

UNITED COURT DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
ECF CASE NO.: 12-CV-1340

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EDWARD L. WHITE, P.C.,

Plaintiff,

-against-

WEST PUBLISHING CORPORATION d/b/a "West", and
REED ELSEVIER INC., d/b/a LexisNexis,

Defendants.

- - - - -x

VIDEO DEPOSITION OF EDWARD L. WHITE

New York, New York

August 30, 2012

REPORTED BY:

DANIELLE GRANT

Ref: 8095

1 E. White

2 reason that you're aware of that you be unable
3 to testify at trial?

4 A No.

5 Q Could you please briefly describe
6 for me any formal education that you've had
7 beginning with college?

8 A I went to -- I graduated from the
9 Oklahoma State University with a chemical
10 engineering degree in 1990. And in '91 I
11 started at Oklahoma City University and
12 graduated in '94 with a juris doctorate.

13 MR. MARKS: I'd like to mark as
14 White Exhibit 1, a copy of a résumé of
15 Edward L. White that I will represent to
16 you we printed off of your web site,
17 EdWhiteLaw.com.

18 (Resume of Edward L. White was
19 marked as White Exhibit No. 1 for
20 identification, as of this date.)

21 Q And I'll ask you to take a look at
22 that and let me know if that your current
23 résumé?

24 A It looks like my current résumé.

25 Q If you can just take a look at

1 E. White

2 White Exhibit 1 and let me know if there's
3 anything inaccurate in this résumé.

4 A I believe it's accurate.

5 Q Why did you leave McKinney
6 Stringer?

7 A I was fired.

8 Q Do you know why you were fired?

9 A Yes.

10 Q Why were you fired?

11 A As most things, there's two kind of
12 reasons, there's the stated reason and there's
13 the actual reason but the stated reason was they
14 were unhappy with my performance.

15 Q What was -- what do you believe the
16 actual reason was?

17 A My boss and I didn't get along.

18 Q And how long did you -- how long in
19 between leaving McKinney Stringer and joining
20 Noland Upton?

21 A A week.

22 Q And how long did you work at Noland
23 Upton?

24 A I worked at Noland Upton about a
25 year.

1 E. White

2 Q And why did you leave Noland Upton?

3 A Start my own practice.

4 Q And you've had your own practice
5 continuously since 1997?

6 A Yes.

7 Q Are you admitted to practice in any
8 courts that are not listed on White Exhibit 1
9 under the heading licenses?

10 A No.

11 Q Have you ever been admitted pro hoc
12 vice in a court outside of Oklahoma?

13 A Yes.

14 Q Which courts have you -- to which
15 courts have you been admitted pro hoc vice?

16 A The Northern District of Texas,
17 the -- I think the Eastern District of Texas,
18 and then the -- was it the Eastern District of
19 New York?

20 Q But not the Southern District of
21 New York?

22 A I don't think the Southern District
23 of New York.

24 Q What kind of case were you
25 litigating that had you admitted pro hoc vice to

1 E. White

2 of which were not the best cases, but. So I
3 think probably early in my career it would have
4 been 50, 60, 70, and it's tailed off in terms of
5 the number now.

6 Q Has there ever been a time where
7 your firm was handling less than ten cases since
8 the first year?

9 A No.

10 Q And over the past three years how
11 many active litigation matters has your firm
12 handled that have involved at least one court
13 filing by the firm, that would be dozens of
14 cases?

15 A Yes.

16 Q Are you the sole owner of Edward L.
17 White, P.C.?

18 A Yes.

19 Q How many employees does Edward L.
20 White, P.C. have?

21 A One.

22 Q Has it ever had more than one
23 employee?

24 A Yes.

25 MR. BLUE: Can I just ask for a

1 E. White

2 A Eleven years.

3 Q So do you have any other employees
4 in addition to Miss Inman that work for your
5 firm, legal or support staff?

6 A Me.

7 Q You haven't had any other
8 assistants other than Miss Inman and the two
9 clerks and the associate you mentioned, correct?

10 A Correct.

11 MR. BLUE: Objection, vague.

12 Q And who is Martin High?

13 A Marty High is a -- he's of counsel
14 with the firm and he's an attorney and
15 professor.

16 Q And how long has he been associated
17 with your firm?

18 A I'd say since 2003.

19 Q How do you know Mr. High?

20 A Mr. High is a professor at Oklahoma
21 State and was my brother's professor in chemical
22 engineering and I got to know him that way
23 initially, and we became friends and eventually
24 colleagues.

25 Q Do you have a -- any written

1 E. White

2 his own behalf or on behalf of a client?

3 Q On your own behalf?

4 A Yes.

5 Q And you had your own firm for ten

6 years before registering a single copyright,

7 correct?

8 A Yes. For --

9 Q On my own behalf.

10 And is it fair to say that your

11 firm has prepared hundreds of court filings?

12 A Yes.

13 Q Is it fair to say thousands of

14 court filings?

15 A Probably.

16 Q Do you have any understanding of

17 whether copyright registration is a common

18 practice among law firms or attorneys with

19 respect to court filings they prepare on behalf

20 of clients?

21 A I haven't asked.

22 Q You don't have an understanding one

23 way or the other?

24 A Correct.

25 Q Are you aware of any other

1 E. White

2 attorneys or law firms with registered
3 copyrights in court filings?

4 A Again, I haven't asked, so, and I
5 haven't done the search, so no.

6 MR. MARKS: I'd like to mark as
7 White Exhibit 5 a copy of a two-page
8 document bearing the Bates numbers
9 P00119 and 120.

10 (Certificate of Registration was
11 marked as White Exhibit No. 5 for
12 identification, as of this date.)

13 Q Mr. White, have you seen White
14 Exhibit 5 before?

15 A Yes.

16 Q What is White Exhibit 5?

17 A It's a certificate of registration
18 for a brief.

19 Q And the title of the brief is
20 Plaintiffs' Combined Motion for Summary Motion
21 for Plaintiffs and Ramsey and brief in support,
22 correct?

