expert affidavit you said that you reviewed the
4 file from SAVE. How many hours did you spend to
5 review that file?

6 A. The SAVE report?

7 Q. Right.

8 A. I would say total of about three hours
9 is my guess. It was several months ago, perhaps
10 even four.

11 Q. I thought you said you spent more like
12 seven hours?

13 A. There was more than just the SAVE
14 report, the seven hours. There are many other
15 documents.

16 Q. Did you see a placement report in that
17 file?

18 A. There was some report, yes.

19 Q. What did it say in your opinion?

20 A. I'm not trained in reviewing that
21 report. I have no experience with it. So because
22 of that I have no opinion about it. It would be
23 unethical for me to give you any opinion of that
24 particular report.

25 Q. But it was a placement report to be an

1 industrial production manager, does that sound
2 correct?

3 A. Yes. I think -- I believe that was the
4 purpose of that report.

5 Q. And might someone who has gotten --
6 gone to an employer assistance professional think
7 that that person might assist the employee in
8 improving what is needed to be an industry
9 production manager?

10 A. Sure. Like communication and
11 interpersonal relationships, absolutely.

12 Q. What other things might improve that
13 relationship? What other skills might that person
14 bring other than we heard that Mr. Kessler from Ms.
15 Gainey had considerable cognitive behavioral
16 therapy skills. What other skills might an EAP
17 bring to the counseling relationship that would
18 benefit someone who was a candidate to be an
19 industrial production manager?

20 A. They would want to provide some
21 coaching in terms of how -- about interpersonal
22 relationships, communication, leadership, teamwork.

23 Q. Assessing other people?

24 A. Sure, yes.

25 Q. Did -- when you received this

1 information from SAVE were there any e-mails with
2 it from my coworkers? Do you recall reviewing any
3 e-mail information?

4 A. I believe so.

5 Q. Can you tell me about it?

6 A. Not really, not without seeing them.

7 Q. Was there anything other than this file
8 that Mr. Wallinger has provided for you? Is this
9 everything that you saw?

10 A. From the SAVE report?

11 Q. Right.

12 A. I can't say with absolute certainty
13 that there is anything missing.

14 Q. Did you see anything -- what else did
15 you see in addition to that information?

16 A. In addition to the report, a letter
17 from Mark Sanford, office of the governor, a policy
18 25 regarding colleague problem solving from the
19 company that you worked for, Showa Denko Carbon.

20 Q. So that's everything you got from SAVE?

21 A. Okay.

22 Q. And if there's a placement report can
23 you find the placement report that's in there?

24 A. Yes.

25 Q. So I want to if I can for a few minutes

1 just contrast some of Jonathon Kessler's
2 observations with that placement report.

3 MR. WALLINGER: Your Honor, I'm going
4 to object to this placement report which I
5 mentioned in an earlier objection. It's some kind
6 of analysis by an analyst or person or entity that
7 has not testified here and findings have not been
8 laid and the foundation and I don't see the
9 relevance.

10 MR. SMITH: Mr. Kessler references that
11 in his work product in the response to litigation
12 so I am asking.

13 THE COURT: Overruled. Go ahead.

14 BY MR. SMITH:

15 Q. Mr. Kessler's work product is in that
16 stack of documents as well? Can you read the first
17 -- let's talk about the paragraph where he explains
18 where I was late. Is it okay if I stand beside the
19 witness and direct him to a couple of statements?
20 Appreciate your time this afternoon very much.

21 THE COURT: Let's take about ten or
22 fifteen minutes.

23 MR. SMITH: I appreciate the Court's
24 attention. I will sort this out.

25 MR. WALLINGER: Your Honor, he is

1 taking an exhibit apart that doesn't have the
2 document in it he is looking for. I am asking him
3 to put it back together and let me help him find
4 what he wants.

5 MR. SMITH: I appreciate that.

6 MR. WALLINGER: All right.

7 THE COURT: Let's resume at 3:15.

8 (A recess transpired.)

9 THE COURT: You ready to resume your
10 cross?

11 MR. SMITH: Yes, Your Honor.

12 THE COURT: Go ahead.

13 BY MR. SMITH:

14 Q. Mr. Krasilovsky, you say in your letter
15 that you are -- reserve the right to offer new or
16 different opinions if and when any additional
17 information is provided to me in this case; is that
18 correct?

19 A. That's correct.

20 Q. Very good. So let me ask you, I am
21 going to perhaps try to change your opinion on a
22 few quick points.

23 A. Okay.

24 Q. Without objection?

25 THE COURT: He doesn't know what you're

1. saying yet.

2. Q. To try to change his opinions. You say
3. in your opinion there is absolutely no indication
4. your client violated any HIPAA confidentiality and
5. no indication your client breached any fiduciary
6. duty. However, when I asked you what a fiduciary
7. duty is I believe you told me you really didn't
8. know; is that fair?

9. A. I don't believe those were my words.

10. Q. And you are certain -- you say there
11. was absolutely no indication your client violated
12. any HIPAA confidentiality. On what did you base
13. that opinion?

14. A. On the clinical records that I
15. reviewed.

16. Q. And no indication your client breached
17. any fiduciary duty, correct?

18. A. Correct.

19. Q. And fiduciary duty means?

20. A. I didn't see anything wrong that he did
21. -- I didn't see anything in the record to indicate
22. he made any mistakes and overall the work that he
23. provided was within community standards.

24. Q. Community standards?

25. A. Yes.

1 Q. Which community?

2 A. Community standards of the United
3 States of America, rural, urban, suburban.

4 Q. EAP?

5 A. Definitely EAP standards, yes.

6 Q. Says your client is licensed
7 independently in the State of South Carolina and as
8 such there is no evidence that he had any duty to
9 obtain a peer consultation as the Plaintiff alleges
10 is your statement?

11 A. That's my statement.

12 Q. You mentioned peer consultation. Is
13 there any evidence that he had a duty to obtain any
14 other type of consultation?

15 A. There's no evidence I saw.

16 Q. So let's talk about the obligation
17 someone might have in a situation where they felt
18 that they could not help the client or the patient.
19 Hypothetically as Mr. Wallinger was saying.
20 Hypothetically if someone came in and they had -- a
21 terrible bruise on their leg and you were a
22 counselor would you refer them to some other
23 professional?

24 A. I would refer them, yes, I would.

25 Q. Who is not in the field of EAP or

1 counseling?

2 A. Correct.

3 Q. If someone came in and they said that
4 they had been assaulted at work who would you refer
5 that to?

6 A. Could you define assaulted?

7 Q. It's a fairly common term. Is that a
8 legal term of art?

9 THE COURT: Is there anything in the
10 record that indicated that you were or anyone else
11 was assaulted?

12 MR. SMITH: That's a good question,
13 Your Honor.

14 THE COURT: Well, if there's not let's
15 move on.

16 MR. SMITH: In fact, Your Honor, I
17 assert that I was literally assaulted.

18 THE COURT: I didn't hear it when you
19 testified.

20 MR. SMITH: It's in the pleadings. I
21 am a polite person -- I don't -- but anyway I will
22 rephrase.

23 BY MR. SMITH:

24 Q. You're saying that there is times
25 though to refer someone to another in another

1 profession totally independent of counseling; is
2 that correct?

3 A. That's correct, at times.

4 Q. Can you give me a little bit of
5 framework as to when you would do that? When would
6 you realize that you cannot help the person, that
7 the problems that the person was suffering from
8 were outside of this scope of your skill set or
9 your expertise?

10 A. If I felt my client would require some
11 type of psychiatric intervention for example,
12 medication, I would refer them to a psychiatrist.

13 Q. If he appeared to be a victim of a
14 hostile workplace who would you refer him to?

15 A. It depends. When you say victim of a
16 hostile workplace, if they were physically
17 assaulted I would -- perhaps they may need some
18 medical care so I would refer them perhaps to an ER
19 or occupational health if they got injured at work.
20 Just depends on what type of injury that they were
21 experiencing.

22 Q. So perhaps OSHA or even worker's
23 compensation?

24 A. If they had a physical injury.

25 Q. Being subjected to hostility at work?

1 A. If they felt they were being subjected
2 to hostility at work I -- actually it depends how
3 well I would know the company.

4 Q. Why is that?

5 A. Many companies would have their own
6 internal type of grievance procedure so I would
7 suggest they would work through that grievance
8 procedure.

9 Q. You might take it fairly seriously and
10 actually inform someone in the company that hey, I
11 think this person is being treated with hostility
12 and it's really affecting his life and work?

13 A. Not all the time, no.

14 Q. Is there a time when you might do that?

15 A. There is a time perhaps I would do
16 that.

17 Q. You state in your opinion that the
18 client did take an adequate history which appears
19 to have been completed during the October 23rd
20 session?

21 A. Yes.

22 Q. Can you tell me what would constitute
23 an adequate history?

24 A. I would need to take a look at those
25 clinical notes.

1 Q. In general how would you determine that
2 an EAP counselor had taken an adequate history of
3 the client or patient?

4 A. I would ask them about their
5 relationships with others at work as well as at
6 home. It's basically a psychosocial assessment, so
7 maybe vocational history, educational history,
8 social history, I would ask them perhaps.

9 Q. You would ask about his coworkers, and
10 maybe tell me about your different coworkers, is
11 that a --

12 A. Not during the first session I would
13 ask them about their coworkers, not necessarily.

14 Q. How many sessions before you might ask
15 them about their coworkers?

16 A. It depends. Probably by the third
17 session or the second session, depends on the
18 numerous issues. Some clients are quite verbal so
19 you can ask them one question and they really want
20 to talk and efforts to stop them sometimes don't
21 succeed. So they go on and on and may not get to
22 that until the third session.

23 Q. Would you perhaps review written
24 documents they brought that other coworkers had
25 written to them to get an idea how they

1 communicated and worked together?

2 A. No.

3 Q. Not at all?

4 A. Very rarely would I have ever done
5 that.

6 Q. Why is that?

7 A. I would rather have the client tell me
8 from their perspective what's going on at work than
9 read a variety of e-mails. It gives me a lot more
10 information than simply e-mails.

11 Q. Is it -- do you perhaps have a bias
12 towards that type of talk therapy because you're a
13 licensed independent social worker and I assume had
14 courses in cognitive behavioral therapy that often
15 includes talk therapy? Is that -- is it fair to
16 say there is a great deal of talk therapy in the
17 counseling world?

18 A. I would say that's a fair assumption.

19 Q. And you understand that I'm an IT
20 engineer, I'm fairly literate and fairly
21 articulate, but I do a lot of work in writing as
22 well and a lot of communication with my coworkers
23 through writing. Simply more efficient rather than
24 us talking. You can see like this talking is only
25 so efficient. So if you were counseling an IT

1 engineer, systems engineer, and he brought you
2 e-mails saying here, I can clearly show you where
3 the differences are in our organization and where
4 we need help, might you really consider reading
5 those e-mails?

6 A. Mr. Smith, I have had clients who are
7 IT systems engineers. And I ask them specifically
8 tell me about your relationships with your
9 coworkers. I don't read their e-mails.

10 Q. I'm going to ask you to read a couple
11 e-mails in this case. I'm going to guide you
12 through them over here if that's okay.

13 A. Okay.

14 Q. First because we have got this laid out
15 I would like to take a look at Mr. Kessler's work
16 product that he presented to you.

17 A. Yes.

18 Q. And ask you to read this starting with
19 right there.

20 A. Where do you want me to end?

21 Q. I believe just the single sentence.

22 MR. WALLINGER: Excuse me, Your Honor.
23 I can't tell if the witness is reviewing a new
24 document or document marked.

25 MR. SMITH: It's the work product in

1 response to litigation.

2 THE COURT: Is that the one that's in
3 evidence? Okay.

4 MR. WALLINGER: Thank you.

5 THE WITNESS: "We reviewed the Profile
6 XT again together."

7 BY MR. SMITH:

8 Q. The next sentence, please.

9 A. "The profile suggested inflexibility
10 and inability to accommodate."

11 Q. Now, this is also the placement report,
12 am I correct, that was sent to you as part of my
13 file?

14 A. Yes.

15 Q. And so can you read the part starting
16 with the accommodating. Read this, tell me what
17 the score is and read this?

18 A. I can read it. "Accommodating.
19 Tendency to be friendly, cooperative, agreeable.
20 To be a team person."

21 Q. What is my score in that ranking?

22 A. Nine.

23 Q. With ten being the best and nine being
24 pretty good?

25 A. I don't know. On page two of the

1 placement report it indicates that for anyone to
2 interpret this they should have a user guide. I
3 don't have a user guide so I cannot make any
4 interpretations of this report.

5 Q. You just said it says nine on the paper
6 there?

7 A. Yes, it is marked nine.

8 Q. And can you read the couple of
9 sentences here that are -- whoever prepared the
10 report wrote those sentences?

11 A. "Mr. Smith shares a high commitment to
12 reducing conflict and establishing cooperation. He
13 is comfortable working as part of a team and with
14 sharing ideas and information. Tracy tends to
15 minimize serious problems and negative information.
16 He is quick to seek solutions which are acceptable
17 to everyone. He is highly motivated by an
18 informal, positive and relaxed work environment.
19 Mr. Smith is quick to accommodate others to avoid
20 interpersonal conflict."

21 Q. Does that square with what Mr. Kessler
22 said or do they seem to have very different
23 opinions?

24 A. I don't know the writer of this. I
25 don't know.

1 Q. Based on face value Mr. Wallinger sent
2 this information to you. I am assuming he wanted
3 you to make an assessment of it. And therefore I
4 am asking you did Mr. Kessler agree with what's on
5 this paper based on his sentence?

6 A. You would have to ask him.

7 Q. With all due respect you are here as an
8 expert witness and you have given an expert opinion
9 and I'm trying to look at the documents that you
10 have reviewed and see if you see any
11 inconsistencies in an attempt to change your
12 opinion.

13 A. It appears to be different than what
14 Mr. Kessler wrote.

15 Q. Do you believe Mr. Kessler's work
16 product in response to litigation was designed to
17 influence you?

18 A. No. I believe the impression I got
19 from Mr. Kessler's notes that were -- that I read
20 were his viewpoint what occurred.

21 Q. So you don't think he slanted anything
22 in order to kind of make me look bad so that you
23 would say that he did nothing wrong?

24 A. I can't speak for what was in his mind
25 when he wrote that.

1 Q. So let me ask you to read on the first
2 page here. I appreciate your time very much. If
3 you will read this paragraph here I will tell you
4 when.

5 A. "Next session was on October 9th, 2012.
6 Smith arrived 30 minutes late to his session and
7 reported that his quote car was on fire."

8 Q. Let's stop there. How do you interpret
9 that sentence literally? What is he saying?

10 A. Mr. Smith arrived 30 minutes late from
11 the time the session was supposed to start and
12 reported that his car was on fire. So something
13 occurred perhaps I am guessing that --

14 Q. Is that a credible statement do you
15 believe?

16 MR. WALLINGER: Objection, pitting.

17 THE COURT: Sustained. What are you
18 getting at?

19 MR. SMITH: The document is not
20 credible, Your Honor, that he has influenced this
21 expert witness to put this opinion out and I
22 believe I have to challenge what he based his
23 opinion on.

24 THE COURT: Credible, I don't
25 understand.

1 MR. SMITH: I am asking -- Mr.
2 Krasilovsky said that -- do I look like the type to
3 person who would have read the document for example
4 all the way through before I signed it. Do you
5 believe I am the type of person who would have run
6 to my counselor's meeting after putting my car out
7 on the side of the interstate.

8 THE WITNESS: I wasn't there so I can't
9 say what transpired.

10 BY MR. SMITH:

11 Q. How many people would rush to their
12 counseling session if their car had been on fire?
13 One out of a thousand, out of a hundred? How many
14 people would really do that?

15 A. Would you like to speculate?

16 Q. Yes, I would.

17 A. In my job --

18 THE COURT: We don't speculate.

19 MR. SMITH: He's an expert witness. He
20 is speculating by offering his opinion.

21 THE COURT: He can't speculate. We
22 don't speculate in court. You either know or you
23 don't know. But just to speculate, I mean you seem
24 to have a fixation that you might be thought less
25 of if you had a car problem.

1 MR. SMITH: Absolutely, Your Honor.
2 Yes, that's my point.

3 THE COURT: Well, you know, if you
4 think that okay. Most people would think if your
5 car caught on fire you had car trouble.

6 MR. SMITH: If I poll this room and
7 asked how many people --

8 THE COURT: I actually had my car catch
9 on fire before. I don't think anybody thought less
10 of me.

11 MR. SMITH: With all due respect, Your
12 Honor, there are several statements in this thing
13 that are designed to influence him and I am
14 bringing them out, goes to his credibility, Your
15 Honor. I appreciate the Court's attention and I
16 will try to move on. I don't want to be
17 argumentative.

18 THE COURT: If you have a point to make
19 make it. But the witness is not allowed to
20 speculate. We do not do that in court. We have a
21 specific objection. It is called objection
22 speculation, and the judge overrules you every time
23 or sustains that objection.

24 MR. SMITH: I was going to say off the
25 record, but for example, this is his opinion --

1 THE COURT: It is not off the record.
2 It is on the record.

3 MR. SMITH: His opinion is a form of
4 speculation, is it not, or how does the Court view
5 that?

6 THE COURT: His opinion is not a
7 speculation in the sense of oh, tell me what
8 somebody else's thinking. That's what you want him
9 to do.

10 MR. SMITH: We are talking in the
11 setting, this is a counselor in a mental health --

12 THE COURT: You can ask him what it
13 made him think, but for him to say well, this is
14 what he made Mr. Kessler think is just so
15 speculative as to be a guess. I mean you don't
16 need an expert. You could be anybody in the room
17 and you get the same quality of answer.

18 MR. SMITH: And I want to be absolutely
19 calm and not be -- but Ms. Gainey made the comment
20 that I was throwing chairs around. Mr. Wallinger
21 introduced a piece of paper without a signature on
22 it basically to impune me and just out of the blue
23 those are the same -- and this is a similar
24 statement, Your Honor, for someone just totally
25 exaggerated in order to try to influence someone to

1 find against -- to write against --

2 THE COURT: I am not -- listen to me.
3 I am not going to let him speculate on anything.
4 Move on or it is over with this witness.

5 MR. SMITH: Understood.

6 BY MR. SMITH:

7 Q. Let me ask you to read the e-mails and
8 we will wrap it up. Starting there.

9 A. "Overall I conclude that Smith had
10 difficulty with interpersonal interaction and had
11 poor insight into that problem and he instead
12 focused on his sense of technical superiority and
13 his need to leave a quote legacy at Showa Denko
14 Carbon, Inc. Smith received no such validation and
15 upon his termination he experienced abandonment.
16 He perceived others to be the root cause of his
17 problems. That attitude and behavior in my opinion
18 similarly is what Smith is engaging in suing me and
19 blaming me and SAVE for his job termination."

20 Q. So is Mr. Kessler saying that others
21 were not responsible for my situation? How do you
22 interpret that paragraph?

23 A. I would interpret it that he felt that
24 you had some significant issues that were clouding
25 your understanding about why you were terminated.

1 Q. Let's get to these couple of e-mails
2 here. And as I was saying earlier, as an IT guy a
3 lot of your communication, maybe most of your
4 communication is through writing.

5 A. Um-hmm.

6 Q. That's what we do, we put systems
7 together so you can put words on the screen and
8 everybody can read it, right?

9 A. Um-hmm.

10 Q. So first of all, let me have you read
11 what Clint Lucas had to say.

12 MR. WALLINGER: Your Honor, is this
13 e-mail in evidence?

14 MR. SMITH: Yes.

15 MR. WALLINGER: It is a plaintiff's
16 exhibit?

17 MR. SMITH: Should I be citing an
18 exhibit number? I apologize.

19 THE COURT: What do you want to ask
20 him?

21 MR. SMITH: I wanted him to -- again I
22 want to ask him to read and understand that Clint
23 Lucas said --

24 THE COURT: What?

25 MR. SMITH: That Clint Lucas said

1 people were hostile toward me and I am going to
2 have him look at the e-mail and I want to point
3 exactly where the hostility came from and point out
4 that I had nothing to do with it. But can I walk
5 through this? I am trying to get through it.

6 THE COURT: Go ahead.

7 MR. SMITH: I apologize.

8 BY MR. SMITH:

9 Q. If you will read that paragraph.
10 E-mail starting Tracy and ending with Clint?

11 A. "Tracy, I think there is an urgent need
12 to begin to improve the work relations in IT.
13 Having said this and certainly considering the lack
14 of cooperation problems that exist, I do not agree
15 that you neither formally or informally should be
16 telling others anything about the DARTS 3 as a
17 priority. Either Greg or Dan must communicate
18 DARTS 3 priority and what is expected of each of
19 you. Given the hostile resistance you have gotten
20 from others why would you want to be the one to say
21 anything to those who have made clear that they
22 have absolutely no desire to work with you or to
23 follow your lead. I would recommend you sit tight
24 and let management do what it needs to do."

25 Q. And so the question he asked is why

1 would you want to be the one to say anything about
2 DARTS 3 and he's saying that to me, right?

3 A. Um-hmm.

4 Q. And so read this part from Mark Little
5 right here. Mark Little to Greg Spires, Tracy
6 Smith, Greg Ruffing.

7 A. "Comment in your monthly report. You
8 seem to have your agenda that doesn't involve the
9 rest of us. This has been a common theme for some
10 time. I am done also. There will be no more
11 comments from me."

12 Q. So what he's saying is that I have an
13 agenda and they haven't really been called in on
14 this agenda, maybe he feels left out? Is that a
15 fair way to look at that statement?

16 A. I don't know who Mark Little is. So
17 who is he because that would help me understand.

18 Q. He's an IT coworker.

19 MR. WALLINGER: Objection, Your Honor,
20 he is testifying about facts and not asking
21 questions.

22 THE COURT: Well, I am trying to give
23 some you leeway, Mr. Smith. I told you earlier
24 today that our purpose here is not to determine
25 whether or not you were right or your coworkers

1 were right, but whether or not Mr. Kessler did
2 anything wrong. You seem to be fixated on having
3 somebody say as between this dispute with your
4 employees you were right and they were all wrong.
5 I don't think you get what your employer --

6 MR. SMITH: Your Honor --

7 THE COURT: -- is trying to do by
8 sending you to this counseling session. But you
9 want to focus on that.

10 MR. SMITH: Your Honor, if you will let
11 me --

12 THE COURT: I have been trying to let
13 you, but you keep going back to the same thing that
14 I am trying to tell you is not helpful. But if you
15 are going to do it do it quickly.

16 BY MR. SMITH:

17 Q. Thank you, Your Honor. So the question
18 on the table is why would I want to say anything to
19 my coworkers, right? That's what Clint Lucas, head
20 of HR has said to me and I am saying Mark Little
21 has said that he basically feels left out, that I
22 seem to have an agenda that doesn't involve the
23 rest of them. I'm a computer programmer, I work
24 eight, nine hours a day trying -- so we have a
25 little bit of interaction, but I am in my office

1 head down doing a lot work. Okay? Just imagine
2 that. And again, I am asking you to act as Mr.
3 Kessler would have acted in a counseling session
4 right here.

5 A. Okay.

6 Q. Little role play if you want to call it
7 that. So if you look at Dan Pascazio's e-mail
8 which is this is Mr. Wing has a lot of interaction
9 over there with Dan Pascazio, let's read what he's
10 saying, the paragraph there. It's not that
11 lengthy.

12 A. "Tracy. Thanks for providing the
13 e-mail trail regarding recent DARTS 3 conversations
14 you have had your fellow IT colleagues. Your
15 assessment of my response to your DARTS 3 question
16 of me is accurate. I do consider DARTS 3 a high
17 priority for IT. However, conveying a priority
18 list as well task assignments to IT colleagues must
19 be relegated to Greg Ruffing and or myself.
20 Therefore, I will try to be very clear on this
21 matter," and it's in bold. "Do not speak on my
22 behalf to other colleagues in any capacity informal
23 or otherwise concerning DARTS 3. If I were to use
24 the" --

25 Q. Let me stop you right there. Just this

1 point here. He doesn't want me to -- so Mark
2 Little has told me I have an agenda that doesn't
3 involve the rest of them and my superior is telling
4 me I don't want you to speak on my behalf to any of
5 your coworkers. He didn't want me to share
6 anything about what I know from talking to Dan and
7 Greg even in -- as I have asked here even
8 informally so they would feel more part of the
9 effort and I could use the help. But he wants only
10 himself and Greg Ruffing to basically call the
11 shots on DARTS 3 and yet allow my coworkers to say
12 that I'm leaving them out, but I am not the one
13 leaving them out. Dan and Greg Ruffing are leaving
14 them out. So can you see the dilemma that with the
15 best of interpersonal skills I'm trying to make --
16 keep my coworkers on board with me, yet I am being
17 told by my supervisors don't tell them anything
18 about what we're doing with DARTS 3. But let me
19 sit there and throw barbs at you anyway. Can you
20 see that I am kind of being hung out to dry there?

21 MR. WALLINGER: Objection.

22 THE COURT: It's really not a proper
23 question for you to make a speech and then say
24 isn't that right.

25 MR. SMITH: Well, in a counseling

1 session, I am trying to establish a rapport and so
2 I am using a number of -- let me try to phrase as
3 good a question as I can.

4 BY MR. SMITH:

5 Q. Mark Little would you agree feels left
6 out because I seem to have an agenda that doesn't
7 involve the rest of them, right? And my agenda is
8 working on this -- these upgrades to the system.
9 And so here I am being, can you agree with that
10 part or I know you don't want to because you're
11 basically an expert witness for the opposing side,
12 but can you empathize with me enough to see that?

13 A. It's -- no, I can't give you a yes or
14 no answer.

15 Q. But you are a licensed -- you are a
16 counselor?

17 A. Can I give you a complete answer rather
18 than yes or no? Okay. I think these e-mails
19 appear to substantiate the reason why you were
20 referred for EAP in the first place is that you are
21 -- the e-mails substantiate you have difficulty
22 working with coworkers.

23 Q. But are they substantive differences or
24 are they interpersonal differences?

25 A. They are interpersonal differences.

1 Q. I am trying to point out that the
2 substance of the matter is I am being asked to --
3 they feel that I am being -- they are being left
4 out. I'm a relatively a new person on the block
5 and I am being asked to do stuff and they are not
6 being assigned those projects. And so yes, they
7 feel a bit left out. These are substantive issues.
8 They aren't I would suggest interpersonal issues at
9 all. So if they are substantive issues shouldn't a
10 counselor recognize that in a work environment
11 there are substantive issues and say to the HR, you
12 know, he seems like a pretty decent person, he's
13 relatively affable and likeable, when you look at
14 the context of the way he is working it's hard to
15 get beyond the substantive issues in the workplace
16 having nothing -- can you see any of that?

17 A. I can see your perspective of that, but
18 I also read these e-mails basically to say cease
19 and desist from doing some work and you continued
20 to do it.

21 Q. Can we address that? Which e-mail is
22 that in?

23 A. I can't recall off the top of my head.
24 So that tells me that you have trouble following
25 orders which is one of the reasons why you were

1 referred to the EAP in the first place.

2 Q. Can you show me which e-mail that one
3 is.

4 A. I don't know if I can find it in this
5 stack.

6 Q. Let me ask you this as a basis
7 question. Do you think it might have been helpful
8 for Mr. Kessler to at least walk through this
9 relatively cut -- this exchange to understand some
10 of the issues I am trying to make right now?

11 A. My concern like I mentioned, when I am
12 doing EAP work, is to go through all of this would
13 take probably 15 minutes of a 45, 50 minute
14 session. And that is a great deal of time that
15 could be utilized in a better way than to read
16 these e-mails. I would much rather my client say I
17 have got a whole bunch of these e-mails. Here is
18 what's going on than for me to sit and read these
19 e-mails.

20 Q. And why do we use e-mails in the first
21 place? We are all using them here one way or
22 another. Why do we put things in writing rather
23 than just talking about them?

24 A. It's written communication.

25 Q. Why do we write things down?

1 A. For a variety of reasons.

2 Q. Is it more efficient -- my point is is
3 it efficient to -- the words are right there. You
4 don't have to transcribe them.

5 A. I think it depends on the culture of
6 the company too.

7 THE COURT: Let me jump in here a
8 second and ask you a question, Mr. Krasilovsky. Is
9 the purpose of referring somebody to a group like
10 SAVE to mediate the dispute or to assist the person
11 that has been referred in developing skills to get
12 along with their employees?

13 THE WITNESS: It's the latter.

14 THE COURT: Or a fellow employee
15 better.

16 THE WITNESS: The latter, Your Honor.

17 THE COURT: So it's not to mediate what
18 the dispute was about between the employer.

19 THE WITNESS: Correct. That would be
20 the HR representative.

21 BY MR. SMITH:

22 Q. Is it appropriate for them to try to
23 diagnose the problem? Is it appropriate for the
24 EAP counselor to accurately diagnose the problem?

25 A. The diagnosis was occupational problem.

1 That's what you fit the criteria for, occupational
2 problem. Exactly what you have been talking about
3 today either on the stand or what you are saying to
4 me right now fit the definition of occupational
5 problem because you are talking about problems at
6 work.

7 Q. Agreed first of all, yes.

8 A. That was the diagnosis.

9 Q. But why do we have -- what is the root
10 cause of the occupational problem? We use
11 something called root cause and now so why are --
12 what would be the root cause? Is it truly an
13 interpersonal issue or there are substantive
14 differences? Would a scenario like this have been
15 possible had Mr. Mr. Kessler read these e-mails and
16 said you know, yeah, you have got a point. I see
17 that you got just some basic dynamics in the
18 organization no matter how good your interpersonal
19 skills are this person, there's substantive
20 differences. This person feels left out because
21 you're being given work where this person is not
22 being given work.

23 And had he realized that and said hey,
24 Mr. Lucas, you know, I have talked to him, I don't
25 really think the issues are interpersonal. I think

1 that there is just some substantive issues in the
2 workplace that need to be reconciled between the
3 different parties. Reading those e-mails with an
4 open mind and understanding the work environment,
5 because I would suggest I have decent interpersonal
6 skills. I have done telephone support in a variety
7 of different jobs that require me to do a fair
8 amount of talking and interacting with people. But
9 what I am really skilled at is writing computer
10 programs and in written communication.

11 Is there any chance that Mr. Kessler
12 should have done what we are trying to do right
13 here, took the 15 minutes and read through the
14 e-mails and said I can see your point that you are
15 the new kid on the block, you are getting the work,
16 these other people are basically attacking you
17 because they feel left out and they are maybe
18 worried about their job? Is that possible?

19 A. Anything is possible.

20 MR. SMITH: I have no more questions.

21 THE COURT: Any redirect?

22 MR. WALLINGER: No, sir.

23 THE COURT: All right. You can step
24 down. You are free to go. I don't know if you
25 missed your plane or not. It is 4:00. I know you

1 were supposed to be out by 4:00.

2 THE WITNESS: Thank you, Your Honor.

3 THE COURT: Catch a plane by four.

4 MR. SMITH: I appreciate the latitude.

5 THE COURT: It's pouring down rain and
6 that means traffic so good luck on catching your
7 flight. Well, do you have any other witnesses
8 other than your client that you intend to call?

9 MR. WALLINGER: Yes, sir. I have Mr.
10 Wing here under subpoena and given that we are not
11 having court tomorrow if I had my choice I would
12 like it if I can go ahead and call him.

13 THE COURT: Who is this?

14 MR. WALLINGER: John Wing.

15 THE COURT: What's he testifying about?

16 MR. WALLINGER: He is the supervisor of
17 the Plaintiff.

18 THE COURT: All right.

19 MR. WALLINGER: He will be brief.

20 THE COURT: Next witness
21 then.

22 JOHN WING

23 having been duly sworn, testifies as follows:

24 THE CLERK: Please give us your full
25 name and spell your last name.

1 THE WITNESS: John Robert Wing,
2 W-I-N-G.

3 DIRECT EXAMINATION

4 BY MR. WALLINGER:

5 Q. Mr. Wing, what county do you live in?

6 A. Berkeley.

7 Q. And do you work now?

8 A. Yes, sir.

9 Q. Where do you work?

10 A. Showa Denko Carbon.

11 Q. What's your position?

12 A. Maintenance superintendent.

13 Q. How long have you worked there?

14 A. A little over 32 wears.

15 Q. Was there an occasion in which you had
16 some involvement in supervising the Plaintiff, Mr.
17 Kessler? I am sorry, the Plaintiff, Mr. Smith.

18 A. Yes, sir.

19 (DFT. EXH. 17-18 were marked for
20 identification.)

21 BY MR. WALLINGER:

22 Q. I'm going to hand you what's been
23 marked as Exhibit 17 which is a nine page sworn
24 affidavit given in Dorchester County in the case of
25 Tracy Smith versus Showa Denko Carbon. Do you

1 recognize that document?

2 A. Yes, sir.

3 Q. I believe you mentioned to me at some
4 point before you testified there was a typo as far
5 as the name of the person in one of the pages in
6 one of the locations. Do you remember where that
7 was?

8 A. Yes, sir.

9 Q. Just indicate the page -- is it page
10 four?

11 A. Page four, yes, sir.

12 Q. There is a third dot paragraph in the
13 middle of the page; is that right?

14 A. Yes, sir.

15 Q. And what word needs to be changed?

16 A. The name of Mr. Little.

17 Q. Should be what?

18 A. Mr. Spires.

19 Q. Okay. Other than that is everything
20 else that's in this statement true and correct to
21 your knowledge?

22 A. Yes, sir.

23 Q. And does that affidavit contain your
24 observations for the period of time in which Mr.
25 Smith was an employee and had some involvement that

1 rose to your level of attention?

2 A. Yes, sir.

3 Q. Your Honor, in lieu of him reading the
4 affidavit to give live testimony today I would ask
5 to be allowed to have him just state that that is
6 his statement and leave it at that unless the Court
7 would like it read.

8 THE COURT: He has written an affidavit
9 previous?

10 MR. WALLINGER: As an affidavit, Your
11 Honor.

12 THE COURT: All right. You don't want
13 him to testify?

14 MR. WALLINGER: I can have him read the
15 whole thing, but I don't want to drag this out.

16 MR. SMITH: I think it might be useful
17 to have it read with all due respect.

18 THE COURT: Just read it out loud.

19 MR. WALLINGER: Very well.

20 BY MR. WALLINGER:

21 Q. What I would ask you to do, Mr. Wing,
22 is read slowly enough that the court reporter can
23 keep up with you. And if you would when you get to
24 a paragraph just say paragraph one, paragraph two
25 and so on, all right?

1 A. Yes, sir. "Personally appears before
2 me Mr. John Wing who upon duly sworn deposes says
3 that No. 1. My name is John Wing. I am currently
4 employed by Showa Denko Carbon, SDKC or the company
5 in Ridgeville, South Carolina in the position of
6 maintenance superintendent. I am authorized to
7 testify on behalf of SDKC and I have personal
8 knowledge of the matters set forth here.

9 No. 2. SDKC manufactures graphite
10 electrodes, specifically graphite products for a
11 variety of industrial applications, particularly
12 for the global steel and automotive industries.
13 The company maintains a large manufacturing plant
14 in Ridgeville, South Carolina, which is comprised
15 of several buildings connected by roads and
16 surrounded by a perimeter security fence.

17 No. 3. In order to provide the highest
18 quality in graphite products SDCK continuously
19 records and monitors manufacturing process data
20 through a complex proprietary data acquisition and
21 rod talking system, DARTS. SDCK uses statistical
22 data collected by DARTS to control all aspects of
23 the manufacturing process from raw materials to
24 finished products enabling the company to produce
25 consistent high quality results. SDKC process

1 engineering IT department, the IT department or
2 department is responsible for assurance that SDKC
3 data acquisition reporting and storage processes
4 are consistently functioning in an accurate and
5 efficient manner.

