BY MS. WECKERLY:

Q Mr. Labus, Mr. Santacroce showed you State's Exhibit 165, which was the published article about this investigation, just a second ago on cross-examination. And he talked about the reference to the limitations of the investigation, I guess, in this case; is that right?

A Yes.

Q Is that unique to outbreak -- this particular outbreak investigation?

A No.

Q Why is that?

A In an outbreak investigation you're going in after something happened and trying to figure out what happened in the past.

Q Okay.

A So it's difficult to know. You weren't there to observe what happened on those days, and so there's always the potential that people will forget things or do things differently by the time you do your investigations.

Q So there's nothing unique about this particular investigation; those limitations occur all the time?

A Yes, that's correct.

Q And the -- the fact that there was some eyewitness observation of unsafe injection practices by yourselves -- by yourself and members of the CDC, I mean, was

that unique, actually?

A No, in an outbreak investigation sometimes you observe what you believe to be the cause of the outbreak.

Q So there's always sort of a combination of sort of observations and scientific conclusions?

A Yes.

Q Now, you were asked about -- or you were shown the -- the chart of all the procedures by Mr. Santacroce. When you and members of the CDC did the chart review in this case, were you able to establish an accurate order of procedures on September the 21st?

A The order, yes, we -- we're pretty sure that one is accurate.

Q Okay. And were you able to get, like, specific times as to each patient in that order?

A No.

Q Why not?

A There were a number of times recorded in the chart; there were a lot of things that just didn't add up and didn't seem to be correct. We had a lot of difficulty relying on most of the times that were in the chart to do anything meaningful.

Q And, I mean, the chart times are -- are variable, correct? Depending on which time you use?

A Yes.

Q And because of that, is it possible to give a precise order of patients?

A The order, probably, but exactly what time they started and stopped, no.

Q Okay. And -- I mean, was there -- do you know if even the two rooms, as we know now, would have synchronized times?

A There were clocks on the wall; they just looked to be standard clocks. They may have been set differently. We don't know, we didn't -- we didn't check the clocks on the wall, and if we did it was still five months after the fact, so...

Q Now, you were asked about biopsy equipment as a possible source on -- of contamination or of transmission on July the 25th, and I thought I heard you say on cross-examination that you weren't -- you weren't able to do a statistical calculation on that date, like you were for the -- the chart in State's 228, on -- that references September the 21st; is that right?

A Yes, that's correct.

Q And why would that be, scientifically?

A You want to compare people that were exposed to those who are unexposed. And if only one person got sick, he's either exposed or unexposed to each item. So there's really no way to do a comparison of just one person.

Q And that's because the -- the sample of the one person who was exposed, or who tested positive on the 25th, there's -- there's no other way to -- to draw a comparison with him and someone else?

A Right. You're trying to do a comparison of groups, and you have a group of one versus a group of zero. So there's no way to do a comparison or any calculations.

Q Okay. But I think you did talk about how the source patient on the 25th went directly to the procedure room, and that was one of the reasons why you were able to conclude a saline flush was not likely to be the cause of transmission?

A Yes, that's correct.

Q And it doesn't matter whether or not the -- Mr. Washington, who was ultimately infected on that day, had a saline flush because you need contamination from the source patient; is that fair?

A Yes, that's correct.

Q When you -- when you learned of the -- the computer error that could help assign which patients were in which room, did you review your conclusions or did you consider whether or not that information would affect the conclusion you drew regarding how the disease was transmitted on the 21st?

A Yes.

Q And did it affect your conclusion at all as to the mode of transmission?

A No, it did not.

Q Mr. Wright asked you about that -- I think it was a notification that was sent out on -- on, I can't remember which day, but it was February of 2008?

A February 7, 2008.

Q Okay. You have a better memory than me. Was that notification issued before you finalized the Health District report regarding this outbreak?

A Yes.

Q So that was sort of a preliminary warning?

A It wasn't really a warning, it was kind of a separate -- we discovered a problem upon doing the outbreak investigation, and did the notification as a result of that problem that we identified.

Q Okay. And your -- your ultimate report was issued some -- some months later, correct?

A Yes.

Q Mr. Wright asked you about that -- that second Epi-Aid, that -- that, I guess, took place after the one you were involved with, correct?

A Yes.

Q And I think he asked you if you were aware of whether or not the Epi-Aid revealed that there was multiuse of

propofol or multiuse of a certain medication. And I think you said you -- your understanding was that that was the case?

A Yes.

Q To your knowledge was -- did that also include the combination of syringe reuse within a patient, or was it limited to -- to multiuse of medication?

A I don't remember the specific details of that investigation. Like I said, I wasn't involved in that one. It was a different agency, and they did a separate response that we weren't involved in.

Q Okay. And I -- I think when you were asked about ambulatory surgical centers and whether or not there were regulations or whether or not they were properly supervised before this outbreak, really wasn't something that you were involved with or even became aware of until this investigation?

A Yes.

Q So you would have -- I -- limited knowledge of what the issues were with those centers prior to the outbreak?

A Yes, I -- I had seen a report at a conference before about an outbreak at an endoscopy center, but really didn't quite understand how ASCs work or regulated or what their role in medicine really is.

Q Okay. Mr. Wright asked you about your conversations with Dr. Carrol and -- and the notification

process. And if -- if I understand you correctly, the notification is a -- is a response to a -- a public health issue; is that fair?

A Yes.

Q And the -- the purpose of that is so people get treatment or find out what their status is?

A The purpose was for people to get tested, and then, if they're positive, get treated or managed as appropriate.

Q Okay. And it really, as -- as you discussed with Mr. Wright, didn't relate to your conclusions regarding the mode of transmission?

A That's correct.

Q When you were speaking with Dr. Carrol, he brought you, I guess, a chart that was based on anesthesia time?

A I'm not sure exactly what he based his chart on, but he did have a chart that he showed me.

Q Okay. Did anything that he showed you make you doubt your conclusions, or make you think, boy, I got to relook at this whole thing because Dr. Carrol here, you know, seems to have a point? Or was it something that you had already considered or...

A I think the biggest thing I took away from him showing that chart was we identified an additional patient

that we hadn't identified earlier because he had somebody listed as a case that was a name we didn't see.

Q Okay. So it actually --

A It gave us one more case, but that really didn't change anything at that point.

Q Okay. Did it -- did it at all make you question your conclusions regarding the source of transmission?

A No.

Q And as -- as you sit here now, you know, some five or so years later, is your conclusion or belief the same regarding what caused the transmission of the hepatitis C virus to these individuals?

A Yes, it is.

Q It's the same? Thank you.

THE COURT: All right. Mr. Wright, any recross?

MR. WRIGHT: Yeah, just on that.

RECROSS-EXAMINATION

BY MR. WRIGHT:

Q Questions about the second Epi-Aid and whether it dealt with any findings of reuse of syringes, do you recall that another clinic was closed down because an anesthesiologist M.D. was multidosing with vials and reusing syringes?

A Yes, but it wasn't from that report.

Q Okay. It -- it was from BLC inspections?

A Yes, it was a separate BLC inspection of that facility.

Q Okay.

A It wasn't the -- the -- I don't think it was the CDC response on that one.

Q It -- that -- that incident predated the second Epi-Aid?

A I'm not exactly sure. I think so, but I'm not exactly sure.

Q Okay.

MR. WRIGHT: No further questions.

THE COURT: Mr. Santacroce?

RECROSS-EXAMINATION

BY MR. SANTACROCE:

Q When you said you had no statistical comparison for July 25th as to the biopsy forceps being reused, is that the same analysis for the propofol contamination? If you only had one infected patient, can you do a statistical analysis?

A I hadn't done a statistical analysis on the propofol contamination before. All patients received propofol, so there was no non-propofol group. If there were multiple medications used, you could have done a comparison, but I couldn't do it on September 21st because everybody was exposed to propofol. There's no way to compare it to anything else.

Q No, I said, July 25th?

A The same thing on July 25th.

Q Okay. You testified that you had problems with the times, but in front of the grand jury you testified that you came to the conclusion that the nurses' times were the most accurate, correct?

A Right.

Q Okay. And you testified that the sequence of the patients was correct; is that your testimony?

A Yes.

Q So we know, for example, that the source patient Kenneth Rubino, was before this patient in yellow, correct?

A Yes.

Q Okay. And then we know that this next patient happened after that, this one, this one, this one, this one, and down the line, correct?

A Generally, yes.

Q The -- well, you're confident, and you testified that that was correct. Is it correct or --

A Yes.

Q -- not correct?

A Yes, it is.

Q Can you see the CRNAs on -- on what's displayed there?

A Yes, I can.

Q Okay. Can you point to which column that's in? Because I can't see it from here.

A It's the --

Q Just point on your screen.

A Oh, my --

Q Okay.

A That's a --

Q I want to --

A -- CRNA --

Q -- move that over --

A -- okay.

Q -- so we can get -- you can -- tap the bottom of the screen, if you would.

MR. STAUDAHER: On the right-hand corner.

BY MR. SANTACROCE:

Q There you go. Okay. So the sequence is correct, and we know that the CRNAs, according to your testimony, only changed rooms at lunch breaks and at potty breaks, and we know that Kenneth Rubino, Stacy Hutchinson, were contaminated in different rooms, correct? Who were the CRNAs in Room 1 with Kenneth Rubino?

A Keith Mathahs.

Q Who was the CRNA for Stacy Hutchinson?

A Ronald Lakeman.

Q And when did -- and if you look down below Stacy

Hutchinson, who was the CRNA for that procedure?

A Keith Mathahs.

Q So Mathahs didn't come over to relieve Mr. Lakeman for a potty break until after Stacy Hutchinson, correct?

A These times, yes.

Q Times or chronology or sequence of --

A Or the --

Q -- patients?

A -- according to the sequence, yes.

MR. SANTACROCE: Nothing further.

THE COURT: Ms. Weckerly?

MS. WECKERLY: Nothing further.

THE COURT: I'll see Counsel at the bench.

Any additional juror questions?

(Off-record bench conference.)

THE COURT: All right. I have a question on -- changing a little bit.

THE WITNESS: Okay.

THE COURT: Did you video or audio record any of the interviews during your investigation at the endoscopy center?

THE WITNESS: No, we did not.

THE COURT: All right. Is that something you normally do, or no?

THE WITNESS: No, that's --

THE COURT: Or ever do?

THE WITNESS: -- that's not normal in our procedures.

THE COURT: Okay. All right. Any followup to that last question? Ms. Weckerly?

MS. WECKERLY: No, Your Honor.

THE COURT: Any followup, Mr. Wright?

MR. WRIGHT: No, Your Honor.

THE COURT: Mr. Santacroce.

MR. SANTACROCE: No, Your Honor.

THE COURT: Any additional juror questions for this witness?

All right. Sir, thank you for your testimony. I'm about to excuse you, but I must admonish you not to discuss your testimony with anyone else who may be a witness in this matter.

Thank you, sir. And you are excused.

Does the State have any other witnesses scheduled for today?

MS. WECKERLY: No, Your Honor.

THE COURT: All right. Ladies and gentlemen, we're going to go ahead and take our evening recess. We will be reconvening tomorrow morning at 10:30.

May I see the bailiff at the bench.

We'll reconvene at 10:30. During the evening recess you are reminded that you're not to discuss the case or

anything relating to the case with each other or with anyone else. You're not to read, watch, listen to any reports of or commentaries on this case, any person or subject matter relating to the case. Do not do any independent research by way of the Internet or any other medium, and please do not form or express an opinion on the trial.

Notepads in your chairs, and follow the bailiff through the rear door. We'll see you back tomorrow at 10:30.

(Court recessed for the evening at 3:47 p.m.)

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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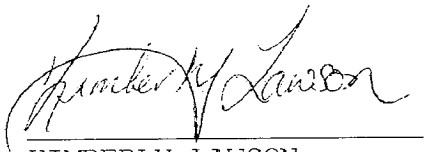

KIMBERLY LAWSON

Table 20-1. Modes of Transmission and Sources of Infection Considered
Patients who were infected on September 21, 2007

Transmission Mode/Source	Result	Rationale
Staff-to-Patient	Ruled Out	No staff members were positive for HCV infection, and source patient was identified through genetic testing
Provider: Physician	Ruled Out	Patients were treated by three physicians, none of which placed the patient at a statistically significant increased risk of infection
Provider: CRNA	Ruled Out	Patients were treated by both CRNAs, neither of which placed the patient at a statistically significant increased risk of infection
Provider: Technician	Ruled Out	Several technicians assisted on the procedures, none of which placed the patient at a statistically significant increased risk of infection
Biopsy Equipment	Ruled Out	Not all infected patients had a biopsy, and those who had a biopsy were not at a statistically significant increased risk of infection
Endoscope	Ruled Out	Five different scopes were used on the infected patients, none of which was the same as the source patient.
Procedure Type	Ruled Out	Infected patients had both colonoscopies and EGDs, neither of which placed the patient at a statistically significant increased risk of infection
Reuse of Bite Blocks	Ruled Out	Infected patients had both colonoscopies and EGDs (which require bite blocks), and the use of a bite block for a patient did not result in a statistically significant increased risk of infection
IV Placement	Ruled Out	Staff were not observed to re-flush heparin-locks, and none reported doing so. Clean needles and syringes were observed to be used for each flush
Sedation Injection Practices	Not Ruled Out	CRNAs were observed reusing syringes on one patient, reusing propofol vials for multiple patients, reported being directed to do so, and reported routinely doing so. CRNAs observed or reporting such practices were the same CRNAs responsible for administering anesthesia on September 21, 2007.

Q Okay. And so as far as her -- they were using syringes to draw up the propofol, correct?

A Yes.

Q And so she would get a new needle, new syringe, draw up propofol, inject a patient, correct?

A Yes.

Q Okay. And then, if the patient needed a second dose of propofol, she would get a new needle, new syringe, draw up, and dose the patient a second time?

A Yes.

Q Okay. And so -- and then she was taught throwing away her needles and syringes in the Sharps container?

A I don't know that she was taught, but that's what we observed.

Q Okay.

A We did observe her recap a needle at one point, which was a concern more for her safety than anything else, but it wasn't a risk to the patient.

Q Okay. And so what is "recap a needle"? In other words --

A So you have the -- the plastic cap on the needle, you pull it off, you do the injection, taking the cap and putting it back on the needle. Kind of like putting a cap on a pen. You have a -- you should just put the whole thing

right in a Sharps container instead of accidentally poking yourself while you're doing that.

Q Okay.

A So it's more of a workplace safety issue for the staff than it would be -- we also saw her remove the cap for one needle, put it in her mouth and pull it off with her teeth, and then do it that way. So again, that's a no-no.

Q Okay. Like this?

A Yes.

Q Okay. And so that's -- the danger in that is...

A Well, there's a contamination risk from that, and then, she could also poke herself with it as well. It's just a bad practice all around.

Q Okay. And so other than those -- I don't want to call them trivial, but not -- not serious transgressions by Linda Hubbard, all of her injection practices, meaning, clean needle, clean syringe, injection into patient, not reusing needles and syringes, on all of that she was fine?

A Yes.

Q Okay. And what you did observe her doing was taking propofol, using it on a patient, but there's still some left in the vial, and so she'd set it aside --

A Yes.

Q -- correct? And so then a new patient comes in and she starts with a new propofol vial and injects them

safely, and then sets aside another partially emptied one?

A Yes, that's correct.

Q And so after a number of procedures she had four or five vials, all with a little bit of propofol in them, still sitting there, correct?

A Yes.

Q Okay. And so then she took a syringe -- needle and syringe and filled up a needle and syringe by taking the remnants out of the four or five propofol vials?

A It was multiple syringes, but yes, that basic idea.

Q Okay. So she filled a couple of brand new, clean needles and syringes out of the four or five propofol remnants?

A Yes.

Q Okay. And so you -- you were observing her multi-using -- using propofol on multiple patients out of one vial --

A Yes.

Q -- is what would have occurred --

A Treating the vial --

Q -- right?

A -- like a multidose vial, basically --

Q Okay.

A -- yes.

Q And she -- she was doing that, knowing that you all are standing there watching her, correct?

A We were in the room, so I assume so, yes.

Q Okay. And so then did -- did you talk to her at that time?

A No.

Q Okay. Her, meaning Linda Hubbard. And the -- this -- using propofol as a multidose vial, it caused you concern?

A Yes.

Q Okay. Now, you had -- you had already known that from Wednesday, correct?

A Potentially, yes.

Q Okay. And so now you're actually seeing it, correct?

A Yes.

Q And did -- did you -- other than Linda Hubbard on that Friday, did you observe other CRNAs?

A I did not, no.

Q Okay. So you -- your sole observations were Linda Hubbard on Friday morning?

A Yes, that's correct.

Q Okay. And I know you came back a number of times during the next couple of weeks to the clinic for various purposes. Did you come in and do any other procedure

observations?

A No, it was all records review when I came back.

Q Now, your -- you had a conversation with Vincent Mione?

A Yes.

Q Okay. And is that after your observations of Linda Hubbard?

A Yes, it was.

Q Okay. And did you -- did you observe any procedures of Vincent Mione?

A I did not, no.

Q Okay. Can you describe Vincent Mione?

A Average height, I believe he had gray hair, I think it was shaved kind of like a buzz cut, from what I remember.

Q It was what?

A Shaved kind of -- a short haircut, from what I remember.

Q Okay. Like a --

A It's been a long time. I don't really remember him that well.

Q -- okay. Well, you -- there's a couple of Vinnie's that were CRNAs; is that correct?

A Yes.

Q Okay. And do you know which Vinnie you talked

to?

A I believe we spoke with Vincent Mione. I think Vincent Sagendorf came in at a different time. I don't think he was working. I think he came in that afternoon, and they had talked to him, but he wasn't working at that clinic on that day.

Q Okay. The -- could it be you have your Vinnie's mixed up?

A I'm sure it's possible, but I -- from what I remember on the notes and the things I took, it was Vincent Mione.

Q Okay. I didn't see it in your notes.

A I --

Q Do you have some notes I haven't seen--

A I'd have to look back --

Q -- is what I'm saying.

A -- what I have. It's been a long time since that conversation. So it's possible that the two were mixed up, but I don't think so.

Q Well, do you have any -- did you write anything down anywhere regarding that conversation with Vincent Mione?

A I don't know if I did or not. If it's not in the notes, then -- then maybe I didn't. It was a brief conversation. It was 30 seconds or a minute or so.

Q Okay. Well, I -- the -- don't take my

representation for it when I tell you it's not in the notes. The -- I didn't see it, but I don't know that I have all of your notes, okay? Do you think anywhere you made a note of that? Have you seen anywhere your conversations where you noted it on January 11 with Vincent Mione?

A I really don't remember.

Q Okay. Now, are you aware that Vincent Mione denies the conversation with you?

A No.

Q Okay. The -- and who else was present?

A Melissa Schaefer.

Q Okay. Now, in your -- one of your interviews, I believe the one -- you were interviewed by the Metropolitan Police Department, correct?

A Yes.

Q Okay. Have you read that transcript lately?

A No, not lately.

Q Okay. My recollection of that is when you were trying to determine who the Vinnie was you may have talked to, you said it was the Vinnie who was brand new there.

A I don't remember that. It's possible.

Q Okay. Do you know which Vinnie was new -- had been recently hired?

A No, I don't.

Q Well, the evidence has been that it's -- it -- I

mean, Mr. Mione testified in here and Mr. Sagendorf testified in here -- the two Vinnies, okay? And Mr. Mione had worked for a number of years at the clinic, mainly Burnham, and Mr. Sagendorf had just been hired in October 2007.

A Okay.

Q Do you remember which of the two you talked to?

A This far after? No, I don't.

MR. WRIGHT: Page 28, Metro.

BY MR. WRIGHT:

Q This is a transcript from your interview Metropolitan Police Department, on May 19, 2008.

A Okay.

Q Look at page 28. Look at that to yourself.

A (Witness complied.) Okay.

Q Does that refresh your recollection as to which Vinnie you talked to?

A From the conversation here it was the newer one, and I don't know enough details to say if that was Mione or Sagendorf.

Q Okay. But the -- this was in May 2008?

A Yes.

Q So this was literally four months later, correct?

A Right.

Q And you couldn't remember the last name of the

Vinnie you talked to, correct?

A That looks correct.

Q And what you believed was that -- whoever is the newer Vincent, the one who had been there a short amount of time, correct?

A That looks correct, yes.

Q So if -- if the evidence is that the person who has been there the short amount of time is Vincent Sagendorf and not Vince Mione, that would have been the person you spoke with; is that fair?

A Possibly, yes.

Q Okay. Well, is that correct?

A Like I said, it's been a long time. I don't remember exactly which one it was.

Q Okay. And you made no report of it and no notes whatsoever?

A None that I remember, but I haven't looked at it in a long time -- or haven't looked at -- for that particular item in a while.

Q Mr. Sagendorf testified in here, and he also denies any such conversation with you.

A Okay.

Q Have you spoken to Melissa Schaefer -- is that her name? I get them mixed up --

A It's still Melissa Schaefer, yeah, she has the

same name.

Q -- Melissa Schaefer, about this?

A About this? No.

Q Okay. She does not recollect any such conversation.

A Okay.

Q Have you read her grand jury testimony?

A Years ago.

Q Okay. Could -- you could be mistaken about this because of the passage of time?

A Mistaken about what, specifically?

Q This conversation.

A That it happened?

Q Yes.

A I don't believe so.

Q Okay. But you don't know who it was with?

A I may have the incorrect Vincent, that's correct.

Q And the -- and the conversation was what?

A It was a -- just a brief conversation about the injection practices, about the reuse of propofol, and the reuse of syringes to access vials, and he said the -- they were told to reuse the syringes, but he didn't do it.

Q Okay. And at -- at that point it seems to me you know that propofol is being multiused, correct? Treated

as a multidose?

A In general, yes.

Q Okay. Well, in general, it had been stated to you all, and you all had observed it, correct?

A Yes, that was the general practice of the clinic.

Q Okay. And at this time of this conversation with a Vinnie, there hadn't been any observations of any syringe reuse, correct?

A Not by me, that's correct.

Q Not by anyone at that point that you knew about, correct?

A That I knew about at that time?

Q Yes.

A That's correct.

Q Okay. So it seems to me if an employee is actually saying -- discussing reuse of syringes, that's the first time you all are hearing it, that would be some significant seminal event.

A I don't know about a seminal event, but it was significant, yes.

Q Okay. But you made no -- no notation, no report, it's not in your -- what do you call this thing?

A The ICS forms?

Q Right. Correct?

A That's correct.

Q When did -- you learned that Gayle Fischer had observed Mr. Mathahs, CRNA, reusing a syringe to redose a patient, correct?

A Yes.

Q You learned about it that afternoon, correct?

A Yes.

Q And you all then have a meeting about it?

A It was in the conference room where we were all working together, so we were just discussing things in general throughout the afternoon.

