

1 A The independent consultant that came out because
2 the first time, we have never been AAAHC certified, so he had
3 us go to North Carolina, learn about it, come back. We hired
4 a consultant. She gave these recommendations.

5 Q Was there ever an issue that you were involved
6 with regarding anesthesia billing specific times, 31 minutes,
7 anything like that?

8 A It was never stated a specific time. It was
9 always explained to me that --

10 Q By whom?

11 A By Dr. Desai.

12 Q And when did that happen?

13 A From day one when the CRNAs came on, so whenever
14 Annamarie LoBiondo started.

15 Q And so he's explaining this to you. What is he
16 saying?

17 A The start time is the time that we start
18 interviewing the patient, I say hello, how are you, my name is
19 so and so and then they start asking various questions. End
20 time is when the patient is discharged safe and the airways
21 and all that other stuff is done.

22 Q Did he give you a time period that that -- that
23 it had to be above a certain amount?

24 A Not at that time, no.

25 Q Eventually did you get a time period that that

1 had to be above?

2 A I knew he was saying it should be 30 minutes.

3 Q Did he ever explain that to you, as to why he
4 wanted it to be that?

5 MR. WRIGHT: Foundation.

6 THE WITNESS: I'm sorry?

7 THE COURT: Well, she has to answer the -- that's
8 overruled. She has to answer the question, and then
9 Mr. Staudaher, depending on the answer, can proceed to try to
10 lay a foundation.

11 So ma'am, you can answer the question. I think it
12 was did he ever explain that --

13 Was that your question?

14 MR. STAUDAHER: Yes.

15 THE COURT: Did -- it's a yes or no question. Did he
16 ever explain that to you?

17 THE WITNESS: Like I said, himself, the CRNAs, the
18 way it was explained to me was from the time they interviewed
19 the patient --

20 MR. STAUDAHER: But that's not my question.

21 BY MR. STAUDAHER:

22 Q My question was regarding the specific 30, it
23 had to be above 30 minutes. What did he -- did he explain to
24 you why [inaudible]?

25 A He said it because the time the patients come in

1 and they are discharged and ready to go, that's the time it
2 should be.

3 THE COURT: And when? When did that happen that he
4 told you that?

5 THE WITNESS: It was probably more so reinforced
6 after the second CRNA. Annamarie really was the one who
7 taught everybody in the beginning.

8 BY MR. STAUDAHER:

9 Q Did you ever go to Annamarie and actually say to
10 her, hey, look, you need to make sure these are 31 minutes or
11 more, or did you ever do that?

12 A No. I wasn't in the facility that much.

13 Q So if, I mean, Annamarie said that you did that,
14 would that be accurate at all?

15 A No, sir.

16 Q Do you recall this at all?

17 A No.

18 Q When you say you weren't in the facility, are
19 you talking about the facility where the procedures are being
20 done?

21 A Right. I wasn't -- I mean, I would drop
22 something off. I would be at the other five locations. I
23 would be busy, I mean, working with the bookkeeper or
24 whatever. I mean, I wasn't -- I'm not a nurse. I'm not a
25 doctor. So I don't have a reason to be down there unless he

1 called me down there and wanted something addressed.

2 Q I'm going to show you what's been admitted as
3 State's 97. Have you ever seen anything that looks similar to
4 this before?

5 A Yes.

6 Q What are we looking at here from your
7 perspective?

8 A It is a organizational chart.

9 Q Now, I see that your name appears right in the
10 middle of it.

11 A Mm-hmm.

12 Q It looks as though the PAs, the CRNAs in part
13 sort of have a connection to you; is that right?

14 A They would. They would turn in -- Mr. Lakeman
15 would prepare, at the end, the CRNA schedule, so I would get
16 that and I would give it to Dr. Herrero. And Dr. Herrero
17 would coordinate the physician time off schedule, and then Dr.
18 Desai would look at it to make sure that we had every office
19 covered, every endoscopy covered, and then I would send it
20 out.

21 Q So this also places you below the staff and
22 partner physicians --

23 A Yes.

24 Q -- is that accurate?

25 A Yes. I -- the partner physicians obviously,

1 they own the facility. And the staff physicians would be the
2 non-partners, Dr. Mukherjee, Dr. Wahid. And then the PAs
3 would really go to the doctors, but if they had a scheduling
4 or something like that, then they could come to me.

5 Q Is that why there's a double line for the PAs?

6 A Yes, sir.

7 Q And the same thing for the CRNAs?

8 A Yes, sir.

9 Q Now, did -- did the doctors answer to you at
10 all?

11 A No.

12 Q So you, as this depicts you below the doctors,
13 you weren't essentially having authority over them; is that
14 right?

15 A No. I did not have authority over the
16 physicians.

17 Q Overriding this is one individual at the very
18 top. Is that how you viewed it?

19 A It was definitely a hierarchy. Doctor -- like I
20 said, he's a very smart intelligent businessman.

21 Q And we had gotten into a moment ago at the very
22 outset the issue of whether you had any authority or control
23 or who had that in the practice. Do you remember that?

24 A Mm-hmm.

25 MR. STAUDAHNER: May I approach, Your Honor?

1 THE COURT: You may. You may move freely.
2 MR. STAUDAHER: Thank you.
3 MR. SANTACROCE: What are you showing?
4 MR. STAUDAHER: Exhibits 179, the memos. And they're
5 not all of them, but there's [inaudible].
6 BY MR. STAUDAHER:
7 Q I'm going to show you some things here, and I'm
8 going to give you the Bates numbers on them so we have them.
9 First of all, I just want you to flip through these and tell
10 me -- this is State's 179 through it looks like --
11 MR. STAUDAHER: What is it?
12 THE CLERK: 208, proposed.
13 MR. STAUDAHER: 208 proposed.
14 BY MR. STAUDAHER:
15 Q Can you just flip through those, if you would?
16 Tell me if you recognize [inaudible] seen them before.
17 A Yes, sir.
18 MR. WRIGHT: Why don't you give me the top stack,
19 Mike, so I can --
20 THE COURT: When she's done, you mean?
21 MR. WRIGHT: The one -- right. The one she's already
22 flipped over, so I can start numbering that.
23 MR. STAUDAHER: The Bates numbers are at the top.
24 MR. WRIGHT: Thank you.
25

1 BY MR. STAUDAHER:

2 Q Do you recognize those documents?

3 A Yes.

4 Q And they appear to be memos and various
5 [inaudible] documents; is that right?

6 A They're directives given to me, what Dr. Desai
7 expected done.

8 Q So illustrative of a direction that you received
9 from him at the clinic?

10 A Yes.

11 Q There was one in there in particular, and I -- I
12 think there's actually a duplicate of it I want to show you.
13 This one here, and this is actually State's Exhibit 81, and
14 the highlighting on this is something I wanted to ask you
15 about. This one has your name on it as being from you.

16 A Mm-hmm. Which wouldn't --

17 Q Do you see that?

18 A Which wouldn't be unusual. He would have me
19 write memos for him.

20 Q So explain that to me. How would that occur?

21 A He would either tell myself, Charlene or Shannon
22 that he wants patients scheduled this way, or he wants a
23 directive, and we would write the memo. It mostly would come
24 from me. Even if it was dictated from him or advised from
25 him, it would come from me. I mean, he was very busy.

1 Q So this memo here that's got -- it has a copy to
2 Dipak Desai, but it's got -- it says --

3 A I always copied him --

4 Q -- from Tonya Rushing --

5 A -- so he knew that it was completed.

6 Q So when it says from Tonya Rushing, this is my
7 question, is this one of the memos that you generated at his
8 direction?

9 A Yes.

10 Q Okay. So the information contained in here is
11 coming from Dr. Desai, not from you?

12 A Yes.

13 Q Can you explain to us what -- what's contained
14 in this document, what this is about?

15 A Basically it's telling this Endo 1 and the
16 schedulers, I would hand it to the schedulers, that he wanted
17 a minimum -- or he wanted 42 patients in the facility
18 scheduled, and if they were double-booked it would tell them,
19 example, HPN PacifiCare Aetna PacifiCare.

20 Q Specifically that portion that you just
21 mentioned, do you see where PacifiCare is separated by other
22 insurance companies at the bottom --

23 A Yes.

24 Q -- down here?

25 Was there any issue with regard to PacifiCare and how

1 they should be scheduled in the practice?

2 A Not that I was aware of.

3 Q This was the sort of the format that you had?

4 A That's how he specifically wanted it, that's how
5 I specifically wrote it.

6 Q And when I asked you the question about
7 PacifiCare, were you under any -- during anytime that you were
8 there, did you become aware of sort of an order that
9 PacifiCare patients had to be done?

10 A Not until later.

11 Q When you talk about later, are we talking
12 about -- well, let's use as a benchmark the investigation.
13 You know -- and I'm talking about the CDC investigation.

14 A Mm-hmm.

15 Q Was it after they came or before they came?

16 A After.

17 Q So this was something that you implemented at
18 his direction but you didn't -- did you understand what --
19 what the implications were?

20 A No. I was very busy. And I don't mean to be
21 disrespectful.

22 Q I'm going to move forward now to a couple
23 things, and I just want to -- those -- those records that you
24 showed, those were things that you've seen before in the
25 clinic, those documents and memos and so forth?

1 A Yes, sir.

2 MR. STAUDAHER: And I want to move for their
3 admission at this point, but I know counsel's still looking
4 through them.

5 BY MR. STAUDAHER:

6 Q With regard to the 30-minute issue, did that
7 ever become a problem at some point? And I'm talking about
8 before the investigation at CDC, at any time was there any
9 issue with that that had arose, but before January of 2008?

10 A Actually, yes. In 2007, Dr. Carrol had been
11 sued by a patient, Rexford. And in that lawsuit I was
12 deposed, the CRNA was deposed, and Dr. Carrol, of course, was
13 deposed. So one of the things they were questioning was the
14 CRNA time. I don't remember which CRNA it was. So it kind of
15 happened simultaneously. The lawsuit was later part of 2007,
16 the testimony happened in 2008, and the CDC thing happened in
17 2007.

18 And then there was a moment where, I don't remember
19 which CRNA, Dr. Carrol came screaming up to my office, by this
20 time I was located upstairs, saying and showing me one of the
21 papers that one of the CRNAs -- I can't -- I don't remember
22 which one, prefilled out an anesthesia form. He was livid.
23 He was screaming. It was a mess. So he --

24 Q Before that happened, did you have any
25 indication that there was any problem like that beforehand?

1 A We did have one with the nurses, the RNs. Katie
2 and Jeff had brought up an issue of the RNs precharting
3 something in their chart. We did bring that to Dr. Desai,
4 Katie, Jeff and myself.

5 MR. WRIGHT: Foundation.

6 THE COURT: When did that happen? And again, you
7 know, we don't expect you to say, oh, that was, you know,
8 July 15th at 11:45. We get, you know --

9 THE WITNESS: I want to say 2007, 2000 -- 2007, early
10 part of 2007.

11 THE COURT: So Katie and Jeff came to you with their
12 concerns, and then the three of you went to Dr. Desai?

13 THE WITNESS: Yes.

14 THE COURT: Okay.

15 BY MR. STAUDAHER:

16 Q So what happens in that meeting?

17 A Dr. Desai was very angry, I mean, first of all
18 that we were questioning him and what took place and so forth.
19 So he proceeded to yell. Everything calmed down and the
20 precharting stopped.

21 Q So the concern was brought to Dr. Desai. Did he
22 seem surprised by what you were bringing him, or just angry?

23 MR. WRIGHT: Could I have foundation as to the
24 conversation --

25 THE COURT: Well, can get there.

1 MR. WRIGHT: -- what the precharting --

2 THE COURT: Overruled. I mean, some of this you can
3 follow up with on cross, and some of it Mr. Staudaher, you
4 know, may get to the specifics.

5 THE WITNESS: I don't know exactly what they were
6 precharting. I think, if I remember correctly, it could have
7 been vital signs or something like that.

8 BY MR. STAUDAHER:

9 Q So you go with Katie and Jeff to tell Dr. Desai
10 about this?

11 A Right. Because Katie brought it to my
12 attention. Jeff was there. It was always better to approach
13 him with three or more.

14 Q So when you say he was angry, was he angry
15 because he was outraged about what was going on, or was he
16 angry because --

17 A Because he thought it was a small --

18 MR. WRIGHT: Objection, Judge.

19 THE COURT: That's sustained. Only --

20 MR. WRIGHT: Just what was said.

21 THE COURT: I sustained the objection, Mr. Wright.
22 If I sustain it you don't have to --

23 THE WITNESS: Dr. Desai --

24 MR. WRIGHT: They caught me off guard.

25 THE COURT: Wait, wait, wait. When an objection is

1 sustained, that means you can't answer the question. What you
2 can say is if Dr. Desai said something, you know, I'm angry
3 because or, you know, you can tell us what he said. But don't
4 like speculate as to what he was thinking or what was going on
5 in his head unless he tells you. That's basically --

6 THE WITNESS: It's very obvious when Dr. Desai is
7 angry. The voices get loud. The voice tone got loud. We
8 were wasting his time.

9 THE COURT: Was that said to you?

10 THE WITNESS: Yes.

11 THE COURT: Okay.

12 BY MR. STAUDAHER:

13 Q So he was mad because you were wasting his time?

14 A [No audible response.]

15 Q Was he angry at all because of what you were
16 bringing him, the actual information you were bringing him?

17 A No.

18 Q Now, with regard to the 31-minute issue again,
19 or 30-plus minute issue, whatever it was, when you have
20 essentially Dr. Carrol coming up to your office, beside that
21 one instance with charting and so forth with Katie and Jeff,
22 had there ever been an issue to your knowledge about any kind
23 of 30-minute time period that was being billed?

24 A No.

25 Q Were you aware -- well, I think you had

1 testified before that Dr. Desai told you that that's what it
2 needed to be though, correct?

3 A From the start time to the end time.

4 Q And that that was this --

5 A It should be around -- he didn't give -- he
6 never gave specific like time frames.

7 Q But didn't you testify that he said it should be
8 greater than 30 minutes?

9 A It should be -- yes, the more than 30 minutes,
10 but he didn't say 30, 31, 35 or anything like that.

11 Q Just more than 30?

12 A Mm-hmm.

13 Q Now, when -- when that occurs -- that's the
14 policy you said was in place forever, since the CRNAs started
15 essentially?

16 A Mm-hmm.

17 Q Now, when this issue comes up when Carrol comes
18 up to your office and he's got this anesthesia record, had any
19 other doctor ever raised this to you before?

20 A No.

21 Q So when he brings it to you, what do you do?

22 A First I tried to calm him down, because he
23 was -- like I said, he was livid. I called up the CRNAs from
24 downstairs, had them come up, and they --

25 MR. WRIGHT: I would interpose an objection, and just

1 give us a time frame.

2 THE COURT: Was this the --

3 THE WITNESS: Within ten minutes --

4 THE COURT: Okay.

5 THE WITNESS: -- after he calmed down.

6 MR. WRIGHT: Just this meeting.

7 THE WITNESS: I mean, he's this short little Jewish
8 guy. He was extremely mad. I mean, he was livid because of
9 the Rexford case and couldn't believe all this with the CDC
10 thing. So got him calmed down to some extent, brought up the
11 CRNAs.

12 I can't -- I know it was -- I think it was Vince
13 Mione, Vinnie Sagendorf, and maybe one or two others, whoever
14 was on the floor downstairs. And he reiterated and I
15 reiterated to them that their time had to be absolutely
16 accurate. He also got on the phone with Dr. Mason --
17 BY MR. STAUDAHER:

18 Q Is he still angry during this whole time?

19 A Yes, he's still angry.

20 Q So he gets on the phone --

21 A But he's composed more. He's a little bit more
22 composed.

23 THE COURT: So Dr. Carrol gets on the phone with
24 Dr. --

25 THE WITNESS: Dr. Phone -- Dr. Carrol picks up the

1 phone on my desk, calls over to Dr. Mason and tells him what
2 he finds, and he wants him to make sure that that's not
3 happening at Desert Shadow Endoscopy.

4 MR. WRIGHT: Can we have a time frame for this? I
5 missed it.

6 THE WITNESS: The whole thing took about 35 minutes.

7 MR. WRIGHT: I mean when did the 35 minutes take
8 place?

9 THE WITNESS: Sometime in February.

10 MR. WRIGHT: Of 2008?

11 THE WITNESS: Of 2008.

12 MR. WRIGHT: Thank you.

13 THE WITNESS: So the CRNAs just, they listened, they
14 said okay and they went back downstairs. Dr. Carrol was still
15 upset. He went downstairs to Dr. Desai's office. I followed
16 him downstairs to Dr. Desai's office, which is in the corner
17 of Shadow Lane building. He starts yelling. Dr. Desai starts
18 yelling. Dr. Desai tells me get the hell out of the room and
19 close the door.

20 I got out of the room, but I did stand there because
21 I didn't want the staff outside the door. They continued
22 their conversation, or disagreement. Dr. Carrol left upset.

23 THE COURT: Could you hear the -- don't say what was
24 said, but could you hear them yelling through the door?

25 THE WITNESS: Yes, I could. I think everybody in

1 the -- the rooms were this way [indicating].

2 THE COURT: It was loud?

3 THE WITNESS: It was very loud.

4 THE COURT: Go on, Mr. Staudaher.

5 BY MR. STAUDAHER:

6 Q So after, after Carrol leaves, what do you do?

7 A After Carrol leaves, which was about ten
8 minutes, maybe not ten -- I don't know. It seemed like
9 forever. After Carrol left, I went back to go talk to Dr.
10 Desai and he dismissed me, and he was mad and didn't want to
11 talk to me really, said, Don't worry about this. And I -- of
12 course, I was upset to see them like that.

13 That's really how it was left. Dr. Carrol left.
14 Dr. Desai was in his office. He was upset.

15 Q So let me ask you this. I'm going to stop there
16 for a moment and go back upstairs with when Dr. Carrol
17 confronts you with this anesthesia record and tells you what
18 he's seen. Did that -- I mean, when you heard that, saw the
19 record, was that a record that you used in your billing
20 company?

21 A Yes.

22 Q When you saw and heard what he was saying, did
23 that affect you in any way?

24 A Absolutely. It's --

25 Q How so?

1 A Well, we processed what they wrote down, and so
2 obviously I'm thinking if they're pre-doing this, this stuff
3 that we're not processing is not accurate and correct.

4 Q So you knew --

5 A Yeah, and I'm upset.

6 Q Did you know what the implications of that were?

7 A Of Medicare and Medicaid fraud, yes.

8 Q So you --

9 A Insurance fraud, yes.

10 Q So you knew that that was going to an insurance
11 company though?

12 A Yes.

13 Q After this all takes place, you get dismissed
14 from the clinic, do you stay in the clinic that day?

15 A I think I left as well. I think I was in shock
16 and like I said, Dr. Carrol and Dr. Sharma -- I mean, Dr.
17 Carrol and Dr. Desai, they've had arguments, but never to that
18 extent. I was probably shaken up, because I knew what
19 implications it would be for me personally in my company. So
20 I'm confident that I did leave the facility that day.

21 Q Where'd you go?

22 A Either to a meeting or home. I can't remember.

23 Q When was the next time you spoke with or saw
24 Dr. Desai?

25 A I can't remember exactly when. Two to three

1 days later.

2 Q Was this in person or on the phone?

3 A In person.

4 Q Did he ever call you at any time during that
5 window period to talk to you?

6 A I don't remember.

7 Q So when you see him again, tell us how that
8 goes.

9 A I go down and I see him and I tell him, you
10 know, what my concerns were. I mean, I respected him and I --
11 it was a different relationship. I told him what my concerns
12 were, you know, and the whole thing with Dr. Carrol and so
13 forth. And he would say, Darling, it's taken care of, there's
14 no problem, the times are right to the start time, to the end
15 time, so forth.

16 Q When you told him your concerns, what did you
17 actually tell him? What were your concerns when you were in
18 this room?

19 A There was two meetings.

20 Q Okay. Let's talk about the first one. What
21 time period are we talking about?

22 A Two to three days afterwards.

23 Q Okay. So two meetings. Did they occur the same
24 day --

25 A No.

1 Q -- or were they separated?

2 A No, they didn't.

3 THE COURT: Had it been a weekend or something that
4 you didn't --

5 THE WITNESS: I think it was like a Thursday --

6 THE COURT: Okay. And that's why --

7 THE WITNESS: -- to be honest with you.

8 THE COURT: -- it was a couple of days to --

9 THE WITNESS: Right. I think it was like a Thursday
10 or something like that. I can't remember the exact date. But
11 I want to say it was a Thursday because it gave Dr. Carrol
12 time to calm down when he came back Monday, you know.

13 BY MR. STAUDAHER:

14 Q Okay. So let's talk about the first meeting.
15 Where --

16 A The first meeting that I had --

17 Q -- does it take place?

18 A -- with Dr. Desai when I was scared, or when I
19 thought all this stuff was going on?

20 Q Yes. Where did it take place?

21 A In his office. We often met in his office
22 downstairs.

23 Q And this is the two to three days later?

24 A Two to three days later.

25 THE COURT: So would that have been on like a Monday

1 after the weekend, or...

2 THE WITNESS: Monday or Tuesday.

3 THE COURT: Okay. So there's the -- kind of the
4 blow-out between Carrol and Desai, you go home, and then it's
5 a few days, maybe a weekend, and then you meet with Dr. Desai
6 early the next week?

7 THE WITNESS: Yes.

8 THE COURT: And that would have been in Dr. Desai's
9 office?

10 THE WITNESS: Mm-hmm.

11 THE COURT: Is that yes, for the record?

12 THE WITNESS: Yes. I'm sorry.

13 THE COURT: And it's just the two of you at this
14 first meeting?

15 THE WITNESS: Yes. I mean, I talked to him a lot by
16 myself.

17 THE COURT: No, just to make it clear.

18 THE WITNESS: Yes, it was.

19 THE COURT: All right. Go on, Mr. Staudaher.

20 BY MR. STAUDAHER:

21 Q So tell us what the concerns were that you
22 voiced to him at that time.

23 A I voiced to him, you know, the concerns of, you
24 know, the precharting and making sure the times -- and he
25 reassured me. He goes, Tonya -- he used to call me darling or

1 he'd call me other endearing names sometimes -- don't worry.
2 He goes, It's okay, they'll write the time down, they'll write
3 what needs to be done, we're fixing anything that needs to --
4 and that was it.

5 Q So at that point, I mean, you had mentioned you
6 were concerned about insurance fraud, things like that. Did
7 you voice that to him at the time?

8 A I did. I did voice it to him.

9 Q What was his response?

10 A That the times were accurate. And he went back
11 to the time they start interviewing and the time that the
12 patient was safe, because they were still in the care of the
13 CRNA, that the CRNA was responsible for that patient, if I had
14 a problem that CRNA would be the one reviving me. So I felt a
15 little bit more comfortable at that point.

16 Q That's what he's telling you though?

17 A That's what he was telling me.

18 Q So you said that there was a second meeting
19 later on.

20 A There was a second meeting which didn't --

21 Q Well, wait. Before we get there, your billing
22 company at this point, do you try to find out what's going on
23 with that with regard to the records that are coming over from
24 the Endoscopy Center to your company to be billed?

25 A Yeah. I mean, obviously as the owner of a

1 company, I went over to make sure my billers were putting
2 exactly what the CRNAs put their start time, end time and made
3 sure, and it did match. What had happened though, is one of
4 my data entry clerks and my billing manager contacted me after
5 this whole blow-out with Dr. Carrol, Dr. Desai, and the
6 anesthesia time went from eight minutes, ten minutes, 12
7 minutes, from 30, whatever, 20, 30, 31, 35 minutes.

8 Q So you say it went from eight to 30?

9 A No. It went from high number, 30, 35, down to
10 eight, ten, 12 number.

11 Q So less than 15 minutes?

12 A Yes.

13 Q Okay. Does that give you concern when you hear
14 that?

15 A Absolutely. I told Brian --

16 Q Before we go any further, the records that are
17 coming in, is this just an isolated one or two, or how many of
18 these are coming over in that way?

19 A I would say a significant amount that where a
20 new employee noticed the difference.

21 Q And called you?

22 A And called myself and the manage -- my billing
23 manager. And I told him bill whatever time is on the sheets.
24 The next -- the next day I went in early, because Dr. Desai
25 would do his prayer in the morning or whatever and I knew he

1 would be early. And I went in there and I showed -- and I
2 talked to him. And I told him that the times are
3 significantly different. I told him that he's putting my
4 family at jeopardy, my business at jeopardy and so forth.

5 Q How does he respond to this?

6 A That conversation he was very angry, and I don't
7 know if it was because of everything else that was going on
8 with the CDC. He started cussing. He started swearing. He
9 was just extremely upset.

10 Q Did he deny it at all, that that was a problem?

11 A No.

12 Q Did he acknowledge that what you were saying was
13 accurate?

14 MR. WRIGHT: Could I have foundation, what was said?

15 THE COURT: I think she already said, so overruled.

16 BY MR. STAUDAHER:

17 Q Was there anything else said?

18 THE COURT: I mean, I guess the question would be
19 what did Dr. Desai say.

20 THE WITNESS: What, you mean his cuss words?

21 THE COURT: No, no. It might be entertaining, but
22 no, that wasn't my question. When Mr. Staudaher said did he
23 acknowledge something, and I guess, you know, what did he say?

24 THE WITNESS: He didn't address my concerns because I
25 have never been that upset with him. I -- I actually cared

1 about him. So when this all came across, it was very
2 overwhelming because of the hepatitis C thing, then this.
3 So -- can I just take a minute?

4 THE COURT: Sure, of course.

5 (Pause in proceeding.)

6 THE WITNESS: I worked for him for a very long time,
7 and the whole idea is -- oh, anyways. Go ahead.

8 So the -- so I was very upset because I knew what the
9 problem was going to be, and he was very angry and I know that
10 it had to do with all the stresses that he was under.

11 BY MR. STAUDAHER:

12 Q So when you say you knew what the problem was
13 going to be, what are we talking about?

14 A Well, obviously if -- if we were getting
15 information from the CRNAs 30 minutes, 31, 35, 20, these high
16 numbers, and then within one week of Dr. Carrol's meeting the
17 anesthesia time went in less than half, there's a problem.

18 Q What is that problem?

19 A We weren't processing accurate times. They must
20 have been precharting. I don't know.

21 Q When you said that you were -- you confronted
22 Dr. Desai and you said that, if I have it correctly, you put
23 me at risk, you put my family at risk, my business at risk,
24 what is the risk that you're talking about?

25 A Well, exactly what -- I can't go into there. So

1 I mean, obviously he put --

2 Q Were you worried about your own liability in all
3 this?

4 A Well, yes, because I'm the billing company. I'm
5 the one who's relying on the information given to me by the
6 licensed professionals. If somebody said they had gall
7 bladder removal and I had a surgeon give me a gall bladder
8 removal, I would bill a gall bladder removal.

9 Q So you were assuming what was given to you was
10 accurate?

11 A Yes, absolutely.

12 Q Now, after -- after he yells at you and the
13 like, I mean, how does this end?

14 A We agreed not -- I told him I -- I couldn't do
15 his billing anymore.

16 Q So you're going to stop doing his billing?

17 A Yes.

18 Q Did you do that?

19 A Yes. He told me I had to finish up what I
20 started, at the end he would get it changed over, get it over
21 to Ida. And I was fine with that.

22 Q So what's the next thing that happens after
23 that?

24 A Well, the facilities were getting shut down.
25 The business licenses were getting yanked. There was a lot of

1 things going on with that. So the billers boxed all the
2 information up, and I couldn't tell you what happened after --
3 I know we stopped doing the billing.

4 I mean, I think that was like it was happening in
5 February. So maybe March is when we were finished and he paid
6 us the residual money that we worked for and finished that
7 out, and I just continued with my other doctors that we
8 performed services for. We laid the staff off.

9 Q So you did billing for other doctors?

10 A I did.

11 Q Was this ever an issue with any other doctor you
12 worked with?

13 A No.

14 Q Now, as far as your interaction with Dr. Desai
15 after that time period, when things are shutting down and
16 after this sort of blow-up meeting that you have with him, the
17 second one, did you have further communication with him about
18 anything?

19 A Yes, I had communication with him. I mean, I
20 helped him shut down -- I didn't quit working for him until
21 2009. I helped him shut down his facilities. I helped him
22 reset up an office for his billing department, and helped him
23 get the medical records and worked with the attorneys to get
24 medical records for patients.

25 MR. SANTACROCE: I'm going to ask for a cautionary

1 instruction at best, not to the jury, but to the witness.

2 THE COURT: Okay. Again, don't get into, you know,
3 conversations with the lawyers.

4 I'll see counsel up here. You meant for like the
5 civil loss?

6 MR. STAUDAHER: I'm not going to ask anything about
7 lawyers, Your Honor, so.

8 THE COURT: Okay.

9 THE WITNESS: I was just getting the medical records
10 ready.

11 THE COURT: Okay. So for if --

12 THE WITNESS: They were like medical requests we had.

13 THE COURT: From the civil lawsuits, when people --

14 THE WITNESS: There were seven staff members.

15 THE COURT: -- wanted their medical records?

16 THE WITNESS: Right.

17 THE COURT: Okay.

18 THE WITNESS: Or legal counsels, when they wanted
19 stuff too. I will get those --

20 MR. STAUDAHER: My question is --

21 THE COURT: Right. You would help -- somebody sent
22 the request for a patient, you know, John Doe's records, you
23 would help to get that together; is that what you were doing?

24 THE WITNESS: Or if the corporate attorneys or any
25 other attorneys wanted information --

1 THE COURT: Can I see counsel at the bench.

2 I'm sorry.

3 (Off-record bench conference.)

4 THE COURT: Ladies and gentlemen, we need --
5 apparently some of the jurors need a break. So we'll just
6 take a quick break, ladies and gentlemen.

7 And during the break, you're reminded that you're not
8 to discuss the case or anything relating to the case with each
9 other or with anyone else. You're not to read, watch, listen
10 to any reports of or commentaries on the case, person or
11 subject matter relating to the case, and please don't form or
12 express an opinion on the trial. Notepads in your chairs.
13 Follow the bailiff through the rear door.

14 And Ms. Rushing, if you'd like to take a break, you
15 can exit through that door, but don't leave yet. Do not
16 discuss your testimony with anyone else during our break.
17 Okay.

18 (Jurors recessed at 4:34 p.m.)

19 THE COURT: How much -- Mr. Staudaher, how much --

20 MR. STAUDAHER: I'm just going to -- I have one
21 question left and that's it.

22 THE COURT: Okay. They -- the jury told the bailiff
23 they needed a break. That's why we took the abrupt break.
24 There is a juror question up here. You guys can look at it.
25 It looks okay to me. I'm going to take a break.

1 (Court recessed at 4:35 p.m. until 4:41 p.m.)

2 (Outside the presence of the jury.)

3 THE COURT: Mr. Staudaher, you said you just have one
4 question?

5 MR. STAUDAHER: I actually don't have any.

6 THE COURT: Okay.

7 MR. STAUDAHER: I'm just going to move to admit those
8 documents [inaudible].

9 THE CLERK: Can you be specific? Eighty-one -- or I
10 mean, 179 to 208?

11 MR. STAUDAHER: Yes.

12 THE CLERK: Okay. And then you mentioned 81. Are
13 you --

14 MR. STAUDAHER: Eighty-one is already admitted.

15 THE CLERK: Oh. Well, that's not what I have.

16 MR. STAUDAHER: That's not what you have?

17 THE CLERK: No. She left me a list --

18 MR. STAUDAHER: Do you have a big red sticker?

19 THE CLERK: -- of --

20 MR. STAUDAHER: That was one of the --

21 THE CLERK: Well, okay.

22 MR. STAUDAHER: That was one of the earlier ones.

23 THE CLERK: So you have the top part that we need to
24 take off, right?

25 MR. STAUDAHER: Yes.

1 THE CLERK: And then we're going to get the red one?
2 MR. STAUDAHER: And that one is the copy [inaudible].
3 (Pause in proceedings)
4 THE COURT: We're waiting for Mr. Wright and
5 Ms. Stanish, and I think the jurors are about ready.
6 (Pause in proceeding.)
7 (Tonya Rushing resumes the witness stand.)
8 (Jurors reconvene at 4:48 p.m.)
9 THE COURT: Court is now back in session.
10 Mr. Staudaher, do you have any more questions for the
11 witness?
12 MR. STAUDAHER: No, Your Honor. The only issue that
13 I have is with the exhibits that I proffered or proposed, and
14 I'd move for their admission again. I know that counsel's now
15 looked at them and --
16 THE COURT: Any objection?
17 MR. WRIGHT: No.
18 THE COURT: All right. And Mr. Santacroce, any
19 objection?
20 MR. SANTACROCE: No.
21 THE COURT: That was exhibit what?
22 THE CLERK: 179 to 208.
23 THE COURT: All right. Those are all admitted.
24 (State's Exhibit 179 through 208 admitted.)
25 THE COURT: And Mr. Santacroce, are you ready to

1 proceed with your cross-examination?

2 MR. SANTACROCE: Yes, Your Honor. Thank you.

3 CROSS-EXAMINATION

4 BY MR. SANTACROCE:

5 Q Good afternoon, Ms. Rushing. I'm going to ask
6 you some questions about your direct testimony today, okay?

7 A Mm-hmm.

8 Q The first thing -- one of the first things you
9 were asked today was whether or not the State had given you
10 immunity from prosecution, and I'm talking about the State.
11 Did -- and I believe you answered no. Was that your answer?