6 No. 4. I am familiar with the
7 Plaintiff in this case, Tracy Smith. SDKC hired
8 Mr. Smith on March 29th, 2010, for the position of
9 IT systems engineer in the IT department. On
10 January 1st, 2012, I took over management of the IT
11 department from Greg Ruffing. I became Mr. Smith's
12 direct supervisor and remained his supervisor until
13 his termination on December 18th, 2012.

14 No. 5. During Mr. Smith's employment
15 the IT department included Mr. Smith and five other
16 colleagues, Stan Pickles, Warren Sneed, Mark
17 Little, Bob Park and Greg Spires.

18 Given the wide -- No. 6. Given the
19 wide variety of functions for which the IT
20 department was responsible, SDKC assigned each
21 department employee several functions for which he
22 had primary responsibility and several functions
23 for which they had backup responsibility. This
24 department structure was intended to insure that
25 all IT functions were supported by personnel with a

1 specialized knowledge base within their areas of
2 responsibility and that all issues were addressed
3 as efficiently as possible.

4 No. 7. During his employment Mr. Smith
5 was assigned primary responsibility for data base
6 reporting and for SDKC web site and backup
7 responsibility for SDKC's inconet system. Mr.
8 Smith's colleagues were assigned all other IT
9 responsibilities.

10 No. 8. Mr. Smith's relationships with
11 other members of the IT department were often
12 contentious and unproductive due mostly to Mr.
13 Smith's inability to focus his opinions and work
14 time to the IT functions within his responsibility.
15 At that time I had been at SDKC for nearly 30 years
16 and several other members of the IT department had
17 over 20 years of experience. However, despite his
18 short time with us Mr. Smith regularly criticized
19 department decisions, suggested that his
20 colleagues' approach to various issues was wrong
21 and claimed that he could propose a better solution
22 despite the limitation of his understanding of the
23 company's data system as a whole.

24 No. 10. Beyond offering unsolicited
25 opinions on unsettled issues that were not his

1 responsibility, Mr. Smith tended to overstep his
2 colleagues in a condescending manner while
3 expressing his disagreement with the department
4 decisions. For example, when a colleague disagreed
5 with Mr. Smith expressed reluctance at his
6 proposals or suggested that he did not understand
7 the bigger picture, Mr. Smith often became visibly
8 angry or dismissive at times soliciting me, my
9 superiors and other colleagues for help in
10 convincing others of the importance of his idea.

11 Other times Mr. Smith publically
12 questioned his colleagues abilities or motives
13 sometimes in the course of condescending e-mails to
14 other colleagues or management. These issues
15 created unsustainable communication issues within
16 the IT department.

17 No. 11. In January 2012 I implemented
18 a regular schedule of department meetings in an
19 effort to encourage more open and collaborative
20 relationships. Unfortunately Mr. Smith's behavior
21 and relationships with his IT department colleagues
22 became increasingly unprofessional and troubling
23 throughout 2012 ultimately prompting several
24 colleagues to approach me to request minimum
25 interaction and shared responsibilities with him.

1 For example, and I will guess I will say bullet at
2 each. First bullet, January 9th, 2012, I counseled
3 Mr. Smith for berating Mr. Park in an e-mail to me
4 and my superior managers in which Mr. Smith stated
5 among other things that Mr. Park showed quote
6 considerable ignorance in a department meeting,
7 that Mr. Park should not challenge Mr. Smith's
8 knowledge of understanding of network concept
9 because Mr. Smith had quote personally installed
10 many different types of networks.

11 Next bullet. On February 6th, 2012, I
12 counseled Mr. Smith for building a server in his
13 office that could potentially leave the company
14 exposed to security threats without involving Mr.
15 Sneed who is responsible for server issues. I
16 advised Mr. Smith to work on building consensus
17 instead on taking on projects without involving his
18 peers. He responded he did not consider Mr. Sneed
19 to be his peer.

20 Next bullet. On July 31st, 2012, Mr.
21 Smith approached me to complain that this would be
22 Mr. Spires, the correction, was questioning his
23 need to assess certain SAP transactions which were
24 outside the scope of his responsibility. I advised
25 Mr. Smith that Mr. Spires was denying him access to

1 those transactions at my direction and that in the
2 future Mr. Smith needed to request access to
3 certain transaction through me rather than
4 publically challenge his colleagues through e-mails
5 with others in the department.

6 Next bullet. On August 1st, 2012, Mr.
7 Smith challenged me on what he believed to be a bad
8 decision regarding SDKC's potential new operating
9 system and he suggested that two colleagues
10 advocating for the system lack his abilities on
11 these issues. When I told Mr. Smith that the issue
12 was still being considered Mr. Smith suggested that
13 he may approach my manager because he did not feel
14 supported by me or by the department. During the
15 two-hour meeting Mr. Smith rambled through a wide
16 range of grievances against various employees and
17 decisions including voicing his displeasure that he
18 had not been selected for the IT manager position
19 despite his expertise.

20 On August -- next bullet. On
21 August 16th, 2012, Mr. Smith stormed out of my
22 office after I questioned his request for
23 administrative privileges for an SDKC server since
24 administration of that server was Mr. Little's
25 responsibility and Smith did not need

1 administrative privileges to access the data he
2 needed to complete the reports within his
3 responsibility. The next day Mr. Smith rejected my
4 suggestion that he approach Mr. Little to discuss
5 his perceived need for administrative privileges
6 insisting that I facilitate another meeting to
7 discuss the issue because he claimed Mr. Little
8 would not listen to him. Shortly thereafter Mr.
9 Smith sent an e-mail to me and other managers
10 demanding an explanation for the limitations on his
11 access to certain systems.

12 Next bullet. On August 27th, 2012, I
13 learned from Mr. Spires that Mr. Smith had become
14 extremely agitated and confrontational during an
15 earlier meeting with Mr. Park to discuss the new
16 operating system. The next day I discussed the
17 issue with Mr. Park and confirmed that Mr. Smith
18 had come into his office after an initial meeting
19 about the operating system and became very upset.
20 Mr. Park stated that at one point Mr. Smith began
21 using threatening profane language and slammed his
22 chair into the wall as he stormed out of his
23 office. That's the end of the bullets.

24 Now this is No. 12. On August 31st,
25 2012, I met with Mr. Smith regarding his continuing

1 unprofessional and uncooperative behavior,
2 particularly the most recent incident involving his
3 outburst toward Mr. Park. During the disciplinary
4 meeting I provided Mr. Smith with a positive
5 discipline procedure PDP notice identifying the
6 deficiencies in his performance and outlined SDKC's
7 expectations for his continued employment. The PDP
8 also placed Mr. Smith on paid suspension known as
9 decision making leave for two days to decide
10 whether he wished to remain employed by SDKC and
11 expressly warned him that continued inappropriate
12 behavior could lead to further discipline. Mr.
13 Smith returned to work on September 4th, 2012, and
14 signed the PDP.

15 No. 13. On September 10th, 2012, I met
16 with Mr. Smith to follow up on another recent
17 confrontation he had with Mr. Sneed regarding the
18 respective responsibilities and decision making
19 authority in the IT department. I reminded Mr.
20 Smith that his responsibility in the department was
21 limited to data and that other colleagues were
22 responsible for systems and software issues that
23 had so frequently dominated his concern and had
24 prompted so many negative interactions with and
25 about his colleagues. In an effort to minimize his

1 confrontation with coworkers I instructed Mr. Smith
2 that moving forward if we experienced issues with
3 his data responsibilities that was related to
4 SDKC's hardware systems or server administration he
5 was to respectfully raise his concern with the
6 appropriate colleagues for resolution and not
7 attempt to interject his opinions or otherwise
8 devote his time or attention to hardware issues.

9 No. 14. As he had in the past Mr.
10 Smith complained about limiting his role to data
11 calling it grunt work and suggested that he may
12 take the issue to superior management because he
13 did not believe he could perform his job without
14 control over other systems. When I cautioned Mr.
15 Smith that he was no longer to challenge his
16 colleagues authority or interject himself into
17 network or hardware issues Mr. Smith got up and
18 walked out of the meeting.

19 No. 15. On September 17th, 2012, Mr.
20 Smith came into my office while I was discussing a
21 storage area network SAN system the company was
22 considering with another colleague. Mr. Smith
23 interjected himself into the conversation and
24 indicated that he had looked into a SAN issue and
25 had some ideas. I asked Mr. Smith why he was

1 researching SAN systems given my instructions that
2 he not address hardware issues. He complained
3 again that he thought he had been hired for his
4 systems expertise and his lack of access to certain
5 systems prevented him from doing his work. I told
6 Mr. Smith for the second time that he had
7 sufficient system access to perform his duties and
8 that he was not to involve himself in systems or
9 hardware issues that were the responsibility of
10 other IT department colleagues.

11 No. 16. November 21st, 2012, Mr. Smith
12 approached me again to offer unsolicited
13 recommendations on SAN technology that he
14 considered to be viable despite his colleague's
15 rejection of the concept. I told Mr. Smith that
16 the issue was hardware related and that he had an
17 issue involving -- that if he had an issue
18 involving his data responsibilities he was to
19 address those to me for resolution, not to attempt
20 to address it himself. Mr. Smith implied once
21 again that he intended to address the issue with my
22 superiors and I reminded him for the third time
23 that hardware was not his area of responsibility,
24 and that he needed to stop addressing issues that
25 were assigned to others.

1 No. 17. On December 12th, 2012, I
2 learned that despite my instructions that he was
3 not to address hardware issues Mr. Smith had
4 contacted and met with a hardware vendor without
5 informing anyone in the IT department. More
6 specifically, Mr. Sneed informed me that he had
7 e-mailed a representative of Dell, an SDKC hardware
8 vendor and discussed potential data storage
9 solutions that the company was considering.

10 Mr. Sneed forwarded his e-mail with
11 Dell to me which indicated that Mr. Smith had
12 requested and held an onsite meeting with Dell on
13 October 24th, 2012, to discuss Dell's various
14 storage server options and that Mr. Smith had
15 indicated to Dell that he would schedule a followup
16 meeting in early 2014 -- 2013, excuse me. I
17 informed Mr. Sneed that Mr. Smith's meeting with
18 Dell was contrary to my instructions and without my
19 permission and I told Mr. Sneed that I would handle
20 it.

21 No. 18. Mr. Smith's repeated failure
22 to follow my instructions to stop researching
23 hardware issue was unacceptable. I conferred with
24 Clint Lewis then SDKC vice president of human
25 resources to discuss appropriate discipline.

1 Considering these repeated issues, Mr. Smith's
2 history of unprofessional and inappropriate
3 behavior and Mr. Smith's warning in his recent PDP
4 that further unprofessional counterproductive
5 conduct would result in further discipline we
6 determined that Mr. Smith's conduct warranted
7 termination.

8 No. 19. On December 18th, 2012, Mr.
9 Lucas and I met with Mr. Smith to discuss SDKC's
10 discovery of his meeting with Dell. I reminded Mr.
11 Smith that he had been instructed three times,
12 twice in September, once in November, that he was
13 not to research or address hardware issues. Yet he
14 had ignored these express instructions at least
15 three -- on at least three occasions including
16 meeting with Dell representatives without informing
17 or including the appropriate colleagues of the IT
18 department. Mr. Smith did not deny holding a
19 meeting with Dell and did not have any other
20 comments in his defense.

21 No. 20. At that point I provided Mr.
22 Smith with a PDP confirming that his employment was
23 being terminated as a result of his repeated
24 failure to follow SDKC instructions to leave
25 hardware issues to others.

1 21. After the termination meeting I
2 returned with Mr. Smith to his office and helped
3 him collect his belongings. SDKC employees parking
4 lot is several hundred yards from the manufacturing
5 plant outside the perimeter fence, but I told Mr.
6 Smith that my truck was outside the building. I
7 offered to help him transport his belongings to the
8 employee parking lot where his vehicle was parked.
9 Mr. Smith was visibly upset, but he agreed and told
10 me that he had appreciated my help very much.

11 22. Mr. Smith had many personal books
12 and other items that he wanted to take with him.
13 But the passenger cab of my truck only had two
14 seats. Mr. Smith did not want to put them in the
15 bed of my truck because he did not want them to get
16 damaged and it would not have been safe for Smith
17 to ride in the bed of the truck so I suggested that
18 I would drive and Mr. Smith would walk to the
19 parking lot. Mr. Smith agreed so we loaded all of
20 Mr. Smith belongings into the passenger cab and
21 went to the parking lot and unloaded his
22 belongings. After Mr. Smith's termination I had no
23 further contact with him other than when he
24 delivered his SDKC computer to me as agreed. I
25 have never been asked to provide an employment

1 reference or provide any other information about
2 Mr. Smith to any third party, nor have I provided
3 any such information to anyone. I am not aware of
4 anyone at SDKC being asked to provide or providing
5 a reference regarding Mr. Smith." Signed by me.

6 Q. You can set that document aside. I am
7 going to hand you what has been marked already as
8 Defendant's Exhibit No. 4 which is a two page
9 document. It's entitled Showa Denko Carbon, Inc.
10 positive discipline procedure. Do you recognize
11 that document?

12 A. Yes, sir.

13 Q. Is that the document that -- first of
14 all, you signed that or cosigned that document?

15 A. Yes, sir.

16 Q. Is that the document that notified Mr.
17 Smith in September of 2012 of performance issues
18 and that he needed to go to EAP if he was going to
19 continue his employment?

20 A. Yes, sir.

21 Q. Show you Defendant's Exhibit 18. That
22 is a one page document entitled Showa Denko Carbon,
23 Inc. positive discipline procedure. It appears to
24 be dated September 18th of 2012; is that right?

25 A. Yes, sir.

1 Q. Okay. Is that the -- I think in the
2 affidavit you read referred to it as PDP, right?

3 A. Yes.

4 Q. Is that the document that was given to
5 Mr. Smith when he was terminated?

6 A. Yes, sir.

7 Q. And can you please read the center
8 part, the typewritten part, of the document that
9 explains the reason he was being terminated?

10 A. "You are being terminated due to your
11 not adhering to my direction of not getting
12 involved in IT hardware needs. On the dates of
13 9-10, 9-21, and 11-21-2102 I instructed you not to
14 get involved in the research or any activities
15 involving hardware. On 9-19, 9-21 and 11-21-2012
16 you were involved in researching and/or contacting
17 vendors with regard to our hardware needs. During
18 my discussion with you I indicated to you that
19 other people in the department were responsible for
20 that part of the business and you did not need to
21 be concerned, nor be engaged in those activities."

22 Q. Now, just so I am, clear, is that the
23 reason that was given and the reason for Mr.
24 Smith's termination?

25 A. Yes, sir.

1 Q. You have been here for a good bit of
2 the day today during various testimony; do you
3 recall that?

4 A. Yes, sir.

5 Q. Okay. Now, one can glean from some of
6 the testimony and questions today that Mr. Smith
7 disagreed with his termination or the reasons for
8 justification of termination; you are aware of
9 that?

10 A. Yes.

11 Q. And he brought a lawsuit against Showa
12 Denko over his termination, correct?

13 A. Yes, sir.

14 Q. And that case is no longer pending,
15 correct?

16 A. Yes, sir.

17 MR. WALLINGER: That's all I have.
18 Please answer any questions Mr. Smith has. Thank
19 you.

20 THE COURT: Cross.

21 CROSS-EXAMINATION

22 BY MR. SMITH:

23 Q. Mr. Wing, do you recognize this
24 document? I will present this as the next exhibit.

25 A. I don't recognize it. I would have to

1 sit and read it.

2 Q. Does it appear authentic?

3 A. Appears -- I don't know whose the
4 signature is on the bottom.

5 Q. I think that's Robert Witten?

6 A. Okay.

7 Q. Do you mind telling me what that -- do
8 you believe it not -- do you challenge the
9 authenticity of that document?

10 A. Not just what I just quickly read
11 through, but I haven't read the whole document, but
12 it's on letterhead so it's talking about the
13 expansion.

14 Q. It's talking about economic challenges;
15 is that right?

16 A. Yes, that how it starts out.

17 Q. Can you read a little bit of it and
18 then give us an overview of the economic challenges
19 that Bob Witten had identified and what is the date
20 of that letter?

21 A. December 14th, 2012.

22 Q. December 14th, 2012. If you would?

23 A. Start reading it?

24 Q. Yes.

25 A. "Colleagues. This is to update you

1 regarding our challenging business condition and
2 some actions we will take to insure our short-term
3 viability and success. As many of you know our
4 graphite electrode business is cyclical. That is
5 it fluctuates with economic conditions in the
6 United States and the world. Every four or five
7 years we experience economic weakness. This is
8 typical of a capitalistic economic system. After
9 the financial crash of 2008 which was not typical
10 and quite severe and the subsequent harsh recession
11 the economy improved somewhat and SDKC also
12 recovered lost volume and profitability. Starting
13 in May of this year, the economy seemed to be
14 stagnating and the steel industry began to decline
15 again. The trend has continued almost
16 uninterrupted. Our customers have began delaying
17 orders and in a few cases cancelling them. The
18 downturn is also causing us to have to reduce
19 prices next year. Demand is soft and customer
20 inventories are high. The price weakness has
21 become a serious concern.

22 SDKC reacts to these short-term
23 fluctuations as most commodity manufacturers do.
24 Among other steps we try to cut costs. Of course
25 SDKC maintains a low overall cost structure in good

1 times and bad. So, during downturns, our cost
2 cutting can only go so far. One of the cost
3 cutting measures that we like to try to avoid
4 unlike some other companies is laying off our
5 colleagues. You recall that this was necessary
6 after the financial crash of 2008, but we plan to
7 do everything possible now so that we do not have
8 to take that step later. Some of the measures will
9 include suspending certain benefits such as tuition
10 reimbursement, gymnasium memberships and so forth.
11 Also we will not authorize a general wage increase
12 in January. The PDA will not be suspended. You
13 will you have a PDA in January and this program
14 will continue in 2013. Your specific efforts to
15 make our company solid will be recognized. Please
16 understand that our cost reduction efforts must
17 include small items and large. They will all
18 contribute to sustaining our short-term viability.

19 Regarding PFC75, you have seen that
20 construction has begun. It may seem unusual to you
21 that we are beginning the expansion at the same
22 time that business conditions are deteriorating and
23 we are taking action to cut cost. Major, long
24 investments such as PFC75 are not subject to
25 short-term fluctuations in the economy. If we

1 react to every one of those bumps in the road we
2 would never have built our plant in the first
3 place. We will vigorously proceed with the project
4 while protecting our existing business. Better
5 economic times will surely return. Let's continue
6 to work together stressing safety, quality and
7 production. Significant cost reduction and cost
8 avoidance will be needed next year. We will not
9 sacrifice safety or quality to achieve it. I ask
10 for your support. Here's wishing you and your
11 families a safe and happy holiday season."

12 Q. So were there financial pressures on
13 December 14th of 2012?

14 A. Yes, according to this.

15 Q. Did that have any impact on your
16 attempt -- your assertions made to get rid of me?

17 A. No.

18 Q. You see the positive discipline
19 procedure that you signed as a termination?

20 A. Um-hmm, yes, sir.

21 Q. Are you the sole signature on that
22 document?

23 A. Yes.

24 Q. Why were you the sole signature,
25 because I met with you and Clint Lucas. Why didn't

1 Clint Lucas sign this document?

2 A. I don't know. I don't know why he
3 didn't.

4 Q. Did you ask him to sign it?

5 A. No, I didn't. I signed it and handed
6 it to him.

7 Q. Do you recall when I was terminated
8 that you offered to allow me to quit so that it
9 wouldn't look so bad on my record?

10 A. Mr. Clint Lucas offered that. I did
11 not.

12 Q. What time of the day was this?

13 A. In the morning.

14 Q. 9:00 a.m.?

15 A. Somewhere around there.

16 Q. Had I got to work before you got to
17 work that day?

18 A. I don't recall. I don't know.

19 Q. How many days did you miss in 2012?
20 You had heart surgery or you had a couple
21 surgeries, I remember you limping in on crutches.
22 Tell us about 2012 from your perspective if you
23 wouldn't mind because you were the IT manager in
24 2012; is that correct?

25 A. Yes.

1 Q. Beginning of 2012, right?

2 A. Yes.

3 Q. Are you still the IT manager?

4 A. No.

5 Q. Tell us about maybe how many -- did you
6 miss ten days of work in 2012?

7 A. I don't have that in front of me.

8 Q. Twenty days?

9 A. I don't know.

10 Q. Thirty days?

11 A. I don't know. I don't have that in
12 front of me.

13 Q. You did have several procedures. You
14 hurt a leg. You were out a considerable period of
15 time; isn't that true?

16 A. I was out for a leg injury. I don't
17 know if it was in 2012. I remember a leg injury.
18 I don't have that documentation in front of me to
19 state when it was.

20 Q. You say that I was researching hardware
21 on 9-17; isn't that correct?

22 A. You came in to a meeting that I was
23 having with another colleague about the SAN network
24 and then you offered some information, some ideas
25 that you had on the SAN.

1 Q. Who was the colleague?

2 A. Brad Kennedy.

3 Q. Was he part of the IT department?

4 A. No, he's not.

5 Q. This is Plaintiff's Exhibit 7, the
6 e-mail I sent to Warren Sneed on the 17th. Can you
7 take a look at that and tell me what -- do I
8 understand correct that I have been instructed to
9 work through Warren for example, when I saw issues
10 with the hardware rather than trying to solve them
11 myself; would that be a fair statement?

12 A. Yes.

13 Q. Can you read it?

14 A. This is to Warren Sneed from yourself,
15 Tracy Smith.

16 "Warren, thanks for re-enabling Ping on
17 the 103 network. This makes it much easier for me
18 to ensure that machines are available and are
19 communicating with each other. Can you notify the
20 IT when you make these type of changes? Both Bob
21 and Stan thought it was working until I showed the
22 timeouts. Thanks. Tracy."

23 Q. So it seems that I complied with your
24 request at least in that one e-mail, did I -- is
25 there anything wrong with that one e-mail from your

1 perspective?

2 A. It looks like that you communicated
3 with Warren Sneed and you are doing something with
4 Warren Sneed. I guess you guys were working
5 together on that. I don't know. I don't know
6 anything beyond that.

7 Q. So at least I seem to be able to work
8 with people to some extent; would that be a fair
9 statement?

10 A. According to this e-mail I read, yes.

11 Q. You mentioned many altercations as you
12 put it in your affidavit and, Your Honor, I have a
13 lengthy written rebuttal to this affidavit that I
14 have filed against Showa Denko in this lawsuit that
15 it -- I would like to put on the record if it
16 please the Court. I am not going to sit here and
17 try to go through it is what I saying. I will put
18 in the written record. It is part of the record
19 against Showa Denko.

20 THE COURT: Let's deal with that some
21 other time. Focus in on this. And let me help you
22 on what you need to focus in on. You sued
23 Mr. Kessler saying basically that I guess he told
24 this gentleman or someone else --

25 MR. SMITH: Told Mr. Lucas.

1 THE COURT: Whoever and that was their
2 decision to fire -- had something to do with their
3 decision to fire him. Unless this gentleman or
4 some other person there says yes, Mr. Kessler
5 contacted us and based on that and these other
6 things that's why we decided to fire you, I don't
7 really need to get into the reasons why they fired
8 you justifiably or not. That is between you and
9 them. You have settled your lawsuit with them.
10 The only thing that matters in this lawsuit
11 according to your pleadings was whether or not you
12 told him some things which he communicated to them
13 and that caused them to fire you.

14 So unless you -- I don't want to just
15 get into all of the problems that you and other
16 employees were having unless you have got evidence
17 that shows he told them something that --

18 MR. SMITH: The point I am making, Your
19 Honor, is that I tried to discuss these issues with
20 Mr. Kessler. And he pulled in --

21 THE COURT: Does not matter. What you
22 have alleged in your lawsuit was that he told his
23 employer, this gentleman's employer, him or
24 somebody else something that they should not have
25 told them and that was the reason why they fired

1 you.

2 MR. SMITH: That's only one of the
3 points in my lawsuit. I also claim that he did not
4 take adequate history and had he taken the history
5 that I am trying to exhibit right now he could have
6 done things, for example, helped Clint Lucas to
7 understand the dynamics of the situation. If he
8 would have come up with an accurate diagnosis of
9 the problem rather than just assuming it was my
10 interpersonal skills and that I needed cognitive
11 behavioral therapy, Your Honor. This is very --
12 this is what his expert witness is based on. I
13 believe I have the right -- I know you're impatient
14 with me. I apologize.

15 THE COURT: I am -- you keep wandering
16 off how you were not justified and you weren't
17 treated right. I get that. I would possibly feel
18 that way. Listen. And that's part of your
19 problem. I am trying to explain something so you
20 don't go wandering off all over the place. This
21 gentleman is who you sued and that's why we are in
22 court today. Now, I have told you one thing that
23 you need to try to prove and if you have got
24 something get it out of him on that.

25 Now, if you want to allege that he had

1. some other duty, that is, to mediate the dispute
2. and pass that on, there is a problem that you have
3. with your theory. And that is you're saying they
4. have a confidential relationship with me and are
5. not supposed to talk to my employer. I guess it's
6. your theory that they can talk to them if it helps
7. me, but not if it hurts me. I mean I don't -- if
8. they are not supposed to talk -- he's not supposed
9. to talk with them and doesn't matter whether or not
10. he was -- knew all the details of what your
11. disputes were with your other employees. I am just
12. saying that's an issue.

13. You can't have it both ways.

14. MR. SMITH: My suit, Your Honor, stated
15. that he did not do several things and did things
16. that he shouldn't. I am trying to point out, first
17. of all, that he did not diagnose the problem
18. correctly. That's what this line of questioning
19. is, Your Honor. Your Honor, that's what this line
20. of questioning is first of all. And in my pleading
21. I say that he did not take an adequate history and
22. I am trying to illustrate the history here as I
23. believe what I am saying is that he had a duty to
24. understand the problem, then we would formulate a
25. plan, we would agree on a plan and perhaps contact

1 Clint Lucas and perhaps meet with Clint Lucas, both
2 of us and say hey, Mr. Lucas, here is what the
3 e-mail shows. Here is what the people show, but
4 see, that's part of the problem is this EAP system
5 is so one sided he never really considered doing
6 that. He simply decided to tow the company line,
7 assumed that I was the bad actor and tell Mr. Lucas
8 he was working to try to fix the bad actor.

9 And I'm telling the Court and trying to
10 show with evidence and e-mails and everything I
11 have got that that is not the case. And where he
12 failed is that he did not take the time to read and
13 go through just what I am trying to go with his
14 expert witness. Just like I tried to sit down, we
15 spent 40 minutes maybe with the expert witness.

16 I spent several hours with Mr. Kessler,
17 never to the point I got to with the expert
18 witness. If I could have just said look at these
19 e-mails, help me understand. Can you see what
20 these people are feeling and how I tried to work
21 with these people. If the Court will allow me a
22 few more minutes I'm going to talk about --

23 THE COURT: I'll allow you. I don't
24 think you hear what I say. But if you want to talk
25 with him about it, go right ahead.

1 MR. SMITH: You're saying I need to say
2 what Mr. Kessler has done, I need to that -- by
3 omission Mr. Kessler's lack of action cost me. I
4 put confidence in his ability to help me form a
5 strategy to assist me as a valuable employee. He
6 did not do that. By his own admission he has
7 refused to look at the e-mails I am trying to go
8 through here in court. He refused to do that. He
9 said there wasn't that problem at all. His expert
10 witness said that wasn't the problem at all. I
11 have poor interpersonal skills and that was the
12 root cause of the problem.

13 I am trying to show that here are the
14 root causes of the problem. Again, I have a
15 lengthy rebuttal of everything Mr. Wing just said.
16 I am not sitting here wasting the Court's time
17 challenging every comment. I hope maybe I can get
18 some credit for not doing that.

19 THE COURT: I told you go ahead. I'm
20 trying to keep you focused on what you have alleged
21 in the lawsuit.

22 MR. SMITH: I have alleged various
23 breaches of duties.

24 THE COURT: Listen to me. You don't
25 have to argue with every point I make. I am just

1 telling you that's what I am trying to do. I am
2 not trying to browbeat you or anything. I am just
3 telling you focus on what you pled.

4 MR. SMITH: I also have made a motion
5 to amend that pleading.

6 THE COURT: And I am letting you.
7 Focus on what you have pled. Okay? This witness
8 has a limited purpose here. Try to get out of it
9 what you want and then we will come back and finish
10 Thursday. Okay? You don't need to ramble all over
11 and rehash everything that we have --

12 MR. SMITH: You have seen the e-mails
13 several times, but I have to get the different
14 people's perspective on them.

15 THE COURT: Go ahead.

16 MR. SMITH: I need a minute.

17 THE COURT: Let's take 10 minutes while
18 you get focused in on what you want to finish for
19 the day. All right?

20 (A recess transpired.)

21 THE COURT: Everybody ready?

22 MR. SMITH: Yes, Your Honor.

23 THE COURT: Go ahead.

24 BY MR. SMITH:

25 Q. I am looking for an e-mail from Warren

1 Sneed. Back to that e-mail, that was 9-17?

2 A. Yes.

3 Q. Which is the same date you have got
4 here interestingly enough. Was I hired as the same
5 grade as Greg Spires?

6 A. I wasn't in that department when you
7 were hired so I can't answer that.

8 Q. And who reported the incident between
9 myself -- Your Honor, and I would ask for latitude.
10 I believe I am rebutting -- he brought him here. I
11 believe I am rebutting his testimony. I ask the
12 Court's permission.

13 THE COURT: To do what?

14 MR. SMITH: Rebut Mr. Wing's testimony.

15 THE COURT: Okay. Go ahead.

16 BY MR. SMITH:

17 Q. Thank you. And it was Greg Spires who
18 reported the discussion that had me go to SAVE; is
19 that correct?

20 A. That's correct.

21 Q. How did -- because Greg Spires' office
22 was not beside Bob Parks' office; isn't that
23 correct? Is the pitch of my voice -- I will try to
24 lower the pitch of my voice. This is a stressful
25 situation, I apologize. How did Greg Spires find

1 out about this discussion?

2 A. I believe he had heard about it.
3 That's all I know. He had heard about that it
4 happened.

5 Q. Warren Sneed's office was adjacent to
6 Bob Parks' office; isn't that correct?

7 A. Yes.

8 Q. Do you think it's possible that Warren
9 Sneed reported this to Greg Spires?

10 A. Possible.

11 Q. Let me show you another -- this is the
12 same e-mail we have gone through and I have a
13 notebook full of e-mails that I am not burdening
14 the Court with.

15 THE COURT: Okay.

16 BY MR. SMITH:

17 Q. We have yet to read aloud in court and
18 I think we can read through it. I'm not sure what
19 time we want to end here, but shouldn't take more
20 than ten minutes. I think it's worth reading
21 through it. You have a good speaking voice. And
22 when you get to a part you think I have been out of
23 line I would like you to tell me. You realize
24 that's chronological.

25 A. So you want me to start from -- you

1 want me to interpret this while I am reading to the
2 Court and also to try to determine whether you are
3 out of line while I am trying to read it?

4 Q. I would like you to read it and then as
5 you get to a point in the e-mail you might stop and
6 say hmm, that seems interesting. I know the Court
7 is tired of hearing me talking and I am tired of
8 talking.

9 A. So where did you want me to start, Mr.
10 Smith?

11 Q. From your report. This is --

12 A. To Tracy Smith from Mark Little.

13 Q. Tell us who is copied on this too.

14 A. Copied to Greg Ruffing and Greg Spires.
15 Subject, comments in your monthly report.

16 "From your report, the number of
17 Wonderware observations acquired by DARTS after the
18 Rebake process is relatively small as shown in the
19 list below. Given the age the Wonderware to DARTS
20 interface machines which run on Windows 95 it may
21 be advisable to prioritize development of an
22 alternate method of acquiring this data and feed
23 the data to SMG SQL servers in real time. Ideally
24 this method can run in parallel with existing
25 Wonderware acquisitions and will allow newer

1 routines based an SAP SMG SQL server data to run in
2 real time. The absence of data collection has
3 nothing to do with Wonderworks. Some of the points
4 you mentioned are no longer collected because they
5 were deemed no longer needed. The points
6 associated with the old 510 test are no longer
7 collected because the equipment is no longer there.
8 The only thing collected from the machine is
9 length. OHMS in 490 was automatically collected at
10 one point, but the newer equipment does not have
11 any communication options. Graph and finish
12 inspection weights are collected. The fieldnames
13 associated with endface machine were items that
14 were on a wish list that some folks thought may be
15 needed one day. Placeholders basically."

16 Q. Let me stop you and just make sure I
17 can quickly summarize and we can agree on that. He
18 quoted something out of the -- my routine monthly
19 report that went to Greg Ruffing, right? And Mark
20 has commented on it, is that accurate from your
21 perspective?

22 A. Yeah, this is before I was in IT, but
23 reading it appears to be that. I don't know
24 whether -- because I got it from your report and I
25 guess that's from Mark Little, so he took it from

1 your report and then he commented down below the
2 table what his comments were. I am just assuming
3 that's what the intent of that was.

4 Q. I want to point out the date is right
5 after I was assessed for the IT management position
6 by -- you are familiar with Dr. Thomas Walsh?

7 A. Yes.

8 Q. And so let's continue. I think you
9 will see where things escalated a bit and I want to
10 point out if I am the one who escalates in this
11 e-mail or if someone else escalates in that e-mail
12 if you can see that.

13 A. You want me to read the next one up
14 from that.

15 Q. Yes, please.

16 A. This is to Mark Little from Tracy Smith
17 copying Greg Ruffing and Greg Spires on the same
18 e-mail thread.

19 Q. We are just responding to each other.

20 A. Right. For the court's records.

21 "Initially one of our process engineers raised an
22 issue related to capturing the length of rods after
23 endface. Currently we don't do this until graph
24 loading but we probably could do this manually and
25 then just enter the data into a screen instead

1 trying to automatically capture it. I realize the
2 rods are pretty hot at endface inspection and that
3 the idea of moving endface has been raised so I am
4 certain that the best management -- what the best
5 management technique is. Stan mentioned an encoder
6 that could be read by the operator. FWIW, I've
7 began to think that it may be easier to capture
8 some, maybe all pieces of rod data after endface
9 and enter them manually rather than trying to
10 automate this data capture especially as we get
11 closer to point of shipment. I got the field list
12 by looking for all the measurements in the DARTS WW
13 table whether they are used or not. Note that I
14 don't mean to imply that we don't capture the data
15 because of Wonderware and understand that some data
16 values simply may not be worth capturing at this
17 point."

18 Q. Can I stop you there and ask you why
19 would I say that, that I am not implying that we --
20 am I basically offering something of an olive
21 branch to Mark there saying?

22 A. It would seem that way on that comment
23 based on what I am reading right there.

24 Q. Appreciate that. If you could
25 continue. Thank you for doing this for us.

1 A. "I like the idea of placeholders even
2 if we don't have a current need for the data.
3 Anyway, capturing and entering the data manually
4 could allow us to reduce reliance on the aging
5 DARTS Wonderware machines and this would then make
6 it easier to transition data captured directly
7 to SMG/SAP/SQL and allow us to perform more
8 shipping and final processes on SMG/SAP/server.
9 Don't get me wrong. I think Wonderware is
10 extremely useful for tracking all the process data
11 related to specific process runs, but perhaps less
12 useful for capturing individual rod measurements
13 when the number of measurement points is relatively
14 small. Maybe we could put this on the list of
15 things to discuss at a future IT meeting."