Q Okay. And would you -- when you were there looking for unsafe practices, and/or trying to determine how this transmission could have occurred, you would bring to the attention of the clinic, management, anything you saw wrong, correct?

A Yes.

Q Okay. Because the whole -- you weren't conducting, like, a criminal investigation, correct?

A That's correct.

Q Okay. You were looking to see how -- how in the world did this happen, and if we can -- how can we correct it and prevent it so it's not happening again?

A Yes, that's correct.

Q Okay. And so, like, on that Friday who did you

meet with to tell them about propofol multiuse and syringe reuse?

A Friday was Tonya and Dr. Carrol, I believe.

Q Okay. And you would share everything with them, correct?

A Yes. We met with them each day and told them what we found, and any new information, kind of what the next steps were.

Q Okay. And so they would then implement changes to prevent those things from happening again, correct?

A That was our request of them, yes.

Q Okay. And to your knowledge, they did that, correct?

A Yes.

Q Okay. And so, like, it was -- these are -- don't use propofol for more than one patient, correct?

A Yes.

Q Okay. And on syringes don't use the same syringe on the same patient to redose, correct?

A Yes.

Q Okay. And there was never anything about reuse of syringes or needles -- I'm calling them as one unit, but reuse of the needle and syringe multipatient, correct?

A That's correct.

Q Okay. And by multipatient I'm talking about,

like, if a CRNA injected one patient and then used the same needle and syringe on a different patient?

A Yes, that's correct.

Q Nothing like that was ever observed, seen, heard, talked about --

A Correct.

Q -- correct? And so was it your understanding that as of Friday the 11th in the meeting going forward, these changes would take place?

A Yes, we met with them late on Friday and they said they would correct things for when they reopened on Monday.

Q Okay. And the -- did you discuss with Gayle Fischer what she had observed with CRNA Keith Mathahs?

A Yes.

Q Okay. And did you understand that the observation was that he was using a needle and syringe, brand new, dosing the patient with propofol and/or lidocaine -- I'm just skipping over that -- but basically dosed the patient, and then when the patient needed a redose, Mr. Mathahs was taking out a brand-new needle, removing the dirty needle from the syringe, placing a clean needle on the syringe, and then going into propofol and drawing a second dose and then injecting the patient?

A That's correct.

Q Okay. And did you discuss with her the practice of changing the needle?

A We discussed all of those things, I guess, in --

Q Okay.

A -- throughout the day.

Q And what does that do, changing the needle?

A It doesn't really reduce risk of infection because the blood can be in the syringe itself, so the needle itself -- changing the needle really doesn't make a difference.

Q Okay. And did you have any discussions with -- you -- with Mr. Mathahs about his belief that that was a safe injection practice by changing the needle?

A No, I did not.

Q Are you aware that Gayle Fischer did?

A I know she talked to him, but I don't know what the details of the conversation were exactly.

Q Okay. Now, what Keith Mathahs was observed doing was an unsafe injection practice; is that fair?

A Yes.

Q Okay. And was he observed using propofol as a multidose vial?

A Yes, I believe he was.

Q Okay. You believe he was?

A Yes.

Q And so if -- if he was, and that was observed, that was immediately stopped?

A Yes. I know, Gayle said she spoke to him after that procedure and -- so there wasn't an ongoing risk of patients that are -- from using a contaminated vial.

Q Okay. And the -- if he was not using propofol as a multidose vial, and was simply using needle and syringe to redose a patient, okay, that would not cause any transmission of hepatitis C?

A That's correct.

Q Okay. And so it was determined by you in your ultimate conclusion that the likely method of transmission on the dates in question was a combination of using propofol as a multidose vial, and at the same time reusing syringes on individual patients?

A Yes, that's correct.

Q Okay. And if that occurred, there was a chance that a virus in the source patient could contaminate the vial of propofol, right?

A Yes.

Q And that that could be -- that vial could then be used on other -- another patient or patients?

A Yes, that's correct.

Q And, I think you've called that the serial contamination of vials theory?

A Not just one. You would have to then take it from a contaminated vial, and then essentially contaminate a second vial from the --

Q Okay.

A -- first contaminated vial.

Q Okay. And you explained this morning that theoretically this -- if the transmission occurred in the way you believe it could have, that it could either have been one 50cc propofol vial was contaminated, correct?

A Yes, theoretically.

Q Right. And that one vial could have contaminated all of the patients that were contaminated on the 21st of September because there was enough volume in it that it could have been used on every contaminated patient, if a little bit was used each time?

A Yes, that's correct.

Q Okay. And that was one -- that's just a single vial contamination theory?

A Correct.

Q Okay. And then your alternative was the serial contamin -- S-E-R-I-A-L contamination theory, correct?

A Yes.

Q And for your serial contamination theory, your conclusion of likely -- this likely serial contamination, this is the first time anyone has ever come up with such a theory,

correct?

A I don't know that that's true or not. I haven't reviewed all the literature to say that nobody else has thought of that idea.

Q Okay. Well, you have looked at the literature and couldn't find any?

A I didn't look at the literature specifically for that. I didn't do a search for any of those types of things, so it's possible it's out there, I don't know.

Q Okay. Well, to your knowledge no one else has ever come up with this serial contamination theory, correct?

A I guess that's true. I never really looked for it, so, no -- to my knowledge, no.

Q Okay.

MR. SANTACROCE: Your Honor, I'm having trouble hearing him.

THE COURT: All right. Well, this actually may be a good time to take our lunch break, and I think some of the jurors are hinting they needed a break.

Ladies and gentlemen, we're going to go ahead and take our -- excuse me, our recess. For the lunch break we will be in recess until 1:40.

During the lunch break you are reminded that you're not to discuss the case or anything relating to the case with each other or with anyone else. You're not to read, watch,

listen to any reports of or commentaries on this case, any person or subject matter relating to the case. Don't do any independent research by way of the Internet or any other medium, and please do not form or express an opinion on the trial.

Notepads in your chairs. Follow the bailiff through the rear door.

(Jury recessed at 12:50 p.m.)

THE COURT: And during the break, do not discuss your testimony with anybody else.

THE WITNESS: Can I leave the -- my notebook?

THE COURT: Sure.

All right. It's lunch.

(Court recessed from 12:31 to 1:43 p.m.)

(Outside the presence of the jury.)

THE COURT: Come on back. Make sure Kenny knows I meant for him to bring the jury in.

(Off-record colloquy.)

THE COURT: Bring them in. We're ready.

THE MARSHAL: Ladies and gentlemen, please rise for the presence of the jury.

(Jury entering at 1:47 p.m.)

THE MARSHAL: Thank you, everybody. You may be seated.

THE COURT: All right. Court is now back in session.

And, Mr. Wright, you may resume your cross-examination.

MR. WRIGHT: Thank you.

BY MR. WRIGHT:

Q I want to go back to the Friday afternoon, January 11, 2008, when you report to the clinic that a propofol issue and a reuse of syringe issue, you all had determined that you had figured out the method of transmission, correct?

A At that point it was a concern; I don't know that we figured out everything about the method of transmission yet at that point.

Q Okay. Did -- do you recall testifying:

Question: My understanding is that you had already reached your conclusion by January 11, 2008, that the reuse of syringes on multiple times on one patient, coupled with the propofol vials being reused on more than one patient, was the source of contamination of hepatitis C at the clinic; is that correct?

You answered, Yes.

A I don't specifically remember that, but okay.

Q Let me show you -- so you can confirm I read it right -- the deposition on February 24, 2009. And I'm looking at page 211.

A (Witness complied.) Okay.

Q Is that correct?

A That's what it says.

Q Having made that determination on Friday, January 11, I -- I'm now going to jump back to where I was before we took lunch recess.

I was asking you if there were anyone, to your knowledge -- well, let me put it this way: You're the first person, to your knowledge, who has ever come up with a serial contamination theory of -- as the mechanism of spreading a virus through vials, correct?

A To my knowledge, yes.

Q And you have looked for any other cases, asked CDC about other cases, looked in the literature to see if there was ever any reported case of serial contamination like you have theorized, correct?

A No, I have not reviewed the literature for that specific item. I haven't done a full study to see if anybody else has ever published that.

Q Okay. Well, you were previously asked in 2009 in your deposition if you were aware of any articles or cases supporting your theory, correct?

A Yes.

Q And you said you were not aware, correct?

A That's correct.

Q And did you then ask the CDC, right after that

deposition, to determine if there were any articles or studies or anything to support your position?

A I believe I did.

Q Okay. And they couldn't find any, correct?

A That seems to be correct.

MR. WRIGHT: Can I just have my next in order?

BY MR. WRIGHT:

Q Look at page 2, 3 of Q1 -- Proposed Q1, tell me if you recognize that?

A (Witness complied.)

Q Do you recognize that?

A Yes.

Q Is that the email from CDC?

A Yes.

MR. WRIGHT: Move the admission of Q1.

THE COURT: Any objection to Q1?

MS. WECKERLY: Yes.

THE COURT: I'll see Counsel at the bench, and I'll see the exhibit.

(Off-record bench conference.)

THE COURT: I mean, isn't that the import of the email basically?

BY MR. WRIGHT:

Q Judge -- is that an accurate record from Southern Nevada Health District emails?

A It looks to be.

Q And that is to you, reporting the results of their search for publications regarding serial contamination of vials, correct?

A Yes.

MR. WRIGHT: Move its admission.

THE COURT: Well --

MS. WECKERLY: Same objection.

THE COURT: For right now that's overruled, but you can certainly ask him what they found, how many studies they found, and whether or not he looked into the study they found, or publication.

MR. WRIGHT: Can we approach?

THE COURT: Sure.

(Off-record bench conference.)

BY MR. WRIGHT:

Q Did you call Melissa Schaefer on about March 24, 2009, and ask her if the CDC was aware of any articles in the published literature that document serial contamination of vials as you presume happened in Las Vegas?

A Yes.

Q Okay. And you stated you want to cite an article in your report to describe this, correct?

A Yes.

Q Okay. And at the time your report is not

completed?

A That's correct.

Q And then a response came from CDC containing one article, correct?

A Yes.

Q And the CDC told you that it seems like there's enough information --

MS. WECKERLY: Objection. Hearsay.

THE COURT: Well, go ahead and ask the question.

BY MR. WRIGHT:

Q The CDC --

MS. WECKERLY: Objection, Your Honor. This is the content of the email.

THE COURT: Well, if the point is that's the only article or why he was directed to that particular article --

MS. WECKERLY: That's not the --

THE COURT: -- he can answer.

MS. WECKERLY: -- content.

THE COURT: Go ahead.

BY MR. WRIGHT:

Q Did the -- did the CDC form you -- tell you, pardon me. Did the CDC state that the article and -- that with the article, it seems like there's enough information here and from your investigation to show that this is clearly a plausible explanation?

A Yes.

Q Okay. And the "plausible explanation" they're talking about, is showing your -- your serial contamination theory as the mechanism of transmission, correct?

A Yes.

Q And then the article they sent you involved a pooling -- P-O-O-L-I-N-G, a pooling outbreak, correct?

A Yes.

Q Okay. And it really wasn't applicable to your serial contamination theory, correct?

A I'm not sure exactly which article that is, so I couldn't say.

THE COURT: Did you follow up and actually pull the article and read the article?

THE WITNESS: I likely did, yes.

THE COURT: Do you -- I mean, don't guess because we tell everyone don't speculate. If you don't remember, then don't guess or speculate as to what you did.

THE WITNESS: Then I don't remember.

THE COURT: All right.

BY MR. WRIGHT:

Q Now, this is -- this is in February 2009, and your report is completed in December 2009, correct?

A This was actually March, but yes.

Q Okay. March, I'm sorry. March 2009, and you

completed your report December 2009?

A Yes.

Q Okay. By -- by then you -- you had already had published an article about the outbreak, with other authors --

A Yes.

Q -- correct?

A Yes.

Q And your theory of contamination?

A Yes.

Q And you have become a speaker at conferences?

A Yes.

Q Discussing your theory of contamination?

A Among other things, yes.

Q Okay. And had you become a celebrity within the epidemiological group?

A No.

Q Okay. You were -- you would go to conferences to discuss the Brian Labus serial contamination theory, correct?

A I think you're the first person that's ever said that, so I would say no.

Q Okay. Ever said what?

A The Brian Labus serial contamination theory. There isn't a conference on that, and it's not a topic of discussion at the conferences, really.

Q Okay. You didn't go put on a PowerPoint and presentation of this?

A Yes, I did. And this was one piece of it, but it wasn't about just serial contamination. It was the -- the outbreak, the response, kind of the -- the entire thing from beginning to end.

Q Okay. And so you -- you had published an article, gone to conferences, plural; how many?

A I think I presented on this three or four times at conferences, maybe.

Q Okay. All before you got your report out, correct?

A No, I've presented on it since then as well, but --

Q Pardon?

A No, I've presented on it since then as well, but it -- there were presentations before the report was completed.

Q To this date, 2013, are you aware of any other cases of serial contamination, or any other articles other than your own?

A No, I'm not.

Q Now, having reached the determination by -- by Friday, January 11, in the evening, as to the method of transmission, you all started then working with the clinic on

a plan for notification; is that correct?

A No, the decision to notify came after that, probably not until February.

Q Okay.

A We worked with a clinic to remediate the situations we found that were problems in the clinic.

Q Okay. To correct everything?

A Yes.

Q Okay. And the -- you on -- on your side were planning a patient notification, correct?

A Not at that point.

Q Okay. Well, you'd made a determination that there were unsafe-injection practices?

A Yes.

Q Okay. And so the -- the question was really the scope of the notification, not whether you would notify, correct?

A We didn't have discussions about that notification yet. We needed to complete the investigation before we moved into that phase, and the investigation on that date still wasn't completed.

Q Okay. You had made your conclusion as to what it was, correct?

A Yeah, we moved that to the top of the list.

Q Okay. Well, did I read accurately that you had

concluded it by January 11?

A Yeah, you did.

Q Okay. And your main -- and your -- aside from correcting what had happened so it stops, your other major concern as the Health District is to get notification to anyone who could have potentially been infected by the practices that preexisted your inspection, right?

A At some point, yes, but not at that early date.

Q Okay. So your -- your belief is you waited until February to start determining are we going to notify patients?

A The extent of a notification that was needed, and how many people, and how to do it, yeah, that -- that waited a little later.

Q So you -- the determination -- ultimately you decided to notify all patients of what we call Shadow Lane and Burnham clinics, okay, from -- for the previous four years, correct?

A Yes, it was split up in different phases, but yes, ultimately that's what we decided.

Q Okay. And that determination for notification was made solely based upon the unsafe-injection practices and the multiuse -- or the use of propofol as a multiuse vial, correct?

A Well, I wouldn't say "solely," I'd say the fact

that there was an outbreak as a result of that showed that there was a risk to patients, so -- but it was based on those two items, the two pieces that -- clearly the unsafe-injection practices.

Q Right. And whether there had been a hepatitis spread or not, you were going to give notification, correct?

A Well, that was part of the discussion. And I can't say what would happen if there wasn't hepatitis because we didn't have that particular situation. So I can just say what we did, and that was --

Q Okay.

A -- to make that --

Q But didn't --

A -- notification.

Q -- didn't you tell Dr. Carrol that in some of the exchanges with him? You just don't get it, Dr. Carrol, even if there had been no transmission whatsoever, the outbreak is what got us into your clinic to observe, and what we observed is infection -- unsafe-injection practices which may put patients at risk, and we're going to send out notices regardless -- regardless of what actually caused the transmission of hepatitis C, correct?

A Yes, that's correct.

Q Okay. And so -- and as I recall, right, in reading one of your depositions, now Dr. Carrol suggested it

could have been -- he was baffled about how it had happened, correct?

A Yes.

Q Okay. And he even suggested -- you met with him a couple times?

A Yes, we did.

Q Right. When he was concerned about whether the notification was premature, or was broader than necessary?

A Yes, that's correct.

Q Okay. And he even suggested at one point that it could have been some person, like, intentionally did this?

A Yes, he did.

Q Okay. And the -- I -- tell me if I'm wrong, but I recall your testimony that he would have note -- given notification even if that was true. If it was, like, caught on videotape, some person having done -- intentionally caused the infections, we still would have given notice because of the unsafe practices we saw?

A Yes.

Q Okay. Now, that -- and that was the basis of your notification decision, and the breadth of the -- the scope of the notification because those practices, as best you could determine, had existed going back four years --

A Yes, that's correct.

Q -- right? Because the clinic told you that we

have not changed anything over the past four years, our propofol use, and what we have done hasn't changed day-to-day?

A That's correct.

Q Okay. Now, when -- when Dr. Cliff Carrol was talking with you and proposing his -- he was questioning whether you all were moving too fast --

A Yes, that's --

Q -- right?

A -- correct.

Q And the -- he showed you his schematic, or chart, that raised questions as to how the contamination could have spread, utilizing your theory, correct?

A Well, I'm not sure how he developed the chart, but yes, he did show me a chart.

Q Okay. He showed you a chart, and it had the rooms separated, correct?

A I don't remember if it did or not.

Q Okay. Well, the -- do you recall that -- I don't know if the chart did or not either, but he -- he was able to tell you what was wrong with the conclusions being reached because he had patients in separate rooms?

A I don't remember that specific --

Q Okay.

A -- part of the conversation.

MR. WRIGHT: I'd like to -- 71.

BY MR. WRIGHT:

Q It's your interview with Metropolitan Police Department --

A Okay.

Q -- in May 2008. Page 71, 72, just read that to --

THE COURT: Is everybody okay?

BY MR. WRIGHT:

Q -- read that to yourself.

THE COURT: Okay.

BY MR. WRIGHT:

Q See if it refreshes your recollection.

A (Witness complied.)

Q Does that refresh your recollection?

A Yes.

Q Okay. And the -- Cliff Carrol had a method of determining which patient was in which room, correct?

A Yes.

Q Okay. And this -- this was in February 2008, correct?

A Yes.

Q Because it -- the notification was February 27?

A Yes.

Q Okay. And this conversation with Cliff Carrol predated the notification?

A Yes, it did.

Q Okay. And it -- it was during -- and did you ask him at the time? I mean, because you all hadn't been able to distinguish rooms, correct?

A That's correct.

Q Okay. And so Cliff Carrol is showing you a -- or talking to you or showing you problems with your theory or your conclusion as to the mechanism of transmission by putting patients in different rooms, right?

A Yes, that sounds correct.

Q Okay. And so did you ask him how do you do that?

A Yes, I did.

Q Okay. What did he say?

A From that interview it was that he had some way of doing it to the computer system.

Q Okay.

A And we had previously asked them for that a number of times, and they were never able to previously provide that to us.

Q Okay. But now -- now, he -- he is -- this is in February and he is telling you it can be done, correct?

A Yes.

Q Okay. And then you didn't pursue that at all?

A To stop the notification? No.

Q Right. And/or to try to figure out which -- which person is in which room, correct?

A I didn't believe what Cliff Carrol had to say, so no, I didn't.

Q Pardon?

A I didn't believe what he had to say, so no, I didn't --

Q You didn't believe --

A -- really --

Q -- him?

A -- no, I didn't.

Q Okay. You thought he was just -- what didn't you believe?

A We had asked him for how to split the rooms up a number of times and he could never tell us, and a week or two before we were going to make this big announcement, all of a sudden he knows a way through a computer system that we can't verify to split the two rooms up. It seemed a little self-serving at the time.

So I -- it wasn't something that was going to change the notification at that point, and that's really what he wanted to do. He wasn't arguing about how the outbreak happened, it was really another attempt to stop the notification.

Q Okay. And so you -- you didn't ask him how he

had come up on this date glitch on the computers?

A No, I did not.

Q Okay. So you just distrusted what he was telling you at the time?

A Yes.

Q Okay. And because he -- Cliff Carrol -- Dr. Carrol just couldn't seem to get it through his mind that this notification was irrelevant, totally irrelevant to the method of transmission of contamination, correct?

A Yes, that's correct.

Q And you had tried to explain that to him that it doesn't matter anymore how the hep C was spread, this notification is because of patient risk, based upon practices that we observed, right?

A Yes.

Q Okay. Now, having made that determination, and of course, you all prevailed and it was notification to patients from 2004, like, March 2004 through January 2008?

A Yes, that's correct.

Q Okay. And you had made some determination as to the prevalence of hepatitis C in Clark County, pre -- already existing hepatitis C, and in the clinic population, correct?

A Yes.

Q Okay. And you expected a back -- what I call in a background incidents. In other words, people that walked in

the door of the clinic already having hepatitis C would be some percentage of the population of the patients, correct?

A Well, I'd use the term prevalence, not incidents, it's an Epi term, but yeah, there's --

Q Okay.

A -- a background rate of disease in the population coming in.

Q Okay. And you made the determination that because -- that the endo -- the clinics, Burnham, Shadow Lane, because of the age of the patients, the age of people that get those type procedures, and the nature of the procedures, that you expected a prevalence of 6 percent, correct?

A I don't think it was that high. I thought it was 4 percent, but there was a background rate in that range.

Q Okay. I'll show you your grand jury testimony.

MR. WRIGHT: 116.

BY MR. WRIGHT:

Q April 15, 2010. Page 116 and going over to 117. Read that, see if that refreshes your recollection?

A (Witness complied.) Yes.

Q Okay. And that's 6 percent, correct?

A Well, like I said, it was the range, and that's the high end of the range. So it wasn't a fixed 6 percent. It was in that range of up to 6 percent.

Q Okay. At most a 6 percent background of

hepatitis C patients walking in the door infected before they ever set foot anywhere near the clinic --

A Yes.

Q -- correct? When you were -- at the clinic, did you meet Dr. Desai?

A Yes, I did.

Q Okay. Do you recall how many occasions?

A It was twice on Thursday. The first time was getting out of the elevator, I was introduced to him, and then our usual Thursday evening meeting or at the end of the day, I went to Tonya's office and he was there.

Q Okay. Now, I have an unrelated question to what we're talking about, but it has come up throughout the trial. Should a known hepatitis C patient, one of those 4 to 6 percent walking in the door, assuming they know it -- now, let me back up.

Of that 4 to 6 percent, some of them might not even know it, right?

A Yes, that's correct.

Q Okay, but assuming I know it, I've got hepatitis C, it's chronic, and I'm hepatitis C positive, I'm going into a clinic for a procedure, are -- are they supposed to treat me differently?

A No, they're not.

Q Okay. What are they supposed to do?

A You assume that every person coming in is basically infected with everything, and so you take precautions to protect yourself and the other patients.

Q Okay. And you're to treat them equally with every other patient?

A You know, like I said, you assume everybody has every disease, so you treat them all equally.

Q Okay. Now, before this event occurred there -- there had been discussions with the Southern Nevada Health District and other agencies in this state about the lack of regulation over ambulatory surgical centers, correct?

A There may have been. I wasn't part of them, though.

Q Pardon?

A I wasn't part of those discussions. I didn't really become involved with ASCs until this particular incident. So what predated the regulatory history of this event, I don't know.