12 A They gave me a proffer in the very beginning,
13 and I have had no immunity or anything else given.

14 Q As you testified today, do you have state
15 immunity from prosecution?

16 A No, sir.

17 Q Do you remember giving testimony in front of the
18 grand jury?

19 A Yes, sir, I do.

20 Q I'm going to show you page 55 of that
21 transcript. I'd ask you to read this portion, please, to
22 yourself.

23 A From here?

24 Q You can read as much as you want, but I'm just
25 directing your attention to here.

1 A Okay.

2 Q Have you read that?

3 A Yes.

4 Q Do you remember Mr. Staudaher asking you --

5 MR. STAUDAHER: Your Honor, I'm going to object to
6 the display of the transcript. He can certainly ask the
7 question --

8 THE COURT: That's sustained. You're on the
9 overhead.

10 MR. SANTACROCE: Oh, okay. I'm sorry.

11 BY MR. SANTACROCE:

12 Q And Mr. Staudaher asked you, "And that out of
13 the abundance of caution, although you were not a State target
14 in this particular case and you have made proffers that you
15 have in the past, out of the abundance of caution we are
16 telling you today from the State's perspective that you in
17 fact are not going to be subject to prosecution by anything
18 you say during this proceeding today, correct?" And you
19 answered correct.

20 Was it your understanding at the time that you gave
21 testimony before the grand jury that you had immunity from the
22 State for prosecution?

23 A It was my understanding that I had a proffer,
24 that what that meant to me was that I could talk and describe
25 and answer the questions, but there was no guarantee of them

1 not using anything or any -- either the State or the other
2 one, against me.

3 Q Have you been charged by the State for insurance
4 fraud?

5 A No, sir.

6 Q Have you been charged by the State for theft?

7 A No, sir.

8 Q Have you been charged by the State for obtaining
9 money under false pretenses?

10 A No, sir.

11 Q You testified that, I believe, back in 2003, you
12 started doing billing for the Endoscopy Center; is that
13 correct?

14 A In 2003 was when Rebecca Duty and myself were
15 introduced by Dr. Desai, and Rebecca's company subcontracted
16 the work to my company, so our company let her company do the
17 billing.

18 Q Prior to that time you had worked for Larry
19 Preston, correct?

20 A Correct.

21 Q And Larry Preston had a medical billing company,
22 correct?

23 A Medical billing and consulting.

24 Q And what did you do for Mr. Preston?

25 A Practice management.

1 Q And Mr. Preston's company did the billing for
2 Dr. Desai at that time, correct, prior to 2003?

3 A I think it was Lizmar and Larry's company.

4 Q And the first nurse anesthetist was Ms.
5 LoBiondo, correct?

6 A Correct.

7 Q And when did she come to be employed, do you
8 know?

9 A I can't recall the date. I would assume 2000.

10 Q 2000?

11 A I would assume there or very close to.

12 Q And when did her billing become your
13 responsibility?

14 A You mean Healthcare Business Solutions?

15 Q Is that your company?

16 A That was my company.

17 Q Healthcare Business Solutions?

18 A Mm-hmm.

19 Q Were you a sole proprietor?

20 A I was an LLC.

21 Q And who were the managing partners of that LLC?

22 A Well, I owned it 100 percent, and then I -- like
23 I said, I didn't do the billing, the physical billing until
24 Rebecca quit in 2006. So Rebecca's company was subcontracted
25 to do all the data entry, all the claim processing and

1 everything else, because she had experience with billing.

2 Q So tell me how that works. You have a company,
3 Healthcare Solutions. She has Paragon.

4 A Right.

5 Q And how does the flow --

6 A There was a contract --

7 Q You need to let me finish the question.

8 A Oh, sorry.

9 Q How does the flow from the CRNA billing get to
10 Paragon?

11 A She had a runner.

12 Q No, I don't mean physically. I mean what is the
13 business procedure. How does it go through Healthcare
14 Solutions to Paragon?

15 A Paragon had a subcontract contract with
16 Healthcare Business Solutions, which --

17 Q You?

18 A Yes, which Rebecca owned a 10 percent ownership
19 in.

20 Q Okay. Let me stop you there. So you had a
21 contract with the Endoscopy Center?

22 A Rebecca and I did.

23 Q Well, Healthcare Solutions --

24 A Healthcare Business Solutions, which was owned
25 by Rebecca Duty and myself, and Rebecca Duty signed the

1 initial contract for health -- on behalf of Healthcare
2 Business Solutions to do billing. Healthcare Business
3 Solutions then had another contract between her company,
4 because it was her employees and stuff like that, to go ahead
5 and process the billing, because she's already been doing that
6 for a few years.

7 Q And that occurred in what years?

8 A Initially right off the bat, off the contract.

9 Q Okay. So after you left Larry Preston's
10 company --

11 A No. Yes, 2003. I'm sorry. You're right.

12 Q So you left Larry's company --

13 A And I went to work for Dr. Desai.

14 Q Went Dr. Desai. Then there came a time shortly
15 thereafter where you formed Healthcare Solutions, and you went
16 into business with Rebecca Duty?

17 A Correct.

18 Q And how did you and Rebecca share the profits at
19 that time?

20 A Rebecca owned 10 percent, and she would invoice
21 Healthcare Business Solutions for the staffing, supplies or
22 whatever else they used in the billing for their billing
23 staff. And then they would do -- I think we would just do
24 disbursements or whatever.

25 Q I want to focus primarily and solely upon the

1 CRNA billing, okay?

2 A Mm-hmm.

3 Q So there came a time in 2006, when Rebecca left
4 and you did the sole billing for the CRNAs?

5 A Correct.

6 Q When I say you, I mean your company.

7 A Correct.

8 Q Of which you're a 100 percent owner?

9 A Correct.

10 Q And what third party payors did you have at that
11 time for the CRNA billers?

12 A The CRNAs were credentialed and contracted
13 through Gastroenterology Center of Nevada. So whatever
14 contract they were on, Blue Cross Blue Shield, Culinary
15 [phonetic] or whatever it was.

16 Q Okay. Well, I want you to give me a list of
17 those, okay?

18 A Okay.

19 Q Go ahead.

20 A The CRNAs were credentialed through Gastro on
21 all the Gastro contracts; Culinary, Medicare, Medicaid --

22 Q You need to slow down. I can't write that fast.

23 A Sorry.

24 Q Culinary. Who else?

25 A Culinary, Medicare, Medicaid, Blue Cross Blue

1 Shield, PacifiCare --

2 Q Hold on.

3 A Sorry.

4 Q Blue Cross Blue Shield. Who else?

5 A Culinary, Medicare, Medicaid, Blue Cross Blue
6 Shield, PacifiCare. HPN, which would be all Sierra products.
7 There's a ton of them. Tri-Care, Tri-West. Gastroenterology
8 Center was contracted with every payer. I can't even begin to
9 tell you what payers. They were not excluded from any payer.

10 Q I'm talking solely about the CRNAs.

11 A The CRNAs were on the Gastro contracts.

12 Q So let's talk about these ones here. Okay.

13 A Mm-hmm.

14 Q For a anesthesia process or procedure, how much
15 did Culinary pay?

16 A I can't remember what they paid from back then.

17 Q How much did Medicare pay?

18 A I'm -- I don't remember. I know it was like
19 probably \$500.

20 Q How much did Medicaid pay?

21 A I don't remember.

22 Q How much did Blue Cross pay?

23 A I can't remember from 2006. I don't know what
24 the payers paid. I'm guessing.

25 Q Okay. You're telling me you don't know any of

1 what these people paid?

2 A Not now.

3 Q Blue Shield?

4 A Not now.

5 Q PacifiCare, HPN, Tri-Care, Tri-West?

6 A I mean, it would depend on how many units were
7 billed and what the contract said. They could vary.

8 Q Well, you testified that they billed 31 minutes
9 or more than 30 minutes.

10 A Right. But some of them were flat rate too.

11 Q Okay. Who's flat rate?

12 A I know the cash pays were flat rate \$150.

13 Q Who were they?

14 A Anybody who was uninsured.

15 Q Okay. I'm talking about third party payers.

16 A I couldn't give you an accurate answer. I mean,
17 it's been six years, five years.

18 Q Well, how much percentage -- and I'm assuming
19 you received a percentage of all billings collected, correct?

20 A Receipts, yes.

21 Q And how much did you receive?

22 A Nine percent.

23 Q Did that ever go up?

24 A It did.

25 Q How --

1 A To 10 percent.

2 Q So in what years were you earning 10 percent?

3 A I think the last year.

4 Q What were you earning in 2007?

5 A It would have been the 9 percent.

6 Q And so you --

7 A I'm guessing at what time frame that was.

8 Q Your company received 9 percent of all the CRNA

9 billings; is that an accurate statement?

10 A Yes, of receipts.

11 Q So if the billings were increased, you would

12 stand to earn more money, correct?

13 A Correct.

14 Q Okay. And conversely, if they went down you

15 would earn less money?

16 A Correct.

17 Q How much money did your company earn from the

18 CRNA billings in 2007?

19 A I would have to look at a document or something

20 to tell you the truth, or a tax return.

21 Q Did your company file a tax return in that year?

22 A Yes, we did.

23 Q How many procedures a day did the clinic do in

24 2007, your best guesstimate?

25 A Forty-five, 45 to 50 a day.

1 Q So up to 50 a day. And what would you say the
2 average third party payer would pay? You've identified
3 Medicare 500 bucks. Would they all be around the same?

4 A I would say probably.

5 Q So 500 times 50 is how much, do you know? I
6 come up with -- and I'm not good at math, so do you have a
7 number?

8 A No.

9 Q 25,000?

10 A Mm-hmm. Probably --

11 Q Is that right?

12 A Probably around there.

13 Q And there was two procedure rooms, correct?

14 A Well, there was --

15 Q Or is there a total of 50 patients?

16 A No. There would be also the Burnham location
17 too.

18 Q So you would get money from Burnham?

19 A All the CRNAs.

20 Q Okay. So let's just talk about Shadow. The 50
21 patients, was that for both rooms or for one room?

22 A For Shadow, that was the whole facility.

23 Q Okay. So from the CRNAs you made 25,000 -- or
24 billed \$25,000 per day; is that correct?

25 A It sounds correct.

1 Q And if you multiply that times five -- I mean,
2 they worked five days a week, right?

3 A Sometimes six.

4 Q Okay.

5 A They pulled Saturdays every once in a while.

6 Q So if we bill times five, is that -- can that be
7 possibly right; is that \$125,000 per week?

8 A I don't remember ever getting a check for that
9 amount.

10 Q Well, you wouldn't though, because you would
11 have billed that and you would have gotten -- well, you would
12 have got 10 percent of that, correct, 9 percent?

13 A Nine percent or 10 percent.

14 Q So you would have received about \$12,500 per
15 week from the CRNA billings; is that correct?

16 A It sounds correct. Without seeing the numbers,
17 I couldn't tell you.

18 Q Okay. You testified that Dr. Desai set up a
19 CRNA fund, correct?

20 A Not fund. An account.

21 Q And he had sole control over that account?

22 A Yes. He would use it at his discretion.

23 Q So when you made the billings in this amount of
24 money per week -- and did you bill per week to the third party
25 payors?

1 A Billed every night. Every time the claim was
2 in, it would go out every night.

3 Q And then would you get a check from the -- would
4 your company, Healthcare Solutions, get a check from these
5 third party payors?

6 A No, sir. They paid directly to Gastroenterology
7 Center of Nevada.

8 Q And which account would they go into?

9 A Gastroenterology Center of Nevada, I believe, or
10 the CRNA. I can't remember which one.

11 Q And your commission came from which account?

12 A Gastroenterology Center of Nevada.

13 Q So Dr. Desai would pay you out of that account
14 for your percentage of the CRNA billings, correct?

15 A Yes. The CRNAs were employed from
16 Gastroenterology Center of Nevada.

17 Q I'm talking about how you got paid.

18 A Yes. Gastroenterology.

19 Q And how often would you get a check? Would you
20 get it weekly, monthly?

21 A Monthly.

22 Q Monthly?

23 A Mm-hmm. At the end of the month they would run
24 the reports.

25 Q And that check would come out of the CRNA

1 account, or the Gastro account?

2 A As I stated, I can't remember which. I'm
3 sure -- more so sure that it came out of the Gastro account.

4 Q Okay. You were the manager of the Shadow Lane
5 clinic, correct?

6 A Correct.

7 Q And you were the COO?

8 A Correct.

9 Q Chief operating officer?

10 A Correct.

11 Q Are you aware that the CRNAs never got one
12 dollar out of that CRNA account?

13 A They would be paid out of Gastroenterology
14 Center.

15 Q So the answer would be yes, you're aware that
16 they didn't?

17 A They were employed, so yes, that would make
18 sense to me.

19 Q And you're aware that they got a salary,
20 correct?

21 A They got a salary and then they got a bonus.

22 Q And there's testimonies that at some point those
23 bonuses stopped; is that your understanding?

24 A They did for everybody, yes.

25 Q So the CRNAs were on a salary?

1 A Yes, sir.

2 Q So unlike your company, Healthcare Solutions,
3 the CRNAs, it didn't matter if they did one patient or 50
4 patients a day?

5 A Correct.

6 Q Now, you testified that you took, or the CRNAs
7 would, I guess -- let me just strike that.

8 How did you get the anesthesia records to bill for
9 the CRNAs?

10 A At the end of the day there was a bin, and the
11 CRNAs would have filled out their charge ticket, like I said,
12 with all the patient information and so forth. The front desk
13 person at the Endoscopy unit would attach the insurance
14 information and everything else, put it back in the bin in an
15 envelope, and the runner would come by and pick up the
16 envelope from that facility.

17 Q Who would attach the documentation?

18 A The front desk person would attach to the charge
19 ticket the patient's copy of the patient's insurance card, a
20 copy of the patient's driver's license, and I think the
21 financial policy of gas -- of Endoscopy Center.

22 Q So the CRNAs would drop off the anesthesia
23 records in the bin, correct?

24 A Right. After they were done filling them out.

25 Q And that was the end of their responsibility as

1 far as billing was concerned?

2 A Right. Because they put their start time and
3 end time, that's all they needed to do.

4 Q Did you ever view any of those anesthesia
5 records when they were in the bin for the three, four, five
6 years that you were doing this?

7 A I'm sure I did.

8 Q Did you ever view any of the EOB cards?

9 A I am sure I did.

10 Q And it's your testimony here today that the
11 first time that you are aware of the CRNAs billing 31 minutes
12 was when Dr. Carroll came to you after the Rexford case?

13 A When the precharted record was done, that is the
14 first time I've heard of that.

15 Q And if Anne LoBiondo told you that when she
16 testified that when she started working you told her to bill
17 31 minutes, she'd be wrong?

18 A Yes. I had -- I can't oversee CRNAs.

19 Q Well, according to the organizational chart, you
20 are overseeing CRNAs. Isn't that you here?

21 A Right. And they have a direct line to the
22 physicians and the physician staff up to Dr. Desai. As I
23 stated earlier, they would coordinate with Mr. Lakeman for
24 their schedule and their covering. I would dissonate that
25 schedule and that covering.

1 Q So the only thing Mr. Lakeman did as far as --
2 was scheduling the CRNAs?

3 A Right. He would coordinate. If they would take
4 off vacation days or whatever, they would communicate it to
5 him.

6 Q And how long did he do that?

7 A I would say probably about a year and a half,
8 two years.

9 Q And he had nothing to do with ordering supplies
10 or anything of that nature, correct?

11 A No, sir. There was only one incident that I can
12 remember that he had an argument with Katie --

13 Q Okay. I don't want you to tell me about that,
14 because that's hearsay from Katie.

15 A No. I was there.

16 THE COURT: Well, it's -- that doesn't matter.
17 BY MR. SANTACROCE:

18 Q So other than that one instance, whatever it
19 was, he didn't have any control over -- he didn't order
20 propofol, he didn't order syringes, he didn't order Chux, he
21 didn't order --

22 A No. He didn't order --

23 Q -- K-Y Jelly?

24 A No. No, sir. He did not.

25 Q Okay.

1 A He wanted a specific drug.

2 Q All he did was schedule the CRNAs as to what
3 their work schedule was for about a year?

4 A Coordinate it, yes.

5 Q Yeah, coordinate it. And you said that he had a
6 direct line to staff physicians. He also has a direct line to
7 the COO, you.

8 A Mm-hmm.

9 Q Okay. Is that fair estimate of the chain of
10 command here?

11 A Yes. He would turn in those sheets and he would
12 turn in his vacation requests and so forth.

13 Q And who would approve them, you?

14 A No. Dr. Desai would approve or the doctors.

15 Q So Dr. Desai would approve every single week of
16 what CRNAs were scheduled; is that what you're telling us?

17 A Absolutely.

18 Q Okay. And he would oversee all of the other
19 things that you mentioned and still be able to do 50
20 procedures a day?

21 A Like I said, he was quite remarkable. Yes.

22 Q He was quite remarkable.

23 In your direct testimony you talked about a meeting
24 that you had with the CRNAs; is that correct?

25 A I'd have to remember it. If you could bring it

1 and let me remember it.

2 Q I believe it was in February of 2008, when Dr.
3 Carrol came to your office about the precharting. Was that
4 '08 or '07?

5 A It was '08, like in February of '08.

6 Q And you testified that you called the CRNAs into
7 the office.

8 A Right. Dr. Carrol, he's a partner, came up, had
9 the --

10 Q I don't need all that explanation.

11 A Yes.

12 Q You called the CRNAs up, correct?

13 A Under the direction of Dr. Carrol, I would
14 definitely call the CRNAs up, yes.

15 Q And you testified that you called -- you can
16 specifically remember calling Vinnie Mione and Vinnie
17 Sagendorf up, correct?

18 A Couldn't remember the others, yes.

19 Q Didn't Vinnie Mione and Vinnie Sagendorf work at
20 Burnham?

21 A They could rotate.

22 Q Do you remember if this meeting took place at
23 Shadow or Burnham?

24 A Shadow.

25 Q You also in your grand jury testified that you

1 called up Vince, Linda, Linda Hubbard and Keith Mathahs. Do
2 you remember that?

3 A I -- if I -- I guess.

4 Q Well, let me show you the transcript.

5 MR. STAUDAHNER: Page, Counsel?

6 MR. SANTACROCE: I'm sorry. Eighty-five.

7 THE WITNESS: Eighty-five? Okay. Yes, and I also
8 state here if I can't remember the other Vinnie was there or
9 not, so obviously I might not have gotten all the names right.
10 Whoever was on the floor at Shadow Lane was called up to the
11 office.

12 BY MR. SANTACROCE:

13 Q Well, one thing is for sure is that Mr. Lakeman
14 wasn't called up, correct?

15 A I didn't remember Mr. Lakeman being called up.
16 I don't know if he was there or not.

17 Q Well, he left your -- the employment in October
18 of 2007, and you're telling me this occurred in February 2008?

19 A Then he wouldn't have been called up.

20 Q So the meeting that you had in Dr. Carroll's
21 office with you and the CRNAs did not include Mr. Lakeman; is
22 that a fair statement?

23 A That would be a fair statement.

24 Q Now, you talked about a time when your company
25 started to grow and you took on other doctors, physicians,

1 correct?

2 A Yes, sir.

3 Q When was that?

4 A I want to say 2005, approximately. I can't give
5 you the exact date. I don't have the books in front of me.

6 Q And what other physicians did you take on?

7 A We took on Dr. Michael Gunter.

8 Q What is his area of practice?

9 A Internal medicine.

10 Q Okay.

11 A Dr. Bhatnagar, who is a surgeon.

12 Q I guess I don't want to go through the names.
13 Tell me if there were any other CRNA billings in any of those.

14 A No, sir, there was not.

15 Q So the Gastro was the only CRNA billings you
16 did?

17 A Yes, sir.

18 Q And you talked about when you found out about
19 the 31 minutes you confronted Dr. Desai; is that correct, or
20 you went to Dr. Desai?

21 A Yes, sir.

22 Q And you expressed your concern to him and he
23 said, Darling, honey, whatever he said, don't worry about it
24 because the procedures start from the preop area to discharge?

25 A Correct.

1 Q Were you aware that that's how Larry Preston was
2 billing the CRNA time as well?

3 A No.

4 MR. STAUDAHER: Objection. Speculation.

5 MR. SANTACROCE: He testified to that.

6 MR. STAUDAHER: It's not what he testified to.

7 MR. SANTACROCE: Well, that's my recollection.

8 THE COURT: All right. Well, she --

9 BY MR. SANTACROCE:

10 Q Okay. So your answer's you were not aware of
11 that?

12 A No, I was not aware.

13 Q Okay. Let me put it -- let me state it this
14 way. Were you aware that Larry Preston believed that the
15 anesthetist's time started when he first made contact with the
16 patient until the patient was discharged?

17 MR. STAUDAHER: Objection, Your Honor.

18 THE COURT: Sustained.

19 THE WITNESS: Can I answer, or no?

20 THE COURT: No, no, don't. Don't answer.

21 MR. SANTACROCE: No, you can't.

22 BY MR. SANTACROCE:

23 Q You never did any CRNA billing when you worked
24 for Larry Preston?

25 A Never.

1 Q Did you see any of the CRNA billings when you
2 worked for Larry Preston?

3 A Never. I was always in Dr. Desai's office.

4 Q You were shown that memo about the insurance
5 companies, and specifically about PacifiCare.

6 MR. SANTACROCE: I think it's 179.

7 MR. STAUDAHER: It's, I believe, 79 or 81.

8 MR. SANTACROCE: Let me see 180, please. I'm sorry.
9 It's actually 185.

10 BY MR. SANTACROCE:

11 Q You were asked about why PacifiCare was spaced
12 this way.

13 A Yes, sir.

14 Q And what was your answer?

15 A At that time the memo was written, I just wrote
16 it and followed orders.

17 Q Is that your whole take on this thing, that you
18 just were following orders?

19 A On that specific memo that you just showed me,
20 yes.

21 Q What sorts of things at the clinic did you have
22 direct control and authority over?

23 A Like I said, I answered to the partners and I
24 answered to Dr. Desai.

25 Q When you answered to the partners, the partners

1 are Dr. Carrol, Dr. Carrera, Dr. Desai?

2 A Mason, Dr. Herrero, Dr. Faris. There was a ton
3 of them.

4 Q And what sorts of things -- were there regular
5 meetings with all of those folks?

6 A Only when Dr. Desai had called them. I mean, he
7 was the one who called the partner meetings. He was very
8 specific on his agendas of what he called them for. He didn't
9 allow us to socialize or have outside conversations like that.

10 Q Well, were you in attendance in those meetings?

11 A On some occasions, and some occasion I was not.

12 Q And so what sorts of things that were in your
13 control did you bring to those partner meetings?

14 A I did not bring much to the partner meeting
15 other than attend. Dr. Desai would have me bring down Medical
16 Manager reports, which showed the productivities of the
17 physicians. He would have us discuss opening new facilities.
18 He just -- he would discuss when a new doctor, like a doctor
19 who had already done three years' time and was getting ready
20 to become partner.

21 Q Well, I guess I'm not quite understanding this.
22 You told us over and over how busy you were at the clinic,
23 correct?

24 A Mm-hmm.

25 Q I want to know what you were doing that kept you

1 so busy.

2 A I would go see referring physicians, drop off
3 referring physicians, referring physician pads, make sure that
4 people were happy. I would do for errands for him, as well as
5 something else if somebody else needed it. I would write
6 letters if he needed letters written. I would build
7 facilities. When I got there, there was only two, three
8 locations. And we revamped the whole Shadow Lane office.

9 So I'd work with the contractors, buy furniture, help
10 him redo like the phone system. Because when we first started
11 we had a very adequate bad phone system in each office. So
12 then he had to put a central phone system, so I'd work with
13 those. I would work with check-in to make sure that they were
14 getting all the patient demographics and all that stuff in, in
15 checking the patients in.

16 We developed patient satisfaction surveys. I mean,
17 whatever he needed. I mean, if it was, you know, set up a
18 dinner with him and somebody, or a doctor with somebody, or
19 attend a meeting, or decorate his office, decorate the offices
20 that they had there. I mean --

21 Q And what -- how much time did you spend
22 overseeing Healthcare Solutions then?

23 A I would go there either an hour in the morning
24 or I would go there three hours at night, two hours at night.
25 Sometimes I couldn't make it there depending if we had a

1 function.

2 Q And when you oversaw the activities at
3 Healthcare Solution, did you review any of the billing
4 records, the CRNA billing records?

5 A No. Because Healthcare Business Solutions
6 didn't do just billing. We also did credentialing, startups,
7 that type of thing for physicians. So that took -- that's
8 where I concentrated on. I had billing managers. I had
9 billers that went to school for billing, and then Ida would
10 address if there was any concerns.

11 Q And those billing managers, who are they?

12 A Ida Hansen was one of them. Kim Taylor
13 [phonetic] was one of them. Tammy Davidson [phonetic] was one
14 of them. Sheila Seefus [phonetic] was one of them. I mean,
15 there was a few of them.

16 Q And those were all employees of Healthcare
17 Solutions?

18 A Yes, sir.

19 Q And during that time period of 2006, when you
20 started that until you closed down, or until the Gastro closed
21 down --

22 A I didn't close down when Gastro closed down.

23 Q No, no. I'm sorry. That's not what I was
24 inferring. Let me restate that. From the time you started
25 Healthcare Solutions in 2006, until the billing practices from

1 Q Okay. And these procedures being short like
2 back to back procedures, there isn't any issue on bacterial
3 growth or keeping it over six hours, correct?

4 A It's not opened for that long.

5 Q Okay.

6 A You're going to use it and --

7 Q And this multi-use of a propofol vial, meaning
8 used on more than one patient, that is standard practice when
9 it is cleanly properly done?

10 A Yes. I think -- okay. Yes.

11 Q Is that -- do you have a caveat?

12 A No, I guess. No.

13 Q Okay. I mean, is it correct --

14 A Yes.

15 Q -- what I stated?

16 Okay. Now, you mentioned on direct examination about
17 a propofol -- pardon me, saline flush directive --

18 A Yes.

19 Q -- at the clinic. Do you recall?

20 A Yes.

21 Q Okay. And are we -- and we're talking about
22 your second -- or your third time back at the clinic?

23 A I believe that's when it was, yes.

24 Q Okay. And at that time there was an idea of
25 Dr. Desai, as you understand it, to inject 5 cc of saline

1 after the first patient injection of propofol; is that right?

2 A Yes.

3 Q Okay. And the -- and you stated you did not do
4 that, correct?

5 A I would not do it because I didn't draw up or
6 prepare the 5 cc syringe myself.

7 Q Okay.

8 A So I would not give it to the patient.

9 Q Okay. And that's part of your standard
10 practice, you're not going to give your patient anything where
11 you don't know where the syringe or the vial came from and you
12 can't attest to the integrity of it?

13 A Yes.

14 Q And so this, you were being presented -- who was
15 telling you to do this, the best you recall?

16 A I don't know who exactly told us to do it. I
17 don't remember if --

18 Q Okay.

19 A I remember being told it was an idea of Dr.
20 Desai's.

21 Q Okay.

22 A And everyone would ask me, the other doctors
23 would ask me why I didn't use it and I said that's -- I didn't
24 prepare that, I didn't draw that up and I'm not going to push
25 it into my patient. I don't know where they came from.

1 Q Okay. Because to implement it, you were being
2 given like a box of prefilled 5 cc saline syringes --

3 A Yes.

4 Q -- right?

5 And you didn't know -- you didn't draw those syringes
6 of saline, correct?

7 A No, I did not.

8 Q And you don't know the integrity of how they
9 were drawn, correct?

10 A Exactly.

11 Q Okay. And so would nurses and various people in
12 the procedure say, hey, you forgot to give 5 cc of saline?

13 A Yes, I would hear that.

14 Q Okay. And what would you say?

15 A I'm not giving that because it's not mine. I
16 didn't draw it up. I didn't prepare it. I'm not -- I don't
17 know what that is.

18 Q And you said that to doctors, correct?

19 A Yes.

20 Q Okay. Did you get in an argument with Dr.
21 Carrol about it?

22 A Well, I asked him. He asked me why I wasn't
23 giving it, and I said because I didn't prepare it and I think
24 it was -- it was done after that.

25 Q Okay. And when you were doing procedures for

1 Dr. Desai, okay, you didn't give saline right in front of

2 Dr. Desai, correct?

3 A Correct.

4 Q Okay. And did he admonish you, order to do it
5 or anything?

6 A He may have. If he did, I -- you know, it
7 didn't escalate. It never escalated into an argument. Even
8 with Dr. Carrol it never escalated into an argument. It was
9 just I made the statement I didn't give it, it wasn't done.
10 It never -- never became a huge issue.

11 Q Okay. And the -- as far as like the saline, I
12 mean, the problem, you weren't going to use saline syringe you
13 hadn't drawn up on your patient, correct?

14 A Yes. I was not going to use it --

15 Q Okay. As far as like --

16 A -- period, the end.

17 Q As far as like saline going into the patient
18 when your patient's getting propofol, just setting aside the
19 drawing up issue, saline does go into the patient when a
20 patient's getting propofol in other settings, correct?

21 A Yes. Usually it's in a running IV bag with IV
22 tubing and...

23 Q Okay. So and you've dealt with those and have
24 experience in that, correct?

25 A Yes.

1 Q Okay. So in an --- where, like at North Vista
2 Hospital?

3 A Well, yes. And if you're going to do a surgical
4 procedure, the patient usually has a -- always has a running
5 IV for fluids and other medications, so.

6 Q So the saline going in with the propofol, I
7 mean, there was nothing peculiar about that?

8 A No.

9 Q Okay. And --

10 A That was not unsafe.

11 Q Okay. And the -- you understood that the idea
12 was this would make the propofol work faster? Did you know?

13 A I believe that was the idea, yes.

14 THE COURT: May I see counsel at the bench, please.

15 (Off-record bench conference.)

16 THE COURT: Ladies and gentlemen, we're going to --
17 we're not going to finish with this witness before a
18 reasonable time for lunch, so we're going to go ahead and take
19 our lunch break now. We'll be in recess for the lunch break
20 until 2:00 o'clock.

21 During the recess, you're reminded that you're not to
22 discuss the case or anything relating to the case with each
23 other or with anyone else. You're not to read, watch, listen
24 to any reports of or commentaries of this case, any person or
25 subject matter relating to the case. Don't do any independent

1 research, and please do not form or express an opinion on the
2 trial.

3 Notepads in your chairs. Follow the officer through
4 the rear door.

5 (Jurors recessed at 12:57 p.m.)

6 THE COURT: Ms. LoBiondo, during the recess, again of
7 course, I have to admonish you not to discuss your testimony
8 with anyone else. Okay. And you're free to go to lunch so
9 long as you're back at 2:00 o'clock.

10 THE WITNESS: Thank you.

11 THE COURT: Be back a couple minutes early if you can
12 so we can start right up at 2:00, okay?

13 THE WITNESS: Okay. Thank you.

14 THE COURT: So you also have, you know, essentially
15 an hour. And ma'am, you exit through that door.

16 THE WITNESS: Yes.

17 THE COURT: The back door is only for the jurors.

18 THE WITNESS: Thank you.

19 (Court recessed at 12:57 p.m. until 2:03 p.m.)

20 (Outside the presence of the jury.)

21 THE COURT: All right. Is everyone ready? Do you
22 want to just grab the witness then?

23 Ms. Stanish, can you or somebody grab the witness?
24 Kenny will do it.

25 MR. WRIGHT: I want to maybe ask her a question

1 outside of the --

2 THE COURT: Oh.

3 MR. WRIGHT: It's just a question about --

4 MS. WECKERLY: That's fine.

5 THE COURT: Okay. So why don't you guys go do that.

6 MR. WRIGHT: Sorry to be innocuous. I just don't
7 get it.

8 THE COURT: Okay. That's fine.

9 (Pause in proceeding.)

10 (Annamarie LoBiondo resumes the witness stand.)

11 (Pause in proceeding.)

12 (Jurors reconvene at 2:11 p.m.)

13 THE COURT: Court is now back in session, and
14 obviously you're still under oath.

15 And Mr. Wright, you may resume your cross-examination
16 of the witness.

17 MR. WRIGHT: Thank you.

18 CROSS-EXAMINATION (continued)

19 BY MR. WRIGHT:

20 Q Ma'am, are you currently employed as a CRNA?

21 A No, I am not.

22 Q Okay. Have you been employed since the last
23 five years as a CRNA?

24 A I was work -- now, I have been working as a
25 nurse practitioner a short period of time.

1 Q Okay. Now, on the -- we went through your uses
2 of a needle and syringes with propofol. Okay. Were you ever
3 at any time at the clinic, 2000 up through 2007, when you
4 left, at any time were you ever ordered, directed, advised to
5 reuse syringes, needles and syringes?

6 A No.

7 Q Okay. You have no knowledge whatsoever of any
8 orders, directions or anything that you should reuse needles
9 and syringes, correct?

10 A No. We had plenty of them.

11 Q Okay. And if someone had ordered you to reuse a
12 syringe or reuse needle and syringe on some other patient or
13 something, what would you do?

14 A I would not do it.

15 Q Okay. And if you were asked when you were
16 interviewed by investigators if you weren't ordered to reuse
17 syringes why would someone at the clinic contend that there
18 were orders to reuse syringes, do you recall that?

19 A I don't recall it, but I know what I would have
20 answered.

21 Q Very well. What would you have answered?

22 A I never heard that.

23 Q Okay. Do you recall saying -- I'll just -- and
24 this doesn't contradict your answer.

25 A I know it doesn't.

1 Q You're right about that.

2 (Pause in proceedings)

3 BY MR. WRIGHT:

4 Q [Inaudible] of page 40 and on to 41, and just
5 read that to yourself.

6 A [Complies.]

7 Q Does that refresh your recollection as to what
8 I'm talking about?

9 A Yes. I remember that.

10 Q Okay. And what was -- when you were asked why
11 someone at the clinic would say such a thing, what did you
12 answer?

13 A I'm sorry. Can --

14 Q When you were asked by the investigators why
15 someone at the clinic -- what -- why would --

16 MS. WECKERLY: Excuse me. I have a hearsay objection
17 if you're intending to read the answer into the record, part
18 of it.

19 THE COURT: Okay. I don't know what the answer is.

20 MS. WECKERLY: Well, it looked -- I mean, I'm not
21 sure he was going to read it, but if he is...

22 MR. WRIGHT: I was going to. Maybe we better
23 approach.

24 THE COURT: Maybe you better, because I don't know
25 what you're looking at there.

1 (Off-record bench conference.)