23 A Yes.

24 Q And this was the summary judgment
25 motion that you filed in the Beer v. XTO Energy

1 E. White

2 case on behalf of Miss Beer and Miss Bique in
3 their seeking of termination of liability on
4 their individual claims?

5 A Correct.

6 Q What is the reference to the date
7 of first publication on this form?

8 A Are you asking me what the date is?

9 Q I see that the date is May 20,
10 2009, and what I'm asking is what is that date a
11 reference to? What happened on that date?

12 A I believe that's when it was filed.

13 Q Was there any distribution of the
14 motion and brief in support by you other than
15 filing it with the court?

16 A I believe we sent it to the client
17 by regular mail -- the clients by regular mail.
18 And there may have been others, but that is a
19 likely one.

20 Q Did you serve it on opposing
21 counsel?

22 A Via the court system it does that
23 automatically.

24 Q And other than filing the document
25 with the court and mailing a copy of it to your

1 E. White

2 MR. BLUE: Objection.

3 A I think -- I think that's more
4 accurate.

5 Q And you don't have any written
6 agreement with Dr. High governing ownership of
7 copyrights in work product that he contributed
8 to in connection with that case, do you?

9 A I don't believe so.

10 Q And Dr. High did in fact contribute
11 to the drafting of plaintiffs' combined motion
12 for summary judgment?

13 A I'm sure he saw it and I'm sure he
14 said things about it, but whether he contributed
15 to drafting I couldn't say as I sit here today.

16 Q He provided you with written
17 comments on your draft?

18 A Yes.

19 Q Made editorial suggestions?

20 A Yes.

21 MR. MARKS: I'd like to mark as
22 White Exhibit 6, a two-page document
23 bearing the Bates number P00054 to 55.

24 (Document, Bates stamped P00054 to
25 55 was marked as White Exhibit No.

1 E. White

2 6 for identification, as of this
3 date.)

4 Q Mr. White, have you seen White
5 Exhibit 6 before?

6 A Yes.

7 Q What is White Exhibit 6?

8 A A certificate of registration for
9 plaintiffs' motion in limine.

10 Q And this is a motion in limine
11 filed on behalf of the plaintiffs in the Beer
12 versus XTO Holdings case?

13 A Right.

14 Q And was this motion filed on behalf
15 of just Miss Beer and Miss Bique or was this
16 filed on behalf of the class?

17 A Class.

18 Q And is the reference next to the
19 line date of first publication, is that the date
20 that this motion in limine was filed with the
21 court?

22 A Yes, I believe it was.

23 Q And in addition to filing this
24 document with the court, did you mail a copy of
25 it to your clients?

1 E. White

2 copyright in the organization certainly of the
3 materials, selection, organization.

4 Q But you don't claim any copyright
5 in the individual exhibits themselves that were
6 prepared by third parties, do you?

7 A To the extent there was an XTO
8 document attached, I didn't, I didn't write it.

9 Q And you don't claim any ownership
10 of that?

11 A Other than as it relates to its
12 selection and organization in the brief.

13 MR. MARKS: I'd like to mark as
14 White Exhibit 7, the document bearing
15 Bates numbers P00056 through P00085.

16 (Summary Judgment Motion was marked
17 as White Exhibit No. 7 for
18 identification, as of this date.)

19 Q Mr. White, White Exhibit 7 is the
20 summary judgment motion and brief in support
21 that you filed on behalf of Miss Beer and
22 Miss Bique on their individual claims against
23 XTO Energy, correct?

24 A It appears to be, yes.

25 Q And the reference to Ramsey on the

1 E. White

2 relationship with you?

3 A I don't believe so.

4 Q Why was this document prepared?

5 A The document was prepared in order
6 to attempt to secure summary judgment for the
7 named plaintiffs.

8 Q Is there any other reason that you
9 prepared this document?

10 A Well, they also -- it's in my
11 strategy of the litigation, but --

12 MR. BLUE: I just want to avoid a
13 situation where --

14 Q I'm not trying to intrude on work
15 product or privilege. My question is, was there
16 any reason that you prepared this document other
17 in connection with your advocacy on behalf of
18 your clients in the Beer versus XTO Energy case?

19 A No, essentially that was it.

20 Q You qualified with essentially. Is
21 there any reason unrelated to your
22 representation of these clients that you
23 prepared this document?

24 A None that I can think of.

25 Q And at the time that you prepared

1 E. White

2 the document you anticipated that you would be
3 filing it with the court on behalf of your
4 clients, correct?

5 A Correct.

6 Q And you filed the summary judgment
7 motion with the court because you wanted the
8 court to consider it and grant the motion,
9 correct?

10 A That was the primary reason, yes.

11 Q What are the ancillary reasons that
12 you filed with the court?

13 MR. BLUE: Can we also --

14 MR. MARKS: Without --

15 MR. BLUE: -- say it's the same
16 caveat, you're not talking about
17 litigation strategy or how he advised
18 the clients how to proceed.

19 Q If it relates to litigation
20 strategy, I will accept that that's the reason.
21 You don't have to give me the particulars of the
22 litigation strategy.

23 A Litigation strategy.

24 Q No reason unrelated to prosecution
25 of a litigation?

1 E. White

2 A Correct.

3 Q And you knew at the time it was
4 prepared that it would be available on Pacer,
5 correct?

6 A Yes.

7 Q For anyone with a Pacer
8 subscription to download?

9 A I think you have to have a
10 subscription but I knew it would be on Pacer.

11 Q And that anyone, any member of the
12 public who wanted to obtain it from Pacer would
13 be able to obtain it?

14 A Assuming they had the subscription.

15 Q Are you aware of any restrictions
16 on who can obtain a Pacer subscription?

17 A I don't know there's requirements.

18 Q And you also knew that a copy of
19 the brief would be available from the courthouse
20 itself, correct?

21 A Yes.

22 Q And that any member of the public
23 who went in and complied with whatever terms the
24 Western District of Oklahoma has set up for
25 copying briefs could go in and may a copy,

1 E. White

2 right?