Q Okay. But that NACCHO meeting, do you recall when this was?

A No, I don't.

Q Patricia Rowley is your boss --

A Yes.

Q -- was?

A Was, yes.

Q Office of epidemiology manager here at the Health District?

A Yes.

Q Do you recall at that meeting in which you were present --

MR. WRIGHT: Page 41.

MS. WECKERLY: I think this is hearsay. My objection is hearsay to this.

THE COURT: I'll see Counsel up here.

(Off-record bench conference.)

BY MR. WRIGHT:

Q Take a look at this. I think you looked at it before at deposition, and tell me if that's -- if you are Male No. 1?

A Yes, that's me.

Q Okay.

A Because I identify myself on the first page here, so yes --

Q Okay.

A -- that's me.

Q And you were present at this meeting. And Female No. 2 is Patricia Rowley?

A That's what it says, yes.

Q Okay. And you were -- and this meeting was with NACCHO representatives discussing the outbreak here in Las

Vegas and assisting them in their planning purposes for a template for future notification issues. Is that what this was about?

A We had several meetings around that same topic. I'm not sure which meeting it was, but those -- that was a general topic of all those meetings.

THE COURT: How many meetings did you have about that topic?

THE WITNESS: Three, four maybe.

THE COURT: Okay.

BY MR. WRIGHT:

Q So my -- and were you discussing with them there the various planning that went into it, and the responses of various government agencies?

A Yes.

Q Okay. And at that time was it stated regarding --

MS. WECKERLY: Objection. Hearsay.

THE COURT: Well, let's let him -- I -- I don't think it's offered for the truth, just that that was a topic of discussion and what this witness was aware of. So it can be considered for that purpose.

Go ahead, ask your question.

BY MR. WRIGHT:

Q Do you recall --

Patricia Rowley: We had started discussions about a year before the outbreak about how there was really no oversight with infection control in dentist offices, doctor's offices, ambulatory surgical centers.

Is that accurate?

A If that's what it says she says. I don't --

Q Okay. Well, the -- is --

THE COURT: Well, do you remember that that's what happened, or --

BY MR. WRIGHT:

Q Do you have any memory of this?

A I vaguely remember the meeting. I don't remember the specific details.

Q Do you recall she stating, We were having these ongoing discussions about the lack of oversight and then this happened, and then it's, like, oh, my god, here's our worst nightmare, the thing that we thought might happen because there really is ineffective oversight and now it's happening.

Because the big question that kept coming back to us was this has been going on --

THE COURT: Well, Mr. Wright --

MS. WECKERLY: Objection.

THE COURT: -- I'm going to sustain because you can't just read everything that she said. I mean, you can ask him what he knew, or what his concerns --

MR. WRIGHT: Okay.

THE COURT: -- were at the time, or what the --

MR. WRIGHT: Well, it --

THE COURT: -- you know, he was --

MR. WRIGHT: -- okay.

THE COURT: -- directed to be concerned about or whatever.

MR. WRIGHT: Well, okay.

BY MR. WRIGHT:

Q Do you recall your boss -- do you recall it was a big concern because of the lack of regulation of dentist offices, doctor's offices, ambulatory surgical centers, that something like this would happen, and then your worst nightmare, what you thought would happen, happened?

A I remember discussions about doctor's offices, vaguely over time. I didn't know what an ASC really was until this particular investigation. So any discussions about that prior to this outbreak --

Q Okay.

A -- really -- I don't remember any of those.

Q The -- after -- after the outbreak -- looking at 2008 now, after the public notification February 27, 2008, did you then participate in meetings or discussions about how widespread the practices were in the State of Nevada and what needed to be done about it?

A Yes.

Q Okay. And did that result in another Epi-Aid participation by CDC to come to Nevada to inspect all of the ambulatory surgical centers?

A Yes, it did.

Q Okay. And do you recall that there were widespread practices of multi -- of -- boy, I mix this up every time -- using single dose vials as multiuse vials?

A I remember they identified some of those issues; I don't know how widespread they were or the full details. I wasn't involved in that particular Epi-Aid, so I don't know the details that well on it.

Q Okay. Who -- would BLC have been more involved in that?

A Yeah, it was -- it was BLC and the State Health Division that coordinated statewide. We're only responsible for Clark County and we don't regulate ASCs, so if it was an ASC issue it would have been BLC within the State Health Division that did it.

Q Do you recall that the State sent out a technical bulletin in February 2008 because of the widespread practices?

A I don't know if it was February 2008. I remember them sending out the technical bulletin in response, but I don't know the date on it.

Q Would you look at Proposed R1, sir?

A (Witness complied.)

Q Is that -- are you familiar with that?

A Yes.

Q Is that the notification?

A Well, you were referring to the second Epi-Aid. This was based off of the first Epi-Aid, prior to that second Epi-Aid was ever initiated. This was right after -- if it was February 2008, it would have been right after our announcement.

Q Okay. And it -- so right at -- and the February 2008 date is on there, correct?

A Yes.

Q Okay. And so that was essentially sending out a notice to the State to engage in safe-injection practices and don't multiuse single-use vials of medication, correct?

A Yes, that's correct.

Q Okay. And that was -- and, in fact, that was sent out, correct?

A Yes, it was.

Q Okay.

MR. WRIGHT: I'd move its admission.

THE COURT: Any objection?

MS. WECKERLY: No objection.

THE COURT: All right. That will be admitted. What

was that, R1?

MR. WRIGHT: Yes.

THE COURT: All right.

(Defendant's Exhibit R1 admitted.)

BY MR. WRIGHT:

Q And after what transpired in your investigation, and after that notice going out to all providers in the State of Nevada, then the Epi-Aid -- the second Epi-Aid, the inspection of all the ambulatory surgical centers took place, correct?

A Yes, that's correct.

Q Okay. And it -- it's your understanding that even after that notification and the publicity, there was still multiuse of vials taking place, discovered during the second inspection --

MS. WECKERLY: Objection. Foundation.

BY MR. WRIGHT:

Q -- correct?

THE COURT: Well, if he -- if he knows.

THE WITNESS: Yes, that's correct.

BY MR. WRIGHT:

Q Did you all at the Health District take a personal dislike with Dr. Desai?

A I can't speak for anybody else at the Health District. Every time I dealt with him he was pleasant and I

had nothing bad to say about the dealings I had with him.

Q Do you recall during the NACCHO meeting, people from the Health District referring to him as Dr. Death, rather than Dr. Desai?

A I don't remember that, and --

Q Okay.

MR. WRIGHT: On page 46.

THE WITNESS: (Witness complied.) Okay.

BY MR. WRIGHT:

Q Does that refresh your recollection?

A I don't remember it, but if it's there, that's probably the discussion that happened.

Q Thank you, sir.

THE COURT: Does that conclude your cross?

MR. WRIGHT: Yep.

THE COURT: All right. Ladies and gentlemen, before we move into Mr. Santacroce's cross, let's just take a quick, about 10-minute break until 3:00.

During the break you're reminded that you're not to discuss the case, or anything relating to the case with each other or with anyone else. You're not to read, watch, listen to any reports of or commentaries on this case, any person or subject matter relating to the case, and please don't form or express an opinion on the trial.

Notepads in your chairs. Follow the bailiff through

the rear door.

(Jury recessed at 2:45 p.m.)

THE COURT: I'm sorry?

THE WITNESS: The exhibit --

THE COURT: Oh, give it to --

THE WITNESS: -- do you get that or --

THE COURT: -- me.

THE WITNESS: -- do I hand it back to him?

THE COURT: You can give it to me, so I can hand it to the clerk. Thank you. And once again, don't discuss your testimony with anyone during the break.

Ms. Weckerly, I'm thinking you'd better line up witnesses for tomorrow. Line up witnesses for tomorrow.

MS. WECKERLY: Okay. We will try to do that.

THE COURT: I mean --

MR. STAUDAHER: We're -- we're really --

MR. WRIGHT: We -- we get to watch a movie --

MR. STAUDAHER: -- limited on --

MR. WRIGHT: -- tomorrow.

THE COURT: Oh, we can watch the --

MS. WECKERLY: That's true.

THE COURT: -- movie tomorrow. Yeah, that's --

MS. WECKERLY: That's 90 minutes.

THE COURT: -- a good idea.

MS. WECKERLY: And I know Mr. Wright has no objection

to it being played.

(Court recessed from 2:46 p.m. to 2:58 p.m.)

(Outside the presence of the jury.)

(Off-record colloquy.)

THE COURT: So tell him we're ready. Just so you know, one of the jurors has an appointment tomorrow morning, so we'll probably start around 10:30.

MR. STAUDAHER: Well --

THE COURT: That we told him to move, but he --

MR. WRIGHT: Good.

MS. WECKERLY: That's fine.

MR. STAUDAHER: We're trying to get this worked out. We've got one confirmed witness for tomorrow right now, and his flight --

MR. SANTACROCE: Can I use your chart?

MR. STAUDAHER: -- into town is at about 10 or 10:30. So we're -- as soon as she gets here, we can do her.

THE COURT: Can we stick one of the insurance people on?

MR. STAUDAHER: That's an insurance person --

MS. WECKERLY: That's who it is.

MR. STAUDAHER: -- but the problem is --

THE COURT: Is there any local insurance --

MR. STAUDAHER: -- we're trying --

THE COURT: -- people?

MS. WECKERLY: They don't have their documents ready yet. We can watch the video.

THE COURT: Oh, yeah.

MR. STAUDAHER: It's the -- you know, we're in the process of getting it done --

THE COURT: And that's 90 minutes, you said?

MS. WECKERLY: Mm-hmm.

THE COURT: Okay. Then, so for that reason maybe we'll go a little bit later today -- Mr. Wright, a little bit later today, then, since you guys don't have to be back until 10:30?

MR. WRIGHT: Yep.

THE COURT: Of course, that doesn't help any of us, but -- because when -- when we start late, then I have to do my own work. I have to do my own calendar, so it doesn't help me any.

Ready.

THE MARSHAL: Ladies and gentlemen, please rise for the jury.

(Jury entering at 3:00 p.m.)

THE MARSHAL: Thank you, everybody. You may be seated.

THE COURT: All right. Court is now back in session. And Mr. Santacroce, you may begin your cross-examination.

MR. SANTACROCE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SANTACROCE:

Q Mr. Labus, I represent Mr. Lakeman back here. I'm going to ask you a few questions about what you testified at your direct examination. Is it appropriate to call you Mister and not --

A Yes.

Q -- Doctor.?

A Mister.

Q Okay. So you're not an MD?

A That is correct.

Q When you conducted your investigation of the hepatitis C outbreak, as I understand it, it was a multijurisdictional investigation; is that correct?

A Yes, it is.

Q So it was the Southern Nevada Health District, the BLC, CDC. Anybody else involved?

A Those were the three main groups. CDC was doing their own investigation, but it was kind of as a technical consultation of the Health District. They were functioning under our authority. So the CDC and the Health District are kind of tied together in some ways.

Q Okay. Was the Metropolitan Police Department involved?

A No, they were not.

Q District Attorney's Office?

A No.

Q Okay. You testified in -- in front of the grand jury and you said it was not like a criminal investigation. What did you mean by that?

A We were conducting a public health investigation. We wanted to know what happened. We really don't care who's responsible, who's at fault, if there is anybody at fault, any of those sort of things. We weren't trying to establish guilt or innocence of anybody. We wanted to find out what happened so we could stop it. And the motivation behind it really didn't matter, as long as we could find out what it was and prevent any additional cases from occurring.

Q It wasn't your intent or purpose to prove the mechanism of transmission beyond a reasonable doubt?

A That's correct.

MS. WECKERLY: Objection. Calls for a legal conclusion.

THE COURT: Well, overruled.

BY MR. SANTACROCE:

Q Correct?

A Yes.

THE COURT: He's already answered.

BY MR. SANTACROCE:

Q So basically you were trying to find out, as the CDC put it, the likely method of transmission?

A Yes, that's correct.

Q And when you started your investigation, you went in there with some sort of a theory or hypothesis that it was through unsafe-injection practices, correct?

A That was the top on the list, but it wasn't the only thing we considered.

Q All right. Well, we're going to talk about some of the other things you did consider, okay? When you went into the investigation, I believe you -- the first day you did some records check -- checking?

A The first full day, yes. We met with the clinic, the first day we met with them on Wednesday. Thursday, our first full day of investigation, we went through records.

Q And then, the next few days, I guess you did some observations?

A Friday we did observations, and then it was mostly records the early part of the following week.

Q And did you conduct interviews?

A Yes, we did.

Q Do you know who you interviewed?

A We talked to a number of people walking around the clinics, sometimes -- they weren't really formal

interviews, it was kind of, you know, if we saw something we'd ask whoever was working with it what was going on. We had the people who were responsible for doing different things show us what they did.

We also did blood draws on all the staff members to look for hepatitis C, and many of them said different things because they had an opportunity to talk to the investigators, but it wasn't a -- a formal interview or anything like that.

Q So it wasn't a sit-down interview that was tape-recorded or -- or written or transcribed?

A No.

Q And the people you interviewed weren't necessarily the same people that were working on July 25th of 2007, or September 21st 2007, correct?

A That's correct.

Q Now, when -- when you go into these investigations, I guess you're looking for sort of commonalities, correct?

A Generally, yes.

Q And you said you looked at certain other things other than the unsafe-injection practices. What are some of the other things you looked at?

A Well, we wondered if it was a particular staff member, either directly transmitting the virus to patients, or the particular actions of a -- of one particular person. So

we looked at that. We looked at the cleaning of the scopes. We evaluated the records to really see if anything kind of jumped out of procedure-type, or what -- kind of those -- the common big groupings you could have. Would it be an upper or lower endoscopy? Did they have the same doctor? same CRNA? same nurse? Anything like that.

Q And as I understand it, you didn't have all the information you needed, and what I mean by that is, for example, you didn't know what room these individual patients were in; is that correct?

A Yes, that's correct.

Q And you didn't know what time the procedures that they had actually occurred?

A Well, we had a number of times on the charts, and we had difficulty putting that together into a number that we could say we were absolutely confident this is the exact order down to the minute of how things occurred.

Q But you did come to some conclusion regarding the times, did you not?

A In general, yes, but it was very specific to do a -- a minute-by-minute analysis because that data just wasn't reliable.

Q And I -- I think what you testified to in the grand jury was that you finally came to the conclusion that the nurse's notes were accurate as far as the times went?

A We decided there were a couple things we were going to use. They had a computerized system, so at the beginning of the procedure, I believe, we used the time the nurse wrote down that said, it's now, you know, 3:15 p.m., and wrote that down as when it started. There's some fuzziness to that because it could have been the clock on the wall, they could have looked at the computer, they could have looked at a watch.

So, you know, the -- all the times aren't exactly synched up. For the ending time we had that time as well as a timestamp that was basically when the doctor finished, they kind of signed the chart, and that was a timestamp on there that we would use as the completion of the procedure, basically when the doctor was done. Even if there was 20 minutes of cleaning up and all those things, it didn't matter because we knew the procedure itself was basically done at that time.

Q And I believe you testified that you actually observed the nurses looking at a clock and writing times down, correct?

A Yes.

Q Okay. And you sort of take -- you took that time as -- as being as accurate as you possibly could be?

A That's correct.

Q I want to talk about some of the things that you

investigated, and I'm going to show you this chart -- Exhibit 228 by the State. And these were some of the things that -- who prepared this? You did?

A I did.

Q Okay. The staff, the patient, you ruled that out. You didn't see any -- you tested everybody, all the staff for hep C, they didn't have it, so you ruled that out, correct?

A Yes, and we also had the names of former staff members, and we cross-referenced those against a list of people we knew to be hep C positive in Southern Nevada and didn't find any matches.

Q And the next one, what did that mean, physician?

A Was there one physician. The actions of one physician make it more likely. So, for example, Dr. A or Dr. B was more responsible for the cases than another one.

Q And then CRNA?

A The same sort of thing. Was one CRNA responsible for the -- the cases, or was it a general issue?

Q Okay. And the next one, technician?

A The same thing.

Q Okay. But who -- which technicians are we referring to?

A The technician that was listed on the chart as assisting the provider. The one who basically helped handle

the scope, handed equipment to the -- the doctor. So there was a -- a technician posted right next to the -- the equipment, and that technician's name was on the chart.

Q And you obtained the name of those GI technicians through the patient charts?

A Yes, we did.

Q Did you interview any of those people?

A We talked to some of the technicians, just in the course of our investigation, but it wasn't a formal interview. The techs that were doing the scope reprocessing, we had them show us the process; so we spent a little more time with them, but we didn't sit down and do a formal interview with any of them.

Q Did you interview or talk to any of the GI techs that were reprocessing scopes on the two infection dates?

A We didn't have a list of who was doing that on those dates, so we may have, but I don't know.

Q Well, you said you reviewed the patient charts for those dates, didn't you?

A The techs that are listed on there were the techs directly assisting with the procedure. The one that was reprocessing isn't listed in the chart.

Q Okay. And what is the issue with the scopes? Or what was the issue?

A When the process was presented to us, they'd use

an enzyme detergent, and it goes in a basin and they -- it's kind of like soapy water in your sink with an enzyme detergent. They use that to clean the scopes. They use brushes and -- that detergent is supposed to be used for one scope, and they were doing two scopes at a time. The two scopes were basically done together and then went into the automated reprocessor. So they were using the detergent on more than one scope.

Q And what's the danger with not cleaning the scopes properly?

A There could be a potential transmission of infection if the scopes aren't cleaned properly.

Q Okay. And did you note how long it took them to clean the scopes?

A Yes, we did.

Q How long was that?

A The automated process was about 17 minutes, the overall process was 30 to 35 minutes or so. It took about a -- a half-hour a scope is a safe estimate. They had to do a -- a manual part first, and then it went into one of two reprocessing machines where they passed a high-level disinfectant through the machine and basically sanitized it. And then -- that was -- and then they just -- I think, air dried it or blew some air through it to dry it out there, then hung it for the next person. So it took roughly a half-hour

or so.

Q So if we had testimony from an expert on Friday that says it takes 55 minutes to clean the scopes, they weren't -- they weren't taking 55 minutes, were they?

MS. WECKERLY: I'm going to object. There's no evidence that it's the same machine, same manufacturer, nothing.

THE COURT: All right. That's sustained. You can say that --

BY MR. SANTACROCE:

Q What --

THE COURT: -- there's no -- and then --

MR. SANTACROCE: I'll ask it a different way.

THE COURT: -- anything else is argumentative to the --

BY MR. SANTACROCE:

Q Did you review any of the manufactured-recommended cleaning instructions for the scopes?

A Yes, we did.

Q And how long did the recommended manufacturers guidelines tell you it would take to clean the scopes?

A It was an automated process, and so it wasn't -- I don't believe they set a time on it or it had a time. It was basically press the button and go kind of thing.

Q Were you aware that some -- at some points the

Medivators that clean the scopes were broken?

A Yes, we had heard reports of that.

Q And, in fact, you testified in front of the grand jury as to that, correct?

A I may have.

Q And what did you tell the grand jury that the GI techs would do when the Medivators were broke?

A When the Medivators were broken there were two things. They could get replacement equipment if needed, but there was a manual process where they would basically soak the scopes in the high-level disinfectant, rather than use the machine.

Q And you noted that there was an issue as to the otoscopes they were cleaning before changing the enzymatic fluids, correct?

A Yes.

Q I'm going to show you State's Exhibit 150. Did you ever view this room -- the room where the scopes were hung up to dry?

A Yes.

Q There was testimony in this case that some GI techs, or some nurses observed fecal matter on these chux here after scopes were allegedly cleaned. Did you note any of that?

A We didn't see any of that.

Q Did you talk to anybody that told you that?

A No.

Q If that was, in fact, true, would that be a problem for you?

A It would have been a concern, yes.

Q Now, the BLC -- were you aware that the BLC did a summary statement of deficiencies for the clinic?

A Yes.

Q Had you seen that?

A Yes.

Q Showing you State's Exhibit ADE-3. This is allegedly an observation by the BLC on 1/16/08. The GI tech was asked to describe the measured amount of M power with what amount of water. The GI tech stated, Add two to three pumps. Not sure the capacity of the basin. And then it says, I don't have an answer for that.

Were you -- were you aware of that? Did you observe that?

A Yes.

Q Okay. And the recommendation by the BLC -- are you aware what that recommendation was?

A I remember reading them, but I don't remember what their specific recommendations were.

Q Here it notes -- can you read this? Do I have it down far enough for you? The GI techs cleaned two

endoscopes before discarding the enzymatic detergent solution in a water rinse. Did you observe that too?

A Yes.

Q Did any of the GI techs tell you that they had actually cleaned more than two scopes, possibly six, seven, eight, nine scopes before changing the enzymatic fluid?

A No, they did not.

Q Would that have been a concern to you?

A Yes, it would have.

Q Now, going down your chart here, you talk about biopsy equipment. What was the concern regarding the biopsy equipment?

A If a particular piece of biopsy equipment could have been the source of transmission was something that we ruled out, as not all patients had a biopsy and those with a biopsy were no more likely to be infected than those who didn't have a biopsy.

Q The biopsy equipment was reused?

A That was reported later on. During the initial investigation it was just -- for this particular one, was there an increased risk due to having a biopsy or not?

Q And you ruled that out because of what?

A Not all patients had a biopsy and the -- basically the patients with a biopsy weren't at a higher statistical risk than those who did have a biopsy.

Q I'm showing you Exhibit 157. This purports to be a chart of -- have you seen this before, so I don't have to explain it?

A Could I see the actual chart itself?

Q Sure.

A That may make it a little easier than --

Q Have you seen that?

A Yes.

Q Okay. So you know what it is?

A Yes.

Q Were you aware that on July 25th that the source patient Ziyad Sharrieff and Michael Washington both had biopsies?

A Is that what it says on the chart? I'd have to look and see. I -- it's not on the column up there, but --

Q Okay. I'm asking you if you were aware of that when you ruled out that biopsy equipment was the source of transmission?

A Well, that's not related to that table. That table was about September 21. So we ruled it out for September 21.

Q So this table only applies to September 21?

A That's what the title says at the top.

Q So the biopsy equipment could be the source of transmission for the 25th?

A I didn't do a statistical calculation on the biopsy equipment for that particular day.

Q So, I guess my question is, you can't rule it out for that date?

A Statistically, no, we couldn't do any calculations for that day because there was only one infected person.

Q Now, what's the next thing? The endoscopes, which I believe we already talked about, correct?

A Yes.

Q And the next -- next one?

A Procedure type where patients with a colonoscopy are more likely to be infected than those with an upper endoscopy or vice versa. There was no statistical finding that either one was a higher risk.

Q And bite blocks?

A The same. Same thing. It's very closely tied to the procedure type. Only upper endoscopies had bite blocks.

Q Now, were you aware that they were reusing bite blocks?

A Yes.