2 BY MR. WRIGHT:

3 Q Do you know what the term "precharting" means?

4 A I guess I do. I've never heard of precharting,
5 but I can imagine it means charting before charting. I don't
6 know.

7 Q Okay. The --

8 A It's not a common term.

9 Q And you were asked about prechart -- page 20,
10 21, second [inaudible].

11 A Okay. Yes.

12 Q Yep. You were asked do you know what
13 precharting means, and you answered it the same way. "I don't
14 know. I guess it means charting ahead of time," right?

15 A I guess that's what I said I thought.

16 Q And then did you explain what you would do on
17 your chart as far as precharting ahead of time?

18 A Well, I wouldn't prechart. You could write -- I
19 mean, I could write the date and my name on the bottom of my
20 records. That's all you could prechart as far as I would
21 do it, and I don't know how else you could prechart anything
22 else other than the date and your name.

23 Q And is there anything wrong with what you were
24 doing? Let me put it that way.

25 A I don't see how that could be wrong.

1 Q Okay. And if they call that precharting, is
2 anything that you did by starting to fill out the chart the
3 way you did, any impropriety whatsoever --

4 A Those were my records that I was going to use
5 for that day and they had my name on it and the date. I don't
6 see anything wrong with that.

7 Q Okay. Now, you received prior to your interview
8 proffer agreements [inaudible] before you [inaudible]; is that
9 your understanding?

10 A Yes.

11 MR. WRIGHT: Approach the witness.

12 THE COURT: Mm-hmm.

13 MR. WRIGHT: Exhibit zero, one, look at that and tell
14 me if that looks like your --

15 THE COURT: I think that would be oh, one.

16 MR. WRIGHT: Oh, one?

17 THE COURT: Letter O.

18 MR. WRIGHT: Oh, all right.

19 THE WITNESS: Okay.

20 BY MR. WRIGHT:

21 Q Does that appear to be a copy of the proffer use
22 immunity letter between yourself and the district attorney?

23 A Yes.

24 Q And that -- that happens to be an unsigned one,
25 but does that look like your agreement?

1 A Yes.

2 Q Thank you.

3 MR. WRIGHT: I move [inaudible].

4 THE COURT: Any objection to O-1?

5 MS. WECKERLY: No, Your Honor.

6 THE COURT: All right. O-1 is admitted.

7 (Defendant's Exhibit O-1 admitted.)

8 BY MR. WRIGHT:

9 Q When you were interviewed, that agreement was in
10 the -- like that's dated July 14, 2008, and then you were
11 interviewed with those five people --

12 THE COURT RECORDER: I'm sorry. I didn't hear that.

13 THE COURT: You need to keep your voice up.

14 BY MR. WRIGHT:

15 Q Interviewed by those five people, do you recall
16 that?

17 A Yes.

18 Q Okay. And did you feel pressured to say certain
19 things?

20 A I -- I think that I did --

21 Q Okay.

22 A -- feel like I had to -- I'm not sure. I mean,
23 everything about this is pressure. I don't know how to answer
24 that. But yes, I felt like I --

25 Q Would they interrogate you?

1 A Well, I -- questions like that are
2 interrogation, I would imagine, trying to find out
3 information. But I didn't -- I felt like there were too many
4 people asking me questions at the same time. You know, I felt
5 that that was an uncomfortable situation for me definitely,
6 having not just one person ask you questions all the time. I
7 mean, having several people asking you questions.

8 Q You were questioned about how fast Dr. Desai
9 performed colonoscopies. Okay. Do you recall that?

10 A Yes.

11 Q And you answered that he was the fastest
12 physician in the clinic, correct?

13 A Yes.

14 Q Okay. And they would press you to put times on
15 it and lower times when you did not want to; is that fair?

16 A Yes. I felt uncomfortable with estimating
17 times. I didn't have any actual records.

18 Q Okay. And --

19 Do you recall being asked -- I'm on page 46.

20 THE COURT: I'm sorry. Can you -- I didn't hear
21 that. Can you --

22 MR. WRIGHT: I'll say it again. I turned around to
23 give a page number. Page 46 of first transcript.

24 BY MR. WRIGHT:

25 Q "Was Dr. Desai slow or fast? What was his

1 average time?" You answered, "If he needed to be, umm, I
2 don't know."

3 "Q Guesstimation?

4 "A Ten minutes meaning fast, you know, I
5 don't know. I'm not sure exactly. I don't
6 want to say times that are wrong.

7 "Q Which part is he fast at, the going
8 in part or the coming out?

9 "A The coming out part.

10 "Q Okay. Another question. But he
11 would also start before people were
12 anesthetized, you've already said that.

13 "A At times, and I would, you know, and
14 everyone would tell him.

15 "Q What's the fastest you've seen him do
16 it?

17 "A Oh, I don't know. You know, I
18 usually didn't really time his procedures
19 because I'm busy with the patient. I really
20 can't say a really good estimate of time, you
21 know. It wouldn't be fair to anyone. I really
22 can't guess. I don't know."

23 That was true and an accurate statement and
24 testimony, correct?

25 A Yes.

1 Q Now, when you were called to the grand jury a
2 month later, August 28, 2008, the first grand jury, do you
3 recall being pressed again regarding the time?

4 A Yes.

5 Q I'm on page 30.

6 "Q Okay. In fact, would you say that
7 Dr. Dipak Desai did procedures faster than the
8 other doctors?

9 "A Definitely.

10 "Q How fast did he typically do the
11 average? Acknowledging that the average is
12 maybe hard to determine, but let's say a
13 colonoscopy where nothing remarkable happens,
14 it just goes the way you expect it to go, how
15 long would you think it would take and how long
16 would it take for Dr. Desai?

17 "A Okay. You're talking about
18 colonoscopies, not upper?

19 "Q Right. I'm talking about
20 colonoscopies for use of a hypothetical, yeah.
21 I'm just talking about a colonoscopy.

22 "A You know, I didn't mark his time on
23 my record and mark my anesthesia time, but I
24 can estimate. And this is just an estimate,
25 that he would do it in as little as four

1 minutes to, you know, ten. And, you know, if
2 there were polyps and if there were, you know,
3 things that had to be done, you know, he would
4 do it, you know. He would do the thing -- he
5 would do the right thing in that case."

6 That's a correct testimony; is that right?

7 A Yes.

8 Q Okay. And when pushed, it's four to ten
9 minutes?

10 A But again, I felt uncomfortable saying a minute
11 time, and I can't -- how can I? I --

12 Q I understand.

13 A I don't feel that I -- I didn't like being
14 pressured to say an exact time.

15 Q Okay. And then let me go to your second grand
16 jury. Okay. It's on page 37, May 6, 2010, like 18 month --
17 almost two years later. Okay. You're called in to a
18 different grand jury to give testimony again, and at the time
19 you're still under your use immunity letters, correct?

20 A Yes.

21 Q Question, "Who was the fastest? Dr. Desai.

22 "Q Just a little bit faster or a lot
23 faster?

24 "A A lot faster.

25 "Q Typically for him to do an upper

1 endoscopy, how much time are we talking about
2 to do the procedure roughly on average?

3 "A I wish I knew an average and I would
4 say it's very -- I wish I knew an average and I
5 would say it's very fast though, maybe.

6 "Q Well, all -- are we talking about ten
7 minutes or are we talking about two minutes?
8 What are we talking about?

9 "A Maybe five minutes. I'm not sure
10 exactly.

11 "Q What about a colonoscopy, did you do
12 more of those with him?

13 "A I don't know more, but I did, yes.

14 "Q How much time did it take him on
15 average to do a colonoscopy?

16 "A Well, those were always longer. Your
17 colon is longer and it depended on what was
18 found. If there were polyps to remove,
19 biopsies to take, if the patient was
20 well-prepped or not, I mean. But generally he
21 was faster than any of the other physicians."

22 Then the prosecutor says, "I'm going to ask you that
23 question one more time." Do you recall that?

24 A Yes. It's -- yes.

25 Q "Roughly how long did it take him to do a

1 procedure? And I'm talking about a colonoscopy type
2 procedure, are we talking about 20 minutes or less or more?
3 Are we -- what are we roughly talking about?

4 "A I would say less, much less.

5 "Q Do you remember telling people that
6 you thought the low end or the fastest --"

7 Pardon me. I say it again, these little transcripts
8 blow me off.

9 "Q Do you remember telling people that
10 you thought the low end or the fastest end was
11 around four minutes or so that he might do a
12 procedure, a colonoscopy?

13 "A He might have done that -- he might
14 have done one in four minutes.

15 "Q So you on -- so on average was it
16 around that time, a little longer?

17 "A On average, I think it would be a --
18 be longer than that."

19 And then on page 62, same transcript. "And
20 specifically, did you tell other investigators that you
21 believed the colonoscopies for Desai were for the most part in
22 the four to five-minute range?

23 "A I said that's how short. I believe
24 that's what I said, that's how short he could
25 do one."

1 Do you know how you got down into the four or
2 five-minute range for a colonoscopy?

3 A Again, I don't feel I should have had to give a
4 minute range or an average, because I don't think that that
5 can be accurate. I did so many procedures over the years.
6 Let's go back to my charts and start averaging it out. I
7 don't know.

8 Q Okay. And isn't that --

9 A I don't think it's fair to ask me that.

10 Q And isn't that exactly what you told them --

11 A That's what I was saying --

12 Q -- the first time you were --

13 A -- it's not fair to ask me. I don't -- I
14 shouldn't have given a time, because --

15 Q Okay. But who kept pushing you to do that?

16 A Whoever was asking me the questions. I was
17 also, you know, told by my attorney to give specifics.

18 Q Okay. I don't want to hear -- I can't ask you
19 about your attorney. I want to hear it, but I can't ask it.

20 THE COURT: We're not allowed to ask about
21 conversations --

22 THE WITNESS: Okay.

23 THE COURT: -- private conversations you had with
24 your lawyer.

25

1 BY MR. WRIGHT:

2 Q Regarding the colonoscopy anesthesia times,
3 okay, the -- as I understand your direct testimony, when you
4 came back like the third time, 2006 to 2007, okay?

5 A Yes.

6 Q The -- it was your understanding that you needed
7 to bill 31 minutes or above 30 minutes; is that correct?

8 A I heard -- heard it said.

9 Q Okay. And you heard Dr. Desai say that at
10 times?

11 A Yes.

12 Q Don't forget 31 minutes --

13 A Yes.

14 Q -- on this procedure, correct?

15 A Yes.

16 Q Okay. And the -- and did you -- were you also
17 told that by Tonya Rushing?

18 A I asked Tonya why we were doing that.

19 Q Okay. And do you recall what her answer was?

20 A She didn't have --

21 MS. WECKERLY: Objection. Hearsay.

22 THE COURT: And sustained.

23 (Pause in proceedings)

24 BY MR. WRIGHT:

25 Q I'm talking about the directive, make sure your

1 anesthesia time was over 30 minutes.

2 A Yes.

3 Q I'm on page 6.

4 "Did anybody else ever talk to you about doing that,
5 everyone -- anybody else from the clinic? Did Tonya Rushing,
6 did Dr. Carrol, did anybody else say?

7 "A I --"

8 MS. WECKERLY: Objection. Hearsay.

9 THE COURT: Let me see the...

10 (Off-record bench conference.)

11 THE COURT: All right. Mr. Wright, please continue.

12 BY MR. WRIGHT:

13 Q "Did anybody else talk to you about that?

14 "A I believe Tonya said it at times.

15 "Q Said it to you personally?

16 "A Yeah.

17 "Q Could you give us the context of
18 those conversations?

19 "A Dr. Desai wants the anesthesia time
20 to be over 31 minutes. I mean, I --

21 "Q How many times? Where would that --
22 go ahead. How many times would she say that to
23 you?

24 "A Umm. I don't know. You know, all
25 that much time to walk -- to talk to Tonya or

1 to anyone else. Dr. Desai would usually say
2 that to us right there in the Endoscopy Center.

3 "Q Back to Tonya. What about Tonya
4 Rushing --"

5 I'm on page 7.

6 "Q -- how often would she do it, once a
7 day, once a week?

8 "A I sometimes didn't even see her once
9 a day, but I mean, I could hear her, you know,
10 saying that.

11 "Q But what was it, like a don't forget
12 thing --

13 "A Yeah.

14 "Q -- you know, kind of?

15 "A Remember it's got to be over 31
16 minutes."

17 Q Okay. Do you recall that?

18 A I -- I recall it now. It's been a long time.

19 Q I understand.

20 A And I didn't actually review that --

21 Q Okay.

22 A -- part of that, but okay.

23 Q But that would be Tonya Rushing we are talking
24 about, correct?

25 A Yes. I understand.

1 Q And she is saying the anesthesia time needs to
2 be more than 31 minutes, as directed by Dr. Desai; is that a
3 fair characterization of it?

4 A Yes.

5 Q Okay.

6 A It's been a long time. I don't remember a lot
7 of exactly. I don't remember how I said that.

8 Q Okay. Did you also talk to Dr. Carrol about it?

9 A Yes. I asked Dr. Carrol.

10 Q Okay. And the it I'm talking about is the
11 anesthesia time.

12 A About the anesthesia time.

13 Q Right. And what conversation was that, do you
14 recall?

15 A I believe he also did not have an answer for me.

16 Q Okay. You asked him like why am I doing this at
17 31 minutes?

18 A Why do you want it this way. I didn't say why I
19 am doing it, because I wasn't doing it.

20 Q Okay. You weren't, correct. Okay. Why am I
21 being instructed to do that, and he didn't have an answer for
22 you?

23 A Correct.

24 Q Okay. And this would have been -- and when did
25 you leave --

1 A In 2007.

2 Q -- in 2007?

3 Like May, June?

4 A Yes. The end of May or...

5 Q Okay. Now, in any of the explanations, did
6 you -- were you ever told about anesthesia time including
7 recovery room time?

8 A No one ever specified there, but I don't think I
9 would have asked it. I know how anesthesia time is done in
10 just the way I -- you know, because of the way that I have
11 always done it since --

12 Q Okay.

13 A -- since anesthesia school. Your time is your
14 time in the room. Your time out is the time that you leave
15 the patient and you're satisfied with their vital signs and
16 that they're in their recovery in the recovery room. That's
17 the ending time.

18 Q I understand.

19 A So --

20 Q Start time, where you first --

21 A -- I don't think I would have asked them.

22 Q Okay. So what I asked you is did you ever get
23 any explanation from Dr. Desai or --

24 A No details.

25 Q -- or Tonya Rushing or Clifford Carrol regarding

1 the calculation of the anesthesia time?

2 A No. I never did.

3 Q Okay. Thank you very much, ma'am.

4 THE COURT: All right. Thank you, Mr. Wright.

5 Mr. Santacroce, cross.

6 MR. SANTACROCE: Your Honor, I don't have any
7 questions, but I'm going to reserve my right to recross
8 depending on Ms. Weckerly's redirect.

9 THE COURT: All right. Ms. Weckerly, redirect.

10 MS. WECKERLY: Just briefly.

11 REDIRECT EXAMINATION

12 BY MS. WECKERLY:

13 Q At the end of cross-examination you were saying
14 that you wouldn't have asked Dr. Desai, Tonya Rushing or Dr.
15 Carrol about how to define anesthesia time essentially?

16 A Yes.

17 Q What is -- and I think you said that the reason
18 is you have your own understanding of what that is.

19 A Yes.

20 Q What is your understanding of the time?

21 A Okay. Anesthesia time is when you take your
22 patient into the room, the OR, the procedure room. Generally
23 you look at the clock with the nurse in the room. Because
24 everyone's watches and clocks are different, you look at a
25 common clock and say 2:55 is our time in. Right. Then the

1 time out is when you're done with the procedure, you unhook
2 the patient, you take them to recovery room, you rehook them
3 up with monitors, check their vital signs, and you and the
4 nurse in the recovery room say this is the time out. That's
5 how you do it in most -- in the hospital.

6 Q Okay. Can you start another procedure, like
7 with a different patient?

8 A Well, you couldn't.

9 Q Right. I mean, well, that's my question.

10 A You can't be in two places at once.

11 Q Are you allowed to start another procedure and
12 still be counting your time on the first one?

13 A No.

14 Q And my understanding is you were directed by
15 three people to do 30 -- essentially over 30 minutes? Or I
16 mean, I just want to clarify that. Did Dr. Desai direct 31
17 minutes or over?

18 A Yes.

19 Q And then my understanding is you said Tonya
20 Rushing would tell you that too?

21 A Right now I'm -- it's hard for me to remember,
22 but if I said that at that time -- I don't remember right now,
23 but I know I remember asking her about it.

24 Q So you had a conversation at least with her
25 about it?

1 A Yes.

2 Q What about the conversation with Dr. Carrol, how
3 would you characterize that?

4 A I asked him why we were doing that, why.

5 Q It's my recollection of your answer on cross was
6 that you didn't get much of an answer.

7 A I didn't get an answer.

8 Q Were you -- if you were asking about it, was it
9 something that you were uncomfortable with?

10 A I was uncomfortable with it.

11 Q Thank you.

12 THE COURT: Any recross, Mr. Wright --

13 MR. WRIGHT: No, Your Honor.

14 THE COURT: -- based on that?

15 Mr. Santacroce, anything based on Ms. Weckerly's
16 questions?

17 MR. SANTACROCE: No, Your Honor.

18 THE COURT: Any juror questions for this witness?

19 No. All right. Ma'am, thank you for your testimony. Please
20 don't discuss your testimony with anyone who may be a witness
21 in this case.

22 THE WITNESS: Okay. Thank you.

23 THE COURT: You are excused.

24 State, call your next witness.

25 MR. STAUDAHER: May we approach, Your Honor?

1 THE COURT: Sure.

2 (Off-record bench conference.)

3 THE COURT: Ladies and gentlemen, we're going to take
4 a real quick recess. Just about 10 minutes, or as long as you
5 need.

6 During the recess, you're reminded that you're not to
7 discuss the case or anything relating to the case with each
8 other or with anyone else. You're not to read, watch or
9 listen to any reports of or commentaries on this case, person
10 or subject matter relating to the case by any medium of
11 information. Don't do any independent research, and please
12 don't form or express an opinion on the trial.

13 Notepads in your chairs, and follow the bailiff
14 through the rear door.

15 (Jurors recessed at 2:57 p.m.)

16 THE COURT: All right. Mr. Staudaher, you had
17 approached the bench to indicate that the next witness had
18 some testimony relating to upcoding.

19 MR. STAUDAHER: That's correct, Your Honor.

20 THE COURT: And upcoding again, is what? When they
21 code a procedure higher --

22 MR. STAUDAHER: Than it should be.

23 THE COURT: -- than it should be, and that they get
24 paid at a higher reimbursement rate?

25 MR. STAUDAHER: And Desai's direct involvement in

1 that process. So we want to make sure that everybody's on
2 board with that, because in her transcripts that's essentially
3 all she talks about is the upcoding. And she really, she's
4 not one who does the anesthesia billing directly, but because
5 they've raised this as an issue, there's a direct --

6 THE COURT: How are they upcoding? I mean, by how --

7 MR. STAUDAHER: Dr. Desai walks in -- well, she
8 mentions some doctors, but then Dr. Desai apparently walks
9 into a room while she's there and directs a person next to her
10 with the stack of forms from other doctors to code them at the
11 highest amount or something, and she refused to do that. She
12 wouldn't do it.

13 THE COURT: And then what happened?

14 MR. STAUDAHER: As soon as he leaves the room she
15 tells the person not to do it because it's illegal.

16 THE COURT: I mean, did she get like fired or...

17 MR. STAUDAHER: No. She eventually quit because of
18 that and other issues about the clinic. I mean, she has some
19 direct observation. It's not just the billing. She had --
20 where she's positioned she can kind of look into the clinic.
21 She's on the medicine side but she can see what's going on in
22 the clinic, and she --

23 THE COURT: So what else is she going to testify
24 about?

25 MR. STAUDAHER: Just about the billing stuff and

1 about her observations of the flow of traffic through the
2 clinic and how that disturbed her to the point that she felt
3 that she had to leave.

4 MR. SANTACROCE: Who is this witness, Your Honor?

5 MR. STAUDAHER: It's Kathy Bien.

6 THE COURT: Kathy Bien?

7 MR. STAUDAHER: Bien.

8 MR. SANTACROCE: What is her position?

9 MR. STAUDAHER: She was a biller.

10 MR. SANTACROCE: Well, I'm going to object to
11 anything that -- anything that she's going to testify as to
12 the medical end of the clinic. She can testify all she wants
13 to the billing, but the medical end --

14 MR. STAUDAHER: These are direct observations.

15 THE COURT: Well, I think what they mean about the
16 medical end is she's sitting there looking down the hallway
17 and seeing people come and go and she thinks what, it's too
18 many people?

19 MR. STAUDAHER: That's the problem, yeah. And the
20 other issue is not only that, but --

21 THE COURT: That's kind of cumulative, I --

22 MR. STAUDAHER: -- she deals with -- she deals with
23 the -- on the medicine side, the procedures themselves. I
24 mean, she has firsthand knowledge of what the length of those
25 procedures should be. Not procedures, but the times that are

1 attributed to sort of a short visit, a medium visit and a long
2 visit. And so when he comes in to tell her that or tell her
3 compadre that, that is clearly something --

4 THE COURT: Is she -- I'm sorry to interrupt you,
5 because I just am trying to understand. Is she billing for
6 the medical side of the clinic or the procedure side of the
7 clinic?

8 MR. STAUDAHER: She bills for the medicine side and I
9 think the other side with exception of the anesthesia billing.
10 She doesn't bill for that.

11 THE COURT: Okay. So she bills for the procedures?

12 MR. STAUDAHER: Yes. And she bills for things that
13 relate to the office visits themselves, that's my
14 understanding.

15 THE COURT: Okay. So she's -- you want her to come
16 in and say I billed for the procedures and Dr. Desai told me
17 to upcode, or what do you --

18 MR. STAUDAHER: I'm going to ask her this. It's
19 open-ended. What did you bill for. So if there's any -- you
20 know, if it's just the medicine, then she can tell us it's
21 just the medicine. If it's medicine and procedures, it's the
22 procedures. But I know for a fact that she did not bill for
23 anesthesia because they asked her that directly in the
24 state --

25 THE COURT: Okay. And then what's she going to say;

1 Dr. Desai told me to upcode, or Dr. Desai --

2 MR. STAUDAHER: Doctor --

3 THE COURT: I mean, I want -- I guess what I'm
4 asking, Mr. Staudaher, is specifically what's she going to
5 say? Like, you know, we did a colonoscopy and he told me to
6 bill it as a polyp removal, or what's she going to say?

7 MR. STAUDAHER: There's essentially just one
8 statement from him or one event where she directly has contact
9 with him.

10 THE COURT: Just tell me what it is.

11 MR. STAUDAHER: He walks in with the --

12 THE COURT: I don't have -- as you know, I don't have
13 the benefit of discovery.

14 MR. STAUDAHER: I understand.

15 THE COURT: I don't have the benefit of everybody's
16 statements and transcripts. So I don't know what she's go --
17 I -- you know, I'm sitting here, I don't -- you know, if she
18 testified in the grand jury, I read that transcript months
19 ago. I don't -- I honestly don't know what you're going to
20 ask her, so I need to know.

21 MR. STAUDAHER: She did not testify to the grand
22 jury.

23 THE COURT: Okay.

24 MR. STAUDAHER: And she references in her statement
25 other doctors. But there's one incident with Dr. Desai where

1 he doesn't directly tell her, but she's sitting next to the
2 person that he comes up to and says this.

3 THE COURT: Okay. So just tell me. She's going to
4 say --

5 MR. STAUDAHER: Walks in with the stack --

6 THE COURT: -- I'm sitting in the office and
7 Dr. Desai walks in and he says, hey, Barbara, you need to
8 upcode, or what's she going to say?

9 MR. STAUDAHER: Hands a stack of -- or a stack of
10 sort of encounter forms from other doctors and says that he
11 wants all of those coded to the highest level, wants the
12 coding changed on that and to the highest level.

13 MS. STANISH: Would you cite for me, please, the page
14 you're referring to with regards to this one minute?

15 MR. STAUDAHER: This one minute?

16 MS. STANISH: I'm sorry. This one encounter with
17 Dr. Desai, could you, please --

18 MR. STAUDAHER: It's not -- it's not referenced by
19 name in there.

20 MS. STANISH: Oh, it's not?

21 MR. STAUDAHER: She says the doctors in places
22 that -- in pretrial she told us this on Dr. Desai. So we
23 want -- that's why we're raising it in advance, to make sure
24 that everybody's aware of it, so.

25 THE COURT: Okay. And these are, these sheets are

1 other doctors' sheets for --

2 MR. STAUDAHER: They're called Encounter Forms.

3 THE COURT: And what does that mean?

4 MR. STAUDAHER: That means that when the doctor has
5 an encounter with a patient and the patient's -- and they're
6 in there for five minutes or ten minutes or half an hour or
7 whatever, they basically put down it's a low level visit, it's
8 a medium level visit, it's an upper level visit. A low level
9 visit is like 15 minutes or less. Medium, I don't know where
10 it ranges, but --

11 THE COURT: Right. I get it. I know.

12 MR. STAUDAHER: So she knew that the flow --

13 THE COURT: Like an initial visit would be -- tends
14 to be a high level visit or whatever.

15 MR. STAUDAHER: Correct. And that the stack that was
16 brought in essentially was code all of them at the highest
17 level. So that's the one issue that would come out with her,
18 so I want to make sure everybody's on board with the -- knows
19 what's coming and that there's no issue with this woman.
20 Because the only thing she has other than her observations of
21 the clinic itself and the volume going through the endoscopy
22 side was this coding issue.

23 MS. STANISH: Your Honor --

24 MR. WRIGHT: I'm --

25 MS. STANISH: -- this matter is not --

1 MR. WRIGHT: Wait.

2 MS. STANISH: Just to clarify, this matter is not in
3 the statement. It sounds like it's something you learned in
4 pretrial.

5 MR. STAUDAHER: That is. She does reference doctors
6 doing this. She doesn't specify who in her statement, but in
7 pretrial she referenced in her statement.

8 THE COURT: Okay. And then how does she know and
9 then what happens after that? The other woman says, oh, these
10 are all -- I mean, how does she get involved then in this --

11 MR. STAUDAHER: She then tells the person not to do
12 that because she would get in trouble for doing that,
13 something to that effect.

14 THE COURT: Okay. And then they code them correctly
15 after that, or...

16 MR. STAUDAHER: My understanding -- I didn't get into
17 the details of what she did afterward. I just know that that
18 one event occurred.

19 THE COURT: And she didn't get retaliated against or
20 fired or disciplined?

21 MR. STAUDAHER: She ends up quitting subsequent to
22 then.

23 THE COURT: But I'm saying nobody said, hey, these
24 aren't being upcoded, you know, you're fired, or, you know,
25 you don't get a lunch break or whatever?

1 MR. STAUDAHER: Not to my knowledge.

2 MR. SANTACROCE: Is this upcoding part of the
3 indictment?

4 THE COURT: No.

5 MR. SANTACROCE: Then why are we doing this?

6 MR. WRIGHT: Right. This is --

7 MR. SANTACROCE: I don't get it.

8 MR. WRIGHT: This is other bad acts for which there
9 was no notice of and for which we haven't had a hearing on.
10 We don't -- and I mean, the only part of this indictment which
11 has any clarity and precision in charging is the billing part,
12 and every billing count specifically says the 31 minute
13 anesthesia time. And it says nothing about any other
14 upcoding, any other fraudulent billing of any type.

15 And this apparently is billing out of the other side
16 of the business and it is not charged. So it's either going
17 to be a variance, if it's coming on, on the medical fraud
18 case. I mean a variance of the indictment, which we didn't
19 have notice of, or it's other bad acts and we didn't have
20 notice of them.

21 And we're not prepared to defend an upcoding case. I
22 have no idea whether you're upping a polyp to a snare or
23 whatever, and I have no experts to counter it.

24 THE COURT: Well, I think what it is, is I mean,
25 we've all seen it on our bills. It'll say, you know, a high

1 visit, medium visit. I know it exactly, like an initial visit
2 with a physician typically would be a high visit, and then,
3 you know, if you just go in and they renew your prescription
4 or whatever, that might be a low visit. I mean, I'm familiar
5 with what you're talking about.

6 MR. SANTACROCE: If it's not --

7 THE COURT: The problem is how is this not other bad
8 acts evidence, number one, and number two, you know, you can
9 say, well, it goes to his intent or motive, which is still bad
10 acts, and maybe they should have known or filed a motion in
11 limine. But if the statement says doctor said this, then it's
12 not even foreseeable that they would have raised this as an
13 objection, if the statement didn't even say Dr. Desai said.
14 So I'm concerned --

15 MR. STAUDAHER: Well, I think they say he. And she
16 keeps referring to the doctor throughout her testimony and
17 then doctors, so.

18 THE COURT: How is this not other bad acts evidence?
19 I mean, I get it. It's -- I mean, I get why it's relevant.
20 It's relevant to his motivation and trying to rip off
21 insurance companies and --

22 MR. STAUDAHER: Well, and his knowledge, and it's --

23 THE COURT: Knowledge of what?

24 MR. STAUDAHER: Knowledge of the fact -- I mean, what
25 the question we just had through the last witness was, that

1 there were other people that were directing this 31 minute
2 thing, that it maybe it was not Desai who's involved --

3 THE COURT: Yeah, but this isn't about the 31
4 minutes.

5 MR. STAUDAHER: I know that, but --

6 THE COURT: But even so, even if it goes to
7 knowledge, intent, motive, I see it relevant to all those
8 things. I see it relevant to all of those things, as I just
9 said. How is it not a bad act? How is it not uncharged
10 misconduct that you're using to try to prove motive,
11 opportunity, intent?

12 MR. WRIGHT: [Unintelligible.]

13 MR. STAUDAHER: Well, I mean, I believe that it could
14 be viewed as a potential bad act, but I think it's also res
15 gestae. I mean, we've got a couple -- we're charging billing
16 issues as far as the jury is concerned.

17 THE COURT: No, I'm sorry. First of all, even civil
18 fraud has to be pled with particularity. I mean, that's, you
19 know, basic rule even for civil fraud.

20 We're talking about a criminal indictment that sets
21 forth what you're going to prove. And to me, I would say,
22 yes, the evidence itself is relevant, but I think there should
23 have been a prior bad act motion. And I think that that's
24 compounded by the fact that from what you tell me in the
25 statement, which again, I have not seen, I don't have the

1 benefit of that, which is as it should be, because of course I
2 don't get the discovery. That's not unusual.

3 But it sounds like there's some ambiguity as to even
4 which doctor she's talking about. So the fact that there
5 should have been a bad acts motion, I think, is compounded by
6 the fact that there's ambiguity in her statement, and so it
7 wasn't foreseeable for the defense necessarily that this
8 person would be called as a witness. And so for those reasons
9 I think it's bad acts evidence. I think it would be relevant.
10 I certainly would have had a Petrocelli hearing on it based --

11 MR. STAUDAHER: But we can't have one. I mean, she
12 is here.

13 THE COURT: Well, I don't think it's fair frankly, to
14 spring this evidence on the defense and say, well, let's have
15 our hearing now.

16 MR. STAUDAHER: But Your Honor, it's not springing on
17 the defense. She -- the things I just mentioned, the upcoding
18 issues are in her statement. They've had her statement. Not
19 necessarily related directly --

20 THE COURT: Well, that's why I mentioned the
21 statement. That's why I mentioned --

22 MR. STAUDAHER: -- to Dr. Desai.

23 THE COURT: -- the statement and the fact that it
24 sounds to me by your own admission the statement is she says
25 doctor, she never said Dr. Desai said this. So what I'm

1 saying is, okay, even if we should, could say, well, yeah,
2 there's notice and if they were going to make an issue out of
3 it they maybe should have said something.

4 I find that the notice doesn't seem complete to me.
5 It seems deficient to me because -- and frankly, upcoding is a
6 different billing issue and, you know, I don't think on a
7 fraud indictment you can say, oh, well, this is fraud too and
8 so let's all lump it in together and prove all these different
9 kinds of fraud that are related by billing. I mean, I just
10 don't see it. I don't see it as sufficiently --

11 It's very clear you're talking about anesthesia fraud
12 and the 31 minutes and that's a specific kind of billing
13 practice. And so, you know, if it was part and parcel even,
14 I'd let it come in together under a doctrine of completeness
15 idea. If -- and I think we had this in another witness, where
16 I said okay, it can come in for -- I don't remember exactly
17 the reasoning.

18 You know, for example if he said, okay, these
19 anesthesia bills are wrong and I want this other stuff upcoded
20 and it's part of the same conversation, I might say, okay,
21 well, it's all together, you know. But this sounds like it's
22 a completely different thing, where he's talking not just
23 about a different kind of fraud, but fraud, you know, now
24 we're talking about clinical office visits as opposed to
25 procedures.

1 And so it's different in those two ways, right. It's
2 the clinical office setting, it's not the procedure setting,
3 and it's a different type of billing fraud. And I think it's
4 been very specific. I mean, I can look at the indictment
5 again, but I think it's very specific that we're talking about
6 anesthesia fraud.

7 And A, I think there should have been a bad acts
8 motion. B, I would have said, yes, I think it would be
9 relevant, I would have had a Petrocelli hearing. But I don't
10 think it's sufficient notice and I don't think it's fair to
11 suspend everything, have a Petrocelli hearing, you know, right
12 now in the middle of the trial and tell them, okay, you got
13 to, you know, anticipate defending on this.

14 You know, if the motion had been filed in writing and
15 I had said, okay, we're going to have a hearing at some point,
16 then at least they know so, you know, maybe we have the
17 hearing a Monday before we start, or a morning, or in the
18 evening when the jury's gone, whatever. But I think just to
19 spring it like this and have the hearing, I'm sorry. It's not
20 sufficient notice.

