

Ex. A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

JOHN WARD, JR.,	*	
Plaintiff,	*	
VS.	*	CIVIL ACTION NO.:
CISCO SYSTEMS, INC. AND RICK	*	
FRENKEL,	*	
Defendants.	*	08-4022

ORAL VIDEOTAPED DEPOSITION OF
JILLIAN POWELL

ANSWERS AND DEPOSITION OF JILLIAN POWELL, produced as a witness at the instance of the Plaintiff, taken in the above-styled and -numbered cause on the 27th day of March, 2009, A.D., beginning at 10:38 a.m., before Kelly Hassell, a Certified Shorthand Reporter in and for the State of Texas, in the offices of Baker Botts, L.L.P., located at 2001 Ross Avenue, Suite 1100, Dallas, Texas, in accordance with the Federal Rules of Civil Procedure and the agreement hereinafter set forth.

1 (Exhibit Number 1 was marked.)

2 Q (BY MS. PEDEN) Okay. The court reporter has
3 previously marked Exhibit 1.

4 MS. PEDEN: If the court reporter can hand
5 that to the witness, please.

6 Q (BY MS. PEDEN) Ms. Powell, have you seen this
7 document before?

8 A Yes.

9 Q And when did you see it?

10 A I was served at my home. I don't remember what
11 day.

12 Q Okay. And are you here today to testify pursuant
13 to this subpoena?

14 A Yes.

15 Q What did you do to prepare for your deposition
16 today?

17 A I spoke with my attorney this morning and that's
18 all I remember.

19 Q So you had one meeting with your attorney this
20 morning?

21 A Yes.

22 Q Did you have any other meetings with your
23 attorney?

24 A No.

25 Q How long was the meeting this morning?

1 A An hour.

2 Q And where did that meeting occur?

3 A In a conference room at Baker Botts.

4 Q So it was here?

5 A Yes.

6 Q Was Mr. Babcock present at that meeting?

7 A No.

8 Q Or Ms. Parker?

9 A Yes.

10 Q Can you tell me what you discussed at that
11 meeting, please.

12 A The procedures for the deposition.

13 Q Did you discuss any substantive questions I might
14 ask you?

15 A Yes.

16 Q And what were those?

17 MR. CHEAVENS: I'm going to instruct the
18 witness not to answer. That's privileged.

19 MS. PEDEN: With Mr. -- with Ms. Parker
20 present, it's privileged?

21 MR. CHEAVENS: We have a joint client.

22 MS. PEDEN: Do you have a joint defense
23 agreement?

24 MR. CHEAVENS: Not in writing.

25 MS. PEDEN: Do you have one that's an

1 understanding?

2 MR. CHEAVENS: Yes. Sure. The substance of
3 those communications are privileged and I'll instruct the
4 witness not to answer, so --

5 MS. PEDEN: Okay. So what privileges are
6 you claiming, Mr. Cheavens?

7 MR. CHEAVENS: Attorney/client privilege and
8 work product privilege.

9 MS. PEDEN: How long has this joint defense
10 agreement been in existence?

11 MR. CHEAVENS: Since I first learned about
12 this lawsuit in the Albritton case.

13 MS. PEDEN: When was that?

14 MR. CHEAVENS: I don't know. I think when
15 we were first served with a document subpoena in the
16 Albritton case last summer.

17 MS. PEDEN: Okay. I think we might need to
18 take a recess and call chambers. Let me just say on the
19 record that I think having opposing counsel in a witness
20 prep session right before the witness is to be deposed
21 about her testimony waives attorney/client privilege.

22 Cisco's request for admissions filed in this case
23 identifies Baker Botts as a third party. They refuse to
24 provide discovery that's in Baker Botts's possession
25 because they're a third party. I just think it's an

1 right?

2 A Yes.

3 Q In October of 2007?

4 A Yes.

5 Q And did you review your E-mails to refresh your
6 memory --

7 A Yes.

8 Q -- about the facts?

9 And did they, in fact, refresh your
10 recollection?

11 A To an extent. Some of the details are still
12 fuzzy due to the length of time.

13 THE VIDEOGRAPHER: Counsel, your mic.

14 Q (BY MS. PEDEN) Well, did any of those documents
15 you reviewed help your memory about the facts surrounding
16 the filing of the ESN complaint?