Q And the next issue?

A That would be the IV placement.

Q And why did you rule that out?

A In order to contaminate a common saline bag you'd have to have a reentry into that saline bag. It was a single flush on September 21. In addition, on July 25, the source patient didn't go into the IV room, his IV was done in the procedure room. So the -- the IV placement room wouldn't have been a factor if the source patient never went into that IV placement room.

Q Were you aware that there was a mistake on the CDC's report as to who gave the -- who started the IVs on July 25?

A Yes, I believe they had an incorrect name or something on there of -- of who did it.

Q Okay. So the fact that you ruled it out because you believed that the same person started the IV heplocks was incorrect?

MS. WECKERLY: I'm going to object. I think that misstates the testimony.

MR. SANTACROCE: Well, he can state what he testified to.

THE COURT: I'm not -- you can answer the question.

THE WITNESS: From the chart it appeared that the IV was placed in the procedure room, and not in the -- the IV prep room.

Q But that was incorrect that you came to find out later?

A In the CDC report --

MS. WECKERLY: Objection. No -- they're talking about --

THE COURT: Okay. When you say the --

MS. WECKERLY: -- that misstates the testimony.

THE COURT: -- IV placement here, what are you talking about?

THE WITNESS: The -- the patient -- they put a heplock in the arm they could inject into.

THE COURT: Okay.

THE WITNESS: On July 25, the patient didn't go into the IV prep room to get the heplock placed, it was placed in the surgical room itself. And that was based on observations of the patient charts.

THE COURT: Okay.

BY MR. SANTACROCE:

Q Okay. And my point is that the CDC erroneously reported that both patients -- that is, the source patient and the infected patient Michael Washington -- their IVs were not both started in the procedure room.

A I never said that Michael Washington's was. It was the source patient that was starting the procedure. On the subsequent ones for the day would have been done in the -- the IV placement. They basically had their IVs placed in two different places.

Q How about on September 21?

A I believe those were all placed in the IV placement room.

Q Okay. Did you find any commonalities with regard to that?

A No, we did not.

Q I'm going to show you this chart for September 21. The top line is all the patients that were in Room 1. And the bottom line are the patients in Room 2, and those are the patients that were tested and reported having hep C. You see Kenneth Rubino, the source patient, up here?

A Yes.

Q Started by Lynette Campbell in the preop area. Did you interview Lynette Campbell?

A I don't believe that she was one of the people I talked to.

Q Do you see Rodolfo Meana?

A Yes.

Q Started by Lynette Campbell.

A Yes.

Q Sonia Orellana? Lynette Campbell. Gwendolyn Martin? Lynette Campbell. Nguyen Huyhn? Lynette Campbell. Patty Aspinwall? Lynette Campbell. Carole Grueskin? Lynette Campbell. The other two patients were started by Jeff Krueger in the same preop area. Did you note that?

A I'd have to look at the table, but I -- I see what you're saying, yes.

Q Okay. And Jeff Krueger testified that they shared saline in the preop area.

A Okay.

Q Knowing this commonality and knowing the fact that they shared saline, does that give you any cause for concern?

A No, based on the -- the CDC observations of the IV prep room, it was known that it was a shared saline. We -- that's not a surprise. It is a multidose vial, and it appeared to be used appropriately from the CDC observations.

Q Is multidose vials of saline acceptable practice?

A Yes, if the saline is labeled for multidose, and in that case I believe that it was.

Q Going back to the BLC statement of deficiencies, that's Exhibit ADE-3. Calling your attention to this area here, do you see that? What was the BLC's recommendation regarding the intravenous fluids?

A Do not use bags or bottles of IV solutions, a common source of supply for multiple patients.

Q So the fact that they were using it was not appropriate practice, at least according to this; wouldn't you agree?

A Well, according to that, yes, that's what they said.

Q Now, we're going to talk about propofol. And you talked about your theory that the mechanism of transmission was unsafe injection practices contaminating propofol bottles, correct?

A Yes.

Q And you testified that you didn't actually know what room the patients were in, when you came to this conclusion?

A Yes, that's correct.

Q In fact, the CDC issued a preliminary finding before they left Las Vegas in mid-January that the -- that's what they believed the cause was?

A Yes.

Q Okay. We had both of the doctors from CDC testify here, and Dr. Gayle Langley Fischer testified that in order for the transmission to have occurred through contaminated propofol, there would have to be a showing that the bottle traveled from room to room. Do you concur with that?

A I would agree that propofol had to travel from room to room; not necessarily a bottle, but yes.

Q A contaminated bottle?

A Or a syringe that was drawn with contaminated

propofol.

Q Well, her opinion was that the contaminated bottle would have to travel from room to room. Do you disagree with that?

A Yes, I do.

Q Again, I -- I'm going to show you State's Exhibit 156. And I guess it's your belief from the last answer that -- you believe that the contaminated bottle wouldn't necessarily have to go from room to room, but an infected syringe would?

A A syringe that had been drawn with contaminated propofol.

Q You didn't have any evidence that a -- first of all, that CRNAs went from room to room except during lunch periods and brief periods of breaks, correct?

A And on the table here you can see that -- if it's set up by room you see people in both.

Q And we'll get to that. I want to know what you testified to in front of the grand jury. You told the grand jury that you had no evidence, or didn't observe any CRNAs moving from room to room except at lunch breaks or a bathroom break, correct?

A Yes.

Q And you didn't see any syringes go from room to room either?

A That's correct.

Q But it's your theory that on this particular date, September 21, somehow a contaminated syringe went from room to room?

A Or a vial. Well, it had to be one of the two. I wasn't saying it was --

Q Had to be one of the two?

A -- I wasn't saying it was exclusively a syringe, but it -- one --

Q Let's look --

A -- one of those.

Q -- at the chart. Room 1 is on the top of your screen there, okay?

A Okay.

Q You see Kenneth Rubino. That's the source patient, correct?

A Yes.

Q And his procedure started at 9:45, correct?

A What's the column header on that one?

Q Let's take a look.

A I just want to see what's on the top of that --

Q Let's -- actually --

A -- that table.

Q -- let's use the nurses' time because that's what you said, I believe, you relied on; is that correct?

A Well, I don't know what column that is, so...

Q Can you see the nurses' times there? The nurses' log notes?

A Yes.

Q Right here?

A Yes.

Q Okay. And what time does it say Kenneth Rubino started?

A 9 --

Q He's the orange one.

A -- 9:49.

Q Okay. And what time did he end?

A 10.

Q And what time did Stacy Hutchinson -- she's right here, Stacy in Room 2.

A I can't see that on the screen. Okay. There it is.

Q See that?

A Yes.

Q Stacy, Room 2? Then sliding over to the nurses' notes, what time did she start her procedure?

A 9:55.

Q So Kenneth Rubino didn't finish his procedure until 10:00. Stacy Hutchinson began before Rubino finished. So presumably Mr. Rubino was already still under anesthesia at

the time that Ms. Hutchinson was undergoing her procedure, right?

A Yes, that's correct.

Q So somehow the bottle from Room 1, from Rubino, would have had to have been transferred to Stacy Hutchinson, or an infected syringe, correct?

A Yes.

Q Even though both of them were undergoing a procedure at the same time in different rooms?

A Yes.

Q Now, what is the next item here? These are what we just talked about, the sedation and injection practices?

A Yes.

Q Okay. You were a co-author on the CDC's -- on this report here, correct?

A Yes.

Q And let me give this back to you before I forget. Thank you. This is Exhibit 105. What contributions did you make to this article?

A Review and comments on it. The main authors were Gayle and Melissa.

Q Okay. So you reviewed it, commented, signed off on it?

A Yes.

Q And you're aware that their conclusions were

drawn prior to any of the information we discussed regarding the assignment of the rooms, the times, all of that, correct?

A Yes.

Q And you'll notice on the last page, there was a caveat to the report. Do you recall what that caveat was?

A No, not off the top of my head.

Q The investigation and conclusions reached are subject to unavoidable limitations. Do you know what those limitations were?

A Yes, and they're described in the rest of that paragraph.

Q Okay. And that is that it -- the investigation was done over a 10-day period, five months after the outbreak, was subject to recall bias?

A Yes.

Q And in fact, you didn't interview the GI techs that were involved on the days of the infections. You didn't interview Lynette Campbell, who was involved on the infection date, did you?

A That's correct.

Q I have nothing further. Thank you.

THE COURT: All right. Redirect?

MS. WECKERLY: Mr. Santacroce, may I just have that for one second? Thank you.

REDIRECT EXAMINATION

days were you there?

A Five or six days.

Q And during those five or six days, were all the -- the charts reviewed from July the 25th and September the 21st?

A Yes, they were.

Q And based on your -- your interviews that you personally did, as well as the CDC interviews and your review of the charts and your own observations, did you eventually personally reach a conclusion about how you believe the hepatitis outbreak occurred in this particular case?

A Yes.

Q And -- I mean, did I leave any -- well, let me ask you this: What was that conclusion?

A That the reuse of propofol vials for multiple patients and the reuse of syringes to access those vials for an individual patient provided the greatest risk of transmission of blood-borne pathogens between patients.

Q And you, I think, talked about earlier that you -- or you considered other possible means of transmission; is that fair?

A Yes.

MS. WECKERLY: May I approach?

THE COURT: Mm-hmm.

BY MS. WECKERLY:

Q Sir, I'm showing you what's been marked as State's Proposed Exhibit 228. Is this a chart that you prepared in association with this investigation?

A Yes, it is.

Q In order to prepare this chart, did you rely on your -- the investigation you conducted with the CDC?

A Yes.

Q And your observations at the clinic on the days you were there?

A Yes.

Q Any -- like, the records or anything else that you may have relied on?

A The clinic propofol records as well, and the -- some of the purchasing records the clinic had as well.

Q Okay. And the patient files, is that --

A Yes.

Q Okay.

MS. WECKERLY: State moves to admit 228.

MR. WRIGHT: Objection.

MR. SANTACROCE: Objection.

THE COURT: Yeah, let me see it.

MR. WRIGHT: May we approach --

THE COURT: Sure.

MR. WRIGHT: -- after you look at it?

(Off-record bench conference.)

BY MS. WECKERLY:

Q Now, let's talk about State's Proposed 228. Was this a chart that -- that you personally prepared?

A Yes, it is.

Q And in terms of -- without reading what the content is, with regard to the top of the chart and the conclusion that you drew, on the first box there, was that based on personal observations or the collective investigation or -- can you let us know what that was based on?

A It was based on laboratory results that I reviewed, and -- I guess both of them would be lab results that I reviewed.

THE COURT: Can you speak up? I didn't hear that last --

THE WITNESS: Both were laboratory results that I reviewed.

THE COURT: Okay. Laboratory results from where? The Health District, or the --

THE WITNESS: It was a combination. The first one was done -- the lab results -- the specimens were collected by the Health District. The second one, the specimens were collected by the Health District or their commercial labs and tested at the CDC.

THE COURT: Okay. And then when you say "reviewed," is that you sitting there and looking at the -- at the results

yourself?

THE WITNESS: Yes.

THE COURT: Okay.

BY MS. WECKERLY:

Q And then the --

THE COURT: And just, sir, so you know, just sort of generally, so I don't have to keep interrupting, if it's not something that you did, let's say, you know, it's somebody else at the Health District who did that, just, you know, say who that person was as opposed to "we" did that because that doesn't really mean anything to us, you know?

THE WITNESS: Okay.

THE COURT: Okay.

BY MS. WECKERLY:

Q And the -- the second conclusion, can you tell us what that was based on, or -- or how you formulated that opinion?

A I analyzed the data that was collected by the team, extracted from the charts, and did the calculations to see if that was a risk.

Q Okay. So that was your own calculation and your own analysis of the data, but the data might have been gathered by others, is --

A That's correct.

Q In addition to yourself, though, probably too?

A Yes, that's correct.

Q Okay. And then the -- sorry, the third box?

A Same thing. The data was collected by the group; I did the analysis myself.

Q Okay. So that's your own conclusion?

A Yes.

THE COURT: I have a question, I'm sorry. How was the data recorded by the group, meaning, did they just have their notes and you all sat and discussed it, or did they all, then, prepare their own written report of what the -- their data was; or how was that, I guess, conveyed to you? Was it conveyed through conversation or a meeting or what?

THE WITNESS: We had standard forms that we used to --

THE COURT: Okay.

THE WITNESS: -- extract the data from the chart. Once it was on the forms, the data was entered to a -- into an Excel spreadsheet, and that -- I went back and recollected some of the data and updated and corrected things, so at the end we had one Excel spreadsheet that we could use to do the data analysis.

THE COURT: Okay. And that was a compilation of all of the chart -- the charts?

THE WITNESS: Yes, that's correct.

THE COURT: All right.

BY MS. WECKERLY:

Q Okay. And the fourth box?

A The fourth box, the same thing. It was a data analysis that I performed on data collected by the group.

Q Okay. And the next one?

A Same thing. It was a data analysis that I did on data collected by the group.

Q Okay. The -- is this the sixth box are we on here?

A Yes.

Q Okay.

A That was a review of the data collected by the group that I performed.

Q Okay. And that particular data was collected from patient charts; is that fair?

A It would have been the procedure charts from --

Q The procedure charts.

A -- the endoscopy center. There were two sets of charts. The patient charts were the -- kind of the medical chart of all the -- all the things that patient had; then there was a chart specific to the procedure that was in the endoscopy center, not the gastroenterology center.

Q Okay. The next one?

A Again, that was an analysis I did of the group data.

Q Okay. This is the third box up from the bottom.

A That was also an analysis I did of the data collected by the group.

Q And the second-to-the-last one?

A The first part was an observation by the CDC -- actually, the whole thing was the -- the observations by the CDC.

Q Okay. And the last one?

A Let's see. The first one was my observation -- it was a CDC observation, my observation, my conversation --

Q Okay.

A -- and then my review of the data collected by the group.

Q Okay.

MS. WECKERLY: With that, Your Honor, the State moves to admit 228.

THE COURT: All right. That is admitted.

(State's Exhibit 228 admitted.)

BY MS. WECKERLY:

Q Can you see that on your screen up there, sir?

A My -- I don't think my screen is on.

Q Oh. Thank you.

A It's on now. Yes.

Q Can you see it now? Okay.

A Yes, I can.

Q Looking at the top of what's been admitted as State's 228, it looks like the chart goes through possible modes of transmission from September the 21st of 2007 --

A Yes --

Q -- correct?

A -- that's correct.

Q Okay. Now, the first one is -- the first column appears to be possible modes of transmission, the middle column appears to be your conclusion regarding it, and the third column on the right appears to be the -- the rationale or your thought process for the conclusion that you drew?

A Yes, that's correct.

Q Okay. So let's talk about a possible transmission source of staff to patient. What were your conclusions regarding that as a possible source of transmission?

A We ruled it out because none of the staff members were positive for hep C. We reviewed the records we had in the database to see if any of the former staff, those were names that we couldn't test, were in there as previously being positive for hepatitis C. And so that was -- initially we ruled it out, and then we had the genetic testing later and could identify the source patient, and that definitely ruled out the staff as a source of hepatitis C.

Q Okay. And you -- not to pick on you, you said

we ruled it "out," but did you personally rule it out?

A I guess I'm speaking as the leader on behalf of the team, but I ruled it out personally --

Q Okay.

A -- yes.

Q So if -- I just want you to be clear if these are your actual conclusions as we go through the --

A It's a little difficult because we work as a team all the time, but yes --

Q -- yeah.

A -- I was the leader of that team; these are my conclusions.

Q Okay. Thank you. And the next possible -- next possibility was, I guess, like, a physician transmitting the hepatitis C, that was considered?

A Yes.

Q And ruled out. Why was that?

A We identified multiple physicians that treated the patients that were infected. We did -- I did a statistical analysis and evaluated if any one of those physicians put the patient at higher risk of being infected, and none was found.

Q Okay. And what -- when you say you did a statistical analysis, saying -- I guess, looking at whether one physician put someone more at risk of -- risk of

contracting the disease, what do you mean by that? Because I know Margaret is going to want to know the math here.

A Okay. This is a calculation called relative risk.

Q Okay.

A And so you look at the -- the risk of disease in the exposed people, and you compare that to the risk of disease in the nonexposed people. So you'd say, the risk of being infected for Physician A, versus the risk of being infected -- or not being infected from everybody else. It's a comparison of the different risks there. So it's -- you do a calculation, then, where it's -- the infection rate in one divided by the infection rate in the other, and you can get a statistical significance on it if you set the -- the P, the probability that it happened by chance at 0.05, the -- kind of the accepted standard, it has to be less than 0.05 to be considered statistically significant.

Q Now, is that -- is that something that epidemiologists do all the -- all the time to kind of assess risks or possible factors that caused transmission, or -- or how do -- I mean, how does that fit in the --

A We use that all the time. When you see on the news that -- whatever the newest thing that's going to kill you is 10 times more likely to kill you than whatever, those are the kind of calculations they're talking about. So it's

the risk of disease, giving it exposure, compared to the risk of disease not having that exposure.

Q Okay. And in my head I -- I would say that that -- does the genetic link that we learned later from the CDC affect that at all as well, or --

A Well, in this case we're talking about a physician -- something that was specific to a physician's procedure. So not --

Q I see.

A -- not the physician -- their blood going to the patient, that would fall under staff to patient. So is it some particular practice of one doctor --

Q Okay.

A -- that made it more likely to transmit hep C because of something that doctor did.

Q All right. Thank you. The next was provider, meaning, the CRNA?

A And this was the same sort of evaluation. We ruled out any one particular CRNA. The patients that had a CRNA were at no greater risk for any of the CRNAs compared to the other CRNAs.

Q Okay. Technician?

A The same is true for that. There was no one technician that created a greater risk for the patient than others.

Q Okay. And what about biopsy equipment?

A Not all infected patients had a biopsy, so that would make it very difficult to transmit it by biopsy equipment, though there's always the potential for cross-contamination. So we -- we did look at the statistics -- or I did look at the statistics as well, and there was no increased risk of disease based on having a biopsy or not.

Q Okay. And when you look at those type of statistics, is there a point in the statistics where it becomes, like, statistically significant, or -- or how do you -- how do you measure that?

A Yeah, there's a probability value that you can calculate, and so it's -- they call it a P value and it's between 0 and 1. So it's the probability that something happened by chance alone.

Q Okay.

A If it's a -- if it's unlikely to have happened just by chance alone, the P value is smaller and smaller and smaller. Anything over 0.05, so 5 percent, is considered not significant.

Q Okay. And that was the statistical outcome of the biopsy equipment, essentially?

A Yes.

Q How about the endoscope?

A This one the -- there were a number of different scopes that were used. Because of the large number of scopes, there weren't enough to really do any meaningful calculations, but the patients all had scopes that appeared to be different from the source patient. We had some problems with the records and some duplicates and things like that. So it's difficult to say for certain, but it didn't appear that there was one scope used on all the infected patients.

Q Okay. How about procedure type?

A There was no increased risk based on an upper or lower endoscopy. The same statistical calculations I performed.

Q And reuse of -- sorry. Reuse of bite blocks?

A This is basically the same as a procedure type. The bite blocks are used only in one of those two procedures. There was no risk from the -- the upper endoscopy procedure, so there can't be the same risk from the bite blocks.

Q Okay. That one seems like you could do without math, but I don't know. No?

A It's the same thing. We still do the calculations just to make sure.

Q Okay. And IV placement?

A In this case, it was the observations on how the IVs were set up by the -- the clinic staff.

Q Okay. And sedation-injection practices?

A So in this case this is the one we did not rule out. We observed the staff reusing propofol vials. The clinic records clearly indicated that they used fewer vials each day than they would have needed for one per patient. So there was vial reuse. And then there was also the observation that the syringe was used to re-access the vial by the CDC.

Q And that was the observation made of Ms. Langley by -- of Keith Mathahs? Is that the observation you're referring to?

A Yes.

Q Okay.

A As well as the conversations with Vincent Mione that said he was told to reuse the syringes but didn't. So it was the idea that that was going on at the clinic at some point.

Q Okay. Now, you talked about the -- the propofol records, I -- you made an allusion to that or you made reference to the propofol records versus the number of patients. Was that something that you personally looked into?

A Yes, it is.

Q And -- and what were your -- what was your assessment or what were your findings regarding that?

A For each day that we looked at we looked at the number of vials that were checked out, the number of vials that were returned, so we could determine how many vials were

used on a typical day in the clinic. For each day that we looked at there were roughly 60 patients a day, and there were fewer than 60 vials being used. It varied day-by-day depending what was going on, and the size of the vials as well.

But from that it was clear that they weren't using the same number of vials, at least, as patients.

Q So there had to be some propofol reuse on multiple patients?

A Yes.

Q Now, when you -- you and the CDC were there, were you able to determine which patients were in which one of the procedure rooms?

A No, we were not.

Q And was that ever something that -- that you, I guess, incorporated in your conclusions as you sit here today, or how does that fit in with your conclusions?

A Several months later something came to our attention that allowed us to try and split it up. The board of medical examiners told us about in their investigation they had a comment from one of the staff members that there was a -- a date error on the bottom of some of the charts, and that could be used to split it out.

So we went back and looked at the date-error issue, and found that that date error did exist at the time of the

procedure. I was able to contact the provider of one of the patients on September 21 and get a copy of the chart that was faxed over right after their procedure.

The date error was obvious at that time. So we know that it happened at that point in time when the procedure was performed, not later. And from that some charts had the date error, some didn't, and that came from a computer system. So we were able to -- if that showed that one room had the error and the other didn't, it allowed us to split up the two rooms.

Q Now, the -- the fact of that date error, did that at all affect your conclusions at all?

A No, it did not.

Q And were you able to reach your -- were you able to reach a conclusion regardless of -- of knowing that piece of information?

A Yes, we were.

Q In -- in your knowledge of -- of hepatitis C and hepatitis C transmission, are people exposed -- that are exposed to hepatitis C, do they necessarily contract the disease even with the direct exposure?

A No. With just about any pathogen, when you expose somebody to a virus or bacteria, some people will become sick; others didn't get sick for whatever reason, or didn't develop an infection for whatever reason.

Q Okay. And are there some people who are exposed

to hepatitis C -- and I think you said this at the beginning of your testimony, that -- that don't even know they have it, and don't experience any symptoms at all, even though they may be positive?

A That's actually the vast majority of patients, 85 to 90 percent of people never have symptoms of it and they wouldn't know unless they were tested.

Q Okay. Now, in this particular case, with the conclusions that -- that you drew, is -- are your conclusions premised on the idea that there was just one infected vial of propofol that was responsible for this on the 21st?

A No.

Q Can you explain how the transmission -- or the -- the ways that you see the transmission occurring on that day?

A Well, there's multiple ways that it could have occurred. Because we didn't observe what happened on the 21st, we can't say exactly what happened. It's possible that it could have came from one vial. There was -- looking at the -- the dose that was recorded for each patient, there would have been enough propofol in one vial to give a little bit to each one, but that wasn't really a realistic scenario.