3 A Yes.

4 Q And did the possibility that
5 somebody might make a copy of your brief from
6 Pacer and distribute your brief affect your
7 decision to write this motion?

8 A If I had prior knowledge of that
9 fact, I still would have written the motion, if
10 that's what you're asking me.

11 Q That is what I'm asking you. The
12 answer is yes?

13 A Yes.

14 Q And did the possibility that
15 someone might make a copy of your brief in Pacer
16 and distribute your brief affect the quality of
17 your work on this motion?

18 A No.

19 Q And at the time you prepared the
20 motion, you had no way of knowing whether West
21 or Lexis would include a copy of it in a
22 database, correct?

23 A Correct.

24 Q Subsequent to your filing of this
25 document with the court, and until, until this

1 E. White

2 one point represented?

3 A Correct.

4 Q And that's the only reason that you
5 provided a copy of the brief to them?

6 A Yes.

7 Q And to your knowledge that's the
8 only reason they requested a copy of the brief
9 was to assume the representation of the
10 individuals you had previously represented?

11 A Yes.

12 Q Have you ever offered to license
13 the copyright you claim in this work to anybody
14 else?

15 A No.

16 Q Has anyone ever asked you for such
17 a license?

18 A No.

19 MR. MARKS: I'd like to mark as
20 White Exhibit 8 a document bearing Bates
21 number P0001 through P00024.

22 (Motion in Limine was marked as
23 White Exhibit No. 8 for
24 identification, as of this date.)

25 Q Mr. White, what is White Exhibit 8?

1 E. White

2 A It's plaintiffs' motion in limine
3 in Beer versus XTO.

4 Q Can you describe for the process of
5 how this document was prepared?

6 A Generally speaking, it was prepared
7 by me addressing the issues that I felt needed a
8 motion in limine filed on and gathering the
9 relevant background information and legal
10 authority and drafting a brief.

11 Q And you believe that Dr. High
12 provided editorial comment on this brief?

13 A I believe he probably did on this
14 one.

15 Q And did Miss Inman play a similar
16 role with respect to White Exhibit 8 as she did
17 in White Exhibit 7 with regard to formatting the
18 document and providing the cover sheet and the
19 certificate of service, et cetera?

20 A Yes.

21 Q Were there any other contributors
22 to the preparation of the motion?

23 A To the extent we talked to clients
24 about it that may have had comments, it's
25 possible.

1 E. White

2 Q Did anyone, to your knowledge,
3 other than you and Dr. High perform any of the
4 case research associated with the preparation of
5 this motion?

6 A I'm sorry, what was that?

7 Q I'm asking who did the case
8 research in connection with the preparation of
9 the motion?

10 A It would have been me, and then to
11 the extent he was providing editorial comments,
12 there may have been work by Dr. High.

13 Q And this document was prepared on
14 behalf of the class in Beer v. XTO Energy in
15 order to persuade the court to exclude certain
16 evidence from trial in this action?

17 A Essentially. I mean you know what
18 a motion in limine is, but yes.

19 Q Was there any other reason that you
20 prepared this document other than for the
21 purpose of representing your clients in the Beer
22 v. XTO Energy case?

23 A No.

24 Q And at the time the document was
25 prepared you anticipated that it would be filed

1 E. White

2 with the court, correct?

3 A Yes.

4 Q And you knew at the time it was
5 prepared that once filed it would be available
6 on Pacer?

7 A Yes.

8 Q And you knew at the time it was
9 prepared that once filed it would be available
10 for copying at the courthouse?

11 A Yes.

12 Q And the possibility that somebody
13 might copy and distribute your brief did not
14 affect your decision to write this motion, did
15 it?

16 A Correct.

17 Q And the possibility that someone
18 may copy and distribute your brief did not
19 affect the quality of your work on this motion,
20 did it?

21 A No.

22 Q At the time you prepared this
23 motion you had no way of knowing whether West or
24 Lexis would include a copy of it in a database,
25 correct?

1 E. White

2 A Right.

3 Q And have you ever offered to
4 license the copyright you claim in this work to
5 anyone else?

6 A No.

7 Q Has anyone ever asked you for such
8 a license?

9 A No.

10 Q And has anyone ever asked you for
11 such a license?

12 A No.

13 Q Has anyone every asked you for a
14 license to your copyright in any of your
15 registered copyrights?

16 A You're asking me if on the ones
17 that were filed on behalf of the firm, not my
18 clients.

19 Q Correct, not your clients. Thank
20 you for the clarification.

21 With regard to the documents for
22 which you secured a copyright registration, I'm
23 asking has anybody ever attempted to license
24 your copyright in any of those Works?

25 A No one has ever expressly asked me

1 E. White

2 for a license to an Edward L. White, P.C.
3 registered work, no.

4 Q Have you ever offered a license to
5 the copyright in any Edward L., P.C. registered
6 work?

7 A No.

8 Q You brought Beer v. XTO Energy as a
9 putative class action, correct?

10 A Yes.

11 Q And with Miss Beer and Miss Bique
12 as the name plaintiffs, correct?

13 A Correct.

14 Q And on or about March 20, 2009, the
15 court granted your motion for class
16 certification, correct?

17 A I think the date's right.

18 Q You were appointed counsel for the
19 class?

20 A Yes.

21 Q And Miss Beer and Miss Bique were
22 appointed as representatives of the class?

23 A Correct.

24 Q On May, I think we've already
25 talked about that on May 20, 2009 you filed a

1 E. White

2 Q And the court denied the second
3 summary judgment motion for damages on behalf of
4 all plaintiffs as premature as there had been no
5 determination for liability for the class,
6 correct?