16 Q. So have I said anything wrong at that
17 point?

18 A. Not that I see from your e-mail to
19 Mark.

20 Q. Let's continue on.

21 A. Some of these pages are copied.

22 Q. It is hard to do if you are not on the
23 computer.

24 A. Read from this point?

25 Q. Right. This is the next e-mail thread.

1 So Mark Little is replying to the e-mail you just
2 read, right?

3 A. Correct. To Tracy Smith from Mark
4 Little copying Greg and Spires.

5 "It should have been investigated and
6 discussed before publishing in a report. Again the
7 aging DARTS interface machines have nothing to do
8 with it. There are fields on the operator screens
9 that will accept manual data now. Logic in the
10 PLC's collect the data. WW just inserts it into
11 the data base. You need a better understanding of
12 the complete system. DARTS system consists of
13 PLCs, camera systems and Wonderware, not just a
14 side based data base. The aging DARTS interface
15 machines will be around until the entire system is
16 replaced unless you are planning on just replacing
17 a small portion of it. DARTS is event based
18 industrial SQL which I assume you are referring to
19 is Wonderware is time based. Industrial SQL was
20 purchased and installed as a requirement of our
21 operating permit. What you're saying doesn't make
22 sense. The only items that are missing and some
23 are of value would be the end face data. There
24 isn't a safe way for the operators to measure the
25 rod. Diameters, length and weight are collected at

1 490 510. Not all diameters are collected in 110 or
2 250 either. Once upon a time there was a bake
3 resistivity, but that's not on your list. Sonic
4 velocity and finishing resistance were analyzed and
5 a decision was made in the 80s this data was not
6 needed. Automatically collecting data is the
7 preferred method. It eliminates human error. In
8 fact, the original architect of the DARTS system,
9 David Nelson, wanted the same technology used for
10 measuring rods used throughout plant. That would
11 be the most consistent but not necessarily the most
12 accurate."

13 Q. Let's continue on.

14 A. To Mark Little from Tracy Smith, copy
15 to Greg Ruffing, Greg Spires. "I would like to get
16 a better understanding of the complete data
17 acquisition system and appreciate the information
18 you share below. Greg Ruffing is editor. I am
19 just a contributor. I am suggesting replacing a
20 relatively small portion of the DARTS starting in
21 shipping in an effort to improve QC and then
22 improve our inventory control. To Greg Ruffing's
23 credit he suggested that early on. We are working
24 on the new CDS. I do think automatic data
25 collection can help eliminate human error, but also

1 see the need for manual backups and need to weigh
2 cost/benefits. In many cases I like the idea of
3 having manual entry alongside automated collection
4 as a double check. Also I agree with your
5 statement that DARTS is event based and that
6 Wonderware industrial SQL is a time series database
7 historian. I realize this historian is very
8 important on our environmental data and contain
9 many of the tags currently fed to DARTS in an event
10 driver manner. Let's put this topic on an agenda
11 of our next IT meeting."

12 Q. So any problems with what I have said?

13 A. No, I just see the discussion going
14 back and forth between you and Mark on the
15 understanding of the systems.

16 Q. Right. Read the next e-mail.

17 A. To Tracy Smith, Mark Little, from Greg
18 Spires, copy Greg Ruffing. "I still think we would
19 benefit from long term planning and group
20 discussion of major topics. If you are shooting
21 skeet you had better lead the target or you miss.
22 So we need to know where each of us sees our system
23 evolving and know how we need to modify or own
24 visions to coordinate with evolutions of our
25 systems."

1 Q. Let's continue.

2 A. To Greg Spires, Tracy Smith, Mark
3 Little from Greg Spires, copy Greg Ruffing. "I am
4 done with this conversation. DARTS 3 can be
5 designed however you want. I don't need to be a
6 part of anything. Really I don't. My consistent
7 recommendation is discuss things in an open way and
8 work toward a team of people who like thinking in
9 common goals without trying to shove one idea just
10 down someone else's throat. Just don't endanger
11 the company with all this lack of working
12 together."

13 Q. So let's talk about that. Greg Spires
14 again was -- he was one of the -- not that I have
15 any lofty credentials, but I have a college degree.
16 Greg Spires had a college degree; is that correct?

17 A. Yes.

18 Q. Does Mark Little have a college degree?

19 A. I don't recall.

20 Q. My understanding was myself because
21 from this document from Linda Clemmons I was hired
22 on the same level as Greg Spires. Of course Greg
23 Spires had been with the company you know better
24 than I, how long, 20 years?

25 A. He's been at the company as long as I

1 have.

2 Q. Right. And you two worked together
3 quite a bit on the SAP conversion; is that fair to
4 say?

5 A. That's correct.

6 Q. Before I got there he was in charge of
7 the shipping process and the CDS, customer data
8 sheets as we call, and they got shipped out with
9 the loads; does that sound correct to you?

10 A. I don't know. This was before I was in
11 the IT department so I don't know what he had the
12 responsibility for.

13 Q. Okay. Fair to say I was brought in at
14 the same level of Greg Spires, but of course had
15 considerably less seniority; is that a fair
16 statement? I mean I was there, what, a year or so
17 at that point. I'd just been assessed for the IT
18 manager based on this document.

19 A. Well, this here e-mail states from
20 Linda Clemmons, Debbie Peek and Clint Lucas that
21 you had hired in and what your bi-weekly salary is.

22 Q. One of them had written that down?

23 A. Whatever is written in here. I don't
24 know who wrote that in there and whether that says
25 you're at the same level as Greg Spires.

1 Q. It says same as Spires, though on
2 there, isn't that --

3 A. It is written in. And whoever wrote in
4 Greg same as Spires No. 22. I don't --

5 Q. That's good enough. And let me make
6 one comment before we go on and ask you in your
7 affidavit do you have any e-mails that back up what
8 you're saying in your affidavit? It seems like all
9 these altercations happened, but there seems to me
10 to be no e-mail evidence of it and as much as we
11 did in e-mail you would think there would be e-mail
12 evidence of all the things that you have asserted
13 in your affidavit?

14 A. Yes, I have a record and they are my
15 commentaries as well as e-mails.

16 Q. Would you be willing to provide those
17 to the Court?

18 MR. WALLINGER: Objection.

19 THE COURT: Did you subpoena them?

20 MR. SMITH: No, Your Honor.

21 THE COURT: He is not required to bring
22 them.

23 MR. SMITH: I asked him if he would be
24 required to -- if he would be willing to do. It
25 that out of line?

1 THE COURT: Unless you signed a
2 subpoena that said bring them to court, all he has
3 got to do is show up. So the answer is no, he
4 doesn't have to bring them.

5 BY MR. SMITH:

6 Q. I was asking as a courtesy. That's
7 fine. I realize courtesy is in short supply in
8 this world and let's continue in the e-mails.

9 A. Next one, Mr. Smith?

10 Q. Yes, please.

11 A. Next one is to Greg Spires, Tracy Smith
12 from Mark Little copied Greg Ruffing. "You seem to
13 have your own agenda that doesn't involve the rest
14 of us. That has been a common theme for some time
15 and I am done also. There will also be no more
16 comments from me."

17 Q. So what's happened there? Greg Spires
18 has said that he doesn't care how DARTS is designed
19 or that's what he's saying, he doesn't want to be
20 part of the design is the way I would read into
21 that. Mark is saying I am not going to help either
22 basically. Is that you how see it?

23 A. That's how I read it, but that's all I
24 am doing is reading. I wasn't part of the
25 department at the time. So I don't know what was

1 going on. I am just reading what you have provided
2 to me.

3 Q. This is about three months before you
4 become IT manager; is that correct?

5 A. That's correct.

6 Q. That would be after I was assessed?
7 You took the same assessment from Thomas Walsh at
8 that time?

9 A. That's correct.

10 Q. And we -- people knew we had taken
11 these assessments because we asked different people
12 to comment on, they were included in the comments
13 of our placement report; is that correct?

14 A. Repeat that again.

15 Q. The comments -- people knew that we
16 were being assessed for management positions
17 because as part of the process we were supposed to
18 ask peers to provide their input into this
19 document, right, so it was somewhat common
20 knowledge that we were being considered for IT
21 manager?

22 A. I wouldn't say that. I wouldn't say
23 that and I don't think it was common knowledge that
24 we were taking it. It certainly wasn't publicized
25 when I took it. It was -- I think it was kept -- I

1 don't want to say quiet, but I never heard it
2 discussed with the exception of me talking to Mr.
3 Walsh.

4 Q. So you weren't asked the way I was to
5 reach out to people and ask them to provide input
6 on the report, provide commentary which Thomas
7 Walsh discussed with us?

8 A. No.

9 Q. Was it not part of your process?

10 A. No.

11 Q. Let's finish off, not much more than
12 this.

13 A. Continue on?

14 Q. Right.

15 A. This is to Dan Pascazio from Tracy
16 Smith.

17 His is not right -- in line with it,
18 but it's about three weeks later. December 13th
19 and this is October 7th so I don't want to give it
20 was right after it.

21 "Dan, thanks for spending time with me.
22 There are -- these are the type of discussions that
23 can be rambling and time consuming. Maybe they are
24 best held over for lunch or dinner. You have a
25 standing offer from me for lunch. I do take away

1 from the discussion that you consider DARTS 3 a
2 high priority for the IT team. I hope it is okay
3 if I informally make this known to members of the
4 IT team. I think this can clarify some issues.
5 Here's the e-mail thread I describe below and is
6 part of the reason I chose not to attend
7 yesterday's meeting. Note the tone of my response.
8 Note that neither Greg came to my aide or suggested
9 that Mark was at all out of line. Note that Mark
10 had not attended any of the IT meetings since Larry
11 left and generally is not easy to talk to. I am
12 also behind on several important tasks I will
13 address in another more concise e-mail earlier next
14 week. Thanks again, Tracy."

15 Q. So what I am saying there?

16 A. You are telling Dan I guess you had a
17 meeting or something with him, you appreciate
18 spending time with you and talking about the
19 priority of the DARTS 3 project. And then you go
20 to discuss and sent that e-mail thread to him of
21 what we just read or I just read.

22 Q. Right. It's interesting Greg Ruffing
23 has nothing to say in that because Greg Ruffing is
24 the IT manager at that point; is that right?

25 A. Yes.

1 Q. And so Greg Ruffing did nothing to help
2 with this situation?

3 A. I don't see anything in this e-mail
4 thread.

5 Q. He was just a casual observer even
6 though he was the IT manager?

7 A. He was the IT manager, but I don't see
8 anything in this e-mail thread.

9 Q. From him?

10 A. From him.

11 Q. He is copied on it?

12 A. Copied on it, but whether he chose
13 another communication path I don't know that.

14 Q. So would you maybe read that's a bit of
15 a vacuum and the people were asking a little bit
16 about what's going on, I am working hard on the
17 shipping system to help improve because the
18 shipping was a fair mess when I arrived there. I
19 will attest to that.

20 MR. WALLINGER: Objection. He is
21 testifying. He is not asking questions.

22 THE COURT: Ask a question.

23 BY MR. SMITH:

24 Q. Was the shipping process running
25 smoothly before I arrived at Showa Denko?

1 A. I wouldn't know. I wasn't the IT
2 manager at that time.

3 Q. Let's -- in your opinion after those
4 comments should Greg Ruffing have said anything?
5 Would it be the place for a manager who has been
6 copied on that e-mail to maybe step in and say --
7 again, the start of the thread comes from my
8 monthly report where I am simply trying to -- we
9 depend on those values for the shipping system and
10 there are some errors and omitted values with them.
11 So would it be reasonable for me to address that
12 issue in a routine monthly report?

13 A. Yes. If you saw a problem that you
14 were responsible for I as an IT manager would
15 expect you to address that in a monthly report.

16 Q. And you agree that I was responsible
17 even at the date I was terminated for SDKC net and
18 SDKC.com, I had at least rights to it, I am listed
19 here on this sheet? Do you recognize this sheet?

20 A. Yes.

21 Q. And that pretty much the work I did
22 depended on the systems to -- when I write a report
23 I have to interrogate the systems and bring the
24 data together to produce the report on this screen,
25 right?

1 A. Correct.

2 Q. So if there were problems with systems
3 what's the most visible -- clearly my reports don't
4 run quickly and it makes my work look substandard
5 perhaps because the systems I am depending on are
6 not performing correctly. Would you agree with
7 that statement? If the systems I am depending on
8 were not running correctly would that reflect
9 poorly on my work?

10 A. If you were still able to get the data
11 from the systems and if it wasn't in a timely
12 manner then you would have to raise that concern
13 that you weren't able to get the data in a timely
14 fashion, but if it was time sensitive to get that
15 data out to me or to another manager, then you
16 would have to raise the concern.

17 Q. The reports I was running were
18 basically someone would push on a button and
19 produce the shipping report in more or less real
20 time, would you agree with that? It was not
21 something that you waited overnight for the
22 processes to run. I did some of those, but a
23 number of processes needed to run so that when
24 somebody clicked on the button the screen showed up
25 in a reasonable period of time? Would you agree

1 with that?

2 A. I'm not that familiar with the shipping
3 report, but if it's something that they would need
4 real time at that time, then it would be an
5 expectation if they had to act on that data when
6 they queried it it should come up in a reasonable
7 amount of time.

8 Q. I did a lot in the shipping, but I also
9 did a lot -- at Greg Ruffing's direction a lot of
10 statistical process control, is that -- do you have
11 any knowledge of that?

12 A. Not what Greg Ruffing was asking you to
13 do.

14 Q. So when you took on the role of IT
15 manager you didn't realize that Greg had asked me
16 to and that I was producing statistical process
17 control charts for the different processing
18 engineers? You did not know that?

19 A. Not that I recall when I turned over
20 with Greg.

21 Q. So describe the turnover from Greg if
22 you can very briefly. I know we want to get out of
23 here.

24 MR. WALLINGER: I don't see the
25 relevance to the question, Your Honor.

1 Q. All right. I give up. I will ask
2 this. An e-mail on 9-17 from Warren Sneed. I will
3 agree that's hard to read. I have a better one.
4 What am I trying to do with the ping command and
5 why did I want it re-enabled?

6 A. I'm not familiar with what you were
7 trying to do.

8 Q. You were the IT manager, right?

9 A. Yes.

10 Q. What does the ping command do?

11 A. I'm not real clear on that, but I think
12 it's the speed of the system, how fast you get
13 response.

14 Q. Can you tell me anything more? How do
15 you run the ping command?

16 MR. WALLINGER: Your Honor, I'm going
17 to object to relevance of this as well.

18 THE COURT: What's the relevance?

19 MR. SMITH: I am -- he brought the
20 affidavit in. I am illustrating what my job really
21 was. It's easy to sit up and just bad-mouth
22 somebody basically which is essentially what he did
23 with his affidavit. What he did when he produced
24 the College of Charleston document. I guess
25 defending reputation is really difficult, Your

1 Honor. That's what I am trying to do as best I
2 know how. It's 5:20. If you all want to --
3 BY MR. SMITH:

4 Q. So we had an IT manager who didn't know
5 the ping command and I'm at fault for trying to run
6 the ping command on a system in order -- so my
7 system -- so my reports don't fail, is that --

8 A. Are you asking me if you were at fault?
9 I didn't say you were at fault.

10 Q. That occurred on 9-17?

11 A. Yes.

12 Q. And researching and contacting vendors
13 would have been a problem. Even if it were true --
14 well, why would it have been a problem?

15 A. If you are researching hardware.

16 Q. That I depend on.

17 A. Correct.

18 Q. Why would that have been a problem?
19 Because you said so?

20 A. Because I said that other individuals
21 in the department are responsible for hardware.
22 You were responsible for data.

23 Q. Is Warren Sneed still with the company?

24 A. No, he's not.

25 Q. One last thing and I will let us go. I

1 wish I knew how to do this better, Your Honor, I
2 apologize. I am looking for an e-mail that I
3 brought that showed Warren on 9-6. This one right
4 here. Do you recall receiving that? Do you recall
5 the meeting that that e-mail is referring to?

6 A. Let me read it here. Okay.

7 Q. What does that e-mail say? Is that a
8 complaint to human resources about Warren Sneed's
9 behavior?

10 A. No, that's an e-mail to me, copy Clint.

11 Q. It's both of you. Is that a complaint
12 about Warren's behavior? Read it to us if you
13 could and let's see how I handled that. Again,
14 this is about two days after I had been giving a
15 decision making leave, we had a discussion after
16 the IT meeting, right, do you recall that?

17 A. Yes, I do.

18 Q. Do you recall that me and Warren talked
19 a little bit, right, and that Warren became very
20 upset and slammed his folder on the floor? Do you
21 recall that?

22 A. Yes, I do. I also recall other parts
23 of the meeting.

24 Q. What had I done at the other parts of
25 the meeting?

1 A. You both were escalating in your tones
2 of voice. I cautioned both of you during this
3 meeting that you needed to bring it down, bring it
4 down to a civil tone.

5 Q. Did I do that?

6 A. You both did. You both did.

7 Q. Did he not just slam his folder down
8 and walk out the door?

9 A. When I encouraged both of you to bring
10 it down you both did bring it down. But the
11 meeting did end up with Warren being upset, walked
12 out of the room and he did take his book and throw
13 it to the ground, picked it back up and walked out.

14 Q. Was Warren targeting me at that point
15 because I had -- I had skills that perhaps Warren
16 did not have; is that a fair statement? I am a
17 Microsoft certified systems engineer. Was Warren
18 certified on SQL server for example?

19 A. I don't remember he was.

20 Q. Everybody has got different skills.
21 I'm not -- I certainly know how little I know about
22 in many areas, but I know a lot in certain areas.
23 Do you agree?

24 A. Yes, you were knowledgeable in areas.

25 Q. But would you agree when someone

1 targets you and basically decides they are going to
2 disable pings so you can't discover your systems,
3 run virus software in the middle of the day, just
4 basically uses petty tactics to hurt your efforts
5 when you are depending on systems like that it is
6 tough to perform, right?

7 A. You rely on systems to get to the data
8 that you needed to get to.

9 Q. They had to perform or else I couldn't
10 do my work?

11 A. Correct. But this other stuff you
12 mentioned about running the ping and these other
13 things that you said, I don't know whether that was
14 being done and whether that was being done to
15 sabotage your efforts.

16 Q. You mentioned in your affidavit that I
17 built a server in my office, right?

18 A. Yes.

19 Q. When did you become aware of that?
20 When did I build that server?

21 A. I don't have the information in front
22 of me. It was earlier in my tenure, probably the
23 first --

24 Q. It wasn't in your tenure at all. It
25 was Greg Ruffing that approved that purchase I had

1 done that?

2 A. When it became aware to me.

3 Q. Was it a server? What was it?

4 A. It's a server that you had in your
5 office.

6 Q. Was it a test system so that I could
7 engineer and write software without having to mess
8 with the daily -- in other words, you develop on a
9 test system? Was it a test system?

10 A. I don't recall any more.

11 Q. You are calling it a server and you say
12 it happened in your tenure, but as I am telling you
13 it happened in Greg Ruffing's tenure.

14 A. It was brought to my attention in my
15 tenure.

16 Q. Who brought it to your attention,
17 Warren?

18 A. Warren Sneed.

19 Q. So Greg Ruffing had given me permission
20 and --

21 MR. WALLINGER: Objection.

22 THE COURT: Do you have -- what's the
23 objection?

24 MR. WALLINGER: Facts not in evidence,
25 relevance.

1 MR. SMITH: This is his affidavit.

2 THE COURT: Go ahead.

3 BY MR. SMITH:

4 Q. So when you took tenure Warren
5 complained about a server in my office in your
6 words, right?

7 A. That's correct.

8 Q. But when Greg Ruffing was there it
9 wasn't a problem with what I describe and
10 accurately so as a test box in my office. So it
11 changed when you became my team manager?

12 A. I don't know what you and Greg Ruffing
13 had discussed.

14 Q. But suddenly -- it wasn't a problem
15 while Greg Ruffing was manager, but once you were
16 manager it became a problem?

17 A. It was brought to my attention by the
18 person that was responsible for the security of the
19 network.

20 Q. So was he responsible for a development
21 system like that, system that I -- because I
22 deployed for example, a SQL server -- in your
23 opinion as IT manager do you want to do development
24 work on production systems?

25 A. No.

1 Q. Why not?

2 A. Because if there's anything wrong with
3 what you are developing it creates a problem for
4 the data or the system that is running.

5 Q. Right. So if I were developing lots of
6 reports and different processes and wanted to run
7 them in parallel to be sure they worked before
8 actually deploying them in an operational system,
9 it would make sense to have a test box in my
10 office; would you agree with that?

11 A. Yes.

12 Q. In the answer to my complaint with
13 Showa Denko you all denied I even had a private
14 office?

15 THE COURT: What are you talking about?

16 THE WITNESS: I don't know about that.

17 THE COURT: Are you talking about your
18 lawsuit with --

19 MR. SMITH: Your Honor, am I able to --
20 and I will stop it here. Are we able to -- that is
21 on public record. There's a lengthy rebuttal to
22 everything he has put on the affidavit here. Can I
23 put that in evidence at some point?

24 THE COURT: No.

25 MR. SMITH: Do I have to rebut it here?

1 THE COURT: You keep -- again, we have
2 gone over this I don't know how many times now.
3 You are trying to relitigate whether or not you
4 were fired or it was justifiable.

5 MR. SMITH: That's what Mr. Wallinger
6 has alleged by bringing in here and every bit the
7 of testimony he put out there was to say that
8 that's the reason I was terminated. And I am
9 telling you no, the reason is that Mr. Kessler
10 would not look at the e-mail documentation to
11 understand my work situation and help me formulate
12 a plan to approach Clint Lucas and perhaps other
13 members of management such as Tim Braden who did
14 agree and I did good work for, but he would not do
15 that.

16 So I have to both refute what Mr. Wing
17 is saying in order to make the case that I was
18 right and I have to make the case he should have
19 listened to the --

20 BY THE COURT:

21 Q. Mr. Wing, let me ask you a question.
22 You are the guy that fired Mr. Smith?

23 A. Yes, sir.

24 Q. And why did you fire him?

25 A. He did not listen to a direct order

1 that I had for him to not engage in hardware
2 research.

3 Q. Did you ever talk to Mr. Kessler about
4 Mr. Smith?

5 A. No, sir.

6 Q. Did any of this stuff that came up
7 before he got referred to counseling have anything
8 to do with why you fired him?

9 A. No, sir. I don't know anything about
10 Mr. Kessler or --

11 MR. SMITH: I was sent to SAVE based on
12 his signature on the form based on what Warren
13 Sneed said about exactly what I am describing about
14 my work, reported to Mr. Wing the discussion
15 between Bob Park. Mr. Park did not report me. Bob
16 had some heated discussions. We actually got along
17 fairly well, but Mr. Sneed's report to Greg Spires
18 then reported to you who then referred me to SAVE
19 and that's how I got to Jonathon Kessler based on
20 all of what you're saying right here right now
21 which most of is simply character assassination.

22 THE COURT: I am just -- he's the guy
23 that fired you. He has said all of this stuff that
24 you are talking about with these e-mails and your
25 disputes has nothing to do with why you got fired.

1 You got fired because you basically ignored a
2 direct order that he gave you.

3 MR. SMITH: He did not give me any
4 direct order like that. And Mr. Sneed basically
5 had it out for me because I was -- the truth is,
6 Your Honor, it would have been easy for me to fix
7 systems quietly without even telling Mr. Sneed so
8 that he didn't get angry that I pointed out a flaw
9 in his system that I was depending on. So I am
10 caught between either not reporting it and fixing
11 it or reporting it and having Warren mad at me
12 because I have said the system is not responding
13 properly. It is difficult work. There is no two
14 ways about it. But I have the capability to
15 troubleshoot things myself and I think if you
16 really get into the nuts and bolts of what he's
17 saying what the problem was I can troubleshoot the
18 systems and the people who then own the systems
19 realize that they were -- yes, I was pointing out
20 that they were at fault. There was nothing I could
21 do, either let the system be broken and my reports
22 don't run or let the people not hate me but the
23 systems not work. It's just a no win situation I
24 guess.

25 THE COURT: Those are arguments that

1 you can make.

2 MR. SMITH: I am trying to lay a
3 foundation.

4 THE COURT: We are eliciting why this
5 fellow says he fired you. He's saying it's got
6 nothing to do with all that other stuff. So I know
7 you dispute that.

8 MR. SMITH: I do, Your Honor.

9 THE COURT: Well, you have asked him
10 several different ways and it's improper to just
11 badger him by continuing to ask him different
12 things. And so I have got to cut you off. I have
13 given you a lot of leeway because you are not a
14 lawyer. But you can't just keep asking somebody
15 the same question over and over and over again.

16 MR. SMITH: Your Honor, I believe when
17 we review the transcript I am not doing that.
18 Probably sounds that way because of what we're --
19 this is tedious work. I believe when we review the
20 transcript you will see there is a reason for
21 asking every question that I have asked.

22 THE COURT: It might be, but this is
23 the man who says he fired you and this stuff with
24 Mr. Kessler he is saying has nothing to do with why
25 he fired you.

1 MR. SMITH: Of course, they brought --
2 he brought him in to say that's why I was
3 terminated. He's the one who signed the form that
4 sent me to Mr. Kessler --

5 THE COURT: Here is what I will do.
6 Because it is getting late and the roads are
7 flooded because it's been raining outside and these
8 people over here are paid overtime and the clerk is
9 going to be upset with me. I will give you five
10 more minutes with this witness and then it's over
11 with. Because you have had him on.

12 BY MR. SMITH:

13 Q. So again you -- Bob Park is now the IT
14 manager, is that true, at Showa Denko?

15 A. Yes, sir.

16 Q. And you're ex-Navy, Bob is ex-Navy,
17 Robert Witten is ex-Navy?

18 A. Yes, sir.

19 Q. And Robert Witten brought Bob in, was
20 instrumental in hiring Bob, right?

21 A. I believe so.

22 Q. And other than this report from Mr.
23 Sneed and certainly after Mr. Park had been there
24 for a while did Mr. Park complain about me? In
25 your affidavit do you cite Mr. Park complaining

1 about me?

2 A. I don't believe so.

3 Q. In your report it seems that Greg
4 Spires complained, Warren Sneed complained, and to
5 some extent Mark Little complained, but Bob Park
6 didn't? Did I do good work for anybody?

7 A. Yes.

8 MR. SMITH: Thank you for your time.
9 Your Honor, I rest if that's what I am supposed to
10 do.

11 THE COURT: Do you have any redirect?

12 MR. WALLINGER: No redirect, Your
13 Honor.

14 THE COURT: Okay. You can step down.
15 Thank you. Good luck on getting home any time
16 soon. I don't know where you live, but it's a mess
17 outside. All right. It is 5:30. We are going to
18 break for today.

19 MR. WALLINGER: Your Honor, could I
20 make one point in the record? I don't think I
21 actually offered the last two Defendant's Exhibits
22 that I had Mr. Wing comment on and I would like to
23 offer them and make sure they are in the record.

24 THE COURT: All right. Any objection?

25 MR. SMITH: I don't think I have seen

1 -- no objection. What are they?

2 THE COURT: All right.

3 MR. WALLINGER: One is his affidavit,
4 the other is the termination notice.

5 (DFT. EXHS. 17-18 in evidence.)

6 THE COURT: They are admitted. We are
7 not going to hold court tomorrow so I can attend
8 the funeral. We will resume Thursday morning at
9 9:30.

10 (These proceedings were adjourned at
11 5:35 p.m., June 6, 2017, Charleston County, South
12 Carolina.)
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1 (The following proceedings continued
2 June 8, 2017 @ 9:24 a.m.)

3 THE COURT: Good morning. Okay. We
4 are back to hopefully finish this trial today. Mr.
5 Wallinger, you got any more witnesses you are
6 calling?

7 MR. WALLINGER: Yes, sir, I do have
8 another witness. Plaintiff has not finished
9 submitting deposition designated testimony and has
10 not rested and I defer to the Court on whether I
11 should continue calling defense witnesses or the
12 Court would like to have the Plaintiff essentially
13 finish the case and get back in the normal
14 progression.

15 THE COURT: We did go out of order in
16 order to accommodate those two witnesses. So are
17 you putting on any more evidence or calling any
18 witnesses?

19 MR. SMITH: Am I allowed to call Mr.
20 Kessler?

21 THE COURT: You can if you want.

22 MR. SMITH: Yes, I would call Mr.
23 Kessler. Do I have to finish any testimony that I
24 give before I call Mr. Kessler?

25 THE COURT: You finished testifying

1 Tuesday, didn't you?

2 MR. SMITH: Right.

3 THE COURT: You testified.

4 MR. SMITH: I didn't address -- and I
5 want to respond to anything Mr. Wallinger asked me
6 in cross. Yes, let me call Mr. Kessler.

7 THE COURT: Okay.

8 JONATHON KESSLER

9 having been duly sworn, testifies as follows:.

10 THE CLERK: State your name and spell
11 your last name for the record.

12 THE WITNESS: Jonathon Nelson Kessler,
13 K-E-S-S-L-E-R.

14 CROSS-EXAMINATION

15 BY MR. SMITH:

16 Q. Good morning, Mr. Kessler.

17 A. Good morning.

18 Q. Can you describe the training you have
19 had that makes you qualified to act in the capacity
20 of an employee assistance professional?

21 A. I attended Ford Sate University from
22 '97 to '99, earned my MSW degree. Then commenced
23 with passing my state board. Then upon 3,000 hours
24 of practice within my employment, accommodated a
25 hundred hours of supervision, close, direct one on

1 one supervision to be able to then sit before the
2 board and take my LISW examination which I passed
3 and allowed me to practice independently. At that
4 time I earned my LISW CP which is clinical
5 practitioner and continued to work in the field of
6 social work at the VA for 18 years. Was employed
7 as a subcontractor with SAVE, Inc. EAP company
8 since 2004, so going on 14 years of practice doing
9 family, individual, marital counseling throughout
10 those years.

11 And continuing with my 40 hours of
12 continuing education which is a requirement of
13 maintaining my licensure and so every two years
14 must have completed 40 hours, 20 of which have to
15 be provided for by a licensed social worker and a
16 number of those hours each year must be maintained
17 in the field of ethics.

18 Q. Do you consider ethics a legal
19 obligation?

20 A. I think ethics by its legal definition
21 would be a legal obligation, yes.

22 Q. Do you take routine competency exams of
23 any type in association with the continuing
24 education programs?

25 A. They're occasionally exams that are

1 required in order to then receive that particular
2 certificate, yes.

3 Q. In obtaining the LISW do you cover --
4 do you take any courses of study related to
5 employment law?

6 A. No.

7 Q. Can you describe any training you have
8 had related to employment law?

9 MR. WALLINGER: Your Honor, he just
10 testified he didn't take any courses in employment
11 law, asked and answered.

12 THE COURT: You can ask him the
13 question.

14 THE WITNESS: I'm not sure if I
15 understood what you mean by employment law.

16 BY MR. SMITH:

17 Q. The laws that govern the treatment of
18 an employee or in an employment context?

19 A. No, sir.

20 Q. You were here when Ms. Gainey testified
21 on Tuesday?

22 A. Yes, I was.

23 Q. And would you agree that she testified
24 that you had had specific training related to
25 confidentiality?

1 A. Of course.

2 Q. Can you describe the training you have
3 had related to confidentiality?

4 A. That's a core component of any kind of
5 counseling in the therapeutic profession.

6 Q. Can you summarize your understanding of
7 the duties of confidentiality?

8 A. It's based upon trust, and that trust
9 would be between the practitioner and the client
10 whoever he or she or they may be to not reveal
11 information received in confidence, should not be
12 shared outside of that context or that room.

13 Q. So there is a trust relationship, would
14 you agree?

15 A. That's correct.

16 Q. And can you list the components of the
17 trust relationship in the context of an employee
18 assistant professional?

19 A. If it -- if it's something that's
20 revealed in confidence that the individual would
21 prefer not to be shared then it will not be shared.
22 If it is information that must be shared then it
23 could only be revealed upon completing a release of
24 information allowing only that specific information
25 to have been shared.

1 Q. When you say specific information, how
2 would you define specific information?

3 A. Well, in the context of this proceeding
4 it would be sharing only information pertaining to
5 the participation in a therapy counseling context,
6 progress being made or not being made, timeliness
7 and cooperation.

8 Q. You mentioned progress. Would it be
9 fair to say that progress in a course of treatment?

10 A. Is that a question?

11 Q. Yes, would it be fair say progress to
12 which you are referring would be the progress
13 within a course of treatment, the progress along a
14 course of treatment?

15 A. That would be the only progress that
16 would pertain.

17 Q. Would you agree that that would require
18 agreement as to what the appropriate treatment was
19 with the client?

20 A. I'm not sure I follow.

21 Q. Was it -- is your statement, the work
22 product in response to litigation, do you attest to
23 that statement?

24 A. I do.

25 Q. So it is a sworn statement at this

1 point?

2 A. I don't know if it was sworn or
3 unsworn. I attest that being my statement, yes.

4 MR. SMITH: Your Honor, I only ask
5 because Mr. Wallinger used the term unsworn
6 statement yesterday and I am trying to understand
7 if Mr. Kessler is fully aware of that statement and
8 wishes to change anything in this statement at this
9 point. It was labeled a confidential work product
10 response to litigation given to the Court. Is
11 there anything you would change?

12 THE COURT: If it was notarized it's a
13 sworn statement. If it wasn't notarized it's not.

14 MR. SMITH: That statement is not
15 notarized.

16 THE COURT: Then it is not a sworn
17 statement.

18 MR. SMITH: So, Your Honor, is it
19 appropriate for me ask certain questions about that
20 statement?

21 THE COURT: If you want you can.

22 BY MR. SMITH:

23 Q. Before I do that let me -- this is from
24 your statement. In your statement you said that
25 Smith was hard to redirect. Do you recall making

1 that statement?

2 A. I do.

3 Q. Why was I hard to redirect?

4 A. Because you had insisted upon providing
5 particular information as opposed to engaging in
6 the therapeutic process.

7 Q. So you said in your statement I asked
8 Smith not to bring any evidence data to sessions so
9 that we could focus on interpersonal skills?

10 A. That is correct.

11 Q. Is that correct?

12 A. That is correct.

13 Q. Had I agreed that my interpersonal
14 skills were the root cause of the problems I was
15 experiencing at Showa Denko?

16 A. I don't recall if you agreed or
17 disagreed that those were your root problems.

18 Q. Did I continue to bring data folders to
19 sessions with me?

20 A. Up until the point in which I asked you
21 to not do so because it was distracting from the
22 therapy process.

23 Q. You contend I never brought a data
24 folder after you told me not to bring data folders
25 to session?

1 A. Can you say that again?

2 Q. Did I continue to bring data folders to
3 session even after being instructed not to?

4 A. I believe upon the third or fourth
5 session after I had requested that you not do so so
6 that we could focus on what we need to focus on
7 that you did not. But up until that point, my
8 recollection is that you had continued up to that
9 point bringing evidence that you felt was
10 imperative.

11 MR. SMITH: Your Honor, I think I
12 should characterize this as evidence at this point.
13 This was data and e-mails from the company. Mr.
14 Kessler characterizes it as evidence in his
15 document which is written after a lawsuit
16 commenced, but I believe it's inappropriate to
17 characterize it as evidence for the record.

18 BY MR. SMITH:

19 Q. Do you believe I was presenting that
20 material in an effort to help you diagnose the
21 situation and me as the patient?

22 A. There was -- I was not diagnosing based
23 on evidence or lack of evidence at that point.

24 Q. So was there ever a diagnosis given to
25 me?

1 A. I believe that's already been
2 addressed, occupational problem.

3 Q. When was that diagnosis determined?

4 A. In the course of our sessions.

5 Q. Before I agreed to a plan of treatment?

6 A. I don't see how that would have been
7 possible. I hadn't met you yet.

8 Q. Ms. Gainey had met me; is that correct?

9 A. That is correct.

10 Q. In the agreement -- how many parts to
11 the agreement are there to be seen by SAVE or one
12 of its counselors?

13 A. I don't understand the question. Can
14 you clarify?

15 Q. How many -- what type of agreement is
16 required for a client to see SAVE or one of its
17 counselors?

18 A. Can you be a bit more specific? I
19 really don't follow.

20 Q. Let me repeat the question. What type
21 of agreement is required for a client to seek
22 services from SAVE or one of its counselors?

23 THE COURT: Are you asking if there's a
24 written agreement?

25 MR. SMITH: I am asking what he knows

1 about the agreement, yes, sir.

