

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF COLORADO

---

3 THE DIRECT MARKETING ASSOCIATION,

4                   Plaintiff,

5 v.                   Civil Action No.: 10-CV-01546-REB-CBS

6 ROXY HUBER, in her capacity as  
7 Executive Director, Colorado  
8 Department of Revenue,

9                   Defendant.

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10  
11  
12  
13                   DEPOSITION OF F. CURTIS BARRY

14  
15  
16  
17                   October 19, 2010

18                   Sandston, Virginia

19  
20  
21  
22                   HALASZ REPORTING & VIDEO

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Reported by: Mary L. Rosser, RPR

1           A     Yes.

2           Q     And do you also get a sense of what their IT  
3 costs and what their IT budgets are?

4           A     Yes.

5           Q     And what kinds of documents would you usually  
6 see or how would you get an understanding of what their  
7 IT budgets are?

8           A     Well, you know, we're often looking at  
9 proprietary profit and loss statements for the company  
10 so, you know, we'll take and understand what those costs  
11 are as a percent of net sales. You know, and it's not  
12 just one line. You're kind of interpreting half a dozen  
13 to a dozen lines. You know, the studies we do where  
14 we're looking to replace a system, we often want to -- we  
15 often have to determine what the change in the IT  
16 Department is going to be, just like we have to determine  
17 what the return on investment is going to be for a  
18 system. The systems are fairly expensive, and how  
19 they're going to get that money back is important or  
20 they're not going to spend the money unless they have to.  
21 And so we -- you know, sometimes you're going from a very  
22 old system that might be 15 or 20 years old that works  
23 well, but it's kind of reaching its limit, and you're  
24 implementing it, say, with a totally new technology that  
25 is maybe more flexible and more -- requires less

1 hand-holding or people time to manage it. So we  
2 understand those and help clients work through what those  
3 costs are and so forth.

4 Q So by the end of the process, you have a very  
5 good understanding of the company's financials and how  
6 their IT costs fit into the overall business?

7 A Not always the total financials, but we have a  
8 pretty good idea of -- we know exactly what -- not  
9 exactly. We know what we have projected the total cost  
10 to either develop and install a system is going to be as  
11 best as we can, or if they're buying a commercial system  
12 we know what the costs of the various stages through this  
13 process are going to be, and we know the modifications  
14 that are going to be required, and the services, meaning  
15 training and conversion and implementation. And the  
16 services part of the project is often 50 percent or more  
17 of the total cost because of the cost of the professional  
18 people that a vendor uses.

19 Q As the president of your company, how much time  
20 do you spend consulting versus on the general management  
21 of your company?

22 A When you have six people, you don't have a lot  
23 of general management. My wife is involved with the  
24 business part time, and she takes care of everything. So  
25 I spend a hundred -- not a hundred, but 95 percent, 90

1 (Exhibit No. 1 was  
2 marked for identification.)

3

4 BY MS. SCOVILLE:

5 Q All right. So why don't you quickly take a look  
6 at Exhibit No. 1 and just make sure this looks like a  
7 complete copy of your report, please.

8 A I believe it is.

9 Q Okay. Well, let's jump in and start on page 4,  
10 if you would. On page 4, about halfway down the page,  
11 you talk about external commercial programming rates --  
12 or from external vendors, and you give a range of \$140 to  
13 \$225 per hour. I need to understand how you arrived at  
14 these numbers.

15 A Okay. Well, as I said, I deal with proposals  
16 from vendors not every day, but, you know, much of the  
17 time so I'm continually looking at what vendors have --  
18 one, what they think the effort is to do something in a  
19 narrative form, and then how much per hour they feel that  
20 they will spend to do that modification. So it includes  
21 all the steps required to develop and program the  
22 modification, and they use different skill levels of  
23 people to do that. There would be a project manager that  
24 spends, say, 10 percent of their time, and then just  
25 various levels of programming skills to do the work, and

1 then people who QC the change and people that document  
2 and so forth. So there are all different skills and  
3 salaries.

4 Q And did you refer to any particular request for  
5 proposal when preparing this report and coming up with  
6 this range?

7 A No. I mean, I've got it in my head. I have a  
8 pretty good idea from one vendor to another what they  
9 charge, and this is typical.

10 Q Did you look at any labor market surveys?

11 A No.

12 Q What about any other sort of market survey data  
13 that would give programming rates?

14 A I deal with internal clients, programmers, and  
15 we talk about cost all the time so I don't -- you know, I  
16 have that in my head.

17 Q And how great would the variance in these rates  
18 be based on geography?

19 A They really don't.

20 Q And can you provide any sort of what I would  
21 call confidence interval for this range? You know, you  
22 see surveys that are done and they say --

23 A Plus or minus five percent.

24 Q Plus or minus five percent. All right. And how  
25 do you know that?

1 Q Okay. And would you provide the same confidence  
2 interval of 5 percent for those estimates?

3 A Yeah.

4 Q Later in the same paragraph, you say, "Well-run  
5 companies carefully budget internal IT projects." So  
6 that I can get a sense of the industry, what would the  
7 range of an IT budget be for a small retailer versus a  
8 large retailer?

9 MR. SCHAEFER: Just for clarity, do you mean the  
10 entire IT department or do you mean --

11 MS. SCOVILLE: I mean, the entire IT department.  
12 Exactly.

13 A If it's a shop that doesn't do anything new,  
14 they're just kind of maintaining what they're doing, it  
15 might be 1 to 1 1/2 percent of net sales. An average  
16 shop might be, you know, where they're doing some new  
17 things, might be 2 percent. And if it's a fast-growing  
18 company doing a lot of things where they have to trade  
19 out their systems or they have to build, say, a West  
20 Coast fulfillment center, it's going to be above that,  
21 above 2 percent.

22 BY MS. SCOVILLE:

23 Q And would that range be the same for small  
24 retailers versus large retailers?

25 A No, but it's -- it sounds logical that it should

1 be, but it's just really based on how efficient companies  
2 are, and sometimes smaller companies are a lot more  
3 efficient than bigger companies, so I've learned that  
4 it's not always size.

5 Q And can you translate those percentages into  
6 actual dollar amounts for me, you know, in terms of a  
7 range?

8 A Well, it depends on the size of the company.

9 Q Right. Let's take a small to moderate-sized  
10 company. What would the range be for their overall IT  
11 costs?

12 MR. SCHAEFER: What are you calling a small to  
13 moderate-sized company so what do you want?

14 BY MS. SCOVILLE:

15 Q Well, maybe we should start by having you define  
16 for us what a small, moderate company is versus a large  
17 company.

18 A Okay. In my mind, a small company is a company  
19 that's, say, under \$5,000,000 a year in sales, net sales.  
20 A moderate-sized company might be somebody in a 20- to  
21 40,000,000 or something. And then a large company, you  
22 know, the mega companies are 250- and above. And so, you  
23 know, you've got some range differences there.

24 Q Sure. And so maybe I need to ask, first of all,  
25 whether or not that's the right distinction to say small,

1 A No. I would --

2 Q Put the support costs on top of that?

3 A Yeah.

4 Q So once you added support costs into a small  
5 company's IT costs in terms of dollar values, what would  
6 a small IT -- sorry, what might a small retailer be  
7 spending annually on support costs?

8 A See, I always try to equate it to percent of net  
9 sales so I would guess from what I know -- you know, from  
10 what I've been doing for many years, it's going to be in  
11 a -- you know, from 1 to 2 percent of net sales. You  
12 know, management, when they're looking at costs, they  
13 know these numbers too so, you know, if they were  
14 presented with a deal that costs 3 percent of net sales,  
15 it's going to get thrown out the window.

16 Q Sure, sure. Now, what about for a  
17 moderate-sized company, one that you said would be in the  
18 20- to \$40,000,000 a year in net sales, what would they  
19 be spending on their IT systems annually?

20 A Well, they're, on the low end, they're going to  
21 be spending, say, 200- to 400,000.

22 Q And what would that include?

23 A It would include -- may include, say, one  
24 programmer, an operator or an operator and a half to take  
25 care of the operations, again, software support, that



1 18 to 20 percent, the hardware maintenance. There's not  
2 a uniform way of necessarily tracking all costs --

3 Q Sure.

4 A -- and you can't just say that every company  
5 tracks the costs the same.

6 Q Right. No, I'm just trying to get a sense of  
7 the industry --

8 A Yeah.

9 Q -- and how it works.

10 A Okay.

11 Q And when we were talking about support fees and  
12 18 to 20 percent, let me just confirm that 18 to 20  
13 percent is the percentage of the cost of the initial  
14 software purchase, right?

15 A True, the license fees.

16 Q The other range of companies that you gave me  
17 was the mega of \$250,000,000 in a year up in annual net  
18 sales.

19 A Right.

20 Q Is there a category between moderate and mega  
21 that we should be discussing?

22 A Well, again, it's going to vary. What I've said  
23 here is three. There's everybody in between, right --

24 Q Sure.

25 A -- and it's going to vary. Just like we said,

1 if they're not doing anything, 1 to 1 1/2, if they're  
2 doing something, 1 1/2 to 2, and if they're doing some  
3 great things, it's over 2. It's all on a continuum.