17 A Yes.

18 Q And without discussing contents of those
19 documents, can you give me an idea of what those documents
20 were that you looked at?

21 A They were E-mail communications to employees of
22 this firm.

23 Q Was one of the documents you looked at an E-mail
24 communication between you and Mr. Pankratz?

25 A Yes, he was copied on one that I remember.

1 Q How about an E-mail between you and
2 Mr. Schortgen?

3 A Yes.

4 Q And you looked at that E-mail?

5 A Yes.

6 Q And did that help refresh your memory about the
7 events?

8 A Yes.

9 Q Any other documents that you looked at that
10 helped refresh your memory?

11 A That was the main document I remember.

12 Q Why was it that you went to that document to
13 refresh your recollection?

14 A I went to that document because it had the most
15 details surrounding the facts.

16 Q Did you review any documents prepared by counsel?
17 And by "counsel," let me -- let me make clear, I mean
18 Mr. Cheavens.

19 A No.

20 Q Okay. How about anything prepared by Mr. Babcock
21 or Ms. Parker?

22 A No.

23 Q Let me go back to your -- the E-mail that you
24 looked at between you and Mr. Schortgen. What specifically
25 about that document refreshed your recollection?

1 Q Okay. So in your practice, it's usually the
2 attorney that calls the court clerk?

3 A If there's a problem filing, yes.

4 Q Okay. If an attorney asks you to do it, would
5 you hesitate to call the court clerk if it was directed by
6 an attorney?

7 A The situation would have -- it would depend on
8 the situation.

9 Q So let's just say you filed a pleading when you
10 were working with Mr. Pankratz and the pleading came back
11 and it had some deficiency and Mr. Pankratz said,
12 Ms. Powell, I'm really busy. I've got a mediation today.
13 Can you call the court clerk and see what's wrong with this
14 filing; would you do that?

15 A I still would probably not do that, no.

16 Q Why?

17 A Well, it really -- these are -- these are
18 circumstances that I honestly would have to be in the
19 situation. It's hard -- almost kind of hard to -- it would
20 be hard to say what I would do in that situation because I
21 haven't been in that situation.

22 Q Okay. Well, let's talk a minute about the
23 complaint that was filed in the ESN versus Cisco case.
24 Mr. Pankratz asked you to call the court clerk, right?

25 A Yes.

1 Q To ask what had happened with that filing, right?

2 A Yes.

3 Q And you didn't have a problem calling the court
4 clerk to ask them those questions?

5 A No.

6 Q And that was at his direction, right?

7 A Yes.

8 Q Is there anything in the local rules that you're
9 aware of that prohibits you from calling the court clerk?

10 A No.

11 MS. PEDEN: Gentlemen, is this a good time
12 for a break?

13 MR. CHEAVENS: Sure.

14 MS. PEDEN: Okay.

15 MR. BABCOCK: Sure.

16 MS. PEDEN: Take a 10-minute break.

17 THE VIDEOGRAPHER: We are off the record.

18 The time is 11:37 a.m.

19 (Break was taken.)

20 THE VIDEOGRAPHER: We are back on the
21 record. The time is 12:04 p.m. This is the beginning of
22 Tape 2.

23 MS. PEDEN: Thank you.

24 Q (BY MS. PEDEN) Welcome back, Ms. Powell. Do you
25 understand that you're still under oath?

1 A PACER.

2 Q Okay. So first of all, when did you pull
3 Exhibit 3 from PACER?

4 A I don't remember.

5 Q Okay. Do you have a general time frame?

6 A The -- it's hard to say. Probably a week to two
7 weeks after the filing was made.

8 Q Okay. And so that would be in late October of
9 2007?

10 A Mid to late October.

11 Q Okay. Why did you pull that document from the
12 court's EF- -- ECF system?

13 MR. CHEAVENS: I'll instruct the witness not
14 to answer if the answer involves a communication with a
15 lawyer either in our firm or with the client Cisco.