7 A The court's order reflects what the
8 court did. I think it was a little more
9 complicated.

10 Q You would agree with me that the
11 court denied motion for summary judgment on
12 damages to the class?

13 A Yes.

14 Q And on April 13, 2010 the court
15 decertified the class, correct?

16 A Yes.

17 Q And the court found that you were
18 not adequately protecting absent class members,
19 correct?

20 A Again, the court's order says what
21 it says.

22 Q And the court's order said that --
23 reflected its determination that you were not
24 adequately representing the class, correct?

25 MR. BLUE: Objection.

1 E. White

2 A It said what it said.

3 Q As a result of that order you were
4 removed as counsel for the class, correct?

5 A Yes.

6 Q And the court also found that Miss
7 Beer and Miss Bique were no longer adequate
8 representatives of the absent class?

9 A Yes, I believe that's correct.

10 Q And at the end of April 2010,
11 Mr. Goodard and Mr. Fenkhauser (phonetic) filed
12 a motion to intervene as names plaintiffs with
13 new counsel, correct?

14 A Goddard, yes.

15 Q Excuse me, Goddard, thank you.

16 And after the court's
17 determination that you were no longer adequate
18 class counsel, you wrote to members of the
19 absent class and offered to represent them
20 individually, correct?

21 A I'm not sure the sequencing is
22 exactly correct but I did -- there was certainly
23 communications.

24 Q Communications between you and
25 members of the class following the court's

1 E. White

2 decertification of the class, correct?

3 A Well, there's no class following
4 decertification.

5 Q Members of the -- members of the
6 formerly certified class?

7 A Yes.

8 Q And in those communications you
9 offered to represent those parties individually
10 in continuing litigation against XTO Energy,
11 correct?

12 A Again, the letters speak for
13 themselves, but yes, essentially that's correct.

14 Q You wanted to stay involved as
15 counsel for those parties, correct?

16 A Yes.

17 Q And by May 15, 2010, you had filed
18 copyright registrations for 15 of the court
19 filings and discovery documents that you had
20 prepared while acting as counsel for the
21 formerly certified class?

22 A I think the dates are right, yeah.

23 Q And you wanted to prevent new
24 counsel from copying the work product you had
25 done on behalf of the class, correct?

1 E. White

2 A I wanted to protect my intellectual
3 property, if that's what you're asking me.

4 Q And the concern that you had was
5 that other lawyers who were seeking to act on
6 behalf of the same individuals you were seeking
7 to represent would use your work product in
8 their own efforts to represent those same
9 individuals?

10 MR. BLUE: Objection.

11 Go ahead.

12 A That was certainly a concern.

13 Q What other concern did you have?

14 A Well, again, it's -- I think that
15 the best way to say it was I was seeking to
16 protect my intellectual property and that was a
17 significant concern.

18 Q What else motivated the timing of
19 registering 15 documents in the case other than
20 the fact that you had been removed as counsel
21 for the class, there was a motion to intervene
22 with new class counsel, and you were seeking to
23 represent those same individuals in their
24 individual capacity?

25 A Well, part of it was I didn't have

1 E. White

2 a trial that I had expected to have and so I had
3 more time. But your assertion that that was
4 copying by subsequent counsel was a concern is
5 accurate.

6 Q And what I'm trying to understand
7 is were there any other concerns motivating the
8 last 15 copyright registrations that you've made
9 in your career on behalf of your firm?

10 MR. BLUE: Objection, asked and
11 answered?

12 A Yes.

13 Q And what were they?

14 A A desire to protect my intellectual
15 property.

16 VIDEOGRAPHER: Excuse me, Counsel,
17 we're coming down to seconds.

18 MR. MARKS: That's fine. Why don't
19 we go ahead and change now.

20 VIDEOGRAPHER: The time is 11:53
21 and we're off the record.

22 (Whereupon, at 11:53 a.m., a recess
23 was taken to 11:59 a.m.)

24 (The deposition resumed with all
25 parties present.)

1 E. White

2 Q They haven't suggested that West
3 Law or Lexis and what materials are on West Law
4 or Lexis should play any part in the fee award?

5 A I haven't heard them say that.

6 Q When did you first become aware of
7 West Law, the existence of West Law?

8 A I believe in law school.

9 Q When did you first become aware of
10 Lexis?

11 A Same.

12 Q When did you first become aware
13 that West Law was making briefs and other court
14 filings written by attorneys available to
15 subscribers?

16 A I don't know.

17 Q Do you recall how you became aware
18 that West Law was making brief and other court
19 filings written by attorneys available to
20 subscribers?

21 A I believe I became aware as a
22 result of performing a search and that brief --
23 a brief or more than one brief appeared as a
24 result to that search.

25 Q So in other words, briefs came up

1 E. White

2 in response to searches that you were doing?

3 A Correct. And I don't remember if
4 it was -- the search revealed that or if
5 clicking on another result revealed that, but
6 some way as a result of a search it appeared
7 that there were briefs on file or available on
8 Lexis, I think.

9 Q And so that's how you learned that
10 Lexis was making briefs available, right?

11 A Right.

12 Q Do you recall the approximate time
13 frame in which you learned that?

14 A It would have been, you know,
15 within the last year or two.

16 Q And when did you first become aware
17 that West Law was making briefs and other court
18 filings written by attorneys available to
19 subscribers?

20 A It would have been after I became
21 aware of the Lexis offering.

22 Q And within the past year?

23 A Again, within the past year or two.

24 Q How did you become aware that West
25 Law was making briefs and other court filings

1 E. White

2 A No.

3 Q How did you become aware that a
4 document prepared by Edward L. White, P.C. was
5 available on Lexis?

6 A I think, and I don't know if this
7 is true in fact, my assumption was once I
8 figured out that briefs were available that I
9 had assumed that basically all federal briefs
10 were available, that there was some sort of
11 program to pull those off and kind of in an
12 automated fashion index and process.