2 THE COURT: Okay.

3 THE WITNESS: Showa Denko -- SAVE was
4 under a retainer with Showa Denko as an EAP
5 affiliate. As a result of you being an employee
6 you had the right to seek EAP services at any time
7 that you wished. As same as your employer had the
8 same right to refer an employee to EAP services if
9 they thought that that would be in the best
10 interest of the employee as well as the employer.

11 BY MR. SMITH:

12 Q. So the right of Showa Denko to refer an
13 employee to SAVE, Inc. or one of its counselors, is
14 -- that is your testimony, that Showa Denko had the
15 right to refer one of its employees to SAVE, Inc.
16 or one of its counselors; is that correct?

17 A. That's what I said, yes.

18 Q. Showa Denko had the right to mandate
19 that an employee go to counseling at SAVE?

20 A. That's up to Showa Denko. I can't
21 speak to that.

22 Q. You said a while ago that they had the
23 right to refer?

24 A. Correct.

25 Q. Can you explain that right to refer?

1 A. If they felt it was in the best
2 interest of their employee who they suspected was
3 having difficulty in the work environment then they
4 had the opportunity then to refer to their EAP
5 company in which SAVE was an affiliate.

6 Q. So the company had a right to refer the
7 employee -- to notify SAVE that an employee was to
8 be seen by SAVE?

9 A. I believe that's correct.

10 Q. In the context of the disciplinary
11 action -- would that be in the context of a
12 disciplinary action taken by the employer?

13 A. I can't speak to that. That's the
14 employer's call.

15 Q. Did we ever actually agree to a plan of
16 care or treatment?

17 A. In the process of working together
18 getting sufficient background to understand the
19 environment of which we worked on the difficulties
20 in which had been presented by your employer, that
21 was the context in which we were to proceed with
22 our sessions.

23 Q. Following the oversight of the
24 employer? Were we following with oversight by the
25 employer?

1 A. The only oversight of the employer was
2 the release of information of which you had read
3 and signed and agreed with and that was only the
4 information shared pertinent to your attendance,
5 your cooperation, participation.

6 Q. What would constitute a plan of care or
7 treatment?

8 A. In the context of your referral it
9 would have been working on interpersonal skills.

10 Q. Who agreed to the plan of care or
11 treatment?

12 A. You could have or could have not
13 participated with SAVE EAP if that had been your
14 choice according to SAVE, Inc., perhaps not that of
15 your employer.

16 Q. So if I had chosen not to follow the
17 plan of treatment that you proposed would I have
18 agreed to a plan of treatment?

19 A. I don't understand.

20 Q. I am trying to get to the point did I
21 agree to a plan of treatment or did you impose a
22 treatment plan upon me?

23 A. I don't believe I imposed a treatment
24 plan upon you.

25 Q. But you just said that I had to agree

1 to go through the process as you are calling it --
2 can you describe the therapeutic process?

3 A. Therapeutic process is ideally a
4 treatment plan between the therapist otherwise
5 known as a counselor and the client or clients as
6 they may be. You're involuntarily referred as I
7 understand. In other words, you did not come on
8 your own accord. You came because of your
9 employer. And so that's the distinction we are
10 trying to make here when we speak to that.

11 Q. I am trying to distinguish when a
12 diagnosis was made?

13 A. I can't tell you exactly the session in
14 which diagnosis was made. This is four years ago.
15 I do not recall.

16 Q. I refer also to just your general
17 practices at SAVE. Is it proper to conduct a
18 treatment procedure before diagnosing the ailment?

19 A. Typically you would diagnose and then
20 have a treatment plan.

21 Q. So I ask again when was the diagnosis
22 made?

23 A. And I say again I do not recall. It
24 was over four years ago.

25 Q. So is it fair to say that you conducted

1 a treatment plan without a diagnosis?

2 A. Sir, we have to begin at some point and
3 that point was at the discretion of your employer
4 who made the referral.

5 Q. That point was at the discretion of the
6 employer who made the referral, is that what you
7 just said?

8 A. I believe so.

9 Q. So is it fair to say that the employer
10 dictated the diagnosis?

11 A. Of course not.

12 Q. I ask again when was the diagnosis
13 made?

14 A. And I say again I do not recall the
15 exact date or session in which that was made.

16 Q. What would be an example of health and
17 oversight activities?

18 A. I am sorry, health?

19 Q. And oversight activities?

20 A. Health and oversight activities? I'm
21 not sure, I don't know what that means exactly, in
22 what context.

23 Q. You don't know what that means?

24 A. I don't know in what context you are
25 referring this to.

1 Q. In the context of an agreement between
2 SAVE and a client?

3 A. Repeat the question, please.

4 Q. What would be an example of health and
5 oversight activities?

6 MR. WALLINGER: Objection, vague.

7 THE COURT: Overruled.

8 THE WITNESS: I don't have an answer to
9 that. I'm sorry.

10 BY MR. SMITH:

11 Q. Are you familiar with the SAVE, Inc.
12 your rights under the Health Insurance Portability
13 Act of 1996?

14 A. Correct.

15 Q. Is there any reference to health and
16 oversight activities in that document?

17 A. I'm sure there is.

18 Q. So again I ask you what would be an
19 example of health and oversight activities?

20 A. Again given the fact that this is a
21 very cumbersome body of work of legislature it can
22 cover anything from medical practice to therapeutic
23 practice and in that context there has to be
24 oversight of the services rendered between the
25 practitioner and the patient or client, in this

1 case employee.

2 Q. Excuse me, the last statement in this
3 case employer?

4 A. In this case employee or employer
5 because again an EAP company, it's a dual
6 relationship. The employer and employee are both
7 considered.

8 Q. So in the context of oversight the
9 employer would be involved in oversight; is that
10 what you're saying?

11 A. I'm not sure what you mean by
12 oversight. What are you implying?

13 Q. That's why I have asked what is an
14 example of health and oversight as stated in
15 your --

16 A. The oversight that they would have any
17 involvement in your participation or lack thereof.

18 Q. In the therapeutic process?

19 A. In the context of referring for what
20 they perceived as being an issue in the workplace.

21 Q. You were giving progress to the
22 employer as to my ability to participate in the
23 therapeutic process?

24 A. That would be correct.

25 Q. And you believe that therapeutic

1 process can begin prior to a diagnosis being made;
2 is that your testimony?

3 A. When you were referred you were
4 referred with a statement of their goal and their
5 identification of the problem.

6 Q. Your Honor, I ask Mr. -- I have a
7 little bit trouble hearing and -- sorry. I said I
8 was having trouble hearing. I was asking perhaps
9 the witness to speak up a little bit.

10 THE COURT: Okay. Would you mind if
11 you get that microphone closer, maybe you can move
12 closer. Might also help if you moved closer to
13 where he can go.

14 THE WITNESS: That's as far as I can
15 go.

16 BY MR. SMITH:

17 Q. I apologize of my hearing. I am
18 getting older. May very well be my hearing.
19 You're familiar with the -- are you familiar with
20 the Department of Health and Human Services?

21 A. I am.

22 Q. What constitutes a valid authorization
23 for release of protected health information?

24 A. Signed consent.

25 Q. Signed consent. Are you familiar with

1 Section 164.50845 CFR, are you familiar with a --
2 in order for me to consent to disclosures to the
3 employer it is your testimony that simply checking
4 a check box on a blue form is sufficient consent?

5 A. If you had questions at the time that
6 would have been the time in which to address it.
7 You signed the document stating you understand it.

8 Q. And so you stated, if I -- correct me
9 if I'm wrong, that this document is
10 self-explanatory; is that true?

11 A. It is true.

12 Q. As so I ask again just to clarify what
13 uses of disclosures for health and oversight
14 activities -- can you give me examples of uses and
15 disclosures for health and oversight activities?

16 A. If I were performing surgery, which I
17 am not, then part of that would be the disclosure
18 of the risks and benefits of proceeding. In the
19 therapeutic context it's the risks and benefits of
20 proceeding.

21 Q. So it would be fair to say we never
22 really discussed the risks and benefits?

23 A. You had opportunity at the time that
24 you reviewed it before you signed the document
25 before we proceeded with the therapeutic process.

1 Q. Again you said I was hard to redirect.
2 Can you give me your best recollection of why I was
3 hard to redirect?

4 A. Because you had become very fixated on
5 particular items that were not found at the time,
6 not that we didn't address them, to be taking away
7 from what you were referred to in the first place.

8 Q. I was taking issue with the course of
9 the therapeutic process; is that a fair statement?

10 A. It's an interpretation I suppose from
11 your perspective.

12 Q. I am asking is that your testimony that
13 I was taking issue with parts of the process, of
14 the therapeutic process?

15 A. I don't know that you were taking issue
16 or not taking issue.

17 Q. But it says that I was hard to redirect
18 as though I wasn't following your lead or following
19 your instructions; is that a fair statement?

20 A. That would be a fair statement.

21 Q. And this was part of -- is a
22 therapeutic process appropriate prior to diagnosis?

23 A. I can't help but feel it's a little bit
24 vague. Can you clarify?

25 Q. You have used the term that I was

1 engaged in the therapeutic process; is that true?

2 A. That's what we were attempting to
3 establish.

4 Q. And I am asking is there a diagnosis --
5 is it appropriate to go through a therapeutic
6 process therapy until we determine what the
7 accurate diagnosis is?

8 A. Depending on the scenario. It may be
9 that somebody already has a diagnosis and you have
10 to start from a baseline in order to then determine
11 if that is accurate or inaccurate, valid or
12 invalid.

13 Q. So there may have already been a
14 diagnosis prior to me seeing you for the
15 therapeutic process; is that your testimony?

16 A. It's always a possibility that there
17 might have been a preexisting something prior to
18 the therapist being involved in the case in a
19 therapeutic relationship with the client.

20 Q. In my case you don't -- was there a
21 diagnosis made in my case prior to me seeing you?

22 A. Not to my recollection.

23 Q. Was the diagnosis made by you prior to
24 therapy commencing, the therapeutic process
25 commencing?

1 A. No, there was not. I did not make a
2 diagnosis at that time.

3 Q. So we began therapy prior to a
4 diagnosis; is that correct?

5 A. Sure.

6 Q. Do you believe that's appropriate?

7 A. Yes.

8 Q. Can you explain why you believe that's
9 appropriate?

10 A. Why would somebody establish a
11 diagnosis before having explored it?

12 Q. Is therapy exploration?

13 A. That's part of the process.

14 Q. Let me put this in a hypothetical
15 context. If I broke my arm would it be appropriate
16 to treat me for a sprained ankle? Hypothetically
17 would a doctor -- if I came in presenting a broken
18 arm would it be appropriate to begin therapy for a
19 sprained ankle?

20 A. Hypothetically if I were a doctor it
21 would involve a full physical and history while
22 also identifying what the problem presenting itself
23 is hypothetically.

24 Q. Do you know what is required for a
25 patient to give informed consent?

1 A. The consent to speak with your employer
2 was provided by you when you signed the release of
3 information, the blue form that is in evidence.

4 Q. Mr. Kessler, that's not my question.
5 Do you know what is required for a patient to give
6 informed consent?

7 A. It's required of the patient to be
8 provided information from which they can then
9 surmise what is being shared or not to be shared.

10 Q. Provided information of what nature?
11 You just said -- can you repeat your last answer?

12 A. I don't recall it verbatim, but
13 essentially it's information provided, in this case
14 the blue release of information form in which you
15 had signed we had completed together which
16 explained what information could be revealed and
17 would be revealed and you signed that document.
18 That was informed and you provided consent. That
19 is informed consent.

20 Q. Is there a health care standard for
21 informed consent?

22 A. Of course there is.

23 Q. Do you know that standard?

24 A. I cannot repeat it to you verbatim.
25 There is a standard that was in question.

1 Q. Can you give me any of the elements of
2 that standard?

3 A. I would imagine it would comprise of
4 confidentiality, trust, integrity, and so forth.

5 Q. Can you think of anything more specific
6 if I went to -- hypothetically if I went to the
7 doctor and I said doctor, I think my arm is broken,
8 would he -- and I asked him to diagnose it, would
9 it be appropriate for him to begin diagnosing my
10 ankle?

11 THE COURT: That's an improper
12 question. He is not a medical doctor. This isn't
13 a medical situation so the analogy doesn't fit.

14 BY MR. SMITH:

15 Q. Are you familiar with the Department of
16 Health and Human Services?

17 A. I already answered that question. I
18 am.

19 Q. Let me read if I might a very brief
20 section. A valid authorization must contain at
21 least a description of the information to be used
22 or disclosed that identifies the information in a
23 specific and meaningful fashion. Would you agree
24 that that is part of the law?

25 A. I'm not a lawyer.

1 MR. WALLINGER: Your Honor, I am going
2 to object to the question because he hasn't
3 indicated what that legal authority is or
4 established that it is relevant to the issue that
5 he is trying to explore with the witness. And I
6 would further note my objection on the basis that
7 HIPAA does not have a privacy right of action for a
8 patient against a clinician and the remedies, if
9 any, under HIPAA are limited to the government to
10 deal with a clinician if there's been some alleged
11 problem with confidentiality of protected health
12 care information. I have no idea what he's
13 reading. I have no idea where he got it and I
14 don't think it's relevant even if it is an
15 authentic part of the HIPAA statutory overlay for
16 purposes of what we are talking about here.

17 MR. SMITH: I'm offering this to
18 present what the federal law is regarding consent
19 authorization to disclose information in order to
20 be able to consent.

21 THE COURT: You can argue that later.
22 That's a legal argument.

23 MR. SMITH: But I am asking Mr. Kessler
24 if he is aware if they as I used the term cloaked
25 much of the agreement under the auspices of HIPAA.

1 I am presenting the HIPAA law by 7164--

2 THE COURT: Just ask him questions
3 about what he did as opposed to saying did you --
4 quote the statute and did you do this. Just ask
5 him what he did and then later on you can make the
6 argument this is what he said he did or didn't do
7 and it violates this law or not, okay?

8 MR. SMITH: Okay. I am doing my best,
9 Your Honor.

10 THE COURT: We are establishing facts.
11 BY MR. SMITH:

12 Q. Would it be fair to say that you are
13 not aware of a HIPAA requirement that requires that
14 the description of the information to be used or
15 disclosed identifies the information in a specific
16 and meaningful fashion? Are you aware of that
17 requirement or not?

18 A. Repeat the question, please.

19 Q. Are you aware of any requirement that
20 requires the description of the information to be
21 used or disclosed that identifies the information
22 in a specific meaningful fashion?

23 MR. WALLINGER: Your Honor, I object
24 because he was just admonished to ask the witness
25 what he did and the facts. He is asking him to

1 now --

2 MR. SMITH: I am asking if he knows
3 what the law is, Your Honor. He has been trained
4 on confidentiality according to Ms. Gainey and by
5 his own personal testimony. I am asking him what
6 he knows about the --

7 THE COURT: I will allow you to ask a
8 question. You are not articulating it well so he's
9 not able to understand the question. That's why he
10 was kind of confused. You need to say I know, I
11 don't know, but you are asking a convoluted
12 question. Ask it in a simple form.

13 BY MR. SMITH:

14 Q. I spend a lot of time writing so that's
15 maybe why I am having trouble with this. Can I
16 show it to him and ask him if he agrees with that
17 statement? If Mr. Wallinger would like to look at
18 it just for the record and we will move on, I
19 promise, Your Honor. Again, the agreement with
20 SAVE is the -- pursuant to HIPAA as I understand it
21 as a layperson.

22 MR. WALLINGER: Your Honor, I don't
23 know this is an authentic and accurate section of
24 the regs, because it's not in a format that I would
25 normally see or use if he was pulling information

1 from the --

2 THE COURT: He is not offering it into
3 evidence. Just ask a question. Just say are you
4 aware of this requirement, answer and then move on
5 to the next.

6 MR. WALLINGER: Well --

7 THE COURT: Just ask him.

8 MR. WALLINGER: I would ask the
9 Plaintiff to let the Court see this information and
10 determine if the piece of it that he wants to ask
11 the witness about can be asked about in isolation
12 based on what I have seen here. I have no
13 objection if the Court will allow him to do it.
14 But it's four pages long. He is asking about one
15 section related apparently to things on the other
16 three pages and I just think the question is
17 inartful relative to what I have seen.

18 THE COURT: Overruled. Just ask the
19 question.

20 MR. SMITH: I am certainly willing to
21 do the best I can -- this is the law as best I can
22 find. It is from the Department of Health and
23 Human Services. I believe this particular element
24 is trying to define what the state of mind someone
25 has to have to authorize someone to release

1 information. That's --

2 THE COURT: I have said you can ask the
3 question. You don't need to argue it any more. I
4 ruled in your favor.

5 MR. SMITH: I apologize. Show this --
6 I need to just tell him --

7 THE COURT: Just read him the section
8 and say do you agree with that or not.

9 BY MR. SMITH:

10 Q. Right. 164.508 on page 755 of 45 -- I
11 don't know how to quote the law, I'm not a lawyer,
12 but core elements. A valid authorization under
13 this section must contain at least the following
14 elements. Number i, a description of the
15 information to be used or disclosed that identifies
16 the information in a specific and meaningful
17 fashion. Would you agree with that statement?

18 A. It's the law, yes, I will agree with
19 it.

20 Q. So what would be your interpretation of
21 specific and meaningful fashion?

22 A. That the information that would have
23 been shared to your employer was that in which we
24 went over and you signed on a release of
25 information specific to and meaningful to the point

1 of your referral to SAVE, Inc.

2 Q. And you believe that you obtained
3 specific and meaningful -- that you described the
4 information to be shared in a specific and
5 meaningful fashion?

6 A. Are you asking me was the information I
7 shared with your employer meaningful and specific?

8 Q. I am asking did I authorize?

9 A. Yes, you authorized that.

10 Q. Specific and meaningful information?

11 A. Right.

12 Q. You are saying that I authorized you to
13 make -- there was -- the information I agreed to
14 was specific and meaningful in this agreement?

15 A. The information that you agreed to, I
16 don't have it in front of me, but from recollection
17 was the date of services, the attendance, and some
18 other items as well.

19 Q. Was there an item called other checked
20 to your recollection?

21 A. I don't recall off the top of my head.

22 Q. Was the -- you're familiar with the
23 facts of this case at this point in time?

24 A. I should hope so.

25 Q. Was there any authorization for

1 treatment planning made by me?

2 A. I believe so, yes.

3 Q. How would I have made that
4 authorization?

5 A. You would have to tell me. You signed
6 it.

7 Q. I am asking you -- let me present the
8 form to you. Is the checkbox for treatment
9 planning checked?

10 A. No, it is not.

11 Q. What would constitute treatment
12 planning?

13 A. It wasn't checked so it wouldn't be
14 involved.

15 Q. I am asking you in terms of that
16 contract what do you mean by treatment planning?
17 Again, is that a specific --

18 A. Are you asking me the context of this
19 release or asking me in general?

20 Q. I am asking you what that release
21 means, Mr. Kessler, and I am asking is that a
22 specific and meaningful description of the -- what
23 I am authorizing?

24 A. I have already answered that. I said
25 yes.

1 Q. And so what does treatment -- so I have
2 not authorized treatment planning; is that correct?

3 A. It is not checked.

4 Q. So would you agree I have not
5 authorized treatment planning?

6 A. It is not checked, that is correct.

7 Q. In your opinion as the person who gave
8 this self-explanatory document to me what does that
9 mean?

10 A. So taking this off the table you are
11 simply asking me --

12 Q. I am asking you what the contract
13 means. What does treatment planning in the context
14 of that contract mean?

15 A. That's the plan of treatment.

16 Q. So I have not authorized the plan of
17 treatment to be disclosed; is that correct?

18 A. That is correct.

19 Q. Just for the record, did you write this
20 document?

21 A. I did -- wait, which document?

22 Q. Did you actually author any of these
23 contracts or you were given these contracts by Sara
24 Gainey of SAVE, Inc.?

25 A. That's the company's.

1 Q. I am asking if you had any part in
2 writing any of these contracts?

3 A. No, I didn't.

4 Q. That's done by Sara Gainey or perhaps
5 her counsel?

6 A. I don't know.

7 Q. You have been trained in the areas of
8 confidentiality; is that correct?

9 A. We already established that, yes.

10 Q. Have you been trained on the meanings
11 of these contracts?

12 A. Yes, we went over the contracts before
13 I was able to issue them.

14 Q. So you have been trained on what the
15 terms in these contracts mean; is that correct?

16 A. To an extent. I didn't take a course
17 in it.

18 Q. Ms. Gainey when I asked -- do you
19 recall in testimony of Ms. Gainey on Tuesday that
20 where I asked her what specific skills or training
21 you had had related to your role as an employee
22 assistance professional she said that you had been
23 trained in the area of confidentiality, correct?

24 A. Correct.

25 Q. Did she mention anything else you had

1 been trained in?

2 A. I'm sure she mentioned several other
3 things as well.

4 Q. Can you recall what those things were?

5 A. She mentioned cognitive behavioral
6 therapy.

7 Q. In the context of the EAP relationship,
8 though, I am asking what Ms. Gainey trained you on.
9 Did Ms. Gainey train you on these contracts?

10 A. I'm not sure training is the proper
11 term here. There were documents to be familiar
12 with as we utilize them in practice.

13 Q. Did Ms. Gainey explain what these
14 contracts meant?

15 A. I don't remember. It was 14 years ago.

16 Q. So you never --

17 A. I don't recall. It was 14 years ago.
18 I did review the documents that we utilize.

19 Q. Did these documents change from time to
20 time?

21 A. I'm sure they do. I'm sure there is a
22 revision indicated on some of these and if not I
23 couldn't tell you. I don't draft these documents.

24 Q. When a change is made are you informed
25 there is a change made to these documents that you

1 . need to be aware of?

2 A. Yes.

3 Q. And who informs you of that?

4 A. It would be probably Ms. Gainey
5 herself.

6 Q. Has Ms. Gainey's counsel ever informed
7 you of those changes?

8 A. Her attorney?

9 Q. For the record, yes.

10 A. No.

11 Q. No?

12 A. No.

13 Q. So you have been trained on these
14 contracts. I asked for the definition of treatment
15 planning to the best of your ability.

16 A. Plan of treatment.

17 Q. What would constitute a plan of
18 treatment? Would a diagnosis be required before a
19 plan of treatment was determined?

20 A. Sometimes in the planning you're
21 formulating a diagnosis. It's not necessarily
22 black and white as I feel like you are attempting
23 to make it.

24 Q. Explain that last part you said.

25 A. I said it's fluid. I don't know that

1 it's as black and white as I feel you are trying to
2 pigeonhole it.

3 Q. So you would assert that I am trying to
4 the pigeonhole --

5 A. I'm not sure --

6 Q. What do you mean by the term
7 pigeonhole, Mr. Kessler?

8 A. I feel like you're attempting to have
9 me agree to something that in my training and
10 expertise I cannot agree to because it's not as
11 simple as I feel you are trying to make it black
12 and white. That's what I am inferring.

13 Q. But you would tell the Court that these
14 documents are self-explanatory; is that correct?

15 A. They are self-explanatory. If you had
16 had a question that would have been the time before
17 signing it.

18 Q. I am asking the questions now and I am
19 asking you again did we ever arrive at a diagnosis?
20 Did I ever consent to the treatment you offered?

21 A. As I recollect, one of the
22 interventions that we have embarked upon would have
23 been role play and to that extent we had not gotten
24 to the point of being able to engage in that
25 particular intervention. That would have been part

1 of the treatment plan.

2 Q. That intervention would be part of the
3 treatment planning?

4 A. It would have been part of the
5 implementation of treatment.

6 Q. Prior to a diagnosis?

7 A. Diagnoses can be arrived at in any
8 course of the therapeutic process. Sometimes
9 there's a diagnosis that is made based upon what
10 information is presented in this case perhaps by
11 your employer. Not that they made the diagnosis,
12 but that clearly there was an occupational problem,
13 otherwise why would you have been referred by your
14 employer? And so part of the process of
15 determining it's fluid. It may have changed. You
16 may have -- you are a person. Let's say you could
17 have determined that, I don't know, perhaps they
18 were severely depressed, then it may have changed
19 from an occupational problem to depression.

20 Q. Did you have a duty to try to diagnose
21 then throughout the course of the therapeutic
22 process?

23 A. If evidence came to light perhaps so.

24 Q. How would such evidence come to light?

25 A. Typically upon question, answer and

1 exploration process, not necessarily exploring a
2 lot of e-mails.

3 Q. Not necessarily, but perhaps exploring
4 a lot of e-mails that might have shed light on the
5 diagnosis; is that possible?

6 A. Anything is possible.

7 Q. I ask more specifically, Mr. Kessler,
8 is it possible that the diagnosis could be
9 determined or at least influenced by reviewing the
10 documents I presented to you which you refer to as
11 evidence and data? Not -- I'm not asking for
12 anything is possible. I am asking is it possible
13 that these documents that I presented to you that
14 are admitted in evidence somewhere would have
15 influenced the diagnosis had you read them
16 carefully with me? You're familiar with the
17 documents I am referring to?

18 A. I recall that I didn't simply dismiss
19 them altogether, that you were provided the
20 opportunity to speak to them, but I would have
21 preferred to have heard it directly from you
22 instead.

23 Q. In fact, you would have preferred to
24 discuss things with my coworkers? Is that a fair
25 statement?

1 A. I don't know what that means. What
2 would I have discussed with which coworker?

3 Q. The coworkers for example, that are --
4 who is listed in the e-mails in question? Do you
5 recall any?

6 A. There's a number of people listed in
7 those e-mails. I had no reason to speak with those
8 individuals. At the time you were the client, they
9 were not.

10 Q. But you -- do you have any direct
11 information from my coworkers as to any allegations
12 made against me?

13 A. Directly from your coworkers at the
14 time, no, sir.

15 Q. You've spoken to Clint Lucas, the head
16 of human resources at Showa Denko?

17 A. You were referred by Clint Lucas. The
18 only communication would have been back to Clint
19 Lucas as it says on the document here.

20 Q. We will come back to that. Did you in
21 testimony hear Ms. Gainey allege that I was
22 throwing chairs at Showa Denko?

23 A. I was here. I was present. I heard.

24 Q. Can you repeat what she said?

25 A. That you had thrown a chair.

1 Q. I think she said I was throwing chairs;
2 is that correct?

3 A. I recall that you argued the point.

4 Q. Was she embellishing?

5 THE COURT: It is called pitting
6 witnesses and we don't allow that.

7 Q. Do you believe that I was throwing
8 chairs at Showa Denko?

9 A. I don't have a belief or disbelief
10 regarding you throwing chairs.

11 Q. Do you believe it's --

12 A. Are you capable of throwing a chair?
13 I'm sure that you are.

14 Q. Do you believe I was throwing chairs at
15 Showa Denko?

16 A. I do not know.

17 Q. So you admit that I was there on a
18 disciplinary action from my employer, correct?

19 A. Apparently that was part of their
20 agreement with you as I understand it after having
21 this suit brought against me and reviewing what was
22 presented.

23 Q. And do you know the factual basis for
24 the disciplinary proceeding?

25 A. Not specifically that of Showa Denko.

1 Q. Is there any proof that I was throwing
2 chairs?

3 A. I don't have any evidence of you
4 throwing chairs or not having thrown chairs.

5 Q. You offered Mr. Wing's sworn affidavit
6 into evidence as part of your --

7 A. Defense.

8 Q. You contracted with Mr. Krasilovsky to
9 come and testify; is that correct?

10 A. I suppose that's correct.

11 Q. And you also offered this work product
12 in response to litigation?

13 A. Correct. If you are speaking of my
14 work product.

15 Q. You labeled it confidential work
16 product in response to litigation. Why is it
17 confidential?

18 A. Because it's only meant for these
19 proceedings.

20 Q. Is it confidential to protect yourself?

21 A. I am defending myself if that is the
22 question.

23 Q. Was it confidential to protect me?

24 A. I was defending myself because you had
25 brought suit against me.

1 Q. I am asking for the reason you wanted
2 to keep this confidential.

3 A. Because it's not to be shared with
4 anyone else other than those that are brought forth
5 in the suit.

6 Q. What does uses and disclosures for
7 judicial and administrative proceedings mean?

8 MR. WALLINGER: Objection, relevance.

9 THE COURT: What's the relevance?

10 MR. SMITH: That this contract Mr.
11 Kessler has been trained on regardless of whether
12 or not I signed that form would allow releases of
13 information like this without my consent. I am
14 trying to establish that fact.

15 THE COURT: That's got nothing to do
16 with the particular box that you are talking about
17 being checked off, right?

18 MR. SMITH: That is a different issue
19 for what it is worth. This is focusing what he
20 knows about this contract, what he knows about
21 confidentiality. Ms. Gainey says that he is
22 trained in confidentiality. Ultimately I will have
23 issues with this contract as you can imagine, infer
24 is that the correct term, and I am going down the
25 list of terms I am going to probably in writing

1 show how they differ in very specific ways from the
2 HIPAA regulations and the intent of that
3 difference.

4 THE COURT: Those are things you can
5 make the argument about.

6 MR. SMITH: Can I ask him what he knows
7 about uses and what is the term uses and
8 disclosures? This is a contract that you
9 understand. I could have --

10 THE COURT: It is not what you sued him
11 for violating, right? Aren't you suing him because
12 you're saying he disclosed it back to the employer?

13 MR. SMITH: Yes, that's part of it and
14 I am saying that disclosure is unauthorized. He is
15 then --

16 THE COURT: Okay. But this is the
17 legal proceeding.

18 MR. SMITH: He's claiming he's -- the
19 intent of this contract, I would argue, Your Honor,
20 is a sham.

21 THE COURT: That's an argument that you
22 can make later, but --

23 MR. SMITH: To establish --

24 THE COURT: Are you suing him for
25 disclosing confidential material to the court?

1 MR. SMITH: Yes, Your Honor. I am also
2 very -- these are material misrepresentations. I
3 suggest they are either intention or intentionally
4 deceptive material misrepresentations, Your Honor.
5 I am trying to establish that.

6 THE COURT: Ask a question.

7 MR. SMITH: This is his contract.

8 THE COURT: Ask a question.

9 BY MR. SMITH:

10 Q. Do you know what the uses and
11 disclosures for judicial and administrative
12 proceedings means as stated on the contract that
13 you had me sign and which you have attested is
14 self-explanatory and which you have attested I
15 could have asked these questions in session. What
16 is the -- so if I would have asked you this
17 question in session what does it mean, uses and
18 disclosures for judicial and administrative
19 proceedings, what does that mean?

20 A. If I didn't know at the time I would
21 have said we are not going to sign this until we
22 have it answered to your satisfaction.

23 Q. So you wouldn't have known and I
24 wouldn't have known so we don't know what we are
25 agreeing to; is that a fair statement?

1 A. You signed it. You had the opportunity
2 to say I'm not comfortable signing this until I
3 understand this clause. I would have said I agree
4 with that, let's get clarification.

5 Q. Do you know what I was agreeing to?

6 A. You are agreeing to the protection of
7 your information.

8 Q. Based on these terms?

9 A. Based on those terms.

10 Q. I am asking you do you know what these
11 terms even mean?

12 A. Ask the question. I will answer to the
13 best of my ability. I'm not going to speculate.

14 Q. I am not going to do that on all of
15 them. I am picking out two.

16 A. Ask then again, please.

17 Q. Do you know what uses and disclosures
18 for judicial and administrative proceeding means in
19 the context of this agreement?

20 A. I'm -- no, not in this. This is where
21 I would approach an attorney.

22 Q. So you were asking me to sign an
23 agreement that is self-explanatory, but you don't
24 know what it means either; is that correct?

25 A. I'm not an attorney.

1 Q. But you are asking me to sign an
2 agreement that you don't know what it means; is
3 that correct? Is that not correct? You do not
4 know what these agreements really mean?

5 A. That specific clause to the extent that
6 if you were to bring suit against me and
7 information could then be disclosed at that point
8 in time, then that's the extent of it. So a
9 confidential statement upon my release to our
10 subject matter expert is allowed.

11 Q. Would you believe it is covered by this
12 agreement? Would you believe it's -- you can
13 release this information to your expert witness
14 based on this agreement?

15 A. I have no answer to that.

16 MR. WALLINGER: Objection, relevance.

17 MR. SMITH: He released to a third
18 party potentially damaging information without my
19 consent, Your Honor. That's what I am trying to
20 establish.

21 THE COURT: Overruled. Tell you what.
22 If this is a good stopping point, let's take a
23 ten-minute break so we can use the restroom. If
24 you need to go to the restroom you can use the one
25 back here. You are not allowed to talk to anybody

1 during the break. We will take ten minutes.

2 (A recess transpired.)

3 THE COURT: Be seated. You may resume.

4 BY MR. SMITH:

5 Q. You did prepare this confidential work
6 product in response to litigation yourself?

7 A. I did.

8 Q. Did you have any help preparing this
9 document?

10 A. I prepared it and it was reviewed by my
11 attorney.

12 Q. What does the word "nexus" mean?

13 A. Nexus is all encompassing.

14 Q. So when you said my services appear to
15 have no nexus to the reasons that Smith was
16 terminated from his employment, can you elaborate
17 on that statement?

18 A. Had no bearing.

19 Q. No influence?

20 A. I didn't say influence. I said
21 bearing.

22 Q. What would be the difference between
23 bearing and influence?

24 A. Influence would imply some strategy.

25 Q. And bearing would mean in your opinion?

1 A. That it held -- that it involved -- I
2 don't know.

3 Q. Let's see if we can figure that out.
4 You mentioned this bearing. You say that influence
5 is not accurate, but that bearing is accurate.

6 A. Influence can have a power dynamic.
7 That's not what this is.

8 Q. Whereas bearing --

9 A. Has no bearing on -- what is your
10 question exactly?

11 Q. I am trying to understand the statement
12 no nexus to the reasons that Smith was terminated
13 from his employment. I am trying to understand
14 what nexus means in this context.

15 A. Your being let go from your employer
16 had nothing to do at all with what you and I had
17 done in a therapeutic context, that's what that
18 means.

19 Q. That's your opinion?

20 A. That's the facts as I see them.

21 Q. You have acknowledged in this document
22 that you spoke to Clint Lucas?

23 A. Correct.

24 Q. What can you tell me about that
25 discussion?

1 A. What it says on the document there.

2 Q. Can you tell us today in court perhaps
3 a little bit more what's in the document?

4 A. Dates of attendance, participation -- I
5 am telling you. Dates of attendance,
6 participation, and engagement or if there were lack
7 of engagement which was not the case.

8 Q. Engagement in the therapeutic process?

9 A. Correct.

10 Q. Based on a diagnosis?

11 A. Based on your participation in --

12 Q. And a plan of treatment?

13 A. The plan of treatment would have only
14 been to the degree of interpersonal relationships
15 and focusing on that.

16 Q. Were you giving Clint information on my
17 ability or willingness to engage in a plan of
18 treatment?

19 A. In terms of cooperation? Then yes.

20 Q. I am sorry, there was a --

21 A. In terms of cooperation that would be a
22 yes.

23 Q. In terms of agreeing with the plan of
24 treatment did you represent to Clint Lucas that I
25 had agreed with the plan of treatment?

1 A. I don't believe I did.

2 Q. So you remember the details of the
3 conversation with Mr. Lucas?

4 A. That was over four years ago so I don't
5 have a strong memory of my actual conversation
6 which may have consisted of five minutes total, if
7 even that.

8 Q. Let's try to pick apart that five
9 minutes. How would the conversation have started?

10 A. I would have called him as per
11 agreement and shared with him that you had either
12 attended or not attended. Of course you had. And
13 that we were making progress. We were working
14 toward focusing initially on interpersonal
15 difficulties, nothing more, and nothing less.

16 Q. Did you indicate to Lucas your
17 continuing EAP goal of improving Smith's
18 interpersonal skills?

19 A. That was one of the goals.

20 Q. And the goal of improving Smith's
21 interpersonal skills were -- whose goal was that?

22 A. Initially it was theirs because they
23 brought forth the referral.

24 Q. So you were telling Mr. Lucas that you
25 were doing what you had been told to do; is that

1 correct?