16 MS. PEDEN: And the basis of your
17 instruction?

18 MR. CHEAVENS: Privilege.

19 MS. PEDEN: Attorney/client and work
20 product?

21 MR. CHEAVENS: Yes.

22 MS. PEDEN: Okay.

23 Q (BY MS. PEDEN) Did someone ask you to pull
24 Exhibit 3 from the ECF system?

25 MR. CHEAVENS: Same instruction. To answer

1 that question, you would have to get into communication.

2 MS. PEDEN: I only asked if somebody asked
3 her to pull it. I haven't -- I haven't asked her questions
4 yet. I'm allowed to test around the privilege.

5 MR. CHEAVENS: Why don't you ask her if
6 someone other than a Baker Botts lawyer or Cisco asked her
7 to do it.

8 MS. PEDEN: Let me ask her this way.

9 Q (BY MS. PEDEN) You can answer my question yes or
10 no without revealing who. Did someone ask you to pull
11 Exhibit 3 from the ECF system?

12 MR. CHEAVENS: No. The only way you can
13 answer that is to get into a communication.

14 MS. PEDEN: I haven't asked her who asked
15 her to pull it.

16 MR. CHEAVENS: I know. I know.

17 MR. PATTON: Are you instructing her not to
18 answer?

19 MR. CHEAVENS: Yes.

20 MR. PATTON: Okay.

21 MS. PEDEN: So let me just be clear on the
22 record. I am asking her if -- if somebody asked her to
23 pull Exhibit 3 from the ECF.

24 MR. CHEAVENS: And if you'll ask her, did
25 someone other than a Baker Botts lawyer or someone with

1 MR. CHEAVENS: During the time period in
2 question, we -- Cisco was our client and Cisco has
3 instructed me to invoke privilege in this case, that
4 they're not waiving any privilege in connection with this
5 case. And so out of an abundance of caution, I have to be
6 fairly rigorous in what I do.

7 MR. PATTON: Sure.

8 MR. CHEAVENS: I would love to do it a
9 little easier, but I've got to follow the client's
10 instructions and --

11 MR. PATTON: Are you representing Cisco now?

12 MR. CHEAVENS: Sure. They're an ongoing
13 client. We don't represent them in this case, no.

14 MR. PATTON: Well, in this matter, do you
15 represent --

16 MR. CHEAVENS: No.

17 MR. PATTON: -- Cisco?

18 MR. CHEAVENS: No.

19 MR. PATTON: Okay.

20 MR. CHEAVENS: But you've got a duty to
21 preserve client confidences even if it's a former client.
22 And here it's not even a former client; it's an existing
23 client.

24 MS. PEDEN: So here's where I'm having the
25 problem with my question is that -- is I understand -- and

1 MR. CHEAVENS: Not in this case.

2 MR. PATTON: Oh, you're raising the -- the
3 privilege issue in another case?

4 MR. CHEAVENS: No, I'm invoking it in this
5 case at the instructions of our client, Cisco.

6 MR. PATTON: In what now? In both cases; is
7 that what you just said?

8 MR. CHEAVENS: No, I didn't say anything
9 about both.

10 MR. BABCOCK: Guys, the question she wants
11 to ask is did anybody ask her to do it.

12 MR. PATTON: Actually, my question was a
13 joke.

14 MS. PEDEN: Go ahead, Chuck.

15 MR. BABCOCK: Go on. You guys go -- go have
16 your fun.

17 MS. PEDEN: Okay. Mr. Babcock, do you agree
18 with me that the question, did somebody ask her to do it,
19 to pull that document from the ECF, is not privileged?

20 MR. BABCOCK: No, I'm not agreeing it's not
21 privileged, but in order to move on, it seems to me that
22 maybe she can answer that, but that's --

23 MR. CHEAVENS: If you'll agree that it's not
24 a general subject matter waiver as to communications on
25 that matter.

1 it was?