4 So just to go back to one thing.

5 Q Sure.

6 A We talked about the purchase of a new system for  
7 the low end, and so purchase for a \$20,000,000 to  
8 \$40,000,000 business, that might be more in a 400- to  
9 \$700,000 purchase. So if you take the mega, mega can be,  
10 you know, probably the low end, \$2,000,000. Obviously,  
11 we don't know the upper end of the megas. You know, I've  
12 had projects that cost 8- or \$9,000,000.

13 Q But that would be on a single project for a mega  
14 retailer --

15 A Right.

16 Q -- not their total IT support costs?

17 A True.

18 Q Do you have any sense of what total IT support  
19 costs would be for a mega retailer?

20 A Well, again, the same thing, 1 to 1 1/2 if  
21 they're not doing much, 1 1/2 to 2 if they're doing  
22 something, and above 2 if they're replacing. You know, a  
23 mega -- I've had clients that will have 200 people in  
24 their IT center in a mega company. Probably the typical  
25 would have maybe at least a dozen on the low end, but big

1 companies have a lot of people.

2 Q And if a mega company were to purchase a new  
3 software system, what kind of numbers would we be talking  
4 about there?

5 A That's what I was just saying.

6 Q I see.

7 A 2,000,000 on the low end, 8- or 9,000,000 on the  
8 upper end.

9 Q I see. Okay. Back to the report. At the  
10 bottom of page 5, you have in the last paragraph Cost to  
11 Evaluate Requested Systems Changes, and you say, The IT  
12 industry best practice is to conduct an evaluation of  
13 proposed changes. And you go on to estimate that a  
14 detailed evaluation can be \$1,000 to \$5,000 on the low  
15 end, to much higher costs for complex changes and new  
16 subsystems. How did you arrive at the \$1,000 to \$5,000  
17 figure for the low end?

18 A Just from what I do every day. In some cases,  
19 we actually help clients set up what we call the change  
20 management systems, in other words, the way the users  
21 request changes to systems and how to cost it out and  
22 things like that, or another case is, you know,  
23 management, when I'm there, may say, Well, let's look  
24 at -- you know, we often look at like a multiple year  
25 backlog of changes. Because they never have enough

1 can see spending a lot more --

2 Q Sure.

3 A -- a couple thousand.

4 Q What I'm trying to understand is if the  
5 evaluation costs are built into --

6 A They are.

7 Q -- the numbers that you've already provided in  
8 the exhibits.

9 A They are, yes.

10 Q Okay. Let's see, on page 7, subparagraph 2  
11 there, you talk about the Cost for Marketing Service  
12 Bureaus --

13 A Right.

14 Q -- and I need to understand, first of all,  
15 exactly what a marketing service bureau is.

16 A Most companies use marketing service bureaus in  
17 a -- in anywhere from one to four different ways. When  
18 they rent and exchange lists -- that's a premise of much  
19 of direct marketing, that the way you build your business  
20 is you rent and exchange similar kinds of product lists  
21 or service lists. So you may not be doing it directly  
22 with a competitor, but certainly a list that you think is  
23 going to respond because, as we said before, it's a low  
24 percent response industry. So when we do that, we might  
25 have anywhere from 50 to thousands of different segments

1 of lists that have to be merged and purged against your  
2 internal file because you don't want to mail the same  
3 book to --

4 Q And lists, you're talking about customers'  
5 names --

6 A Yes.

7 Q -- and addresses?

8 A Yes.

9 Q Okay.

10 A So we don't want to mail -- let's say, if we  
11 back up, the best customers are on many people's lists,  
12 okay, because that's where -- they're a good customer.  
13 They like to shop this way. So we don't want to -- if  
14 you're on four lists, which is not uncommon, there can  
15 be -- you know, we actually develop a lot of numbers for  
16 companies from the service bureaus so we know how many  
17 people shop once, twice, three times, four times, up  
18 through like ten times, plus. So we don't want to send  
19 multiple catalogs or promotions so we want to get those  
20 down, so we call that merge/purge. So that's one way.  
21 Most people would use service bureaus for that.

22 Another way is that even though they have  
23 internal marketing files -- every company has internal  
24 operational files, in other words, when a customer calls  
25 in, they say, where is my backorder or you shipped me

1 this and it's broken or can I get another widget just  
2 like this one. That's an operational file. You go in  
3 and -- now, some people also take their operational files  
4 and make those internal marketing files, and there may be  
5 more data that's added or it looks different than just  
6 operational data.

7 Q And would a service bureau do the transformation  
8 from an operational file into a marketing file or would  
9 the companies do that and then send a bureau the  
10 marketing file?

11 A No. A low percentage of the companies will try  
12 to do that internally by themselves. They may do the  
13 merge/purge outside and then have that sent back. But  
14 most, most mailers will use the service bureau also to  
15 develop the mailing, in other words, what's going to be  
16 mailed. And the reason is, is that the -- how data is  
17 organized and analyzed is fairly complex. It's not just,  
18 you know, a bunch of names and addresses and Janie bought  
19 this and Bill bought that. You know, it's tracking, over  
20 a longer period of time, it's tracking response rates by,  
21 you know, how many are one-time buyers and maybe we've  
22 sent the one-time buyers reactivation notices to try to  
23 get them to buy again. And so we track what marketing  
24 data -- or, excuse me, what marketing promotions an  
25 individual customer actually got, okay, and then we

1 determine through the service bureaus are we spending too  
2 much or too little to get that response. So it becomes  
3 fairly, it becomes fairly data intensive and data rich.

4 Q So the marketing service bureaus, as I  
5 understand what you just said, are the firms that are  
6 doing the data crunching --

7 A Yes.

8 Q -- to determine that I am a woman of a certain  
9 age, who has small children, who only shops when she has  
10 free shipping offers or something like that --

11 A True.

12 Q -- is that right?

13 A That's exactly right.

14 Q Okay. So the marketing service bureaus are the  
15 people who crunch all the numbers to make sense of it for  
16 the retailers?

17 A And sometimes analyze it for them, meaning the  
18 human, you know, here's the report, but this is what it  
19 means.

20 Q Okay.

21 A Then you have another use is for actually  
22 developing models, in other words, data models. How do I  
23 find more of Stephanie. Stephanie is a type of  
24 shopper -- is a good shopper for kids under six years old  
25 or five years old.

1 A Right.

2 Q And as I understand it, these are not pricing  
3 models that would be publicly available?

4 A Right, no.

5 Q They would be in response to requests --

6 A Right, yeah.

7 Q -- for proposals? Okay. When was the last time  
8 you personally reviewed a pricing model?

9 A We do a couple of them a year. We did one in  
10 the spring of this year.

11 Q And were there any particular pricing models  
12 that you relied on in forming your opinions in this  
13 report?

14 A No.

15 Q So you're relying more on your general  
16 experience with the pricing models?

17 A And on the -- there's two aspects. One is, as  
18 we have in the exhibits, the cost of merge/purge, which  
19 is certainly one of the smaller costs in this report, and  
20 often -- and then the services. In other words, where  
21 people are going to develop, you know, a reporting system  
22 for you comes back to these same kinds of costs that we  
23 talked about a couple of hours ago. So it's more that  
24 than some complex model.

25 Q So before we get into the specifics of the three



1 crossfoot my assumptions, and that was helpful and it  
2 ended up in some cases decreasing my initial estimates.

3 Q Okay. But other than kind of checking your  
4 estimates against some folks in the industry, you didn't  
5 do any more formalized studies --

6 A No.

7 Q -- of the costs?

8 A No.

9 Q Did you refer to any literature or existing  
10 studies to determine the costs?

11 A No.

12 Q Now, you're aware, I believe, that the Act  
13 exempts retailers with less than \$100,000 in gross  
14 sales --

15 A Yes.

16 Q -- to Colorado residents?

17 A Right.

18 Q Did your analysis exclude that level of  
19 retailers?

20 A Yes.

21 Q And how did you take that into account? How did  
22 you exclude those folks?

23 A Well, I work primarily -- when I think about the  
24 size of a business, I think about the size of the  
25 12-month buyer file; in other words, how many customers

1 THE WITNESS: Okay. Yeah.

2 MS. SCOVILLE: Well, let's take about a  
3 10-minute break then.

4 THE WITNESS: Thank you.

5 (Break.)

6

7 BY MS. SCOVILLE:

8 Q Right before our break, you mentioned that you  
9 had talked to about 15 companies; is that right, to kind  
10 of check your estimates?

11 A Right.

12 Q How did you select which 15 to speak with?

13 A They were just -- some were software vendors of  
14 commercial systems. They were just people that I trust  
15 their judgment. You know, I can give them an idea  
16 quickly, I don't have to spend a week telling them what  
17 I'm trying to do, and I can get a, Have you thought about  
18 this or maybe this is a little bit high or this is low.  
19 Just people I trust.