13 Q Do you understand sitting here
14 today whether or not that's the case?

15 A I don't know if that's the case.

16 Q Did you ever search Lexis for a
17 copy of a brief or other court filing prepared
18 by your firm?

19 A I believe I did.

20 Q And were you able to locate any?

21 A I believe I was, yeah.

22 Q Which documents were you able to
23 identify?

24 A I believe some of the Beer
25 documents, one or more of the beer documents.

1 E. White

2 Q And when did you conduct that
3 search?

4 A I don't know. After they were
5 registered in 2010, but I don't know when.

6 Q Certainly within the last year or
7 two which is the time frame in which you've
8 indicated you first became aware that Lexis made
9 briefs available, correct?

10 A Correct.

11 Q And have you ever conducted a
12 search for your own materials on West Law?

13 A No.

14 Q Has anyone ever done that on your
15 behalf?

16 A It's possible, I don't know.

17 Q Sitting here today, you're not
18 aware of anybody having searched West Law for
19 copies of your briefs or other court filings on
20 West Law?

21 A Correct.

22 Q When was the last time that you
23 used Lexis to access one of your own documents?

24 A I don't know.

25 Q Within the past year?

1 E. White

2 correct?

3 A I believe that's correct.

4 Q And has that dispute been resolved?

5 A Yes.

6 Q And other than that fee dispute,
7 have you had any dispute of any kind with West?

8 MR. BLUE: Other than this?

9 Q Other than the litigation?

10 A I think -- I think years prior to
11 that I had switched one other time and -- and
12 had a dispute with them as well, so my
13 recollection is I may have in a prior instance.

14 Q And at any point prior to filing
15 this suit, did you ask Lexis to remove materials
16 written by Edward L. White, P.C. from its
17 database?

18 A No.

19 Q And prior to filing did you have
20 any communications with Lexis about not putting
21 any of your materials into the database in the
22 first place?

23 A I don't believe so.

24 Q And did you ever have any
25 communication with anyone at Lexis about the

1 E. White

2 availability of materials, of your materials in
3 this database?

4 A Other than this litigation I don't
5 believe so.

6 Q And have you had billing disputes
7 with Lexis?

8 A I don't believe so.

9 Q And did --

10 A I mean, I actually feel recently I
11 had a deal where there was a sizable
12 transactional charge of some sort and we
13 negotiated a lesser amount. So I think that
14 would fit that.

15 Q Has anyone ever told you that a
16 request to Lexis to remove materials from its
17 database would be futile?

18 A No.

19 Q Did you have any reason to believe
20 that such a request would be futile?

21 A Yes.

22 Q What's the basis for your belief
23 that a request to Lexis to remove materials from
24 its database would be futile?

25 A Same, essential expectation and

1 E. White

2 action, have you had conversations with other
3 attorneys about the availability of briefs on
4 West Law or Lexis?

5 MR. BLUE: I'll object to the
6 extent that previous answers have
7 discussed that.

8 Q You can answer.

9 A I believe I have.

10 Q Who's that?

11 A Couldn't say specifically. Like
12 most lawyers, I talk to my friends and
13 colleagues about various legal matters and it
14 would have been in that context of, you know,
15 did you realize that this was out there.

16 Q Sitting here today, you can't
17 recall a specific conversation?

18 A No, I can't recall a specific.

19 Q Has anyone ever told you in words
20 or in substance that they would writing legal
21 briefs if they were copied and distributed by
22 West Law and Lexis without permission?

23 A No.

24 Q Has anyone told you in words or in
25 substance that the quality of their briefs would

1 E. White

2 diminish if they were copied and distributed by
3 West Law and Lexis without permission?

4 A No.

5 Q Has anyone ever told you that they
6 had complained to West Law or Lexis about the
7 availability of court filings on West Law or
8 Lexis?

9 A It, you know, it's one of those
10 deals, I don't have a specific recollection but
11 I believe that somebody I talked to had
12 mentioned that they had complained.

13 Q You don't recall who this person
14 is?

15 A No, I don't.

16 Q Man or a woman?

17 A I believe it was a man, but I've --
18 I've had quite a few conversations with folks
19 about this issue so I can't be sure who it was.

20 Q Since the filing of the complaint,
21 you mean?

22 A Since and before.

23 Q So you've had quite a few
24 conversations about this issue before you filed
25 a complaint in this action?

1 E. White

2 the percentage of attorneys who might have
3 accessed either of those Works through West Law
4 or Lexis is tiny as a percentage of the people
5 who have obtained copies of those documents
6 through Pacer or from the court itself?

7 A I don't know what fraction of
8 people that have accessed those Works have done
9 so through Lexis or West Law versus Pacer, if
10 that's your question.

11 Q And if somebody wanted to see those
12 briefs so that they could compete more
13 effectively with you, they could go get a copy
14 from Pacer, couldn't they?

15 A If they specifically knew about the
16 case at issue and knew that they wanted those
17 specific briefs, but it's, you know, not part of
18 my complaint in this case is that it's the
19 systematic way and you know, the text search
20 ability and the ability to pull up a whole set
21 of briefs on an issue is what undercuts my
22 ability to practice. It's not just that one
23 brief's available if you know that case and you
24 know you want that brief, which has always been
25 the case, but it's that there's a systematic way

1 E. White

2 that someone can have access, use, and basically
3 have a whole roadmap for a case based on briefs
4 on file.

5 Q And can you identify a single
6 client represent -- client representation that
7 you have lost because of the availability of one
8 of your Works on West Law or Lexis?

9 A I can't imagine someone coming to
10 me and saying I would have hired you but I went
11 to Joe Smith because he told me he could get
12 these briefs off Lexis. It's never happened but
13 I can't imagine how it would.

14 Q And are you aware of any case that
15 you have lost in part because your litigation
16 adversaries had access to briefs that you had
17 filed in the past?