2 A. Not necessarily. That's what we were
3 exploring.

4 Q. Exploring?

5 A. Correct.

6 Q. What were you exploring?

7 A. Your ability and/or inability to
8 effectively interact with others in your work
9 environment.

10 Q. Let me have you read that statement if
11 I can. Spend a few minutes on that. This is I
12 believe germane to the issue, beginning with Lucas
13 indicated.

14 A. "Lucas indicated that Smith still was
15 not forming constructive relationships at employer.
16 Smith was offending people. Smith was talking down
17 to supervisor and coworkers and Smith was trying to
18 change their system."

19 Q. The next sentence?

20 A. "I indicated to Lucas that continuing
21 EAP goal of improving Smith's interpersonal
22 skills."

23 Q. Let me get that back from you. Thanks.
24 This was after a couple of sessions, right, October
25 23rd?

1 A. I believe so, yes.

2 Q. So at that point in time did you have
3 any indication that I did not agree with the
4 statement that Mr. Lucas was making?

5 A. I recall that you had from I believe my
6 session one.

7 Q. I had what?

8 A. Not agreed with the terms of what
9 brought you to SAVE, Inc.

10 Q. I questioned whether or not we really
11 needed to work on my interpersonal skills or
12 perhaps examine the work environment; is that a
13 fair statement?

14 A. Well, somewhat gets back to being --
15 having to be redirected, but we did discuss that.

16 Q. So I asserted that we needed to look at
17 the work environment?

18 A. Yes, you asserted.

19 Q. Did I have the right to assert that?

20 A. You did.

21 Q. And do you believe that?

22 A. Which?

23 Q. That we needed to look at the work
24 environment? Given what you know today do you
25 believe we needed to look at the work environment

1 perhaps more than we needed to focus on my
2 interpersonal skills?

3 A. I focus on the person's environment and
4 so I have a dual responsibility which I understand
5 can be confusing, but it's between the employer and
6 the employee. I did not discount what you had to
7 bring forth because you are at that time an
8 interaction with the client.

9 Q. You agreed that I said that
10 interpersonal skills weren't the issue here, that
11 it was the work --

12 A. I don't recall that specifically. I
13 know that you had brought a file folder of
14 information that you wanted to have reviewed.

15 Q. And that I was difficult to redirect so
16 that we can focus more on my interpersonal skills,
17 is that --

18 A. You needed to start someplace. We
19 started with what you brought forth. That's part
20 of the therapeutic alliance. To be able to
21 establish some sense of why you were there, to what
22 purpose. We have goals to be met and those should
23 be yours, but they are also that of your employer.

24 Q. So you have this dual obligation to
25 employer and employee; is that correct?

1 A. That is correct.

2 Q. Where do you disclose that on these
3 agreements?

4 A. Disclose which?

5 Q. The dual obligation?

6 A. I don't specifically. I can't
7 specifically point out where that is.

8 Q. You have been trained on these
9 documents?

10 A. Yes, sir.

11 Q. Does it say anywhere that there's a
12 dual obligation?

13 A. I don't recall.

14 Q. Did you explain to me that there was a
15 dual obligation?

16 A. I explained to you, that's the reason
17 why I had you sign this document here which is the
18 release as to what and what needed to be released
19 to your employer because you were supervisor
20 referred.

21 Q. Were you acting as a disciplinarian?

22 A. No, sir.

23 Q. Are you familiar with this document?

24 A. Yes, sir.

25 MR. SMITH: Do I need to say the

1 exhibit number?

2 THE COURT: For the record, it would be
3 helpful.

4 BY MR. SMITH:

5 Q. I am trying to learn how to do it.
6 Plaintiff's Exhibit 3, can you tell me what that
7 document is?

8 A. What that document --

9 Q. What is that document?

10 A. It is a SAVE, Inc. brochure.

11 Q. That would have been presented to an
12 employee at Showa Denko?

13 A. I don't know. I don't know.

14 Q. What's the use of that document?

15 A. To explain services I would imagine to
16 the employee perhaps even at Showa Denko.

17 Q. Does the employer rely on that document
18 at all?

19 A. I don't know. You would have to ask
20 the employer.

21 Q. In your experience has the employer
22 ever relied on that document?

23 A. I don't know. Again, I'm a
24 subcontractor. I'm not SAVE.

25 Q. Did you feel an obligation to uphold

1 the terms of that document?

2 A. What terms specifically are you
3 referring to?

4 Q. Any representations or terms on that
5 document? Did you feel the obligation to uphold
6 those?

7 A. Of course.

8 Q. And you've been trained on
9 confidentiality, correct?

10 A. I think we have already established
11 that.

12 Q. Is confidentiality the most important
13 element in a counseling relationship?

14 A. Of course.

15 Q. Can you tell me in your own words
16 without referring to a contract what is a
17 confidence?

18 A. Confidence is a trust between one or
19 more individuals.

20 Q. A trust to do what?

21 A. To maintain privacy, what needs to
22 remain private.

23 Q. So back to your conversation with Mr.
24 Lucas, you said nothing to counter Mr. Lucas's
25 assertion that I was having trouble forming

1 constructive relationships and that I was offending
2 people. Is that true? Did you say anything to --

3 A. To the contrary? When he made those
4 statements of what they were continuing to observe
5 in the workplace?

6 Q. Yes.

7 A. Did not.

8 Q. You did not. Had I expressed to you
9 that several people seemed to be out to get me?

10 A. To some degree, yes.

11 Q. Those same people might have reported
12 things to Mr. Lucas because they were out to get
13 me; is that possible?

14 A. I mean that would be speculation. That
15 was your speculation.

16 Q. Is it possible that someone who didn't
17 like me for whatever reason might go to HR and
18 complain about me falsely because they had a
19 personal agenda against me? Is that possible?

20 A. Anything is possible.

21 Q. Is that specific fact, Mr. Kessler,
22 possible?

23 A. It's a fact as you see it. I don't --
24 can't speak to it further than that. It is
25 possible of course. Interpersonal dynamics are

1 complex. It could be a possibility.

2 Q. Good, thank you. Is it possible that
3 people I was getting along with at work didn't go
4 to HR to complain about me?

5 A. It is possible.

6 Q. Is that likely?

7 A. It is possible.

8 Q. Is it likely, Mr. Kessler, in your
9 expert opinion as a --

10 A. Are you asking me if people can get
11 along good are they less likely to go -- people are
12 more apt to complain than they are to compliment.

13 Q. Thank you. So it's possible Mr. Lucas
14 had a biased perception himself that he didn't see
15 the picture at Showa Denko?

16 A. He is human resource. His expertise
17 and his ability to perform his job I have no
18 oversight.

19 Q. That's not my question, Mr. Kessler.
20 Because as we have just -- you have established
21 that people are more likely to complain than they
22 are not to complain in a work environment. They
23 don't run to HR and say gosh, Mr. Smith is doing a
24 wonderful job, do they? That's fairly uncommon,
25 right?

1 A. I don't know.

2 Q. In your experience?

3 A. I have seen it happen a number of
4 different ways.

5 Q. You would expect someone with a
6 personal agenda and somebody who was getting along
7 fine and doing our work would have equal --

8 A. Mr. Smith, I can't speak to Showa
9 Denko's human resource labor relation interpersonal
10 and what have you.

11 Q. Mr. Kessler, weren't you speaking to
12 the head of HR, the president of the human
13 resources?

14 A. I spoke to him a couple of times.

15 Q. At Showa Denko, Inc.?

16 A. I spoke to him a couple of times, yes,
17 I did.

18 Q. So given if Mr. Lucas, in fact, had a
19 biased perception of me by acquiescing to his
20 statement, by tacitly agreeing with his statement
21 by saying you're continuing with EAP goal and
22 Smith's interpersonal skills, weren't you tacitly
23 agreeing with Mr. Lucas?

24 MR. WALLINGER: Objection, assumes
25 facts not in evidence. He is assuming that Mr.

1 Lucas had a bias against him which has not been
2 offered as proof in this case.

3 THE COURT: Overruled. You can ask the
4 question.

5 BY MR. SMITH:

6 Q. You need me to repeat the question?

7 A. Please. Sorry.

8 Q. You have just testified that Mr. Lucas
9 could have been biased by an employee who had a
10 personal vendetta against me?

11 A. No, I said that it's a possibility that
12 folks may have had a vendetta against you or an
13 employee had gone to HR and made a complaint, just
14 a generality.

15 Q. And Mr. Lucas not being provided
16 information by others?

17 A. I don't know what information he
18 received or did not receive. I don't know beyond
19 that. I don't know that he had a personal bias
20 against you.

21 Q. I say could he have been biased in his
22 perception -- could Mr. Lucas have been biased in
23 his perception?

24 A. I won't speculate that perhaps he could
25 have been biased. I do not know. I'm not Mr.

1 Lucas.

2 Q. And so if he had sent me to your
3 services might he have been looking for an
4 independent opinion as to whether or not the
5 reports he was getting from coworkers who might
6 have --

7 THE COURT: Is someone's phone ringing?
8 Sorry about that. I thought I was hearing a
9 buzzing.

10 MR. SMITH: I thought I heard it, too.

11 THE CLERK: Might be a feedback from
12 his mic.

13 MR. SMITH: Sound is wonderful in here
14 by the way.

15 BY MR. SMITH:

16 Q. So again Mr. Lucas, we have established
17 that he could have been biased and perhaps he was
18 looking to you for something more of an objective
19 opinion on whether or not --

20 A. I am sorry. Did you say that we have
21 established you have been?

22 Q. You said that he could have been biased
23 by a coworker or a person --

24 A. You are putting words in my mouth.
25 That is not what I am saying. What I am saying is

1 a person could have been biased. It may or may not
2 have been Mr. Lucas. I do not know those facts.

3 Q. But we have established Mr. Lucas could
4 have had a biased opinion based --

5 A. It's a possibility.

6 Q. Good. So just exploring that
7 possibility, right?

8 A. If you wish.

9 Q. I do. Thank you. We had been in
10 several sessions by this time, October 23rd of
11 2012?

12 A. I don't exactly recall how many
13 sessions we had up to that point. But we at least
14 had two.

15 Q. And so at that point with your
16 statement that you had a continuing goal of
17 improving Smith's interpersonal skills, could that
18 have been interpreted by Mr. Lucas to say yes,
19 interpersonal skills are the problem, given Mr.
20 Mr. Lucas that impression?

21 A. I have no idea what impression
22 Mr. Lucas would have taken away from that.

23 Q. No idea?

24 A. You should probably ask Mr. Lucas.

25 Q. And had I agreed that interpersonal

1 skills were the problem at that time, by that time?

2 A. I don't recall at that point. I
3 believe that you were more concerned with bringing
4 forth documents that would demonstrate that others
5 were to blame.

6 Q. That I was being targeted, was that
7 a --

8 A. That's correct.

9 Q. What did I mean by that when I said I
10 was being targeted?

11 A. You felt that others had an agenda.

12 Q. Such as a disgruntled coworker who was
13 trying to hurt my job prospects?

14 A. Perhaps.

15 Q. And how much did we explore that?

16 A. We explored it to the degree in which
17 it was necessary to do so at that point in time.

18 Q. So given Mr. Lucas's statements that I
19 was offending people and not forming constructive
20 relationships, might it have been appropriate for
21 you as a professional counselor, EAP professional,
22 to tell Mr. Lucas, Mr. Lucas, Mr. Smith suggests
23 that some people in the organization are targeting
24 him? Would that have been appropriate?

25 A. I think that early on we hadn't even

1 explored your ability or inability to work with
2 others well or otherwise.

3 Q. So are you saying that even though I
4 presented these documents you needed proof that I
5 was -- I was not at fault? You assumed -- did you
6 assume that I was at fault until I proved that I
7 was not at fault?

8 A. No, we just simply hadn't gotten to
9 that point yet.

10 Q. But you are assuming, aren't you, in
11 the statement that I needed to work on
12 interpersonal skills?

13 A. We needed to explore your interpersonal
14 skills ability.

15 Q. Because of complaints from a
16 disgruntled coworker, correct?

17 A. I suppose so.

18 Q. So weren't you taking the word of a
19 disgruntled coworker over my word?

20 A. No, sir, because we hadn't gotten to
21 that point yet.

22 Q. I had made the point to you very
23 clearly that I felt I was being targeted. I used
24 the e-mails, didn't I, to present evidence that I
25 was being targeted?

1 A. That was your interpretation of the
2 dynamic of the workplace.

3 Q. You continued to believe the employer's
4 statement that my interpersonal skills were the
5 root cause of the problem?

6 A. Interpersonal skills were the reason in
7 which you were at SAVE, Inc. initially. That was
8 the main point of you being there.

9 Q. In whose opinion? Who made the
10 assertion that my interpersonal skills were the
11 reason that I was at SAVE?

12 A. You were referred by your supervisor
13 for those reasons.

14 Q. And you took the supervisor's word over
15 mine?

16 A. No, sir. We had not yet been able to
17 explore the interpersonal skills dynamic and what
18 you present -- other than what you have presented
19 was in the form of e-mails.

20 Q. So you assumed that the complaint that
21 Showa Denko made against me and presented to you --

22 A. I don't take sides.

23 Q. I didn't finish my question. You don't
24 take sides. You have a dual obligation; is that
25 correct?

1 A. Correct.

2 Q. How often have you found management to
3 be at fault in any setting?

4 MR. WALLINGER: Objection. He said he
5 didn't take sides.

6 THE COURT: I don't -- can you answer
7 that?

8 THE WITNESS: Not particularly.

9 THE COURT: He said he couldn't answer.
10 I am trying to imagine unless he kept tally on
11 something how he would, but I allowed him to
12 answer. He said he didn't.

13 BY MR. SMITH:

14 Q. My question is your experience as a --
15 you have quite a bit of experience as a counselor
16 and in the EAP setting and you to quote your
17 document know what's expected of an EAP counselor;
18 is that correct?

19 A. That is correct.

20 Q. In your experience have you ever found
21 management to make false statements about an
22 employee?

23 A. I believe that's the same -- I thought
24 that's what we just addressed.

25 Q. I am trying to rephrase my question as

1 best to my ability.

2 THE COURT: Go ahead.

3 BY MR. SMITH:

4 Q. Has management -- have you ever found
5 in your experience management to make false
6 statements about an employee?

7 A. I would agree with Ms. Gainey that
8 probably less than three percent of the referrals
9 that we receive are from employers --

10 Q. That's not my question.

11 A. I am trying to answer the question the
12 best as I understand what you're asking me.

13 Q. Have you ever found management to make
14 a false statement against an employee in your
15 experience?

16 A. In my personal experience I have not.

17 Q. Ever?

18 A. I just said I have not.

19 Q. You heard Mr. Wing's testimony
20 yesterday regarding his affidavit and the reasons I
21 was terminated, correct?

22 A. I did.

23 Q. Do you believe it to be credible?

24 A. That was the first time I had heard or
25 seen or I should say heard any of that affidavit.

1 Q. Do you believe it to be credible?

2 MR. WALLINGER: Objection.

3 THE COURT: Sustained. I told you we
4 don't allow pitting of witnesses. In other words,
5 one witness isn't allowed to say I think the other
6 witness was lying or telling the truth.

7 MR. SMITH: Okay. I apologize.

8 BY MR. SMITH:

9 Q. You did hear Mr. Wing say that he and
10 Mr. Lucas had been involved in the decision to
11 terminate me, didn't you? Didn't you hear
12 Mr. Lucas say that he had and Mr. Wing had come to
13 the conclusion to terminate me?

14 A. I believe that is accurate.

15 Q. Do you recall the reason he gave?

16 A. There were 15 and more reasons.

17 Q. You never read that affidavit before?

18 A. Not to my recollection, no.

19 Q. And so you had spoken to Mr. Lucas
20 before the decision was made; is that correct?
21 This October 23rd date before that decision was
22 made, correct?

23 A. I believe so. I don't recall the date
24 that the affidavit -- I think it was December
25 something or another so that would be an accurate

1 statement.

2 Q. So given that you had spoken to
3 Mr. Lucas, Mr. Lucas had repeated assertions that
4 were not evidence. Was he not just basically
5 passing along hearsay to you?

6 A. I am sorry?

7 Q. Was Mr. Lucas passing along hearsay to
8 you when he says that people were complaining about
9 me or that they -- I was offending people? Did he
10 present any factual evidence to that effect?

11 A. He presented to me what he believed to
12 be true. I have no way of knowing or not whether
13 he was swayed or anything.

14 Q. You have no way of knowing his
15 statements were true, do you?

16 A. Given the fact that I'm not a Showa
17 Denko employee then how would I know.

18 Q. You had no evidence or -- to know
19 whether or not his statements are true; isn't that
20 true?

21 A. Sure.

22 Q. And so hypothetically you heard Mr.
23 Wing's testimony yesterday, my cross-examination of
24 Mr. Wing. And do you know how the original
25 complaint that had me arrive at SAVE, Inc. for

1 assistance, where that originated?

2 A. I believe it was a disagreement between
3 you and a coworker if I recall correctly.

4 Q. Had that coworker reported me directly?

5 A. As I recollect from Tuesday it was
6 another employee.

7 Q. Who allegedly overheard the incident,
8 the alleged incident?

9 A. I believe that may be the case.

10 Q. And did he report it directly to Mr.
11 Wing?

12 A. To who?

13 Q. The other employee that overheard the
14 conversation? Did he report it directly?

15 A. I believe that may have been the case.

16 Q. Did he actually report it to another
17 coworker? He reported it to --

18 A. I don't recall.

19 Q. -- the supervisor?

20 A. I do not recall.

21 Q. Did Mr. Wing testify that this coworker
22 reported it to Greg Spires who then reported it to
23 Mr. Wing?

24 A. If I'm following you correctly I
25 believe that might be accurate from Tuesday's

1 testimony.

2 Q. Why would an employee -- in your
3 experience as an EAP professional why would an
4 employee do that? Why would he not go directly to
5 Mr. Wing?

6 A. I have no idea why an employee would go
7 directly to Mr. Wing.

8 Q. You study human behavior; isn't that
9 that true?

10 A. That's part of my degree, yes.

11 Q. And we talked and your note talked
12 about the game of survivor a little bit?

13 A. You used the analogy of the survivor TV
14 show, yes, sir.

15 Q. Repeatedly as a way to try to present
16 an analogy as to what might be going on at Showa
17 Denko?

18 A. Sure.

19 Q. And so can we explore that analogy just
20 very briefly as a way humans behave?

21 A. If you wish.

22 Q. If you want to vote someone off the
23 island who is a threat to you winning the game do
24 you frequently go to other people and try to turn
25 them against that person so that when we get to the

1 jury we are able to have the votes to vote that
2 person off the island?

3 A. So you are asking me to utilize the
4 analogy of the survivor, a TV game show in terms of
5 your work environment.

6 Q. I presented that to you in some depth
7 at counseling sessions. Yes, sir, I am.

8 A. And your question is whether or not one
9 might pit against someone who is the stronger of
10 the group?

11 Q. That would be a fair statement.

12 A. To take the competition out of the
13 equation?

14 Q. That would be a fair statement of my
15 question, yes.

16 A. In the game show of survivor that seems
17 to be the tactic, yes.

18 Q. Do you think that tactic might be used
19 in the workplace?

20 A. It's certainly possible.

21 Q. Is it human nature, is survivor a game
22 that is illustrating human nature to some extent?

23 A. For a reality TV based show, perhaps.

24 Q. Again so at work if you were a
25 disgruntled coworker or thought that a person was a

1 threat to your job you might try to turn coworkers
2 against that person in order get that person off
3 the island before you got voted off the island? Is
4 that a possibility?

5 A. It's a possibility.

6 Q. As a professional -- are you a
7 professional psychologist?

8 A. No, I'm not a professional
9 psychologist.

10 Q. You are a social worker who is trained
11 in -- help me understand a little bit better.

12 A. Licensed independent social worker with
13 a clinical practitioner designation.

14 Q. You deal with cognitive behavioral
15 therapy and human behavior?

16 A. That's correct.

17 Q. Do you deal with sociology at all?

18 A. The word social is involved in both.
19 They are not the same thing.

20 Q. Is the game of survivor an example of
21 sociology or how would you describe it?

22 A. I'm not an expert on game shows.

23 THE COURT: Mr. Smith, let me suggest
24 to you that as the finder of fact I'm not at all
25 familiar with this game show you are talking about.

1 So you are wasting a lot of time trying to get him
2 to agree about a game show strategy that I know
3 nothing about.

4 I don't watch the TV show you are
5 referring to. So maybe it's inside baseball. It
6 means nothing to me so move on to something else.

7 MR. SMITH: I will, Your Honor. Just I
8 am trying to establish human behavior.

9 THE COURT: But you keeping doing it in
10 the context of a game show on TV that I don't know
11 anything about.

12 MR. SMITH: I do this because we
13 discussed this at some length and before he talked
14 to Clint Lucas and I explained how I was being
15 targeted, Your Honor. I will move on. But that's
16 why I am trying to use this as an illustration. We
17 did talk about --

18 THE COURT: Okay. We have spent -- you
19 made your point and then you want to hit it about
20 five more times to get him to reagree. I am just
21 telling you, move on to something else because you
22 are spending a lot of time talking about a game
23 show on TV that I don't watch. So there may be a
24 point to the line of questioning. It's getting
25 lost on me because I don't watch the show. It's

1 like if you were using a soccer analogy I wouldn't
2 know what you are talking about. Baseball maybe
3 you got a better shot. Football maybe you got
4 better shot. But rugby, soccer, cricket, if you
5 were making a point I wouldn't know about it.

6 Same thing. I don't know anything
7 about this game show you are talking about. So I'm
8 sure it's important to you because you think that's
9 what is happening to you, but I don't get it. So I
10 don't watch the show.

11 BY MR. SMITH:

12 Q. You would agree that it's possible that
13 another coworker who was trying to protect his job
14 and saw me as a threat to his job might try to pit
15 other coworkers against me and make a complaint in
16 order to gain some type of advantage or to
17 discredit me in the eyes of management?

18 A. I believe that is your interpretation
19 of the dynamic at work as being that, it's a
20 possibility.

21 Q. So given that we had discussed that
22 before your conversation with Clint Lucas, would it
23 have been your place to perhaps ask Mr. Lucas if
24 something like this was going on?

25 A. Not necessarily.

1 Q. Why not?

2 A. Because you were referred for
3 interpersonal skills, abilities or inabilities as
4 the case may be, and we had not thoroughly explored
5 that dynamic.

6 Q. You at least admitted to having a dual
7 obligation to me; is that correct, at least equal
8 with that of the company; is that correct?

9 A. To an extent that is correct.

10 Q. To an extent that's correct. Can you
11 explain the limits of that dual obligation as --

12 A. You didn't come to me voluntarily, to
13 SAVE I should say voluntarily. You were referred
14 by your supervisor. We do have an obligation to
15 explore what it is that they would like to have
16 addressed. That doesn't take you out of the
17 equation, but we had yet to get to that point.

18 Q. Where does that obligation come from?

19 A. I am telling you what the obligation
20 is.

21 Q. I am asking you where that obligation
22 arises?

23 A. Part of the dual dynamic of the EAP
24 services.

25 Q. It's an agreement?

1 A. It's -- call it what you will, but
2 that's what it is.

3 Q. Sorry?

4 A. I said call it what you will, but that
5 is what it is.

6 Q. Is it an agreement?

7 A. It's -- I am just telling you what I
8 understand it to be. I don't know if that is an
9 agreement or a policy or statute, I don't know.

10 Q. You're saying it's a customary
11 practice; is that true?

12 A. Customary practice, yes, sure.

13 Q. Which determined the legal agreement
14 under which you work, am I correct?

15 A. I suppose so.

16 Q. Again, are there any disclosures made
17 in these documents that you have this dual
18 obligation to the employer, to an employer and
19 employee?

20 A. Can you clarify? I am sorry.

21 Q. Do any of these documents say that you
22 have such an obligation to the employer?

23 A. I don't recall off the top of my head.

24 Q. On these four documents is there any
25 mention of the type of disclosures that you might

1 make to management?

2 A. Right here.

3 Q. So everything is based on that. Other
4 than that there is nothing else; is that true?

5 A. Of what I can and cannot disclose to
6 your employer?

7 Q. Right.

8 A. Given that the other items don't apply,
9 then right.

10 Q. The other items don't apply. How do
11 you mean?

12 A. If you were to threaten someone in your
13 work environment or if you were at risk of harm to
14 yourself, I would have had to disclose information.
15 I am obligated to do that, but that didn't apply.

16 Q. That obligation comes from your
17 standing as a counselor?

18 A. A counselor, yes.

19 Q. Would someone in my position expect a
20 counselor in your position to maintain trusted
21 information?

22 A. Correct.

23 Q. And to not tell people things I didn't
24 agree with or that you thought were -- did I have
25 an expectation that you would not tell people where

1 we disagreed?

2 A. Is that -- would I have an obligation
3 to not reveal or to reveal?

4 Q. Would you have an obligation not to
5 reveal potentially damaging information about me?

6 A. Correct.

7 Q. So the representation made to Mr. Lucas
8 that you are continuing EAP goal was to improve
9 Smith's interpersonal skills, that's a statement I
10 don't agree with, didn't agree with there. Didn't
11 you have a legal duty not to disclose that
12 information?

13 A. No, I don't recall you saying that you
14 firmly absolutely didn't believe that there were no
15 interpersonal skills lacking.

16 Q. Didn't you presume the treatment plan?
17 You never got my consent on a treatment plan; isn't
18 that true?

19 A. You knew why you were there.

20 Q. I knew why I was there?

21 A. Yes, sir.

22 Q. And what did I know?

23 A. I would -- it's whatever you and Clint
24 Lucas discussed and what they shared with us with
25 your referral that was received.

1 Q. I did know why I was there and I tried
2 to explain to you why I was there. I was there
3 because I was being targeted and I needed a
4 competent counselor who had my interests -- firmly
5 understood my interests, to understand my
6 situation, not to continue repeating false
7 statements about me or perpetuating false
8 statements about me; isn't that true?

9 A. I made no false statements on you, for
10 you, against you, anything to that extent.

11 Q. Could you have cost me Clint Lucas's
12 vote on a survivor island with your statement?

13 A. I don't know how to answer that
14 question.

15 Q. Could you have turned Clint Lucas to
16 say I'm not going to vote to keep Mr. Smith here
17 based on all that's going on and Mr. Kessler's
18 representations that yes, he does have
19 interpersonal issues?

20 A. Did I sway his opinion? Did I --

21 Q. Yes. Did you sway his opinion?

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

23 Q. Did you do anything to try to change
24 his opinion or question his opinion?

25 A. Again, what was it that I would have

1 changed?

2 Q. Did you question his opinion?

3 A. No, I did not question his opinion.

4 Q. Was he in a position of authority over
5 you?

6 A. No, of course not.

7 Q. You have seen a number of people from
8 Showa Denko?

9 A. I have not.

10 Q. Have you ever seen anyone besides me
11 from Showa Denko?

12 A. I have not.

13 Q. Does Ms. Gainey have an influence over
14 the amount of work that you get?

15 A. No, not necessarily. She knows what my
16 hours are and that's about the extent of it.

17 Q. She does refer people to you though; is
18 that correct?

19 A. She did in this instance.

20 Q. And so you need to please Ms. Gainey to
21 keep the referrals coming; is that a fair
22 statement?

23 A. That's not a fair statement at all.

24 Q. If Ms. Gainey was unsatisfied with your
25 work would she keep referring patients to you?

1 A. You should have asked Ms. Gainey when
2 she was on the stand.

3 Q. You're in that relationship?

4 A. You are asking what Ms. Gainey would
5 have done. I'm not Ms. Gainey.

6 Q. I am asking you did you feel the need
7 to please Ms. Gainey?

8 A. I'm an independent licensed counselor.
9 If she had an issue she would have brought it to my
10 attention at any point and I would have received
11 that information.

12 Q. Did you form -- did you articulate an
13 opinion to Mr. Krasilovsky in this document?

14 A. I presented what I understood to have
15 been the facts of the case in my involvement.

16 Q. Let me ask you to read this paragraph
17 beginning with overall I conclude.

18 A. "Overall I conclude that Smith had
19 difficulty with interpersonal interaction and had
20 poor insight into that problem and he instead
21 focused on his sense of technical superiority and
22 his need to leave a legacy at Showa Denko Carbon,
23 Inc. Smith received no such validation. Upon his
24 termination he experienced abandonment. He
25 perceived others to be the root of his problems.

1 That attitude and behavior in my opinion similarly
2 is what Smith is engaging in by suing me and
3 blaming me and SAVE for his job termination."

4 Q. Do you stand by that opinion today?

5 A. I do.

6 Q. Let's take a little time and -- how did
7 you conclude that I had difficulty with
8 interpersonal interaction?

9 A. I think simply your statements of the
10 difficulties you were having with various
11 coworkers, how you engaged upon interaction with
12 them. There was possibly other manners in which
13 you could have intervened with those individuals to
14 perhaps come to a different outcome.

15 Q. But your conclusion differs from my
16 conclusion as to the root of the problem; is that a
17 fair statement?

18 A. I think that would be a fair statement.

19 Q. So you believe that I didn't understand
20 the root of the problem at Showa Denko?

21 A. I believe there's two sides to every
22 story.

23 Q. And you have a dual obligation to both
24 parties?

25 A. I do.

1 Q. You said that I had poor insight into
2 that problem. How did you come to that conclusion?

3 A. You would not allow us to proceed in
4 exploring the extent of your interpersonal skill
5 ability.

6 Q. That indicates poor insight into the
7 problem, the fact that I was not willing to explore
8 the interpersonal issues that you allege existed?

9 A. Correct.

10 Q. Is that circular reasoning?

11 A. I don't know. Is it? I don't know,
12 sorry.

13 Q. In other words, you have gotten a
14 diagnosis that I have interpersonal problems and
15 you are a counselor who is trained in dealing with
16 interpersonal problems; is that a fair statement?

17 A. Correct.

18 Q. And do you basically see every problem
19 as an interpersonal problem?

20 A. Of course not.

21 Q. When would you not -- what would be the
22 burden of proof if you will that when you see a
23 problem that is not an interpersonal problem? When
24 would I get a clean diagnosis that hey, I really
25 don't have significant interpersonal problems,

1 something else is going on here. What would lead
2 you to that conclusion?

3 A. I think in the process of role play we
4 could have established how you might interact with
5 a particular individual in order to influence them
6 or reach a mutual goal and so forth.

7 Q. So role play. And can you give me a
8 quick example of how we would have -- how that
9 would have happened? How would I pass the test
10 that I don't have interpersonal problems through
11 role play to your satisfaction so that we could get
12 on to the substance of the issue? What would it
13 have taken?

14 A. So we probably best would have used a
15 real world example. So perhaps it would have been
16 pertaining to the colleague that felt threatened
17 about your abilities and knowledge base and how you
18 might be able to work a better dynamic between the
19 two of you so that you would not appear to be as
20 threatening as you claim to have been against this
21 individual. And in the process of going back and
22 forth me representing that individual we could have
23 had a better, perhaps even more insightful,
24 opportunity to identify areas in which either you
25 were on target or perhaps not on target.

1 Q. What if I -- in my opinion, because I'm
2 a Microsoft certified systems engineer and college
3 graduate, believed one of these people, perhaps the
4 person targeting me, really wasn't competent for
5 the job?

6 A. What's the question?

7 Q. In other words we have assumed that we
8 could work things out with this other employee.

9 A. I use that as an example. That may not
10 have been an example in which we role play.

11 Q. In fact, might that have come out if we
12 had examined the documents that I had evidence of
13 his work, my work and explain his incentive to
14 target me to explain that he was in control of
15 systems I depended on and that I basically was
16 fearful of retaliation from this person, tried my
17 best to avoid this person in order to keep doing my
18 job. Would you have been the appropriate person to
19 help determine that and help take action?

20 A. I was not in a position to address your
21 competency at the workplace.

22 Q. That's not what I am asking. If I told
23 you about this situation would you have referred me
24 to someone else who might have been able to help me
25 in that situation? It was not a peer of yours.

1 Who could you have referred me to?

2 A. What's the situation?

3 Q. If I am being stalked or harassed or
4 had my work interference with a coworker and I show
5 you the evidence of this, what would you do?

6 A. I don't know what your orientation was
7 at Showa Denko, but I can only presume that they
8 would have had labor relations or union or some
9 mechanism that you could have employed at that
10 point in time.

11 Q. So I asked you earlier what your
12 training was in employment law. And so what you
13 have raised -- you have suggested that I must have
14 had other alternatives, is that basically what you
15 are telling me? I must have had labor relations or
16 labor union, someone that I can turn to other than
17 yourself? Is that your testimony?

18 A. It could have been accomplished
19 concurrently. It wouldn't have to have been
20 termination of the SAVE employee counseling in
21 order to then take up that outcome, that mechanism.

22 Q. What would that mechanism have been?
23 That's what I am trying to understand. Trust me,
24 what would that mechanism have been? Who could I
25 have gone to? Who could you have guided me to?

1 Did you have an obligation?

2 A. We weren't that far along, Mr. Smith.

3 Q. You all focus on crisis intervention,
4 am I correct?

5 A. That's one of the things in which we
6 focus on, yes.

7 Q. So if you are having a crisis at work
8 shouldn't you know the appropriate parties to send
9 someone to when you are not able to help them?

10 A. I'm not -- there was no conclusion that
11 I couldn't help you.

12 Q. How long would it have taken to come to
13 that conclusion?

14 A. I don't know. It takes two parties to
15 get there.

16 Q. It does take two parties.

17 A. You were resistant and you admitted to
18 such initially for at least the first three,
19 possibly four sessions.

20 Q. In fact, if we had used those three or
21 four sessions to establish what I'm trying my best
22 to establish here in court perhaps we could have
23 dealt with the situation soon enough to save my
24 job; isn't that possible?

25 A. I had nothing to do with the loss of

1 your job, Mr. Smith.

2 Q. It is possible that we could have come
3 to a conclusion that you weren't able to help me
4 and articulated to Clint Lucas and others in
5 management, that hey, here is what I have
6 discovered. I don't believe he has any
7 interpersonal problems. He should be referred to
8 someone else. Isn't that possible?

9 A. I am not going to speak to
10 possibilities in that regard.

11 Q. Does the EAP code of conduct require
12 you to do that?

13 A. To do which?

14 Q. To seek assistance when you are unable
15 to help an employee with their problems?

16 A. You are pointing at yourself. You're
17 saying employees. I'm not going to answer that
18 question.

19 Q. I'm an employee.

20 A. Yes, you are an employee. For yourself
21 there was no wrongdoing.

22 Q. Are you familiar with the obligations
23 of an EAP counselor?

24 A. We have already been through this or so
25 I thought, but I'm a not CEAP.

1 Q. And in your document it says that EAP
2 services differ markedly from other clinical
3 counseling services; is that your words?

4 A. That's my words.

5 Q. So being a licensed independent social
6 worker may not give all the skills you need to be
7 an employee assistance professional; is that a fair
8 statement?

9 A. One is a certificate. The other is a
10 license.

11 Q. Do you agree to certain codes of
12 conduct as an EAP?

13 A. I'm not a CEAP. It doesn't
14 specifically apply. But my code of conduct, my
15 code of ethics I should say don't differ
16 significantly.

17 Q. Weren't you biased to provide cognitive
18 behavioral therapy and to come up with a diagnosis
19 that the person had interpersonal issues?

20 A. Say that again.

21 Q. Were you biased to come up with the
22 conclusion that the person had interpersonal issues
23 which just happened to fit your training?

24 A. No.

25 Q. How many sessions do you think it would

1 have taken -- you said we were -- I was terminated
2 early in the process. That was eight sessions in,
3 correct? And you considered that early?

4 A. I don't count about those first two
5 because I was not involved in those first two, nor
6 did I have knowledge what was preceded.