2 A I don't know.

3 Q Where were you when you first learned that ESN
4 filed a complaint against Cisco?

5 A It is likely I was in my office. I was in my
6 office.

7 Q Who told you that ESN filed a complaint against
8 Cisco?

9 A Kurt Pankratz.

10 Q And did he tell you in your office?

11 A On the phone.

12 Q Was anybody else on the telephone?

13 A No.

14 Q Do you know how long your conversation with
15 Mr. Pankratz lasted?

16 A A minute or two.

17 Q And what, if any, facts did you learn about the
18 ESN complaint?

19 MR. CHEAVENS: Instruct her not to answer on
20 the grounds that it's a privileged communication.

21 MS. PEDEN: Even as to facts?

22 MR. CHEAVENS: Sure. Kurt -- Kurt Pankratz
23 told her facts. Those are privileged communications.

24 MS. PEDEN: And the basis of your privilege?

25 MR. CHEAVENS: Whenever I say "privilege,"

1 you can just count on it being attorney/client and work
2 product.

3 MS. PEDEN: Okay.

4 MR. CHEAVENS: We don't need to repeat all
5 those words all the time.

6 Q (BY MS. PEDEN) So when you spoke with
7 Mr. Pankratz on the phone, did he give you any of his legal
8 conclusions about the ESN case?

9 MR. CHEAVENS: Instruct her not to answer.

10 Q (BY MS. PEDEN) Just a yes or no.

11 MR. CHEAVENS: No, instruct her not to
12 answer.

13 MS. PEDEN: I think I'm entitled to test
14 around the privilege.

15 MR. CHEAVENS: No.

16 MS. PEDEN: I mean, obviously, we're going
17 to end up in front of motion -- with a motion in front of
18 the Court about what's privileged and what isn't and --

19 MR. CHEAVENS: Well, that may be obvious to
20 you, but to me, this is obviously privileged. So if you
21 file such a motion, it's frivolous.

22 MS. PEDEN: Well, I think what I'm getting
23 at here is if you're going to claim a work product
24 privilege -- any privilege, if you're going to claim the
25 privilege, I'm entitled to test around whether or not it's

1 a valid claim of privilege.

2 MR. CHEAVENS: I don't know what you mean
3 "test around." I'm instructing the witness not to answer
4 and I suggest you proceed.

5 MS. PEDEN: Okay. Well, just for the
6 record, we'll take it up with the Court after the
7 deposition.

8 MR. CHEAVENS: We can take it up with the
9 Court. We've already talked to the Court once today. We
10 can call -- you can call them again. We're all here.

11 MS. PEDEN: Well, I -- you know, I don't
12 think it's anything that we're going to be able to agree to
13 today and I think the judge was right, that it needs to
14 benefit a briefing. So I think we'll just go forward with
15 the deposition.

16 MR. CHEAVENS: Okay. Go ahead.

17 MS. PEDEN: You can preserve your objections
18 and we'll preserve ours.

19 MR. CHEAVENS: Go ahead.

20 Q (BY MS. PEDEN) Okay. When you were talking with
21 Mr. Pankratz, did he ask you to call the court clerk?

22 MR. CHEAVENS: Instruct her not to answer.

23 MS. PEDEN: Okay. On this one, Mr. Pankratz
24 has already testified in his deposition.

25 MR. CHEAVENS: His deposition was given in

1 the Albritton case under a different agreement, an
2 agreement that you folks have refused to apply in the Ward
3 case.

4 MS. PEDEN: Yes, but his -- Mr. Pankratz's
5 deposition is not under seal.

6 MR. CHEAVENS: So what?

7 MS. PEDEN: So it's a -- it's a public
8 document.

9 MR. CHEAVENS: So what?

10 MR. PATTON: They're not privileged, Joe,
11 when you got it out in public.

12 MR. CHEAVENS: I mean, it was taken
13 pursuant -- to my understanding, taken pursuant to a
14 protective order.

15 MS. PEDEN: So just for the record,
16 Mr. Pankratz's depo --

17 MR. CHEAVENS: I was there. You don't need
18 to read it. Let's not waste time. Let's keep going.

19 MS. PARKER: My understanding is that that
20 was designated confidential -- highly confidential under
21 the protective order.

22 MR. CHEAVENS: And by the way, of course,
23 Nick, as you know, depositions are not filed; so they're
24 not public records. We used to file them, Nick, when you
25 and I were young lawyers, but we're too old for that now.

1 MS. PEDEN: And maybe I should be more
2 precise. It's my patent litigation coming out when I say
3 "reliance on advice of counsel." What I mean is that it's
4 a central issue in this case and that Cisco has put it at
5 issue --

6 MS. PARKER: Put what at issue?

7 MS. PEDEN: Put communications with counsel
8 at issue. So it's just something we're going to have to
9 brief. I know we won't agree on it today.