20 Q And did you also speak with actual retailers,  
21 also?

22 A Well, I mean, yeah, they were -- you mean big  
23 box retailers or --

24 Q No. I'm talking about actual multichannel  
25 retailers --

1 A No.

2 Q -- as opposed to software vendors.

3 A No. Most of them were multichannel retailers.

4 Q And of the retailers, did they cover both  
5 catalog and Internet?

6 A Almost every one of my clients does. There's  
7 rarely one that isn't multichannel.

8 Q And did you speak with a range of small to  
9 medium and large retailers?

10 A Mostly moderate, one large, one mega.

11 Q And how did you decide on the number 15?

12 A Well, we were trying to meet a date, and that's  
13 about what I had time to do.

14 Q And did you keep any notes of your conversations  
15 with them?

16 A Just one, which I've turned over to you that  
17 had -- I didn't really -- you know, I wasn't trying to do  
18 something methodically. I was just trying to check the  
19 assumptions. It's in what you got last week, I think.

20 MS. SCOVILLE: Okay. Let's mark this as Exhibit  
21 2, please.

22 (Exhibit No. 2 was  
23 marked for identification.)

24

25 MR. SCHAEFER: A very minor point, they may be

1           A     They're a marketing service bureau company.  And  
2 these others, I can't tie it down to a specific company.

3           Q     Okay.  Well, why don't you give me a list of the  
4 companies with whom you spoke.

5           A     One would be D.M.insite.

6           Q     And what kind of company is that?

7           A     That's a web software company, web software  
8 provider.

9           Q     Okay.

10          A     Let's see, I talked to CommercialWare, which is  
11 a -- it's a software company.  I had a short time to be  
12 able to do this, so I'm thinking about the calls I made  
13 versus the ones I got back, and I can't specifically say  
14 which ones these represent.

15          Q     Okay.  But just generally, who else did you  
16 speak with?  Who are the other 15 companies?

17          A     Well, as I said, I made a number of calls and  
18 got a limited number of call-backs.

19          Q     Okay.  Do you remember the retailing companies  
20 with whom you spoke?

21          A     I don't.  I'm giving you the ones that I  
22 remember.

23          Q     Do you have any other documents that would  
24 reflect who the retailers with whom you spoke were?

25          A     No.

1 even if he didn't specifically rely on this particular  
2 phone call.

3 MR. SCHAEFER: Let me ask you -- it's clear the  
4 witness has some sensitivity about it. The issue I have  
5 is whether or not you can -- if you establish that the  
6 information contained is relevant to the report or to the  
7 opinion, that's fine. If he didn't rely on it or he  
8 didn't consider it, it seems to me that the name is not  
9 necessary, other than in an effort to identify someone  
10 without, I think, a reason typed in the report.

11 MS. SCOVILLE: Okay. I think we've already done  
12 that, but let me take another shot at it.

13 BY MS. SCOVILLE:

14 Q So, Mr. Barry, I understand that you in  
15 mid-September came up with initial estimates of the costs  
16 for companies to comply with the three categories of  
17 Colorado regulations; is that right?

18 A Yes.

19 Q And then you spoke with 15, approximately,  
20 companies, and then you made revisions of those  
21 estimates; is that right?

22 A Well, I validated what I was thinking, not based  
23 on what they were telling me that it was going to cost  
24 them. Much of what I have in my report is what I have as  
25 experience. All I was doing was -- I didn't ask them

1 what it would take them to do it. I was validating the  
2 process. That's why I don't understand. I never asked,  
3 I never asked them what it was going to cost them because  
4 I didn't want to get but too far into it.

5 Q And why didn't you want to get too far into  
6 it?

7 A Well, because I talked to Brann & Isaacson, and  
8 they told me from the very beginning to be very careful  
9 not to solicit any work on this account; in other words,  
10 you know, don't -- be very objective, which is what I do  
11 in all my work, and, you know, if you're going to talk to  
12 people, don't, you know, don't make a point of being an  
13 expert, just use it to validate your process, and that's  
14 what I've done. The cost, I have no -- what it's going  
15 to cost some company to do something is my estimate.  
16 It's not what they've told me. They haven't estimated  
17 something and given it to me.

18 Q So as I understand it, no company gave you an  
19 estimate of what they have or have not done to comply  
20 with the regulations?

21 A No.

22 Q What did you ask the companies?

23 A I would say -- for example, if we talked about  
24 web, we talked, as the requirements -- or as the report  
25 says, and it's going to require a change in, say, the

1 order path, I would ask them, you know, if you had to, if  
2 you had to do some major change in the order path, how  
3 much -- you know, what does that entail, and they'd  
4 describe it to me, and then I'd say to myself, okay,  
5 that's, you know, that's a moderate change or a small  
6 change. But I never gave them any kind of a written  
7 description so that I have any uniformity between  
8 descriptions. It was really more to make sure that I  
9 could say these were conservative estimates, that I  
10 wasn't giving such a high number that we'd spend a lot of  
11 time arguing whether it was 50,000 or 35,000.

12 Q And it's my understanding that you revised some  
13 of your numbers after speaking with these companies; is  
14 that right?

15 A Right.

16 Q Okay. And we'll get into the specific numbers  
17 in a minute. As I understand it, you did not have a  
18 formulated list of questions when you called these  
19 15 companies?

20 A No.

21 Q You didn't use a questionnaire?

22 A No, no.

23 Q All right. And you didn't do anything to  
24 methodically track their responses?

25 A No.

1 please.

2 (Exhibit No. 4 was  
3 marked for identification.)

4

5 BY MS. SCOVILLE:

6 Q Do you recognize Exhibit 4 as an e-mail that you  
7 sent to Matthew Schaefer on September 23rd?

8 A Yes.

9 Q All right. This e-mail says, "I have talked to  
10 15 companies today. 50% had no awareness of this  
11 regulation which is very worrisome and disconcerting in  
12 trying to estimate costs."

13 A There's a mistake in this.

14 Q And what is the mistake?

15 A I didn't talk to 15 in one day. I talked to  
16 them over -- the way I remember it is that I had like  
17 three days or two days so it wasn't "today". And I'm  
18 pretty sure this is the first time and the only time that  
19 I sent Matt a note that said I've talked to people, I  
20 think. I mean, I haven't gone back and looked at every  
21 e-mail that you have.

22 Q So when you say that "50% have no awareness of  
23 the regulation which is very worrisome and disconcerting  
24 in trying to estimate costs", what about it was worrisome  
25 and disconcerting?



1           A       Just that they were not -- it wasn't on their  
2 radar. It wasn't disconcerting for me or worrisome for  
3 me because I had already written down what I thought, but  
4 I was concerned for them and their clients.

5           Q       When you talked to retailers, what did you learn  
6 in terms of whether multichannel retailers were aware of  
7 the regulations?

8           A       About the same. You know, they had -- there had  
9 been only, I think only one news story on this topic, and  
10 it was back in July. It was in Multichannel Merchant  
11 that DMA was suing the State of Colorado. They actually  
12 had some errors in it. It was literally one 8 1/2 by 11  
13 long that just said this is it, more later, but it did  
14 have errors.

15          Q       But of the retailers with whom you spoke, about  
16 50 percent were aware of the regulations as I understand  
17 it?

18          A       Yeah, to some degree. It doesn't mean they were  
19 doing anything about it. I would say, I would say with  
20 high certainty nobody I talked to knew the details of the  
21 three requirements.

22          Q       And Wyland, the marketing service bureau with  
23 whom you spoke, were they aware of the regulations?

24          A       No.

25          Q       The next sentence reads of this e-mail in

1 Exhibit 4, "So the impressions and costs were all over  
2 the place. I took your advice and cut the costs down  
3 considerably to avoid issues." What issues were you  
4 trying to avoid?

5 A Well, as you know, if you looked at my drafts,  
6 which I had in my -- I think it was the September 17th  
7 draft or whatever the first one to Brann & Isaacson was,  
8 I had pushed myself to think through what I thought it  
9 was going to take typically and put a dollar on it, and  
10 those are the costs that I, as I talked to some people  
11 not about what it was going to cost them, but just the  
12 effort and the process, that I changed, and I don't, I  
13 mean, I don't remember which ones changed and which ones  
14 didn't, but the -- what Matthew had asked me to do was to  
15 just be conservative with it, don't try to do a study of  
16 a bunch of different companies. That's not what we set  
17 out to do.

18 Q And when this e-mail in Exhibit 4, the last  
19 sentence of that paragraph says "I took your advice",  
20 what was Mr. Schaefer's advice?

21 A I just said what it was. It was to be  
22 conservative.

23 Q And that's the whole of his advice to you?

24 A Yeah. I mean, he's a lawyer, he doesn't know  
25 anything about systems, and he trusted my judgment for

1 Q Okay. So it could be an icon or a URL?

2 A Right, or just a hot link, if you know -- you  
3 know, like the words "Colorado sales tax".

4 Q Highlighted and underlined --

5 A Right. Yeah.

6 Q -- you click on that, and then it takes you  
7 somewhere else?

8 A Yes.

9 Q And you assume that the linking notice would  
10 send customers to a retailer's FAQs; is that right?

11 A It's one way to do it.

12 Q Okay. What would another way to do it be?

13 A Just to have a -- when you do that hot link, to  
14 be able to go out to a place either in the web system or  
15 in the order management system where you have company  
16 policies so that, you know, we could put out there in a  
17 user-friendly way what the statute said and what the  
18 customers' options were, and that they would be required  
19 to pay the sales tax if, as you know better than I, all  
20 the possibilities. So just, you know, we have places in  
21 the systems that allow us to do that for both call center  
22 and e-commerce.