7 Q. How many sessions would be typical?

8 A. There's no typical.

9 Q. Would it have been an ongoing lengthy
10 relationship?

11 A. Typically that's typically not. It's
12 short-term solution focused.

13 Q. And so you would have been able to
14 change my -- if my interpersonal skills were at
15 fault how quickly would you have been able to
16 change them?

17 A. Depends on you. It depends on the
18 client. I don't hold a magic wand that makes a
19 client become a different person.

20 Q. Does such a magic wand exist?

21 A. No, sir.

22 Q. To change a behavior takes a pretty
23 long time, am I correct?

24 A. That's not accurate.

25 Q. We were early in the process?

1 A. We were early in the process, yes, sir.

2 Q. What would the typical process be for
3 someone like myself? Can you give any parameters?

4 A. With a resistant client? If that's
5 indeed what you were, it can take many, many
6 sessions.

7 Q. Were you biased to find in favor of the
8 opinion of Showa Denko who SAVE, Inc. has on
9 long-term retainer?

10 A. It matters nothing to me whether
11 they're on retainer or not. I have no bias against
12 them whatsoever.

13 Q. Was there an obligation to do what was
14 in the company's best interest?

15 A. Which company?

16 Q. You choose, SAVE or Showa Denko.

17 A. No, sir. I'm an independent
18 practitioner. I am not going to sell my morals and
19 values to a company.

20 Q. So I am relying on your morals and
21 values in this relationship you have with SAVE and
22 Showa Denko?

23 A. If you had reason to mistrust them or
24 what have you, you could have requested a referral
25 elsewhere or a different therapist or any of that.

1 So that was your right to do so at any time.

2 Q. How many EAP counselors work for SAVE?

3 A. It depends on any given year or day
4 sometimes.

5 Q. Mr. Krasilovsky, you heard his
6 testimony yesterday, correct?

7 A. Tuesday, yes, I did.

8 Q. Tuesday. He said insurance won't pay
9 for EAP services. Why is that?

10 A. I don't know. He's the expert. I do
11 not know.

12 Q. But you know what's required of an EAP
13 counselor and --

14 A. I don't run the business side of the
15 house.

16 Q. Do you believe his testimony is
17 accurate that insurance won't pay for EAP services?

18 A. If he says so.

19 Q. Are EAP services typically company
20 sponsored?

21 A. In my experience, that has been the
22 case.

23 Q. Do you know of any cases where they are
24 not company sponsored?

25 A. Not off the top of my head.

1 Q. Again, I've asked you about these
2 contracts. Is there any disclosure of a potential
3 conflict of interest anywhere in these contracts?

4 A. Are you asking me did I have some
5 conflict of interest --

6 Q. I am asking is there any disclosure of
7 any potential conflict of interest in any of these
8 contracts. And are there any other contracts that
9 I should have been aware of at that time?

10 A. No. I believe you were made aware of
11 whatever you needed to be made aware of engaging in
12 services.

13 Q. Did I know -- let me ask you -- let me
14 let you answer that question.

15 A. Can you repeat the question.

16 Q. Did these contracts show any indication
17 that I was advised of potential conflicts of
18 interest between you and --

19 A. I am not sure what those conflicts
20 would have been.

21 Q. Do you know what a conflict of interest
22 is?

23 A. Sure.

24 Q. Can you explain what that is?

25 A. Sure. If I were being paid directly by

1 Showa Denko, and it would behoove me to maintain
2 that agreement, then perhaps that would have been a
3 conflict of interest. That was not the case.

4 Q. It would behoove you to maintain?

5 A. Just an example.

6 Q. Was it important to keep Showa Denko
7 happy?

8 A. I have no idea. I'm not the business
9 side of the house.

10 Q. You had a dual obligation, though, to
11 both parties because --

12 A. The human resource, not the business
13 contractual arrangement or what have you.

14 Q. To your knowledge are there any written
15 contracts between SAVE and Showa Denko?

16 A. That would have been a question for Ms.
17 Gainey.

18 Q. I am asking you what you know.

19 A. I don't know.

20 Q. Is it ethical for someone to have --
21 you have dual trust -- can you have a trust
22 relationship with parties whose goals are adverse?

23 A. Sure.

24 Q. And how do you maintain that?

25 A. If I were working with a couple let's

1 say and they want an opportunity to meet with me
2 individually and if there appears to be a
3 difference of opinion or conflict, then that would
4 not be shared nor revealed, but it might be
5 suggested that in order to move forward with their
6 mutual goal that perhaps it should come to light.

7 Q. So you have got to respect certain
8 confidences in that say martial counseling session?

9 A. Correct.

10 MR. WALLINGER: Objection, relevance.

11 THE COURT: What's the relevance?

12 MR. SMITH: It is very similar to the
13 dual obligation he has to me and to the company.
14 The example Mr. Kessler is giving he has a dual
15 obligation to the husband and wife.

16 THE WITNESS: The example -- sorry.

17 MR. SMITH: I am trying to illustrate
18 how he ethically would deal. He just gave the
19 answer I want between two parties that he has a
20 trust relationship in theory with both parties.

21 THE WITNESS: I am speaking to the --
22 you asked me to provide an example. I gave you an
23 example. My example doesn't continue further to
24 the relationship between Showa Denko and SAVE, Inc.
25 or me and Showa Denko. I was speaking to an

1 example which existed between husband and wife or
2 two people in a relationship. Not a work
3 relationship, not an employer/employee
4 relationship, not a dual relationship. So I
5 disagree with the conclusion you appear to be
6 drawing based on the example I gave.

7 BY MR. SMITH:

8 Q. Your -- I am trying to understand your
9 dual obligation and how trust acts in the context
10 of your dual obligation, how you avoid conflicts of
11 interest which were never disclosed to me?

12 A. There's no conflict of interest.
13 There's nothing to disclose. If there was a
14 conflict of interest it would have been disclosed.

15 Q. Should you have disclosed the fact that
16 you were going to talk to Clint Lucas --

17 A. I did. You signed this.

18 Q. And the description of the information
19 in a specific and meaningful fashion, wouldn't that
20 have been required to maintain the trust
21 relationship you had with me?

22 A. Unless you have something that suggests
23 that the information wasn't meaningful and --

24 Q. So the burden is on me to prove that
25 disclosure you made was proper?

1 A. No, it is upon you to disclose what was
2 improper.

3 Q. It's my duty as the patient to
4 understand what would be improper for you as the
5 counselor?

6 A. I am sorry. Let's back up. So not
7 terms of this particular suit. I told you what
8 would be revealed. I did not share anything more,
9 nor did I share anything less.

10 Q. Did you hear Ms. Gainey say that there
11 are certain things that should not be disclosed
12 even in the presence of an agreement like that?

13 A. Yes, of course.

14 Q. What would some of those be?

15 A. For example, that you had brought up I
16 wouldn't have shared your particular views on what
17 marriage would have been. That would have been
18 improper.

19 Q. Anything else?

20 A. There's many things.

21 Q. How do you make that decision? Is it
22 because it's potentially damaging and embarrassing,
23 would those be things that you would consider?

24 A. It is morally wrong to do so.

25 Q. But even more than morally wrong,

1 aren't they legally wrong? Aren't you violating a
2 trust?

3 A. If I violated a trust by having done
4 what?

5 Q. By disclosing things, specific things
6 without specific and meaningful disclosure, without
7 telling me that what you were going to say to Clint
8 Lucas or even telling me what Clint Lucas had said
9 about me because by not telling me what Clint -- is
10 that a legal obligation in your opinion?

11 A. I don't believe so.

12 Q. It is not a legal obligation. You have
13 a trusted relationship to me to reveal --

14 A. I'm not an attorney. I don't know what
15 you mean by the legal obligation. But in the sense
16 of confidence and sharing of information I did
17 nothing improper.

18 Q. I am trying to understand if you
19 understand the boundaries of the trust relationship
20 in this context.

21 A. I believe I do.

22 Q. And you have been trained on
23 confidentiality?

24 MR. WALLINGER: Objection, asked and
25 answered.

1 THE COURT: It's been asked and
2 answered about a dozen times. Let me tell you
3 here's what we are going to do. I've given a lot
4 of leeway because you are pro se. A lawyer would
5 never have gotten to ask the same thing a dozen
6 times. But I have allowed you to do that. You
7 have had this witness for over two hours, close to
8 two and-a-half hours. We started at 9:30. It is
9 ten minutes to 12:00. So you have had him all
10 morning to ask him everything you wanted. I will
11 give you 15 more minutes, but it needs to be on new
12 ground because I have given you two and-a-half
13 hours to talk about confidentiality and breach of
14 trust and you got to talk about something else.
15 Wind it up because you are just asking the same
16 questions.

17 MR. SMITH: I apologize. I don't know
18 the burden of proof and I'm trying to establish --

19 THE COURT: You have two and-a-half
20 hours of asking the same questions, just different
21 ways. So if you've got a new point, I am not the
22 smartest judge in the world, but I know what you're
23 trying to prove. And I know why you are trying to
24 prove it and I got it the first time you asked him
25 the questions.

1 MR. SMITH: I apologize.

2 THE COURT: But just pick a new point
3 to argue because otherwise we are going to -- I'm
4 going to cut off. But I am willing to say I will
5 give you 15 more minutes to get on to a new subject
6 matter if you have one.

7 MR. SMITH: Yes, Your Honor. I
8 apologize to the Court.

9 BY MR. SMITH:

10 Q. You said in your statement that -- how
11 did you characterize my statement that I was the
12 most qualified to act as an IT manager?

13 A. Can you -- I am sorry. I don't
14 understand the question.

15 Q. Let's read this statement here Smith
16 came across.

17 A. "Smith came across in that session as
18 somewhat self-depreciating, and "I tend to ramble,"
19 but also as grandiose, "I am the most qualified to
20 act as the IT manager."

21 Q. So explain what you mean by grandiose?

22 A. I am trying to think of many examples
23 to narrow it down to one right now. The fact of
24 the matter that as it has come about by taking the
25 IT manager survey or whatever that document is

1 referred to that entailed that you were the most
2 qualified individual, although many others had
3 taken that same profile. And the assumption that
4 you were the most qualified out of everybody that
5 had gotten that performance measure taken would
6 logically conclude that you are the most qualified
7 to have gotten that division. The fact of the
8 matter that somebody who you have a disagreement
9 with is out to get you because you are the most
10 qualified person on the island is grandiose in my
11 opinion. That's an opinion.

12 Q. With significant negative connotations?

13 A. How do you mean?

14 Q. It seems like a very -- is that a
15 judgmental statement that I was grandiose?

16 A. No, it can be a clinical statement,
17 judgment, clinical statement I should say.

18 Q. Is that a clinical diagnosis?

19 A. It is not.

20 Q. And you believe I believed I was the
21 most qualified simply because of that document?

22 A. You said so.

23 Q. Why do you think I believed that I was
24 most qualified?

25 A. Because you believed that you are and

1 were.

2 Q. But did I give any reasons in session
3 to --

4 A. I was not there to determine your
5 competency and your work. That was not my role.

6 Q. Are you discounting that I might have
7 been the most qualified person to be the IT
8 manager?

9 A. It had no relevance.

10 Q. Wouldn't it have relevance if I were
11 being targeted?

12 A. If you were being targeted.

13 Q. And you dispute that I was being
14 targeted? Do you dispute that I was being targeted
15 at this point?

16 A. At this point now at this point in our
17 trial and what we are doing here with me on the
18 stand defending myself do I dispute that you are
19 being targeted? I believe that you feel strongly
20 that you were indeed being targeted.

21 Q. In your expert opinion was I being
22 targeted?

23 A. I just answered the question.

24 Q. You told me what you think I think. I
25 am asking you what you think, Mr. Kessler.

1 A. I believe that you believe that you
2 were being targeted.

3 Q. Your Honor, can I ask him to answer my
4 question directly what do you believe?

5 THE COURT: He told you what he
6 believed. You didn't like the answer, but he told
7 you what he believed.

8 MR. SMITH: He is telling me what I
9 believe, Your Honor.

10 THE COURT: He told you what he
11 believed and he said he believed that you believed
12 you were targeted. That's what he believes. You
13 want him to say something else, but that was the
14 answer to the question.

15 You want to answer whether or not he
16 felt like you were targeted and he doesn't
17 apparently have an opinion on that. But he is
18 willing to say that you believed you were targeted.

19 BY MR. SMITH:

20 Q. Do you have any opinion on that
21 personally? Do you have any opinion on whether or
22 not I was targeted personally?

23 A. I have nothing further to say regarding
24 that.

25 Q. Do you believe had you took an adequate

1 history to come to the determination of whether or
2 not I was targeted?

3 A. I took the best history in which you
4 allowed me to take.

5 Q. Including reading the e-mails I
6 presented to you?

7 A. We did read e-mails. I did not
8 completely toss them out of the equation, sir.

9 Q. But you have no opinion of whether I
10 was being targeted. Just one more point, Your
11 Honor. Those e-mails are introduced into evidence,
12 correct? We reviewed this document, this is the
13 front page of this document. Is that a placement
14 report?

15 A. This document says it's a placement
16 report. You presented the document. The
17 highlights are my highlights. This is what I
18 reviewed outside of session that we discussed
19 during a session. I don't know the validity of
20 this. I don't know anything about this document.
21 It is not an instrument that I am familiar with
22 that I would have administered to anybody so
23 whatever opinion or conclusion that this document
24 would have presented I can't speak to it other than
25 just you asked me in my testimony did I indicate

1 whether or not you are accommodating or not. I
2 indicated that you were not. I referred to this
3 document. You are going to point out the fact that
4 it has a nine and that clearly was a false
5 statement on my part to influence the expert
6 witness. Guilty as charged. But I was not trying
7 to influence the testimony of our expert witness.
8 It was a mistake.

9 Q. I am not asking that question, but I
10 appreciate --

11 A. I'm sorry. It's been two and-a-half
12 hours. I am really kind of getting tired. I
13 apologize. I am doing my best, I really honestly
14 am, Your Honor.

15 Q. And I apologize. Your Honor, I know I
16 am taking up a lot of court time. I apologize for
17 doing that. I will ask that we take a recess and
18 come back. I am not going to go much longer, but I
19 feel like I need to get a few more answers. It
20 does not go to what he told his expert witness. It
21 goes to what his opinions were and the rationale
22 for his opinions.

23 THE COURT: What does it matter what
24 his opinions are? It only matters what he told
25 people or what he did. He is not being sued for

1 being an expert. He's not an expert. He's a
2 counselor. So I'm not sure what you're saying you
3 need to get as to what his opinions are. We have
4 had two and-a-half hours of what his thoughts are
5 on what went on. Where are you trying to go?

6 MR. SMITH: I am establishing the
7 extent of his competence and the credibility of the
8 statements in his work product, Your Honor. I am
9 questioning the credibility of his statements and
10 using his testimony on the stand to establish or
11 discredit his credibility. He is upset right now
12 and I am trying to wrap this up.

13 MR. WALLINGER: Your Honor, I would
14 object because he put my client's statement into
15 evidence as a Plaintiff's exhibit. He is now
16 trying to cross-examine my client to get him to
17 disagree or give an opinion that would somehow
18 attack the credibility of this statement. If he
19 didn't want the statement in evidence he shouldn't
20 have offered it and then he wouldn't be having to
21 ask him questions about it.

22 MR. SMITH: I am certainly --

23 THE COURT: Let me ask a question just
24 as a matter of curiosity. This document labeled
25 confidential work product, I assume he prepared it

1 for a lawyer?

2 MR. WALLINGER: Your Honor --

3 THE COURT: How did it ever get --

4 MR. WALLINGER: Mr. Kessler got sued.
5 He has a chart which is in evidence which is not
6 especially easy to read. Mr. Kessler then prepared
7 a narrative statement that essentially goes through
8 chronologically the information that is in the
9 chart. That was provided -- after he signed it
10 that was provided by me to the expert to consider
11 along with the clinical information and other
12 information in the case. It's just a statement by
13 him that essentially distills the summarized
14 information because at the time I was having to
15 decide whether to retain and disclose an expert.
16 My client had not been deposed because the
17 Plaintiff hadn't deposed him for over a year. So I
18 didn't have the deposition that I could give the
19 expert to read to consider various information
20 beyond just what a chart said.

21 So instead of having the expert talk to
22 my client, my client signed a statement which I
23 gave to the expert and the expert reviewed it,
24 considered it as part of his opinions and Plaintiff
25 has put it into evidence. It was designated

1 confidential because at the time it was done it was
2 both work product and because it was an issue of
3 whether we could disclose it outside the scope of
4 the judicial.

5 THE COURT: I was wondering if a judge
6 ordered this disclosure or whatever.

7 MR. WALLINGER: No, sir, he didn't.
8 And, in fact, when I moved for summary judgment I
9 asked Judge Jefferson to keep the information until
10 the hearing until we could find out from the
11 Plaintiff whether he had any objection to the
12 statement being in the court file and a public
13 document. At the hearing he said no objection.
14 The memorandum was filed as a matter of record and
15 it's been in the public record ever since.

16 MR. SMITH: I don't have an objection
17 to it being a matter of public record at this
18 point, Your Honor.

19 THE COURT: That's in evidence. It's
20 not -- I was just asking as I said a matter of
21 curiosity. You very seldom see a document labeled
22 work product in evidence. So I just wondered how
23 it got there.

24 MR. WALLINGER: Yes, sir.

25 THE COURT: Now I know.

1 MR. WALLINGER: It was just to protect
2 the interests of the parties.

3 THE COURT: It's in evidence. He can
4 use it.

5 MR. SMITH: Your Honor, I would also
6 suggest the relevance of this document --

7 THE COURT: Well, you put it into
8 evidence so it's in evidence. So the relevance
9 thing, I don't know why you would be arguing
10 relevance. You're the one that put it in evidence.

11 MR. SMITH: Because I believe it shows
12 state of mind, Your Honor.

13 THE COURT: What's your point?

14 MR. SMITH: That if you read through
15 this document you're going to -- basically says
16 this continues the pattern of false statements that
17 were made about me starting with Warren at Showa
18 Denko all the way through the counselor who is
19 supposed to have a trusted duty towards me.

20 THE COURT: Okay. Here's what we will
21 do. We will break until 1:30. You can come back.
22 I will give you another hour with this witness.
23 I'm going to give you that. We are going to take a
24 break for lunch. And we will come back at 1:30. I
25 will give you an hour with the witness. Okay? Do

1 you have any other witnesses you are going to call?

2 MR. SMITH: No, Your Honor.

3 THE COURT: Do you have any other
4 witnesses you are going to call?

5 MR. WALLINGER: I'm going to have to
6 recall my client briefly.

7 THE COURT: Well, you can do that or
8 you can just cross-examine him. It's not like we
9 need to jump through hoops.

10 MR. WALLINGER: As long as I am allowed
11 to lead him I may do that for the sake of
12 expediency, Your Honor.

13 THE COURT: All right. See you all at
14 1:30. You are still on the stand so you don't get
15 to talk to your lawyer during the break. Hopefully
16 it's stopped raining. You can just go find a quiet
17 place to grab a sandwich or something. I will see
18 you all at 1:30.

19 (A luncheon recess transpired.)

20 THE COURT: All right. Got everybody?
21 You may resume.

22 BY MR. SMITH:

23 Q. Mr. Kessler, you are familiar with the
24 confidential work product in response to litigation
25 and you presented it to Mr. Krasilovsky; is that

1 correct?

2 A. I am familiar with the document. My
3 attorney provided it to our expert witness.

4 Q. These are all your words; is that fair
5 to say?

6 A. Correct.

7 Q. Are any elements of this document
8 intended to scold or embarrass me?

9 A. No, sir. That was never the intent.

10 Q. The significance of putting the
11 statement in there that I was late to session
12 because my car was on fire, can you explain why
13 that's relevant?

14 A. I believe we discussed that in
15 testimony or in deposition; however, four
16 and-a-half -- four years after the fact, revealing
17 my notes it very well could be having not put in a
18 pronoun I may have made that -- made an error
19 whether it had been your car or a car, my
20 recollection had not been clear.

21 Q. Did you chuckle at deposition when I
22 asked you the same question?

23 A. Did I do what?

24 Q. Chuckle at deposition when I asked you
25 the same question?

1 A. I don't recall.

2 Q. I'm not sure I am able to ask this
3 question, but I'm going to ask it. This document
4 was originally presented to the Court and asked to
5 be kept confidential; is that your understanding?

6 A. I am sorry?

7 Q. This document was presented to the
8 Court with your motion to dismiss and with
9 instructions initially to keep it confidential; are
10 you aware of that?

11 A. I don't recall. I don't.

12 Q. Do you recall that at the motion to
13 dismiss I asked Judge Jefferson or I waived
14 confidentiality and said it could be --

15 MR. WALLINGER: Objection, relevance.

16 THE COURT: Where are you going with
17 this?

18 MR. SMITH: I am basically making the
19 case this was intended to scold and embarrass me
20 and that it was written in the fashion it was in
21 order to -- so that I would not want it placed in
22 the public record and certain parts are rather
23 embarrassing to me. But I feel I had no choice
24 except to allow it to be admitted. I believe the
25 statements in here are prejudicial and to scold and

1 embarrass me and that continued the pattern.

2 THE COURT: Do you have a question that
3 you want to ask him? What is it?

4 MR. SMITH: Your Honor, I was trying to
5 respond why I believe it is relevant. I believe it
6 is relevant because I believe the intent is to
7 scold and embarrass me with this document.

8 THE COURT: Okay. You got a question
9 you want to ask him now?

10 MR. SMITH: Yes, Your Honor.

11 BY MR. SMITH:

12 Q. The issue regarding -- would you agree
13 that you stated Smith indicated that he had dated
14 someone for seven years, but he believed marriage
15 was for having kids and for financial benefit. Do
16 you agree those are your words?

17 A. I believe those are your words, but
18 they are my words in this document.

19 Q. Top of the paragraph number -- page
20 three. I have got a copy of it I can point out to
21 you.

22 A. The pages are not numbered.

23 Q. It's the third page in here.

24 A. Okay, I see it. Yes, sir.

25 Q. And that's protected health

1 information?

2 A. I am sorry?

3 Q. Is that protected health information?

4 A. I would say it is.

5 Q. Because it was released in session?

6 A. It was not released in session.

7 Q. Because it was addressed in session, in
8 a counseling session, that makes it protected?

9 A. Your employer would not have needed to
10 know that information, therefore, it wasn't and
11 would not have been revealed.

12 Q. But is that protected health
13 information?

14 A. It's protected in that it's not
15 included on the release.

16 Q. So to give that information out would
17 be a violation of that release?

18 A. In what context of it being released?
19 In the context of us in session or even after
20 session then it would be protected, but in this
21 report summarizing our sessions four plus years
22 later, then my understanding is that's off the
23 table.

24 Q. But this document could be released as
25 part of an administrative procedure or judicial

1 procedure?

2 A. Judicial, not administrative. Your
3 employer never asked or requested records from
4 SAVE, Inc., nor would they have been revealed to
5 them.

6 Q. Even if it were part of a judicial
7 proceeding?

8 A. If it were -- as I said, if it were
9 part of a judicial proceeding.

10 Q. Then it could have been released to the
11 employer?

12 A. It is possible. That's not ever
13 happened so I can't speak to that.

14 Q. Did the contract say that one of the
15 exceptions to privacy is that this type of
16 information can be released in an administrative
17 proceeding?

18 A. Would this be an administrative
19 proceeding?

20 MR. WALLINGER: Objection, relevance.

21 MR. SMITH: I am asking what is on the
22 contract again.

23 THE COURT: Overruled.

24 THE WITNESS: According to the
25 contract, I don't know what evidence number this

1 is, but under use and disclosure of following
2 protected health information does not require
3 consent. No. 4, uses and disclosures for judicial
4 and administrative proceedings. Judicial I believe
5 is what we are participating in.

6 BY MR. SMITH:

7 Q. Right.

8 A. In defense of myself, this is the
9 document in which I drafted and that was submitted
10 to our subject matter expert.

11 Q. And an administrative proceeding could
12 include a proceeding in front of the employee
13 commission?

14 A. Possibly, but it wasn't.

15 Q. I am simply asking what the terms of
16 that contract are again is what I am trying to
17 understand. And this document could be released
18 for health and oversight activities?

19 A. I suppose it could, but it wasn't.

20 Q. I am simply trying to understand the
21 terms of that contract. On page 4 starting where
22 we reviewed the profile XT?

23 A. Yes, sir.

24 Q. Can you read -- we reviewed the profile
25 XT test again together and the next sentence?

1 A. This is regarding this evidence before
2 we took a break?

3 Q. Right.

4 A. The profile suggested inflexibility and
5 inability to accommodate.

6 Q. How did you arrive at that conclusion?

7 A. Well, I arrived at that conclusion four
8 years later upon reviewing my notes which I don't
9 write everything down in the event that records
10 have to be released against my wishes or yours. So
11 the notes are primarily just to keep track of what
12 was discussed during our sessions. And so as I
13 mentioned earlier, the accomodation as you have
14 pointed out as well on this placement report, it
15 suggests that you scored quite highly. And I
16 contend that I made an error in that statement
17 because again the profile report suggested that
18 you're a nine, but again I'm not an expert. I
19 don't know about this instrument.

20 Q. The -- your perception of me was that I
21 was judgmental. Was that also stated in the
22 document?

23 A. I am sorry. Where are you reading
24 from?

25 Q. Would you -- without reading through

1 would you agree that you had determined that I was
2 judgmental and inflexible?

3 A. I haven't read over this document in
4 the last couple of days. Can you -- I surmise that
5 you are referring to it's in writing?

6 Q. Do you recall in session at all what --
7 do you recall any of our sessions? It was a while
8 back.

9 A. I recall our sessions to an extent.

10 Q. Just any mental impression about why
11 you thought I was judgmental and inflexible?

12 A. What is a mental impression? I am
13 sorry.

14 MR. WALLINGER: Objection.

15 THE COURT: Overruled.

16 THE WITNESS: What do you mean by
17 mental impression?

18 BY MR. SMITH:

19 Q. I am asking for your opinion on how you
20 arrived at the conclusion that I was judgmental and
21 inflexible?

22 A. The inflexibility perhaps with not
23 being willing to engage in the role-play for
24 example.

25 Q. Was I opinionated?

1 A. I think we're all full of opinions.

2 Q. Would you describe me as opinionated?

3 A. I don't know if I would use that
4 adjective necessarily.

5 Q. Am I open minded?

6 A. I don't know if I would use those words
7 either necessarily.

8 Q. Can you read what Dr. Thomas Walsh, you
9 know what the score was, just read what his
10 statements were in the profile XT?

11 A. It's a very lengthy document.

12 Q. Just under accommodating is what I am
13 asking just to establish those three statements?

14 A. Sure.

15 Q. What does accommodating mean in that
16 document? What does accommodating mean?

17 A. Says tendency to be friendly,
18 cooperative, agreeable, to be a team person.

19 Q. And then his comments written below the
20 graphical score there?

21 A. "Mr. Smith shares a high commitment to
22 reducing conflict and establishing cooperation. He
23 is comfortable working as part of a team and with
24 sharing ideas and information. Tracy tends to
25 minimize problems and negative information. He is

1 quick to seek solutions which are acceptable to
2 everyone. He is highly motivated by an informal,
3 positive and relaxed work environment. Mr. Smith
4 is quick to accommodate others to avoid
5 interpersonal conflicts."

6 Q. So you would agree that statement
7 differs from the statement that is in your work
8 product?

9 A. I believe I admitted to that during
10 deposition.

11 Q. Is it possible that I'm very
12 opinionated, but also open minded? Are those two
13 mutually exclusive? Can one be opinionated as well
14 as being open minded?

15 A. I suppose depending on the context.

16 Q. You're familiar with the release of
17 this document?

18 A. The DRG that Ms. Gainey drafted up when
19 you requested your records?

20 Q. Do you need a copy of it?

21 A. If we are going to speak to it.

22 Q. Actually here is the one that's on
23 record. This is Exhibit 6. You did not actually
24 produce this document, Ms. Gainey produced this
25 document?

1 A. That is correct. It appears to be her
2 handwriting.

3 Q. Can you explain what this document
4 says?

5 A. It's a typical document designated
6 record set that would share when session began,
7 when session ended in terms of dates, total number
8 of sessions, procedure code for treatment modality,
9 frequency of treatment.

10 Q. Can I ask you a question about the CBT
11 code for treatment modality. What is 90801? Do
12 you have any idea what that means?

13 A. I do not off the top of my head know
14 what those specific items mean. The procedure
15 codes are numerous.

16 Q. Would you agree that tests were given
17 during our sessions?

18 A. Right.

19 Q. And under symptoms would you agree that
20 no symptoms were found with the exception of other
21 problems?

22 A. According to the person who completed
23 this form, yes.

24 Q. And what were the other problems?

25 A. Occupational problem.

1 Q. Do you concur with that?

2 A. I do.

3 Q. And under functionality it says
4 abnormal?

5 A. Um-hmm.

6 Q. And the reason being? What's the
7 reason Ms. Gainey gives for abnormal functionality?

8 A. You should probably have asked her when
9 she was on the stand.

10 Q. Isn't it on the form right here?

11 A. It is. I didn't complete this form.

12 Q. Do you have any understanding of what
13 Axis I is?

14 A. Axis I can be typically medical
15 diagnosis, but it also can include those medical
16 diagnoses that would also be found in the DSM-V to
17 include depression and things of that nature.

18 Q. You would agree with the paper Ms.
19 Gainey stated it was an occupational problem seems
20 to -- does that concur with your diagnosis?

21 A. My working diagnosis? Yes.

22 Q. It was an occupational problem. And
23 are there any other diagnoses that you believe are
24 attributable or relevant to me? Did you find any
25 other diagnosis other than occupational problem?

1 A. I'm not going down that road in this
2 courthouse. So no, I am sticking with
3 occupational.

4 Q. And what does GAF mean?

5 A. That is global assessment of
6 functioning. It is no longer utilized in the
7 DSM-V. It's somewhat subjective, but there are
8 descriptions as to what would constitute a hundred
9 or what would constitute a zero and 50 meaning, you
10 know, somewhere middle of the road. So according
11 to this you were above middle of the road in terms
12 of your global functioning scale.

13 Q. What is the normal scale for an
14 individual?

15 A. What's normal? Define that for me,
16 please, because I have yet to see normal.

17 Q. A mean score?

18 A. It's a zero to 100.

19 Q. Do you have any idea where 70 lies
20 relative to the mean?

21 A. I don't recall off the top of my head.
22 I'd have to refer to the DSM which is typically
23 what had been done back then.

24 Q. And under progress at the last session
25 it says about the same; is that correct?

1 A. That's correct.

2 Q. So it was not getting better or getting
3 worse, is that --

4 A. That's what she concluded.

5 Q. Do you concur with that conclusion? I
6 did see you last, right?

7 A. That is correct. When we saw each
8 other last you had just been terminated so I
9 wouldn't suspect that this would necessarily reveal
10 that.

11 Q. Prognosis of the last session? What is
12 the result of report on that?

13 A. It would suggest kind of middle of the
14 road. Neither good nor bad. There's definitely an
15 unsure about it. So it's guarded. They could go
16 either -- could have gone either way.

17 Q. So prognosis was not good; fair
18 statement?

19 A. No, because then it would have said
20 poor.

21 Q. You concur with the diagnosis that
22 occupational problem was my --

23 A. Probably for the fifth time, yes.

24 Q. I am sorry. I am just trying to be
25 thorough. I don't mean to -- on page 4 on the

1 second paragraph, you start where you explain that
2 EAP?

3 A. Right here? "I explained that EAP is
4 neutral and my goal is to promote employer/employee
5 satisfaction and productivity." Would you like me
6 to continue?

7 Q. That's fine. And is that the first
8 time you had told me that?

9 A. I don't recall. You had asked me
10 specifically that session which is why I documented
11 that.

12 Q. Is it documented anywhere else in this
13 document?

14 A. I don't believe so.

15 Q. And that was the last session and my
16 mother had accompanied me; is that correct?

17 A. It appears so, yes. That was
18 December 18th which was the last session.

19 Q. On the last page you state, "In my
20 opinion I have not deviated from any standard of
21 care applicable to my professional EAP services nor
22 have I done anything improper or unethical. My
23 limited communications with Smith's employer were
24 proper in scope and were with Smith's express
25 permission." Are those your words?

1 A. I don't know if those are precisely my
2 words, but that's most certainly my intent that I
3 concur with.

4 Q. Did you write this document?

5 A. I wrote the majority of the document,
6 yes, I did.

7 Q. Did anybody else write parts of this
8 document?

9 A. Maybe not some of the format of the
10 final draft of it, but I concurred with it. I
11 signed it.

12 Q. Are those your words "in my opinion"?

13 A. I may not have used the word "deviated."

14 Q. Who -- I am asking who wrote that and
15 do you agree with it?

16 A. I do agree with it. I signed it.

17 Q. So those are your words today in court?

18 A. If you are asking do I agree with what
19 is written in this document, I would agree with
20 what is written in the document. As you pointed
21 out about the accommodating factor, I have already
22 admitted to that having been an error on my part
23 after four years.

24 Q. Would you say this document was written
25 to influence your expert witness?

1 A. As I believe I have stated earlier, no.
2 This is not the only document which he received.

3 Q. Were you employed by Ms. Gainey to find
4 a problem that did not exist?

5 A. Can you be a bit more specific as to
6 what you are referring to?

7 Q. Do you believe you were employed by Ms.
8 Gainey to find a problem that did not exist?

9 A. You just repeated the question. Are
10 you asking me a problem with you, a problem with
11 your employer, a problem with the refrigerator? I
12 don't understand.

13 MR. SMITH: Am I supposed to object?

14 THE COURT: Pardon?

15 MR. SMITH: Can I ask the witness to
16 answer the question?

17 THE COURT: Repeat your question.

18 BY MR. SMITH:

19 Q. Were you employed by Ms. Gainey to find
20 a problem that did not exist?

21 A. No.

22 Q. So what problem existed?

23 A. You have an occupational problem.

24 Q. Not interpersonal problems?

25 A. That was part of it.

1 Q. Is there a diagnosis code for
2 interpersonal problems?

3 A. Not specifically, no.

4 Q. Is there a diagnosis code that might
5 indicate interpersonal problems more specific than
6 occupational problem?

7 A. With the new CPD codes version 11 there
8 are thousands upon thousands. There's one if you
9 get struck by an orca. There's probably one that
10 would apply that there is an interpersonal problem.
11 I can't say for certain.

12 Q. To your knowledge the diagnosis of
13 occupational problem was made by Ms. Gainey?

14 A. As she indicated on the DRG, that is
15 correct.

16 Q. And when was that diagnosis made? When
17 did you become aware of that diagnosis?

18 A. I really have answered or tried to
19 answer that question to the best of my ability. I
20 don't recall the exact session or date in which I
21 personally concluded that that was the diagnosis.

22 Q. Would you agree we began therapeutic
23 treatment prior to a diagnosis being determined?

24 A. Part of the treatment is exploration.
25 It's not uncommon to start with an idea of what it

1 was that had brought you to session. It was
2 clearly occupational, but it's fluid.

3 Q. Were you predisposed to find
4 interpersonal problems as the diagnosis?

5 A. That was what I understood that you
6 were being referred to EAP services for.

7 Q. So it's fair to say that based on why I
8 was being referred to EAP services you presumed
9 that interpersonal problems must be an issue?

10 A. I'm a professional. I will start with
11 what is presented and I will explore to determine
12 if that is accurate, inaccurate, if there is some
13 validity to it or there's not some validity to it.
14 But occupational is a very global diagnosis. You
15 came to us as a result of a referral from your
16 employer as a result of your job which is your
17 occupation.

18 Q. Would it be fair to say when you spoke
19 to Clint Lewis on October 23rd that you believed
20 therapy to improve interpersonal problems was
21 warranted by the diagnosis?