10 MR. BABCOCK: It's just my training as a
11 lawyer, when I hear advice of counsel defense, that means
12 something to me and we have not asserted that either by
13 pleading or in any other way.

14 Q (BY MS. PEDEN) Okay. So, Ms. Powell, I was
15 asking you about your telephone conversation with
16 Mr. Pankratz and I think the last question I asked was what
17 facts, if any, you learned from Mr. Pankratz about the
18 filing of the ESN versus Cisco complaint.

19 MR. CHEAVENS: And I instructed the witness
20 not to answer.

21 Q (BY MS. PEDEN) So my next question is, did you
22 receive an assignment from Mr. Pankratz?

23 MR. CHEAVENS: Same objection and
24 instruction.

25 Q (BY MS. PEDEN) Okay. What did you do after you

1 got off the telephone with Mr. Pankratz?

2 A I called the clerk of the court in the Eastern
3 District of Texas.

4 Q Okay. What time of day was that?

5 A I don't remember.

6 Q Do you know if it was before lunch?

7 A I don't remember.

8 Q Do you have any estimate?

9 A No.

10 Q Why did you call the clerk's office in the
11 Eastern District of Texas?

12 MR. CHEAVENS: Instruct her not to answer to
13 the extent if the answer would require disclosure of a
14 communication with other Baker Botts lawyers or staff or
15 the client.

16 Can you answer the question?

17 THE WITNESS: I cannot answer the question.

18 MR. CHEAVENS: Okay.

19 Q (BY MS. PEDEN) When you say that you called the
20 court's -- the clerk's office in the Eastern District of
21 Texas, what division did you call?

22 A Beaumont Division quality control clerk.

23 Q Okay. What is a quality control clerk?

24 A They're the clerks that, after the beginning of
25 each morning, they go through all the -- I believe what

1 record. The time is 1:35 p.m. This is the beginning of
2 Tape 3.

3 MS. PEDEN: Mr. Cheavens, before I continue
4 my questioning, I just want to raise something with you.
5 Earlier today when Ms. Powell was testifying, she testified
6 that she had reviewed some documents to refresh her
7 recollection to give her testimony here today and I would
8 like to ask that those be produced under Federal Rule of
9 Evidence 612.

10 MR. CHEAVENS: She didn't say she reviewed
11 documents in preparation for this deposition. She said she
12 reviewed documents back last fall in connection with her
13 deposition, which was then scheduled in the Albritton case.

14 Q (BY MS. PEDEN) Okay. So, Ms. Powell, so I'm
15 clear, when you reviewed those documents, I think my -- I
16 think my question to you was that those documents refreshed
17 your recollection and that it refreshed it sufficiently for
18 your testimony today that you didn't go back and look at
19 those documents; is that right?

20 A Yes.

21 MS. PEDEN: So, Mr. Cheavens, I think that
22 although she reviewed them then, it refreshed her
23 recollection for her testimony today and I think we're
24 entitled to production of the documents.

25 MR. CHEAVENS: They were -- the documents in

1 question were produced under an agreement in the Albritton
2 case and you have them. So you're -- you're not deprived
3 of the documents. You have them. You can't use them in
4 the Ward case because you refused to enter in to extend the
5 same agreement that was made in the Albritton case. You've
6 refused to extend it in this case. And so I think
7 it's a -- that's an improper attempt to get privileged
8 information that was produced under an agreement back then.

9 MS. PEDEN: Right. And so I guess what I'm
10 getting at is a little bit different. It's not that the
11 documents are produced pursuant to a protective order in
12 Albritton's case. It's that this witness in this
13 deposition in this case testified that she reviewed those
14 documents to --

15 MR. CHEAVENS: Not in connection with this
16 case. That's the difference. Look, there's no point in
17 just making this -- arguing on the record. Just take this
18 up with the Court.

19 MS. PEDEN: Okay.

20 Q (BY MS. PEDEN) Okay. Ms. Powell, do you
21 understand that you're still under oath?

22 A Yes.

23 Q And during the break, did you have communications
24 with counsel with either Ms. Parker or Mr. Babcock present?

25 A Yes.

1 be.