23 Q So it would be possible then for the linking  
24 notice to take a customer not to the frequently asked  
25 questions page, but to like the terms and conditions

1 section of the offer?

2 A Yeah. We don't call it that, but it would be  
3 just like, you know, our company policies. It could be  
4 on returns or product damage. And on the surface of it,  
5 it probably wouldn't be visible to the customer without  
6 clicking that maybe.

7 Q And in terms of the cost that it would take  
8 companies to create this path, is the cost any different  
9 if it takes -- if the linking notice takes the customer  
10 to frequently asked questions, as opposed to the  
11 company's policy page?

12 A No.

13 Q Okay. What about a pop-up window, would a  
14 pop-up window work as an alternative?

15 A Yes.

16 Q And would programming the order path for a  
17 pop-up window be more or less expensive than a linking  
18 notice?

19 A It might be, it might be somewhat more, but a  
20 small amount of money. A question would be, you know, do  
21 you want the customer to click on that, that they accept  
22 that or not, which is kind of a negative, you know,  
23 customer service issue.

24 Q And when you said that it might be somewhat more  
25 but a small amount of money, tell me what you mean by

1 that. I'm not sure I understand that.

2 A Well, I mean, it's going to vary by company. It  
3 might be a couple thousand dollars more, it might be  
4 less.

5 Q To program a pop-up window --

6 A Yeah.

7 Q -- as opposed to a linking notice?

8 A It's not a huge amount, but it would be more  
9 than just hitting an FAQ.

10 Q You mentioned in the last paragraph under  
11 1(a) -- we're back on Exhibit 1, your report here -- that  
12 you have used the assumption that companies adopt a  
13 linking notice, rather than some form of "work around".  
14 What would a "work around" be?

15 A "Work around", generally the way the term is  
16 used, is something that may be less desirable, but gets  
17 it done without major programming.

18 Q And what would be some examples of "work  
19 arounds" in this particular context?

20 A I don't have any.

21 Q Let's go back to Exhibit No. 5, if you would,  
22 which is one of the earlier drafts of your report. Okay.  
23 If you would look at page 7, please. The second full  
24 paragraph says, "Retailers we have talked to are looking  
25 at a variety of solutions and workarounds including

1 did come up, and I told them I didn't think that would  
2 work.

3 BY MS. SCOVILLE:

4 Q Okay. The second sentence of this paragraph  
5 says, "Another is that e-commerce customers to force the  
6 Colorado customer, when they enter their delivery  
7 address, to have to click a button before proceeding with  
8 the sale that they understand their sales tax  
9 obligations." Is this something that's actually being  
10 done by a company?

11 A No. I don't remember -- no, but it goes back to  
12 what I just said a couple of minutes ago. It has some  
13 negative customer service ramifications. People just  
14 kind of threw this up.

15 Q Okay. So it was an idea --

16 A Right.

17 Q -- that was thrown out by one of the people that  
18 you talked to?

19 A Right.

20 Q All right. The next paragraph says, "There are  
21 a variety of workarounds that we have heard discussed  
22 which probably do not meet the regulation. One is using  
23 e-commerce trigger e-mails to inform the Colorado  
24 customer after the order is accepted by the system." Is  
25 that something that companies are actually doing?

1 A No. It's an idea again.

2 Q And did you believe that that option for  
3 complying with the regulations would be acceptable?

4 A No.

5 Q Okay. And is that based on your conversations  
6 with the Brann Law Firm?

7 A I don't, I don't think so. It just seemed to be  
8 when using a trigger e-mail, it's after the fact rather  
9 than before.

10 Q Okay. So in your opinion, that would not meet  
11 the Colorado regulations?

12 A That's my opinion.

13 Q If it did meet the Colorado regulations, would a  
14 trigger e-mail be less expensive than changing the web  
15 order path?

16 A Assuming that everyone can identify a Colorado  
17 order -- a Colorado customer and trigger an e-mail may  
18 mean some changes there, but --

19 Q Would it be less expensive, I guess is my  
20 question.

21 A Than what, what we're assuming here?

22 Q Than changing the web order path. And let's  
23 actually start over so we've got a clean question.

24 Sorry.

25 Would a trigger e-mail after an order is placed

1 this 5- and 10,000 also involves the discovery and  
2 evaluation process.

3 MR. SCHAEFER: Stephanie --

4 MS. SCOVILLE: Yes.

5 MR. SCHAEFER: -- can we take a break just long  
6 enough for me to check out?

7 MS. SCOVILLE: Oh, of course, of course. I'm  
8 sorry, we are getting close. Let's go ahead and take a  
9 break.

10 (Break.)

11

12 BY MS. SCOVILLE:

13 Q Okay. Right before our break we were talking  
14 about your estimates for changing the web order path as  
15 5- to \$10,000. Did you attempt to break that 5- to  
16 \$10,000 into the components of designing the program  
17 changes, developing, programming and testing?

18 A Not in writing, I don't have them in writing,  
19 but I did sit down and kind of go through that  
20 mentally.

21 Q Okay. And how would you divide up this  
22 particular estimate of 5- to \$10,000 in terms of those  
23 categories?

24 A Well, I think that at least half of the --  
25 anywhere from half to 75 percent of the costs are in the



1 design and what management wants to do and whether it  
2 meets, whether it meets the -- not just this, but does it  
3 meet the need, and the programming part, the physical  
4 change hopefully is smaller than the design.

5 Q So programming and testing might be just a  
6 quarter --

7 A Yeah.

8 Q -- of the estimate?

9 A Right. It's going to vary on, you know, what  
10 kind of a change, but --

11 Q And I apologize if I'm repeating myself from  
12 five minutes ago. I'm already having trouble remembering  
13 exactly what we covered, but I don't think I've asked you  
14 this yet. Did you do any tests or studies to actually  
15 program a change like this?

16 A No.

17 Q And did you refer to any literature or published  
18 studies about what the cost might be?

19 A Of making the Colorado change?

20 Q For the transactional notice.

21 A I'm not aware of any.

22 Q So this is based on your experience?

23 A Right.

24 Q And did you discuss changing the web order path  
25 with the 17 companies with whom you spoke?

1           A       I did with the ones that had a reasonable idea,  
2 you know, an awareness. In other words, with half the  
3 companies, if they weren't aware, then I wouldn't have  
4 spent all my time trying to get them to know what to  
5 do.

6           Q       And what was the feedback you got from actual  
7 companies about the cost to change the web order path?

8           A       Well, I didn't ask anybody for a specific cost.  
9 What I asked them was, am I thinking about the process  
10 that you might have to go through, and then I put the  
11 cost on it.

12          Q       And have you had any similar experiences with  
13 the clients of your firm in terms of assisting them with  
14 changing web order paths to comply with a similar  
15 regulation?

16          A       With changing a web order path, yes, but not  
17 with a similar regulation.

18                               (Exhibit No. 10 was  
19                               marked for identification.)

20

21 BY MS. SCOVILLE:

22          Q       Okay. Let's, if you would, take a look at  
23 Exhibit No. 10. Do you recognize this as your draft  
24 report dated September 15th?

25          A       Yes.

1 Q If you would, take a look at page 4, please,  
2 under C, Estimated Costs, 1, Order management, enterprise  
3 and e-commerce systems.

4 A Let's see --

5 Q At the top of the page.

6 A Yes.

7 Q And in the underlined text, you have, "FCBCO has  
8 not estimated the dollars but it could be a \$50,000 one  
9 time cost. How the software vendor might charge for that  
10 is obviously unknown as it would be a shared expense."

11 And then in the next paragraph, you say,  
12 "Company website developers would have an equally  
13 difficult time in making this change. This could be  
14 another \$30,000 to \$50,000 charge to inform the  
15 customer."

16 First of all, I want to confirm that this part  
17 of your draft report is referring to the transactional  
18 notice.

19 A Let me take a look at that.

20 Q Sure.

21 A I believe it does. I'm not sure there isn't  
22 some overlap between one and two now, but --

23 Q Okay. How did you arrive initially at the  
24 \$50,000 for external costs and 30- to 50- for internal?

25 A Just, as I said before, thinking through what I

1 thought the issues would be, trying to put what I would  
2 consider to be a cost on there that I could then  
3 validate, and that looking at -- you know, thinking about  
4 other projects we've done that are similar in the same  
5 parts of the system, like the order processing part or  
6 the web path part, trying to be realistic because, as we  
7 said hours ago, IT people don't estimate accurately, and  
8 I didn't want to come in too low initially. So it was  
9 kind of like this is a strawman figure, and then tried  
10 to -- and then validate it and think further about it.

11 Q Okay. And you obviously changed your  
12 estimates --

13 A True.

14 Q -- downward. And why did you change the  
15 estimates downward?

16 A One, I wanted to make sure that I didn't --  
17 since I don't have the details written down, that I could  
18 talk through them and, you know, discuss them. With a  
19 larger number like that, I think that's harder to do. I  
20 think there are very real costs to this statute, and what  
21 didn't change is most of the things I identified -- most  
22 of the areas that I identified in the initial report are  
23 in the final.