You would have a -- there were 50cc vials, so that would potentially be used for multiple patients, much more than a 20cc vial, obviously.

Q Sure.

A So that vial could have moved back and forth and it could have been one vial. Or you could have had fresh propofol drawn from that vial, and basically contaminated a second vial when they went in to draw the rest of it, or through, basically using it on a patient, then going into a second vial.

So they could basically recontaminate a second or third vial, as many as needed for that to happen.

Q Okay. And in -- is there any way -- would there be any way for you to determine in that type of scenario if the -- if the virus or there's -- if the virus dilutes it all, or the virus, you know, somehow gets less and less in each vial, or is -- is that impossible?

A It's likely that some dilution would occur, especially if you're talking about going from one vial to a second. But we didn't know how much blood was introduced. We didn't know the patient's viral load. And we didn't know what happened from vial to vial exactly. So there's no way we can say step by step exactly what happened.

Q What was the -- the year that you issued your conclusion regarding the -- the outbreak in this case, and how it was your conclusion regarding the mode of transmission?

A The final report was released in 2009.

Q Okay. And that was the -- the conclusion was

the -- sort of the combination of reusing propofol vials and the reuse of syringes on single patients?

A Yes, that's correct.

Q It's several years later; have your conclusions changed at all since you issued your report?

A No.

Q Has anything come to your attention that makes you question your conclusion that you made back in 2009?

A No.

Q Thank you.

MS. WECKERLY: I'll pass the witness.

THE COURT: All right. Ladies and gentlemen, before we move into cross-examination, let's go ahead and take our morning recess. We'll be in recess until about 11:15.

During the recess you're reminded that you're not to discuss the case or anything relating to the case with each other or with anyone else. You're not to read, watch, listen to any reports of or commentaries on the case, any person or subject matter relating to the case, and please don't form or express an opinion on the trial.

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

And, Mr. Labus, during the break please don't discuss your testimony.

THE WITNESS: Okay.

(Jury recessed at 11:01 a.m.)

THE COURT: I'm just waiting for them to get out of the hallway. And, sir, if you want to take a break, you're free to go out that door.

THE WITNESS: Thank you.

(Court recessed from 11:02 a.m. to 11:15 a.m.)

(Outside the presence of the jury.)

THE COURT: Are you going to be first, Mr. Wright?

MR. WRIGHT: Yep, I think.

THE COURT: And you -- this is going to take two days?

MR. WRIGHT: I don't think --

THE COURT: Ms. Weckerly took an hour.

MR. WRIGHT: -- I don't think so.

THE COURT: Almost exactly an -- a little less than an hour.

MS. STANISH: That's not long.

THE COURT: It was, like -- it was, like, no, that's what I'm saying --

MS. WECKERLY: I'm the quickest.

THE COURT: -- it was 50 minutes. I mean, so --

MR. WRIGHT: No, I don't --

THE COURT: -- how do you turn --

MR. WRIGHT: -- think so.

THE COURT: -- Ms. Weckerly's 50 minutes into 2 days?

MR. WRIGHT: I didn't know what it was going to be.

THE COURT: Right.

MR. WRIGHT: So I don't think it --

THE COURT: I mean, it was almost --

MS. WECKERLY: Got more narrowed, admittedly, this morning, but --

THE COURT: -- so.

MR. WRIGHT: So, no, I don't see it being as long as I had forecast.

THE COURT: All right. In other words, Ms. Weckerly, be prepared to have another witness for tomorrow.

MS. WECKERLY: We will -- yes, try to get someone together. It will -- it will in all likelihood be an insurance person.

THE MARSHAL: Ready, Judge?

THE COURT: Yeah. Mr. Labus, come on back up to the witness stand. The bailiff is going to bring in the jury.

MS. WECKERLY: Also, I did the email, everybody -- draft instructions.

THE COURT: Oh, great.

MS. WECKERLY: So everybody can...

(Off-record colloquy.)

THE COURT: Bring them in.

THE MARSHAL: Ladies and gentlemen, please rise for the jury.

(Jury entering at 11:17 a.m.)

THE MARSHAL: Thank you, everybody. You may be seated.

THE COURT: All right. Court is now back in session. And, Mr. Wright, you may begin your cross-examination.

MR. WRIGHT: Thank you.

CROSS-EXAMINATION

BY MR. WRIGHT:

Q Good morning, Mr. Labus. I'm Richard Wright. I represent Dr. Desai.

A Good morning.

Q In preparation for your testimony here, what have you reviewed?

A I went through my report, I went through some of the notes I had from -- that I had taken in the clinic, as well as an -- a number of research articles.

Q Okay. Did you read any of your testimony?

A My grand jury testimony.

Q Okay. Anything else?

A No, that's all that comes to mind.

Q Okay. And are you a hepatitis expert?

A No.

Q The -- your -- the definition you utilized for acute hepatitis C -- well, strike that.

We've had experts in here testify regarding the distinction between acute hepatitis C and chronic hepatitis C, and symptomatic hepatitis and nonsymptomatic hepatitis C, and they have talked about the acute/chronic distinction as being one of duration. In other words, acute hepatitis C is short term, and chronic long term. Do you agree with that?

A Yes.

Q Okay. And they talk about acute hepatitis C as -- all hep -- let me put it this way, all -- when I contract hepatitis C, whether I know I have it or not, I have acute hepatitis C for the first, say, six months, and I will either be symptomatic or not symptomatic; does that make sense?

A Yes.

Q Okay. And I had understood your definition of acute hepatitis C, it seems like you were viewing acute hepatitis C as newly acquired hepatitis with symptoms -- symptomatic?

A Yes, that's correct.

Q Okay. So that's -- that's your definition of it, correct?

A No, that's the -- the national case definition that we use for public health surveillance. The Council of State and Territorial Epidemiologists comes with -- comes up with definitions, so there's one for acute hepatitis C, and then there's another one they call past or present. And it's

because of that challenge in determining is it a newly acquired nonsymptomatic case, or is it something the person had for decades.

So for surveillance purposes and for outbreaks we use the -- the acute disease with symptoms as the definition for acute disease.

Q Okay. The -- so that when we're talking about -- because some -- some of those other experts said the acute hepatitis C has nothing to do with the severity of the disease. But for your purposes, when we say, like, in Clark County there are two to four reported cases a year; is that about accurate?

A Yes.

Q Of acute hepatitis C, we're talking about someone newly acquired hepatitis and they are symptomatic, jaundiced, sick, everything that happens in those first six months, if -- if it's symptomatic, correct?

A Yes, the cases I'm talking about, it's the public health case definition. They're taking the medical approach which they need for treatment. So it's kind of two views of the same thing.

Q I got it. And so the -- how many -- and you -- you testified that acute hepatitis C with symptomatic, okay? I'm -- I just got it and I'm sick.

A Yes.

Q That's reportable by physicians by law?

A Yes, it is.

Q Okay. And the first two cases that are November, December were reported by physicians?

A Yes, that's correct.

Q Okay. And how many -- aside from physicians reporting acute hepatitis C, the Health District also gets reports from all the labs around here of positive hepatitis results, my -- my terminology.

A Yes, that's correct.

Q Okay. And so every -- every one that gets a blood test at any time, for whatever reason medically in Clark County, if it -- if they test positive for hepatitis, that's reported to the Health District?

A Yes, it is.

Q Okay. And then the Health District keeps a record of all of that?

A Yes, we do.

Q Okay. A registry of hepatitis C?

A More of a list of just positive lab results, but that kind of idea, yes.

Q Okay. And how many -- how many hepatitis -- when you get -- how many do you get a day from a lab, average?

A I can't say for -- per day. I'd say for -- per month we get 2 to 3,000 probably. We get thousands of results

a month; it's a very large number.

Q Okay. I didn't hear you. Say that again?

A I said we get probably 2 to 3,000 a month, a very large number.

Q Okay. So 2 to 3,000 a month reports come in of positive blood tests for hepatitis C?

A Yes.

Q Okay. In Clark County?

A Yes.

Q I mean, is that -- that's your jurisdiction -- Southern Nevada Health District is co-terminus with Clark County, correct?

A Yes, it is.

Q Okay. And are -- are those new reports or duplicates because someone keeps getting blood tests?

A It would be both of those.

Q Okay. Both of those? Because you get -- say you get 3,000 this month, some of them you may already have in your database?

A Yes, that's correct.

Q Okay. When I say "you," I'm talking about the Health District, obviously.

A Yes, that's correct.

Q And so it's -- of those -- say it's -- it's 3,000, so we're, like, talking about -- say 100 are reported

tomorrow, come it -- does -- does anyone contact those people or do anything with that?

A No, we don't.

Q Okay. And do -- you don't know if it's newly acquired -- well, you -- you would know if it's newly reported, correct?

A Yes.

Q Okay. But you wouldn't know if the person just got hepatitis C, and you wouldn't know if they have symptoms?

A Without a physician report on just the lab tests, no, we wouldn't.

Q Okay. So when -- when this -- these first two reports came in, and then we're back to January 2008 now, okay? And that -- that was your initial involvement?

A Yes, that's correct.

Q Okay. And it was passed up to you because you're an epidemiological investigator; is that right?

A Yes.

Q Okay. And already the two reports that had come in had been investigated in the sense of your office -- or the health -- someone in the Health District contacting the two people, correct?

A Yes, that's correct.

Q Okay. And talking to them either by phone or in person to determine risk factors?

A Yes, that's correct.

Q Okay. And do you -- you also independently test them?

A Generally, we won't, unless there's some additional reason to do so. If we have a lab test from a commercial diagnostic lab, there's no reason to do additional testing.

Q Okay. And that's -- that's reliable information? I mean, you -- you have the -- it's reported by a physician, and then the -- the lab tests are there showing that it's positive for hepatitis C?

A Yes.

Q And then the -- the person is contacted and they are symptomatic, and they're interviewed for the common risk factors you all have developed, correct?

A Yes, but I'd say we also determine if they're symptomatic. Just because a physician reports it as an acute case, it may not meet our definition. It may be a misdiagnosis. It may be he only had partial information. So that's part of it as well.

Q Okay. And so someone else did that in the Health District?

A Yes.

Q Okay. And they confirmed that the people are -- were sick, had been hospitalized or whatever and they were

symptomatic with acute hepatitis C?

A Yes, that's correct.

Q And then the -- the background -- the interview of them for risk factors, that takes place, correct?

A Yes.

Q And as I understand it from testimony we've had here, the -- the risk factors for newly acquired acute hepatitis C, but symptomatic, is not as thorough an analysis; is that fair?

A That's correct, we can't consider every possibility.

Q Right. I mean, it's newly acquired, so just by definition we know, like, within the last six months they got the hep C?

A Right. When we do the interviews we ask about those risk factors and the six months prior to the onset of their symptoms, so we limit it to the -- the incubation period of the disease.

Q Okay. As opposed to other people, if I just test positive hep C, and I -- I just found out; I took a blood test and just learned I had hep C and didn't even know it, an interview on me on risk factors goes all the way back, correct?

A Yes, that's correct.

Q The -- to -- and the most common risk factors

are the -- I'm not sure I'm saying it right. The most -- what's the most dangerous conduct? How do you rank the risk factors?

A For newly acquired disease, the majority of cases it winds up being IV drug use, so that's the big question. When you look at the older cases, a lot of it was blood transfusion, so before they started screening the blood supply for it accurately in 1992 there was a risk of hep C, and especially going back into the '70s the way they -- they got blood donors. At one point they had paid blood donors and it tended to attract people that were more likely to have hepatitis.

And so there were risks from mostly blood or medical procedures back then. More recently, though, it's more IV drug use, and a lot of them are undetermined still.

Q And so now it's confirmed by your -- by the Southern Nevada Health District, we have two reported cases, and at that time you had the common link which was a same clinic, correct?

A Yes.

Q And the -- that -- that's what caused it to come to your desk to start looking into it?

A Yes, that's correct.

Q Okay. And just -- I guess, just those two isn't the correct word, but, I mean, with -- with only two reported,

that in and of itself sends up big red flags when they are connected to a common facility?

A Yes, for an uncommon disease like hep C.

Q Right. And so with -- with those two, who do you reach out to first?

A I'll talk to my boss, I'll talk to other epidemiologists or the lab, as necessary. In this case it was mostly talking to my boss, and then contacting the CDC.

Q Okay. And your boss is?

A Patricia Rowley.

Q Okay.

A Or was my boss; not anymore, but she was at the time.

Q Okay. And what is her position?

A She was the manager of the epidemiology office.

Q Okay. And how many of you epidemiologists are in there?

A There's around a half-dozen over that time period. There's a couple that do infectious disease and the other ones do chronic disease, injury, all sorts of things that are totally unrelated to any outbreak investigations.

Q Okay. 'Cause you guys go in and look at the restaurants and all that stuff that we see on T.V.?

A That's the environmental health inspectors, but if there's an outbreak there we do the restaurant outbreaks as

well.

Q Okay. And you were -- when this -- how did this end up on your desk or your computer -- what would -- end up on your computer?

A Yes, I got an email from my boss that just had the details, so the -- the supervisor over the disease investigators that did the interviews notified the office manager, who told me about it.

Q Okay. And you -- were you selected -- do you specialize in this type of investigation?

A We only had two infectious disease epidemiologists and I was the senior person. So I -- I tend to find out about most things, or at least at the time I did.

Q Okay. And had -- had you previously done a -- and is an investigation the correct word in your --

A Yes.

Q -- okay.

A Yes, it is.

Q The -- had you previously done an investigation involving hepatitis C transmission?

A No.

Q Had you previously investigated an ambulatory surgical center for a viral outbreak?

A No.

Q Okay. And by "viral outbreak", I'm talking

about a virus as opposed to, like, bacterial infection, right?

A That's correct. I haven't -- I haven't done any ASC investigations before this one.

Q Okay. And the -- and had -- had you investigated any hepatitis cases?

A Yes.

Q Okay. What type?

A I've done hepatitis A and hepatitis B.

Q Okay. And hepatitis A is generally transmitted how?

A Hepatitis A is typically food borne, and hepatitis B is the same sort of transmission generally as hepatitis C.

Q Okay. And were those in clinics, hospitals, or what?

A No.

Q They were not?

A That's correct.

Q Okay. So when -- when this initially came and it -- it -- you guys deal -- that relative risk, the statistics you all were talking about, that -- that had to be up there high, the two within a couple of months same -- precisely same clinic, correct?

A Well, I would say a red flag was there, but I wouldn't say relative risk. We use that in a different

context, basically.

Q Okay. The -- and so you -- did you talk to your boss, and then initially contact CDC that very day?

A Yes.

Q Okay. And so this is January 2nd, if I recall correctly?

A Yes, that's correct.

Q And so you get in touch with CDC and you tell them what you have, correct?

A Correct.

Q Okay. And are you at that point requesting this epi -- what they called an Epi-Aid?

A Not at that point. Not initially.

Q Okay. You are contacting them looking for guidance and expertise?

A Yes, that's correct.

Q Okay. And so -- and that -- that first day while you were contacting them, a third case gets reported?

A Yes.

Q Okay. And once again, that was physician-reported?

A Yes, it was.

Q And it was vetted -- I mean, it was confirmed it's hepatitis, it's acute, and no risk factors, and lo and behold same clinic and same date as one of the others?

A I believe one or two of the cases also had a dental procedure in the six-month window as well, but all three of them had that -- that same endoscopy center link.

Q Okay. And so you reported that to CDC?

A Yes.

Q Okay. And then the -- the plans -- how -- what happened between the 2nd and the 9th?

A We started discussing with CDC, was an Epi-Aid appropriate? Did they have people available to come out and assist us, and -- and then it was a question of which branches at CDC. So we spoke with the hepatitis branch and the branch that does healthcare-acquired infections, DHQP is their acronym, it's Division of Healthcare Quality and Promotion.

So we were having discussions with them, trying to figure out what the next steps were going to be. We made our official Epi-Aid request, probably the -- the third, probably that next day. They got their team together and said they'd be able to arrive the following Wednesday.

Q Okay. And the Epi-Aid request, I mean, that's part of the bureaucracy of government, you have to officially have someone ask them?

A Our state epidemiologist has to make an official letter of request to the CDC; and then the CDC comes up with kind of a plan of why are they coming out, what are they looking for, and what's the reason for the trip. Then that

gets approved and they find hotels and flights and all that sort of stuff. But it's a pretty standard process that's used all over the country, and we've had Epi-Aids before; it's not a first time we've used it.

Q Okay. And so the -- the state epidemiologist -- is that?

A Yes.

Q Who is that?

A That's Dr. Ihsan Azzam.

Q Okay. And so he -- he was in the loop and forwarded the request?

A Yes, that's correct.

Q Okay. And so they -- they come out and they -- they, from the CDC was Melissa --

A Dr. Schaefer --

Q -- Schaefer --

A -- and Dr. Fischer.

Q -- okay. And they arrive on the Wednesday the 9th?

A Yes.

Q And you all have a meeting with them, before going over to the clinic?

A Yes, that's correct.

Q And at that meeting, yourself, Dr. Fischer, and Dr. Schaefer from CDC, and people from BLC?

A As well as a number of other Health District people.

Q Okay. It -- so they're -- your -- your agency?

A Yes.

Q Okay. And at that time had you been -- had you made any initial determinations in your own mind as to what you thought the probable cause was --

A No.

Q -- going in?

A No, I didn't.

Q Okay. Do you recall that your initial belief was that it was scope-related because it was a clinic and that's what you all, meaning the Health District, thought was the most likely cause?

A I believe my boss sent an email that it was concerned about the scopes because it was an endoscopy clinic --

Q Okay.

A -- and that was just the initial thought, based on the type of the clinic.

Q And it -- and it was the CDC that said, no, we think that injection practices is the most likely cause, based upon our past outbreak investigations?

A I don't think they said it was the most likely cause, they said it was more likely that it was an injection

safety issue than the scopes, but it really could be anything going into there.

Q Okay. But they said the first thing we want to look at is injection practices?

A I don't know if it was the first thing they said, it was something they wanted to look at, though.

Q Okay. The -- I read a conversation you had with somebody called Nachos?

A It's NACCHO. It's the National Association --

Q NACCHO.

A -- of County and City Health Officials.

Q Okay.

A Yes, they get that --

Q Well, it's --

A -- all the time. It's a running joke with them.

Q -- N-A-A-C-H-O [sic], NACCHO?

A N-A-C-C-H-O, NACCHO.

Q And it -- and -- do you recall the conversation?

A I remember talking to them a number of times over the years.

Q Okay. But the -- do you recall a conversation with yourself, Dr. Sands, the -- everyone involved in this with the NACCHO representatives after this outbreak and investigation had occurred in which you were sharing with them, your -- your -- what had occurred?

A Vaguely.

Q Okay. Do you recall -- because I recall reading in there that you stated that your all's initial presumption or assumption was that it was scope related, but that's why we call in the experts because they said the first thing we want to look at is injection practices. And I -- I'm summarizing it, but --

A It doesn't sound incorrect. I don't specifically remember the conversation, though.

Q Okay. And it -- it does not sound incorrect. That sounds like that's accurate about the mindset on going in the door.

A In a general sense, yeah. The scopes were on the list, and I would say the injection safety was probably the top of the list of things that we were looking at.

Q Okay. And so you all had waited for CDC to arrive, and that was one week, correct?

A I think they officially approved the request on Friday, so it was several days, yes.

Q Okay. The -- oh, I mean, from -- from the 2nd to the 9th you all made the determination to wait, get CDC, BLC involved, and don't notify the clinic until everything is in place?

A Yes.

Q Okay. And that's just part of the way

investigations are properly done, correct?

A Yes.

Q Okay. Because the -- you want to -- to your knowledge, no one at the clinic had any idea of this outbreak until you called on the -- on Wednesday the 9th?

A As far as I know, that's correct.

Q Okay. And you called that afternoon, and told them -- did you tell them on the phone?

A I think we gave them a brief overview that we had a number of hepatitis C cases that were potentially linked to the clinic, and we were initiating an investigation, and we wanted to come over and meet with them right away.

Q Okay. And do you remember who you spoke with on the phone?

A I got passed around to a couple of different people, and I think the final person I really spoke to was Tonya Rushing.

Q Okay. And so -- and then you all, within a half-hour, walked across the street and --

A Yes.

Q -- into the clinic. Had you ever been there before?

A No.

Q Okay. And you ultimately met with Tonya Rushing, correct?

A Yes.

Q Okay. Dr. Cliff Carrol?

A Yes.

Q Okay. And Jeff Krueger or Katie Maley may have been present at the first meeting?

A Jeff was present for most of it; Katie was kind of in and out.

Q Okay. So most likely Jeff Krueger first meeting?

A Yes.

Q And at -- at that meeting you had the two -- two BLC people, two CDC people, and yourself?

A Yes.

Q Okay. And did you tell them of the three cases?

A Yes, we did.

Q Okay. And it's hepatitis C, acute, symptomatic --

A Yes.

Q -- positive? And what -- what was the response or reaction?

A They were surprised and offered whatever assistance we needed in the investigation. They were very accommodating when we talked to them.

Q Okay. And what -- you had set up with CDC a game plan for the investigation, correct?

A Yes.

Q Okay. And so you told them, here's what we will need when we come back tomorrow?

A We started to because we didn't know what documents existed. So the first question is what do they have, and then we can decide what sort of things we wanted to look at. We -- I think we had some general categories, but without visiting the clinic we didn't know exactly what to ask for.

Q Okay. And so in visiting it -- and you actually did a walk-around, correct?

A A brief one, yes.

Q Okay. And you were aware that there was a -- what we've called the -- the gastro side, which was medical offices, and then there was actually the procedure clinic, I -- endoscopy side?

A Yes.

Q Okay. And you learned that they had a patient log -- patient list for both days, correct?

A Yes.

Q And patient charts, that would be, like, the patient's file for those days?

A Well, there were two patient charts. So there was the procedure chart on the endoscopy side, and then there was the general medical chart of the patient on the -- the

gastro side.

Q Okay. And essentially -- and whether it was all learned right at that very first afternoon -- Wednesday afternoon, you became aware of all of those charts, the doctor side and the procedure side, and those were presented for all of the patients for July 25th and September 21st, correct?

A As well as a couple additional days. I think -- I think July 25th was a Monday, so I don't think we got any charts from prior to that, but we got the -- the two or three days prior to September 21st as well.

Q Okay. And to get -- so going -- so a number of days, three or four, before the September 21st?

A Yes.

Q Okay. Now, at that first meeting Wednesday afternoon, they -- they give you an overview verbally of their operation?

A Yes.

Q Okay. Like, number of procedures, types of procedures, types of scopes, types of processing, types of medication?

A They talked about the number of patients and the general setup. I know we talked about the medications. I don't know that we went into the types of scopes and how those were processed. That was maybe a little more detailed than the first meeting.