21 Now, if you want to call this woman and, you know,
22 since she traveled here I'll let you put on the evidence, what
23 she observed as the crowdedness, which truthfully, I think is
24 getting very repetitive and very cumulative. But since this
25 woman had to travel, if you want to do that, you can do it.

1 MR. STAUDAHER: Two things. We're not going to
2 call --

3 THE COURT: Because that's percipient --

4 MR. STAUDAHER: -- her for just that one issue.

5 THE COURT: Okay.

6 MR. STAUDAHER: We would call her in rebuttal.
7 They're on notice of this.

8 THE COURT: Okay. That's fine. You can call anybody
9 in rebuttal as long as you're rebutting something.

10 MR. STAUDAHER: However, I will say this, and this is
11 in part because we're trying -- I'm doing this proactively so
12 that we don't get into a problem with the witness --

13 THE COURT: And I appreciate that.

14 MR. STAUDAHER: -- based on what the Court -- you
15 know, it's not my intention to do anything wrong here, so
16 that's why.

17 THE COURT: No. I appreciate that.

18 MR. STAUDAHER: So here's part of the issue. That
19 witness has been known since the beginning of the case. That
20 witness has been known to coming in to testify for at least a
21 week that we've told them that we are actually going to call
22 this witness, and we gave them -- we give them the witnesses'
23 notices up front, including Tonya Rushing and things like
24 that. We told them that these people are going to testify.

25 THE COURT: And I appreciate that as well --

1 MR. STAUDAHER: They've got --

2 THE COURT: -- and I said last Friday, I said that I
3 felt that the State had gone above and beyond what they were
4 required to do in accommodating the defense, much of which is
5 being done because of Dr. Desai's stroke issues. And I have
6 said and I will say again, I believe the State is going above
7 and beyond to make accommodations here. So I don't want to
8 seem that I'm critical in that regard at all, because I'm not.

9 MR. STAUDAHER: With that being said though, with
10 regard to this witness, and this is not a long transcript and
11 it's not a long witness, but probably 80 percent of what's
12 here, or at least a good portion of what's here relates to the
13 issues of upcoding.

14 Now, there's not been a motion in limine to limit her
15 testimony or to prevent her testimony. There's not been
16 anything raised with this witness that, hey, that we know what
17 this witness is going to come in and say, it's about upcoding
18 with doctors, the clinic, whatever.

19 So right now, when we go forward with the witness,
20 there's no -- I mean, they know what the statements are. They
21 know what the witness is going to be in advance, and yet we
22 don't have any issue with regard to, oh, we need to limit this
23 witness's testimony.

24 So in part it's almost -- and I'm not accusing them
25 of laying in wait, but it's like come on, if you know that

1 something's coming that's objectionable in your eyes, then
2 they need to let us know so we can litigate it before those
3 witnesses hit the stand and we end up with a problem.

4 Another person beyond Ms. Bien who's going to testify
5 after her, or if she was going to testify, is Tonya Rushing.
6 I mean, she has a lot of stuff that we don't even know about.
7 I don't know exactly what's going to come out of her mouth,
8 because she had --

9 THE COURT: Well, then don't -- okay. You know what.
10 We're not going to go down the same road. If you don't know
11 the answer to the questions --

12 MR. STAUDAHER: That's not what I'm saying.

13 THE COURT: -- okay, then don't ask the question.

14 MR. STAUDAHER: What I'm saying is that she has an
15 intimate knowledge of Dr. Desai and based on questions that
16 come out from either side, there could be things that come out
17 that we don't know about. I mean, I clearly have ideas of
18 where I'm going to go with her and what I'm going to try to
19 elicit. But there's -- the defense also knows some of the
20 issues that might come up that they might have concerns about.

21 THE COURT: Well, if the defense elicits testimony
22 that is improper or something like that, then it's not your
23 worry for another motion for a mistrial. And as I said,
24 misconduct is cumulative and -- you know, don't -- I'm just
25 warning you, Mr. Staudaher, don't ask a question unless you

1 know the answer, and don't elicit testimony that may be
2 improper.

3 MR. STAUDAHER: That's not what I was saying.

4 THE COURT: And if you think, if you think that you
5 may ask her a question -- I just want to be clear on this,
6 because we've had this issue twice, the Bruton problem. We've
7 had this last thing with the federal indictment. So I want to
8 be very clear, very up front with you to the extent I can be,
9 and that is this.

10 If you think that there is something Ms. Rushing may
11 say that she shouldn't be saying, then you need to, you know,
12 direct her don't say this, or you need to ask focus questions.
13 Now, if the defense then starts objecting as leading and then
14 you have to, you know, ask them a little more open-ended and
15 she blurts something out, well, then you're protected, you
16 tried.

17 But, you know, I just -- you know, going forward, I
18 don't want these issues cropping up again and again, because
19 at some point in time it's cumulative, Mr. Staudaher.

20 MR. STAUDAHER: I know. But my concern is this. If
21 there's something that defense knows that is an issue with a
22 particular witness like Ms. Bien, and they're aware of it in
23 advance, we would like to hear about it so we can litigate it
24 outside the presence, so it's not an issue.

25 THE COURT: And I think that's -- I don't think

1 that's unreasonable, Mr. Wright, but --

2 MR. WRIGHT: I'm flabbergasted about it because --

3 THE COURT: -- you know. Well, you've been
4 flabbergasted.

5 MR. WRIGHT: -- most of the statement -- no. The
6 statement, 75 percent of what Tonya Rushing says in her
7 voluminous interviews are inadmissible and improper. I mean,
8 there's accusations of obstruction of justice. There's
9 accusations of misconduct by lawyers. I have no -- I'm not
10 dreaming that they're going to bring in inadmissible stuff.
11 If I started moving in limine on what they ask every
12 witness...

13 THE COURT: Here's what I'm saying, Mr. Wright.
14 First of all, it's not Mr. Wright's obligation to make a
15 motion to preclude them from, you know, testifying to
16 inadmissible evidence. That's not -- I don't think that
17 that's what Mr. Staudaher was suggesting.

18 I think what Mr. Staudaher was suggesting is if they
19 give you the name of the witness like Ms. Bien, and the only
20 thing that witness could possibly testify to is something
21 which you think is not admissible, then please, do us all a
22 favor and let them know. And if you can't resolve the issue
23 between the two of you, then give me a heads up before, you
24 know, ten minutes before the witness is supposed to testify,
25 so that they don't waste time and money bringing people out

1 here and housing them, which they now have to --

2 And, you know, it's not their money. It's tax money
3 that they now have to house this woman to have her in the
4 wings as a rebuttal witness, or fly her home and fly her back.
5 So I don't think that's unreasonable for Mr. Staudaher who, as
6 I said, has been -- and Ms. Weckerly, who have been extending
7 courtesies to the defense that they're not required to extend.

8 I don't think it's unreasonable for them to expect
9 that in return, and to save them the time and the money and
10 everything like that in bringing out people if you're going to
11 object to their testimony, and it's going to be 100 percent
12 objectionable.

13 Now, with respect to Ms. Rushing, who has evidence
14 testimony that certainly is going to be admissible, I agree
15 with you, Mr. Wright, you don't have to make a motion saying
16 please preclude Ms. Rushing from, you know, disparaging
17 defense counsel, Ms. Stanish or, you know, whatever there
18 might be in her statement.

19 So going forward, is Ms. Rushing then going to be
20 next?

21 MR. STAUDAHER: Yes. She will be next.

22 THE COURT: All right.

23 MS. WECKERLY: Can we -- can we talk to -- tell
24 Ms. Rushing --

25 THE COURT: Yes.

1 MS. WECKERLY: I mean, I know she's on the stand, but
2 in terms of like what like not to talk about obviously.

3 MR. WRIGHT: Yes.

4 THE COURT: Are you fine with letting Ms. Weckerly do
5 that?

6 MR. WRIGHT: Yes.

7 THE COURT: Okay. For the record, Mr. Santacroce,
8 are you also fine with Ms. Weckerly and Mr. Staudaher
9 giving --

10 MR. SANTACROCE: If they give an admonition, fine.
11 But if they start getting into particular testimony and
12 coaching her --

13 THE COURT: Do you have any objection to them --

14 MS. WECKERLY: They can witness it.

15 THE COURT: -- walking out there with you and
16 standing there --

17 MS. WECKERLY: That's fine.

18 THE COURT: -- to witness what you're doing?
19 Why don't you do that. Then there's no issue.

20 MR. SANTACROCE: Okay.

21 THE COURT: Okay. If anyone needs to take a restroom
22 break, do it now, and we'll bring the jury back in.

23 (Court recessed at 3:20 p.m. until 3:26 p.m.)

24 (Outside the presence of the jury.)

25 THE COURT: The jury's ready. Kenny's bringing

1 them in. Ms. Weckerly, the jury's coming in, in a minute, so
2 I didn't know if you wanted to get Mr. Staudaher or not.

3 MS. WECKERLY: Okay. I'll get him.

4 UNKNOWN SPEAKER: [Inaudible.]

5 THE COURT: Kenny's bringing the jury in. You can
6 bring -- if you'd get the witness, is that what you asked?
7 Yeah, I appreciate it. Thanks, Detective.

8 (Pause in proceeding.)

9 (Jurors reconvene at 3:27 p.m.)

10 THE COURT: Court is now back in session.
11 Ms. Rushing, you are still under oath. Do you understand
12 that?

13 THE WITNESS: Yes.

14 TONYA RUSHING, STATE'S WITNESS, PREVIOUSLY SWORN

15 THE COURT: Thank you. Mr. Staudaher, you may
16 proceed.

17 MR. STAUDAHER: Thank you.

18 DIRECT EXAMINATION (Continued)

19 BY MR. STAUDAHER:

20 Q When we left off, I think one of the questions
21 that I had asked you was about your background, and kind of
22 got you to -- maybe if I didn't, I'm asking you now. Will you
23 tell us a little bit about your background that got you in the
24 position you were at, at the Endoscopy Center?

25 A I started off as a medical assistant working for

1 practices. And I went to -- I worked for Hogan clinic, and I
2 was promoted to front desk manager and started doing that type
3 of thing, and then clinic manager. And then I worked -- I was
4 recruited by Mr. Preston to come to work for his company as a
5 practice manager. And that was in 2000 and -- or 2000.

6 Met Dr. Desai. Larry -- Mr. Preston hired me. So I
7 worked under Professional Medical Consultants for two years
8 until 2002, and then Dr. Desai and the other physicians asked
9 me to come aboard and work with them full-time.

10 Q Now, at the clinic, you said practice manager;
11 is that what you were at the Endoscopy Center?

12 A I wasn't a practice manager with the -- I was
13 hired with Gastroenterology Center of Nevada.

14 Q And so what is the difference?

15 A The endoscopies are separate entities.
16 Endoscopies is where like procedures, everything else. That's
17 clinical. I was more with the office staff, front desk, PBX
18 operators, that type of stuff.

19 Q Did you work at all in the clinical side of
20 things?

21 A I'm not a clinical person, so I'm not -- no, I
22 didn't do any kind of patient care or anything like that. Is
23 that what you're asking?

24 Q What was your job title at the clinic?

25 A Towards the end it was COO, chief --

1 Q COO as what?

2 A Chief operating officer of Gastroenterology
3 Center of Nevada, and it plays a dual role for endoscopies as
4 well.

5 Q Now, did you have more of a personal role
6 though, as with Dr. Desai beside just your work at the clinic?

7 A Yes. I worked with Dr. Desai on fundraisers,
8 personal plan events, on if he wanted to take out referring
9 physicians to dinners or whatever.

10 Q What about the hiring and firing of physicians,
11 things like that?

12 A I could never hire a physician. All the
13 physicians were recruited in and Dr. Desai and the other
14 partners would have the final say of who they were going to
15 hire.

16 Q Did you have any limitations on what you could
17 do independently in the practice?

18 A Absolutely. I mean, Dr. Desai was the
19 businessman. He was the one who set the parameters of what we
20 could and couldn't do.

21 Q So did he give you your parameters by which you
22 were to work?

23 A Yes. He would quite often dictate to me what he
24 wanted me to do, what physicians he wanted me to see, who he
25 would want me to meet with, if he wanted a facility billed,

1 where, so forth.

2 Q So when you say he would dictate to you, how
3 would that information come? Was it face-to-face meetings,
4 memos, what?

5 A It could be either/or, face-to-face verbally, a
6 lot of memos were written to me giving me instructions.
7 Especially if he was gone he would write and dictate memos
8 through the transcription service that would get delivered to
9 me.

10 Q Who did you answer to?

11 A Dr. Desai.

12 Q Is there anybody that was in the practice that
13 you -- that he delegated sort of supervisory responsibility
14 for you?

15 A It depends on what it was. I mean, if it was
16 political communications or communications that were needing
17 soft-spoken physician, that, it would be Dr. Sharma. If it
18 was endoscopy stuff, it might be Dr. Carrol. But overall he
19 would see what I would do and make sure that I did what he
20 asked me to do, or the other physicians.

21 Q And again, I just want to be clear on this.
22 What -- when I asked you what independent sort of information
23 or ability you had in the group, I mean did you have any
24 authority within the group?

25 A No.

1 Q So even though you have this position as COO,
2 does that not mean that you could really do anything, or what?

3 A Well, COO is given because he was having me meet
4 with a lot of hospital administrators and so forth. So he
5 thought that it would be better if he had a COO. I was never
6 on corporate papers. I was never on anything like that, but
7 it would give the illusion that I would.

8 Q Now, I'm going to -- how long was your tenure at
9 the clinic? I mean, how long did you work there?

10 A Well, I started working with the group in 2000,
11 and I became employed by the group in 2002.

12 Q Were you there when CRNAs started working at the
13 clinic?

14 A Initially there was -- yes, but initially there
15 was anesthesiologists. And then the first CRNA, which was
16 Annamarie LoBiondo, came aboard.

17 Q Now, as far as -- well, coming -- the decision
18 making within the practice, who made the decisions?

19 A Dr. Desai was the business head between all the
20 physicians and everybody.

21 Q How deep into the practice would those decision
22 processes go? I mean, what would he immerse himself into?

23 A He knew every facet of the practice, from front
24 desk people to scheduling to physicians to contracting,
25 everything. He's a very intelligent person.

1 Q Was billing part of that?

2 A Absolutely.

3 Q So was he aware of the billing and how it worked
4 and so forth?

5 A Absolutely.

6 Q As far as the anesthesia portion of it, did you
7 end up -- not you I know. We'll get to that in a moment. But
8 was the anesthesia billing when it came to CRNAs, was that run
9 through the practice?

10 A No. Initially Annamarie LoBiondo was our first
11 CRNA. She came in on kind of like an independent contractor
12 working, and she brought her billing company, Lizmar, with
13 her, and they performed the billing for the CRNAs. Then the
14 next CRNA came on board, which was, I believe, Keith Mathahs,
15 and he wanted us to grow the CRNAs, because we were having
16 problems with getting anesthesiologists to cover the Endoscopy
17 Center.

18 Q Was there more -- was there a secondary benefit
19 also with having CRNAs there beside just scheduling?

20 A Well, yes. There was financial gain.

21 Q And who was in control of the finances related
22 to the CRNA billing?

23 A Dr. Desai had the CRNA account set up.

24 Q And whose -- who controlled that account?

25 A Solely Dr. Desai.

1 Q Now, as far as setting policy within the
2 organization, who did that?

3 A At the endoscopy centers?

4 Q Wherever you worked. I mean, you worked for all
5 entities within a group, correct?

6 A Well, the endoscopy centers, they had a nurse
7 director, a nurse manager, and then the physicians. So the
8 clinical stuff would be set by the nurse managers and the
9 director of nursing, and oversaw by the physician and
10 Dr. Desai.

11 Q As far as the schedule though, I mean as far as
12 doctors and how the schedule ran and who was in control of
13 that?

14 A Dr. Desai was very much in control of that at
15 the Shadow Lane office. At the --

16 Q And why do you say that?

17 A Because he would want to maximize the patients.
18 So he knew which physicians worked best with other physicians,
19 which physicians were slower and faster at performing
20 endoscopies.

21 Q Would he give you direction on who to schedule
22 with whom essentially, or how did it work?

23 A Yeah. Yes, he would. He put it in writing. He
24 was very vocal about it.

25 Q Did he indicate how many numbers he wanted to

1 hit on a daily day -- day-to-day basis in the clinic as far as
2 patients go?

3 A Yes.

4 Q And that's -- I guess I should have broken that
5 down. There's a medicine side and there's also a sort of a
6 procedure side at the Shadow Lane facility, correct?

7 A Right. The clinic office, Gastroenterology
8 Center of Nevada was adjacent, next to the Shadow Lane office.

9 Q Did you ever become aware at some point that
10 Dr. Desai wished to sell the business?

11 A Yes.

12 Q Can you tell us about that?

13 A In, I want to say, and I don't have the exact
14 dates, approximately in 2007, '6, he had mentioned that he was
15 going to have Chip Wallace [phonetic] and another gentleman
16 investigate selling the facilities. I know AmSearch
17 [phonetic] was one of the surgery companies that were looking
18 at purchasing the facility.

19 Q Was there -- can you tell us about how, if you
20 know, there was a determination of how much to sell the
21 business for?

22 A It was multiples --

23 MR. WRIGHT: Foundation, please.

24 THE COURT: All right. Sustained.

25 MR. STAUDAHER: When you --

1 THE COURT: And --

2 MR. STAUDAHER: That's fine.

3 BY MR. STAUDAHER:

4 Q When you were eventually talking, you said 2006,
5 '7 was when this was going on?

6 A It was the end of 2006, I believe, yes.

7 Q Were you present at any -- with Desai during any
8 discussion? I mean, did he talk to you, did he talk to the
9 people in your presence, that kind of thing?

10 A He talked to the physicians and he talked to
11 myself.

12 Q Okay. And the times that he talked to you, when
13 was that and where was it?

14 A Most of the time it would be in his office
15 downstairs.

16 Q At Shadow Lane?

17 A At Shadow Lane.

18 Q And roughly is it when in this time period is he
19 telling you these things?

20 A I'm sorry. You mean like time and year, or time
21 in the days?

22 Q Well, time of the year.

23 A Time of year, like I said, I'm approximating end
24 of 2006.

25 Q Okay. So you're having these conversations.

1 Was there more than one?

2 A I was present once just with him myself, and
3 then once with Chip Wallace.

4 Q During the time that you were --

5 MR. WRIGHT: Who?

6 THE WITNESS: Chip Wallace.

7 MR. STAUDAHER: So during --

8 MR. WRIGHT: Chris Wallace?

9 THE WITNESS: Chip, C-h-i-p.

10 MR. WRIGHT: Thank you.

11 BY MR. STAUDAHER:

12 Q Let's talk about the time when it was just you
13 and he, meaning you and Dr. Desai. Tell us about the
14 discussion.

15 A He discussed that he was getting older, that
16 surgery centers were becoming more and more in demand because
17 the insurance companies didn't want to pay the hospitals, and
18 that the surgery center would be more valuable for him to sell
19 eventually and that he was looking seriously at selling the
20 facility, the Shadow Lane office at least.

21 Q Have you ever heard the term "multiples," things
22 like that?

23 A Yes, because he had explained it to me because I
24 didn't understand. I never have sold a business before, so
25 apparently it's the bottom line, whatever the profits were and

1 they would take it by five times, three times or whatever.

2 And I think that the multiple that they were talking was

3 anywhere like six or seven.

4 MR. WRIGHT: They?

5 THE WITNESS: I'm sorry. Dr. Desai was talking about

6 obtaining the six or seven.

7 BY MR. STAUDAHER:

8 Q So he wanted six or seven times the multiples of
9 the -- was this the gross or net profit of the business and
10 how did it work?

11 A The net.

12 Q The net. So after expenses, whatever --

13 A After expenses.

14 Q -- was there?

15 Now, in doing that, did he structure how salaries
16 were paid out of the clinic for example, I mean, where the
17 expenditures for the clinic were [inaudible]?

18 A I'm not understanding the question. I'm sorry.

19 Q I said salaries. Did he do anything to
20 structure how payments and sort of liabilities in the clinic
21 were minimized, anything like that?

22 A Well, yes. Jeff and Katie were on Gastro
23 payroll, and the reason that he gave us was is because they --

24 MR. WRIGHT: Objection. Foundation.

25

1 BY MR. STAUDAHER:

2 Q And when you say he, who are you talking about?

3 A I'm sorry. Dr. Desai explained that Katie --

4 MR. WRIGHT: Who?

5 THE WITNESS: To me. I'm sorry.

6 THE COURT: To you?

7 THE WITNESS: To me.

8 THE COURT: And when did this happen?

9 THE WITNESS: Same time, around 2000 -- I mean, they
10 were on payroll like that for 2006, '5, right in that area.

11 THE COURT: So in other words, they were taken
12 from -- if I understand correctly, is that they were taken
13 from the payroll of the procedure side and put on the payroll
14 of the sort of office visit side; is that what happened?

15 THE WITNESS: I believe -- I don't know if they ever
16 were on -- initially on Endoscopy payroll.

17 THE COURT: Okay.

18 THE WITNESS: I think that they were always on the
19 Gastro payroll.

20 THE COURT: Okay.

21 THE WITNESS: And the reason being is because they --

22 MR. WRIGHT: Foundation.

23 THE COURT: Does that explain to you -- don't
24 speculate about the reason, only if Dr. Desai explained to you
25 what the reason was.

1 THE WITNESS: Cost sharing is the reason he explained
2 to me.

3 THE COURT: Okay. All right.

4 MR. WRIGHT: Okay. Foundation as to that.

5 THE WITNESS: Okay. Cost sharing.

6 BY MR. STAUDAHER:

7 Q Cost sharing. This was a -- was this part of
8 this same time frame that you're talking about or what, that
9 he's telling you these things? Is it during that conversation
10 or is it [inaudible]?

11 A This would have been before.

12 Q Okay. So how long before roughly?

13 A I can't remember.

14 Q But he was talking about the issue of selling
15 the business, or at least why he was putting people on
16 different sort of areas of the practice; is that correct?

17 A Yes.

18 Q And when you say cost sharing, what does that
19 mean, or what did he explain to you that that meant?

20 A Well, the reason being is because --

21 MR. WRIGHT: Objection. Can we approach the bench?

22 THE COURT: Sure.

23 (Off-record bench conference.)

24 THE COURT: Ma'am, don't speculate, you know. If
25 someone asks you a question and you're not sure what the

1 reason was, or Dr. Desai didn't give you a reason, don't, you
2 know, try to guess or speculate as to what the reason might
3 have been or what reason makes sense to you. Do you
4 understand?

5 THE WITNESS: Yes.

6 THE COURT: Okay. Go on, Mr. Staudaher.

7 BY MR. STAUDAHER:

8 Q Okay. And again, we're talking about Dr. Desai.
9 Your either being present when he was saying this to someone
10 else, or you actually having the conversation yourself with
11 him. Okay. Or being directed by him, he gives you a memo,
12 some communication with Dr. Desai or you in his presence,
13 okay?

14 A Yes.

15 Q Now, selling the practice, let me go back to the
16 issue of the cost sharing thing. When did that first come up
17 roughly, as far as that as an explanation for why things were
18 structured the way they were?

19 A I can't remember the date.

20 Q Well, without giving us an exact date, can you
21 give us in a general ballpark?

22 A Probably 2005, 2006, around in there.

23 Q And during the times when that was brought up,
24 who was present?

25 A Myself.

1 Q You and Dr. Desai?

2 A Mm-hmm.

3 Q Anybody else?

4 THE COURT: And you have to -- I'm sorry.

5 THE WITNESS: I'm sorry. Yes.

6 THE COURT: You have to answer yes or no --

7 THE WITNESS: Yes.

8 THE COURT: -- because everything's recorded, and
9 mm-hmm, that, you know --

10 THE WITNESS: I'm sorry.

11 THE COURT: -- we don't know what that means in the
12 tape.

13 THE WITNESS: Yes.

14 BY MR. STAUDAHNER:

15 Q So just so we're clear, you and Dr. Desai, no
16 one else?

17 A Yes.

18 Q Did that happen on more than one occasion?

19 A Yes.

20 Q So let's talk -- how many occasions were there
21 roughly?

22 A I can think clearly of two.

23 Q So let's talk about those two. And the first
24 one, are we still talking about the same general time frame?

25 A No. One was after, like I said, like the first

1 time we got triple AHC, so it was the second time when Katie
2 Maley came back aboard.

3 Q Okay. So let's talk about the first one.
4 What -- tell us what happened during that conversation, or
5 what was discussed.

6 A He felt that Jeff was a charge nurse and he
7 oversaw both facilities, so he wanted to have Gastro pay for
8 his time and services. I believe that's how it went.

9 Q Did Dr. Desai explain to you why he wanted
10 Gastro to pay it?

11 A Just because he didn't want all of it to come
12 out of Shadow.

13 Q What about the second conversation you had with
14 him?

15 A That's when he was more interested in selling
16 the facilities and getting us recertified for AAAHC.

17 Q So talk to us about that. Again, was this just
18 you and he present during this conversation?

19 A There could have been another physician there.
20 I don't remember.

21 Q Okay. But you know specifically Dr. Desai was
22 there?

23 A Right.

24 Q And roughly in the time frame, this is when he's
25 more interested in selling?

1 A Right.

2 Q And when roughly are we talking about here?

3 A 2000 -- in 2006, 2005, I think that's when we
4 got our -- the next certification was 2000 -- 2000 -- whenever
5 that second certification was.

6 Q Tell us about that portion of the conversation.

7 A Well, we rehired Katie Maley as the director of
8 nursing, because she had a bachelor's degree and Jeff only had
9 an associate's degree. And so he wanted to have us
10 recertified for AAAHC because it made more value for the
11 facility. And we would have both Katie and Jeff paid out of
12 the Gastro centers, I believe.

13 Q Did he explain why he wanted to do that? Was it
14 the same reason?

15 A In that conversation, I don't think he went into
16 detail about it.

17 Q So this is what he told you before you're just
18 implementing it?

19 A It was understood.

20 Q Okay. Now, as far as the clinics themselves,
21 there's the medicine clinics, there's the endoscopy clinics at
22 different locations; is that fair?

23 A That is fair.

24 Q Initially the corporate structure of those, were
25 they all combined as a group, or did they change names? How

1 did it work and did that -- did that vary over time?

2 A Gastroenterology Center of Nevada was the clinic
3 portion. So that's the portion that saw the patients,
4 diagnosed the patients and so forth.

5 Then there was two endoscopy units, and they did
6 change names and I don't remember the time. One was
7 endoscopy -- it used to be Endoscopy Center of Southern -- or
8 Endoscopy Center 1 and Endoscopy Center 2. One was located at
9 Shadow Lane, two was at the 4275 Burnham Avenue. It was
10 changed to have two separate entities, two separate LLCs for
11 legal purposes, for liability purposes, and it would make it
12 easier for Dr. Desai to sell. They did have different
13 ownership structure.

14 Q And was that -- I mean, was this a conversation
15 that he had with you at some point about that?

16 A Yes. I mean, when we had to do the
17 re-credentialing and everything else for the facilities.

18 Q Okay. So did he indicate to you that it had
19 anything to do with selling the practice?

20 A Yes, and the other physicians knew that as well.

21 Q So after you are working there for a period of
22 time, at some point do you get involved with the anesthesia
23 billing portion of things?

24 A Correct.

25 Q Can you tell us about that?

1 A As I said, in 2000, and when Annamarie first
2 came aboard and we had Lizmar billing, and then we had another
3 billing company. And in approximately November or something
4 like that of 2003, Dr. Desai introduced me to a person named
5 Rebecca Duty [phonetic], who was Dr. Nemec's administrator and
6 biller. And he -- she had already had experience. She
7 already had a billing company, and he had asked her and I to
8 join together --

9 MR. WRIGHT: Foundation, please.

10 THE COURT: The letters -- you can go back over it
11 after. He meaning Dr. Desai had asked?

12 THE WITNESS: I'm sorry. Dr. Desai had introduced us
13 and asked Rebecca and I to form a company for the anesthesia
14 billing.

15 BY MR. STAUDAHER:

16 Q So roughly when is this?

17 A In 2003. October is probably when we met,
18 November is when we started solidifying things, and I believe
19 the contract was signed in December of 2003.

20 Q You were present with Dr. Desai. Anybody else
21 during this time?

22 A Rebecca, myself and Dr. Desai.

23 Q So you were going to take over that portion of
24 things?

25 A Yes, sir.

1 Q What was your understanding of what you would --
2 what your role would be in that regard?

3 A My role, as I already was, was working with
4 physicians doing credentialing and helping them do practice
5 management and so forth, so I would maintain that section of
6 the business. Rebecca has a company called Paragon -- I can't
7 remember what the whole name was. She would take over all of
8 the anesthesia billings since she had experience in it. And
9 Dr. Desai wanted me to just make sure that she got everything
10 as far as the charge tickets or anything like that. And
11 that's what I did.

12 Q So you then just start working at that
13 exclusively?

14 A No. I still maintained full-time employment
15 with Gastroenterology Center of Nevada.

16 Q Did you have any employees for your practice
17 then, this sort of billing company?

18 A I didn't until 2006. Rebecca sent me a memo
19 saying that she was overworked, stressed and had some personal
20 issues going forward and she needed to stop having her billing
21 company do it. And so I went to Dr. Desai, showed him the
22 email, talked to him, told him I'm not qualified to do this.

23 He had made the suggestion to me that I -- he,
24 Dr. Desai, made the suggestion for me to hire Ida Hansen,
25 which is Gastroenterology Center of Nevada's billing manager,

1 she would know how to do this. So I did. I hired Ida as an
2 independent contractor.

3 We then recruited billers. I got a little two-space
4 area off of 7000 Smoke Ranch and we put the billers in there.
5 We connected to Gastroenterology Center of Nevada's billing
6 system, because he didn't want to use an outside billing
7 system anymore. So --

8 Q When you say he, you're talking --

9 A Dr. Desai --

10 Q -- Dr. Desai?

11 A -- did not want us to use an outside billing
12 system's software. He basically wanted to make sure that it
13 was all his information. So I was fine with that and Ida knew
14 the system, so I was fine with that. So we hired four billers
15 and then hired some part time. Ida trained them and we
16 started like that.

17 Q So did you have direct involvement in going over
18 there on a daily basis to oversee operations, anything like
19 that during that time?

20 A No. The billers basically are data entry
21 persons. They receive a charge ticket, an anesthesia form
22 filled out by the CRNAs which has the patient's name, the date
23 of birth. They make a copy of the insurance cards. And it
24 has the information that they need to put the data into the
25 software to create a claim.

1 Q So how did this work? When you got the money
2 that came in for the claim, I mean, how did it get back to
3 Gastro?

4 A The mail went to Gastroenterology Center of
5 Nevada. The billing -- the billers upstairs, Bonnie Hepler
6 [phonetic], received the money, prepared the deposits, made
7 copies of the EOBs, made copies of the checks.

8 MR. WRIGHT: Could you explain EO -- explain what --

9 THE COURT: Don't interrupt. I mean, you can --

10 MR. WRIGHT: Okay.

11 THE WITNESS: Explanation of benefits that told the
12 biller what the insurance paid and allowed or disallowed.
13 Then a courier would go over to Shadow Lane and pick it all up
14 and then take it to my billing office, and they would apply
15 and post the payments and so forth.

16 BY MR. STAUDAHER:

17 Q How did you get your cut out of this?

18 A I got my cut off a percentage of what was
19 received.

20 Q So you would bill it out; whatever came in, you
21 got a percentage of that?

22 A Yes, sir.

23 Q Now, as far as the billing that came in, where
24 did that money go?

25 A It went to Gastroenterology Center. Is that

1 what you're asking me?

2 Q Which account or accounts did it go into?

3 A And Bonnie would deposit it into the CRNA
4 account.

5 Q So and again, is that the one that Dr. Desai had
6 control of?

7 A That's the one that the money was for the CRNAs.
8 That's the one he wanted the money to go into.

9 Q Any question that -- I mean, he was the one that
10 took and wrote checks. Did anybody else do that in any way
11 during the time you were there --

12 A Wrote checks?

13 Q -- out of that account?

14 A Out of the CRNA accounts?

15 Q Yes.

16 A No. Only Dr. Desai wrote the checks out of the
17 CRNA account.

18 Q Now, at some point down the road, I mean, how
19 many employees do you end up with? Does it fluctuate over
20 time, or was it stable during the time you had the company?

21 A No. Actually, after Rebecca had left and we
22 started performing billing services in 2006, we grew. We
23 performed billing services for other physicians and other
24 physician types. And so then we moved over to the 7365
25 Prairie Falcon Road and we hired our own internal billing

1 managers. We had two of them -- three of them, I'm sorry, and
2 went forward.

3 Q So you're still over -- your primary location
4 where you're working is where now, during this time?

5 A I'm still employed at Gastroenterology Center of
6 Nevada.

7 Q And are you still doing the kinds of things you
8 described earlier there?

9 A Yes.

10 Q So this is just a side type business it sounds
11 like?

12 A It was a side type business where I was planning
13 on leaving and going full time to work.

14 Q Now, as far as the whole issue of selling the
15 business, and I'm talking about Desai selling his business,
16 were there any conversations that he had to you about trying
17 to maximize profits, anything like that in the business?

18 A Maximize profits?

19 Q Try and get the -- so he can -- this multiples
20 that you described so that they would be worth something.

21 A Well, not specifically as you just asked that
22 question, no.

23 Q Well, maybe I asked it improperly or -- I
24 mean -- and so you don't have it --

25 A Well, I don't mean it to be --

1 Q So as far as you're concerned, explain to me
2 what you're talking about. Was there something there, some --
3 some interaction?

4 A Dr. Desai wanted the numbers up. I mean, he
5 always wanted high volume at the Shadow Lane office. I mean,
6 that is widely known.

7 Q And the reason that he gave for that?

8 A Because it would make a bigger bottom line for
9 him when he sold the practice.

10 Q Now, was he ever -- did he ever discuss with you
11 anything about trying to control costs at the clinic, anything
12 like that?