24 Q But just the dollar value changed?

25 A Yeah. And what I didn't want -- nobody likes --

1 I've never worked with anybody, whatever the issue is  
2 that we're working on, if I come in and say, Well, I  
3 think it's 5,000 and it ends up being 50-, nobody likes  
4 that. But if I say it's some other number and I'm  
5 bringing it down, that has always -- whether it's an  
6 estimate of my time or software. So it's more of a  
7 personal style kind of thing. I don't want to go back  
8 with some huge increase.

9 Q Well, what is the most accurate number in your  
10 professional opinion --

11 A In the report.

12 Q -- as to the actual costs?

13 A In the report.

14 Q The 5- to \$10,000?

15 A Yes.

16 Q Okay. And so I guess I'm still trying to  
17 understand why you revised it downwards, other than just  
18 not wanting to aim too high.

19 A Well, I think, I think they're realistic, and I  
20 also think that if the statute stands, I think that those  
21 are very conservative estimates, that those are small  
22 numbers as estimates go for IT changes. They may look  
23 big to a novice, but they're not a -- they represent true  
24 costs, actual costs, and I believe that these will end up  
25 being conservative.

1 MS. SCOVILLE: Let's take a look at Exhibit 11,  
2 please.

3 (Exhibit No. 11 was  
4 marked for identification.)

5

6 BY MS. SCOVILLE:

7 Q Do you recognize Exhibit 11 as another draft of  
8 your report?

9 A Yes.

10 Q Okay. If you would take a look at page 4,  
11 please, the top of page 4, and this is part of Exhibit A,  
12 the transactional notice. And the first full paragraph  
13 on page 4 says, "Estimated cost to modify order the order  
14 path for the message is estimated from \$15,000 to  
15 \$25,000." And is that another iteration of your estimate  
16 of changing the web order path?

17 A Yes.

18 Q And that came after --

19 A As best I recall, yeah.

20 Q Okay. And that appears to have come after our  
21 initial estimate of 50- or 30- to 50-?

22 A Right.

23 Q I guess I'm still trying to understand what you  
24 did or what changed in your analysis to take it from 50-  
25 or 30- to 50- to 15- to 25- down to 5- to 10-. What

1 changed along the way?

2 MR. SCHAEFER: Object to the form.

3 A Well, again, as I said, I originally put a high  
4 number, a strawman on that, realizing I was going to have  
5 a week to two weeks to develop it, develop it further and  
6 to think about it, and, you know, this is all this is.  
7 This is not meant to be any more than that, that these  
8 are working notes, working drafts, I guess is a better  
9 way to say it.

10 BY MS. SCOVILLE:

11 Q And what changed -- or why did you revise your  
12 estimate downward from 15- to 25- in Exhibit 11 to 5- to  
13 10- in your final report?

14 A To be very conservative with the costs. As I  
15 said in the early part of this document, what flexibility  
16 people have with systems, whether they use outside  
17 companies to program them or they can maintain  
18 themselves, whether their technologies are flexible, all  
19 these things make some costs easier than others for  
20 people to accommodate. Older technologies and outside  
21 developers make it more expensive.

22 Q Sure. And your 5- to 10- estimate takes outside  
23 developers and older technologies --

24 A Right.

25 Q -- into account?

1           A     True.

2           Q     Did you do any studies or any tests as you  
3 revised the numbers downwards?

4           A     No.

5           Q     So you had initial estimates which were based on  
6 your own experience of 50- or 30- to 50-?

7           A     Right.

8           Q     And then you had estimates of 15- to 25- based  
9 on your experience?

10          A     Based on thinking about it more.

11          Q     And then you had your final estimate of 5- to  
12 10- also based on your experience?

13          A     Yes, and a limited outside validation.

14          Q     Did anything that the 17 companies you  
15 interviewed say to you factor into your decision to  
16 revise these numbers downwards?

17          A     I would say no. It was, again, a validation of  
18 process, you know, what they think this means they'd have  
19 to do. Obviously, I'm leading them through; you know,  
20 you have to change the order path if that isn't true  
21 then, you know.

22          Q     And looking at Exhibit No. 11, can you tell  
23 whether or not this draft was done before or after you  
24 talked to the 17 companies?

25          A     I have no idea.



1 printed; is that right, and that's what the 5- to 10-  
2 estimate represents?

3 A All the invoices would look alike, but we'd have  
4 sufficient size on the front of the invoice to  
5 accommodate whatever it is the companies feel comfortable  
6 with saying. Some might be one line long, and some might  
7 have a friendly paragraph.

8 Q And how common is it right now, this Colorado  
9 regulation aside, for retailers to have forms that are  
10 specially generated for different states' requirements?

11 A Rare.

12 Q Okay. What are some of the other instances  
13 where a separate form for a particular state would be  
14 triggered?

15 A There may be in horticulture provisions that say  
16 something about seeds, quarantined products. It's very  
17 rare.

18 Q You include that the cost estimate for modifying  
19 the invoice or packing slip would be 5- to \$10,000. On  
20 what data did you base that conclusion?

21 A My experience in going through what I think  
22 would have to be considered and the time to develop an  
23 estimate, along with the time to develop a design and the  
24 programming and testing.

25 Q And did you break this 5- to \$10,000 into

1 different categories and give hourly estimates for each  
2 step in the process?

3 A Not as notes.

4 Q But it sounds like you did that in your head; is  
5 that right?

6 A Yes. Right.

7 Q And can you recreate for me how you got to the  
8 5- to 10-?

9 A Well, as I said this morning, I believe it would  
10 cost a couple thousand dollars to evaluate the change.  
11 In the case of something this complex, it could easily  
12 cost \$5,000 if people aren't aware of it. I said before  
13 that the program -- the system design and the program  
14 design, not the programming, is more than half the cost  
15 of every change.

16 Q Programming is more than half in this  
17 instance?

18 A No. The design of what I have to do --

19 Q I see.

20 A -- as a programmer. We call that program  
21 design. In other words, I'm going to take the statement,  
22 the computerized statement, and I'm going to do this.  
23 Well, I have to write all that down, I have to get  
24 everybody to agree to it. That's more than half the  
25 cost. So that's how I came up with it.

1 Q And did you estimate the number of hours and  
2 then multiply it by hourly rates?

3 A Right.

4 Q Okay. And what hourly rates did you use?

5 A I used a blended rate between the \$32 -- let's  
6 look at the page. If we look on page 4 of the final  
7 report, we have \$24 and \$48 without benefits. If we put  
8 benefits into it, we have \$31 and \$62. So I took a  
9 blended average of those two.

10 Q And did you just do a straight average --

11 A Yes.

12 Q -- 31 plus 62, divided by half?

13 A Yes. Like 47 or something. So, again, trying  
14 to be conservative, not trying to push it towards the  
15 high side or the low side.

16 Q So if you take \$5,000 -- and I just did the math  
17 right here -- divided by the blended rate, which is  
18 actually 46.5, you get 107 hours of time to modify the  
19 invoice. That would be the low end, right?

20 A Yes.

21 Q And then you could do the same math to determine  
22 how many hours it would be to modify to get to the upper  
23 range of \$10,000?

24 A Right.

25 Q And is that how you did the math --

1 A Yes.

2 Q -- to get to these numbers?

3 A Yes.

4 Q And did you come up with the amount of hours  
5 first or did you come up with the numbers, the totals  
6 first?

7 A I came up with the hours, you know, just how  
8 many -- when you look at all the pieces to this and just  
9 envisioning what most companies would have to do as they  
10 figure out what they're going to do to meet this, if they  
11 have to, and then I used the dollar averages.

12 Q Now, none of the figures in your final report or  
13 your draft reports are expressed in terms of number of  
14 hours. They're expressed in final costs.

15 A Right.

16 Q Do you have any notes or other documents that  
17 would reflect your thinking in terms of hours?

18 A No, I don't.

19 Q Okay. And I'll tell you -- I did the math  
20 sitting here -- that it would take 215 hours at the  
21 blended rate to get to \$10,000.

22 A Okay.

23 Q How did you arrive at 215 hours?

24 A With some technology, I'm going -- you know,  
25 with like mainframe technology or some of the older

1 programming is closest to 150 to 160 average?

2 A Yeah, somewhere in that. I mean, I don't  
3 remember how it calculates out right now. I will say  
4 that, and you can see this in my drafts, that I use the  
5 computer a lot to capture thoughts, and then I refine  
6 them. You can see things that I throw out or I typically  
7 put them at the end of the document, and so I don't, I  
8 don't write as many manual notes as I might have 15 years  
9 ago. I kind of think with the computer and kind of  
10 capture things that way and then write over them or  
11 discard them.

12 Q So you don't have any documents that would  
13 reflect how you did the math in terms of what blended  
14 rate you used times how many hours to get to these  
15 figures?

16 A No. I'm telling you how I remember doing it.

17 Q Okay. Did you do any tests or studies to come  
18 up with the 5- to \$10,000 estimate for modifying the  
19 invoice or packing slip?