Q Okay. And at that first meeting they -- they talked about medications that they used, administered, on the patients, correct?

A Yes.

Q Okay. And they talked about anesthesia?

A Yes.

Q And that they used several narcotics?

A Yes.

Q And used propofol?

A Yes.

Q And used lidocaine with propofol?

A Yes.

Q Okay. And they explained at that first meeting that the lidocaine and propofol came from multidose vials?

A I know they explained the lidocaine did, I don't know that they said it was a propofol multidose vial. I don't remember specifically what they said. But I believe the conversation they said they used one vial per patient, that they weren't using multidose propofol vials.

Q Okay. You think they said they were not multidosing propofol?

A From what I remember with the conversation, Tonya said if -- if you check the Sharps container there'll be, you know, vials in there with a bunch of propofol left in them from the procedures.

Q Did you do a -- what do you call this report I'm going to show --

A I can't see it. I don't know. Those look like the incident command forms from --

Q Okay.

A -- each day.

Q And incident command forms. Did you prepare incident command forms for this investigation?

A Yes.

Q I'm going to show you --

MR. WRIGHT: Can I approach, Your Honor?

THE COURT: Sure.

BY MR. WRIGHT:

Q -- page 9 and 10, which I think is January 9, 2008. Look at those, tell me if that refreshes your recollection regarding that they told you that they used lidocaine and propofol from multidose vials.

A (Witness complies.) That's what I have in the note here. It still doesn't sound like exactly what happened. The lidocaine was from multidose vials. The propofol, as far as I knew, was not. It's not clear from the way this is written, but that was the -- the conversation.

Q Okay. When you say, "was not," I understand that the vials say -- I mean, ultimately, when you investigate, the vials say single dose; but what I'm asking

is, did they tell you that they used propofol multi -- multipatient?

A I don't believe that they did.

Q Okay. What -- do you read that differently than I do?

A Yes, it was a -- quick notes that I jotted all this down at the end of the day to kind of log everything. And I should have been clearer on what I wrote there, but I -- I wrote it as, Propofol with lidocaine is the primary anesthesia used, and comes from multidose vials. The lidocaine came from multidose vials, but the propofol, as far as I knew, did not.

Q Okay. Have you looked at the BLC -- when you ultimately prepared a report, did you look at their report?

A I've read their report, yes.

Q Okay. Did you look at their notes of this first meeting?

A When I read the entire report, but it's been five or six years since I read it, so --

Q Okay.

A -- that's not something I recall.

Q Are you aware that -- do you know who Dorothy Simms is?

A Yes.

Q Okay. Was she present at this first meeting?

A Yes.

Q Okay. And she states that Jeff Krueger said that they use multidose vials of propofol?

A Okay. If that's in the report, I can't disagree with it.

Q Okay. Well, does that explain why you would put in your January 9th incident status summary that, Propofol with lidocaine is the primary anesthesia used, and comes from multidose vials?

A It could be.

Q Is there any -- strike that.

After this first meeting on Wednesday, in the afternoon, you all make plans to come back the next morning?

A Yes.

Q Okay. And you return the next morning, and that's all of -- all of the same people, plus several more from your office?

A I believe so. I think it was the same two BLC investigators, plus one additional BLC person as well. I think they had three people on the first day that -- that BLC came back.

Q Okay. And that -- that first full day would have been Thursday the 10th?

A Yes.

Q And that was almost exclusively devoted to

records review?

A Yes.

Q And you all set up in a conference room, and they brought in the patient's logs -- patient lists for the relevant days, and started bringing in all of the charts, hospital -- or the -- ASC, the procedure records and the doctor records?

A Yes, that's correct.

Q Okay. And you all started going through those to put together your -- your chart, looking for commonalities?

A Yes.

Q And that -- that took place most of Thursday?

A Yes.

Q Okay. And anything else on Thursday that was relevant?

A Well, there was a staff meeting we attended, where we told them what was going on, and that we'd be observing in the clinic because we planned to do observations the next day, so we wanted them to know --

Q Okay.

A -- why we were there.

Q Okay.

A We also caught the end of a procedure, and then saw the scope reprocessing that day, I believe.

Q Okay. And so the -- the staff meeting, we're

talking about the clinic staff, correct?

A It was the endoscopy center staff.

Q Okay. Right. Procedure -- the procedure clinic's staff, and it was explained to them who you all were, and why you would be lurking in the background --

A Yes.

Q -- watching?

A Right.

Q Okay. And so then you all came back on Friday, and started your observations, correct?

A Yes.

Q And you were doing observations of procedures that morning?

A Yes, that's correct.

Q And you were watching Linda Hubbard --

A Yes, I was.

Q -- CRNA? And what doctor; do you recall?

A The -- Dr. Clifford Carrol.

Q Okay. And did you watch a number of procedures?

A Yeah, a half-dozen or so.

Q Okay. Were they uppers or lowers or do you know?

A I think it was a mix of the two. I remember the colonoscopies. It was just a -- is a longer procedure, and so there was a little more to observe. But it was just kind of a

mix of whatever was scheduled in whatever order. We didn't choose any certain type. We just, you know, whatever they brought in is what we observed.

Q Okay. And you are observing with whom?

A I was in the room with Melissa Schaefer, and BLC people were kind of in and out.

Q Okay. And so as you're watching -- you're watching Linda Hubbard's injection practices?

A Yes.

Q Okay. And she knows -- you're there, Melissa is there?

A Yes.

Q And possibly another BLC or two?

A Yes.

Q Okay. And so with you all watching her, she is drawing propofol and doing patient injections?

A Yes, that's correct.

Q Okay. Did you see any -- we'll get to the number of propofol vials, but just on her injection practices, did you see anything unsafe?

A Specifically, on hers, I think on one of them it was the way -- or she didn't wipe the top of the vial with alcohol or something like that, but nothing -- nothing major, just the kind of minor, typical things that you expect to see if there's, you know, slight problems here or there.

IN THE SUPREME COURT OF THE STATE OF NEVADA

DIPAK KANTILAL DESAI, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	CASE NO. 64591

APPELLANT'S APPENDIX VOLUME 33

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA, Plaintiff, vs. DIPAK KANTILAL DESAI, RONALD E. LAKEMAN, Defendants.	CASE NO. C265107-1,2 CASE NO. C283381-1,2 DEPT NO. XXI **TRANSCRIPT OF PROCEEDING**

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

JURY TRIAL - DAY 37

MONDAY, JUNE 17, 2013

APPEARANCES:

FOR THE STATE: MICHAEL V. STAUDAHER, ESQ.
PAMELA WECKERLY, ESQ.
Chief Deputy District Attorneys

FOR DEFENDANT DESAI: RICHARD A. WRIGHT, ESQ.
MARGARET M. STANISH, ESQ.

FOR DEFENDANT LAKEMAN: FREDERICK A. SANTACROCE, ESQ.

RECORDED BY JANIE OLSEN COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

I N D E X

WITNESSES FOR THE STATE:

E X H I B I T S

LAS VEGAS, NEVADA, MONDAY, JUNE 17, 2013, 9:13 A.M.

* * * * *

(Outside the presence of the jury.)

THE MARSHAL: Judge Valerie Adair presiding. Thank you. Everybody may be seated.

THE COURT: Our last juror just arrived, so -- but then I just heard you had something out of the presence?

MR. WRIGHT: Yeah. Introduction of the report.

THE COURT: Okay. Shut the door. All right. Yes?

MR. WRIGHT: The Health District report.

THE COURT: I'm sorry?

MR. WRIGHT: Admissibility of the --

THE COURT: Right. We have to have a ruling on that because Mr. Labus is -- I've consulted the cases, and while Health District-type reports are admissible in some cases, you know, reading everything, this is not a routine cataloging of information. That's one of the things talked about in the case of United States versus Barry.

One of the things we look at is whether or not the report is prepared, it's likely there's going to be litigation or a criminal proceeding. I think this was a very unique case, and I think that this report is much more akin to an investigative police-type report than it is to an epidemiological report or a public record, which is, you know, as cited by the United States Supreme Court, the routine

cataloging of information. And so for that reason I don't think that the report is admissible in this case.

Now, the next issue are the hepatitis-infected people, the 109 or so people. Are you -- and I haven't fully decided that issue -- will that be something that you're going to be getting to in the -- this morning, Ms. Weckerly?

MS. WECKERLY: Your Honor, I wasn't planning to actually go into that --

THE COURT: Okay. Here's --

MS. WECKERLY: -- on direct.

THE COURT: -- that's -- okay. You and I are on the same page, then.

MS. WECKERLY: Okay.

THE COURT: Here's my sort of preliminary ruling, if you will. The State is precluded from going into it on direct examination. If, however, on cross-examination the defense opens the door by, kind of like what I said with the CDC investigators by, you know, pointing to, oh, it's only these seven people or it's only these eight or nine or however many it was, people, then I think the door can be opened for questioning. You know, there were other people who could not be determined to have been infected by another source, nor could they, you know, scientifically or genetically be linked to the center. So I think it could be opened.

Is that what you're going to say, Ms. Weckerly?

MS. WECKERLY: I was going to say that. There's just a couple of things -- just so it -- on the actual infection days that we have charged, there were ten people on each day that were lost to follow-up.

THE COURT: Okay.

MS. WECKERLY: I was planning on eliciting that on direct examination.

THE COURT: And I think that's fine, that doesn't implicate the confrontation clause --

MS. WECKERLY: Right.

THE COURT: -- because they were lost to follow-up.

MS. WECKERLY: Right. We don't know their outcome, right.

THE COURT: Right.

MS. WECKERLY: I think if there's questions, though, about, you know, the exclusion, you know, maybe it was Lynette Campbell and the saline flush or maybe it was scopes, I think certainly the fact that there were numerous other infections that are at least related or linked, I mean, that -- Mr. Labus uses -- he categorizes it by whether or not there's a risk factor, but there were 105 people that didn't have a risk factor, and I think that lends itself to it not being scopes and it not being a particular employee.

THE COURT: It still could be scopes, though, because didn't you say of the people who are on the case, not all had

colonoscopies? So you've got that same argument whether it's the 100 and -- is that basically what you're saying? Because if they all had the same thing, whether it's 100 people or 10,000 people, if the -- let's just say the scopes were the means of transmission, they could still be infecting that many people.

Do you see what I'm saying? If they're not sterilizing the scopes or the forceps --

MS. WECKERLY: Yeah.

THE COURT: -- or whatever --

MS. WECKERLY: I mean, I think that it's not conclusive, but I think it certainly --

THE COURT: Well, I'm not sure it is -- I mean, I think it could be suggestive if you looked at, okay, well, Lynette Campbell wasn't working these other days, or I think you pointed out already previously in the trial, you know, you can't say it's the colonoscopy instruments when some people had endoscopies.

MS. WECKERLY: Right.

THE COURT: I mean, I think that kind of --

MS. WECKERLY: Right.

THE COURT: -- thing, but just a number alone doesn't tell me anything. Do you see what I'm saying?

MS. WECKERLY: Yes.

THE COURT: And so I think, yes, different procedures

than that would -- or some people had polyps removed so that could implicate the forceps, but some people didn't have polyps removed so that couldn't implicate the forceps.

MS. WECKERLY: Yeah.

THE COURT: Or some people had endoscopies so -- with nothing removed at all, no tissue sampling, so that wouldn't be the same. Do you see what I'm saying? A comparison like that, I think, is meaningful because you're comparing the use of different instruments.

Numbers alone, I don't find particularly meaningful in a vacuum because, like I said, let's just say it's the forceps and you're treating 60,000 people and you tell me, well, it was 100 people. Well, it still could be dirty forceps if all of those people were having polyps removed or biopsies done or something like that. Do you see what I mean?

MS. WECKERLY: I do. There was -- there was, though, at least one case at the other center --

THE COURT: Okay.

MS. WECKERLY: -- and, I mean, that would -- I doubt --

THE COURT: Well --

MS. WECKERLY: -- there's the same scope there or whatever. I guess there could be the same cleaning issues or whatever, but in -- I -- whatever the ruling is, I'll certainly --

THE COURT: I mean --

MS. WECKERLY: -- abide by it.

THE COURT: -- like I said, I can see them opening the door.

MS. WECKERLY: Okay.

THE COURT: If you feel that they have opened the door in some way, then obviously the remedy is to approach the bench --

MS. WECKERLY: Sure.

THE COURT: -- and we may have to -- I may -- we may have to do some questioning of Mr. Labus out of the presence of the jury to establish, you know, what he knows and how he knows it and possibly argument to say -- to link up whether or not, in fact, it is contrary to what has been suggested by a question on cross. Do you see what I mean?

MS. WECKERLY: There is one table from the report that -- I understand the ruling on the report itself, but it goes through what was eliminated as a source of transmission on the 21st that I will seek to admit because it's just narrowed to that infection date.

THE COURT: Any objection to the table --

MR. WRIGHT: Yes.

THE COURT: -- being separately marked as an exhibit?

MR. WRIGHT: Yes, I object to it.

MR. SANTACROCE: Can I see it?

MS. WECKERLY: Sure.

THE COURT: Basis?

MR. WRIGHT: The basis is -- and it's a bigger basis than just the table, and so -- I understand the report is not admissible, and the State is not going to elicit -- I just want to make sure I understand --

THE COURT: Elicit on --

MR. WRIGHT: -- the rules, right?

THE COURT: -- direct examination the infection. That's what Ms. Weckerly said, she does not --

MR. WRIGHT: Right.

THE COURT: -- have the intent to elicit on direct examination the 100-plus other infected patients. But she does intend to elicit that how many people were -- couldn't be contacted, we just don't know.

MS. WECKERLY: Ten on each day -- on each infection day didn't respond. So they were lost. There's no follow-up on them.

THE COURT: I'm fine with that because I don't think that implicates the confrontation clause because --

MR. WRIGHT: Well, the --

THE COURT: -- it is what it is. They were contacted and we just don't know.

MR. WRIGHT: They were subpoenaed?

MS. WECKERLY: Well, we didn't --

THE COURT: They didn't. That was what the whole issue was.

MS. WECKERLY: We don't know who they are.

THE COURT: That was the whole issue with the Health District --

MR. WRIGHT: Certainly, we know who they --

THE COURT: -- Mr. Coffing, who I see is sitting here --

MR. WRIGHT: Certainly.

THE COURT: -- opposed the release of that information. I ruled in the Health District's favor. That was one of the issues, as I recollect.

MR. WRIGHT: There's only 120 patients. We know the names of every one of them. This isn't rocket science. Of course they know who it is, and they can subpoena them. And because they opted not to, I'm supposed to -- if I examine the expert on the information he used to reach his conclusions, I'm opening the door to waiving my confrontation rights?

THE COURT: I don't think that's what anyone is suggesting here. I think -- what I'm ruling, anyway, is kind of what happened with the CDC people, where you sought to suggest that, oh, well, you are basing it on this limited number or something like that, and I said -- I don't remember exactly what the question was -- I don't remember exactly what the answer was, but I said, Look, you can't create a false

impression without opening the door to then the State, you know, addressing that false impression. That's what I said. I think it's the same with Mr. Labus.

So, you know, if you open the door, then the State may be able to get into that. Again, limited to this: By their own self-reporting we did not identify other risk factors, but they could not be scientifically or genetically linked to the center. I mean, that's it. That's what I understand that the evidence would be.

So they can't say that -- in argument -- that they're linked because they never were linked. They can't say definitively they didn't have other risk factors. By their own self-reporting they didn't identify other risk factors. I mean, I think that's what it would open the door to.

Again, you know, I think my ruling is consistent here, that, you know, you can't create a false impression, and if you do, then that may open the door to what really occurred with the testing and interviewing of all of the infected people.

MR. WRIGHT: Okay. So if I open the door, then I get the identity --

THE COURT: Well --

MR. WRIGHT: -- of all of those people and I get the information I need? The State has created this riddle, Judge, and I want to -- I'm not making myself clear. They opted

to --

THE COURT: No, I think you --

MR. WRIGHT: -- put an --

THE COURT: -- are making yourself clear.

MR. WRIGHT: -- no, they opted to put an expert on the stand who has looked at materials and reached his conclusions. And part -- part of his thought process had to have been, oh, I think it's this or that because we sent out letters and we got this many back, and that corroborates it to me this or that happened. And so that's off limits. I can't go to the area that he relies upon because I'm not going to get it, if -- because of the law that says that's --

THE COURT: Well, what if you asked him of his thought process and his thought process was, well, there were 100-and-something other infected patients? I'm not going to tell him, Well, you can't testify about your true thought process.

It's exactly the same situation that was created with the CDC. I'm not going to tell him, well, if Mr. Wright asks you what your thought process was or why you focused on this to the exclusion of something else and that involved 109 other patients, then I'm not going to tell him that he can't answer that question truthfully.

I mean, I guess we are in a bit of a --

MR. WRIGHT: That's good. So I'm -- I'm waiving --

THE COURT: -- conundrum here, but --

MR. WRIGHT: -- I'm waiving my confrontation rights --

THE COURT: No, you're not --

MR. WRIGHT: -- he --

THE COURT: -- waiving your confrontation rights.

MR. WRIGHT: -- certainly I am.

THE COURT: You have your full confrontation rights.

MR. WRIGHT: Of those 106 patients? Get something straight, I dispute that they even have hepatitis. I dispute that they got it at the clinic. I admit nothing. He's relying upon hearsay to make the determination, No. 1, that they are infected. No. 2, that they're clinic-associated because they have no risk factors. And No. 3, he won't disclose who they are. That's the evidence. He won't tell us who they are.

They're putting an expert on the stand who knows something, has it down -- I can't look at what he's looked at, and the State opted to use him as the expert. In any ordinary case like this, you get an expert, you have him read all the transcripts of the evidence that came in, or you have him sit here the whole day so that they have heard the same thing everyone has heard, and then they get up there and opine.

But Mr. Labus has, by law -- by your ruling -- the right to have information that he has relied upon, that he

cannot share with me. And so how do I have the right to confront him on that issue?

MS. WECKERLY: As to --

THE COURT: Ms. Weckerly?

MS. WECKERLY: -- as to the charge days, everybody has access to -- to all of that information, and I don't -- the fact that they sent out letters and didn't get a response from 10 people on each day -- there isn't -- there's nothing there. There's nothing to confront because they didn't get information back from --

THE COURT: He's not talking about that. I am assuming --

MS. WECKERLY: But as --

THE COURT: -- you're talking about the 100-and-some --

MR. WRIGHT: Correct.

MS. WECKERLY: Okay. The other 100 -- the other 105, he can -- I mean, he's certainly, when I've read his depositions, he's very qualified when he talks about that because he says, This is their self-reporting, I can't link them conclusively to the clinic; they may, you know, there's instances where people falsely report. I don't think he relies on those opinions to form his opinion or conclusion about how the transmission occurred on our actual days, but he does rely on the transmission to, I guess, to make the

decision as to how far -- how far back to send out safe-injection practices.

So he -- he saw unsafe-injection practices back in 2005 --

THE COURT: But -- and that doesn't really matter --

MS. WECKERLY: -- but -- but I'm not asking --

THE COURT: -- what --

MS. WECKERLY: -- him about that, so --

THE COURT: -- whether he sent out 30,000 letters --

MS. WECKERLY: Right.

THE COURT: -- or 90,000 letters or 60,000 letters or whatever. I mean, to me that has nothing to do with, you know, whether your defendants, in this case, you know, are guilty or not guilty --

MS. WECKERLY: Right.

THE COURT: -- how many letters he wound up sending.

MS. WECKERLY: Right. But I don't think that he relies on that aspect of the Health District action to reach the conclusion as to the source of transmission. But if he's going to be asked about, you know, why did you send all those out, or boy, you only got seven people out of sending out 47 letters, you know, that's not true. So I think that's where the --

THE COURT: I --

MS. WECKERLY: -- the false impression is.

THE COURT: -- and that's -- that's exactly what I was -- was saying too. Everything else you can -- I mean, I don't see a problem with fully confronting him on the bases of his conclusions, and how, you know, he determined it had to have been the propofol and the CRNAs, and --

MR. WRIGHT: Because they elect to choose him as the witness who has information that he cannot share with me. They -- they didn't have to use him, and so because of that if I cross-examine him fully with my confrontation rights I'm waiving -- I'm opening the door and then in can come evidence that is hearsay, and that I don't have a right of confrontation to --

THE COURT: Well, let's be clear here --

MR. WRIGHT: -- all because the State didn't do it.

THE COURT: Let's be clear here. First of all, they didn't go out and choose Mr. Labus as their expert. Mr. Labus was the employee of the Health District that went out and did the investigation which far preceded any involvement by the District Attorney's Office. Just -- so to me I think it's unfair to somehow suggest that Mr. Labus is in the same exact position of a retained expert and they could have chosen anyone is inaccurate.

I mean, they're -- they're calling Mr. Labus because Mr. Labus was on the front lines of this thing. He was on the ground there doing this investigation, and the District

Attorney's Office had no part in that choice.

Ms. Weckerly?

MS. WECKERLY: Well, I mean, that's true. He's a percipient witness too. He has conversations with people that we intend to bring in because their statements in court, you know, these are prior inconsistent statements. He's a regular witness and he also has expertise, and based on his observations on the day they were there, his collaborative, you know, I guess discussions with the CDC representatives, he reaches a conclusion about how the transmission occurred. And when he rules out the other sources it's based on information he observed or got from the records from those two infection days.

Now, why the notification was as broad as it was is a different decision, so, I mean --

THE COURT: I don't think that's really what Mr. Wright is focusing on, the --

MR. WRIGHT: Right.

THE COURT: -- notification.

MR. WRIGHT: I'm not. I just have the -- and I have a problem with the -- for the two dates in issue, July and September. The -- they're -- they are going to elicit that 10 patients on each day we don't know whether they have hepatitis, is that what I understand?

MS. WECKERLY: Right. Yeah, there's no follow up on

-- they didn't --

MR. WRIGHT: Okay. But --

MS. WECKERLY: -- respond.

MR. WRIGHT: -- okay.

THE COURT: I think what you can't argue -- I mean, I think the evidence will be they didn't respond, that's it.

MR. WRIGHT: To what? The subpoenas?

THE COURT: To the letters.

MR. WRIGHT: The compulsory process? What -- why wasn't the case investigated? So I -- I open the door if I go into these 10? I want to know who they are. I want to know who didn't respond, and that's what I'm going to ask him.

THE COURT: I don't think you open the door to anything --

MR. WRIGHT: Okay. Well, then --

THE COURT: -- there.

MR. WRIGHT: -- I'm going to ask him for those 10 on each day --

THE COURT: And then he can say, well, it was our belief that -- or we were -- or we were told we didn't have to -- or whatever the case may be. I mean, those were the part of the ones that, as I recollect, were litigated. The State subpoenaed the information, as you recall, the Health District filed -- I think they filed that they objected to the service of a subpoena, I believe, so they filed it, I think,

as a motion to quash, if I recall, and they argued that pursuant -- as you -- as you'll remember, pursuant to state statute. They didn't have to disclose that information.