18 A Again, I can't imagine that
19 specifically coming up but it certainly is, and
20 I didn't mention that fact before, but that, the
21 access of adversaries to briefs in an easy
22 fashion that involve Edward L., you know, Ed
23 White, is another way in which I could have been
24 harmed by the --

25 Q The fact that a litigation

1 E. White

2 adversary could have used West Law or Lexis to
3 obtain copies of briefs you have filed in the
4 past?

5 A Correct.

6 Q And your litigation adversaries
7 know who you are presumably, right?

8 A Presumedly.

9 Q So they could go to the courthouse
10 and get copies of your briefs and filings,
11 couldn't they?

12 A Again, not as in a simple of
13 fashion, but yes.

14 Q So it's easier for them to get it
15 through West Law and Lexis, but they could get
16 it through publicly available records at the
17 courthouse or on Pacer, correct?

18 A Yes.

19 Q You have also alleged that you have
20 suffered irreparable injury from the
21 availability of the motion for summary judgment
22 and the motion in limine on West Law?

23 A I think we allege that, yes.

24 Q And is the irreparable injury any
25 different from what you've described? Is that a

1 E. White

2 the Pacer system.

3 Q And that's true for court filings,
4 right, too, when you make a public court filing
5 the public has access to it, right?

6 A Correct.

7 Q Are you damaged by the availability
8 at the courthouse of copies of your public
9 filings?

10 A I suppose to a limited extent, yes,
11 the same extent, but part of the system.

12 Q And you're being irreparably
13 injured by the fact that the court makes your
14 documents available to the public, right?

15 MR. BLUE: Objection.

16 A I don't know if I'd say it that
17 way.

18 Q Would you say you're being
19 irreparably injured by the availability on Pacer
20 of your briefs and other court filings?

21 A Again, I don't know that I'd say it
22 that way. I don't -- they have -- it's a
23 different situation in my mind.

24 Q And what is the difference?

25 A The federal systems for filing

1 E. White

2 White.

3 Q Mr. White, I'd like to start by
4 asking you a question that was asked earlier
5 today, and I understand from my colleagues that
6 the transcript may not have come out clearly so
7 bear with me, I'm just going to ask the question
8 again.

9 We were speaking earlier today
10 about the summary judgment motion that you
11 filed on behalf of Miss Beer and Miss Bique in
12 the Beer v. XTO Energy case.

13 Do you recall that?

14 A Yes.

15 Q Did the possibility that someone
16 might make a copy of your summary judgment
17 motion and supporting brief from Pacer and
18 distribute that material affect your decision to
19 write the summary judgment motion?

20 A No.

21 Q Your professional reputation has
22 not been compromised by the fact that West Law
23 and Lexis subscribers have been able to access
24 some of your court filings through those
25 services, has it?

1 E. White

2 A I don't believe so.

3 Q And your ability to represent
4 clients effectively has not been comprised by
5 the availability of some of your past court
6 filings on West Law or Lexis, has it?

7 A My ability to represent them
8 effectively has not been compromised, but as I
9 explained, I think it affects my business.

10 Q Because other lawyers are able to
11 compete for business with you by -- through
12 access to your briefs?

13 A Well, as we've discussed, but yes,
14 essentially.

15 Q The brief filed on your behalf in
16 opposition to West's and Lexis's partial motions
17 to dismiss cited briefs written by other
18 lawyers, correct?

19 A I believe that's correct.

20 Q I don't want to make this a memory
21 test. Let me hand you a copy of plaintiff's
22 memorandum of law in opposition to defendants'
23 motions to dismiss filed on your behalf in this
24 case.

25 If I could point your attention to

1 E. White

2 old -- some ole subject matter just to get to
3 new points.

4 And you are aware that the same
5 ground rules that Mr, Marks had talked about
6 before still apply to my questions, correct?

7 A Yes.

8 Q We don't need to go over any of
9 them again, you feel comfortable, do you
10 understand them?

11 A Yes.

12 Q Great. Have you ever physically
13 filed a document with the court?

14 MR. BLUE: Objection.

15 A With any court?

16 Q With any court?

17 A Yes.

18 Q And when you say specifically
19 filed, have you ever gone down and hand filed
20 with the clerk of the court?

21 A Yes.

22 Q What is your understanding
23 regarding the right of the public to access the
24 court files that you would physically file with
25 the court?

1 E. White

2 A I think it varies depending on the
3 court clerk, hours of operations, their
4 particular policies, but generally are you
5 asking me what their -- is it available
6 publicly? What are you asking me?

7 Q Does the public have the right to
8 access the document?

9 A Typically.

10 Q Do they have the right to typically
11 review the document subject to any
12 confidentiality?

13 A Yes, typically.

14 Q Would they have the right to make
15 copies of the document?

16 MR. BLUE: I'm going to ask for a
17 clarification. When you're talking
18 about does the court allow them to make
19 copies or are you asking him a legal
20 conclusion whether that is somehow legal
21 and permissible?

22 MR. WHITNEY: I'm asking
23 understanding what the public is able to
24 do?

25 MR. BLUE: Okay.

1 E. White

2 A Typically my understanding is the
3 public is able to make copies or have copies
4 made by the clerk.

5 Q And do you have any understanding
6 that that's impermissible if the public makes
7 copies of those documents?

8 MR. BLUE: Objection. Same thing I
9 said before. I'm just trying to see
10 what -- are you saying permissible under
11 the court rules or permissible as a
12 matter law or just either way.

13 Q Either way?

14 A My understanding is that it's
15 generally permissible under court rule as long
16 as there's not a confidentiality agreement as
17 the caveat.

18 Q And is it impermissible under any
19 other rules?

20 A Well, I think that gets into
21 questions of fair use, what the person is making
22 a copy for, so I think it could be permissible
23 or it might not be permissible depending on what
24 they -- what the document's used for.

25 Q And what kind of use would you say

1 E. White

2 this date.)

3 (E-mail bearing Bates numbers P86
4 to P91 was marked as White Exhibit
5 No. 12 for identification, as of
6 this date.)