20 A I didn't, but as I said before, I considered  
21 those and I think my peers would consider those to be  
22 conservative numbers, and that there will be costs the  
23 companies will bear that are that or hirer, depending on  
24 the technology and the skill levels and so forth.

25 Q Did you refer to any literature or published

1 studies in coming up with the 5- to 10,000 estimate?

2 A No.

3 Q And is that something you discussed with the  
4 17 companies with whom you spoke?

5 A What is the "that"? Would you reword what the  
6 "that" is?

7 Q Sure. Did you discuss your estimate of 5- to  
8 \$10,000 to modify the packing and order slip with the  
9 17 companies with whom you spoke?

10 A No. I was talking to them more about process,  
11 what would you have to do if you had to do it.

12 Q If you could go back to Exhibit 5, which is one  
13 of your earlier draft reports, on page 7. This is the  
14 paragraph we discussed earlier that you said related to  
15 catalog sales and, as I understand it, would apply more  
16 to modifying the packing slip.

17 A What paragraph is it that you're looking at?

18 Q The first full paragraph.

19 A Right.

20 Q "Retailers we have talked to are looking at a  
21 variety of solutions and workarounds including having the  
22 sales person or Call Center rep input a short phrase  
23 message that will print on the customer order and refer  
24 the customer to the website for more details." Is that  
25 something that companies are actually doing right now?

1 question, which is, would it be more or less expensive  
2 than what you've estimated in your report?

3 MR. SCHAEFER: Same objection.

4 A I don't know. I don't know that it would be  
5 acceptable.

6 BY MS. SCOVILLE:

7 Q All right. Going back to Exhibit 11, which is  
8 also an earlier draft of your report, on page 4, you  
9 initially estimated that to modify the invoice and  
10 packing slip would cost 15- to \$20,000. I'd like to  
11 know, I guess, what changed between your initial estimate  
12 and your final estimate of 5- to 10-.

13 A Well, first off, I don't know the date of this  
14 document and where I was in that thinking process. And  
15 as I said, I started out with high numbers and brought  
16 them to something that I felt was conservative as I  
17 worked through it.

18 Q And as I understand it, you did not do any  
19 studies or tests or any other specific --

20 A No.

21 Q -- analysis in changing those numbers?

22 A No.

23 Q Going back to your full and final report --

24 THE WITNESS: Can I ask you a question?

25 MS. SCOVILLE: Sure. And I don't know if I'll

1 Q What would an average percent of calls be if an  
2 item is backordered?

3 A Probably 30 or 40 percent.

4 Q Okay. Can you think of other examples that  
5 would generate a high number of calls?

6 A You know, periodically, there are billing  
7 issues. For example, you read in a paper where, let's  
8 say, a big bank processor has doubled billed credit card  
9 customers. Well, that generates a tremendous -- you  
10 know, everybody, whether they have it wrong in their bill  
11 or whether they think they do because they're a  
12 cardholder, it generates a call. There are certain  
13 segments of the direct marketing public that are older  
14 customers, not myself but older customers, they will call  
15 because they think big brother is watching them; what am  
16 I buying, how do I pay this. There's probably -- well,  
17 first off, baby boomers are the largest segment of the  
18 population, and there are catalogs, especially in women's  
19 merchandise, that are fairly large where the average  
20 customer is 60 or older, and they get something that  
21 isn't worded well, isn't clear what they have to do,  
22 they're going to call. That's the easy thing to do.  
23 They're not going to call you. They're going to call  
24 us.

25 Q So what data did you use to reach your estimate



1 of 50 percent?

2 A Best judgment.

3 Q And did you do any tests or studies?

4 A No.

5 Q And did you refer to any published literature?

6 A No.

7 Q We do have some e-mail correspondence. I think  
8 it has already been marked Exhibit No. 3. This is your  
9 e-mail with Matt Schaefer on September 16. Point No. 6  
10 says, "To figure number of call center calls, etc. How  
11 about if we figure 50 percent?" What was the Brann Law  
12 Firm's response to your inquiry on that point?

13 A I don't remember. I would say that it sounded  
14 reasonable, but I don't specifically remember.

15 Q Back to your final report, the next item in your  
16 transactional notice calculation is professional  
17 assistance, and you estimate that companies will need 3-  
18 to \$5,000 worth of professional assistance to do the  
19 transactional notice. How did you come up with the 3- to  
20 \$5,000 number?

21 A Just from working through it, best judgment,  
22 experience.

23 Q What accounting assistance would be needed to  
24 comply with the transactional notice?

25 A Well, some people use their outside accountants

1 as advisers so it would be as much that. You know, what  
2 we're thinking about is to meet Colorado regulations.  
3 There are some sales tax software companies that also  
4 provide consulting. So I would imagine people, they're  
5 not going to try to interpret this by themselves I  
6 wouldn't think. They wouldn't be smart to.

7 Q Does your 3- to \$5,000 estimate include changes  
8 to customer privacy policies?

9 A No.

10 Q All right. So that would be separate?

11 A Right.

12 Q What about involvement from the creative  
13 department to finesse the wording, is that included in  
14 the 3- to \$5,000?

15 A No.

16 Q So it's just strictly legal and accounting  
17 costs?

18 A Right.

19 Q All right. And what data did you use to decide  
20 that that number should be 3- to 5-?

21 A You know, from a -- you were saying accounting  
22 and legal. I think there's a place for consultants to do  
23 that, and I know that once you open up all these issues  
24 that it's reasonable to think you're going to spend a  
25 couple of days, three or four days, to fully answer all

1 the questions. It wouldn't be in one sitting, but it  
2 would be going back and looking at how they interpreted  
3 what you told them and how they're going to proceed and  
4 it's, I think, a conservative estimate.

5 Q Did you do any tests or studies yourself to  
6 determine the 3- to 5,000 amount?

7 A Just that I know -- no.

8 Q And did you refer to any literature or published  
9 studies?

10 A No.

11 Q And did you discuss this with any of the  
12 17 companies with whom you spoke?

13 A No.

14 Q Okay. Going back to Exhibit 10, which is your  
15 September 15th draft. On page 4, you initially put the  
16 consulting and legal expertise costs at 5- to \$7,000.

17 A Okay. Where is -- right here.

18 Q It is right above No. 3.

19 A Okay.

20 Q Consulting and Legal Expertise for Compliance  
21 Costs - \$5,000 to \$7,000. How did you come up with the  
22 5- to \$7,000 estimate?

23 A Again, this was my original draft. Like some of  
24 these others, they were strawman numbers. I revised them  
25 down. I may have asked Matt what he thought as an

1     adviser, but, you know, they were a little too high.

2           Q     And did Mr. Schaefer indicate he thought the  
3     5- to 7- was too high?

4           A     I don't remember specifically. I'm just saying  
5     I think I remember that, but I'm sure if he did you'll  
6     show me an e-mail.

7           Q     Well, I don't have an e-mail.

8           A     I don't either.

9           Q     So that's why I'm wondering what your  
10    discussions with him were.

11          A     Well, what I do remember is when we helped two  
12    clients work on shipping and handling, I remember what  
13    that number was, and it was in that upper range and he  
14    felt -- what I remember is, I think that he felt that  
15    might be too high.

16          Q     If you could look at Exhibit A.1.

17          A     In this --

18          Q     In your final report. Pardon me.

19          A     The final report.

20          Q     Exhibit No. 1.

21          A     Okay.

22          Q     I just want to make sure I understand. You've  
23    got Basic statutory/regulatory requirements and Necessary  
24    but not discretionary, and you've got the Totals for low  
25    end first your compliance costs (sums of above), \$10,000.

1 THE WITNESS: Could we take a break? I need to  
2 use the rest room.

3 MS. SCOVILLE: Absolutely. You know, let's go  
4 ahead and break for lunch. It's noon. And we can go off  
5 the record.

6 (Break.)

7

8 BY MS. SCOVILLE:

9 Q Mr. Barry, this morning we just touched very  
10 briefly on how on-line retailers -- and let's just focus  
11 on on-line retailers for a moment -- collect and keep  
12 information about their customers. And so in your  
13 professional experience, it is common for on-line  
14 retailers to keep track of what it is that customers buy,  
15 right?

16 A Yes.

17 Q And retailers, on-line retailers would also  
18 track what customers spend annually?

19 A Yes.

20 Q And would they also track what customers spend  
21 in their lifetime?

22 A Some do and some don't.

23 Q Okay. What about whether or not on-line  
24 retailers track how long a customer spends on a  
25 particular website?