The Court ruled in the Health District's favor, that they didn't have to disclose that information. And so -- now, could the --

MR. WRIGHT: So that --

THE COURT: -- state have done more?

MR. WRIGHT: Yeah, could --

THE COURT: Yes.

MR. WRIGHT: -- is that hard to figure out with 126 patients? They sit on their hands and do nothing to investigate the case.

MS. WECKERLY: But, I mean, even if -- even if we got the people, we still don't know how the Health District classified them. I mean, that's -- you know, yes, we could, but we wouldn't know what the internal classification of the Health District --

THE COURT: Right. But you would -- I mean, hypothetically, had you done the -- I mean, to be fair, had you done the investigation and had you found the people and had you contacted them and had some of them been willing to speak with your investigator, at least some of them may or may not have been tested and some of them may have disclosed the results of those tests.

MS. WECKERLY: Right. I mean, that's how we got --

THE COURT: That's what Mr. Wright --

MS. WECKERLY: -- looked --

THE COURT: -- is talking about. So then you would know, okay, these ten -- of the ten you found five and five were infected with hepatitis -- or two of the five were and the other three weren't, or whatever the case may be. Is that basically what you're saying?

MR. WRIGHT: Correct. And I am viewing it that there are six total -- well, one -- one viral -- not connected, I mean, the one for the two days -- or two.

MS. WECKERLY: Two.

MR. WRIGHT: But I'm viewing that that the state of the evidence is there were seven for the two days combined, seven out of 126 or whatever the number is. And if the State is going to argue that there's seven, or there may be 27 --

THE COURT: Yeah, I don't think that would be --

MR. WRIGHT: -- that -- that --

THE COURT: -- fair. They can't argue that. That would be --

MS. WECKERLY: No, we're going to argue that --

THE COURT: -- totally --

MR. WRIGHT: Well, then why are they --

THE COURT: -- unfair.

MR. WRIGHT: -- bringing it out at all?

MS. WECKERLY: We're -- we're going to argue there's nine because we're -- we count --

THE COURT: Yeah, the --

MS. WECKERLY: -- Lakota Quanah and --

THE COURT: -- Lakota Quanah --

MR. WRIGHT: Oh, that -- that's --

THE COURT: -- that's fine.

MR. WRIGHT: -- what I meant.

THE COURT: You can argue that there's nine. I mean --

MR. WRIGHT: But they're --

THE COURT: -- I don't --

MR. WRIGHT: -- they're going to argue there's --

MR. COFFING: Hold on, one --

THE COURT: -- think you can say --

MR. COFFING: -- at a time.

MR. WRIGHT: -- 29.

MR. COFFING: One at a time.

THE COURT: -- well, we didn't hear from these people, so they, you know, it -- the inference is that they were infected. I mean, it's just as likely they didn't respond to the Health District because they weren't infected, and they thought --

MR. WRIGHT: Well --

THE COURT: -- I'm not infected, why -- why am I

going to bother with this whole thing?

MR. WRIGHT: Right. But the --

THE COURT: I mean, I think that's just --

MR. WRIGHT: -- what --

THE COURT: -- as reasonable an inference --

MR. WRIGHT: -- why -- why is it --

THE COURT: -- as to why.

MR. WRIGHT: -- coming out, other than to draw the inference that there may be others?

THE COURT: I think they can bring it out to explain the blanks on the sheet that -- that we don't know, that the -- is that -- I mean, if that's what they're doing --

MS. WECKERLY: That's -- right, we don't --

THE COURT: -- on the schedule --

MS. WECKERLY: -- know.

THE COURT: -- is to say, look, these were people, the Health District, that we don't know.

MR. WRIGHT: The Health District does, but we don't?

THE COURT: Yeah. I mean --

MR. WRIGHT: And so in a --

THE COURT: -- the truth is the truth --

MR. WRIGHT: -- criminal case we're not --

THE COURT: -- Mr. --

MR. WRIGHT: -- allowed to know. I --

THE COURT: Mr. Wright, there are -- I've said this

over and over again. You know, you didn't weigh in on the issue with the Health District and the State. I'm not saying you had to, but here's the deal, and I've said this over and over again: There are two, you know, just -- this is a, you know, the Health District preventing the spread of disease and studying how disease is, you know, spread and things like that, that's a very strong State-ish interest, and I ruled that that State interest is equal to the State interest in going forward in criminal proceedings.

And so in this case I ruled they didn't have to disclose --

MR. WRIGHT: Okay.

THE COURT: -- that name because you --

MR. WRIGHT: I -- I'd --

THE COURT: -- have to protect the open flow of information with the Health District because their function is to, you know, identify communicable diseases and to try to, I guess, ascertain how those are spread and to prevent the further spread. And so, you know, they have a strong and compelling, in my view, legitimate interest --

MR. WRIGHT: Okay. As --

THE COURT: -- in keeping the -- that information confidential.

MR. WRIGHT: And stronger than my client's right to a fair trial and his compulsory process rights and his rights of

confrontation? I make the demand right now for a Court order. You say the State's balance doesn't tip; I want it -- under compulsory process, my right to confront witnesses and the evidence that is available. I want the information that won't be turned over to the State by the Health District.

MS. WECKERLY: Well, yeah, I don't have it, so...

MR. WRIGHT: No, I'm -- I'm subpoenaing it, I'm demanding it, he's testifying, I am requesting that the witness produce it.

THE COURT: Mr. Coffing, I'm assuming you're here for the Health District?

MR. COFFING: Your Honor, I was here to just be with the witness, Your Honor. I wasn't --

THE COURT: Right. I mean, here's --

MR. COFFING: -- anticipating --

THE COURT: -- the thing. You want to subpoena the information, I guess, subpoena the information. As I recall, the --

MR. WRIGHT: No, I'm requesting --

THE COURT: -- statute, it was pretty much no exceptions. You know, to me the remedy if, you know, you can't get a fair trial with the information is a separate remedy than forcing the Health District to turn over the information. Now, everyone keeps saying that, well, you could have figured out the information other ways. So if that's the

case, then I don't see how the interest of the Health District somehow is minimized when there are alternate routes to find that information.

MR. WRIGHT: I don't have to do any of that.

THE COURT: Well, all I'm saying is, first of all, the State cannot create a false inference to their benefit by virtue of the fact ten people didn't respond. They can explain what the missing people mean on the chart, but they can in no way argue, well, maybe these people would have had hepatitis, we just don't know. That would be improper argument in my view, and you can't do it. So does that alleviate some of your concerns?

MR. WRIGHT: No. I still want the information. I'm -- I don't want to -- I don't want to -- I don't want this on an idea that, okay, if you want it, go subpoena it. The witness is here, and so I am going to request that he produce it. And so I -- I just want a ruling so that --

THE COURT: Do you have the 126 names?

MR. STAUDAHER: They're -- they're on the chart.

MS. WECKERLY: They're on the charts, but we --

THE COURT: On the day?

MS. WECKERLY: -- you know, we redacted them. But I don't --

MR. STAUDAHER: Counsel --

MS. WECKERLY: -- I don't --

MR. STAUDAHER: -- Counsel had the --

MS. WECKERLY: -- know who --

MR. STAUDAHER: -- originals, so they've --

MS. WECKERLY: -- didn't follow up.

MR. STAUDAHER: -- got all that.

MS. WECKERLY: I don't know that. I know who the people are, but I don't know who was lost to follow up because that would only be known to the Health District.

MR. WRIGHT: Oh, so you're -- you're talking about -- I mean, there are -- there are 20 people who didn't respond for the two --

MS. WECKERLY: Right.

MR. WRIGHT: -- days, correct?

MS. WECKERLY: Correct.

MR. WRIGHT: The identity of those 20?

MS. WECKERLY: I don't know that. Only the Health District knows that.

THE COURT: Then how do you know --

MR. WRIGHT: We have patient lists.

THE COURT: -- okay, well, wait. I'm missing something here because if you have -- let's make this easy for us, 100 people, okay? And let's say of the 100 people 8 -- 8 that day were infected, okay? So now you've got 92 people. And of those 92 people, are you saying -- and then, of the 92 people, I understand you knew X, you know, A, B, and C, and D,

weren't infected; is that true?

MR. STAUDAHER: No.

MS. WECKERLY: No.

MR. STAUDAHER: What we have is 126 -- the -- and Counsel had the original, the unredacted information, so both sides have had all the names of the patients that -- those two days, who had procedures done on those two days. Of those 126 people, or whatever, we -- we -- there are apparently a total of 20, 10 for each day, that were lost to follow up by the Health District. So of the --

THE COURT: Right. But you know who was not lost to follow up.

MR. STAUDAHER: No.

MS. WECKERLY: No.

MR. STAUDAHER: If we knew who was not lost to follow up, we would know --

THE COURT: Then you would know who --

MR. STAUDAHER: -- was --

THE COURT: -- right.

MS. WECKERLY: Right.

MR. STAUDAHER: -- and that was all -- that was the information that we were requesting. That was what the Court ruled we could not get. So we don't know which ones the Health District contacted and didn't contact --

THE COURT: So all you know is, okay, of the other,

say 90 people that weren't lost to follow up --

MR. STAUDAHER: We don't know who those people are -- which ones were not lost.

THE COURT: -- right. That -- that none of them tested positive for hepatitis, and that 10 people you don't know and nine people did test positive; that's what you know?

MS. WECKERLY: Right.

THE COURT: And you know the identity of the people who do -- did test positive?

MR. STAUDAHER: That we have linked --

THE COURT: Right.

MR. STAUDAHER: -- and --

THE COURT: Right. And --

MS. WECKERLY: Of the ones that followed up --

THE COURT: -- that's all you know?

MS. WECKERLY: -- we know who they are. We know that the -- we know the ones that are positive.

THE COURT: Right. Which are the ones -- you know that. So the other people, you know that they weren't positive, but you don't know their identities.

MR. STAUDAHER: No, we don't know that they weren't positive. We don't --

THE COURT: I'm not talking about --

MR. STAUDAHER: -- know if they were ever tested --

THE COURT: -- the people who didn't follow up, I'm

talking about --

MR. STAUDAHER: Oh.

THE COURT: -- the people who did follow up.

MR. STAUDAHER: It's our understanding that those people were tested --

THE COURT: And they're negative?

MR. STAUDAHER: -- at some point and they were negative, yes.

THE COURT: Okay. And what Mr. Wright is saying is okay, you know there were 126 patients on that day. You can eliminate the people we already know their identities because they're in this case and they tested positive. Of those other people, what you could do is try to subpoena and contact all of those, and then find out from those who contacted you back, Did you follow up with the Health District or not follow up with the Health District?

Is that essentially what you're saying, Mr. Wright?

MR. WRIGHT: Yes. And it -- it affects on the chart when we have skipped -- the whole skipping and room to room, and presumptions that this -- this person that followed didn't get hep C, now it's going to be left -- well, we -- we don't know if they did or didn't.

THE COURT: How is this different from --

MR. WRIGHT: And --

THE COURT: -- any other case where the defense's

argument is, Look at how poorly investigated this case was. Let's just take a run-of-the-mill robbery case and, you know, somebody says, oh, you know, it was an African-American person that was 5 feet, and then they stop an African-American person on the street and he's 5'7 and they arrest him, and then they shut the whole thing down and they don't bother with fingerprints or DNA or anything else that they could have done that would have potentially exonerated the person that they picked.

And that's what the defense argues, and I know, though, you don't tend to handle those kinds of cases, but trust me on this, that's probably the majority of what we see. You know, how is this any different when the argument is, look, the State didn't do a good job? They didn't do a thorough investigation. They could have done more. You know, where -- where are these other things that they could have done?

MR. WRIGHT: The --

THE COURT: Tell me how this is different.

MR. WRIGHT: The difference is the State of Nevada has the information. They -- the State of Nevada has it. You're saying the District Attorney doesn't. The State has evidence that may be exculpatory. That may help the -- and I can't have it. And you're putting this privacy right of the Health District --

THE COURT: Well, first of all, let's be --

MR. WRIGHT: -- above --

THE COURT: -- clear here, Mr. Wright. You weren't heard on -- you were all here, as I recall, but none of the defense wanted to be heard on the issue with the Health District. So what the Court considered was what the State had presented and what the Health District had presented.

And basically, the issue that was litigated at that time was, well, the State said, well, we, you know, feel like we need to find these things and blah, blah, blah, and, you know, the Health District, as I recall, said there's other ways for them to get it.

And our interests in protecting full and complete disclosure to fulfill the duties of the Health District, you know, are tantamount to -- to their, you know, interests in finding this information. The statute, I thought, was pretty clear -- the State statute -- and so that was the issue before the Court at that time.

The Defense, you know, was here, they, you know, didn't -- didn't choose to weigh in at that point. And so I don't think in some way it's fair to penalize the District Attorneys who are here because they did seek out that information --

MR. WRIGHT: Well, they --

THE COURT: -- from the Health District. I'm not

saying you were obligated to do it.

MR. WRIGHT: Of course, I'm not --

THE COURT: All I'm --

MR. WRIGHT: -- I'm not obligated --

THE COURT: -- no, and I'm not -- and well, just before -- I'm not suggesting that you were, but let me just say that the consideration that, you know, what was -- what was considered by the Court was the arguments from the State, the DA's office, and the Health District at that time, you know, not, you know, some of the arguments that you're making today. So that's all I'm saying.

In any event --

MR. WRIGHT: Because today I'm saying it under compulsory -- compulsory process, and the right of confrontation, I want the evidence that the State of Nevada has and will not give me.

And I don't buy their higher investigative privilege that trumps my client's right to the evidence. There -- these cases come up all the time. The State, if they don't want to turn it over, has the option. They do this in secrecy cases, top secret, don't want to turn over CIA information. The remedy is the case gets dismissed.

You don't just say, oh, sorry, you got to go to trial without it. That's what I am requesting and want, and the State has it. And the Health District, they're

willy-nilly on their obligations. They'll promise confidentiality. I mean, it's right in their -- in Labus's note, they tell someone this is an off-the-record statement, and then turn right around and hand it to the police.

So I don't buy this investigative --

THE COURT: Well, just --

MR. WRIGHT: -- privilege and the public interest.

THE COURT: -- just to be clear, it's not an investigative privilege under the --

MR. WRIGHT: Public health privilege.

THE COURT: -- statute -- it's a patient privilege. It's to get people to disclose these diseases to the Health District, as I -- as I recall it, so that they're not afraid that their identities will be made known, in this case, publicly.

And so, that's what it's for, so that people feel like they can go to the Health District if they've contracted a disease and they don't have to worry about their name being disclosed down the road.

And the -- the State interest is pretty obvious. We need people who are willing to go and disclose these things for the Health District so that the Health District can determine outbreaks and put an end to them. And the idea being, if people know, well, hey, if I go to the Health District, then some criminal defense attorney may get my name

and, you know, the reporter sitting in the back row now is going to know who I am and that I've got hepatitis, or, you know, maybe I went even, you know -- you know, some people may not want it -- want it known they went to the gastro center because maybe they have, you know, Crohn's disease or cancer or some other disease that they don't want known publicly. They don't want their employers to know about it.

And so these are all interests. What if one of those people tested positive for AIDS, HIV, totally unrelated to this case? That's something that's clearly protected. And so there are abundant reasons why that's an important statute that had nothing to do with the proceeding.

But, you know, right now as I'm sitting here I can think, well, gosh, if people know, wow, if I go in and I disclose these things and I'm tested and I have a disease that I don't want people know -- knowing about because it's stigmatized, and it could even be a problem with my employer, you know, what if you're -- then that's going to put a -- put a stop to the flow of information to the Health District.

And I think this right here what we're -- what we're seeing is exactly what they're concerned about. And so, you know, I -- I stand by the ruling in that regard.

So here's what I would suggest going forward. Let's get started. We'll go through the direct of Mr. Labus. If you have a question regarding cross, if that will open the

door, then certainly approach the bench. If we need to take a break or something like that, we'll excuse the jury and take a break.

With respect to this issue with the nondisclosure. This was an issue that's been known for a long time, and so to me, to spring it on, you know, on the Court and ask for an order compelling the Health District to turn over these records in, you know, contravention of the previous order or -- I'm not going to do that.

So, you know, you certainly have the right to raise this issue at a later date, and you can do that, you know, to brief it fully and say that your client's rights were denied --

MR. WRIGHT: Okay.

THE COURT: -- because of the failure of the Health District upon the Court's order to disclose the information, and then the failure of the District Attorney's Office to take alternate steps to try to learn or ascertain the information. You certainly can do that, as, you know --

MR. WRIGHT: Okay. So is it --

THE COURT: -- post-trial remedy, but at this point in time I don't think it's fair to make the motion while the jury is all waiting around to start, when this is an issue that's been known, not for days, not for weeks, but for months. I made that ruling months ago.

So, Mr. Santacroce?

MR. SANTACROCE: Yes, I just needed to make my record, Your Honor. I want to join Mr. Wright's motion objection regarding these 104 patients. In addition, I want to object to State's Proposed 228, which is the chart. This chart lists a bunch of things that the Health District apparently considered and ruled out, and it says, results ruled out.

They go through the IV placements. They go through the scopes. They go through the biopsy equipment. And they say, we've ruled these out for various reasons. And now, the Court's telling me if I go into, for example, Lynette Campbell and the IV placements which they ruled out, then I'm opening the door to these 104 patients? I mean, how -- if you're going to allow this in, and the jury is going to take it back to the jury room --

THE COURT: I didn't say I was -- okay. Go on.

MR. SANTACROCE: -- no, I'm just saying I object to it coming in, unless I can cross-examine on each one of these things that were ruled out without opening the door to the bigger issue. So that's the dilemma I have, and that's why I'm objecting to allowing this to come in.

THE COURT: All right.

MR. SANTACROCE: Or at least give me some direction as to what I can go into without opening the door.

THE COURT: One of the problems the Court's having right now is I don't know what Mr. Labus's answers would be to those questions. And I don't know if Ms. Weckerly knows what Mr. Labus's answers would be to those questions. I mean, I think it's fair, you know, Mr. Santacroce's theory is that it's more likely that the -- that it was transmitted through contaminated saline than it was through, you know, the propofol, which makes sense in -- you know, I think he's -- he's got a good theory he's working with because you got to put the virus in numerous bottles of propofol as opposed to a single bottle of saline.

So, you know, it's -- that's where he is, and he has a right to flesh that theory out, certainly. So, you know, if Mr. Santacroce gets into, you know, why was Lynette Campbell and the saline solution excluded, you know, do you know what Mr. Labus is going to say because I certainly don't?

MS. WECKERLY: I mean, I think he's going to say it's, you know, it's based on their observations at the clinic and their review of the charts. I don't think he -- I mean, I don't think he's going to make reference to the other 105 cases. But he's going to base it on what they observed at their investigation.

THE COURT: Okay. So pretty --

MS. WECKERLY: And all of these conclusions are based on their observations or chart reviews from the --

THE COURT: -- just from those two days.

MS. WECKERLY: -- two infection days.

THE COURT: As long as that's it, then I don't see that opening the door. You can fully cross-examine.

MR. SANTACROCE: Okay.

THE COURT: You know, Ms. Weckerly, I guess what --

MS. WECKERLY: Well, I can get him and ask him.

THE COURT: -- well, you can ask him or, you know, just tell him, look, if some answer is going to call for going into the -- why don't you just, you know, ask him. If that's all he based everything on, then I don't see the door being opened, and we're -- okay?

MS. WECKERLY: Okay.

THE COURT: So if anyone needs -- yes, Mr. Wright?

MR. WRIGHT: Right. I just want it clear. I don't want to ask him in front of the jury. I mean, the state of the record is I have requested the production of the patients that -- the 105, identity of them, and the 20 for the two dates in question.

THE COURT: Right.

MR. WRIGHT: And the -- the privilege precludes the production; is that correct?

THE COURT: I mean, I don't know --

MR. WRIGHT: I mean, I just want the record --

THE COURT: -- I don't know why it --

MR. WRIGHT: -- straight.

THE COURT: -- would be different from you requesting it than it was from the State requesting it.

MR. WRIGHT: Because I have compulsory process --

THE COURT: Well, that wasn't --

MR. WRIGHT: -- and right of confrontation --

THE COURT: -- okay --

MR. WRIGHT: -- and they don't. And I -- and you act like I knew this the entire time. I'm telling you, until we were at a sidebar up there talking about the 105, I did not know they didn't know who those 105 were. We were up there --

THE COURT: Well, the 105, and the 10 are different --

MR. STAUDAHER: Yes, they're completely different.

MR. WRIGHT: Correct.

MS. WECKERLY: They're different.

THE COURT: -- different issues.

MR. WRIGHT: Correct. I understand they're different issues, but I -- I'm telling you, I didn't know they hadn't conducted -- because that's when I was up there squawking about --

THE COURT: Okay.

MR. WRIGHT: -- why didn't they do a criminal investigation. Why did they just take -- handed to them this, and then they turned it into a criminal case? And then I

learned, up there for the first time, that they didn't do anything. That they just --

MR. STAUDAHER: No, that's --

MR. WRIGHT: -- well --

MR. STAUDAHER: -- that's another time, now --

MR. WRIGHT: -- that's a misstatement. I'm -- I don't meant hey didn't -- they accepted the report of the Southern Nevada Health District, and accepted what would be turned over to them, and did nothing further to try to get more information than what was in there. And so, I didn't know all of that from preparation towards the case.

So all I'm saying is now my compulsory process right under the Constitution, I just want it clear that they -- that the privilege, and I -- you articulated it well, and I understand the reasons and the basis for it, and I don't -- and I'm not arguing about your judgment on the call, I'm just saying I want the record clear that it not only trumps the State's demand for it, but it trumps my demand for it for Dr. Desai.

THE COURT: All right. Off -- that issue was not considered at the time I made the ruling.

MR. WRIGHT: Right.

THE COURT: All right. So having said that, you know, I read this months ago. My belief, from memory, would be that there were no exceptions to that. Now, you know, if

you would like -- again, I think it's a little bit unfair to ask for a ruling, you know, right now. My recollection of reading everything and studying it and -- was that there are no exceptions. And again, I'm, you know, I think it's to protect people from, you know, being hauled into court in unrelated matters, and having their private health information disclosed.

And so, you know, I think that the -- the ruling would be the same. And I'll certainly say, this morning I'm not going to order Mr. Labus or the Health District to turn over the information to you.

MR. WRIGHT: Okay. And I wasn't -- I wasn't suggesting there was a statutory exception in there for the --

THE COURT: No. No, I know you --

MR. WRIGHT: -- okay. I'm saying --

THE COURT: -- you're not -- I'm saying, I didn't consider it -- the statutory rule and weighing that, doing any kind of weighing analysis with Dr. Desai's Constitutional rights. And I think you're right, you know, generally if he can't get a fair trial and there's no way to turn over the information or get the information, then the remedy is dismissal. I don't see that as being the case here. I don't see that he's being denied his right to a fair trial because of the absence of the information.