22 A. Well, there was certainly indication
23 that there were interpersonal problems. You
24 admitted as much; whether it be on your behalf,
25 maybe not so much as your belief, but on the part

1 of the employer or, excuse me, the colleague that
2 took deference to you.

3 Q. When did I indicate that interpersonal
4 problems were the root cause of my occupational
5 problems?

6 A. That was what I had to explore with
7 you.

8 Q. I did not state that in session?

9 A. I don't recall if you stated it or did
10 not state it.

11 Q. In fact, I argued against that in
12 session?

13 A. Perhaps.

14 Q. I ask again were you employed to find a
15 problem that did not exist?

16 A. No, sir.

17 Q. Do you believe your conduct cost me the
18 vote of Clint Lucas at Showa Denko?

19 A. As I responded to that question
20 probably two hours ago, I haven't changed my mind,
21 so no.

22 Q. I am almost done, Your Honor. Did you
23 make the disclosure to Clint Lucas, president of
24 HR, to bolster your purported diagnosis that
25 interpersonal problems were the root cause of my

1 occupational problems?

2 A. No. I purported that we were going to
3 continue to explore that possibility.

4 Q. Did you do -- make those disclosures
5 because I would not concede that my interpersonal
6 skills were the root cause of the problems at Showa
7 Denko?

8 A. Say that one more time.

9 Q. Would you concede that because I would
10 not concede that interpersonal problems were the
11 root cause that you in your discussion with Clint
12 Lucas, you made the statements to bolster the
13 designation to fit your skill set?

14 A. You lost me.

15 Q. When you spoke to Clint Lucas were you
16 bolstering the diagnosis of interpersonal problems?
17 Do you know what the word "bolster" means or to --

18 A. Yes, I do understand that. It's a very
19 long question.

20 Q. Were you looking for validation that
21 interpersonal problems were the root cause of the
22 problem?

23 A. I was not looking for validation.

24 Q. Did you receive evidence from Clint
25 Lucas that --

1 A. Only what he reported.

2 Q. And then you said that you would
3 continue treatment with the goal of improving my
4 interpersonal skills?

5 A. Exploring it and seeing if that indeed
6 is a root cause of the problems that were
7 presented.

8 Q. I will ask one last time. What is the
9 origin of the duty to the employer?

10 A. What do you mean by origin?

11 Q. There are no written contracts between
12 SAVE and Showa Denko that you are aware of?

13 A. If that's what Ms. Gainey stated.

14 Q. Just that you are aware of? You not
15 aware of any agreements?

16 A. Correct.

17 Q. And so I am trying to understand where
18 the dual obligation comes from.

19 A. The dual obligation referring to the
20 client dual?

21 Q. Right. Normally -- would a layperson
22 assume when they entered a clinical counselor's
23 office that that clinical counselor had a duty only
24 to the patient? Would that be a reasonable
25 assumption by a layperson?

1 A. Any time that I have had an employer
2 referred -- well, employer referral I make it very
3 clear that there's a dual relationship at stake.
4 And this is all explained as we are completing the
5 release of information form and the purpose behind
6 that.

7 Q. Can you read that from that contract?

8 A. What would you like me to read?

9 Q. I am trying to find the part that says
10 that you have a duty to the company, to the
11 employer?

12 A. This form is used for many different
13 types of releases. So whether or not -- there's no
14 specific form that states just that. This is a
15 general release of information that we tailor for
16 the purposes. Why else would I be communicating
17 with your employer? Why else have you signed it?

18 Q. Again, a layperson entering your
19 office, would he assume that you have a duty, a
20 trust relationship to me as the patient?

21 A. If you are suggesting I didn't explain
22 this to you prior to you signing this, I don't know
23 where to go with that. Like I said, it's a very
24 important detail which would have been explained.
25 Had you had any questions prior to signing it we

1 would have explored that further.

2 Q. So your testimony is now that you did
3 explain the dual relationship to me?

4 A. My testimony has never changed in that
5 regard. I don't believe you have asked me that
6 specifically. That's what makes EAP unique from
7 just a typical therapeutic counselor practice.

8 Q. On the last -- first page, last
9 paragraph?

10 A. "I went over with Smith and had him
11 execute an employee statement of understanding
12 which is self-explanatory."

13 Q. Let me ask you this: If it were
14 self-explanatory did I need explanation? Would you
15 agree I am a reasonably intelligent person?

16 A. Is that a question?

17 Q. Yes. Do you believe I'm a reasonably
18 intelligent person?

19 A. Yes, sir.

20 Q. And so you're asserting that those
21 contracts are self-explanatory; is that correct?

22 A. That's correct.

23 MR. SMITH: Nothing further.

24 THE COURT: All right. Cross?

25 MR. WALLINGER: Well, he's my witness,

1 Your Honor, I can either do my --

2 THE COURT: You can do it any way on
3 how you examine him, but I don't see any reason
4 since he is the only witness we have got left to
5 have him sit down and then come back up.

6 MR. WALLINGER: That's fine. Am I
7 protected as to the stage at which I would make my
8 motions?

9 THE COURT: You are.

10 MR. WALLINGER: Thank you.

11 (DFT. EXH. 19 was marked for
12 identification.)

13 MR. WALLINGER: Your Honor, I need just
14 a minute to put this exhibit back together so I can
15 use it.

16 THE COURT: All right.

17 (Brief pause.)

18 THE COURT: Let's take ten so you can
19 get a few minutes to get organized.

20 MR. WALLINGER: Thank you, Your Honor.

21 (A recess transpired.)

22 THE COURT: Ready?

23 MR. WALLINGER: I am, Your Honor.

24 CROSS-EXAMINATION

25 MR. WALLINGER:

1 Q. Jonathan, I'm going to ask you some
2 questions.

3 A. Yes, sir.

4 Q. And try to fill in some areas that you
5 have not been able to testify sufficiently about
6 yet. First of all, can you tell us how old you
7 are?

8 A. I am 46.

9 Q. Are you single or married?

10 A. I'm married.

11 Q. How long have you been married?

12 A. It will be 20 years on Flag Day, so the
13 14th, next Wednesday.

14 Q. Do you have any children?

15 A. I have three children.

16 Q. And how long have you lived in the
17 Charleston area?

18 A. Since 1995.

19 Q. I'm going to hand you Defendant's
20 Exhibit 19 which is a copy of your vitae from which
21 I have redacted your telephone number and your home
22 address and your e-mail. What I would like to do
23 is just kind of go backward very quickly. What
24 year did you get your undergraduate degree from
25 Florida State?

1 A. That would have been 1994.

2 Q. And where did you obtain your masters?

3 A. Obtained it at Florida State
4 University.

5 Q. What year?

6 A. 1999.

7 Q. And what was the first year that you
8 had the certification as a licensed independent
9 social worker?

10 A. That would have been 2004. Hold on.
11 2003, excuse me.

12 Q. All right. So insofar as that from the
13 time you first obtained that certification where
14 have you practiced?

15 A. Well, I have been with the VA for
16 20 years..

17 Q. Let's start at the beginning. You
18 initially worked with youth; is that correct?

19 A. When I received certification for --
20 you mean when I got my license?

21 Q. Yes, sir.

22 A. So after graduating from Florida State
23 with my masters I worked with youth at a risk
24 shelter for a couple years and then I worked at --
25 in a methadone clinic in North Charleston for

1 several months, then I became employed where I had
2 done my internship which would be the Ralph H.
3 Johnson Medical Center downtown here. That would
4 have been in 1999 the fall.

5 Q. So have you worked full time for the VA
6 hospital in Charleston since 1999?

7 A. I have.

8 Q. And have you been a social worker and a
9 counselor in some role thereof since?

10 A. Of course SAVE, Inc.

11 Q. I don't mean SAVE. Let's talk about
12 the VA first.

13 A. Sure.

14 Q. At the VA have you worked as a
15 counselor and licensed independent social worker in
16 a clinical practice?

17 A. Yes.

18 Q. And currently do you supervise others?

19 A. I do.

20 Q. How many people do you supervise?

21 A. At this very moment?

22 Q. Yes.

23 A. About 60.

24 Q. And is there a significant counseling
25 component to what those people do?

1 A. There is.

2 Q. Do you also see and counsel veterans
3 directly?

4 A. I do.

5 Q. Have you done that for years at the VA?

6 A. I have.

7 Q. Is it fair to assume at this point then
8 that you have counseled hundreds of veterans?

9 A. Easily.

10 Q. Now, you started working part time with
11 SAVE, Inc.; is that right?

12 A. Correct.

13 Q. When did that begin?

14 A. 2004.

15 Q. Have you worked part time continually
16 since 2004 with SAVE, Inc.?

17 A. Correct.

18 Q. And your legal relationship to SAVE,
19 Inc. is that you are an independent contractor,
20 correct?

21 A. That is correct.

22 Q. And you are paid an hourly rate for
23 seeing or doing whatever you're doing while you're
24 there?

25 A. That is correct.

1 Q. And individuals are referred to you by
2 SAVE, Inc.?

3 A. Yes.

4 Q. And SAVE, Inc. is an EAP; is that
5 right?

6 A. It is.

7 Q. And that stands for employment
8 assistance program?

9 A. Correct.

10 Q. Is it safe to say at this point then
11 that you have counseled and assisted hundreds of
12 people at SAVE, Inc. in your part-time efforts
13 there?

14 A. It would be fair to say that, yes.

15 Q. Other than this case have you ever been
16 sued for any kind of breach of contract or claim of
17 any kind?

18 A. I have not.

19 Q. Have you ever had a professional
20 complaint made to any disciplinary or regulatory
21 authority about you?

22 A. I have not.

23 Q. And you currently have in good standing
24 a license independent social worker certification
25 with the State of South Carolina?

1 A. I do.

2 Q. And you did in 2012?

3 A. I did.

4 Q. Do social workers have training,
5 experience and expertise in how to counsel and help
6 people?

7 A. Basically, yes.

8 Q. Is some of what social workers do
9 similar to what licensed professional counselors
10 do?

11 A. Yes.

12 Q. Is some of what social workers do
13 similar to what psychologists do?

14 A. To an extent, yes.

15 Q. Understanding that there are other
16 things that each discipline may do differently, can
17 a licensed independent social worker work in an EAP
18 and provide counseling to EAP clients or patients?

19 A. Yes.

20 Q. Does the social worker need to
21 understand how the EAP process works as part of
22 that?

23 A. The business?

24 Q. No, the nature of the relationship to
25 the client and to the employer?

1 A. Has to have a knowledge base that that
2 exists.

3 Q. Okay. Are you familiar with the
4 professional obligations that a licensed
5 independent social worker working in an EAP setting
6 would need to comply with and meet?

7 A. Yes.

8 Q. You heard testimony earlier in the week
9 from an expert witness, Mr. Krasilovsky from Emery
10 University?

11 A. Correct.

12 Q. And during his testimony he mentioned
13 the applicability of certain South Carolina
14 statutes governing social work?

15 A. Correct.

16 Q. Do you remember that? Do you agree
17 that as a social worker in an EAP setting that you
18 are obligated to comply with those standards?

19 A. I do.

20 Q. Mr. Krasilovsky also mentioned the
21 South Carolina promulgated regulations addressing
22 social work practice. Do you remember that
23 testimony?

24 A. I do.

25 Q. Do you agree that you are obligated to

1 comply with those --

2 A. I do.

3 Q. -- rules?

4 A. I do.

5 Q. And he also mentioned and I marked as
6 an exhibit, Exhibit 16, a code of ethics set out by
7 the National Association of Social Workers?

8 A. I am familiar with that.

9 Q. Do you agree that your duties need to
10 be done in compliance with and meet whatever those
11 standards are?

12 A. Absolutely.

13 Q. And all of those address in particular
14 confidentiality of patient information, correct?

15 A. It does cover that, yes.

16 Q. To your knowledge are those sources of
17 information the information that SAVE would have
18 expected you to comply with in performing your
19 obligations relative to Mr. Smith?

20 A. Yes.

21 Q. Now, you are not a certified employee
22 assistance professional also known as a CEAP?

23 A. That's correct.

24 Q. You have not applied to become one
25 today, correct?

1 A. That's correct.

2 Q. Is it your testimony that you do not
3 believe you are obligated to follow those not being
4 a member of or certified within that organization?

5 A. I'm not obligated having not -- I do
6 not hold that certification, correct.

7 Q. All right. So insofar as your various
8 educational background and your work experience, do
9 you believe that in 2012 you were qualified to and
10 capable of providing counseling and EAP services to
11 the Plaintiff, Mr. Smith?

12 A. I did.

13 Q. I'm going to hand you what's been
14 marked as Defendant's Exhibit 6 which is a packet
15 of documents that's already been introduced into
16 evidence, been testified to be the file that SAVE,
17 Inc. had on Tracy Smith. I'm going to give you and
18 ask you to turn to the page that has the Bates
19 label at the bottom 28. Got blue ink. Do you
20 recognize that document?

21 A. I do.

22 Q. And for the record is that a SAVE, Inc.
23 authorization for release of protected health
24 information?

25 A. Yes, it is.

1 Q. And did you assist in completing that
2 document to the extent any writing needed to be put
3 on it?

4 A. I did.

5 Q. And was that the authorization which
6 Plaintiff Tracy Smith signed on September 25, 2017?

7 A. That is correct.

8 Q. Did you also sign it?

9 A. Yes, I did.

10 Q. There is a reference at the beginning
11 at the top to certain categories of information
12 that could be revealed or communicated by SAVE,
13 Inc. or you to the employer Showa Denko Carbon, in
14 particular Mr. Lucas; is that right?

15 A. That is correct.

16 Q. Did that document indicate that dates
17 of sessions could be communicated to Mr. Lewis?

18 A. That is correct.

19 Q. Did that document indicate that
20 progress of Mr. Smith could be communicated?

21 A. That is correct.

22 Q. Can you indicate whether or not the
23 document indicated that telephone exchange of
24 information of that category was permissible?

25 A. Yes.

1 Q. Can you state whether the document
2 permitted disclosure of your recommendations to Mr.
3 Lucas?

4 A. That is correct.

5 Q. Can you state whether this document
6 authorized disclosure of Mr. Smith's attendance at
7 and participation and compliance at SAVE, Inc.?

8 A. That is correct.

9 Q. All right. Now, let's turn over to the
10 next page, Bates No. 29.

11 A. (Witness complies with request.)

12 Q. And do you recognize that document?

13 A. I do.

14 Q. That is -- well, just tell us what that
15 is, briefly.

16 A. It's a cancellation no show policy and
17 it also includes insurance copay and deductible
18 what our policy is.

19 Q. Let's turn over to the next page,
20 page 30. It's a two-page document, continues on to
21 Bates 31 and it's a pink paper document. Do you
22 see that?

23 A. I do.

24 Q. Can you explain what the name of that
25 document is?

1 A. It's SAVE, Inc. employee statement of
2 understanding.

3 Q. Okay. And does that document among
4 other things explain what SAVE would offer in the
5 way of services and how the employee assistance
6 program works and what confidentiality rules would
7 be followed?

8 A. That's correct.

9 Q. And did you sign that document on
10 September 25, 2012?

11 A. Yes, I did.

12 Q. Did Mr. Smith sign it?

13 A. Yes, he did.

14 Q. With regard to these three documents we
15 have been over which I will call the blue, the
16 white and the pink, did you explain to Mr. Smith
17 what those documents were and why he needed to sign
18 them?

19 A. To a degree, yes, I did.

20 Q. All right. And was he coherent while
21 he was with you?

22 A. He appeared to be.

23 Q. Did he appear to be impaired in any way
24 as to his mental function in terms of being able to
25 understand or not understand you?

1 A. He did not appear to be.

2 Q. Did he look at the documents after they
3 were presented to him?

4 A. I would presume so. He did sign it.

5 Q. All right. And was there any question
6 in your mind about whether Mr. Smith had seen,
7 understood and agreed to the information set out in
8 those documents?

9 A. None.

10 Q. Is that information information that
11 would be provided to any client coming in for EAP
12 counseling if it's a referral from an employer?

13 A. It would be provided to every client.

14 Q. Okay. So I think what I would like to
15 do now is to move on to and have you just identify
16 for the record whether the documents contained in
17 that exhibit appear to be a complete set of
18 whatever information that you had looked at,
19 generated or dealt with while counseling Mr. Smith.

20 A. It is.

21 Q. Now, Ms. Gainey had seen Mr. Smith
22 before he was referred to you; is that right?

23 A. That is correct.

24 Q. Now, I'm going to hand you the document
25 that has been referenced many times, Plaintiff's

1 Exhibit 1, which is a narrative statement that you
2 have signed and testified about already. And I
3 want to ask you a few questions about it. First of
4 all, this document did not exist before the lawsuit
5 was filed, correct?

6 A. That is correct.

7 Q. And it is not part of SAVE's file to
8 your knowledge?

9 A. That is correct.

10 Q. This document was prepared after you
11 were served with this lawsuit?

12 A. Correct.

13 Q. And at that point it was over three
14 years after your last contact with Mr. Smith; is
15 that right?

16 A. Correct.

17 Q. What I would like to do is go to page
18 one, three-quarters of the way down which starts
19 with the paragraph I saw Smith for a total. Do you
20 see that?

21 A. I do.

22 Q. I would like you to just read slowly
23 enough that the court reporter can easily keep up
24 the information that is contained in that, and if I
25 can interrupt you which I will try not to do

1 frequently, it will be because I might want to ask
2 you a question or two, okay?

3 A. Starting with Smith for six sessions.

4 Q. Yes, sir.

5 A. "I saw Smith for a total of six
6 sessions between September 25th and December 18th,
7 2012. I understand that Smith had been referred to
8 SAVE by employer's human resource director Clint
9 Lucas as part of a disciplinary action by employer
10 against Smith. On September 25th, 2012, Smith
11 arrived for his session with me. I went over with
12 Smith and had him execute employee statement of
13 understanding which is self-explanatory. I also
14 went over with Smith and had him execute an
15 authorization for release of protected health
16 information. That agreement states that Smith
17 expressly consented to my communicating," I believe
18 that's in, it's a smudged copy, "In person or
19 telephonically certain information to employer such
20 as dates of my sessions with Smith, progress and my
21 sessions with Smith, Smith's compliance and
22 attendance and participating in the sessions and my
23 recommendations as to Mr. Smith's ability to engage
24 in the therapeutic process.

25 That signed agreement was faxed to

1 employer HR director as I understand it. On that
2 date Smith in his session reported to me that he
3 was on administrative leave. He understood that he
4 was there as a result of disciplinary action.
5 Smith stated that IT department employee had
6 overheard Smith yelling and cursing at another IT
7 team member which Smith denied doing.

8 Smith stated that he had believed that
9 some of his team members resented him because he
10 "plays the course and not the people." Smith
11 explained that he was brought in by employer IT
12 manager to eventually take on the role as IT
13 manager. Smith stated when he started with
14 employer Smith wanted to integrate the employers
15 network as a personal goal, but he came to conclude
16 that he was there for data management and not for
17 systems improvement. Through anecdotes Smith
18 shared quote unquote evidence of his value to
19 employer and Smith presented a file folder of
20 alleged evidence (e-mails, spreadsheets, et
21 cetera). Smith came across in that session as
22 somewhat self-depreciating. "I tend to ramble,"
23 but also as grandiose. "I'm the most qualified to
24 act as the IT manager."

25 Q. Incidentally, does the word

1 depreciating actually mean deprecating?

2 A. It's deprecating, apologize.

3 Q. Go ahead.

4 A. "Smith indicated that his "outburst" at
5 work was reported by a "spiteful coworker" and
6 Smith minimized the incident. Smith admitted to
7 job dissatisfaction and not receiving validation
8 for his ideas on technical mastery. Our next
9 session goal was to work on his interpersonal
10 relationship and communication skills. On
11 September 26th I called employer and reported that
12 Smith had attended EAP counseling the day prior.
13 Again, before seeing this client I understood from
14 my coworker Ms. Gainey that Mr. Smith was on
15 administrative leave and that the referral to SAVE
16 was supervisor mandated.

17 The next session was on October 9th,
18 2012. Smith arrived 30 minutes late to the session
19 and reported that his "car" was on fire. Smith
20 brought with him a folder containing more evidence/
21 data. Smith was difficult to redirect during the
22 session and I asked him not to bring the data
23 folder to future sessions in order to let us focus
24 on interpersonal skills. Smith stated that he
25 thought employer was "squeezing" out the older work

1 force. Smith stated that his aspiration was to
2 complete a working product (network goal) as I have
3 previously stated as a "direct link" to upper
4 management. He also stated that in the two years
5 of employment there the company was always quote
6 contentious as it was in quote recovery from an
7 earlier incident.

8 I asked Smith about his prior work
9 experience and he reported some consultant work and
10 work at All State, Brooks Hill and some accounting.
11 Smith mentioned that he scored low. He reported
12 that he "sidesteps" that issue but Smith was still
13 perceived as aggressive. I offered to role-play at
14 our next session the part of the employer or
15 coworker in order to facilitate identification of a
16 positive communication style while alerting Mr.
17 Smith to ineffective or condescending speech. I
18 was unable to initiate interpersonal or
19 communication skill building this session due to
20 Smith's late arrival and his insistence on speaking
21 to his evidence and data. Later I notified
22 employer (HR) of Smith's attendance at that
23 session.

24 The next session was on October 23rd,
25 2012. I recall that Smith did not intend to

1 propose to management his ideas then to help --
2 excuse me -- I recall that Smith did not intend to
3 propose to management his idea then to help improve
4 the company and that Smith declined to participate
5 in role-play. The session focused on Mr. Smith's
6 personal background and family. Smith reported
7 that he had a "survivor" mentality and a quote
8 nurturing solitude. He described some traits of
9 his parents and siblings. Smith indicated he had
10 dated someone for seven years. He believed
11 marriage was for having kids and for financial
12 benefit. Smith's personal goals included
13 developing a professional accounting system,
14 maintaining health and having a quote cash cushion
15 and growing fruit trees on a farm in Louisiana.
16 Smith indicated his parents wanted him to settle
17 down and buy a house.

18 At some point that day I spoke with
19 Clint Lucas, the human resources director at
20 employer. Smith submitted -- Lucas indicated that
21 Smith was still not forming constructive
22 relationships at employer. Smith was offending
23 people. Smith was talking down to supervisors and
24 coworkers and Smith was trying to change their
25 system.

1 I indicated to Lucas my continuing EAP
2 goal of improving Smith's interpersonal skills."

3 Q. Let me stop you there. Let's go back
4 to Defendant's Exhibit 6, the packet from the file.
5 If you will turn to page Bates 7 which is not
6 colored.

7 A. (Witness complies with request.)

8 Q. That is note from an activity on
9 September 4th of '12; is that right?

10 A. That is correct.

11 Q. That was prior to your involvement?

12 A. That's correct.

13 Q. And according to the notes there
14 regarding this referral did Showa Denko indicate
15 some difficulty with Smith's interpersonal skills?

16 A. That they did.

17 Q. So when you spoke to Mr. Lucas on that
18 date you just read from your statement which I
19 think you said was in October?

20 A. 23.

21 Q. Right. And told him that your
22 continuing EAP goal was on improving Smith's
23 interpersonal skills, you are not telling him
24 anything that he didn't already know?

25 A. That is correct.

1 Q. What you told him in essence was I'm
2 working on the thing that is the same thing that
3 Smith was referred for?

4 A. That is correct.

5 Q. And nothing else was said to Mr. Lucas
6 about Mr. Smith's state of health or these other
7 details that you have already mentioned that you
8 had learned to that point forward?

9 A. That's correct.

10 Q. Okay. So from your perspective as an
11 EAP professional was there anything improper about
12 telling Mr. Lucas, the HR manager, that you were
13 working on improving his EAP --

14 MR. SMITH: Objection.

15 Q. His interpersonal skills?

16 THE COURT: What?

17 MR. SMITH: Assumes -- I believe the
18 premise of the question is not true.

19 THE COURT: Overruled.

20 BY MR. WALLINGER:

21 Q. Just to repeat the question. When you
22 spoke with Mr. Lucas on October 23, 2012, and
23 communicated that you were working on improving
24 Smith's interpersonal skills, in your opinion were
25 you communicating something that was appropriate

1 within the scope of EAP professional services?

2 A. It was.

3 Q. And in your opinion was that
4 information true?

5 A. It was.

6 Q. And based upon the prior authorization
7 for release of protected health information, which
8 is Bates 28 in that packet, was that a telephone
9 exchange?

10 A. It was.

11 Q. And was that a report on progress?

12 A. It was.

13 Q. Did you provide any diagnosis or
14 assessment to Mr. Lucas on the thing that's not
15 checked here?

16 A. I did not.

17 Q. Did you provide any kind of test result
18 block that's not checked?

19 A. Did not.

20 Q. Did you provide any symptoms, one of
21 the blocks not checked here?

22 A. I did not.

23 Q. So that was, what, the third time that
24 you had spoken to Mr. Lucas?

25 A. I believe so, yes.

1 Q. So the first two times were to just
2 tell him or leave that message that Smith had had
3 his appointment?

4 A. Yes, sir.

5 Q. Did you speak with Mr. Lucas again
6 after October 23, 2012?

7 A. I don't believe that I had. There was
8 no requirement to have done so necessarily.

9 Q. All right. So let's pick up then where
10 you had just stopped.

11 A. Would that have been I indicated to
12 Lucas my continuing EAP goal?

13 Q. Yes. Right after that when after it
14 says improving Smith's interpersonal skills. I
15 think that might be where you stopped.

16 A. "We discussed nothing that went beyond
17 that. Nothing that went beyond the proper scope of
18 such an EAP plan and/or any employer feedback. And
19 we discussed nothing outside the categories of and
20 limitations on information Smith had authorized me
21 and SAVE to disclose to the employer. Again,
22 employer's stated goal for Mr. Smith was to assist
23 him with developing better interpersonal skills,
24 more specifically to be able to better articulate
25 his ideas in a manner less "offensive" and more

1 "palatable" in order to form more constructive
2 working relationships.

3 The next session was on November 13th,
4 2012. Smith arrived on time and brought along a
5 professional profile. (Profile XT, Grenell
6 Consulting Group LLC." Smith indicated that the
7 profile (test) was completed on him and some other
8 colleagues. The profile was dated 8-28-2011.
9 Profile documents showed many positive traits but
10 also that Smith was rigid and judgmental which he
11 has been of his employer and colleagues. Smith
12 stated "I know my failures."

13 We then focused on Smith's
14 interpersonal skills, but also explored his job,
15 culture and dynamics. Smith reported that
16 employees were like the TV show "Survivor" and
17 people there were getting pushed out. Smith
18 believed that it would be best for employer to have
19 a better company culture but that "now the best
20 defense is offense." Smith viewed his job as a
21 career stepping stone. Smith was not open to the
22 concept of having more willingness to admit
23 mistakes in order to gain trust with his colleagues
24 and to help a better work culture for increased
25 productivity. Smith indicated that he felt he

1 "inherited" employer's problems. Interpersonal
2 skills training begins with a robust education on
3 interpersonal dynamics, identification of his
4 interactive style and communication pattern which
5 Smith would only superficially explore with me. I
6 did not to the best of my recollection inform
7 employer of this session and employer did not
8 contact SAVE to inquire about whether Smith had
9 attended the session. There was no requirement I
10 contact the employer.

11 The next session was on December 4th,
12 2012. Smith arrived on time for the session and
13 was cooperative and fully participatory in process.
14 He reported that he had initially resented EAP
15 sessions, but no longer did. He expressed
16 frustration with employer and immediate supervisors
17 regarding implementing change. Smith wanted to
18 remain employed for his quote resume but he had
19 hoped to make an "impact" that would be noticed
20 (i.e. system networking) as I previously mentioned.
21 We reviewed the profile XT again together. The
22 profile suggested inflexibility and inability to
23 accommodate. Smith considered asking employer more
24 directly for its "recommendations" and specifically
25 whether Smith should leave employment as part of a

1 growth opportunity. We discussed Smith finding a
2 mentor in his profession and he stated that he has
3 one in mind. I did not to the best of my
4 recollection inform employer of this session and
5 his employer don't contact SAVE to inquire about
6 whether Smith had attended.

7 The last session was on December 18th,
8 2012. Smith arrived early to session joined by his
9 mother. I required his mother to execute the same
10 confidentiality agreements and authorizations that
11 Smith had previously executed. Smith appeared
12 agitated and defensive. He indicated his mother
13 was present as a "witness." Smith asked me to
14 explain my role, my professional background and to
15 describe EAP's services and my relationship with
16 Smith's employer which I did.

17 I explained that EAP is neutral and my
18 goal is to promote employer/employee satisfaction
19 and productivity. Smith then reported that he was
20 "fired" that morning. Smith stated his intention
21 to retain an attorney. The remainder of our
22 session was not particularly productive. I have
23 had no further sessions with Smith."

24 Q. So let me stop you there. Based upon
25 what we have been over then, you did not become

1 aware of Mr. Smith's termination or of the
2 employer's decision to terminate Smith until that
3 day in December that he came in for his last
4 session?

5 A. The 18th, correct.

6 Q. And prior to that date had the employer
7 or its representative indicated to you they were
8 going to terminate Mr. Smith?

9 A. Prior to that date? No, sir.

10 Q. And had he ever asked you for any
11 recommendation regarding the issue of whether to
12 terminate Mr. Smith?

13 A. No, sir.

14 Q. So that's roughly seven weeks between
15 the October 23rd session you had when you last
16 contacted Mr. Lucas and when Smith came in and said
17 he was terminated; is that right?

18 A. Sure, yes.

19 Q. With two sessions in between those
20 dates, correct?

21 A. Yes.

22 Q. Now, after this lawsuit was filed and
23 various discovery was done under authority of the
24 court did you become aware at some point of what I
25 will hand you what is Defendant's Exhibit 18 which

1 was the one-page termination notice or memo?

2 A. After the lawsuit was filed? Correct.

3 Q. And you were here when Mr. Wing
4 testified earlier this week?

5 A. I was.

6 Q. And do you have an understanding both
7 from that exhibit and from his testimony of whether
8 Mr. Smith was terminated for getting involved in IT
9 department hardware needs?

10 A. That was my understanding, yes.

11 Q. During the course of your sessions and
12 counseling with Mr. Smith and up until his last
13 session with you had you been aware of any issue
14 with Mr. Smith getting involved in IT hardware
15 needs or disobeying an order by Mr. Wing?

16 A. I did not have knowledge of that.

17 Q. With respect to the confidentiality
18 documents that were in the SAVE file that started
19 the 28th and went all the way over to 30, did you
20 cosign those documents if they had a cosignature as
21 a representative of SAVE?

22 A. As a representative, yes.

23 Q. All right. And can we agree then Mr.
24 Smith's agreement as referenced in those documents
25 was between him and SAVE?

1 A. Correct.

2 Q. Having said that, you would agree that
3 as a contractor an agent of SAVE would have been
4 bound to follow that agreement, correct?

5 A. Correct.

6 Q. Let's move on. Mr. Smith's lawsuit
7 against you alleges that you failed to obtain an
8 adequate history and understanding of his work
9 environment.

10 A. Yes.

11 Q. Did you in your opinion obtain an
12 adequate history and understanding of his work
13 environment?

14 A. I believe so, yes.

15 Q. His lawsuit alleges that you failed to
16 provide adequate assistance, treatment and
17 counseling of him. Are you aware of that
18 allegation?

19 A. I am.

20 Q. Do you believe that you provided
21 adequate assistance, treatment and counseling of
22 him?

23 A. I do.

24 Q. While no longer a cause of action being
25 pursued in this case, there was in the past an

1 assertion by Mr. Smith that you intentionally
2 inflicted emotional distress upon him. Did you at
3 any time do that?

4 A. I did not.

5 THE COURT: He has withdrawn that cause
6 of action.

7 MR. WALLINGER: All right.

8 MR. SMITH: Objection for the record.

9 THE COURT: I was just pointing out you
10 withdrew, didn't you, on Monday?

11 MR. SMITH: Right. I object to the
12 question Mr. Wallinger made.

13 THE COURT: Okay. No harm no foul.

14 BY MR. WALLINGER:

15 Q. Mr. Smith's lawsuit also alleges that
16 you breached a duty to obtain peer consultation
17 from other people or agencies to reconcile his dual
18 obligation -- your dual obligation to him and to
19 Showa Denko. Are you aware of that?

20 A. I am.

21 Q. Do you believe in your opinion you had
22 any duty to obtain a peer consultation from other
23 people or agencies?

24 A. I did not.

25 Q. Were you qualified to counsel Mr. Smith

1 based upon what -- how he presented and the
2 information you had and the issues that you saw to
3 deal with?

4 A. I do.

5 Q. Did you ever make any false
6 representation to Mr. Smith?

7 A. I did not.

8 Q. In your opinion did you obtain
9 appropriate and adequate informed consent from Mr.
10 Smith at the time that he signed the documents we
11 have been over?

12 A. I did.

13 Q. The remainder of the statements we had
14 had you read from that you have not read yet in the
15 record, aside from whatever issue you have already
16 corrected in the past testimony, do you agree and
17 stand by that information?

18 A. I do.

19 Q. I think those are all the questions I
20 have. If there is any cross-examination please
21 answer those questions.

22 THE COURT: All right. Do you have any
23 redirect?

24 MR. SMITH: I do briefly, Your Honor.

25 REDIRECT EXAMINATION

1 BY MR. SMITH:

2 Q. Mr. Kessler, you just said that you
3 believe you obtained informed consent from me; is
4 that correct?

5 A. That is correct.

6 Q. Whose duty would it be to insure that
7 informed consent had been arrived at?

8 A. It would be both parties honestly.

9 Q. Is that personal opinion or --

10 A. No, it would be both parties. You
11 would have to have been informed to be able to
12 provide consent, you were informed and you provided
13 consent. If you had a question I would have been
14 there to respond or answer.

15 Q. Do you understand in a -- to your --
16 that in a trust relationship one party is dominant
17 over the other party?

18 A. Not necessarily.

19 Q. Can you -- when you say necessarily,
20 can you elaborate further?

21 A. Sure. There's -- most individuals in
22 which I counsel or couples for that matter are on
23 equal footing. There is no dominant. I am not
24 there to judge. I am not there to pick sides.

25 Q. An example you just gave, both would be

1 patients in that case; is that correct?

2 A. They would be clients.

3 Q. Would they both be patients?

4 A. Patients, clients, sure.

5 Q. Was Showa Denko a patient?

6 A. They are not a patient.

7 Q. But they are a client?

8 A. They're a client of SAVE.

9 Q. Mr. Wallinger used the term informed
10 consent. Do you know what that means?

11 A. I have already been over that.

12 Q. Am I correct you said earlier that it
13 was my duty to ask questions of this
14 self-explanatory contract if I did not understand
15 it; is that correct?

16 A. If you want to use the word duty,
17 that's up to you. But --

18 Q. That's my word.

19 A. You had the opportunity at the time
20 before signing something and there was no reason
21 for me to think that you were all -- that you were
22 impaired or incapable or incompetent.

23 Q. Do you believe I had all the
24 information I needed to consent to that agreement?

25 A. I do.

1 Q. In your work product you describe in
2 the last session that you explained the dual nature
3 of the relationship; is that correct?

4 A. Correct. And we have talked about that
5 as well as I recall.

6 Q. In your document -- nowhere in your
7 document do you say that you provided that
8 information to me; is that correct?

9 A. I am sorry?

10 Q. In your document prior to that last
11 session there is no evidence that you told me that
12 you had --

13 A. This was already six pages long. I
14 didn't go line by line minute by minute for the six
15 sessions in which you and I had met.

16 Q. And you produced that document from
17 your notes; is that correct?

18 A. Correct.

19 Q. So in your notes is there any
20 indication that you had explained to me there was a
21 dual obligation in your role to both me and to the
22 employer?

23 A. As I have pointed out several hours
24 ago, when an employee is referred by the employer
25 prior to initiating a release of information there

1 would have been full explanation of why information
2 must be shared back to the employer.