7 Q Mr. White, have you seen what's
8 been marked as Exhibit 11 before, which is the
9 one that starts with Bates number P25?

10 A Yes.

11 Q And what is it?

12 A This is the -- a copy of the e-mail
13 that's received from the court upon filing of a
14 document and this particular one is document
15 176, a motion in limine.

16 Q And is this the motion in limine
17 that is at issue in this case that you're
18 accusing Lexis and West and copyright
19 infringement on?

20 A I believe it's the same one, yes.

21 Q And Exhibit 12 for Bates number
22 P86, can you tell me what that document is?

23 A It's the same kind of thing, it's
24 an e-mail notice regarding the motion for
25 summary judgment.

1 E. White

2 Q And is that the same -- is that the
3 motion for summary judgment that is at issue in
4 this case that you're accusing West and Lexis of
5 copyright infringement on?

6 A I believe so, there are two but I
7 think this is the correct one.

8 Q Did you receive these notices after
9 filing the Works at issue in the Beer v. XTO
10 Energy case?

11 A Yes, I would have received a notice
12 by e-mail.

13 Q Do you have an understanding of who
14 can get these notices?

15 A Anyone who's entered an appearance
16 in the case, any counsel or parties or pro se
17 entered an appearance, and I think in this
18 particular instance it indicates on page P87 who
19 got the notice.

20 Q Do you know if attorneys who are
21 not representing parties in this case can
22 receive these ECF notices?

23 A I don't receive any in cases where
24 I'm not an attorney but it's possible I suppose.

25 Q What was your understanding of the

1 E. White

2 availability of these briefs after they were
3 filed?

4 MR. BLUE: Objection, asked and
5 answered.

6 You can answer it again.

7 A My -- I knew that they were filed
8 and therefore available on Pacer and also I
9 believe that you could get a -- I say this -- I
10 think you can get a paper copy at the courthouse
11 although I have not done that in a long time.

12 Q If I can turn you to the -- sort of
13 the top third of these documents, we can look at
14 Exhibit 11 but you can see that the same
15 language exists on Exhibit 12. It says, the
16 second to last sentence above where it says U.S.
17 District Court near in the middle of the page,
18 "To avoid later charges, download a copy of each
19 document during this first viewing." If you
20 want to back it up it says -- let me read the
21 whole paragraph to make it clear.

22 "Judicial conference of the United
23 States policy permits attorneys of record and
24 parties in a case (including pro se
25 litigations) to receive one free electronic

1 E. White

2 Q You do recognize, understand
3 however that ECF filed documents are made
4 available to the public via Pacer, correct?

5 A Generally, yes.

6 MR. WHITNEY: I'm going to mark the
7 next document as Exhibit 13, which is
8 Bates number LN3080 to LN3181.

9 (Document bearing Bates numbers
10 LN3080 to LN3181 was marked as
11 White Exhibit No. 13 for
12 identification, as of this date.)

13 Q Mr. White, the court reporter has
14 just handed you a document that on the top
15 states United States District Court Western
16 District of Oklahoma ECF Registration Form.

17 Do you see that?

18 A Yes.

19 Q Have you seen this document before?

20 A I suspect that I fille one out but
21 I don't recall seeing one before.

22 Q And you've testified that you have
23 an ECF registration with the Western District of
24 Oklahoma, correct?

25 A Correct.

1 E. White

2 restate it I would appreciate it.

3 Q Okay. Are you aware that by filing
4 a document with ECF, you are authorizing any
5 member of the public to access and copy the
6 document filed through ECF?

7 MR. BLUE: Objection calls, for a
8 legal conclusion.

9 You can answer.

10 A I'm aware of the idea as expressed
11 in this policy that litigants -- litigants
12 receive a free copy and others can purchase
13 copies as specified here.

14 MR. BLUE: I just want the record
15 to show that Mr. White is referring to
16 Exhibit No.

17 THE WITNESS: 15.

18 MR. BLUE: 15.

19 Q Do you have any objection to
20 members of the public accessing your document, a
21 document that you had filed with the court via
22 ECF accessing it via Pacer?

23 A Not generally.

24 Q Do you have a specific objection to
25 a member of the public accessing a document you

1 E. White

2 say it it's going to mean the same thing.

3 The response number four,
4 notwithstanding the general objections,
5 plaintiff have -- plaintiffs have no responsive
6 documents.

7 Do you see that?

8 A Yes.

9 Q Do you have any agreements with
10 other counsel regarding the ownership of
11 co-authored Works?

12 A The question presumes that these
13 are -- that the Works at issue are co-authored
14 Works. I don't believe that's true and so
15 therefore I don't -- the only person who would
16 be a co-author even respectively is Mr. High,
17 Dr. High, and I think in these instances he
18 was -- he made some editorial comments but I
19 think I was the author, so I don't think there's
20 any agreements that respond.

21 Q You are aware that Mr. High's name
22 appears on the caption of the Works; is that
23 correct? I can show you the --

24 A I know it does on one.

25 MR. BLUE: Sorry. I don't think

1 E. White

2 it's proper to call it the caption. You
3 mean the cover page?

4 MR. WHITNEY: Yes.

5 A Yes, it does, on both.

6 Q Okay. And notwithstanding that his
7 name appears on the cover page, and I believe
8 the signature block, and the signature block of
9 these two documents, of the motion in limine and
10 the motion for summary judgment, is it your
11 position that he is not a co-author of these
12 documents?

13 A Yes.

14 Q Turn to request number five. All
15 documents, the request seeks all documents
16 concerning your agreement with any person other
17 than clients or counsel regarding the ownership
18 of co-authored Works. The response,
19 notwithstanding the general objections
20 plaintiffs have no responsive documents.

21 Do you see that?

22 A Yes.

23 Q Do you have any agreement with any
24 person other than clients or counsel regarding
25 the ownership of co-authored Works?