2 Q Okay. So you said -- at that time, did you have
3 the docket in front of you?

4 A I don't remember.

5 Q Okay. Well, did you call her and say, the docket
6 reflects one date; do you remember?

7 A I don't -- I don't remember.

8 Q Is there anything that you could look at that
9 would refresh your recollection?

10 A No.

11 Q Okay. So you do -- you do remember, however,
12 that you were calling to ask about the filing date of the
13 ESN complaint?

14 A Yes.

15 Q Okay. And so however you posed the question to
16 Ms. LaFitte, you were trying to figure out what the filing
17 date of the ESN complaint was?

18 A Yes.

19 Q Okay. What did she say to you?

20 A The summary I got was that it had originally
21 been -- the filing had begun before midnight -- had ended
22 after midnight, but posted the date of the day before and
23 that someone had called and the -- and it had been
24 corrected to reflect the 10, dash, 16 date.

25 Q Did Ms. LaFitte tell you that the civil cover

1 sheet or the JS44 had been received earlier and that it had
2 been logged?

3 MR. BABCOCK: Before you answer that
4 question, I believe you're reading from a privileged
5 document in another case, Ms. Peden; so I'm going to object
6 to you doing that. That's a document that you're not
7 supposed to use in this litigation.

8 MS. PEDEN: Well, Mr. Babcock, I'm trying to
9 ascertain the facts from this witness and she's having a
10 difficult time remembering the facts and I think the fact
11 of what she spoke with and what she learned from the
12 third-party clerk is not privileged.

13 MR. BABCOCK: The protective order in the
14 other case specifically says that you're not to allow --
15 you're not allowed to use documents produced in that case
16 subject to the protective order in other litigation, and
17 that's exactly what you're doing. I don't have any problem
18 with your questioning this witness about her recollection
19 of conversations with the clerk. I do have a problem with
20 you using a privileged document in another case.

21 Q (BY MS. PEDEN) Ms. Powell, did you discuss the
22 civil cover sheet, the JS44, in the ESN versus Cisco case
23 with Ms. LaFitte?

24 A I don't remember.

25 Q Did you understand that the court's office had --

1 file until after midnight?

2 MR. BABCOCK: Object to the form of the
3 question.

4 A Can you repeat the question?

5 (Requested portion read.)

6 A I don't remember exactly.

7 Q (BY MS. PEDEN) You don't remember Ms. LaFitte
8 using the words "officially filed after midnight"?

9 A No.

10 Q Did Ms. LaFitte tell you that the ESN complaint
11 had been officially filed before midnight?

12 A Ms. LaFitte said that it had been filed and
13 stamped before midnight. No, I -- I don't remember
14 exactly. I don't remember exactly.

15 MS. PEDEN: Counsel, do you object to me
16 showing the witness her E-mail that -- that records her
17 recollection of her testimony -- or her conversation with
18 Ms. LaFitte?

19 MR. BABCOCK: If they're privileged, I do,
20 if you're asking me.

21 MS. PEDEN: It's designated as privileged,
22 although it's --

23 MR. CHEAVENS: Well, this was the document
24 produced in the Albritton case pursuant to the stipulation
25 there, including the protective order?

1 MS. PEDEN: Yes, it's the E-mail that
2 Ms. Powell wrote that records the factual information that
3 she learned from Ms. LaFitte.

4 MR. BABCOCK: If we -- if we designated it
5 as privileged in the Albritton case, then yes, I do object.

6 MS. PEDEN: Mr. Cheavens?

7 MR. CHEAVENS: This is Cisco's privilege.
8 You've heard what he said.

9 MS. PEDEN: Well, there's a work product
10 privilege out there too, which I think --

11 MR. CHEAVENS: Okay. Pursuant to the
12 instructions of our counsel -- our client, we invoke the
13 privilege. I think the document you're talking about was
14 produced under a stipulation and it is pursuant to a
15 protective order in the other case.