13 A He discussed cost controlling consistently.

14 Q And is that -- I mean, is this more than a
15 single event that you talk about?

16 A Well, he -- can I give you an example, because I
17 don't know how else to explain it.

18 Q What is the example going to be about?

19 A Yes. Yes, he would make sure --

20 THE COURT: If you don't know what the example is,
21 don't -- everybody's afraid to say yes.

22 THE WITNESS: Okay. Well, it would be like this.
23 It -- we -- the staff there worked long hard hours. Okay.
24 I'll give you an example. Something like orange juice. Okay.
25 We went to AAAHC and we -- and it wasn't mandatory, but it was

1 just a nice gesture. He flat out said no. So the nurses
2 would buy the orange juice, or we'd put it in the nursing
3 staff orange juice, and I guess it was used for diabetics or
4 hypoglycemic patients or something. I'm not really sure.

5 We -- he also, one of the things that was
6 recommended, blanket warmers. So we priced out blanket
7 warmers.

8 BY MR. STAUDAHER:

9 Q Is this -- are these recommendations after the
10 AAAHC comes in and they recommend you have things on --

11 A We hired a consult -- right. We hired a
12 consultant to come in --

13 MR. WRIGHT: Foundation.

14 THE WITNESS: I'm sorry?

15 MR. WRIGHT: Foundation.

16 THE COURT: When was the consultant hired? I mean,
17 and we don't expect you to say, oh, that would have been on
18 June 12th at noon. I mean just as near as you can remember.
19 And if you don't remember --

20 THE WITNESS: It was the first time we were AAAHC
21 certified, which I believe was what, 2004, 2000 -- I can't
22 remember. Whenever it was the first time.

23 THE COURT: Okay. So at some point they came in and
24 made recommendations?

25 THE WITNESS: Right. We hired a lady that came in on

1 site, gave us recommendations for like little bags that said,
2 you know, the company's name, have booties in it for the
3 patients so their feet were warm or whatever. A blanket
4 warmer was suggested. And Dr. Desai flat out said no.

5 THE COURT: Did he say -- did he convey --
6 communicate that to you, no, I'm not going to get this?

7 THE WITNESS: Oh, yes. I mean, sometimes Dr. Desai
8 could be very volitable and use language that was
9 inappropriate.

10 THE COURT: What's a blanket warmer? Like a plate
11 warmer, you stick the blankets in it --

12 THE WITNESS: It's like a box that you put --

13 THE COURT: -- and it heats them up?

14 THE WITNESS: -- like the blankets in there to stay
15 warm. Because the endoscopy units are fairly cold, patients
16 are just wearing a gown, and so it would kind of cover them
17 up.

18 THE COURT: Makes them nice and toasty?

19 THE WITNESS: Right. So --

20 THE COURT: All right. Go on. I'm sorry,
21 Mr. Staudaher.

22 BY MR. STAUDAHER:

23 Q So beside those kinds of -- and those were
24 recommendations by the accrediting agency or whatever
25 [inaudible]?

1 Desai, like first day 2004, you're there, what I'm asking is
2 did you continue with your same standards and procedures?

3 A Yes.

4 Q Okay. So there wasn't any change or someone at
5 the clinic said, whether it's Dr. Desai or anyone else,
6 someone said, no, we're going to do it this way or that way?

7 A I would never let anyone tell me how to do
8 anesthesia. It's --

9 Q Okay. And your --

10 A Followed my standards of care.

11 Q Okay. And you're adamant about that, correct?

12 A Yes, I am.

13 Q And you're vociferous, loud, whatever you want
14 to call it, you state your mind is what I've been told; is
15 that correct?

16 A I wouldn't -- I would not let anyone interfere
17 with the way that I take care of my patients. I have a
18 standard of care and I keep to it, yes, and I would not allow
19 anyone to tell me what to do otherwise unless it were in the
20 patient's best interests.

21 Q Okay. And the -- while you were working first,
22 first stint at Dr. Desai, 2000-2004 period, did another CRNA
23 come?

24 A Yes.

25 Q Okay. And so that's the second one, correct?

1 A Yes.

2 Q Okay. And who was that?

3 A That was Keith Mathahs.

4 Q Okay. And anymore come while you were there --

5 A During the --

6 Q -- first time?

7 A -- 2000 to 2004, no.

8 Q Okay. So when Keith Mathahs came, it was still

9 a one -- one procedure room?

10 A Yes.

11 Q Okay. When you left in 2004 and returned about

12 a year later in 2005, is that correct?

13 A Yes.

14 Q Okay. When you returned in 2005, just for the

15 time frame, was it then a different bigger facility, two

16 procedure rooms having moved like across the -- into -- across

17 the hall?

18 A Yes.

19 Q Okay. So when you left, still one procedure

20 room and one CRNA other than yourself, Keith Mathahs?

21 A Yes.

22 Q Okay. Had anyone -- did you ever go work

23 Burnham?

24 A I can't remember if I did during that time

25 period, but during -- definitely during the second time

1 period --

2 Q Okay.

3 A -- I worked at Burnham, and also at the North
4 Vista Hospital.

5 Q Okay. And did -- do you -- did you know
6 Mr. McDowell, Ralph?

7 A Yes.

8 Q Did he -- was -- do you know when he came to
9 Burnham?

10 A I don't remember.

11 Q Okay.

12 A I know it was when it was the old Burnham, the
13 one room. So he probably was the first CRNA at Burnham, I
14 believe.

15 Q Was that -- is the old Burnham the upstairs?

16 A Yes.

17 Q Okay. And then ultimately Burnham moved
18 downstairs and had more procedure rooms?

19 A Yes.

20 Q Okay. Now, when you were at Shadow Lane first
21 time, single procedure room and Keith Mathahs is there, would
22 you two work at the same time, rotate?

23 A Yes.

24 Q How did it work?

25 A He would do one patient and then I would do the

1 next.

2 Q Okay. Same procedure room?

3 A Yes. Unless I went to the hospital, or he or I
4 went to Burnham.

5 Q Okay. And the -- when you would work with Keith
6 Mathahs, and if you are both working on a given day at Shadow
7 Lane, okay?

8 A Yes.

9 Q And there are colonoscopies and upper
10 endoscopies going on, would you rotate each patient?

11 A Yes.

12 Q Okay. And so would you like start the
13 assessment history with one patient while Keith is doing a
14 patient in procedure?

15 A Yes.

16 Q Okay.

17 A I would go speak with my patient and take the
18 history and make sure they had an IV.

19 Q And then when your patients -- when Keith
20 Mathahs is done with a procedure, your -- the patient you had
21 just assessed and was going to be yours would go into the
22 procedure room?

23 A Yes.

24 Q And you would do all of your own assessment,
25 charting, history, questioning of the patient?

1 A Yes, always.

2 Q Okay. The -- and did -- did you -- when you
3 came to the work as the first CRNA at the clinic, 2000, okay,
4 I'm going back a little bit, they didn't have CRNAs then and
5 didn't have anesthesia billing, are you -- is that correct?

6 A I -- I don't know. I don't know what you're
7 say -- what you're -- I'm not clear on that question.

8 Q Okay. Did you do anything like bringing the
9 forms with you, like your anesthesia form, charting, charts or
10 whatever? I'm not sure I'm using the correct terminology.

11 A Yes. The anesthesia record.

12 Q Okay. And you had anesthesia records you were
13 utilizing?

14 A Yes. I got them from -- adapted it from
15 previous facilities that I had worked in. I think I actually
16 had one from -- which was similar to the one that they used at
17 one of the hospitals in Las Vegas.

18 Q Okay. So you brought those. And did you deal
19 with -- who did you deal with when you first came to work? I
20 mean, you were hired by Dr. Desai, correct?

21 A Yes.

22 Q And he was one of the physicians doing the
23 procedures and he ran the clinic and was a majority owner, you
24 understood all that?

25 A Yes.

1 Q And there were other physicians in the group
2 that you were -- that were performing procedures, partners?

3 A Yes.

4 Q Okay. And then who -- who was your initial --
5 who did you work with who was like the charge nurse?

6 A The charge nurse --

7 Q I'm not sure --

8 A -- was Betty.

9 Q I'm not sure of the terminology. The head
10 nurse.

11 A I believe it was Betty.

12 Q Betty?

13 A But I can't remember her last name.

14 Q Okay. Were the -- did you deal with Tonya
15 Rushing?

16 A Oh, Tonya is -- always been the office manager.

17 Q Okay. Did you -- you brought -- when we talked
18 about the form that you brought, is that we're talking about
19 the anesthesia chart that you actually fill out for a given
20 patient, correct?

21 A Yes.

22 Q But and on that would be all of the relevant
23 information that you keep, time, amount of -- personal
24 history, blood pressure, everything you do with that patient,
25 interview, all is charted by yourself?

1 A Yes.

2 Q Okay. And then that chart becomes a part of the
3 nursing record?

4 A It becomes part of the patient record, I
5 believe.

6 Q The patient record.

7 A Yeah.

8 Q Okay. And you brought that -- do you recall
9 referring Tonya or talking to anyone at the clinic about
10 billing, anesthesia billing, and like who had been doing your
11 billing?

12 A I don't remember. I mean, I had billers that I
13 used when I was working on my own, but that --

14 Q Was it Lizmark [phonetic] or something?

15 A I had used them, yes.

16 Q Okay. Is that -- okay. Do you recall when you
17 first started work who was doing the billing at the clinic
18 involving anesthesia?

19 A I -- I don't know who they used.

20 Q Okay.

21 A I have nothing to do with their billing.

22 Q I understand.

23 A I had nothing to do with that.

24 Q Okay. But you knew -- I mean, you came to work
25 as an employee, correct?

1 A Yes.

2 Q Okay. And you weren't a -- working for yourself
3 as a CRNA?

4 A No. I was employed with a salary.

5 Q Okay. And you knew like if an anesthesiologist
6 came to the clinic because you were off, so an
7 anesthesiologist MD came to the clinic, okay?

8 A Yes.

9 Q And he performed anesthesia services on a
10 patient, okay, how was that billed?

11 A You know, again, I have no idea how they billed.
12 You know, I -- I don't know what -- you know, what their
13 arrangements were. I cannot even -- I can't even, you know,
14 say that I had nothing to do with anyone's billing, you know.
15 But I -- especially I cannot say what their billing was and
16 how they did it.

17 Q Okay. The -- and when you previously, if you
18 were working like an independent CRNA you would do your own
19 billing for your services?

20 A In different --

21 Q Here.

22 A -- places where I worked.

23 Well, in Las Vegas, when I worked with Southwest
24 Medical, I did not do the billing. When I worked with the
25 plastic surgeon in their office, they just tell you how

1 much -- you know, that's different because it was private pay.
2 They tell -- the surgeon would tell you how much you were
3 going to make.

4 Q Okay.

5 A So again I didn't bill. The only thing I had to
6 bill for was when I did -- when I did pain management
7 procedures. That would be the only time.

8 Q Okay. So when you're working with Dr. Desai
9 first time period, you're an -- a salaried employee with
10 benefits, correct?

11 A Yes.

12 Q And you got bonuses?

13 A The first time, from 2000 --

14 Q Correct.

15 A -- to 2004, I was salary.

16 Q And so at that time your payment, your salary
17 had nothing to do with the number of procedures you did or
18 anything else, you were a salaried employee?

19 A Absolutely not, it did not have anything to do
20 with that.

21 Q Okay. And your bonuses had nothing to do
22 with --

23 A I don't know what they had to do with, because
24 they went away --

25 Q Okay.

1 A -- the longer I worked there.

2 Q Okay. Well, they went -- when you came back as
3 a per diem employee, no longer a salaried employee, there were
4 no bonuses, correct?

5 A Yes, there were no bonuses. I was working per
6 hour.

7 THE COURT: I'm sorry. Finish your answer.

8 THE WITNESS: I'm finished.

9 THE COURT: All right. The jury needs a break.

10 So we're going to take a quick ten-minute break,
11 ladies and gentlemen. During the break you're advised you're
12 not to discuss the case or anything relating to the case with
13 each other or with anyone else. You're not to read, watch,
14 listen to any reports of or commentaries on this case, any
15 person or subject matter relating to the case, and please
16 don't form or express an opinion on the trial.

17 Notepads in your chairs, and follow the bailiff
18 through the rear door.

19 (Jurors recessed at 11:27 a.m.)

20 THE COURT: Ms. LoBicndo, during the break, do not
21 discuss your testimony with anyone else.

22 THE WITNESS: I'm allowed to go out?

23 THE COURT: This way.

24 (Court recessed at 11:27 a.m. until 11:43 a.m.)

25 (Outside the presence of the jury.)

1 THE COURT: You can -- Mr. Staudaher, would you
2 retrieve the witness, please.

3 MR. STAUDAHER: Certainly.

4 THE COURT: The bailiff's in the back with the jury.

5 (Pause in proceeding.)

6 (Jurors reconvene at 11:45 a.m.)

7 THE COURT: When the witness comes out of the
8 restroom, just bring her in.

9 (Pause in proceeding.)

10 THE COURT: We'll get started as soon as we locate
11 the witness.

12 (Pause in proceeding.)

13 (Annamarie LoBiondo resumes the stand.)

14 THE COURT: Mr. Wright, you may resume your
15 cross-examination.

16 MR. WRIGHT: Thank you.

17 CROSS-EXAMINATION (continued)

18 BY MR. WRIGHT:

19 Q You left in 2004. Did you go to work somewhere
20 else?

21 A Yes.

22 Q Okay. Where did you go to work in between?

23 A Nevada Anesthesiologists and Pain Specialists.

24 Q Say it again.

25 A Nevada Anesthesiology and Pain Specialists.

1 Q And what type of work was that?

2 A It was doing anesthesia for an anesthesiologist
3 who was doing pain management procedures.

4 Q Okay. And you then came back 2005, worked your
5 second period with Dr. Desai, correct?

6 A Yes.

7 Q Why did you come back?

8 A I had to leave the other facility due to
9 personal reasons.

10 Q Okay.

11 A Health reasons and because I have two children.
12 I had to -- something that was a -- could be a little more
13 flexible to my schedule, so I could spend more time with my
14 children.

15 Q Is that why you came back as per diem?

16 A Yes.

17 Q Okay. So that you were working no longer
18 salaried, but would come, I think you said, like work two to
19 five days a week?

20 A Yes.

21 Q Okay. And so there was more flexibility on your
22 children?

23 A Yes.

24 Q And you weren't working Saturday, Sundays,
25 night, late nights?

1 A Yes.

2 Q Okay. Is that the practice in some other jobs
3 for CRNAs?

4 A In most of them, when you do anesthesia, you're
5 working until that surgeon that you're working with is done,
6 which could go into the night and on weekends.

7 Q Okay. Now, when you returned, the practice was
8 the clinic, patients, physicians, two procedure rooms, it was
9 bigger, correct?

10 A Yes.

11 Q Busier?

12 A Pardon me?

13 Q Busier?

14 A Yes.

15 Q Okay. And the -- when you returned, had the --
16 who was in charge? Was Betty still there?

17 A No.

18 Q Tonya Rushing still there?

19 A Yes.

20 Q She was there throughout, correct?

21 A Yes.

22 Q As the -- on the management side?

23 A Yes.

24 Q Okay. How about Jeff Krueger and Katie Maley?

25 A They were there. They were RNs.

1 Q Okay. And were -- what were they, head nurses,
2 chief of nurses? What do you call them?

3 A At one time Jeff was an RN, just an RN, but he
4 was then promoted to -- I don't know what his title would have
5 been. And I guess he was in a supervisory nursing position
6 and Katie was also in a supervisory maybe administrative
7 nursing position, I believe. I'm -- I don't know exactly what
8 their -- I don't remember exactly what their titles were.

9 Q Okay. And you as a CRNA, both when you were
10 there as an employee the first time and then coming back CRNA
11 per diem, you were within the chain of command, okay, you
12 worked for Dr. Desai, correct?

13 A Yes.

14 Q Okay. And you were under the supervision of any
15 physician who was doing a procedure at the time of the
16 procedure?

17 A Yes.

18 Q Okay. And the -- if you had any issues,
19 complaints or anything, who would you go talk to?

20 A Whomever I was working with at the time, which
21 you mean a physician.

22 Q Right. If it's a physician, you're talking to
23 the like Dr. Carrol or Dr. Desai or Dr. Carrera?

24 A Yes.

25 Q Okay. And if you had some issue with management

1 side or something, would you go through Dr. Desai, Tonya
2 Rushing, Katie Maley, Jeff Krueger?

3 A It depends on what the issue was.

4 Q Okay. Were they your superiors, Katie Maley,
5 Jeff Krueger?

6 A No.

7 Q Okay. You were independent of them; is that
8 fair?

9 A Well, they may have had supervisory or
10 administrative roles in the facility, but that does not
11 include my anesthesia care. They cannot tell me how to do
12 what I do. They're not anesthesia experts. They're not
13 certified to do anesthesia. So they can administrate the
14 facility or supervise certain issues, but not to interfere
15 with what I do with my patients.

16 Q Okay. And you would totally completely look out
17 and do what is proper and correct for your patients, correct?

18 A Yes.

19 Q And if someone told you to do something that
20 like leave the room, go tend another patient while your
21 patient was asleep, you wouldn't do it?

22 A Of course not. You would never abandon a
23 patient --

24 Q Okay.

25 A -- during an anesthetic.

1 Q And the -- if you saw things wrong in the
2 procedure room, you would point it out?

3 A Yes.

4 Q Okay. And I think some of the things you
5 testified to on direct examination for the State, I think some
6 of this all runs together. But were you asked about bite
7 blocks?

8 A Yes.

9 Q Okay. The reuse of bite blocks after they're
10 cleaned and sterilized?

11 A When I first came to work for Dr. Desai, I had
12 never worked in a gastroenterology facility before, so I -- I
13 did question it, that they were not re-sterilized. And I -- I
14 believe Betty, the supervising nurse at the time, was not
15 happy with that, that it was a concern, and so I also became
16 concerned about that.

17 Q Okay. And you complained about it?

18 A Yes, I did.

19 Q Okay. And I think you also mentioned the first
20 time, your first period there forceps reuse, do you recall?

21 A Yes.

22 Q Okay. And were forceps being cleaned, whatever
23 they did with them, and then reused when you were first there?

24 A Yes.

25 Q Okay. And when you returned like second time,

1 third time, was that occurring?

2 A You know, I really have to maintain that my area
3 of expertise is anesthesia and I cannot be -- I'm not an
4 expert in how they sterilize the equipment. I mean, I
5 understand if I have a piece of equipment how that is supposed
6 to be sterilized. But I am not -- I am doing anesthesia and
7 that's my area of expertise. I cannot be an expert in other
8 areas.

9 Q Fair enough. But I have to ask the areas that
10 you've testified about. Okay. I mean, that's why --

11 A Okay.

12 Q -- I'm asking you about them.

13 A Okay.

14 Q I understand you don't know whether the reuse of
15 forceps, whether they were being cleaned, sterilized properly
16 in the Medivator, not in the Medivator, you just don't know,
17 correct?

18 A Correct.

19 Q Okay.

20 A I would be concerned because others were talking
21 about it, saying that they were not.

22 Q Okay. But they -- it may have been sterile or
23 not, but you -- it was a topic of conversation and something
24 that caused you concern?

25 A Yes.

1 Q Okay. And you voiced your concerns anytime you
2 had them?

3 A Yes.

4 Q Okay. And on the forceps reuse when you
5 returned to work, they were not reusing them anymore; is that
6 my understanding?

7 A That's what I understood, yes.

8 Q Pardon?

9 A Yes. I believe that they were not.

10 Q Okay. Now, on anything like -- I've read your
11 interviews and testimony. So like if you saw a scope that had
12 something on it, a colonoscope, okay?

13 A Yes.

14 Q You would point it out and tell the tech,
15 correct?

16 A Yes.

17 Q And you recall having done that, correct?

18 A Yes.

19 Q And the tech would then take and go back, send
20 it back for reprocessing and get another one?

21 A Yes.

22 Q Okay. And your determinations to cancel a
23 procedure, okay, I want to go there. You testified about the
24 time when a lady was not NPO-ing, drinking water, and so you
25 did not want to go forward. Do you recall that?

1 A Yes.

2 Q Okay. I want to talk about -- generally about
3 that and that incident, okay?

4 A Okay.

5 Q Now, you're responsible when you interview the
6 patient, new patient comes in, anesthesia is your territory,
7 and you're going to make an independent determination of your
8 own whether it is safe to anesthetize that patient, correct?

9 A Yes.

10 Q And that's your realm of responsibility?

11 A Yes.

12 Q And that's why you go through all of those
13 questions, hook them up, take all those readings, find out
14 their -- what their allergies are and if they are healthy and
15 fit enough to undergo the anesthesia, correct?

16 A Yes.

17 Q Okay. And there were many occasions where
18 your -- you would do your assessment and say no, correct?

19 A Yes. If I didn't feel they were -- that they
20 were fit for an anesthesia that day or for what I would say no
21 for in that facility.

22 Q And it could be for an entire array of reasons,
23 like blood pressure? I mean, you tell me. What are the
24 various reasons where you'd say it's no go today?

25 A Someone who's unstable for any reason, any

1 medical reason. If they have an unstable condition that
2 cannot be safely handled in an outpatient facility like that,
3 they sometimes would need to have their anesthesia done in a
4 hospital. Sometimes they would need to see a specialist, a
5 cardiologist first to be cleared for anesthesia. They had a
6 recent heart attack or severe coronary artery disease where
7 you felt they were unstable.

8 Q Okay.

9 A Many issues or a combination of.

10 Q Okay. And at times you made the determination
11 the patient should -- the procedure should take place in
12 hospital rather than outpatient --

13 A Yes.

14 Q -- correct?

15 And when you made those determinations, you would
16 discuss it with the physician who was going to do the
17 procedure?

18 A Yes.

19 Q And because that -- they -- the physicians
20 weren't always happy with canceling something on the schedule
21 because they're there and they're ready to do it; is that
22 fair?

23 A Yes. I mean, you would -- most of the time you
24 would explain that to them and they would agree with you.

25 Q Okay. And the -- also the patients weren't

1 always happy with the determination, correct?

2 A Correct.

3 Q And you would have to explain it to the patients
4 and/or their family, why it wasn't going forward today but
5 they had to reschedule; is that correct?

6 A Yes.

7 Q Okay. But once you made the determination,
8 it -- were you ever -- did you ever go ahead and like do it
9 anyway?

10 A No.

11 Q Okay. I mean, you were never overruled in the
12 sense that you did it despite your best judgment; is that --

13 A No, I would not be overruled. If I didn't
14 believe something was safe, I would not do it.

15 Q Okay. When I read your interviews or testimony,
16 I saw that when as the clinic grew this would come up like --
17 you estimated like one time a day that someone out of like 60
18 patients may not be qualified to go forward?

19 A Yeah. Again, I don't remember that exact
20 estimate, but I -- it may be fair.

21 Q Okay. And on those, it would then be canceled
22 and that's the CRNA's call, correct?

23 A Yes. Again, you would discuss it with whoever
24 their physician is or who's going to perform the procedure and
25 I would not do it.

1 Q Right. And you want everyone on board on the
2 decision, correct?

3 A Yes.

4 Q And --

5 A That's the way you do it. You decide together.
6 You work together.

7 Q Okay. On the -- there was one incident with
8 Dr. Desai where you saw a lady drinking out of a jug of water,
9 right?

10 A Yes.

11 Q Okay. And the -- so you said that's a no go,
12 correct?

13 A Yes.

14 Q Okay. And that's a no go because she's not
15 following the NPO. What's that mean?

16 A It's a Latin word meaning nothing to eat or
17 drink after midnight.

18 Q Okay. And so nothing to eat or drink after
19 midnight, and she's sitting there drinking out of a jug of
20 water --

21 A Right.

22 Q -- right before --

23 A She had other compounding factors.

24 Q Okay. And this resulted in an argument between
25 yourself and Dr. Desai?

1 A Yes.

2 Q Okay. And the -- do you recall that the lady
3 was also upset?

4 A Yes.

5 Q Okay. She wanted it done, correct?

6 A Yes.

7 Q Is that correct?

8 A Yes, that is correct.

9 Q I didn't hear you. I'm sorry.

10 A I'm sorry. Yeah, I did say yes.

11 Q And that incident, was it -- is it fair to say
12 that you and Dr. Desai butted heads on that?

13 A I believe we disagreed, yes.

14 Q Okay. Well, did it get blown out of proportion,
15 in your judgment?

16 A It was a long time ago.

17 Q Yes.

18 A I mean, I don't remember it getting blown out of
19 proportion. I remember other individuals becoming involved in
20 it that it was not their jurisdiction to make that decision or
21 voice their opinions.

22 Q Okay. Well, go ahead and say it. I mean,
23 because I don't know. I wasn't there.

24 A Yeah.

25 Q I mean, the other -- Tonya Rushing?

1 A She was one of them, yes.

2 Q Okay. And the -- in other words, you said I'm

3 not doing it and Dr. Desai wanted to do it, correct?

4 A Yes.

5 Q And the patient wanted to do it?

6 A Yes.

7 Q And you said, not me, I'm out of here?

8 A Yes. I didn't feel that it was safe to proceed.

9 Q I understand. And you said, I'm out of here,

10 correct?

11 A Well, when it --

12 Q You tell me. I'm not --

13 A When it became that much of an issue, yes. The

14 only way to proceed was to -- to leave, to not do it.

15 Q Okay. So you left, right?

16 A Yes. I left.

17 Q Okay. And were you -- did you quit, were you

18 fired, did you come back?

19 A At that time I just knew I was leaving. I

20 didn't intend to quit and I did not get fired.

21 Q Okay. And then you came back and --

22 A Tonya said, We're going to get the lawyers if

23 you leave.

24 Q Okay. So you're leaving and she says, We're

25 going to get lawyers, here come the lawyers, right?

1 A I never saw the lawyers.

2 Q Okay. And the -- did anything but -- do you
3 know if the patient had the procedure?

4 A I do not know.

5 Q Okay. You don't know if our -- you don't know
6 if the patient waited -- I mean, what are the options for
7 patients at times like that, I mean in those situations?

8 A I think that she should have waited until the
9 next day or another time when she could go through proper, you
10 know, preparation.

11 Q Okay. Are there times --

12 A But I don't know what happened to her.

13 Q Okay. All you know is you didn't do it and you
14 left?

15 A I wasn't comfortable with doing it, so I did not
16 do it.

17 Q Correct. And then you didn't get -- you never
18 heard from the lawyers, you didn't get fired or anything?

19 A No, I did not.

20 Q You came back to work?

21 A Yes, I did.

22 Q Okay. And you continued doing your work exactly
23 as you had done it?

24 A Yes.

25 Q So if there was anyone else you thought isn't

1 anesthesia-able, you would say no?

2 A Yes, I would.

3 Q And did -- did Dr. Desai ever -- did any
4 incident like this ever come up again with Dr. Desai?

5 A Oh, I believe there were other instances where
6 patients were not a good candidate for an anesthesia there,
7 and yes, those incidents -- incidences did come up again.

8 Q Okay. And would you -- and what happened? Did
9 you do them?

10 A No, I didn't. I would discuss it with Dr. Desai
11 or whoever was the physician at that time and not do them.

12 Q Okay. Are there -- is the patient given the
13 option of having the procedure without anesthesia?

14 A It depends on the reason for saying that they're
15 not able to have anesthesia. It depends on the reason. If
16 they're an unstable diabetic and their blood sugar is not
17 acceptable, then they're not going to have any procedure that
18 day. It depends on the patient, individual case.

19 Q Well, I saw that -- I mean, I think I read that
20 in your statement or testimony.

21 A Mm-hmm.

22 Q I mean, were there times where the person would
23 opt to not have anesthesia and have the procedure?

24 A There were patients who did not want to have an
25 anesthetic and would do it without.

1 Q Okay. I don't want to mislead you, but I
2 thought I read that.

3 (Pause in proceeding.)

4 BY MR. WRIGHT:

5 Q Showing you page 32 of an interview, 7/3/08.
6 Just read that to yourself.

7 A Okay.

8 Q Okay. And then -- and as much as you want of
9 it, and see if that refreshes your recollection.

10 A From -- from here?

11 Q Yeah. Whichever -- whatever you need to read to
12 put it in context here.

13 A Okay.

14 Q Were there times when a person, because -- opted
15 to have the procedure without anesthesia?

16 A There were times when patients would opt to do
17 that, yes, but they had to be patients that were not -- that
18 were still physically good candidates to have anesthesia that
19 day at that facility.

20 Q All right. So I mean, if I -- I mean, you give
21 an example of the reasons by which I'm not -- I'm not okay
22 today for anesthesia, but I'm going ahead and have like an
23 upper endo anyway. Is that feasible?

24 A It depends on the reason why. I can't
25 generalize.

1 Q Well, you tell me. I don't know the reason why.

2 A I -- if someone is not stable because they've
3 recently had a heart attack or they have arrhythmias, they're
4 not stable to be there at all and have a procedure.

5 Q Okay. I mean, that procedure -- so are all
6 procedures canceled for medical reasons and nothing to do with
7 the --

8 A Okay. Yes. If it's a medical reason, then they
9 should not be having any procedure, not just --

10 Q Okay. But I --

11 A -- an anesthetic.

12 Q I thought there were patients that just couldn't
13 undergo anesthesia --

14 A Yes.

15 Q -- or otherwise were eligible for the procedure.

16 A Yes. And there were patients who opted to go
17 without anesthesia.

18 Q Okay. That's --

19 A They just didn't -- maybe they were afraid of
20 anesthesia.

21 Q Okay. That's what I was asking you.

22 A Okay.

23 Q And that's what you had said, correct?

24 A Okay. Yes.

25 Q Okay. We're on the same page. And the -- look

1 at page 34, if that refreshes your recollection that that one
2 incident with Dr. Desai was blown out of proportion. I think
3 that's where I got that. Was that your view of it?

4 A That it was blown out of proportion?

5 Q Yes.

6 A I -- I think if it were blown out of proportion
7 it would be because he was insisting that I still continue
8 with the procedure, and I -- I did not feel comfortable with
9 that.

10 Q I understand.

11 A And there was a risk of aspiration, so I did not
12 want to do it.

13 Q Okay. Is that what you --

14 A So I don't feel it was blown out of proportion
15 in that --

16 Q Okay.

17 A Okay.

18 Q I'm not sure I have the right page. Did you say
19 it was blown out of proportion and ridiculous?

20 A Oh. Well, what I meant by blown out of
21 proportion and ridiculous, that there -- it -- in most cases,
22 the surgeon or the physician, whoever it is, would just agree
23 with you and the case wouldn't be done. Why it was blown out
24 of proportion, because an argument ensued to try to get me to
25 change my decision and I -- I don't think it had to go that

1 far.

2 And I, you know, usually the physicians don't
3 disagree with you that strongly that it has to involve
4 other -- other people and the patient.

5 Q Okay.

6 A Most of the times you would tell the -- explain
7 to the patient why that wasn't safe and that would be it.

8 Q Okay. Now, would you butt heads with Dr. Desai
9 on occasion?

10 A Yes.

11 Q Okay. And would you --

12 A I mean, we would have disagreements, yes.

13 Q Okay. You're a strong personality? Little in
14 size, strong in personality for a characterization?

15 A I -- I don't know.

16 Q Okay. Well, you weren't a shrinking violet?

17 A No.

18 Q Okay. And you would argue with Dr. Desai?

19 A If I felt necessary or -- yes. If that was
20 appropriate at the time I would, yes.

21 Q Right. I mean, there isn't any complaint that
22 you would not voice? I'm not criticizing you for it, ma'am.
23 I'm just --

24 A If I felt there was an issue, yes, I would be
25 voice -- vociferous about it. I would be outspoken, yes.

1 Q And stand up for the patient?
2 A Yes, always.
3 Q Okay. And your view is, from having worked
4 there and with the other CRNAs -- when you came back Keith
5 Mathahs was still there?
6 A Yes.
7 Q I'm talking about the second time, okay?
8 A Yes.
9 Q More CRNAs were there?
10 A Yes.
11 Q Was Linda Hubbard there then?
12 A Yes.
13 Q Okay. Ron Lakeman?
14 A Yes, I believe. I can't remember the dates that
15 everyone joined or --
16 Q Okay. But you were working with them --
17 A Yes.
18 Q -- correct?
19 A Mm-hmm.
20 Q And when you came back per diem, I think you
21 said you'd come in like -- or that you'd go to North Vista or
22 come in at 11:00, or come in and work until the end of the
23 shift or what?
24 A I would do -- go where -- you know, it would
25 vary.

1 Q Okay. So --

2 A I would have had to maybe go -- I was flexible.
3 So one date I might start somewhere and then come there. I
4 might go to the hospital first and then come to the facility,
5 or I might just start later in the day and work until the end
6 of the day.

7 Q Okay. And were there times there would be
8 three of -- three CRNAs working two rooms for a period of
9 time --

10 A Yes.

11 Q -- like at Shadow Lane?

12 And the -- and then there were times where you would
13 come to Shadow Lane and you would just be one of two CRNAs?

14 A Yes.

15 Q Okay. And at that time you were working with
16 Linda Hubbard, Keith Mathahs, Ron Lakeman? Am I leaving
17 anyone out you can think of?

18 A There were two others that -- a woman, Bobbie
19 and Vince.

20 Q Okay. I didn't hear you. I'm sorry.

21 A Bobbie, and I can't remember her name.

22 Q Bobbie, another lady?

23 A Yes.

24 Q Okay. And a Vinnie?

25 A Vinnie.

1 Q Okay. And in your working with them at all
2 times when you were there, your experience with them, the
3 other CRNAs, was they stood up for the patients the same as
4 you did?

5 A I can't speak for them.

6 Q You can't?

7 A I mean, I believe they would.

8 Q Okay.

9 A But I -- you know, and I do remember instances
10 where they would also not feel comfortable. But I -- again, I
11 can only -- I can only answer for what I did and how I do my
12 anesthesia.