1           A     You mean how long physically they're on the  
2 website?

3           Q     Right.

4           A     Yes.

5           Q     So they would know that I searched, you know,  
6 landsend.com for 30 minutes or something like that?

7           A     If I were Lands End.

8           Q     Yes, if you were Lands End.

9           A     Yes.

10          Q     Okay. Do on-line retailers also track how many  
11 times a particular customer visits their site?

12          A     Yes.

13          Q     Do they track which Internet browser customers  
14 use?

15          A     Yes.

16          Q     Do they track which items customers are  
17 interested in?

18          A     To the degree that they can.

19          Q     Okay. And to what degree can they do that?

20          A     I think most can.

21          Q     Beyond more than just what is ultimately  
22 purchased --

23          A     Right.

24          Q     -- they can determine which items I, as a  
25 customer, viewed?

1 A What they looked at and so forth.

2 Q Okay. Do they track what country customers are  
3 from?

4 A Yes.

5 Q What ZIP Code they're from?

6 A Yes.

7 Q Which computer they use or which IP address?

8 A Yes.

9 Q Whether or not customers use discount codes?

10 A Yes.

11 Q Whether or not they visit a site after receiving  
12 an e-mail?

13 A Yes.

14 Q What about whether or not customers buy after  
15 receiving a special offer?

16 A Yes.

17 Q Okay. What other kinds of metrix do retailers  
18 use to track customers?

19 A Well, I mean, there's literally -- this is a  
20 creative marketing thing so the list isn't endless, but  
21 it's pretty large. You know, can you reactivate this  
22 customer with a certain type of message, meaning they  
23 haven't shopped in a while; the time sensitivity of the  
24 message, in other words, if they bought a week ago and  
25 you send them some special offer, do they buy again right

1 away; the purchasers or customers who buy "X" also buy  
2 "Y", so it can serve up to the customer some purchase  
3 preferences. That's kind of endless.

4 Q Okay. And as I understand it, catalog companies  
5 would, to the extent that they can, track similar  
6 metrix?

7 A Right.

8 Q Okay. And that's how it is that retailers can  
9 identify me as a woman of a particular age, who has  
10 children, and buys certain kinds of good when I have a  
11 free shipping offer?

12 A It might not be on-line, though. It might be  
13 sometime after. It doesn't have to be on-line.

14 Q Okay. Sure, sure. And then what do retailers  
15 do with all of the data that they collect?

16 A Number one, they're looking for, you know, how  
17 promotions work -- do promotions work and under what  
18 circumstances, what facts they work; what merchandise,  
19 meaning what products; how can I liquidate overstock  
20 products; you know, effectiveness of various promotions  
21 and how -- you know, that versus another. We call that  
22 A/B testing. You know, here is Offer A versus Offer B,  
23 which one responds better.

24 Q Okay. And then do they also use the data to  
25 improve their marketing to a particular customer?



1 A Yes.

2 Q And do they provide the data that they track to  
3 the marketing service bureaus?

4 A Generally, what they provide is the raw data,  
5 the transactions, the returns, not necessarily -- they  
6 may provide, you know, findings, but, you know, how many  
7 click throughs they had, that probably wouldn't go to the  
8 marketing service bureau.

9 Q What about to the database companies we talked  
10 about, the four or five large ones?

11 A I think it's the same. I don't think it goes  
12 generally beyond the company in most cases.

13 Q So in your professional experience, the data  
14 that companies collect, that retailers collect, such as  
15 how much is spent annually, on what kinds of items, after  
16 how many visits to the website, you're saying that most  
17 retailers keep that information in-house?

18 A No, no. What I meant was, they don't -- the  
19 first two you said, the marketing service bureau would  
20 take the same data and develop their own data. If you  
21 want to read back what those first two were just to -- so  
22 those two, you know, I pass the raw data. I may have it  
23 inside, but I'm really using the outsider to kind of use  
24 that and validate it and put it together with other data.

25 The third one was more like clickstream data.

1 basic data, so it varies. You know, how accurate it is,  
2 it's accurate, but if you can't recombine it with  
3 something, then what value -- you're not sometimes sure  
4 what value it has.

5 Q In your experience, do retailers keep this data  
6 for more than a year?

7 A I think most do.

8 Q Okay. What would be the outer limit in your  
9 experience as to how long a retailer would keep the  
10 data?

11 A I don't know if I could answer that. I mean, I  
12 just -- you know, maybe a couple of years. As your  
13 promotional schedule changes, then the history, it  
14 changes. So, you know, unless you really plot every  
15 promotion -- and companies have hundreds of promotions.  
16 So you see the ups and downs. Big deal. What do you do  
17 with it?

18 Q All right. So going back to your report, just a  
19 couple more questions on the transactional notice. Still  
20 on Exhibit A, page 2, at the bottom of page 2, onto page  
21 3, you talk about on-going compliance costs, and you  
22 estimate on-going compliance annual costs of \$1,500 to  
23 \$2,000. What data did you use to reach the conclusion of  
24 \$1,500 to \$2,000?

25 A Just because this is a sensitive customer

1 Q So I'm wondering how you took those two numbers  
2 to get to 5- to 10- in the middle.

3 A Because I thought it was on the low end of the  
4 range, and I think it's reasonable.

5 Q Okay. Let's go to Exhibit B, which is the  
6 annual purchase summary.

7 A In the final?

8 Q Yes, please, in Exhibit 1. Under Subparagraph  
9 1, the last full paragraph, it talks about there are two  
10 potential sources for the detail order information, the  
11 operational order processing system and the direct  
12 marketing system. Can you explain to me the difference  
13 between the two systems?

14 A Are we right here?

15 Q Yeah, exactly.

16 A Well, we talked this morning -- I think it was  
17 this morning -- that, you know, the system, the part of  
18 the system that we use for the call center to take the  
19 order, service the customer, that's what we call the  
20 operational part of it. The direct marketing is the  
21 marketing part of it, in other words, if they were using  
22 the same data, but formatted and analyzed differently  
23 for, say, the RFM. So it's the marketing versus the  
24 operations.

25 Q And do most retailers have both, the operational

1 order processing system and the direct marketing  
2 system?

3 A It's in the same system. It's just how you view  
4 the data. There are different reports and things.

5 Q Okay. I guess what I'm trying to understand is,  
6 all retailers would hold this data, and would most  
7 retailers be able to view it through both lenses, through  
8 the operational lens and through the marketing lens?

9 A Catalog companies can. Again, e-commerce may  
10 not be as sophisticated at the marketing side of it.

11 Q Okay. So e-commerce retailers would be more  
12 likely to view their data through the operating lens?

13 A Right.

14 Q Okay. I see. But the data already exists,  
15 right?

16 A Yes.

17 Q One of the costs that you list in your report,  
18 and this goes on to page 2, in terms of the steps that  
19 are necessary on the annual report, are, No. 6, for the  
20 accounting department to check the file to determine if  
21 any corrections are necessary. What work would the  
22 accounting department need to do?

23 A Well, what I'm envisioning is, we're not just  
24 going to run this and then pump out the data. It was  
25 something that is very customer sensitive and now reports

1 literature --

2 A No.

3 Q -- for that number?

4 A No.

5 Q You conclude that 20 percent of Colorado  
6 purchasers will buy \$500 or more per year from a  
7 particular retailer. How do you know that?

8 MR. SCHAEFER: Objection. That's not what it  
9 says. It says less than 20 percent.

10 BY MS. SCOVILLE:

11 Q Okay. Let me start over. You conclude that  
12 less than 20 percent of Colorado purchasers will buy \$500  
13 or more a year from a particular retailer. How do you  
14 know that?

15 A Just taking the \$100 average order as being a  
16 higher than average order in direct businesses and the  
17 fact that they're going to buy two times or less on the  
18 average, they won't reach the \$500. I know looking at  
19 customers' results over the year, if you have somebody  
20 that buys \$500, you've got a really premium buyer.

21 Q And did you do any particular studies to  
22 determine that 20 percent is the right percentage?

23 MR. SCHAEFER: Same objection, but go ahead.

24 A Less than 20 percent. I think that's a very  
25 conservative number. I think it could easily be 10 to 15

1 because it will be a premium buyer.

2 BY MS. SCOVILLE:

3 Q So it could be as low as 10 percent of  
4 customers?

5 A Yes.

6 Q Okay. Did you do any studies yourself to  
7 determine what percentage of folks would buy \$500 or  
8 more?

9 A No. I just, as I said, know that from working  
10 with clients' results and experience.

11 Q And did you refer to any published literature?

12 A No.

13 Q Did you discuss that with the 17 companies with  
14 whom you spoke?

15 A No.

16 Q Is published literature available in your field  
17 that would talk about the percentage of buyers who spend  
18 more than a certain amount?

19 A There are just general surveys, which are hard  
20 to apply because they often take in small start-up  
21 catalogs and very large catalogs and they average things  
22 together and they end up not sure how to apply the data.  
23 So could be, but --

24 Q And did you try and estimate different  
25 percentages based on small start-up catalogs versus

1           A     It says, "The relevant systems development costs  
2 for these steps were also included in Exhibit B." So the  
3 costs are included for developing.

4           Q     Okay. But not in the costs that you've  
5 estimated for the customer information report?

6           A     No, no.

7           Q     The next paragraph talks about the  
8 specifications that the Department of Revenue is going to  
9 publish for transmitting the customer information report,  
10 and you estimate that complying with the Department  
11 specifications will add \$1,000 to \$3,000 to the costs.  
12 How did you arrive at those numbers?

13          A     Well, first off, if the Department of Revenue  
14 specifies something that retailers don't use generally as  
15 software, I felt that we should recognize some kind of a  
16 placeholder. They would say we'd have to, you know,  
17 purchase a piece of software to do that or a program --  
18 you know, maybe change a series of programs that we have,  
19 but certainly we've got to respond to it  
20 electronically.