3 Q. Is it possible I believed that the
4 reason you had shared the date of the sessions was
5 because I was obligated to attend sessions and that
6 I relied on you to provide the date of the sessions
7 to show human resources that I was complying with
8 their mandate that I see you?

9 A. That was part of it.

10 Q. At any time did you -- did you tell me
11 that you had a duty to Showa Denko?

12 A. A duty to do what?

13 Q. At any time did you tell me that you
14 had a duty to Showa Denko?

15 A. Specifically what duty?

16 Q. Any duty?

17 A. That's what you would have signed the
18 release permitting me to be able to communicate
19 with them which was an expectation of theirs.

20 Q. Would you say the communication to
21 Showa Denko regarding attendance was basically a
22 condition of my employment?

23 A. That I have no knowledge of. That's
24 your employer -- what they chose to do with that
25 information was -- it was up to them.

1 Q. Am I correct that the last
2 communication you had with Clint Lucas was the
3 communication where you stated it was your
4 continuing EAP goal to work on my interpersonal
5 skills?

6 A. To the best of my recollection that was
7 it.

8 Q. And you communicated with Clint Lucas
9 about the previous sessions; was that correct?

10 A. Either by speaking with him or leaving
11 a voice mail that you had attended.

12 Q. So you let him know about attendance.
13 Up until that communication where you actually
14 talked to him about the treatments you were
15 pursuing with me?

16 A. That's correct.

17 Q. And then there was no communication
18 after that?

19 A. Not to my recollection.

20 Q. No communication of the dates of the
21 attendance?

22 A. Not to my recollection.

23 Q. Why wouldn't we go ahead and keep
24 communicating if you -- why wouldn't you continue
25 to communicate that information after that?

1 A. It's not a requirement. It wasn't part
2 of the duty as you are stating it to be.

3 Q. Duty to who?

4 A. As you said, a duty to your former
5 employer.

6 Q. Was it the duty to me to inform my
7 employer that I was attending sessions regularly as
8 required? That duty was owed to me, wasn't it?

9 A. In cases that I have had in which the
10 employee was referred to me it was never required
11 that every single session be reported back, nor had
12 it been every single time.

13 Q. Where would that requirement come from?
14 Where would a requirement to contact the employer
15 to let them know that you were attending sessions
16 as required, where would that requirement of you
17 come from?

18 A. The employer would like to know whether
19 or not their employee is participating. If they
20 had any question or concern then they also had the
21 ability to contact SAVE during business hours to
22 make an inquiry of that.

23 Q. Was it my duty to notify the employer
24 that I was attending sessions?

25 A. You could have done so if you had

1 wished. It was not a duty.

2 Q. But you did it for the first couple of
3 sessions; you talked to Clint Lucas, he said I was
4 still having trouble forming constructive
5 relationships allegedly with certain people and the
6 organization. You told him of your continuing --
7 can you repeat your words, your continuing effort
8 to improve my interpersonal skills, but you never
9 notified him after that of any sessions?

10 A. There's no obligation to have done so.

11 Q. What would create such an obligation?

12 A. If he said I need to know every single
13 session Mr. Smith has attended or not attended.

14 Q. In your position and trusted
15 relationship as the dominant party you don't
16 believe it would be --

17 A. I'm not a dominant party here. I am
18 sorry. You are putting that expectation on me. I
19 am trying to suggest that's not the dynamic.

20 Q. Am I a patient of yours in that
21 setting?

22 A. You are a client.

23 Q. Is this a health care setting?

24 A. I'm there -- I was there in the attempt
25 to help you.

1 Q. Is this a health care setting?

2 A. It's not a doctor's office.

3 Q. So is it your testimony this is not a
4 health care setting?

5 A. It's not a doctor's office.

6 Q. You are a licensed independent social
7 worker. Can you give me your honest opinion is
8 this a health care setting or not?

9 A. It could be defined as that I'm sure.

10 Q. When I came in do you think I assumed
11 it was a health care setting?

12 A. I do not know what you assumed or did
13 not assume.

14 Q. Do you believe a reasonable layperson
15 would assume it's a health care setting?

16 A. To some people it's a place where they
17 go see a shrink. Doesn't mean they are right or
18 wrong.

19 Q. Are you a shrink?

20 THE COURT: That's really not a thing,
21 all right? It's what people call a psychiatrist,
22 but it's really not a thing. Okay?

23 MR. SMITH: Your Honor, this is for the
24 relevance. I believe that he sees himself in that
25 fashion as a counselor and that's where --

1 THE COURT: Well, ask him if he's a
2 psychiatrist or a psychologist, but to ask him
3 something that is really just -- it's not a thing.

4 MR. SMITH: It's an utterance, Your
5 Honor. I just wanted to make it clear on the
6 record.

7 THE COURT: Whatever.

8 BY MR. SMITH:

9 Q. Implicit in the communication with
10 Clint Lucas -- is there a diagnosis implicit to the
11 communication with Clint Lucas?

12 A. It was an occupational problem that had
13 brought you to SAVE, Inc. What he implied from my
14 communication with him is whatever he implied from
15 my communication with him. I do not know.

16 Q. By telling him that you were -- a
17 course of treatment included working on
18 interpersonal skills weren't you confirming a
19 diagnosis that I had problems with interpersonal
20 skills?

21 A. I am sorry, Your Honor. I feel like I
22 have addressed this before, at least it feels very
23 familiar to me. I will answer the question.

24 THE COURT: Sorry, I didn't hear you.

25 THE WITNESS: I feel like I have

1 addressed this before. I'm willing to answer the
2 question again if need be.

3 THE COURT: It's been trod over, so if
4 you got new material.

5 MR. SMITH: These are coming from the
6 notes of Mr. -- to the best of my ability from Mr.
7 Wallinger. I am just trying to refine a few
8 points. I am almost done, Your Honor.

9 THE COURT: Proceed.

10 BY MR. SMITH:

11 Q. Is this the form that I signed with
12 Sarah Gainey?

13 A. Appears to be so.

14 Q. And this is the form you say I signed
15 with you, correct?

16 A. We have already established that that's
17 correct.

18 Q. And we have established that treatment
19 planning is not checked; is that correct?

20 A. Already established that, yes.

21 Q. So have we established there was no
22 diagnosis prior to when you spoke with Clint for
23 the last time?

24 A. Sure.

25 Q. You also said there was -- regarding

1 contacting Clint Lewis there was no requirement to
2 do so necessarily. Is that your statement?

3 A. Yes.

4 Q. When you say necessarily, what would
5 have made it necessary for you to contact Clint
6 Lewis?

7 A. I have already answered that. Had he
8 said I really require you, Mr. Kessler, or SAVE,
9 Inc. to notify me each and every session that Mr.
10 Smith has attended, has not attended, if he were
11 late, if he arrived early so and so forth.

12 Q. Would that have been a written
13 agreement?

14 A. Not necessarily. I never wrote
15 anything to the man.

16 Q. Was the obligation on me to make sure
17 that my counselor contacted my employer and told
18 him that I was attending?

19 A. I don't know what he and you agreed on
20 prior to coming to SAVE. That was not made known
21 to me.

22 Q. And it was my duty to inform you of why
23 I was there?

24 A. We had that. It's in this file right
25 here when the receptionist took the referral

1 information down for Mr. Lucas.

2 Q. You were bound to follow the SAVE
3 agreement; is that correct?

4 A. As an employee a -- obligated to
5 follow, yes.

6 Q. And what is that agreement with SAVE,
7 Inc.?

8 MR. WALLINGER: Your Honor, objection.
9 I can't even understand what that question is.
10 What is the agreement.

11 THE COURT: How about rephrase the
12 question.

13 BY MR. SMITH:

14 Q. What is your agreement with SAVE, Inc.?

15 A. That's the same question.

16 THE COURT: Do you have a contract? Is
17 it in evidence?

18 THE WITNESS: No, it is not.

19 THE COURT: Okay.

20 MR. SMITH: I made a motion to compel.

21 THE COURT: I am trying to -- I'm not
22 trying to favor you, but I have been cutting you a
23 lot of slack, all right? On redirect you are
24 limited with your lawyer to discussing matters he
25 brought up in cross. If this wasn't brought up by

1 you or by him --

2 MR. SMITH: Mr. Wallinger brought it
3 up.

4 THE COURT: It wasn't in evidence.

5 MR. SMITH: Mr. Wallinger said -- Mr.
6 Wallinger said -- I can have the transcriptionist
7 read back -- address the issue of he's an agent of
8 SAVE and bound to follow the SAVE agreement. I am
9 asking --

10 THE COURT: Go ahead.

11 MR. SMITH: -- what the agreement is.

12 THE COURT: If it is not in evidence
13 it's not in evidence.

14 MR. SMITH: I've made a motion to
15 compel the documents from SAVE, Inc.

16 MR. WALLINGER: Your Honor, this is why
17 I objected to the question because he's
18 misconstruing testimony. The witness testified
19 that he followed the agreement that he signed on
20 SAVE letterhead. He is not talking about some -- I
21 didn't even bring up a contract or agreement
22 because there is no written agreement. So this
23 testimony he is asking about is confusing that he's
24 getting into some other agreement that I didn't
25 even address at all. He has had two and-a-half

1 hours of direct exam of my client. I took 25 to
2 30 minutes of cross of my client and now we are
3 heading for another hour of questioning that I
4 perceive have long since been asked and dealt with
5 already.

6 THE COURT: Sustained. So just go on
7 to the next question you have.

8 BY MR. SMITH:

9 Q. There was no obligation emanating from
10 the agreement with SAVE for you to contact my
11 employer regarding dates of services; is that your
12 testimony?

13 A. Correct.

14 Q. You stated that I was not willing to
15 admit mistakes in your document or seemed unwilling
16 to admit mistakes. On what do you base that
17 assertion?

18 A. Would you me like to use examples from
19 today?

20 THE COURT: I'm sorry?

21 Q. You understand this is a little
22 different proceeding than our counseling sessions.
23 I am a Plaintiff in this case and I have the right
24 -- you are an adverse party and I have the right to
25 ask you questions that are adverse to your

1 interests.

2 THE COURT: What was the question?

3 MR. SMITH: I asked -- he said that I
4 was not willing to make -- to admit mistakes. I am
5 asking him on what he bases that assertion on.

6 THE COURT: If you can answer it answer
7 it.

8 THE WITNESS: One suggestion. Your
9 perspective is that you are in this survivor like
10 work environment because this colleague who felt
11 threatened. Well, there is another possibility,
12 Mr. Smith. In reading those e-mails it could come
13 across that you are following your own agenda and
14 trying to pursue your own interests and feel that
15 because someone else is taking issue with it and
16 saying let me out of it that perhaps actually
17 that's your problem and not everybody else's. So
18 you come across at times as not being able to admit
19 as perhaps you're the problem, Mr. Smith.

20 MR. SMITH: Your Honor, he just brought
21 up the issue of these e-mails. I know the Court is
22 not eager to go through these e-mails again.

23 THE COURT: So we are not going to.

24 MR. SMITH: I object to his statement
25 he made as nonresponsive.

1 THE COURT: Overruled.

2 BY MR. SMITH:

3 Q. Aside from the e-mail a specific
4 example as you just described?

5 A. I did. When an employee said count me
6 out of this, I want nothing further to do with this
7 incident, this discussion, this whatever it might
8 have been. That was my example.

9 Q. Who is the employee?

10 A. I fail to see the relevance. I don't
11 know who the employee was.

12 THE COURT: I couldn't hear what you
13 are saying.

14 A. I just said that I am having trouble
15 seeing the relevance to that particular question.
16 I don't recall the employee specifically, I am
17 sorry.

18 THE COURT: Okay. He doesn't know then
19 the answer to your question.

20 BY MR. SMITH:

21 Q. Do you believe it's appropriate to base
22 your conclusions on hearsay that is not
23 corroborated as to the source?

24 A. You brought me hearsay. You could have
25 edited those e-mails and I would have never known.

1 Q. Are you suggesting that I edited those
2 e-mails?

3 A. I am suggesting that you're asking
4 about hearsay. It goes both ways which is why I
5 would prefer to have communication with you and
6 your perception of what is happening as opposed to
7 going over a file demonstrating your expertise on
8 what it is you do which was never in question and
9 some select e-mails that you chose and selected to
10 bring to me to demonstrate your side.

11 Q. You say there was never in question.
12 How do you know that?

13 A. I wasn't there to judge your
14 capabilities at your workplace.

15 Q. You said with the e-mails my
16 professional skills were never in question. That
17 is -- actually I would offer that's not true.

18 A. You came to us as a result of your
19 employer saying you lacked the interpersonal
20 skills. You did not come to us for me to determine
21 if you had the technical skills to perform your
22 job.

23 Q. Nor was I asking you to determine
24 whether I had the technical skills to do my job. I
25 was asking you to read the e-mails so that you

1 could understand where people were being
2 cooperative and where they were not being
3 cooperative.

4 A. And we did and we -- I attempted to
5 have us move on.

6 Q. Did I agree that that was what was
7 needed in the situation?

8 A. That what was needed?

9 Q. Needed to move on and not address the
10 issues illustrated in these e-mails? Did I agree
11 with that?

12 A. I don't recall.

13 Q. You said that I was hard to redirect;
14 isn't that true?

15 A. That is true.

16 Q. Did I agree on a course of treatment
17 with you?

18 A. I don't recall. You could have
19 withdrawn and said I'm not interested in
20 participating in those any longer. I request
21 another therapist. I request a referral from the
22 agency to another agency. You did none of those
23 things.

24 Q. That was my duty to do those things?

25 A. It was not your duty. It was your

1 option.

2 Q. Did you have an obligation to inform me
3 of those options?

4 A. I did not.

5 Q. And did you?

6 A. I said I did not.

7 Q. Did you inform me of any of those
8 options?

9 A. It wasn't an issue at the time.

10 Q. Did you inform me of any of those
11 options?

12 A. It wasn't a matter at the time to have
13 brought forth. It was not relevant at that time.

14 Q. Mr. Kessler, please answer the
15 questions. Is the answer no, you did not do that?
16 You did not refer me to anyone else?

17 A. No, I did not. I have already
18 established that. I did not refer you to anyone
19 else.

20 Q. And did you believe I could trust -- do
21 you believe I can trust you?

22 A. I don't know what you believe, whether
23 you could have trusted me or not trusted me. It
24 appears that you were resistant. You stated in one
25 session that you felt resentful for having to come

1 to these sessions. That's understandable. Whether
2 or not you believed you could trust me I do not
3 know. Sometimes it takes many sessions to develop
4 that rapport and trust.

5 Q. You did not inform me of any
6 communication with Clint Lucas; is that correct?

7 A. It is right here. That is what was
8 communicated. I wasn't obligated to tell you what
9 it was that I was going to communicate of more than
10 what you signed.

11 Q. Specific and meaningful communication
12 of what was said?

13 A. We have already been over this, Mr.
14 Smith.

15 MR. WALLINGER: Your Honor, I object
16 and I agree. I think this was asked and answered.

17 THE COURT: We have beaten this line of
18 questioning to death so if you got something else
19 then we will talk about it. But we are just
20 rehashing what we hashed over a dozen times already
21 today.

22 BY MR. SMITH:

23 Q. Were you employed to find a problem
24 that did not exist?

25 A. I have already been over that as well,

1 Mr. Smith.

2 THE COURT: You have asked that I don't
3 know how many times. Do you have anything on
4 recross?

5 MR. WALLINGER: I do not.

6 THE COURT: You may step down. Do you
7 have any other witnesses that you intend to call?

8 MR. WALLINGER: I do not.

9 THE COURT: Do you have any other
10 witnesses that you intend to call?

11 MR. SMITH: I do not.

12 THE COURT: So everybody had rested?

13 MR. WALLINGER: He had mentioned
14 something to offering designations and I don't know
15 if he still wants to do it.

16 THE COURT: Are you putting in a
17 deposition?

18 MR. SMITH: I would put in the three
19 depositions, myself, Kessler and Gainey are on the
20 record; is that correct?

21 MR. WALLINGER: I have introduced the
22 depositions. Whether he wants to designate to have
23 Your Honor hear page and line is up to him.

24 MR. SMITH: Can you put them in there
25 so you can read them?

1 THE COURT: That's the point of it.

2 MR. SMITH: Right. I would do that,
3 yes, Your Honor.

4 THE COURT: Whose? Is there somebody
5 that's not already in? That's what I am asking.
6 Are you putting in anything new?

7 MR. SMITH: No, Your Honor. I just
8 want to be sure these three depositions are in and
9 I believe they are, so no, Your Honor.

10 THE COURT: Okay. All right. Then you
11 have been asking me for two days to make a motion
12 and I have -- we have gone so far out of order in
13 order to accommodate other witnesses. We are at
14 the point where you can make your motions that you
15 could have made yesterday probably.

16 MR. SMITH: Your Honor, I would like to
17 -- one question. If I am out of order I apologize.
18 I do have a motion to compel the documents from
19 Sarah Gainey. Have you -- is it appropriate to
20 rule on that at this time?

21 MR. WALLINGER: That was already denied
22 before trial, Your Honor, Tuesday morning.

23 MR. SMITH: I thought you took it under
24 advisement, but motion to produce the documents
25 from Sarah Gainey related to their documents on the

1 subpoena, for all documents related to her
2 agreements with Mr. Kessler and with Showa Denko.

3 THE COURT: That was a motion that I
4 heard?

5 MR. WALLINGER: He made a discovery
6 motion either Friday or over the weekend, I don't
7 know, and it was one of the things that we
8 mentioned Tuesday morning before the case was --

9 THE COURT: You mean Monday morning?

10 MR. WALLINGER: Yes, sir, I am sorry.
11 Monday morning before trial began there was three
12 pretrial motions.

13 THE COURT: What is the documents that
14 he wants?

15 MR. WALLINGER: He wanted documents
16 relating to their relationship to the employer and
17 any contract they had with my client and they have
18 already indicated through their counsel they don't
19 have any documents to give him.

20 MR. SMITH: I asked for all documents.
21 I asked -- I would also ask the identified versions
22 of these documents with employees of Showa Denko be
23 considered in that motion to compel.

24 THE COURT: The lawyer has responded by
25 saying they don't have any documents responsive to

1 your request. I gather that has already been
2 produced. You have the entire file.

3 MR. SMITH: That is myself, Your Honor.
4 I am questioning the trade practices of this
5 organization and to prove that I should have access
6 to these documents to prove that there are --

7 THE COURT: You have them in your hand.

8 MR. SMITH: Of other people, of the
9 other people to establish the pattern of unfair
10 trade practices by this enterprise.

11 THE COURT: You want other peoples
12 files? You are not getting those. We would have
13 to have --

14 MR. SMITH: For the record --

15 THE COURT: We would have to give every
16 single one of those people the opportunity to come
17 in and object for privacy reasons just like you
18 and --

19 MR. SMITH: Based on this agreement you
20 don't, Your Honor, with all due respect. He
21 identified -- it would be certainly fine to have --
22 to see what checked boxes are typically checked for
23 the typical patient of SAVE. I am making the
24 motion if you --

25 THE COURT: All right.

1 MR. SMITH: For the record.

2 THE COURT: And your motion is denied.

3 All right. Do you have motions that you want to
4 make?

5 MR. WALLINGER: I do, Your Honor.

6 THE COURT: You can sit down while he's
7 talking.

8 MR. WALLINGER: As a preliminary
9 matter, I need to clarify that the pro se complaint
10 is somewhat unclear as to what causes of action are
11 actually claimed because he made a motion to amend
12 the complaint before trial that has not yet been
13 ruled upon to add three more causes of action. I
14 am a little uncertain as to what I have to argue
15 against in trial to defeat.

16 With that said, I will just make an
17 argument what I think I am dealing with and then we
18 can go from there if the Court would allow me to do
19 that.

20 THE COURT: Well, let me look at this.
21 Again, they are kind of scattered, but based on
22 what I see is left I would say there is a breach of
23 contract cause of action, there's a
24 misrepresentation cause of action, there's a breach
25 of fiduciary duty cause of action and a negligence

1 cause of action.

2 MR. WALLINGER: All right. And his
3 motion to amend which has not been technically
4 granted or denied seeks to add three more causes of
5 actions. One is South Carolina Unfair Trade
6 Practices Act, one is tortious interference with a
7 contract, and the third is tortious interference
8 with prospective economic advantage. Okay.

9 THE COURT: Okay. You can address
10 those as well.

11 MR. WALLINGER: At this time the
12 defense will make a motion which we were prepared
13 to make and I think for the record technically it
14 is retroactively made at the close of the
15 Plaintiff's case.

16 THE COURT: Hold on one second. Do you
17 need a break?

18 THE REPORTER: We can go a little
19 longer.

20 MR. WALLINGER: We are now as I
21 understand at the close of the Plaintiff's and the
22 defense's case and I would make a motion for a
23 directed verdict in favor of the Defendant and for
24 dismissal with prejudice of the suit and all of the
25 causes of action that are alleged or attempted to

1 be alleged. I will briefly break these down into
2 two groups of issues. One are legal issues. The
3 second are factual issues based upon the evidence
4 in the trial.

5 With regard to the legal issues, as to
6 the breach of contract cause of action, the
7 Plaintiff had a contract with SAVE, Inc. Mr.
8 Kessler as the representative of SAVE signed that
9 contract. The breach of contract cause of action
10 fails as a matter of law because there is no
11 contract between my client and the Plaintiff. I
12 would also assert as I did in the motion for
13 summary judgment that that cause of action is
14 barred by the statute of limitations in that it is
15 alleged that the actual conduct happened in October
16 of 2012. The suit was filed on December 18, 2015,
17 which was three years to the day after the
18 Plaintiff was fired.

19 So the issue for the Court is whether
20 the firing was the first notice of any damage or
21 not.

22 As to the breach of contract cause of
23 action, finally I would argue that there has been
24 no proof of the type of damages that can be
25 recoverable in contract. The Plaintiff has

1 basically alleged through the suit and allegations
2 and the statements two kind of damages, emotional
3 distress and lost earnings from the position that
4 he held. One cannot in a breach of contract cause
5 of action obtain emotional distress damages.

6 There's an old case that I can hand up, I have got
7 it in the box somewhere. It's a pretty sound
8 principle of law, that emotional distress can't
9 just flow from a tort cause of action.

10 The second issue is there has been no
11 evidence at all of what damage, if any,
12 economically Mr. Smith has had from losing his job.

13 For all we know, he went and got a new
14 job the next day. For all we know, he did not want
15 another job after losing the job he had. But there
16 was no testimony from him or any other witness that
17 he called to establish a single cent of lost
18 pecuniary damages. And so legally and factually I
19 submit that the directed verdict on the breach of
20 contract cause of action should be granted.

21 On the misrepresentation cause of
22 action, Your Honor, the elements of that are proof
23 of a false representation to the Plaintiff by the
24 Defendant, that the Defendant had a pecuniary
25 interest in making a statement, that the Defendant

1 owed a duty to only communicate truthful
2 information, that the Defendant breached the duty
3 by failing to exercise due care, that the Plaintiff
4 justifiably relied on the representation and the
5 Plaintiff suffered pecuniary loss as a result of
6 reliance on the representation.

7 I would submit that was a failure of
8 proof factually on those elements. That there is
9 no reasonable inference to be drawn by the fact
10 finder in this case that could support that. I
11 would renew as well the position that the claim is
12 barred by the statute of limitations based upon the
13 date of the alleged tortious conduct.

14 As to the breach of fiduciary duty
15 cause of action, I would argue that there is no
16 fiduciary duty in the context of a counseling
17 relationship with the patient and that the
18 standards of care are set by the sources of
19 information that our expert witness has already
20 identified and also because EAP services
21 necessarily are providing services to two parties,
22 the employer and the employee. It is impossible to
23 have a fiduciary duty because you're dealing with
24 more than one person in a fiduciary relationship as
25 such that there is always just the professional and

1 the other. And I think that's barred by the
2 statute of limitations.

3 As to the negligence cause of action,
4 there was some discussion during the case about
5 whether general simple ordinary negligence could be
6 pursued or whether a professional negligence claim
7 had to be asserted. I think the Court can glean
8 from the nature of this case that this is not a
9 case of a person having a slip and fall in a
10 clinician's office or being hit with a blunt
11 instrument in the clinician's office. The
12 complaint here is the nature of the specialized
13 counseling services, in particular, the duty of
14 confidentiality and how broad or narrow that is.
15 It is my position that those are specialized things
16 that a layperson cannot prove on their own and that
17 expert testimony is required to prove those and
18 that he has not offered any expert testimony to
19 support his claim of negligence.

20 And I would just mention the case of
21 Griffin Plumbing 351 S.C. 459, 570 S.E. 2d 197 from
22 the court of appeals of 2002 that in essence there
23 has to be expert testimony to support a claim of
24 professional negligence and there has been none.
25 And his claim fails as a matter of law and proof

1 from that.

2 I would argue for the record again the
3 statute of limitations would bar the claim. The
4 defense to those causes of action I have already
5 been over is principally consent. And I would also
6 argue that there is no reasonable inference from
7 the evidence available other than the Plaintiff
8 consented to the communications that my client
9 made.

10 Additionally, I would say that there is
11 no reference from the evidence other than what he
12 did communicate was squarely within what he was
13 allowed to do. And Mr. Kessler's testimony as the
14 last witness is fresh in our mind and there is no
15 showing of him having communicated anything more
16 than what is in the record. And notably Mr. Smith
17 did not bring in Mr. Lucas to see if Mr. Lucas had
18 any testimony the same or different on the issue.
19 And so there's a failure of proof of anything my
20 client said being the cause or a cause of the
21 Plaintiff's termination. The only evidence in the
22 record is that the Plaintiff disobeyed the
23 supervisor's instructions to not get involved in
24 hardware analysis and procurement, that the
25 Plaintiff disobeyed those instructions and that the

1 supervisor had had enough and terminated him.

2 As far as the tortious interference
3 with contract cause of action has the elements of
4 proof of a contract, the Defendant wrongdoer's
5 knowledge of that contract, the Defendant's
6 intentional procurement of the breach of the
7 contract, the absence of justification for the
8 breach, and damage flowing from that. I have put
9 in evidence, Your Honor, the application of the
10 Plaintiff which showed that it was an at will
11 employment relationship. There was no contract
12 between the Plaintiff and the employer that could
13 be breached through procurement and there is a
14 failure of proof of any of those elements and it
15 would be barred by the statute of limitations.

16 As to the tortious interference with
17 prospective economic advantage, I will take the
18 same position that there was no interference and
19 there was no proof or reasonable inference
20 otherwise.

21 With regard to the South Carolina
22 Unfair Trade Practice Act cause of action, there
23 was a failure of proof. In addition as a matter of
24 law, it would be my client's position that he is a
25 licensed clinician in a regulated profession and

1 that pursuant to the act and the statute, the act
2 does not apply him. He would be exempt from that
3 and I would support that by the case of Ward vs.
4 Dick Dyer and Associates 304 S.C. 152 403 SE 2d
5 310, 1991. There is also a total failure of proof
6 and no reasonable factual inference that the
7 Defendant engaged in an unfair or deceptive act in
8 the conduct of trade or commerce or that it
9 affected the public interest or that the Plaintiff
10 suffered monetary or property loss from those acts.

11 And I again as to all the causes of
12 action that he asserted remind the Court that
13 despite all of the discussion that the Plaintiff
14 has seen fit to have in this courtroom about what
15 should or shouldn't be done by the Defendant or by
16 the employer or anybody else, he didn't take any
17 time to put into evidence proof of the pecuniary
18 loss or of another kind of damage that's
19 recoverable. And indeed insofar as the mental
20 anguish claimed, there's no evidence of him having
21 sought treatment for that by any clinician or the
22 cost of that.

23 So for all those reasons, Your Honor,
24 the Defendant would move for a directed verdict and
25 dismissal of the cause of action with prejudice and

1 I haven't had a bench trial in a couple years, so I
2 wasn't sure if Your Honor would take this under
3 advisement to issuance of a final order, but I just
4 wanted to protect the record by making a motion at
5 this time.

6 THE COURT: All right. Thank you. All
7 right. Mr. Smith, do you want to respond?

8 MR. SMITH: Yes, Your Honor. Again I
9 am not an attorney. And is it appropriate to --
10 because I want to hit all the things he just
11 discussed, I have done my best to take notes, can I
12 get any of that from the transcript so I can go
13 down and see exactly what he's claimed?

14 THE COURT: Well, I don't have the
15 ability to give you a real-time transcript. So
16 just do your best.

17 MR. SMITH: First of all, the date of
18 October 2012 is incorrect. I have asserted that
19 the actions or inactions that caused my dismissal
20 occurred throughout -- through December through the
21 date I was terminated. I saw Mr. Kessler the date
22 I was terminated.

23 THE COURT: Let me ask you some
24 questions because maybe that will make your
25 argument a little more focused as to what I see are

1 the strengths and the weaknesses of your case, all
2 right? First of all, breach of contract. You
3 don't have a contract with him. Do you? You had a
4 contract with --

5 MR. SMITH: What is this?

6 THE COURT: That's a release, isn't it?

7 MR. SMITH: This is authorization for
8 release of protected health information.

9 THE COURT: Okay.

10 MR. SMITH: What is this? This is not
11 an agreement with Mr. Kessler in any way?

12 THE COURT: I don't know. Is that your
13 agreement with SAVE?

14 MR. SMITH: Mr. Kessler signed it.

15 THE COURT: Okay. That answers the
16 question. You -- all of the things that you are
17 claiming that he did wrong or didn't do to assist
18 you, viewing them in the light most favorable to
19 you, as I must do at this point, I don't remember
20 the gentleman's name, but the guy that fired you,
21 your supervisor said he fired you because you kept
22 messing with hardware after he repeatedly told you
23 not to do it. And he didn't know anything about
24 you talking to Mr. Kessler and it had nothing to do
25 with his decision to fire you. All right?

1 Now, in the eyes of the law, you --
2 there are a lot of people out there that have
3 causes of action. I know you are excited and you
4 want to respond, trust me, it's in your best
5 interest to be quiet and listen, all right? You
6 may have all of the elements of a cause of action,
7 but then people forget even though I may have had a
8 contract with somebody, and they breached it or I
9 may have had a fiduciary duty relationship with
10 somebody and they told somebody that they were
11 supposed to do something, or they told somebody
12 that they shouldn't have told them, you still have
13 to show that that is what caused you to lose your
14 job. That's called proximate cause. You may have
15 come across that.

16 So let's just say he, Mr. Kessler, owed
17 you a fiduciary duty. And he told Mr. Lucas when
18 he shouldn't have told Mr. Lucas something. That's
19 not what caused you to get fired. You messing with
20 the hardware is what caused you to get fired. It
21 wasn't even your interpersonal skills according to
22 Mr. -- what was his name?

23 MR. SMITH: Mr. Wing for the record.

24 THE COURT: The guy that fired you.

25 MR. WALLINGER: Wing.

1 MR. SMITH: Clint Lucas was in on the
2 discussion where they decided to terminate me.
3 That's on the record. That was Mr. Wing's
4 testimony.

5 THE COURT: Mr. Wing, that was it. Mr.
6 Wing, I asked him specifically why did you fire
7 him. And he said he was the one that fired you and
8 he fired you because of your insistence on messing
9 with hardware that he didn't have -- Mr. Kessler
10 and your getting counseling had nothing to do with
11 your getting fired and he didn't even know anything
12 about it.

13 MR. SMITH: And I would suggest --

14 THE COURT: So how do you get past that
15 proximate cause gap in your case?

16 MR. SMITH: Mr. Wing is not credible
17 first of all.

18 THE COURT: That's for me to decide.

19 MR. SMITH: I assert Mr. Wing is not
20 credible first of all. The same person who had me
21 sent to SAVE, Warren Sneed as Mr. Wing said who
22 reported to Greg Spires through the e-mails show
23 had a vendetta against me who reported it to Mr.
24 Lucas who had me sent to SAVE is the same person
25 who claimed that I was messing with hardware when I

1 didn't have the right to and the evidence is right
2 here in Mr. Wing's hand that I did have the right
3 to. That is a false statement. I had the right to
4 SDKC net, the SATS and G server, I had access to
5 those machines throughout my employment. I was
6 hired as a systems engineer. The same person who
7 made these false allegations that Mr. Kessler --
8 hearsay basically Mr. Kessler relied on is the same
9 person who set up another set of lies and I was not
10 able to -- I was not informed of those lies because
11 he broke off communication with Mr. Lucas after
12 Mr. Lucas had shared a number of harsh things,
13 never told me about them, never gave me a chance to
14 save my job. To save my job. Save. I deserve an
15 opportunity --

16 THE COURT: Let's leave it like this.
17 I'm going to give you the opportunity as I told you
18 to make your argument in writing. Because I think
19 it would help you to work through in order this
20 argument. Because one of the problems about
21 representing yourself is you cannot do it
22 dispassionately like a lawyer can. And you get
23 upset because you perceive it's not going your way.
24 That's why it is best to get a lawyer because your
25 lawyer, it's not him. He's the advocate. And

1 you're your own advocate so you can't do it
2 dispassionately. So you get upset. That's
3 understandable, but it is one of the reasons. Plus
4 you are not a lawyer so as I have told you there
5 are proof problems in your case. But I will let
6 you argue them.

7 I will just tell you my biggest issues
8 with your case is that proximate cause issue --
9 listen to me, proximate cause and damages. You put
10 in no proof of damages. Listen to me.

11 You need to address those two issues,
12 all right? You also need to address in addition to
13 the elements of the proof on some of these because
14 Mr. Wallinger has made good arguments on some of
15 these that you simply haven't proved the elements
16 of the various things, is -- there's a statute of
17 limitations issue. If the basis of your breach of
18 fiduciary duty claim is Mr. Kessler telling
19 Mr. Lucas things that he wasn't supposed to and
20 that breached confidence, well, he did that in
21 October of 2012 and you didn't file suit until more
22 than three years later in December 15th. You need
23 to address that.

24 MR. SMITH: Two years I believe.
25 Regardless I am again alleging that he did not

1 contact Mr. Lucas as he was obligated to do
2 throughout December 18th. He did not --

3 THE COURT: Okay. Mr. Smith, stop
4 again. Because I'm telling you you wear a person
5 out and I am trying to give you advice --

6 MR. SMITH: Yes, Your Honor.

7 THE COURT: -- on what the strengths
8 and weaknesses are of your case. And I'm giving
9 you time to address them in writing and I am just
10 telling you you don't have to wonder where I think
11 your strengths and weaknesses are. I just told
12 you. All right? So you need to address those.

13 MR. SMITH: Yes, Your Honor.

14 THE COURT: You don't need to argue
15 with me now. You need to address them in writing.
16 All right. I'm going to give you 30 days to do
17 that. I'm going to give Mr. Wallinger 30 days.
18 You come up with proposed orders. If you need a
19 little more time let me know before the 30th day.
20 I will consider an extension, but 30 days is a lot
21 of time. I'm sure you will get right at it. But
22 today is June the 8th. Let's see what July the 8th
23 falls on here. That is a Saturday. So July 10th
24 submit to my office here in Charleston in writing
25 your proposed order. Mr. Wallinger, same thing.

1 And then I will review them, study them and make my
2 decision after I have had a chance to think about
3 it. Okay?

4 MR. SMITH: Thank you, Your Honor. I
5 do appreciate it.

6 THE COURT: All right. Go home and get
7 some rest.

8 (These proceedings were concluded at
9 4:07 p.m., June 8, 2017, Charleston
10 County, South Carolina.)
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3 CERTIFICATE OF REPORTER

4 I, Ruth C. Weese, Registered Diplomate
5 Reporter for the State of South Carolina at Large,
6 do hereby certify that the foregoing transcript is
7 a true, accurate, and complete record.

8 I further certify that I am neither related
9 to nor counsel for any party to the cause pending
10 or interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 6th day of November, 2017 at
13 Charleston, Charleston County, South Carolina.

14 *Ruth C. Weese*
15

16 _____
17 Ruth C. Weese

18 Registered Diplomate

19 Reporter
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