13 Q Okay. I know. But the way I phrased the
14 question was from anything you experienced there that you
15 would -- well, on the practices of the other CRNAs, okay, you
16 worked with them side by side so to speak [inaudible], right?

17 A Different rooms.

18 Q Okay. But you would interact with -- like with
19 Keith Mathahs, you knew him, correct?

20 A Yes, I knew him.

21 Q Trust him?

22 A I mean, that's -- I don't know how to answer
23 that question. I --

24 Q Well, talk about your -- I mean, he's --

25 A Trust -- don't trust anybody.

1 Q As much as you're able to trust someone, did
2 you --

3 A When I would have discussions with him, you
4 know, yes, if -- you know, we're both anesthesia experts, so I
5 would imagine. But again, I can't speak for anyone else's
6 practice.

7 Q Okay.

8 A Doctors won't speak about other doctors. I
9 don't think that's...

10 Q I only ask you these questions because I've
11 already read your statements. Okay. I think you said -- I
12 think you were asked by either the interrogators or
13 prosecutors, did you think the other CRNAs would cut corner.
14 You said, Keith Mathahs, I don't think, would compromise a
15 patient's safety whatsoever. Do you recall that?

16 A No, I don't, but I can see that I said that.
17 Okay.

18 Q Okay. But I mean, do you disagree with that?

19 A Don't disagree. Okay.

20 Q Are you all right?

21 A Yes. I'm fine.

22 Q Read page [inaudible] to yourself.

23 A [Complies.]

24 Q Does that refresh your recollection?

25 A Yes. But I don't like the way this is -- that's

1 not how I even -- first of all, this -- these papers I didn't
2 get until right before I was subpoenaed, and I didn't get a
3 chance to read them over. Five people in there asking me
4 questions and if I had a time to read them over, I would have
5 corrected that. That's not even proper sentence structure,
6 and I don't -- that doesn't reflect what I meant.

7 Q Okay.

8 A Okay.

9 Q I'm going to try to unravel this. Okay. Is
10 this your statement?

11 A Well, you know, they are my statements. Okay.

12 Q And the -- your interview -- I'm going to back
13 up for a minute. Okay. Go backwards. If there's something
14 wrong, all I want is for you to testify accurately and
15 truthfully to the jury, okay?

16 A And I agree.

17 Q And so, and I'm not intending to mislead you in
18 any way or -- okay?

19 A Okay.

20 Q Whatever it is it is. We'll hear it.

21 A Mm-hmm.

22 Q Okay. You were interviewed at length by an
23 investigator, correct?

24 A Yes.

25 Q Okay. And that -- that's a transcript of your

1 interview, and there were prosecutors there, detectives there,
2 people from attorney general's office. Do you recall that?

3 A Yes.

4 Q Okay. And you had your lawyer there, correct?

5 A Yes.

6 Q Okay. And after -- that was a very lengthy,
7 hours and hours interview, correct?

8 A Yes.

9 Q Okay. And then after that you went to a grand
10 jury a first time, correct?

11 A Yes.

12 Q Okay. And then after that you went to a grand
13 jury again a second time, correct?

14 A I believe I only went to one grand jury.

15 Q Well, have you been -- copies of your statement?

16 A Yes.

17 Q Okay.

18 A I do have them now.

19 Q Okay. Did you just get them?

20 A I received them before I, you know, when I was
21 subpoenaed.

22 Q Okay. But up until then, I mean, you were --
23 that interview was in 2008, a long time ago?

24 A Yes. I did not receive it then. I received it
25 in 2013.

1 Q Okay. And then you went to the grand jury.
2 This long interview was July 30, 2008.

3 A Okay.

4 Q And then a month later, August 28, 2008, you
5 went to a grand jury.

6 A Yes.

7 Q Okay. And did you receive a copy of this?

8 A Yes, I have a copy.

9 Q Okay. And then you went to a grand jury two
10 years later, in 2010. Did you --

11 A I don't remember two grand -- can I see that?

12 Q Sure.

13 A I'm not really sure.

14 Q It's a little tiny --

15 A Because I have this one, and -- oh, the -- was
16 that when -- who was the prosecutor then?

17 Q Scott Mitchell.

18 A Oh, okay. Yes, I remember it. I don't have a
19 copy of that.

20 Q Okay. You don't have this --

21 A I don't think so. I mean, I'll check my
22 records, but --

23 Q That's all right.

24 A I could be wrong. I'm not sure. But now I do
25 remember that.

1 Q Okay. But the chronology was long police
2 interview?

3 A Yes.

4 Q Then grand jury and Scott Mitchell, and then
5 grand jury with Mr. Staudaher?

6 A Yes.

7 Q Okay. And on getting back to your interview, I
8 was asking you if you had given your opinion regarding the
9 other CRNAs you were working with and whether they stood up
10 for patients. Do you recall?

11 A I recall being pressured to do that, yes.

12 Q Okay.

13 A But I don't --

14 Q I'm not pressuring you.

15 A And that's not what I meant either.

16 Q Okay.

17 A I meant I knew Keith better. I had worked with
18 him longer. That's all I meant.

19 Q Okay. I want to for the record just make it
20 clear, when you said you didn't disagree -- or you disagree
21 with something, because we have to make a record of all this.

22 A Yes.

23 Q And so just to -- the underlining obviously
24 [inaudible]. Why don't we, just for the record, kind of go
25 through these two pages, okay?

1 A Okay.

2 Q And then you tell me what --

3 A Okay.

4 Q -- you disagree with.

5 Can you see that up there?

6 A Yes.

7 Q The question, "Were you worried that other CRNAs
8 maybe were compromised in any way, or that the pressure was
9 getting to these people so they were having to cut corners in
10 any way?" Then A-L, that's yourself, "The first CRNA that
11 they hired that I had contact with, I didn't think that he
12 would compromise patients either. I mean, there are worse
13 situations where --

14 "Q Who was that?

15 "A The first one was Keith Mathahs. He
16 was the first one that was hired.

17 "Q After you?

18 "A I think Ralph McDowell was hired next
19 to work at Burnham. Okay. Then Keith came and
20 he worked with me at Shadow Lane facility."

21 A Mm-hmm.

22 "A And then I was able to go to the
23 hospital at that time, and I was going, you
24 know, Lake Mead or North Vista or whatever.

25 "Q What about the subsequent CRNAs, did

1 you worry about any of them -- did you worry
2 that any of them were less?

3 "A No. Because, you know, most of the
4 time they were pretty open about it, you know,
5 telling the doctors too bad you have to wait.
6 Like, you know, I would have a patient history
7 on every patient and, you know, if they didn't
8 like it, I would just continue on with what I
9 was doing and do the right thing.

10 "I would never -- it's my
11 patient. I'm responsible. I have malpractice.
12 I have a responsibility to the patient, and I
13 would take their full history and what
14 medications they were on and whatever amount of
15 time that took, if I had to stop and get a
16 blood sugar or check their blood pressure, I
17 would do everything I had to do.

18 "I would not compromise, you
19 know. I would do it efficiently. And even
20 though the other -- some of the other CRNAs, I
21 mean, I would hear them complaining to some of
22 the doctors. But, you know, I believe they
23 really did their job, you know. I don't know
24 what they did in their rooms with their
25 patient.

1 "But, you know, when I first
2 started working and it was Keith and we would
3 switch off, and that was kind of -- you know,
4 that was good because we had time to go and
5 interview our patients before, and that would
6 keep things running more smoothly.

7 "Q What does that mean, switch off?
8 What do you switch off?

9 "A I would do one patient, he would do
10 the next.

11 "Q So it was only one room at the time?

12 "A At the time when -- you know, so this
13 is Shadow Lane, until I left, you know, in
14 2004."

15 Now, is there something in there not accurate?

16 A There are a lot of you knows.

17 Q You know.

18 THE COURT: You should read my transcripts.

19 THE WITNESS: No, there is not anything in there that
20 is not accurate.

21 BY MR. WRIGHT:

22 Q Okay. On the -- maybe I'm misunderstanding
23 something. I mean, you weren't pressured in any way to say
24 this exchange here [inaudible]?

25 A No.

1 Q Just this issue here.

2 A No.

3 Q Okay. Later you felt pressured to say certain
4 things?

5 A Well, I didn't feel I should speak about others.
6 That's not my place.

7 Q Okay. Let's go to propofol administration,
8 okay?

9 A Okay.

10 Q The -- I want to go through the way you -- the
11 way you did it, and then ask you if you were instructed to do
12 various things like reuse syringes and that kind of stuff.
13 Okay. So first of all, there were 20s and 50s is my
14 understanding, when you returned like second stint.

15 A Yes.

16 Q Okay. And then just to fill it out, after your
17 second time, 2005-2006, if I understand your chronology, mid
18 2006 you left for about four months and then came back until
19 mid 2007; is that fair?

20 A Yes. I don't have my exact time, but if --

21 Q Okay. So --

22 A I believe it would be close.

23 Q When you were back and they were using 50s and
24 20s, we're talking about cc bottles of propofol, right?

25 A Yes.

1 Q Okay. And so first of all, starting with a 20,
2 okay, a 20 cc vial of propofol.

3 A Yes.

4 Q You're going to -- what would you normally do?
5 Just tell us your normal practice with a 20, and you're
6 starting the first patient.

7 A I would open up two 10 cc syringes and two new
8 clean syringes out of the package, two clean needles out of
9 the package, and open the bottle of propofol, wipe it off with
10 an alcohol wipe and remove, draw up or remove two 10 cc
11 amounts in each -- one 10 cc in each syringe, each of two
12 syringes so I would have -- the bottle would be empty and I'd
13 have two brand new syringes.

14 Q Okay. And they're full and they're separate,
15 new and clean, using my terminology, right?

16 A Mm-hmm.

17 Q And propofol bottle empty, throw it away, right?

18 A Yes.

19 Q Okay. Now you're going to inject the first
20 patient. Okay. And the patient has heplock in, right?

21 A Yes.

22 Q And so you would inject what normally first
23 time, if there is any such thing as a normal, 50 to 100 --

24 A Yes, depending on their weight and medical
25 condition.

1 Q Okay. And if there's --

2 A If they're elderly you use less obviously. You
3 know, there are conditions that you -- you make that decision,
4 watch the patient as you're injecting.

5 Q Okay. I just jumped over all that you did.

6 A Sure.

7 Q But I mean, the patient came in, you hooked them
8 up to the blood pressure machine, the oxygen thing, the EKG,
9 all of that stuff, they're all hooked up ready to go and
10 you're ready to inject. Okay.

11 A Yes.

12 Q So then you inject anesthesia. And just
13 assuming it's an upper endoscopy and it's a short procedure,
14 it could be that the patient gets 80, what do you call those,
15 milligram?

16 A Milliliters or cc. They're equal.

17 Q Okay. 8 cc, right?

18 A Mm-hmm.

19 Q And so theoretically that could be all the
20 anesthesia a patient needs?

21 A Yes.

22 Q Okay. And so then with that patient you'd be
23 done and you still have some in the syringe, right?

24 A Yes.

25 Q Okay. And you do what with that?

1 A Throw it in the -- throw it away in the sharps
2 container.

3 Q Okay. And you still have a clean 10 cc syringe
4 of propofol, right?

5 A Yes.

6 Q Okay. Next patient comes in and you've done
7 everything, interviewed, all okay, hook them all up, time to
8 give anesthesia again. Use the same -- use the -- the unused
9 needle and syringe full of propofol for next patient?

10 A Yes.

11 Q Okay.

12 A The totally new clean syringe, yes.

13 Q Right. That's all proper and correct?

14 A Yes.

15 Q Okay. And if let's just say 50 cc vial of
16 propofol, your normal practice starting first thing in the --
17 first time you're working that day, you go into a room and
18 there is 50 cc vials sitting there. Okay. Would you
19 oftentimes put together a bunch of needles and syringes?

20 A If it's a brand new bottle and I'm taking the
21 top off, I would -- I could -- if there is 50 cc in the
22 bottle, I would take five 10 cc syringes sterilely out and lay
23 them out.

24 Q Okay. And so they're all sterile and clean --

25 A Yes.

1 Q -- and so you would --

2 A That way there's no question of going in and out
3 of a vial. You have them out.

4 Q Okay. And so you laid them out. You've got 50
5 cc, and then you would draw up all five of them?

6 A Yes.

7 Q Okay. So you then have five full syringes, 10
8 each?

9 A Yes.

10 Q Okay. And then toss the propofol vial, correct?

11 A Yes.

12 Q Okay. And then you would use those five on
13 whatever number of patients then came through, never reusing a
14 needle and syringe on another patient; is that --

15 A Never.

16 Q I mean, is that a fair --

17 A Yes. Absolutely never.

18 Q Okay. And that is -- that is how you practiced,
19 correct?

20 A Yes.

21 Q Okay. And if a patient is -- let me give --
22 give you a hypothetical of a patient. Let's say we have a 20
23 cc vial. Okay. And you have given the patient his 10 cc,
24 okay, and 10 cc are still in the vial, okay?

25 A Yes.

1 Q Now the patient needs more propofol, okay?

2 A Mm-hmm.

3 Q Would you go back into the propofol vial with

4 the same syringe that you had used on that patient already?

5 A If it's the same patient --

6 Q Yes.

7 A -- and the same bottle --

8 Q Yes.

9 A -- and no one else has touched that bottle,

10 that's your patient, you can use the same syringe. Because we

11 had hepllocks, you would change the needle. In some facilities

12 you have needleless. We didn't have needleless. We had

13 needles. But that's -- so yes, I would be able to do that if

14 that was not used on another patient.

15 Q Okay. And the -- I just want to walk through

16 that. The -- you've already injected the patient once. Okay.

17 Brand new propofol vial, draw up and inject patient, same

18 needle and syringe, need -- patient needs more. You would

19 take, remove the needle, put on a brand new sterile needle,

20 and because it's the same patient, same vial, no one else has

21 used either, go back in with same syringe, new needle, draw

22 up, inject patient?

23 A Yes. You could do that. That's that patient's

24 bottle.

25 Q Okay.

1 A That patient's syringe.

2 Q And then with the caveat that that -- that
3 vial's going in the trash and --

4 A Even if there's 2 cc left, 5 cc left, you cannot
5 use them in another patient at that point --

6 Q Correct.

7 A -- because you've gone in there with their
8 syringe.

9 Q Yes. Okay. And so then with that hypothetical
10 I gave you, the needle and syringe and the propofol vial are
11 tossed --

12 A Yes.

13 Q -- correct?

14 A Yes.

15 Q And the -- if you want -- if someone wants to
16 call that reuse of a syringe, it -- in that limited
17 circumstance with new needle, you would -- could reuse it,
18 correct?

19 A Well, it's not really reuse. It's reuse on the
20 same patient. It's their --

21 Q Okay.

22 A -- syringe. You don't change the IV tubing
23 every time you put some -- put a medicine in there. You --
24 it's that patient's syringe. You're not going to use it on
25 anyone else. You're not going to use that bottle on anyone

1 else.

2 Q Okay. So the -- so right. And so that -- you
3 are using the same syringe on the same patient with a new
4 needle, and you aren't going to use that needle, that syringe
5 or that propofol vial on anyone else?

6 A Absolutely.

7 Q Okay. And that -- that is proper procedure and
8 the way you have always done it?

9 A Yes. That's the way it's done everywhere.
10 It...

11 Q Okay. And not just at the clinics, but
12 everywhere you worked?

13 A Everywhere else I've ever worked, anyone else
14 I've ever worked with.

15 Q Okay.

16 A Any anesthesiologist anywhere.

17 Q Okay. And on setting aside needles now and
18 syringes --

19 A Pardon me? I'm sorry.

20 Q Setting aside needles and syringes, just talking
21 about propofol vial, okay?

22 A Okay.

23 Q It's -- are you aware propofol vial says single
24 use on it?

25 A Yes.

1 Q Okay. And the -- under the hypothetical I gave
2 you at the beginning, you know, which was using propofol on
3 more than one patient, like drawing up five out of the --

4 A Separate syringes, yes.

5 Q Right. You are using the propofol on more than
6 one patient cleanly, aseptically, correct?

7 A Yes.

8 Q Okay. Yet the propofol vial says single use,
9 right?

10 A Yes.

11 Q Okay. How do you reconcile that?

12 A Well, again, it's always -- I mean, if you're --
13 you have to do anesthesia on five patients and you have one 50
14 cc vial, you're -- the way to make that work in a sterile
15 fashion is to draw them up individually separately prior to
16 violating the integrity of the bottle, prior to going into it
17 with anyone's -- you don't break sterility by drawing up five
18 separate syringes. So if that's what you're presented with,
19 that's how you use it. That's what we had.

20 Q And that's the way --

21 A You know, it's different when you do a procedure
22 in the hospital. When it's a long surgical procedure, you're
23 just dealing with one patient for a long period of time.
24 These are shorter procedures, so that's how you -- that's how
25 you can do it.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
SEP 02 2014 09:14 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

DIPAK KANTILAL DESAI,)	CASE NO. 64591
)	
Appellant,)	
)	
vs.)	
)	
THE STATE OF NEVADA,)	
)	
Respondent.)	
_____)	

APPELLANT'S APPENDIX VOLUME 29

FRANNY A. FORSMAN, ESQ.
Nevada Bar No. 000014
P.O. Box 43401
Las Vegas, Nevada 89116
(702) 501-8728

RICHARD A. WRIGHT, ESQ.
Nevada Bar No. 000886
WRIGHT, STANISH & WINCKLER
300 S. Fourth Street, Suite 701
Las Vegas, Nevada 89101

Attorneys for Appellant

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar No. 004352
200 Lewis Avenue
Las Vegas, Nevada 89155
(702) 671-2750
Attorney for Respondent

INDEX TO APPENDIX VOLUMES 1 through 41

<u>DOCUMENT</u>	<u>VOL.</u>	<u>PAGE(S)</u>
Indictment	1	000001-000042
Amended Indictment	1	000043-000084
Court Minutes 7/21/10	1	000085
Court Minutes 2/08/11	1	000086
Finding of Competency	1	000087-000090
Recorder's Transcript - Hearing: Video Deposition Tuesday, March 20, 2012	1	000091-000129
Indictment (C-12-283381 - Consolidated Case)	1	000130-000133
Second Amended Indictment	1	000134-000176
Third Amended Indictment	1	000177-000212
Defendant Desai's Motion and Notice of Motion for Competency Evaluation	1	000213-000229
Recorder's Transcript - Hearing Re: Defendant Desai's Motion for Competency Evaluation Status Check: Experts/Trial Readiness (All) Tuesday, January 8, 2013	1	000230-000248
Fourth Amended Indictment	2	000249-000284
Notice of Motion and Motion to Use Reported Testimony	2	000285-000413
Reporter's Transcript Re: Status Check: Experts (All) Thursday, March 7, 2013	2	000414-000440

<u>DOCUMENT</u>	<u>VOL.</u>	<u>PAGE(S)</u>
Defendant Desai's Opposition to State's Motion to Admit Foreign Documents Relating to Rodolfo Meana	2	000441-000445
Order	2	000446-000449
Court Minutes 3/21/13	2	000450
Defendant Desai's Opposition to State's Motion to Use Reported Testimony	2	000451-000454
Court Minutes 3/26/13	2	000455
Independent Medical Evaluation, 4/14/13 Filed Under Seal - Separately	2	000456
Reporter's Transcript - Calendar Call (All) State's Motion to Admit Evidence of Other Crimes Tuesday, April 16, 2013	2	000457-000497
Fifth Amended Indictment	3	000498-000533
Reporter's Transcript - Jury Trial Day 7 Friday, May 3, 2013	3	000534-000622
Reporter's Transcript - Jury Trial Day 8 Monday, May 6, 2013	3 & 4	000623-000773
Reporter's Transcript - Jury Trial Day 9 Tuesday, May 7, 2013	4 & 5	000774-001016
Reporter's Transcript - Jury Trial Day 10 Wednesday, May 8, 2013	5	001017-001237
Reporter's Transcript - Jury Trial Day 11 Thursday, May 9, 2013	6 & 7	001238-001517

<u>DOCUMENT</u>	<u>VOL.</u>	<u>PAGE(S)</u>
Reporter's Transcript - Jury Trial Day 12 Friday, May 10, 2013	7 & 8	001518-001784
Reporter's Transcript - Jury Trial Day 13 Monday, May 13, 2013	8 & 9	001785-002061
Reporter's Transcript - Jury Trial Day 14 Tuesday, May 14, 2013	9 & 10	002062-00
Reporter's Transcript - Jury Trial Day 15 Wednesday, May 15, 2013	10 & 11	002303-002494
Reporter's Transcript - Jury Trial Day 16 Thursday, May 16, 2013	11 & 12	002495-002713
Reporter's Transcript - Jury Trial Day 17 Friday, May 17, 2013	12 & 13	002714-002984
Reporter's Transcript - Jury Trial Day 18 Monday, May 20, 2013	13 & 14	002985-003247
Reporter's Transcript - Jury Trial Day 19 Tuesday, May 21, 2013	14 & 15	003248-3565
Reporter's Transcript - Jury Trial Day 20 Wednesday, May 22, 2013	15 & 16	003566-003823
Reporter's Transcript - Jury Trial Day 21 Thursday, May 23, 2013	16 & 17	003824-004014
Reporter's Transcript - Jury Trial Day 22 Friday, May 24, 2013	17	004015-004185
Reporter's Transcript - Jury Trial Day 23 Tuesday, May 28, 2013	18	004186-004384

<u>DOCUMENT</u>	<u>VOL.</u>	<u>PAGE(S)</u>
Reporter's Transcript - Jury Trial Day 24 Petrocelli Hearing Wednesday, May 29, 2013	19	004385-004510
Reporter's Transcript - Jury Trial Day 24 Afternoon Session Wednesday, May 29, 2013	20	004511-004735
Reporter's Transcript - Jury Trial Day 25 Thursday, May 30, 2013	21	004736-004958
Reporter's Transcript - Jury Trial Day 26 Friday, May 31, 2013	22	004959-005126
Reporter's Transcript - Jury Trial Day 27 Friday, June 3, 2013	22 & 23	005127-005336
State's Exhibit 18 - Meana Death Certificate Admitted 6/3/13	23	005337-005345
Reporter's Transcript - Jury Trial Day 28 Tuesday, June 4, 2013	23 & 24	005346-005611
Reporter's Transcript - Jury Trial Day 29 Wednesday, June 5, 2013	24 & 25	005612-005885
Reporter's Transcript - Jury Trial Day 30 Thursday, June 6, 2013	25 & 26	005886-006148
Reporter's Transcript - Jury Trial Day 31 Friday, June 7, 2013	27 & 28	006149-006430
Reporter's Transcript - Jury Trial Day 32 Monday, June 10, 2013	28	006431-006641
Reporter's Transcript - Jury Trial Day 33 Tuesday, June 11, 2013	29 & 30	006642-006910

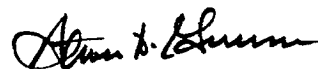
<u>DOCUMENT</u>	<u>VOL.</u>	<u>PAGE(S)</u>
Reporter's Transcript - Jury Trial Day 34 Wednesday, June 12, 2013	30 & 31	006911-007143
Reporter's Transcript - Jury Trial Day 35 Thursday, June 13, 2013	31	007144-007382
Reporter's Transcript - Jury Trial Day 36 Friday, June 14, 2013	32	007383-007619
Reporter's Transcript - Jury Trial Day 37 Monday, June 17, 2013	33	007620-007827
State's Exhibit 228 - Table 20-1 - Modes of Transmission and Sources of Infection Considered Admitted 7/17/13	33	007828
Reporter's Transcript - Jury Trial Day 38 Tuesday, June 18, 2013	34	007829-008038
Reporter's Transcript - Jury Trial Day 39 Wednesday, June 19, 2013	35	008039-008113
Reporter's Transcript - Jury Trial Day 40 Thursday, June 20, 2013	35 & 36	008114-008361
Reporter's Transcript - Jury Trial Day 41 Friday, June 21, 2013	36 & 37	008362-008537
Reporter's Transcript - Jury Trial Day 42 Monday, June 24, 2013	37 & 38	008538-008797
Reporter's Transcript - Jury Trial Day 43 Tuesday, June 25, 2013	38	008798-009017
Reporter's Transcript - Jury Trial Day 44 Wednesday, June 26, 2013	39	009018-009220

<u>DOCUMENT</u>	<u>VOL.</u>	<u>PAGE(S)</u>
Reporter's Transcript - Jury Trial Day 45 Wednesday, June 27, 2013	39 & 40	009221-009473
Defendant's Proposed Instruction No. 2	41	009474-009475
Defendant's Proposed Instruction No. 3	41	009476
Defendant's Proposed Instruction No. 4	41	009477
Defendant's Proposed Instruction No. 5	41	009478
Instructions to the Jury	41	009479-009551
Verdict	41	009552-009559
Reporter's Transcript - Sentencing Hearing Thursday, October 24, 2013	41	009560-009583
Judgment of Conviction	41	009584-009589
Amended Judgment of Conviction	41	009590-009595
Notice of Appeal	41	009596-009600

(COPY)

Electronically Filed
03/11/2014 01:04:15 PM

TRAN



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO. C265107-1,2
)	CASE NO. C283381-1,2
vs.)	DEPT NO. XXI
)	
DIPAK KANTILAL DESAI, RONALD)	
E. LAKEMAN,)	
)	
Defendants.)	TRANSCRIPT OF
)	PROCEEDING

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

JURY TRIAL - DAY 33

TUESDAY, JUNE 11, 2013

APPEARANCES:

FOR THE STATE:	MICHAEL V. STAUDAHER, ESQ. PAMELA WECKERLY, ESQ. Chief Deputy District Attorneys
FOR DEFENDANT DESAI:	RICHARD A. WRIGHT, ESQ.
FOR DEFENDANT LAKEMAN:	MARGARET M. STANISH, ESQ. FREDERICK A. SANTACROCE, ESQ.

RECORDED BY JANIE OLSEN COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

KARR REPORTING, INC.

006642

I N D E X

WITNESSES FOR THE STATE:

ANNAMARIE LOBIONDO

Cross-Examination By Mr. Wright 55

Redirect Examination By Ms. Weckerly 143

TONYA RUSHING

Direct Examination By Mr. Staudaher 167

Cross-Examination By Mr. Santacroce 225

E X H I B I T S

STATE'S EXHIBITS ADMITTED:

PAGE

179 through 208 224

DEFENDANT'S EXHIBITS ADMITTED:

PAGE

O-1 130

1 LAS VEGAS, NEVADA, TUESDAY, JUNE 11, 2013, 9:11 A.M.

2 * * * * *

3 (Outside the presence of the jury.)

4 THE COURT: We're on the record regarding the joint
5 motion for mistrial. We did not receive any communication to
6 my law clerk regarding any cases or anything.

7 MR. STAUDAHER: Oh, we did. Well, I didn't send it
8 to your law clerk, but I sent it to your JEA.

9 THE COURT: Okay. Who I told you yesterday was out,
10 but she was here this morning. Apparently she hasn't gotten
11 to that through her long list of emails. She was out of the
12 office yesterday.

13 MR. STAUDAHER: I'm sorry.

14 THE COURT: In any event, I've done some -- oh, some
15 research on my own and consulted with colleagues and whatnot.
16 Is there anything else from the State, since apparently you
17 did send some cases --

18 MR. STAUDAHER: Yes, we did.

19 THE COURT: -- to my JEA, which as I said, she's been
20 out. And then she just came in this morning and I'm sure she
21 probably had about 50 emails to go through.

22 MR. STAUDAHER: We went through -- we did not find
23 any Nevada cases on this issue obviously, but we did look to
24 other jurisdictions. And under U.S. v. Escalante, which is a
25 Ninth Circuit case, 637 F.2d 1197 -- and we provided these to

KARR REPORTING, INC.

1 counsel as well; Carrillo v. State, 591 SW.2d 876; State vs.
2 Shoemaker, 638 P.2d 1098; Harris v. State, 475 SW.2d 922;
3 People v. Devin, 444 NE.2d 102, and that one was not dealing
4 with a curative instruction, it dealt with the court's sort of
5 a jury instruction; State v. Banks, 961 So.2d 645; Demorez
6 [phonetic] v. State, 797 So.2d 640.

7 Carrillo, although it was overruled on other grounds,
8 actually dealt with an issue of the mention of an indictment,
9 of the defendant being under indictment in the actual
10 presentation.

11 THE COURT: Was that the same indictment or a
12 different indictment?

13 MR. STAUDAHER: Different indictment, I believe.

14 THE COURT: Okay.

15 MR. STAUDAHER: I'd have to go back and double-check
16 that.

17 THE COURT: Because obviously that's the issue. I
18 mean, a lot of defendants are under indictment. The issue is
19 a different indictment --

20 MR. STAUDAHER: Yes. Not for the current case.

21 THE COURT: -- in a different jurisdiction.

22 MR. STAUDAHER: Correct.

23 THE COURT: Whether that's federal or a different
24 state.

25 MR. STAUDAHER: Correct.

1 MS. STANISH: And my reading of that case is
2 different than Mr. Staudaher's.

3 MR. STAUDAHER: That's fine.

4 MS. STANISH: I thought there was an improper
5 question by the prosecutor in that state regarding the
6 indictment of an accomplice, not the defendant himself.

7 MR. STAUDAHER: That's, I believe, accurate, Your
8 Honor.

9 MS. STANISH: Okay. That's different from what I
10 understood you just to say to the Court.

11 THE COURT: Right. I understood it to be the same
12 defendant. Obviously that would be pertinent for Mr. Lakeman.

13 MS. STANISH: Right.

14 MR. STAUDAHER: There was an indictment issue in that
15 particular case.

16 MS. STANISH: So that had nothing to do with exposing
17 the jury to an indictment against the subject defendant. The
18 other cases, as from my late night reading about them, was
19 that they primarily --

20 MR. STAUDAHER: Could I actually do my argument
21 first?

22 THE COURT: Yeah. Why don't you let Mr. --

23 MS. STANISH: Oh, I'm sorry. Go ahead.

24 MR. STAUDAHER: With regard to those cases, although
25 they're other jurisdictions, they're a variety of other

1 jurisdictions including the Ninth Circuit. In virtually all
2 of them, with the exception of, I believe it was People v.
3 Devin, a curative instruction was given in those cases and
4 went up on appeal, all those jurisdictions to my recollection,
5 in looking at the cases.

6 And Ms. Weckerly has actually looked at the last
7 three of these. I was looking at the first four. Curative
8 instructions were deemed to be sufficient to cure that. The
9 issue raised is twofold, or it's broken down into twofold with
10 a mistrial based on the type of thing we have before the
11 Court. And there's nothing that we were able to find where
12 there was a concurrent case in another jurisdiction on the
13 same underlying facts.

14 THE COURT: Right.

15 MR. STAUDAHER: That being said --

16 THE COURT: And as I said yesterday, if it was a
17 different unrelated case, for example, guns or drugs or
18 robbery, I would see that as worse than an indictment in the
19 same case. I don't know if the defense agrees with that, but
20 to me, I would see that as more prejudicial than what we have
21 in this case, where it's an indictment on the same facts, so.

22 MR. STAUDAHER: And it boils down, at least in my
23 review, that it's basically a twofold approach; one, is it
24 clearly prejudicial, two, is it of such character as to
25 suggest that the impossibility of withdrawing the impression

1 produced on the minds of the jury by such a thing as a
2 curative instruction would be sufficient.

3 All of those jurisdictions, as I said, or I believe
4 all of them with the exception of the People v. Devin case,
5 was or were in a situation where they fell into that category,
6 a curative instruction was given, the case went forward, it
7 went up on appeal on that issue, and it was sustained by
8 the -- an abuse of discretion standard by the judge, and they
9 basically upheld that decision saying the judge did the right
10 thing.

11 Now, with regard to that, whether or not the
12 impression left in the minds of the jury can be cured by a
13 curative instruction, I would note that this whole issue of
14 the federal case has come up in the case before. We actually,
15 if we go back to -- we actually got the transcript of one --

16 THE COURT: Mr. Mathahs, I believe.

17 MR. STAUDAHER: Mathahs, so I can refer to that as
18 part of the record. On a cross-examination, the issue --

19 MR. WRIGHT: I don't have it.

20 MR. STAUDAHER: It's available on Odyssey, and we
21 said that it was filed yesterday.

22 MR. WRIGHT: I'm just telling the Court I don't
23 have it.

24 MR. STAUDAHER: But in any case --

25 MR. WRIGHT: Is it free?

1 THE COURT: If it's on Odyssey it is.

2 MR. WRIGHT: Okay.

3 THE COURT: If it's on Odyssey --

4 MR. STAUDAHER: We paid for it, but certainly
5 they're --

6 THE COURT: Okay. I mean, once it's been requested,
7 as I understand -- and Janie, feel free to pipe up here if I
8 state this incorrectly. Once it's an official transcript and
9 it's on Odyssey, as long as you can access the filings on
10 Odyssey, then you can print that out and download it just like
11 you could any other filing, just like a brief or something
12 like that. That's my understanding.

13 That's certainly how I would access it. Correct,
14 Janie?

15 THE CLERK: Once it's been filed and it's on Odyssey.

16 THE COURT: Once it's been filed. Now, if it's
17 requested, you know, by both sides or something like that, or
18 copies are requested before it's filed, then that's when the
19 charges accrue. But once it's filed, then it's accessible to
20 anyone who has access to the actual briefs and filings on
21 Odyssey.

22 MR. STAUDAHER: With regard to that, with that
23 transcript, the first time that an issue of federal proffer
24 came up in the record that we have before was on
25 cross-examination by, I believe, Mr. Santacroce. On follow-up

1 cross-examination by Mr. Wright, he delved into it in quite a
2 bit of detail as far as the relationship to Mr. Mathahs.