16 MS. PEDEN: Right. I understand your
17 position. My -- my position is that, you know --

18 MR. CHEAVENS: And you want to violate the
19 protective order?

20 MS. PEDEN: No. You know, I didn't just
21 hand her the document. I'm conferring with counsel about
22 the document. I think the document contains only factual
23 information that she learned from a third party. It
24 memorializes a conversation with a third party. I'm not
25 sure that it was -- that it's properly claimed as

1 privileged and the witness is having a hard time
2 recollecting the conversation and I think that document
3 would help her refresh her recollection and move things
4 along.

5 MR. CHEAVENS: The problem is it's under the
6 protective order.

7 Q (BY MS. PEDEN) Ms. Powell, when you talked to
8 Ms. LaFitte, did you discuss the fact that ESN's attorneys
9 had contacted the clerk's office?

10 A She mentioned that they had contacted the clerk's
11 office.

12 Q Did she tell you that ESN's counsel contacted the
13 clerk's office to explain that they had actually filed the
14 complaint after midnight?

15 A She said they had completed the filing after
16 midnight.

17 Q And did you understand that ESN's counsel had
18 called the clerk's office to ask about the docket entry?

19 A I can't remember.

20 Q But you understood that ESN's counsel had called
21 to ask the court clerk about the same filing that you were
22 calling to ask the court clerk about; is that right?

23 A Yes.

24 Q Did Ms. LaFitte tell you who called the clerk's
25 office from ESN's side?

1 Q (BY MS. PEDEN) When you were talking to
2 Ms. LaFitte about the filing of the ESN complaint, did
3 Ms. LaFitte tell you that ESN's counsel unduly influenced
4 the Court to make a change?

5 A Repeat the question.

6 Q Yeah. When you were talking to Ms. LaFitte on
7 the telephone about the filing of the ESN complaint, did
8 Ms. LaFitte tell you that ESN's counsel had called the
9 court -- the court clerk's office and unduly influenced
10 them to change a docket entry?

11 MR. BABCOCK: Object to the form.

12 A No.

13 Q (BY MS. PEDEN) Did she tell you that the clerk's
14 office was doing a favor for a local lawyer?

15 A No.

16 Q Did Ms. LaFitte tell you that people in her
17 office were conspiring with ESN's counsel to manufacture
18 subject matter jurisdiction in the case?

19 A No.

20 Q Did you tell anyone at Baker Botts that ESN's
21 counsel was conspiring with the court clerk?

22 MR. CHEAVENS: Object and instruct her not
23 to answer. Communications with people at Baker Botts are
24 privileged.

25 Q (BY MS. PEDEN) As you sit here today, do you

1 understand -- is it your understanding that the people at
2 ESN's counsel were conspiring with the court clerk?

3 MR. CHEAVENS: I object. That's a
4 conclusion she would draw based -- or not draw, for that
5 matter, based on communications and goes into the mental
6 processes of this witness and I instruct her not to answer.

7 MS. PEDEN: Okay. Well, so the record on
8 this side is clear, I'm not asking her about
9 communications; I'm asking her about her understanding --

10 MR. CHEAVENS: Her mental processes is what
11 you're asking about and that's the heart of work product.

12 Q (BY MS. PEDEN) Ms. Powell, do you have an
13 opinion as you sit here today about whether or not ESN's
14 counsel conspired with the court clerks in the Eastern
15 District of Texas?

16 MR. CHEAVENS: Instruct her not to answer,
17 same grounds.

18 MS. PEDEN: Whether or not she even has an
19 opinion on that subject?

20 MR. CHEAVENS: I'll let you answer -- ask
21 that.

22 Do you have -- just say yes or no to whether
23 you have an opinion. Don't say what the opinion is.

24 A Can you repeat the question?

25 Q (BY MS. PEDEN) As you sit here today, do you

1 banner had changed; is that right?

2 A Yes.

3 Q Okay. And what did she say about the banner?

4 A It went back to the filing issue that I -- we had
5 talked about before.

6 Q Okay. So she told you the banner had changed
7 because ESN's counsel had logged on to the electronic
8 filing system before midnight, right?