21          Q     So those costs could be less, depending on the  
22 software specifications that the Department of Revenue  
23 releases?

24          A     Yes.

25          Q     Would that portion of the costs ever be zero?

1 A Potentially.

2 Q And in coming up with the 1,000 to 3,000 number,  
3 did you refer to any literature or published studies?

4 A No.

5 Q Discuss that with any of the 17 companies with  
6 whom you spoke?

7 A No. I used my own judgment.

8 Q The next paragraph indicates that, "Customer  
9 information and purchase information is protected by  
10 privacy statutes and the data is typically encrypted when  
11 sent between locations. This is not specified in the  
12 Colorado regulations and could increase costs." And I  
13 was a little bit confused about that. What would  
14 increase the costs?

15 A Encryption.

16 Q So the retailer company encrypting the data?

17 A Right.

18 Q And do the retailers already encrypt any of  
19 their data?

20 A There are a variety of different methods of  
21 encryption. We're dealing with something we don't know  
22 from the Department of Revenue and, you know, we don't  
23 know how to react to that until we see it.

24 Q Is it possible that depending on what the  
25 Department ultimately specifies that that cost could turn



1 out to be zero?

2 A It's a possibility.

3 Q The second to the last paragraph on this page  
4 says, "Companies will spend hundreds of hours of general  
5 management, marketing, call center, IT and accounting  
6 time interpreting and implementing this regulation in  
7 their company business environment and systems." And you  
8 go on to estimate that it will take between 150 and 200  
9 hours or between \$7,500 and \$10,000, separate and apart  
10 from additional systems costs. How did you come up with  
11 the 150 to 200 hours?

12 A Well, as we talked about this morning, the types  
13 of people, meaning call center, marketing, fulfillment,  
14 the general management of IT, that will have to make up a  
15 committee that will determine what their company's  
16 interpretation of the regulation is, how they're going to  
17 need it, and how they are -- you know, what they're  
18 determination is for what they need to do in terms of  
19 changing what they do. I think that's a conservative  
20 estimate for the number of people and the salaries that  
21 we see people paying.

22 Q And so what was the hourly rate that you used  
23 here for those types of management jobs?

24 A Well, I don't exactly remember. We could divide  
25 it out and see, but I think you'll find it's in the

1     ballpark.

2           Q     Well, if we divide \$7,500 -- hang on, I can't  
3     use my phone, this calculator apparently. All right. If  
4     we divide \$7,500 by 150, you have \$50 an hour.

5           A     And that's in line with what I said with the  
6     call center training procedures. So that's pretty low  
7     when you put general management into it and so forth, so  
8     if you take the \$10,000.

9           Q     And in determining the hourly rate, again, you  
10    did that based on your own experience; you didn't refer  
11    to any published studies?

12          A     No.

13          Q     And in determining the 150 to 200 hours, again,  
14    you relied on your general experience and didn't refer to  
15    published studies?

16          A     Did not.

17          Q     Or do any studies of your own?

18          A     Did not.

19          Q     Did you talk to any of the 17 companies with  
20    whom you spoke about this?

21          A     No.

22          Q     Did you attempt to break down, in terms of the  
23    150 to 200 hours, how much of that would be management  
24    versus marketing versus call center versus IT?

25          A     No, I didn't.

1 Q How were the call center costs in this component  
2 different from the call center costs that you have  
3 already estimated, which included overhead, on the annual  
4 statement -- or, sorry, the transactional notice?

5 A Yeah, transactional. What we were talking about  
6 there are procedures. So once this committee decides  
7 what it is they're going to do, then another set of  
8 people will take what's decided and interpret it in terms  
9 of their systems and process and what they tell people  
10 and the training materials for the reps. The people in  
11 the call center part of it are putting the training and  
12 procedures together. They're not determining that.

13 Q And in terms of the IT costs on this component,  
14 how are the IT costs in this component different from the  
15 IT costs that you've already estimated on the  
16 transactional and annual statement?

17 A On the transactional or annual statement, those  
18 are the design costs and the programming costs. This is  
19 more part of being in the management team that defines  
20 what they think the solution will be and how it affects  
21 the company.

22 Q So if I understand it, then, the costs that  
23 you're estimating for the customer information report in  
24 terms of management time, the \$7,500 to \$10,000, that's  
25 really executive or higher level company time spent to

1 comply with the regulations; is that right?

2 A Yes.

3 Q All right. Let's go to Exhibit D. Your second  
4 bullet point on Exhibit D talks about the high cost of  
5 losing customers and losing sales, and you include, "We  
6 anticipate that this statute's requirement will cause a  
7 major percentage of the customers to abandon the shopping  
8 cart or stop and call the Call Center." I think you've  
9 already given the estimate that more than -- or at least  
10 50 percent of customers will call the call center.

11 A Yes.

12 Q Have you made an estimate of how many customers  
13 will abandon the shopping cart?

14 A No.

15 Q What would a major percentage of customers  
16 abandoning the shopping cart be?

17 A I would say somewhere between 25 and 50  
18 percent.

19 Q And on what data do you base your conclusion  
20 that 25 to 50 percent of customers will abandon the  
21 shopping cart?

22 A That a high percentage of the Internet  
23 transactions are abandoned because of price or ease of  
24 use -- lack of ease of use of the site, and this is a  
25 very negative thing. You're telling the customer that

1 after the fact you're going to pay more for that product,  
2 and there's no -- you know, it's not going to build  
3 sales. It has to lose sales.

4 Q And are there published studies in your field  
5 that talk about the percentage of Internet transactions  
6 that are abandoned because of price or ease of use?

7 A Yes.

8 Q And did you refer to any of those?

9 A No. I just read them all the time and take  
10 those into account.

11 Q And so the 25 to 50 percent is based on your  
12 general experience then?

13 A Yes.

14 Q Did you discuss that with any of the 17  
15 companies with whom you spoke?

16 A No.

17 Q And you haven't done any studies yourself?

18 A No.

19 Q You conclude that the regulations will cause  
20 retailers to lose customers and sales, right?

21 A Yes.

22 Q Do you have any way to quantify how much  
23 retailers will lose?

24 A I can't mathematically do it, but I think about  
25 how competitive today's retail environment is and if

1 somebody is going to pay -- if a customer is going to pay  
2 more from my -- as an out-of-state retailer than somebody  
3 in state or someone else, then the person with the same  
4 product, but a different price, the lower price often  
5 gets the sale.

6 MS. SCOVILLE: Could you read back my initial  
7 question? I'm sorry, I've already lost it.

8 (The question was read by the court reporter.)  
9

10 BY MS. SCOVILLE:

11 Q So I understand that, you know, this is based on  
12 the competitive environment, but do you have any way to  
13 quantify?

14 A No.

15 Q And you haven't done any studies yourself in  
16 that area?

17 A No.

18 Q Have you discussed it with any actual  
19 retailers?

20 A No.

21 Q In your experience working with clients in your  
22 company, are there clients you've had who have  
23 implemented governmental regulations that have caused  
24 them to lose sales?

25 A Not that I can think, no.

1 purchasers, and that number is going to be lower once you  
2 take the four bullet points --

3 A Right.

4 Q -- in Exhibit B into account?

5 A Right.

6 Q Okay. If you could take a look at the first  
7 page of Exhibit 10. You have under "A. Conclusions", you  
8 have, "The initial start up costs may be \$34,000 to  
9 \$46,000 for small to moderate sized companies", and those  
10 numbers were eventually revised downward, right?

11 A Yes.

12 Q And then if you would take a look at the  
13 September 16th draft, which is Exhibit No. 9.

14 A It's right here, I think.

15 Q Thank you. All right. On page 4, you have  
16 Initial cost to set up internal company program, Total  
17 estimated costs, \$28,000 to \$38,000 per company. Do you  
18 see that?

19 A Yeah.

20 Q And those costs were also reduced down, right?

21 A True.

22 MS. SCOVILLE: Why don't you-all give me just  
23 two or three minutes to check my notes, but I think I'm  
24 done.

25 (Break.)

1 fulfillment systems with packing inserts in the past?

2 A All the time.

3 Q What, on average, does a simple packing insert  
4 cost to place in an individual package?

5 A Under 10 cents.

6 Q In this case, it needs to be provided with every  
7 order?

8 A From Colorado.

9 Q So this would be something south of a dime, but  
10 for every single order placed?

11 A Yes. And then with gifts and ship-to's, because  
12 the package isn't going -- since the package is not going  
13 to the purchaser, you'd have to have a separate notice  
14 mailed to the purchaser. In other words, we're not going  
15 to put a notice in the box that this gift -- your  
16 purchaser is going to have to pay the sales tax. We're  
17 not going to do that. So we're going to have to take  
18 that fact, whether it's a ship-to or a gift, and send  
19 that to the purchaser. Then the question I would think  
20 would be, does it have to go first-class or can it go  
21 bulk.

22 Q So that would be an additional cost with the  
23 ship-to's and gifts?

24 A Yes.

25 Q Ms. Scoville asked you questions as well about