3 Starting on page 80 going into page 81 of the
4 transcript, he talks about the fact that the federal
5 prosecutors talked with him and that he proffered with them.
6 He actually goes through what a proffer is in that. And
7 probably most important is on lines -- I believe, page 81,
8 lines 4 and 5. He's asking a question of Mr. Mathahs in front
9 of this jury --

10 MR. WRIGHT: Who's he, me?

11 MR. STAUDAHER: You, yes.

12 MR. WRIGHT: Okay. I thought he was Mathahs.

13 MR. STAUDAHER: This is Mr. Wright's cross at this
14 point not brought up on direct examination. He says, "And the
15 federal prosecutors were contemplating prosecuting you for
16 billing fraud." So the issue of what they were prosecuting,
17 what they were contemplating bringing charges against him was
18 brought out by defense counsel in front of this jury. So
19 that's not an issue that's not been out there.

20 He then talks about the proffer agreement, and this
21 is another point that I wanted to make. He says, "Okay.
22 Well, something that you could go talk to them about where
23 they would hear what you would say and they would decide
24 whether they're going to make you a witness or a defendant, is
25 that true"; and he says okay and then goes on.

1 So it's clearly, I believe, at least the impression
2 before the jury is that there is a case, a federal case out
3 there. Whether or not it's going to get anywhere is another
4 story, but there is a federal case out there. It's a proffer
5 that was given in the --

6 MR. WRIGHT: Read that again, where I said it's a
7 case.

8 MR. STAUDAHER: You didn't say a case. You said that
9 they were going to make you a witness or a defendant. I would
10 say --

11 THE COURT: Can you read the quote directly, because
12 Mr. Wright doesn't have the benefit of a transcript?

13 MR. STAUDAHER: Sure. Okay. "So do you know what a
14 proffer agreement is, that is the question.

15 "A Not truly.

16 "Q Okay. Well, it is -- it was
17 something where you could go in and talk to
18 them and they would hear what you have to say,
19 and then they would have -- they would decide
20 whether they're going to make you a witness or
21 a defendant; is that true?

22 "A Okay."

23 That's in the same context of what he just asked with
24 regard to the billing fraud that he was essentially being
25 contemplated charge -- there were charges being contemplated

1 against him for billing fraud.

2 He goes on, on that same page, and then, I believe,
3 just make sure here, there's another reference on page 99, and
4 he talks specific about what they discussed at the federal --
5 with the federal proffer, or with federal prosecutors. It had
6 to do with the global fee and anesthesia billing specifically.
7 He mentions that on page 99, and also going into page 100.
8 Anesthesia bill, the global fee, it actually gives dollar
9 amounts for the anesthesia and so forth.

10 So at this point, the direct questioning on
11 cross-examination of Mr. Mathahs, and this is one witness, the
12 issue of a proffer in federal -- federal -- the FBI being
13 present in questioning and the U.S. attorney being involved
14 came up with Dr. Carrera, it came up with Dr. Carrol, it came
15 up with Dr. Vishvinder Sharma.

16 It came up with literally every CRNA we've had up
17 here so far that had anything to do with any kind of a proffer
18 agreement. And even as of last night we had a request for any
19 proffer agreements that were in place by, I think, Mr. --
20 Ms. LoBionda, and there was one other. So that's a recurrent
21 theme that has been going on throughout the entirety of the
22 case.

23 I don't believe that based on that, based on just the
24 line of questioning that I just quoted out of the transcript
25 of Mr. Mathahs that this is a new issue before this jury, that

1 there's no at least inference at the very least that there is
2 a federal case out there that is being prosecuted, and that
3 that witness specifically was looked upon as a target of that
4 prosecution. That's one issue.

5 So as far as the clearly prejudicial that in fact it
6 has never come out before about there being any kind of a
7 federal case involved in this, that is simply not the case.
8 It is. The fact that we have the cases which show that a
9 curative instruction in not that specific setting, but I would
10 argue similar types of settings, are -- is as a reasonable
11 accommodation.

12 And we actually proffered a curative instruction also
13 to defense counsel. I know that the Court doesn't have it,
14 but I can provide it right now.

15 THE COURT: If you would.

16 MR. STAUDAHER: May I approach?

17 THE COURT: You may.

18 MR. STAUDAHER: And we did not get anything back from
19 counsel yesterday with regard to precedent or any other
20 caselaw that would indicate an opposition to the things that
21 we're talking about here, or a curative instruction that would
22 have been proffered. So that's the only one we have. I'm
23 going to allow Ms. Weckerly, if she will, to address maybe the
24 other three cases, if there's any differences in those other
25 than the ones I've cited.

1 THE COURT: All right. Thank you. Ms. Weckerly.

2 MS. WECKERLY: Your Honor, I mean, my -- the cases I
3 read are pretty much in a similar analysis. I mean, in those
4 cases the court was called upon to examine the prejudice given
5 the facts of each particular case. And so in my view of those
6 cases, this Court has to look at what's been presented in the
7 totality of the trial to determine whether there's prejudice.

8 And in the cases that I read, it was a similar
9 analysis where the reviewing court, on an abuse of discretion
10 standard, viewed the curative instruction and whether it was
11 sufficient and in the cases I had that they did, but the
12 analysis of prejudice was always unique to the case.

13 And in -- I mean, in our case, as Mr. Staudaher
14 mentioned, I mean, there's certainly -- I don't think it's any
15 mystery to this jury that there was a federal investigation or
16 a concurrent federal case. And given that the curative
17 instructions in the cases that we cited were sufficient, it's
18 the State's view that that would be the appropriate remedy in
19 this situation.

20 The other thing that obviously is pointed out in
21 those cases is how extreme of a remedy a mistrial is, and it's
22 sort of like if there's no other alternative to cure the
23 taint. So with that...

24 THE COURT: All right. Mr. Wright, do you wish to
25 respond?

1 MR. WRIGHT: Yes, and then Margaret will discuss the
2 cases. Correct. We didn't find any cases or a prosecutor
3 deliberately elicited the fact for no legitimate or benign
4 purpose, or deliberately intentionally elicited the fact that
5 the defendant is under indictment federally for another
6 offense. So correct, no authority. I couldn't find a case,
7 Margaret couldn't, where that has been done. And so no
8 authority on that.

9 The idea that I, I guess, waived it, waived the issue
10 or invited them to do this because I cross-examined the
11 witnesses regarding their immunity, I just don't get that. I
12 don't get that listening to Mathahs's -- my cross-examination
13 of Mathahs. There's no question there has been an
14 investigation. FBI was there. CDC was there. BLC was there,
15 United States Postal Service, Homeland Security, deputy
16 attorney generals.

17 The whole crew of the team was there and
18 investigating. And because of a multi-jurisdictional
19 investigation, the State is saying it was already patently
20 obvious to the jury that Dr. Desai is currently under
21 indictment for other conduct, other offenses. I don't even
22 see the connect. This was a -- when I say deliberate and
23 intentional, I'm not saying willful. That's different.

24 THE COURT: Right.

25 MR. WRIGHT: I'm saying it was intentionally

1 eliciting it --

2 THE COURT: It wasn't a witness blurting it out, as
3 sometimes occurs.

4 MR. WRIGHT: Correct. And it was done --

5 THE COURT: And when you say willful, no one
6 believes, I don't think, that Mr. Staudaher intended to commit
7 misconduct.

8 MR. WRIGHT: Well, not to cause a mistrial. I think
9 he intended to bring out what he brought out, that Dr. Desai
10 is under indictment. And it's brought out for one purpose,
11 the inferences that it draws and what it does to the jury.
12 There's no other reason to bring it out.

13 I'm not saying -- what I'm saying, I don't believe he
14 was doing it to, you know, intentionally cause a mistrial.
15 That whole willfulness for doing it plays into the double
16 jeopardy analysis if there's then a mistrial declared.

17 THE COURT: Right. Exactly. If you were to make a
18 motion to dismiss if the Court were to grant a mistrial, then
19 you could seek to have the case dismissed on the grounds that
20 jeopardy had attached because of this and other willful
21 conduct by the prosecutor that you might refer to.

22 MR. WRIGHT: Correct. And I mean, as I understand
23 it, that's when you analyze the motivation of the prosecution
24 in engaging in it. So all I'm talking about is that it was
25 deliberately elicited.

1 THE COURT: Right. He asked the question and he
2 clearly asked it. He stated that question.

3 MR. WRIGHT: Right. And he wanted the answer that he
4 got because he knew the answer that was going to come out, and
5 that only is detrimental and harmful to Dr. Desai. And so I
6 don't know. I can't -- the curative instruction to me is
7 laughable, and I don't know how you cure the fact that from
8 the jury you're asking them to disregard that he is presently
9 indicted.

10 And of course I argued with you yesterday, I disagree
11 that the fact he's being charged for the same conduct is
12 somehow benign. I think it --

13 THE COURT: I didn't say it was benign. I said in my
14 view it's not as bad as if Mr. Staudaher elicited testimony
15 that Dr. Desai was under indictment for unrelated charges such
16 as what the federal government would bring, firearms charges
17 or drug trafficking charges. To me that would be worse and
18 clear cause for a mistrial. That's my --

19 MR. WRIGHT: I disagree. Because I could argue about
20 that he'll get his day in court there because the charges are
21 bullshit. He's charged with bribery or something. But what
22 can I argue on this? It bolsters the strength of the case on
23 the billing fraud that the United States has indicted him for.
24 So how do I address that with the jury?

25 And it was intentionally brought out. I mean, that's

1 why I get -- that's why I think it is more insidious when it's
2 the federal imprimatur on the billing fraud case. And so
3 that's why I disagree on if it was something else, because I
4 could dance better with that. I just don't see the cure
5 for it.

6 Margaret will respond to the cases.

7 MS. STANISH: Sure. Your Honor, as I previously
8 mentioned, the Carrillo case does not relate to the deliberate
9 solicitation of a pending indictment against a defendant. It
10 related to an employee of the defendant who apparently aided
11 and abetted. That person wasn't on trial, but they brought
12 out that the individual was charged.

13 THE COURT: I see that as very different.

14 MS. STANISH: Yeah, exactly. And with respect to the
15 remaining cases, as Ms. Weckerly points out, the court
16 analyzes the improper question in the context of the entirety
17 of the case, however those cases, for the most part, the
18 appellate court finds no harmless error on the grounds that
19 the solicited information was brought in for some 404(b)
20 permissible purpose.

21 And so for example, I believe the State puts a lot of
22 weight in the Ninth Circuit case of Escalante. That was a
23 drug case where the prosecutor elicited an uncharged drug
24 smuggling incident which the prosecutor mistakenly thought was
25 part of the conspiracy, and upon cross-exam it was discovered

1 no, it wasn't. And so there was -- the Ninth Circuit said
2 yes, it was improper, but, you know, we could have let it in
3 under a 404(b) analysis.

4 And the remaining cases are similar in nature in that
5 there was although the question was improper, not all of it --
6 not all these cases, by the way, Your Honor, relate to the
7 fact that the defendant was under indictment. They relate to
8 comments in closing arguments, 404(b) evidence, nothing to do
9 with indictments.

10 But the bottom line is that the appellate courts
11 found that given the -- those piece -- those inadmissible
12 evidence -- that the inadmissible evidence in those cases
13 could have been -- were not prejudicial, because they could
14 have been in on 404(b) grounds or similar analysis along those
15 lines. And of course, we don't have that here.

16 THE COURT: You don't.

17 MS. STANISH: The other thing that I think is quite
18 pertinent is the Carrillo case, because it does stand for the
19 proposition that you can cure a case and instruct the jury to
20 disregard it unless where it appears the question was
21 calculated to inflame the minds of the jurors, which our
22 position is that it was.

23 Because there was no legitimate reason for doing
24 that, and that the -- the inadmissible evidence was of such a
25 character as to suggest the impossibility of withdrawing the

1 impression that calculated question left on the minds of the
2 jury. In our opinion it was deliberate and, as Mr. Wright
3 argued, has left an impression on the jurors' mind that Your
4 Honor cannot eradicate a day after the fact.

5 Oh, and by the way, Your Honor, we could not find in
6 none of these cases address poor Mr. Lakeman's issue.

7 THE COURT: Yeah. I mean, honestly, I'll hear from
8 Mr. Santacroce, but I just don't see the prejudice to
9 Mr. Lakeman at all by the facts that the jury knows that
10 Dr. Desai and Tonya Rushing are both under federal indictment
11 and Mr. Lakeman isn't. I just don't see the -- if anything,
12 it's kind of good for Mr. Lakeman, because will the -- you
13 know.

14 I mean, I'm sorry. That's how I see it. But
15 certainly, Mr. Santacroce, you have a right to be heard.

16 MR. SANTACROCE: Thank you. Well, I strongly
17 disagree with the Court's analysis regarding Mr. Lakeman. The
18 fact of the matter is that a witness stood up there and
19 testified that Dr. Desai and herself were under indictment and
20 it's for billing fraud. And my client is directly charged in
21 this case for billing fraud, for theft, for defrauding an
22 insurance company. He is linked at the hip, as I told you
23 yesterday, with Dr. Desai, and the stink of that permeates and
24 inures to my client.

25 Now, my approach is more philosophical. The United

1 States Supreme Court many, many years ago said it's not the
2 prosecutor's job to obtain a conviction, but rather the
3 prosecutor's job is to justice. And if that is the case, it's
4 certainly incumbent upon the Court to do justice. I know it's
5 a difficult decision for this Court, but it doesn't matter if
6 the misconduct occurred on the first day of trial or three
7 months into trial.

8 THE COURT: No. Absolutely, you're correct.

9 MR. SANTACROCE: The Court has to preserve the
10 integrity of the system and preserve the due process rights of
11 these two gentlemen at all costs.

12 Now, with regard to the statement, the -- there's
13 tons of California cases on the subject, as to prosecutorial
14 misconduct and when a prosecutor asks improper questions, and
15 most of those cases were reversed on appeal. The fact of the
16 matter is not is there a connection between what Ms. Rushing
17 said the indictment was and whether they were different
18 charges or not. The question is was it an improper question,
19 did it cross the line, and I think we can all agree that it
20 did.

21 Now we have to address the remedy. There is no
22 remedy, because the remedy, as Mr. Wright said yesterday, is
23 more severe than what happened. The cure is more severe than
24 what happened. If we now go into the whole issue, what do I
25 do with my client? I have to clear up the fact that no, he is

1 not charged federally. I can't believe the mistaken
2 impression in the jury, whether they have it or not, that he
3 is attached to this federal indictment and there's no way to
4 get out of that.

5 So you asked me what the prejudice is to Mr. Lakeman.
6 I have to clear it up, Your Honor.

7 THE COURT: What -- I mean, let me say this. You
8 know, it could have come out that Ms. Rushing was under
9 indictment, and that, you know, in your view would have
10 suggested that Mr. Lakeman could be under indictment or
11 Dr. Desai could be under indictment. So to me the fact, you
12 know, is the same, and I just fail to see the prejudice to
13 Mr. Lakeman.

14 I mean, clearly Dr. Desai, that was an improper
15 question and she shouldn't have answered. It happened so
16 quickly there was no objection. I think we were all surprised
17 by the question.

18 MR. SANTACROCE: But we immediately approached the
19 bench to address it.

20 THE COURT: Right. But she said the answer, and it
21 was -- I mean, I think candidly, Mr. Staudaheer was surprised
22 by the question.

23 MR. SANTACROCE: Let me just point out the
24 distinction with regard to the proffer orders -- offers with
25 Mr. Mathahs. Every witness basically that has testified has

1 been given immunity. This was a joint task force. At every
2 single interview there was multi-jurisdictions represented,
3 including the feds. Now, none of those people were under
4 indictment. We have a right to ask about the proffer. None
5 of those people said, yes, I was indicted, not indicted.

6 The distinction here is that this witness came up and
7 said she was indicted along with Dr. Desai. There's a
8 tremendous distinction to that, because every one of these
9 proffer orders were multi-jurisdictional. They didn't result
10 in indictments. None of the witness talked about indictments.
11 Cross-examination didn't talk about indictments.

12 Now we have a witness coming out from the stand
13 saying indicted with Dr. Desai. I don't think you can cure
14 that prejudice, Your Honor.

15 MS. STANISH: Your Honor, if I can tag on that just
16 to clarify the Carrillo case, because the Carrillo case
17 factually, the prosecutor asked a witness if he knew whether
18 the defendant's associate, and I'm saying this in connection
19 with Mr. Santacroce's issue, if the defendant's associate was
20 under indictment, the defense in that case had time to object
21 before the witness blurted out the answer, and the question
22 was withdrawn and a curative instruction was then given.

23 And the court found that the question itself was an
24 improper question designed to elicit inadmissible evidence,
25 finding that the indictment of an accomplice, which Dr. Desai

1 is vis-a-vis Mr. Lakeman, that that is an improper question.
2 So, you know, the Carrillo case does stand for and support the
3 argument that association with somebody who's under indictment
4 is improper to bring before the jury.

5 THE COURT: Does the State wish to respond?

6 MR. STAUDAHER: Just one last thing out of the
7 transcript of Mr. Mathahs regarding Mr. Wright. I mean, it
8 wasn't just left that he asked about the federal proffer or
9 that there was the issue of the very facts underlying that
10 case being brought forth, or that there was the fact that he
11 was either going to be a defendant or a witness in that case.
12 Not the case. He didn't say that word, but that's clearly the
13 implication.

14 But he also ends that whole line of things by -- or
15 line of questioning by asking about the fact that, And then
16 you were not prosecuted federally, correct; correct. So he
17 brings up the fact that he -- the feds didn't do anything with
18 him as well. And I'm not trying to imply that there would be
19 an issue of -- or even a portion of the doctrine of, you know,
20 admissibility based on the fact that there was anything
21 improper done.

22 But clearly the inference there was that maybe the
23 case was dropped federally or -- it wouldn't -- and as the
24 Court pointed out, it wouldn't have been improper to ask
25 Ms. Rushing if she was under indictment in the federal case

1 and what that was about. That information came out. It
2 certainly would imply that it -- that other people were
3 involved with that type of things.

4 THE COURT: May or may not be under indictment.

5 MR. WRIGHT: Your Honor, whoa. I disagree with that.
6 I didn't know the Court thought asking her if she's under
7 indictment was proper. I never anticipated that.

8 THE COURT: Well, that question was the first
9 question which wasn't objected to.

10 MR. WRIGHT: It wasn't objected --

11 THE COURT: There's no objection there. And then
12 Mr. Staudaher followed up with the clincher question, if you
13 will, which was, And who is involved in that indictment. And
14 I think we were all so --

15 MR. WRIGHT: I was flabbergasted.

16 THE COURT: Well, I know that was your word.

17 MR. WRIGHT: I couldn't --

18 THE COURT: Surprised.

19 MR. WRIGHT: I couldn't even remember it to tell you
20 what had transpired. But bringing out she was indicted, I
21 never envisioned that would occur. How do I then
22 cross-examine her?

23 THE COURT: Well, and that -- that may not have come
24 out either. All I'm saying is if that did come out, the same
25 situation would pertain to Mr. Lakeman as pertains now. The

1 jury would be aware of federal charges and in fact, in my
2 view, that would be worse for Mr. Lakeman, because now the
3 jury's been told, even though they're --

4 You know, let me just put something else out there.
5 You know, and I say this all the time. And I think we've seen
6 with the jurors who are here that they are following the
7 instructions and that they are conscientious jurors. And I
8 think at some point you do have to trust the jury and believe
9 that if you tell them to disregard evidence and you give them
10 instructions, that they're going to do their best to follow
11 those instructions. And I do believe that with this jury.

12 And so, you know, some prejudice is too great, that
13 you can't -- you can't unring the bell as it were, you can't
14 trust an instruction to cure it. But I think at some point
15 you also have to have some confidence in the jurors and the
16 belief that they are going to follow the law and they are
17 going to diligently and conscientiously, you know, follow
18 their duties, and not just presume that they won't follow the
19 instructions, and that they will consider evidence and discuss
20 and deliberate on evidence which they've been told to
21 disregard. Just my feeling.

22 MR. WRIGHT: If that were so, there'd never be
23 mistrials, because we could just cure everything by saying
24 disregard that fire alarm that just went off, you never
25 heard it. I mean, we have to be real about the impact of

1 these things and --

2 THE COURT: And mistrials are an extreme remedy.

3 MR. WRIGHT: But only extreme remedy in the state
4 court system in Nevada, where normally every time I could have
5 forecast the State's cases before I even got them, because
6 it's always the same; is this reversible error, if we can get
7 this done is that reversible error or not, never looking at
8 does Dr. Desai get a fair trial. All we ever talk about is
9 can we salvage this case and if we do, can it withstand
10 appellate scrutiny. That isn't what this is about.

11 This is about deliberately the prosecutor -- and this
12 is a pattern in this case. This isn't the first mistrial
13 motion and I didn't invite any of them. And it just keeps
14 happening, happening, happening and the Court becomes an
15 apologist for the State each time. And what's the remedy?
16 Nothing. They get rewarded for it. That's what's happening
17 here.

18 THE COURT: Well, there have been numerous motions
19 for mistrial and I was going to point this out. This is the
20 second time Mr. Staudaher has asked a question which has been
21 misconduct and has elicited impermissible testimony, the first
22 being the Bruton issue that happened with the CDC. Some of
23 the other motions for mistrial that have been made frankly, I
24 didn't agree with the defense.

25 You know, one on the top of my head concerned

1 Ms. Weckerly conferring with Mr. Mathahs's attorney out in the
2 hallway, I didn't see that as misconduct. We went over that.
3 We don't need to go over that again.

4 So just the fact that the defense has made numerous
5 motions for mistrial does not mean, in my mind, that there
6 have been numerous instances of misconduct, because I don't
7 agree with that. I will agree with the defense on this. This
8 is the second time that Mr. Staudaher has asked a question
9 that's misconduct that has elicited an impermissible answer.
10 The first was the CDC, the Bruton issue. And this is the
11 second.

12 And even if this Court does not grant a mistrial, as
13 we all know, prosecutorial misconduct is cumulative and at
14 some point, whether another time and, you know, while each
15 error separately may be overcome by a curative instruction or
16 something like that, you know, misconduct after misconduct
17 simply can't be overcome.

18 And so if this Court does not grant a mistrial, you
19 know, Mr. Staudaher, I expect you to do whatever you need to
20 do to avoid future misconduct; meaning write your questions
21 out, if you need to have them looked at by Mr. Lalli or Mr.
22 Wolfson or someone else to make sure that they don't call for
23 impermissible -- that they're not impermissible questions,
24 then maybe you need to do that.

25 Because frankly, you know, again, this is the second

1 time that there has been a question and typically, you know,
2 in my experience, when there is an issue of impermissible
3 testimony, it was not directly solicited. It was, you know,
4 spontaneously the witness says something and it's in response
5 to a question and no one foresaw the answer, or it's an
6 open-ended question and the prosecutor just kind of stepped,
7 you know, asked the question not anticipating all of the
8 answers.

9 But in this question as well as the other question,
10 and I believe that it was one of the gals from the CDC, we
11 argued about this on the last motion, that was the only
12 possible answer and this was the only possible answer, and it
13 was designed to elicit just the testimony that came in. So I
14 have to agree with Mr. Wright on that.

15 You know, again, just the fact that they've made
16 motions for mistrial, in my view, does not establish that
17 there has been numerous instances of misconduct. But any
18 instance of misconduct is too many, and certainly now two
19 serious occurrences are way too many. That's not saying I
20 don't believe this can't be cured by a curative instruction.

21 But I'm telling you if we do that, going forward I
22 expect nothing else to occur, because you shouldn't be asking
23 these questions. You're far too experienced a prosecutor to
24 be asking questions like this. These might be questions a
25 rookie would ask that frankly didn't know that it was

1 misconduct to ask these questions. But a prosecutor at your
2 level in your office, I can't believe that you don't know that
3 you're not supposed to elicit this testimony.

4 You know, a first or second year deputy might ask the
5 questions not knowing. But I mean, you either didn't know or
6 you did it on purpose or you just weren't thinking. I'm
7 willing to give you the benefit of the doubt at this point,
8 but going forward, if we go forward, I can't -- you know, it's
9 up to you.

10 It's your job to also make sure, you know, as
11 Mr. Santacroce said, it's the prosecutor's job to do justice,
12 and that means not committing misconduct, and that means not
13 answering questions -- or I'm sorry, not asking questions that
14 you know you're not supposed to ask and then trying to put the
15 Court in the position of remedying your errors.

16 Is there anything else by either side? Anything else
17 by the State?

18 MR. STAUDAHER: No, Your Honor.

19 THE COURT: Anything else from the defense?

20 MR. WRIGHT: No, Your Honor.

21 THE COURT: All right. I'd like to go back and
22 review. As I said, I did my own research. I want to make
23 sure I covered everything.

24 MR. STAUDAHER: Would the Court like me to bring the
25 actual witness cites?

1 THE COURT: No. Security's here. I can -- I can get
2 that, and I've been making notes. And then I'll be back in a
3 few, in a few moments.

4 I will also however, say this. As I stated
5 yesterday, my recollection and my impression was that, you
6 know, everybody knew that there had been federal involvement,
7 involvement by the FBI, involvement by the United States
8 Attorney's Office, that there had been talk of prosecution by
9 the attorney's office with respect to immunity and other
10 things. So certainly that impression was there with the jury.

11 So I don't see this as being as prejudicial if it
12 just came out of left field. I mean, the jurors knew that the
13 United States attorney was involved in this. The jurors knew
14 that there was talk of immunity and whatnot with the federal
15 government, with the United States Attorney's Office. So to
16 me it's not a big jump for them to know, oh, yes, there's also
17 a case in the federal courts.

18 I don't see that as a big jump from all of the
19 evidence that's been presented in this case, and all of the
20 talk involving the FBI and the United States attorneys, and
21 immunity and federal immunity and state immunities, and
22 proffers, and a proffer with the FBI and a proffer with the
23 metropolitan police departments.

24 So there has been, you know, not just with
25 Mr. Mathahs, but with other witnesses this has come up over

1 and over again. It was the impression, I said, just I had
2 been left with and we discussed this yesterday. And certainly
3 it would be the impression that the jury is left with, you
4 know, they were aware of the United States attorney's
5 involvement in this.

6 So the fact that there is a pending federal
7 indictment, to me, is not a big stretch from what has already
8 been admitted and what was clearly admissible and was not
9 objected to as part of the case thus far. So I will say that.

10 MR. WRIGHT: I just respond to that -- just to
11 restress, all cross-examination, all defense activity in
12 examining and confronting this -- these witnesses were proper
13 and all calculated to not do what has now been done here. And
14 none of that was invited by any of my conduct or
15 Mr. Santacroce's. And I still disagree.

16 I mean, what they did with Rushing, even leaving out
17 the indictment of Dr. Desai, to put her on the stand. This
18 idea that he brought out the immunity on every other witness,
19 I heard that yesterday. I bet not more than four or five of
20 them did he bring it out, maybe Mathahs and another one or
21 two. We brought it out.

22 THE COURT: Mostly the defense brought it out, that's
23 true.

24 MR. WRIGHT: But then you put Rushing on the stand
25 and you bring out the fact that she has this federal and state

1 use immunity by which she can testify here and she has the
2 immunity only if she's truthful, which also violates Ninth
3 Circuit law on vouching for a witness.

4 And then bring out she's under indictment but she has
5 special license to come here and testify truthfully. And then
6 I'm supposed -- I'm left -- I'm supposed to cross-examine her
7 on this, which none of which should have come out? Cross -- I
8 can't even touch the indictment, immunity or anything without
9 her saying, well, he's indicted with me.

10 I mean, I don't know the motivation of it. Maybe as
11 the Court's saying, it dawned on me if the Court's saying,
12 gee, there was federal investigation, I mean, none of that --
13 I'm used to dealing with joint investigations, so to me it
14 means nothing. The feds have their nose under every tent
15 around here. There's nothing remarkable about it.

16 But I think maybe the State thought I was getting
17 some kind of unfair advantage and leaving the inference that
18 the feds had found nothing. So there was --

19 THE COURT: I certainly didn't get that impression
20 from any --

21 MR. WRIGHT: Well, I thought maybe that's why they
22 set the record straight and showed that he is indicted for it.
23 I mean, like I was saying with Mr. Mathahs, where you didn't
24 get prosecuted, whatever I said. I mean, maybe they thought I
25 was unfairly leaving the impression that he was fully

1 thoroughly investigated and the feds did nothing. It never
2 entered my mind on any of my examination.

3 But something had to have motivated him to decide to
4 set the record straight and tell the jury he's indicted for
5 billing fraud. Thank you.

6 THE COURT: Mr. Staudaher, I mean, I think you need
7 to state what were you -- you know, colloquially, what were
8 you thinking?

9 MR. STAUDAHER: Here's part of it. We had just
10 finished with Keith Mathahs -- or not Keith Mathahs, but
11 Ronald --

12 THE COURT: Ms. LoBionda?

13 MR. STAUDAHER: -- Ronald Chaffee.

14 Oh, I was thinking Mr. Chaffee.

15 THE COURT: All right.

16 MR. STAUDAHER: We just finished with Mr. Chaffee.
17 The whole issue at the very end of his testimony was that he
18 was given immunity and so forth, and that's clearly the
19 impression that was left. He was never given immunity by the
20 State. Never has been. And he's only been -- if he has
21 immunity, he was only given that by the federal authorities.

22 So that was the reason to go into that with her
23 initially, to address that issue, because she was not given
24 immunity by the State, nor was Mr. Chaffee, nor was a lot of
25 these witnesses. And I believe that there's --

1 And I know that there's been an issue with regard to
2 semantics on immunity versus whether a proffer confers
3 immunity to somebody, or whether that means that you just
4 can't get into, you know, you can't use what they said in the
5 proffer and prevents -- it has nothing to do with preventing
6 us from prosecuting somebody down the road.

7 THE COURT: And we're all in agreement what that
8 letter meant. It's just we're using disagreement of the
9 appropriate terms.

10 MR. STAUDAHER: But clearly Mr. Wright is using that
11 to at least get in front of the jury that these witnesses have
12 been granted immunity blanketly across the board, it seems to
13 me, when he asked the question. So that was the reason to
14 bring it out primarily.

15 I will tell the Court that I did intend with that
16 witness, before she testified, to bring out the fact that she
17 was under indictment with the federal authorities for her
18 activities at the clinic. The caveat question, the follow-up
19 question was I did it intentionally at the time, but was an
20 afterthought as I asked that question. It was something I
21 should not have done. I acknowledge that.

22 It was not something I started to -- planned to do
23 that portion of it. It just happened. I wasn't thinking on
24 that issue. It just happened as a result of that first
25 question, and I apologize to the Court and counsel for that.

1 I acknowledge that it was improper and I -- that's the issue.
2 I did intend to elicit from the witness that she -- she was
3 under indictment initially, and I did ask that question and
4 for what it was involved with.

5 The caveat portion of that where I asked the
6 follow-up was, I think, in frustration possibly and for what I
7 believed was going on, and maybe I wasn't thinking clearly at
8 the time and it came out. I apologize, but that was not a
9 willful thing that I was attempting to conduct -- or have
10 misconduct occur in this case. It was not my plan to do so.

11 THE COURT: Well, just because a prosecutor doesn't
12 intend to commit misconduct, as you know, doesn't make it not
13 misconduct.

14 MR. STAUDAHER: Oh, I realize that.

15 THE COURT: And as Mr. Wright pointed out, you know,
16 if a mistrial is granted and it's for misconduct, you know,
17 then he of course has the option of seeking dismissal and
18 arguing that jeopardy has attached because of willful
19 misconduct. And at that point, my understanding is Mr. Wright
20 can go back over, you know, everything that's occurred during
21 the course of the trial, to try to demonstrate pattern and
22 practice of misconduct on the part of the State.

23 And I have no doubt that that is exactly what
24 Mr. Wright would do. And as I just want to be clear, just
25 because they've made motions for mistrial, this Court does not

1 agree that those have been instances of misconduct. The ones
2 I agree with are the two questions that you, you know -- and I
3 am singling you out as opposed to Ms. Weckerly, who hasn't
4 asked these inappropriate questions. It's you who asked them.

5 And I do find while, you know, you didn't intend
6 to -- I don't think you said I'm going to do something wrong
7 here, I hope I can get away with it. I don't think you did
8 that. I think you intended to ask the question and didn't
9 really think it through and, you know, that's what I -- I'm
10 giving you the -- that's what I think you probably did.

11 You got in the heat of the moment and it's along --
12 you know, and I think, like I said, I don't think you set out
13 to do something wrong. I believe you, you know, asked the
14 question and just didn't -- just did it without thinking.

15 MS. STANISH: Your Honor.

16 THE COURT: Ms. Stanish.

17 MS. STANISH: To follow up on an issue raised by
18 Mr. Wright about the Ninth Circuit caselaw regarding vouching,
19 I think we need to explore that as well. Because when the
20 government raises the immunity issue, raises any agreements
21 regarding the person's testimony and any obligation that
22 they're going to testify truthfully, that does raise
23 unconstitutional vouching.

24 And I don't have a recollection, without reviewing,
25 what was said before this improper questioning regarding what

1 may also be what is likely, given this explanation we had
2 where he wants -- he did this for the purpose of beating us to
3 the immunity issue.

4 THE COURT: The punch line.

5 MS. STANISH: I think there's an issue of improper
6 vouching that we need to explore, and I would ask that we
7 review the -- again, the video of Ms. Rushing's testimony so
8 that we can more fully explore the application of the Ninth
9 Circuit law with respect to that.

10 THE COURT: Are you asking me to do that now?

11 MS. STANISH: Yes. Yes.

12 THE COURT: Janie, if you would cue that up, or do
13 you need to take a break to have JAVS come up?

14 All right. As I said, I wanted to review something
15 in chambers. Ms. Olsen needs to get that -- I'm happy to play
16 that again -- needs to have that cued up on JAVS, and then
17 we'll go through that portion of the testimony again. All
18 right. If anyone needs a brief recess, go ahead and take it.

19 (Court recessed at 10:01 a.m. until 10:11 a.m.)

20 (Outside the presence of the jury.)

21 THE COURT: Mr. Santacroce, will you do me another
22 favor?

23 MR. SANTACROCE: Sure.

24 THE COURT: When you were outside, did you see a sign
25 on the door directing people to Department 8 for the morning

1 calendar?