9 A Yes.

10 Q But had not officially filed until after
11 midnight, right?

12 A Yes.

13 Q And that they called up the clerk's office? We
14 talked about that earlier, right?

15 A Yes.

16 Q They called up the clerk's office and they had
17 explained what happened?

18 A Yes.

19 Q And the clerk made a correcting entry; is that
20 right?

21 A I don't know what kind of entry it was.

22 Q Okay. But they corrected something that changed
23 the banner on the complaint?

24 A All I know is the banner changed.

25 Q Okay. Fair enough.

1 Is there anything else about the
2 conversation with Ms. LaFitte that you can remember?

3 A No.

4 Q No?

5 A Hunh-uh.

6 Q Is there anything you can look at that will
7 refresh your recollection?

8 A I don't know.

9 Q Okay. Have you now told me everything you can
10 remember about your conversation with Ms. LaFitte?

11 A To the best of my recollection.

12 Q Okay. What did you do when you got off the phone
13 with Ms. LaFitte?

14 A I don't remember exactly.

15 Q Did you report back your findings or your
16 conversation with Ms. LaFitte to anyone?

17 A Yes.

18 Q Okay. And who did you report back to?

19 A Kurt Pankratz and Steve Schortgen.

20 Q Okay. And did you do that in an office meeting,
21 E-mailed, telephone?

22 A I can't remember how I told Kurt.

23 Q Okay. So let me -- let me just get -- did you
24 tell them both at the same time?

25 A No.

1 Q Were they together?

2 A No.

3 Q Okay. Two separate communications?

4 A Yes.

5 Q Okay. Who did you tell first?

6 A Kurt.

7 Q Okay. So -- and you don't remember how you
8 communicated back to him?

9 A Hunh-uh.

10 Q Do you remember when?

11 A It was soon after.

12 Q When you say "soon," minutes, an hour?

13 A The same day.

14 Q The same day.

15 Did you have an understanding that he wanted
16 to have this information quickly?

17 A No.

18 Q And what facts that you learned from Ms. LaFitte
19 did you report back to Mr. Pankratz?

20 MR. CHEAVENS: I instruct her not to answer.
21 That's privileged communication.

22 Q (BY MS. PEDEN) Did Mr. Pankratz have any
23 follow-up questions? I'm not asking what the questions
24 are, just did he have any questions for you about your
25 conversation with Ms. LaFitte?

1 A No.

2 Q So you just reported back what you found?

3 MR. CHEAVENS: I instruct her not to answer.
4 That's -- you're trying to get a backdoor of that
5 communication.

6 Q (BY MS. PEDEN) Let me be clear. I'm not asking
7 you what you told him that you found, okay, and I'm not --
8 I just -- I want to know, you -- you reported back to
9 Mr. Pankratz concerning your telephone call with Rhonda
10 LaFitte?

11 A Yes.

12 Q Okay. And you said you also told Mr. --

13 A Schortgen.

14 Q -- Schortgen about your conversation with
15 Ms. LaFitte.

16 When was that?

17 A It was much later.

18 Q Do you have a date?

19 A About a week later. Around a week.

20 Q And do you know how that communication occurred?

21 A It was by E-mail.

22 Q E-mail.

23 I don't -- my question isn't eliciting any
24 of the -- or any of the things contained in the E-mail,
25 okay? I just want to know, did Mr. Schortgen send you the

1 Q (BY MS. PEDEN) Were you asked to send him an
2 E-mail?

3 MR. CHEAVENS: What she was asked is
4 privileged. I instruct her not to answer.

5 MS. PEDEN: Even though it's not asking
6 about the contents of the E-mail?

7 MR. CHEAVENS: There's no way you can answer
8 that question without disclosing a communication.

9 MR. PATTON: Unless the communication she's
10 disclosing was with a third party that wasn't --

11 MR. CHEAVENS: No, the communication between
12 Steve Schortgen and her.

13 MR. PATTON: I'm talking about if she
14 reported the results of the third-party comments --

15 MR. CHEAVENS: No, that's still work
16 product.

17 MR. PATTON: I see. Okay.

18 MS. PEDEN: I'm not even going there. I'm
19 just trying to get the same type of information that would
20 be on a privilege log, who the E-mail is from and --

21 MR. CHEAVENS: Well, you've got a privilege
22 log.

23 MS. PEDEN: Yeah, but you can't tell exactly
24 from the privilege -- I mean, there are multiple E-mails on
25 the privilege log and different topics, so --