1 E. White

2 Do you see that?

3 A Yes.

4 Q Have there been any communications
5 between you and LexisNexis regarding the Works
6 at issue in this case?

7 A I don't believe so. Other than the
8 litigation.

9 Q Of course. Have there been any
10 communications between you and West Law
11 regarding the Works at issue in this case?

12 A Other than the litigation
13 communications, no.

14 Q Request number 26 seeks all
15 communications with third parties other than
16 counsel of record in this case about LexisNexis.
17 The response, notwithstanding the general
18 objections as to the complaint Works, plaintiffs
19 have no responsive documents.

20 Do you see that?

21 A Yes.

22 Q Have there been any communications
23 with third parties other than counsel of record
24 in this case about LexisNexis with regard to the
25 Works at issue in this case?

1 E. White

2 from Pacer and read them, and to the extent that
3 I read them I, you know, you learn something
4 from them. So I guess that's using them.

5 Q Have you ever copied any of the
6 content in a brief filed by another attorney in
7 court that you have acquired via Pacer in a
8 document that you have subsequently filed in a
9 court?

10 A I don't believe so. I believe I
11 have, like I said I've read the briefs. They
12 will identify relevant cases. I'm not very
13 trusting of other, you know, let's say Joe Smith
14 writes a brief. It's fine that he says the law
15 is thus but I want to read the case myself, I
16 tend to not be really comfortable copying
17 people's work. Not -- not just because it's
18 copyright issue but because I don't know how
19 thorough they were to the starting point
20 sometimes.

21 Q Is it your position that the cases
22 cited in a brief are the copyrighted material of
23 the author who cites them?

24 A It can be. As -- as copyright case
25 law goes from my understanding, the selection of

1 E. White

2 the material to be included in a documents can
3 be a copyrightable element. Does that answer
4 your question?

5 MR. BLUE: There may have been some
6 confusion, if I can get some
7 clarification. Are you talking about
8 the citation being copyrightable or do
9 you mean the underlying case?

10 Q The citation.

11 A I don't think the citation itself
12 is protectable.

13 Q What is protectable?

14 A I think I explained to the extent I
15 understand it, it's that the gathering,
16 compilation of that particular set of cases as
17 it related to the legal issue at hand can be a
18 protectable element of what is copyrightable.

19 Q So if you cite hypothetically three
20 cases to support an issue, is it your view that
21 no other lawyer can ever cite those three cases?

22 A No.

23 Q So in what way would it be
24 copyrightable?

25 A I think it's like everything else

1 E. White

2 you can go ahead.

3 A It's possible.

4 Q In the Works at issue in this case,
5 is it your contention that the -- the
6 organization of the cases that you've cited in
7 those briefs are copyrightable?

8 A Well, I mean, it's -- the
9 organization of those cases in toto in the
10 brief, yes. But if you're asking me in
11 paragraph 27 the fact that I cite the Smith
12 case, is that particular fact copyrightable, I
13 don't think so.

14 Q And when you're quoting a case in
15 these briefs, is that copyrightable?

16 MR. BLUE: Objection, calls legal
17 conclusion.

18 Can I just have a standing
19 objection on legal conclusion on this
20 line of questioning?

21 MR. WHITNEY: Sure.

22 Q And I'm trying to understand what
23 your claim to copyright infringement is here.
24 I'm asking you specifically with regard to the
25 Works at issue in this case.

1 E. White

2 and, you know, to the extent that the
3 plaintiff has a position on those
4 things, it's going to be particularly by
5 counsel in the proper legal context.

6 MR. WHITNEY: I understand. I'll
7 ask a few more questions. Your
8 objection is noted.

9 MR. BLUE: Thanks.

10 A And your question was?

11 Q Do you claim copyright ownership in
12 the format of this brief, table of contents,
13 brief in support, undisputed material fact,
14 argument authorities, summary judgment standard,
15 conclusion?

16 A When stated that way, I don't think
17 I would claim, you know, because lots of briefs
18 have that general organizational structure, but
19 I think when you get into the details of -- if
20 the format is all the words, yes. If the format
21 is just the fact that it has headings, no.

22 Q Now, we've touched on this before
23 but I think it's one specific question I don't
24 think was asked. Have you ever accessed any
25 of -- either of the two briefs at issue in this

1 E. White

2 was taken to 2:58 p.m.)

3 (The deposition resumed with all
4 parties present.)

5 VIDEOGRAPHER: The time is 2:58 and
6 we're back on the record.

7 Q Mr. White, to the extent that
8 anyone accessed your briefs on Lexis or West
9 Law, you're not aware of the reasons why they
10 did, correct?

11 A Correct.

12 Q And you did not create the motion
13 for summary judgment at issue in this case in
14 order to license or sell it to other lawyers,
15 correct?

16 A Not -- not for that purpose.

17 Q And you did not create the motion
18 in limine at issue in this case license in order
19 to license or sell it to other lawyers, correct?

20 A Same answer.

21 Q Has anyone ever offered to license
22 any of your briefs, pleadings or motions?

23 A Not directly.

24 Q Have they offered indirectly?

25 A Well, to the extent I've been

1 E. White

2 contacted and people have asked me to serve as
3 co-counsel on the case, I think in part that's
4 the work on cases I've done and they know I have
5 knowledge that is embodied in those briefs.

6 Q But they've offered to retain you
7 as co-counsel?

8 A Correct.

9 Q They haven't offered to license a
10 brief that you had previously offered?

11 A Correct.

12 Q And have you ever attempted to
13 license any of the Works you've created and
14 filed with courts of record?

15 A You mean to sell a, "Here's a copy
16 fro \$50," that kind of a transaction.

17 Q Correct.

18 A No.

19 MR. MARKS: Nothing further.

20 MR. BLUE: Nothing from the
21 plaintiff.

22 VIDEOGRAPHER: The time is 2:59 p.m
23 and we're off the record.

24 (Time noted: 2:59 p.m.)

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E. White

EDWARD L. WHITE

Subscribed and sworn to before me
this _____ day of _____ 2012.

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