2 MR. SANTACROCE: I'll check.

3 MR. WRIGHT: I was looking for my co-counsel, but I'm
4 not allowed to go in the ladies room.

5 MR. SANTACROCE: Yes. There's a sign on the door.

6 THE COURT: Is it a prominently displayed sign?

7 MR. SANTACROCE: Very prominent.

8 THE COURT: Okay. Well, I asked Mr. Santacroce,
9 because about eight people came in during the argument,
10 including the chief deputy assigned to this department who
11 wheeled his little cart in here, and --

12 THE MARSHAL: [Inaudible] not enough?

13 THE COURT: -- a P&P officer who should be trained in
14 observation wandered in and thought we were doing -- I'm doing
15 the morning calendar, so.

16 All right. Janie, have you found the area? All
17 right. We'll go ahead and --

18 (Audio/video played for the Court - not transcribed.)

19 THE COURT: All right. That's it.

20 MR. WRIGHT: Did you hear how squeaky I sounded?

21 THE COURT: Only because I wasn't speaking, and you
22 can't compare yourself to my voice.

23 All right. He didn't get into whether or not she was
24 going to be testifying truthfully or anything like that, so I
25 don't see an issue there. Also, it would occur to me that she

1 might have an expectation of benefits from -- on the federal
2 case if she testifies. In this case, I don't know if
3 that's --

4 I'm not that familiar with what happens in the
5 federal system criminal side, whether or not that's something
6 that's calculated in the sentencing guidelines or something
7 like that. I assume that it is. Ms. Stanish is nodding.

8 So certainly that's an area that, you know, could be
9 explored, as to her bias or motive to testify in this case and
10 testify favorably for the prosecution, if she's expecting a
11 benefit from the judge or the U.S. Attorney's Office or
12 anything like that in connection with her federal case, which
13 certainly seems likely to me.

14 Because of course you're left wondering, well, why on
15 earth would she cooperate testifying if she's not getting a
16 benefit for it, and of course she's anticipating a benefit.
17 So I think that, you know, that's certainly a fair, I guess,
18 subject just in that regard goes to her motive and bias. All
19 right.

20 MR. WRIGHT: I had -- did she say it can be used
21 against her? I mean --

22 THE COURT: Yes. She's --

23 MR. WRIGHT: -- she even misstated her immunity.

24 THE COURT: Well, she did misstate her immunity,
25 that's true. And that may have been a slip of the tongue on

1 her part, or she may not understand -- she may not really
2 understand the immunity agreement, which also then would go to
3 the truthfulness of her testimony.

4 Because if she feels like her testimony can be used
5 against her, then obviously she has a motivation to paint
6 herself in the best positive light and Dr. Desai in the worst
7 possible light, if she thinks that somehow her testimony can
8 be used against her. Obviously in that situation, if that's
9 really what she thinks and it's not a slip of the tongue,
10 she's not going to -- she's going to say as little implicating
11 herself as she can.

12 And we all know people are notoriously bad at not
13 implicating themselves when they're trying not to implicate
14 themselves, as I'm sure Detective Whitely would agree. But
15 that's, I think, something that it may have been a slip of the
16 tongue. If it's not, I think that that could be significant
17 with her motive and everything like that.

18 Getting back to the issue of the mistrial, as I said,
19 you know, the impression is out there, the U.S. Attorney
20 involvement, people making proffers, whether or not Mr.
21 Mathahs is going to be indicted. As I've said several times
22 already, but I'll say it again, I don't think it's a fair, you
23 know, stretch to conclude or to surmise that there's also
24 possible federal charges.

25 At the end of the day the issue here is whether or

1 not Dr. Desai can have a fair trial notwithstanding what has
2 gone on. You know, looking at a footnote in the Bruton case,
3 you know, the Court must grant a mistrial when the defendant's
4 chances of having a fair trial have been irreparably damaged.

5 So at the end of the day the question is can
6 Dr. Desai get a fair trial notwithstanding the misconduct and
7 the answer to the question. In my honest opinion, I believe
8 that Dr. Desai can still get a fair trial notwithstanding the
9 testimony of the federal indictment for the reasons I've
10 already stated both today and yesterday.

11 I think that certainly a curative instruction is
12 appropriate if the defense requests that. As you know,
13 Mr. Staudaher and Ms. Weckerly have offered an instruction.
14 You know, that instruction looks all right to me. The one the
15 Court had thought of was a little bit simpler, but I'd
16 certainly accept or consider anything offered by the defense.

17 What the Court had thought would be something like
18 whether or not there is a federal indictment against Dr. Desai
19 for the same or similar charges is irrelevant and may not be
20 considered by you as evidence in this case.

21 Previously on another issue the defense had asked
22 that the Court provide an instruction that it was misconduct.
23 The Court would be willing, if requested to do so, to provide
24 such an instruction to the jury, something to the effect of
25 you are instructed that the last question by Mr. Staudaher of

1 this witness and her answer was improper, and the question
2 constituted prosecutorial misconduct.

3 And then the instruction whether you are told to
4 disregard it and then something like whether or not, or
5 something to that effect, that's the Court's suggestion. I'd
6 be willing to do something like that if requested to do so by
7 the defense.

8 So, you know, going forward, what -- you know, your
9 motion for a mistrial has been denied, understanding that
10 going forward at this point and as I said, it is my true and
11 honest belief that Dr. Desai can still receive a fair trial.
12 And as I said, I just don't see the prejudice to Mr. Lakeman,
13 so I think implicit in that is my belief that Mr. Lakeman can
14 also get a fair trial going forward.

15 What, if any instruction would the defense, starting
16 with Dr. Desai's attorneys, would the defense like the Court
17 to give to the jury?

18 MR. WRIGHT: What cross-examination is Mr. Santacroce
19 going to be allowed? I mean, I just want to know before --

20 THE COURT: I believe that the answer, the answer
21 that's been given doesn't really call for cross-examination in
22 my view, but I'll certainly hear from Mr. Santacroce on this.
23 I know he feels differently. Because the answer was that she
24 and Dr. Desai were under indictment, so it's obvious that
25 Mr. Lakeman isn't under indictment.

1 MR. SANTACROCE: Well, it's not so obvious to me,
2 Your Honor. It may be obvious to you, and I think I should be
3 allowed at least one question to ask her the indictment for
4 which she and Dr. Desai are under federally does not include
5 Mr. Lakeman.

6 THE COURT: The problem with that, Mr. Santacroce, is
7 this. We tell them it's irrelevant as to whether or not
8 anybody's under indictment. Well, I can't tell them it's
9 irrelevant and then ask you to bring out evidence relating to
10 the indictment. It's either irrelevant and they can't
11 consider it, or they can consider it.

12 MR. SANTACROCE: But you're the one that's saying
13 it's irrelevant in the instruction.

14 THE COURT: Well, I don't have to use that word. But
15 I mean, that's the gist of it, that it may not be considered.
16 Now, whatever word, I'm certainly happy to accept words
17 offered by the defense. Those, you know, that's just a
18 suggestion, what I thought of.

19 MR. SANTACROCE: Well, if the Court instructs me not
20 to do that, I won't do it.

21 THE COURT: You know, but I can give a different
22 instruction. It can't be obviously considered as evidence
23 against anybody. But, you know, my feeling is A, I don't see
24 the prejudice to Mr. Lakeman. I think her answer was
25 complete. She said it was her and Dr. Desai. It was she and

1 Dr. Desai who are under indictment.

2 She did not mention Mr. Lakeman in any way. So the
3 evidence that we're going to tell the jury not to consider, so
4 it's really not evidence. But they didn't hear anything
5 negative about Mr. Lakeman at all, and so I just don't really
6 see the need for cross-examination on that. But certainly
7 I'll listen to your arguments.

8 MR. SANTACROCE: I don't have anymore argument with
9 that.

10 THE COURT: Okay.

11 MR. SANTACROCE: I'll accept what the Court says.
12 But I do have a related issue, because on this whole immunity
13 issue, the State is saying she hasn't been offered immunity,
14 and I am confused.

15 Because in the grand jury transcript, on page 55,
16 Mr. Staudaheer asks, Out of the abundance of caution, although
17 you're not a State target in this particular case and you've
18 made the proffers that you have in the past, out of the
19 abundance of caution we're telling you today, from the State's
20 perspective, that you in fact are not going to be a subject to
21 prosecution by anything you say during this proceeding today,
22 correct? The answer, Correct.

23 I don't know how they can say and elicit from her
24 intentionally that she has no State immunity. Is that not
25 State immunity?

1 MR. STAUDAHER: It was her intent -- it wasn't --
2 well, I mean, it is what it is as far as the transcript is
3 concerned, but she was never conferred any immunity in the
4 case. She felt she knew that she could be prosecuted when she
5 came down to testify before the grand jury.

6 MR. SANTACROCE: But he said --

7 MR. WRIGHT: Whoa, whoa.

8 THE COURT: Did you send her a Marcum notice?

9 MR. STAUDAHER: No. We didn't send her a Marcum
10 notice.

11 THE COURT: No. I mean, she was subpoenaed as a
12 witness.

13 MR. WRIGHT: She has immunity.

14 THE COURT: So I mean, she didn't think --

15 MR. STAUDAHER: Yes, that's what I mean.

16 THE COURT: -- she could be prosecuted at the grand
17 jury. That's what I heard you say.

18 MR. STAUDAHER: Oh, no, no, no. Not that she was
19 prosecuted down there at the grand jury, but that she could
20 become a target in this case. She was never conferred any --

21 MR. SANTACROCE: How much plainer --

22 MR. STAUDAHER: I mean, they can ask her.

23 THE MARSHAL: One at a time, Counsel. One at a time.

24 MR. SANTACROCE: How much plainer can that language
25 be; she's not a target, she's not going to be prosecuted? And

1 he elicits the testimony from her saying you weren't given
2 immunity, were you.

3 I don't understand his questioning at -- he asks
4 questions he knows are false. Just like with Mr. Chaffee, the
5 same thing. He asked the question about the reuse of needles
6 when he knew it was false. They pretried him by
7 Mr. Chaffee's testimony and asked him that question.

8 He keeps asking improper questions throughout the
9 trial, and it's -- for him to ask the question she did not
10 have immunity when he tells her he's got immunity at the grand
11 jury, I don't get it.

12 MR. STAUDAHER: She never came before the grand jury
13 on -- only because she would be given immunity from
14 prosecution in the case. She knew from the time we proffered,
15 from the time we've talked to her throughout the entirety that
16 we hadn't made a decision in that regard yet.

17 THE COURT: Well, was that conveyed to her, her
18 attorney?

19 MR. STAUDAHER: Yes, that she had not made a -- we
20 had not made a decision. She agreed to come down and do the
21 proffer. The proffer itself, nothing could be used against
22 her. Clearly that was part of it. So her indication there
23 was that, yes, we would not use that against her.

24 We had not made a decision on prosecuting her or not
25 prosecuting her. She agreed to come down before the grand

1 jury and essentially give testimony, but we at that time, to
2 the best of my recollection, did not have any agreement in
3 place that we would give her immunity from prosecution,
4 period.

5 MR. SANTACROCE: Your Honor, the State's quote,
6 Mr. Staudaher's quote is, "We are -- quote, we are telling you
7 today from the State's perspective that you are in fact, are
8 not going to be subject to prosecution by anything you say
9 during this proceedings today, correct? Correct."

10 MR. STAUDAHER: The grand jury proceedings.

11 MR. SANTACROCE: And that is his direct quote. Now
12 for him to stand up here and say she wasn't given immunity is
13 absolutely disingenuous at the least and misleading at best.

14 THE COURT: So what are you asking? I mean --

15 MR. SANTACROCE: Look --

16 THE COURT: I mean, I guess, Mr. Santacroce, what are
17 you asking for?

18 MR. SANTACROCE: I am asking to clarify her immunity,
19 and for my cross-examination, I want to get into the fact that
20 she has been given immunity.

21 THE COURT: That's -- by the State, that's fine.

22 MR. SANTACROCE: But he -- he has to be instructed
23 not to keep asking questions he knows are false.

24 THE COURT: Well, okay. To be fair to Mr. Staudaher
25 in this regard, what you've read to me can easily be

1 interpreted not as immunity from prosecution, but immunity for
2 whatever she says during her testimony before the grand jury,
3 that --

4 MR. WRIGHT: She gets to commit perjury?

5 THE COURT: Well, that's what he says. But I'm
6 saying it can easily be -- look, I wasn't there. I didn't
7 tell Mr. Staudaher what to say. I'm, you know, hearing it
8 cold like you folks. What does that mean? Well, to me what
9 it sounds like is she has immunity for what she's saying in
10 front of the grand jury. That's what it sounds like.

11 Was that your intent, Mr. Staudaher?

12 MR. STAUDAHER: Yes, Your Honor. I mean, when I
13 asked the question in court today -- or yesterday rather, I
14 asked her if she was ever conferred State immunity in this
15 case. Her answer was no. If that's what her impression is
16 from what we've --

17 MR. WRIGHT: It's false answer. She has --

18 THE COURT: Well, Mr. --

19 MR. WRIGHT: She has use immunity. Why do we keep
20 dancing around this? She has use immunity conferred on her.
21 It's immunity. And he keeps misrepresenting and he stands up
22 in front of the jury and says, you don't have immunity, and
23 it's lies. And we just keep accepting it and tolerating it.
24 It's immunity. That's what she has. Correct?

25 THE COURT: She has immunity for the use of her

1 statements unless -- and I don't remember the exact language
2 to the letter, unless they were found to be false or
3 inconsistent with her prior statement or perjury, in which
4 case --

5 MR. WRIGHT: Or if she changes her story.

6 THE COURT: I said inconsistent with her prior
7 statement. I believe -- I don't have the letter in front of
8 me. That's from my memory.

9 All right. So going forward, let's deal with one
10 issue at a time. Going forward, what if any instruction would
11 the defense, starting with Dr. Desai's attorneys, would the
12 defense like me to give to the jury?

13 MR. WRIGHT: What you said. I want to hear it again.

14 THE COURT: All right. Here's what I -- all right.
15 Here by just chicken scratch, but ladies and gentlemen, you
16 are instructed that the last question to this witness --

17 MR. WRIGHT: And we have to say what it was. They
18 aren't even going to know what the hell the last question was,
19 Judge. I mean, we're going to have to inform --

20 THE COURT: Well, that, I might highlight it.

21 MR. WRIGHT: Well, I -- highlight it? How can it be
22 any higher? My client's under indictment by the feds. I
23 mean, we're not going to put --

24 THE COURT: Well, it'll be obvious. I mean, I'll say
25 whatever, you know --

1 MR. WRIGHT: The information that --

2 THE COURT: Here's what I was going to say. You are
3 instructed that the last question to this witness from
4 Mr. Staudaher was improper and constituted prosecutorial
5 misconduct. You are instructed to disregard the question and
6 the answer thereto. Whether or not there is a federal
7 indictment against Dr. Desai for the same or similar charges
8 is irrelevant, and may not be considered by you as evidence in
9 this case.

10 I'm happy to modify that as suggested by the defense.
11 That -- I can give the State's instruction. This is what I
12 thought of.

13 MR. WRIGHT: Say the last part again.

14 THE COURT: Whether or not there is a federal
15 indictment against Dr. Desai for the same or similar charges
16 is irrelevant and may not be considered by you as evidence in
17 the case. I can give that instruction. I can not talk about
18 the misconduct. I can only say whether or not there's a
19 federal indictment may not be considered by you. I can call
20 it misconduct.

21 I mean, if I say whether or not there's an indictment
22 and don't call it misconduct, then, you know, the jury can
23 also, I mean, it's maybe a little more innocuous that okay,
24 well, why do we need to convict him here if the feds are just
25 going to do it, you know, have their own case. I mean, so

1 there's different, you know, ways to think about doing this.
2 This is something I thought of.

3 The other thing, you know, we can -- is Ms. LoBiondo
4 here?

5 UNKNOWN SPEAKER: She is.

6 THE COURT: All right. Another possibility is if you
7 want time to decide this, we can finish with Ms. LoBiondo's
8 testimony and then decide on the instruction, and bring
9 Ms. Rushing in after we're done with Ms. LoBiondo. And then
10 the Court will instruct them however we decide. And I'm happy
11 to take -- as I said already, you know, I'm not married to
12 this. It's something I thought of.

13 The State, I think their instruction's okay. That's
14 fine too. You know, I said the -- I offered to give the
15 misconduct instruction because that had been requested
16 previously on another issue. And so, you know, if I think
17 this rises to that level, if the defense wants me to make that
18 instruction and give them that instruction, I will do that.

19 MR. SANTACROCE: I'm fine with your instruction that
20 includes the prosecutorial misconduct as you read it to us.
21 I'm fine with that.

22 MR. WRIGHT: I'm going to need to consult with my
23 client for a moment and the -- and I would just rather do it
24 now, before LoBiondo. I mean, I want to address it because
25 that was the last they heard.

1 THE COURT: Okay. So do you want a few moments to
2 confer?

3 MR. WRIGHT: Yes.

4 (Court recessed at 10:33 a.m. until 10:45 a.m.)

5 THE COURT: All right. As soon as Mr. Wright comes
6 back. And Ms. Stanish, did you have an opportunity, ample
7 opportunity to confer with your client, Dr. Desai, regarding
8 what you're requesting as an instruction?

9 MS. STANISH: Yes, Your Honor.

10 THE COURT: All right. Mr. Wright, have you had an
11 opportunity along with Ms. Stanish to confer with your client,
12 Dr. Desai?

13 MR. WRIGHT: Yes.

14 THE COURT: And what are the defense's wishes
15 regarding an instruction to the jury?

16 MR. WRIGHT: As you stated. I want to make sure
17 it's -- you are instructed to disregard, instead of the last
18 witness, I want to use Tonya Rushing, I mean, just so
19 there's --

20 THE COURT: Okay. So just read to me --

21 MR. WRIGHT: Well, I didn't -- you are instructed --

22 THE COURT: Well, I said that the last question to
23 this witness, but you would like to say Tonya Rushing?

24 MR. WRIGHT: Correct. The last question and answer.

25 THE COURT: From Mr. Staudaher was improper and

1 constituted prosecutorial misconduct.

2 MR. WRIGHT: Yes.

3 THE COURT: You are instructed to disregard the
4 question and the answer given by Ms. Rushing; you want that?

5 MR. WRIGHT: Yes.

6 THE COURT: Whether or not there is a federal
7 indictment against Dr. Desai for the same or similar charges
8 is irrelevant and may not be considered by you as evidence in
9 this case; are you fine with that?

10 MR. WRIGHT: Yes.

11 (Pause in proceedings)

12 MR. WRIGHT: Yes.

13 THE COURT: All right. Is there anything else we
14 need to deal with before we bring the jury in, and then I'm
15 assuming we'll conclude with the testimony of Ms. Rushing?

16 MS. WECKERLY: I think that Mr. Wright wants the
17 instruction, but to do the cross of LoBiondo.

18 THE COURT: Okay. So is that what you want,
19 Mr. Wright? You want me to --

20 MR. WRIGHT: To instruct the jury right now.

21 THE COURT: Right. Instruct them immediately when
22 they come in?

23 MR. WRIGHT: Yes.

24 THE COURT: And then you would like to finish with
25 Ms. LoBiondo and do her cross?

1 MR. WRIGHT: Yes.

2 THE COURT: Okay.

3 MR. SANTACROCE: Can you just add on that instruction
4 that it's irrelevant to both defendants, somewhere in there?

5 THE COURT: Against either defendant?

6 MR. SANTACROCE: Yes.

7 THE COURT: So -- all right. All right. Kenny,
8 bring them in.

9 And just so it's clear for the record, that is the
10 instruction that you would like me to give?

11 MR. WRIGHT: Yes.

12 MR. SANTACROCE: Yes.

13 THE COURT: All right. And Ms. Weckerly or
14 Mr. Staudaher, what's your lineup for today?

15 MS. WECKERLY: We have Ms. LoBiondo, Tonya Rushing.
16 And then if we get farther we have Ryan Cerda and Kathy Bien.

17 THE COURT: Okay. So Ryan Cerda is who?

18 MS. WECKERLY: He was the person that entered the
19 actual billing stuff for the anesthesia records. So the other
20 two are just very short witnesses, so I don't know if we'll --
21 we kind of have them coming in, in the late afternoon.

22 (Jurors reconvene at 10:50 a.m.)

23 THE COURT: Court is now back in session. The record
24 should reflect the presence of the State through the deputy
25 district attorneys, the presence of the defendants along with

1 their counsel, the officers of the court, and the ladies and
2 gentlemen of the jury.

3 Ladies and gentlemen, before we begin with the
4 testimony this morning, I must give you the following
5 instruction. Ladies and gentlemen, you are instructed that
6 the last question to Tonya Rushing from Mr. Staudaher was
7 improper and constituted prosecutorial misconduct. You are
8 instructed that you are to disregard the question and the
9 answer given by Ms. Rushing. Whether or not there is a
10 federal indictment against Dr. Desai for the same or similar
11 charges is irrelevant and may not be considered by you as
12 evidence in this case against either defendant.

13 I believe going forward this morning we will resume
14 with the testimony of Ms. LoBiondo. You'll recall that her
15 testimony was interrupted prior to cross-examination. So
16 Officer Hocks, would you please retrieve Ms. LoBiondo, and we
17 will resume her testimony.

18 ANNAMARIE LOBIONDO, STATE'S WITNESS, PREVIOUSLY SWORN

19 THE COURT: Mr. Wright, you may proceed with your
20 cross-examination.

21 MR. WRIGHT: Thank you.

22 CROSS-EXAMINATION

23 BY MR. WRIGHT:

24 Q Ma'am, my name is Richard Wright, and I
25 represent Dr. Desai. Okay.

1 A Yes.

2 Q Have we ever met?

3 A No.

4 Q Okay. I'm going to ask you a lot of questions
5 about your background, your years of employment at what I call
6 the clinic, meaning working for Dr. Desai, and questions about
7 your prior testimony, okay?

8 A Yes.

9 Q And if you have any questions, if you don't
10 understand anything I'm saying or if you're confused on any of
11 my questions, don't be bashful. Just say I don't understand
12 or you're -- just speak up, okay?

13 A Yes.

14 Q Okay. Now, you are a CRNA, correct?

15 A Yes.

16 Q And as I understand your testimony here, you
17 have a bachelor's degree in nursing?

18 A Yes.

19 Q And two master's degrees?

20 A Yes.

21 Q One in CRNA-ing, and the other was in being a
22 nurse practitioner?

23 A Yes.

24 Q Okay. What's a nurse practitioner?

25 A A nurse practitioner is a nursing professional

1 who is -- has gone to a master's -- through a master's
2 program, a master prepared professional who specializes in a
3 certain area of patient care. My specialty was pediatrics, so
4 in the care of children, and well children, sick children --

5 Q Okay.

6 A -- children in all aspects of development.

7 Q And you did that first, before becoming a CRNA,
8 correct?

9 A Yes, I did.

10 Q All of your education was in the New York
11 system?

12 A Yes.

13 Q Okay. And your employment before moving to
14 California was in the New York system?

15 A Yes.

16 Q Okay. And that's --

17 A In CRNA also.

18 Q Oh, correct. And in that system often you're
19 working in like teaching hospitals?

20 A Yes.

21 Q Okay. And so you are around other CRNAs or
22 anesthesiologists and students, correct?

23 A Yes.

24 Q Okay. And that is dissimilar from the practice
25 here in Las Vegas, correct?

1 A Yes, very much so.

2 Q Okay. And you moved first to California,
3 correct?

4 A Yes.

5 Q And you practiced how long in California as a
6 CRNA?

7 A From 1992 until 1994.

8 Q Okay.

9 A Sometime during that year.

10 Q Right. Approximately though, we're looking at,
11 just for a time frame. And the -- do you recall when propofol
12 came onto the scene --

13 A Yes.

14 Q -- year-wise?

15 Was it like while you were in California, or back in
16 New York?

17 A Well, they were developing it when I was in New
18 York, but we were not using it yet at our hospital. We were
19 still using other sedative hypnotics. When I went to
20 California, I began using it at the hospitals that I worked in
21 there.

22 Q Okay. And so when propofol first came available
23 in the '90s, you started utilizing it in your practice?

24 A Yes.

25 Q Okay. And you were -- in California you worked

1 in what kind of practice?

2 A I worked at the VA Medical Center in Long Beach,
3 which was affiliated with -- I can't -- all the sudden I'm
4 [inaudible] blank.

5 Q That's all right. A practice group?

6 A Sorry. Of the VA Medical Center in Long Beach,
7 Kaiser Permanente Hospital system, and all throughout
8 California. I would rotate to different hospitals. I worked
9 for what they called a resource network, where I would rotate
10 to different hospitals for Kaiser. And I also worked for two
11 private practice anesthesia groups, where I would go into
12 offices throughout Los Angeles and Orange County and do
13 various procedures in office based practices.

14 Q Okay. And by that time, in California, you were
15 using a full range of anesthesia products including propofol?

16 A Yes.

17 Q Okay. And when you -- propofol, when it first
18 became available, was a new type of anesthesia, correct?

19 A Yes.

20 Q Okay. And do you remember how it first came --

21 A It came in a glass vial.

22 Q Okay. And when it was in the first glass vial,
23 were there issues about whether, what do you call it,
24 bacterial preservatives in it or something?

25 A Yes. It had a preservative, but because it's a

1 lipid substance, lipid base, you have to be very careful
2 with -- with how you use it.

3 Q Okay. The -- and --

4 A Sterile technique.

5 Q I'm sorry. Did you finish your answer?

6 A Yes.

7 Q Okay. A lipid substance, I don't know what that
8 means. But let's talk like with Demerol, that's -- were you
9 using Demerol?

10 A Yes.

11 Q Okay. Is that a less fragile substance? I
12 don't know the correct terminology.

13 A Well, it's -- there's not -- we were very
14 careful with propofol because it was new and because of the --
15 it was a what they call a cremophor. It was a lipid. Because
16 of its properties you had to be extra careful. And also
17 because it came in a glass vial, that was another precaution
18 you had to take. Demerol is not like that. It's -- usually
19 comes in a -- it could come in a glass vial too, it didn't
20 really matter.

21 It's just the property of the substance is different
22 than --

23 Q Okay.

24 A -- in the -- there wasn't as much of a chance
25 of -- I mean, you're still careful with everything. You

1 weren't less careful with any other substances, so.

2 Q Okay. With propofol, is there a greater chance
3 of bacterial growth?

4 A Yes.

5 Q Okay. And did it have -- see, I don't know on
6 the others. Are there some anesthetics that once you're using
7 it you could use it the next day?

8 A It had been practiced for years and everywhere
9 that there are vials that, you know, were opened that you were
10 label and be able to reuse the next day.

11 Q Okay. Because they had sufficient antibacterial
12 preservatives or something that allowed that?

13 A Yes.

14 Q And as long as you were clean in your handling
15 of it, that was permissible?

16 A For years everywhere, even in doctors' offices
17 with vaccines. It was always done like that.

18 Q Okay. And when propofol came along, it has a
19 shorter when opened shelf life?

20 A Yes.

21 Q And that is like how long?

22 A Six hours. However, if you had a small vial,
23 it -- I don't know of an occasion where it's going to be out
24 that long.

25 Q Okay. And it's basically once opened, use

1 rather quickly or you're going to throw it away because it
2 cannot be preserved?

3 A Yes.

4 Q Okay. Now, you came to Las Vegas and you
5 explained you worked a couple of places before going to work
6 for Dr. Desai in 2000, correct?

7 A Yes.

8 Q So you were here, I think you said you came to
9 Las Vegas in 1994, so you worked about six years before
10 starting employment with Dr. Desai's clinic?

11 A Yes.

12 Q And you worked for several different places you
13 said, like Lake Mead Hospital, which is now North Vista,
14 correct?

15 A Yes.

16 Q And at -- then -- and during those times you
17 were CRNA-ing?

18 A Yes. I was not employed by the hospital.

19 Q Okay. You were employed by a group?

20 A Yes. Well, that's the way it works in Las
21 Vegas. No anesthesiologist is employed by any hospital here.
22 It may be changing now, in 2013. But at that time I worked
23 with a group.

24 Q Okay. And the group you work with have an
25 anesthesiologist plus yourself?

1 A In every group?

2 Q No.

3 A Are you asking -- can you be more specific?

4 Q Yes. The -- did you practice -- before you went
5 to work with Dr. Desai, did you practice at times with an
6 anesthesiologist?

7 A Yes.

8 Q Okay. And was that in bigger longer procedures?

9 A Usually, yes.

10 Q Okay. And so a CRNA and an anesthesiologist, an
11 MD anesthesiologist would be working at the same time?

12 A It depends on the facility or the -- or the
13 case.

14 Q Okay.

15 A There were times when I would work alone.

16 Q As a CRNA?

17 A Yes.

18 Q Okay. And when you did that --

19 A And do my own cases.

20 Q And when you did that it was perfectly lawful,
21 permissible and within your realm and proper?

22 A The Nevada state law states that a CRNA is
23 allowed to practice with a -- any licensed doctor, podiatrist
24 or dentist.

25 Q Okay. And so when -- if you are -- a

1 procedure's being performed by a podiatrist, dentist or doctor
2 in which he needs a patient to be put to sleep and uses you
3 for the services, then he is the physician that you are
4 working under --

5 A Yes.

6 Q -- correct?

7 A Yes.

8 Q And when you -- during your six years in Las
9 Vegas before Dr. Desai's clinics, were you doing the full
10 array of anesthesia including propofol?

11 A Yes.

12 Q Okay. And so you come and are -- how did you
13 get to Dr. Desai?

14 A I was working in a physician's office doing
15 anesthesia, plastic surgery cases, and a doctor came in, an
16 anesthesiologist came in and asked me if I was interested in
17 working for Dr. Desai.

18 Q Okay. And the -- so this was -- was this an
19 anesthesiologist who knew Dr. Desai?

20 A Well, I would imagine he knew Dr. Desai. I did
21 not know him.

22 Q Okay. Do you know if that anesthesiologist
23 worked -- so he's an anesthesiologist. He said are you
24 interested in working for Dr. Desai's clinics, and so you
25 responded and went and were interviewed?

1 A I did not know Dr. Desai prior to that, but I
2 did agree to go and meet with him for an interview.

3 Q Okay. And so were you interviewed by Dr. Desai?

4 A Yes.

5 Q Okay. And at that time there was no CRNA
6 practicing in Dr. Desai's clinic, correct?

7 A I did not know of one.

8 Q Okay. Well, you were hired as the first CRNA is
9 your understanding?

10 A Yes.

11 Q Okay. And when you were hired in 2000, were
12 there also anesthesiologist MDs working at times in Dr.
13 Desai's clinic?

14 A There were MD anesthesiologists who would work
15 there and cover when I could not be there.

16 Q Okay. Because at the time you were the only
17 one?

18 A Yes.

19 Q And there were times you were off on vacation or
20 whatever?

21 A Yes.

22 Q And so at that time an MD anesthesiologist would
23 work there is your understanding?

24 A Yes.

25 Q Do you know who they were? Do you recall any of

1 them?

2 A Pardon me?

3 Q Do you recall any of the MD anesthesiologists?

4 A Dr. Yee was one of them.

5 Q Yee, Y-e-e?

6 A Yes.

7 Q Okay.

8 A There were -- I don't how many and I'm sorry I
9 cannot recall their names. There were doctors who came from
10 Southwest Medical Associates group, I believe. I don't recall
11 their names right now.

12 Q Okay. And I ask you questions, if you remember
13 them, fine. I mean, because I've never been able to interview
14 you or talk with you, so at times I'm just fishing and trying
15 to get information that you know or don't know.

16 A Okay. Now, you start -- when you started work,
17 what -- and I'm talking about at the clinic now, did you start
18 at Shadow Lane?

19 A Yes.

20 Q Okay. And it was at that time one procedure
21 room, correct?

22 A Yes.

23 Q Okay. And did you work exclusively there or
24 elsewhere for Dr. Desai at the beginning?

25 A I -- at the beginning I worked exclusively

1 there.

2 Q Okay.

3 A Although I did sometimes go to North Vista to do
4 procedures with -- pain procedures, anesthesia for pain
5 management procedures at North Vista Hospital with Dr. Maduka
6 [phonetic].

7 Q Okay. And what -- what anesthesia was being
8 utilized, when you were hired at Dr. Desai's clinics, for the
9 procedures?

10 A At first we were using Demerol and Versed.

11 Q Okay. And then while you were there on what I'd
12 call your first stint, your first period of employment, which
13 was 2000 to 2004, correct?

14 A Yes.

15 Q Okay. That first period you evolved into
16 propofol; is that correct?

17 A Yes.

18 Q And do you recall why the transition?

19 A We decided to use propofol because it's a great
20 anesthetic. Patients can be comfortable and rest during
21 procedures. It's a sedative-hypnotic with a little bit of
22 amnesia, and it -- patients were able to tolerate the
23 procedures and wake up nicely, quickly. They were not
24 nauseous, or they didn't have that hung-over feeling that you
25 get with Demerol. And Demerol, many people could not tolerate

1 Demerol.

2 Q Okay. So propofol, quick-acting, quick
3 recovery, no -- no -- not the same side effects as some of the
4 other anesthetics?

5 A Yes.

6 Q Okay. And the -- so propofol was tried and
7 became the standard at the clinics; is that correct?

8 A Yes.

9 Q Okay. And your injection practices pre,
10 pre-propofol and when you started using propofol, were your
11 practices the same working for Dr. Desai in the
12 administration; the way you did your job, was it the same as
13 you had been doing?

14 A I'm trying to understand exactly what you mean
15 by "the same."

16 Q Okay. The -- you had been administering
17 anesthesia for 15 years when you went to work for Dr. Desai,
18 correct?

19 A Yes.

20 Q Okay. And so you had certain procedures, your
21 standard policy. Like how you drew up Demerol, how you drew
22 up propofol, how you injected it, you had standards that you
23 had developed and followed, correct?

24 A Yes.

25 Q Okay. And so when you went to work for Dr.