MR. WRIGHT: Okay. But I'm not talking due process

for a trial. I'm talking compulsory process aside from right of confrontation in me cross-examining him. My independent right. I can't even remember the cases on compulsory process, but it's -- there's one Supreme Court case, Oklahoma versus somebody, and there was a statute that precluded turning over certain information, and it was found that compulsory process trumped --

THE COURT: And I'm happy to read that case, and I would have read it had anyone given me a heads-up that we would be arguing this this morning, which is why I'm saying, I don't think it's fair of you, really, to spring this this morning on the State. Ms. Weckerly, did you read that case in anticipation for --

MS. WECKERLY: Not on --

MR. WRIGHT: I didn't either.

THE COURT: -- today's argument? I certainly didn't.

MS. WECKERLY: Not on compulsory process.

THE COURT: So, you know, I'm happy to read it at the lunch break, if someone wants to get me a cite for that case, and consider it; but again, that wasn't what was considered last time, you know, no exceptions to the statute.

I'll reiterate it, the State interests and the public health interests in the statute, I think, are obvious. And as we sit here fighting over these people, and, you know, media being present, I think the reason for the statute,

really, has hit home. And it's quite obvious to the Court.

And so, you know, if these people were hauled into court, I think it would have a chilling effect on future people going to the Health District if they think, gee, I don't, you know, want to be -- I don't want my name being out there in the -- in the public eye. I'm happy to read the case.

MR. WRIGHT: Okay.

THE COURT: Like I said, you know, this is just sprung on me this morning. I didn't read the case. You know, I haven't been reading up on compulsory process and -- and statutes that preclude, you know, dissemination of information. So --

MR. WRIGHT: I haven't read up on it either, Your Honor. It just seems so fundamental to me that a witness can't get on the stand that knows more than I do, and then the State has the information and can't share it with me. I mean, I don't even need cases for that -- to say that proposition doesn't work.

But I understand -- understand the ruling --

THE COURT: Well, he is a percipient witness to this, and frankly --

MR. WRIGHT: I have no problem with his percipient witness -- I want to be clear on that -- I didn't say he couldn't testify. I mean, whatever his percipient thing is, I

got it. I know the issue.

THE COURT: Here's the problem, though, the whole -- I mean, part -- what I'm -- I've heard from the Defense is, you know, this was sort of the whole -- I mean, my words not yours -- this whole sort of rush to judgment and, you know, that they didn't consider everything. Brian Labus was, you know, and the CDC -- the gals from the CDC, it was them. So I don't know how this case could be put on without Brian Labus or someone from the Health District to explain, well, Why did we get to this theory?

Because that's what I'm hearing in the opening statement, it was a rush to judgment, it wasn't a thorough investigation. Then you get the plaintiff's bar involved and it's really, oh, go after the propofol and -- to the exclusion of these other cheaper things, like the saline -- the multiuse saline. And so I don't know how the case could go forward without bringing all of that out.

So let's take a couple-of-minute break, and then I want to get started with the jury.

MR. STAUDAHER: Your Honor, I'm not going to argue anything. I just want to put something on the record, if I may, and it will just take one second.

I know that the Court -- and I'm not quibbling with the order regarding the admission or not of the actual report of the Health District, but I do want to put in that the State

did submit four cases for the Court's review: United States v. Berry, 683 F 3d --

THE COURT: And I think that was the one --

MR. STAUDAHER: -- 1015 --

THE COURT: -- I was quoting from this morning.

MR. STAUDAHER: -- a 2012 case, that was a criminal matter. And then also, Ellis v. International Playtex, 745 F 2d 292. Drayton v. Pilgrim's Pride, which was 472 F 2d 638. And also, the Beechcraft -- or Aircraft Corporation v. Beech Aerospace Services v. Rainey, which was 488 US 153, a U.S. Supreme Court decision.

I didn't indicate -- have any indication that the Defense had ever submitted any cases --

THE COURT: They did not.

MR. STAUDAHER: -- and I don't know what else the Court reviewed, but I did want to have on the record that that was submitted, and --

THE COURT: And I did consider all of them, and --

MR. STAUDAHER: -- at least --

THE COURT: -- and the case I was quoting from this morning was U.S. v. Berry, which was the sole criminal case, and that was the one where the documents that the Court upheld were routine administrative documents, that there was no anticipation of a criminal proceeding.

Other cases have talked about litigation, and, you

know, I don't know the exact timing of all of these events, but, you know, I think it was pretty clear early on, certainly by what was going on in the media, that there could be criminal charges, certainly that there would be civil litigation involved in all of this.

And so I think the record is complete there. Can we get started with the jury?

MR. STAUDAHER: Yes, Your Honor.

THE COURT: Okay.

(Pause in the proceedings.)

THE COURT: Go ahead and bring in the jury, Kenny. Thanks.

Do you have the full name of that Oklahoma case?

MR. WRIGHT: No, but I'll get it.

THE COURT: Doesn't give me a lot -- doesn't give my poor law clerk a lot to work with there.

MS. STANISH: Oklahoma and compulsory process --

MR. WRIGHT: Right.

MS. STANISH: -- U.S. Supreme Court, you'll find it.

MR. WRIGHT: Compulsory process.

MS. STANISH: Westlaw search will work with that.

MR. WRIGHT: It seems like to me it was a statute that preclude -- if you can believe this --

THE COURT: Well, I mean, if it's --

MR. WRIGHT: -- a statute precluded the defendant

from calling a charged accomplice as a witness or something. It was a statute that precluded testimony.

THE COURT: What was the, like, basis for the statute? Like, the public policy behind the statute?

MR. WRIGHT: I don't even -- it wasn't very good. It wasn't as big as the --

THE COURT: Unlike this public --

MR. WRIGHT: -- interest here.

THE COURT: -- policy behind the statute, which is, you know, pretty compelling.

MR. WRIGHT: Correct.

THE MARSHAL: Ladies and gentlemen, please rise for the presence of the jury.

(Jury entering at 10:11 a.m.)

THE MARSHAL: Thanks, everybody. You may be seated.

THE COURT: All right. Court is now back in session. The record should reflect the presence of the State through the Deputy District Attorneys, the defendants and their counsel, the officers of the court, and the ladies and gentlemen of the jury.

And the State may call its next witness.

MS. WECKERLY: Brian Labus.

THE COURT: Mr. Labus, just right up here, please, sir, next to me, up those couple of stairs. And then remain standing, facing this lady right there, who will administer

the oath to you.

BRIAN LABUS, STATE'S WITNESS, SWORN

THE CLERK: Thank you. Please be seated. And please state and spell your name.

THE WITNESS: Brian Labus, B-R-I-A-N, L-A, B as in boy, U-S, as in Sam.

THE COURT: All right. Thank you.

Ms. Weckerly?

DIRECT EXAMINATION

BY MS. WECKERLY:

Q Sir, how are you employed?

A I'm the senior epidemiologist for the Southern Nevada Health District.

Q And how long have you been the senior epidemiologist for the Health District?

A I've been the senior epi for about 11 years; I've been employed there for 12.

Q Okay. And what's your educational background that allowed you to work in that capacity?

A I have a bachelor's degree in biology from Purdue and I have a master's of public health and infectious diseases from UC Berkeley.

Q Prior to having the position you have as the senior epidemiologist, did you hold other positions within the Health District?

A Yes, I was an epidemiologist.

Q An epidemiologist. Were you assigned to investigate the hepatitis outbreak at the Endoscopy Center of Southern Nevada in 2007?

A Yes, I was.

Q Can you explain to the members of the jury how it was that the -- the outbreak itself came to your attention?

A Hepatitis C, when acute cases occur, is reportable to the health authority, and by law we're responsible for investigating those.

Q And what -- what is -- how does the Health District and the CDC define an acute case of hepatitis C?

A An acute case of hepatitis C is defined by a number of lab tests that show the person has hepatitis C, as well as some current liver problems, so an elevated liver enzyme which shows damage to the liver, or bilirubin, which is why you turn yellow and get the symptoms from hepatitis. You have to have a discrete onset of symptoms. So the combination of the lab test and the symptoms are what defines it as an acute case of hepatitis C.

Q And is there a time period where cases are defined as acute, like, from the time of exposure, like, what would be the outer range of what could be considered acute?

A If a person is infected, they'll develop acute disease within six months.

Q And the other cases, I assume, are called chronic?

A That winds up being a little bit of a tricky term. Chronic usually refers to a long-term infection with hepatitis C. So you have a new infection. A small percentage of those people get symptoms, they get sick with the disease. The rest have a subclinical disease. So the virus is in them, it's doing damage, but they don't have any outward symptoms. Some people clear the infection, but most go on to have a long-term infection, which is the chronic hepatitis C.

Q And are chronic cases reported to the Health District?

A All lab reports are reported to us, but chronic hepatitis C is not legally reportable to us.

Q Okay. And typically how many acute cases would be reported to the Health District in a normal year?

A Usually between two and four cases in Clark County.

Q Okay. In Clark County? Now, when you -- when was it that you first learned of this outbreak?

A I learned about it on January 2, 2008.

Q And when you -- did you learn about it, like, because you were assigned to investigate it, or how was it that it came to your attention?

A We had the two cases reported, one was in late

November, one was in December. They were investigated by our investigation staff at the office. And when they identified the common link between the cases it was passed up the chain, and that's when I became aware of it.

Q Okay. So initially you were just aware of two cases that were possibly associated with the clinic?

A That's correct.

Q And based on that, what steps did you take in order to kind of get a plan together to start investigating?

A This was sort of uncommon for us. We don't normally see hepatitis C tied to a medical facility; and when the two cases were identified, they had procedures on different dates. So we had two cases, sort of associated with the same place, and sort of in the same time range, but not on the same date. So we contacted the CDC to talk to them about where should we go with this investigation? What would be the appropriate next steps?

Q So initially, one of the cases you had reported was -- went from July 25?

A That's correct.

Q And then you had another one from September the 21st?

A That's correct.

Q And then based on that they -- they had an association with the clinic, but not much else of a

connection; is that fair, initially?

A Yes. Colonoscopies are a common procedure, and so the fact that both people had them, it was uncommon, but it really -- didn't really make it certain that it was any one particular clinic. It could have just been a coincidence.

Q Okay. And what was -- what was behind the decision to contact the CDC?

A The fact that we had some connection between these two cases, but not a really strong connection, and we wanted to talk to the experts on hepatitis and healthcare-acquired infections to see if this warranted a full investigation.

Q And when -- had you -- have you in previous investigations contacted the CDC for, I guess it's advice or -- or their thoughts on an investigation or an outbreak?

A Yes.

Q And is that something that's frequently done by the Health District?

A Yes, and there's a process in place to do that. There's kind of informal request and formal request, but they're kind of the -- the experts on those diseases. So when we don't know what to do -- if the State doesn't know, then we go up to the CDC.

Q Now, do the -- does the CDC always send an investigative team out, or sometime do they just offer advice

or -- or maybe information, and then the investigation is just done with local officials?

A Most of the time it's more of an informal discussion with CDC where we're just asking for their expertise and they kind of give us their thoughts just as scientists. We occasionally will request a formal investigation from the CDC. There is a document that's requested by our state epidemiologist that goes to the CDC, and there's an official process for having them send somebody out.

Part of it is deciding, is it worth sending somebody out? Is it something where they need to come into the field? Or is it something they can do just by assisting from Atlanta?

Q Okay. In this particular case two people were sent out from the CDC, correct?

A Yes, that's correct.

Q And that's Dr. Melissa Schaefer and Dr. Gayle Fischer, now, Langley?

A Yes, that's correct.

Q Okay. When was it that those two doctors came out?

A They arrived on January 9.

Q And prior to them coming on January 9, what -- what did you do in terms of the investigation?

A Well, on the 2nd we were discussing things with

CDC, and we identified a third case. And the third case with acute disease also had a procedure on September 21. So now we had two cases that were on the same day, a third case on a different day. Clearly there was something going on with that clinic because that's more than we'd expect in a typical year, basically.

Q Sure.

A So we began just to -- to get whatever documents we had on -- on the clinic; we talked to the Bureau of Licensure and Certification because they are the group responsible for regulating that facility. So the first question was, are they responsible; we contacted them, they said that they were responsible, and then we coordinated our response with them.

We both decided to wait until CDC arrived to launch our field investigation.

Q Okay. And then the CDC obviously gets there?

A Yes.

Q And do you -- are you the one that actually makes the call over to the clinic on the 9th to inform them that you're coming over?

A Yes.

Q And how -- how much in advance of your arrival at the clinic did you make that phone call?

A It was about 30 minutes.

Q Okay. And when -- when you all went over on the 9th, do you recall if it was in the morning, afternoon?

A It was in the afternoon.

Q And it was yourself, Dr. Schaefer, and Fischer, and who else?

A And we had two people from the Bureau of Licensure and Certification.

Q Was the -- was the investigation of the Bureau of Licensure coordinated with your investigation at all, or was it a separate one, or how would you describe it?

A I would say it's a parallel investigation. They had their own investigative process. There were things that they had to look into when they were out there. They were doing basically a complaint response, essentially, and they had certain things they had to do that -- that we didn't and vice versa.

So CDC was there to assist us, and the BLC was doing a parallel investigation at the same time.

Q Okay. So it's fair to say you worked pretty closely with the CDC and less so with the -- the Bureau of Licensure?

A We were all in the same room, but a lot of it -- they were looking at some other things that we weren't particularly interested in, and they looked at a lot of the paperwork; do -- do the employees all have licenses, do they

have up-to-date TB tests, a lot of just the normal things they do as part of the -- the regulation of the clinic. Things that didn't matter to us as part of the outbreak, really.

Q Okay. And so it's pretty close by, right -- the -- where the Health District was at that time versus the location of the clinic?

A Yes, the clinic was right across from the Health District; my office was another block up the street.

Q Okay. So you -- did you just walk over there --

A Yes.

Q -- on the 9th, all of you?

A Yes.

Q And who do you meet up with when you get to the clinic on the afternoon of the 9th?

A We met with Tonya Rushing. We met with Dr. Carrol. And then they had a few other people join us. Jeff Krueger was in and out, and Katie Maley.

Q And who was it of your group that explained to the clinic staff why you were there?

A I did.

Q And what did you tell them?

A Basically what I've told you. We identified three cases of hepatitis C, we had this common connection, they were acute cases, we, you know, we don't know what's causing it, but we're here to do an investigation, figure out

why this occurred, and what steps, if any, are needed to prevent additional cases in the future.

Q Did you make any requests of the clinic in terms of your next steps in the investigation?

A Yes, we started to ask for documents and those sort of things. They took us down and gave us a quick kind of walk through the clinic just to give us an overview, and we started talking about what kind of documents they had so that the next day we could start to get the -- the paperwork we needed to go through.

Q And what was the -- the paperwork that you were looking for?

A We wanted the -- the logs that had a list of every person that was seen on those days, and then we wanted the charts from all the people that had procedures on those days, as well as the -- I believe the three or four days prior to the -- their procedures as well.

Q Okay. You didn't get -- you didn't review those charts on the first day you were there, though; is that fair?

A No, we were at the clinic maybe an hour, hour and a half. We had a meeting with them, they gave us the overview, and that was -- we got there at the end of the day, 4:00 or so, so it was already late in the day. We planned to come back the next morning at 8:00 and start our -- our document review at that time.

Q Did you observe any procedures at all that first day on the 9th, or was it just sort of a walk-through?

A We didn't really observe procedures. We could see what was going on; I think it was the last patient of the day, or they were just finishing up. So there really wasn't much to see at that point. It wasn't a -- an observation of their procedures, more just kind of a looking around and getting a feel for how the clinic worked.

Q Okay. Obviously you go back on the 9th?

A The 9th was the Wednesday, we went --

Q I mean, the 10th, sorry.

A Yes, that's correct.

Q And did you go in the morning at this -- at that point?

A Yes, we did.

Q And is it the same group of people that you described, the BLC, the two doctors from the CDC, and yourself?

A Yes, as well as a couple additional investigators from my office. We had a lot of documents to go through, so I -- we had different people at different times assisting us go through and abstract the information.

Q Okay. And what were the -- what did you first do when you -- when you got there on that second day?

A We were requesting documents on that day, and so

they started to bring us those documents. They showed us to a conference room and let us get set up in there so we could start to review things. Then we started going through all the -- the paperwork that they had, the patient logs, the charts; we started requesting things, like their policies and procedures. BLC was doing the same thing at the same time, so we made a lot of requests of them for paperwork, basically.

Q Between yourself and other representatives from the Health District and the CDC, did you all develop sort of information you were looking to extract from each patient file on those days, or how did you go about categorizing that information?

A The CDC came up with a questionnaire that we could use to extract the information on the document, so collect the patient names, demographic information, then all the -- the details of the procedure: What time did it start? What time did it end? Which people were involved. Basically so we got consistent information out of the charts and could put a big table together of everything we collected.

Q And was that to do sort of a comparison to see if you could see any, I guess, commonalities?

A Right. We were looking for whatever common links we could identify between the cases.

Q Now, at the time you were there and extracting information from the charts, did you have at that time, in

your head, an idea of how you thought the hepatitis C could have been transmitted in this case that early on?

A We had a number of possibilities going in, just knowing what had happened in previous outbreaks, but we didn't know what happened in this particular clinic.

Q And when you say you had a number of ideas, are part of those or were part of those ideas based on just the nature of the disease itself?

A No, they were based more on the nature of previous outbreaks that had happened over the last 10 or 15 years that CDC investigated and had been published in the literature. So we knew what sort of things others had found doing these types of investigations, so those were kind of the main things that we expected to look at in our investigation.

Q Okay. And those were -- I mean, I think you just said it, those were things you were going to look at, but not to the exclusion of other options or other possibilities; is that fair?

A That's correct.

Q So as -- as you're reviewing the charts on the second day, did you or any members of your team or the CDC start to observe procedures at all?

A At the end of the day we went in and we did a meeting with the staff, and explained why we were there. We saw part of one procedure, and I believe they walked us

through the scope-cleaning process that day and showed us how they did things.

Q The procedure that you just mentioned, was that one that you personally observed?

A Yes, I was in the room.

Q And who -- who was the CRNA, I guess, on that procedure; if you recall?

A That day it was Linda Hubbard.

Q And at the time you observed that procedure, was there anything that you took notice of in terms of how she handled the procedure or administered the sedation?

A I noticed that she was only wearing one glove, instead of two. Other than that, it was just the very end of the procedure, I believe. She had already given the injection, so there wasn't really that much to observe. We were just there for part of that procedure, not the entire one. So it was just a little bit of that on that particular procedure.

Q And I think you also said that you observed the scope cleaning on that day?

A Yes.

Q And was that something you personally observed?

A Yes.

Q And can you describe what you saw of that procedure, or of that aspect of the practice?

A They walked us through step by step from when a scope came into the room, through the manual cleaning process, through the automated reprocessing of the scopes, just kind of step by step how they did everything.

Q From your observations of that, did you -- did you see any deficiencies or anything that you were concerned about in terms of the scope cleaning?

A The one that we noticed was that they used the detergent solution for two scopes. It was labeled for use on a single scope or set of instruments. But that was the only one that jumped out as not following the manufacturer's instructions.

Q And the -- the fact that you'd seen that deficiency, how did that play into your assessment as to whether that was the -- the reason why hepatitis C was transmitted at this clinic?

A I guess it was a cause for concern, and so we asked the CDC -- their experts on scope cleaning what they thought of it.

Q Okay. And was that discounted at some point or at that point?

A At some point after discussion, the people at the CDC felt that there was a cleaning process in place --

MR. SANTACROCE: I'm going to object as to hearsay.

MS. WECKERLY: Well, it's already been testified to

by them, but --

MR. SANTACROCE: Well, it's still hearsay.

THE COURT: Well, that doesn't mean it's not hearsay.

MS. WECKERLY: Okay.

BY MS. WECKERLY:

Q Well, based on -- based on your investigation collectively at some point, did you discount that?

A Yes.

Q Now, was that -- you sort of saw the end of -- or a little bit of one procedure that day, and then you observed the scope cleaning, and did anything else happen that day aside from additional possible chart review?

A No, it was mostly chart review. Every day we were meeting with the clinic multiple times to let them know what we found. I believe on the first day we identified one or two more additional cases. We had the -- the list of recent cases that we've been notified of, and we were able to cross-reference those with the clinic patient list. So we did identify -- I'm not sure which day it was, but we -- I know we identified one on that day, and I don't know exactly when the rest of them were.

Q So it's -- as you're there investigating, you learn of at least one or two more cases from the September 21st date?

A Yes, that's correct.

Q And so at that point you're kind of at a bigger number even than when you started?

A Yes, that's correct.

Q You go back the next day? I guess that would be the 11th; is that right?

A Yes, Friday the 11th.

Q Okay. And what -- what do you do on that day?

A We spent the morning observing procedures. So we had a number of us in the rooms observing procedures, while other people were still back abstracting information from the records.

THE COURT: How many people, total, went in with you from the Health -- at that time?

THE WITNESS: On that day we had myself, the two people from CDC, one or two BLC investigators were there, we also had two or three other people from the Health District doing the record abstraction at that point.

THE COURT: All right. Go on, Ms. Weckerly. Sorry.

BY MS. WECKERLY:

Q You personally observed procedures on that day, that Friday?

A Yes, I did.

Q Who did you observe doing procedures?

A I observed -- Linda Hubbard was the CRNA and Dr. Carrol was doing the procedures that morning.

Q And how did you -- what was the observation of Linda Hubbard's practice with regard to administering propofol?

A She would inject the patient with the propofol, and when the procedure was done, any remaining propofol that was in the vial stayed on the table she had set up for all her equipment, and after several patients she took several syringes and filled them from the existing vials of propofol.

Q Okay. So she would fill, like, one syringe from a couple different vials?

A Yes. She had multiple vials out there, and she basically just removed all the propofol from those four or five vials that were sitting there into multiple syringes.

Q Did that get your attention or cause you concern?

A Yes.

Q Why is that?

A Propofol is labeled for single-patient use. It was being treated as a multidose medication at that point, and so that's one of the concerns with injection-safety issues, the use of essentially multidose vials -- or single-dose vials incorrectly as multidose vials.

Q On the day that -- that you were there, do you remember the size of the vials that were being used?

A I believe the ones that we saw were all 20cc

vials.

Q Did you observe the preop area of the clinic at all on Friday or any of the other days?

A Yes, that was kind of the main area, so you had to walk through that to go to anywhere else.

Q From your observations of the preop area, did you see any deficiencies in terms of saline flushes or administering heplocks, anything that caused you concern?

A There was a separate room where they did the IV setup, and so that wasn't in the main preop area, that was a separate room, and I didn't do observations of that particular room.

Q Okay. The CDC investigators with you, did one of them observe that area?

A Yes.

Q Now, when you were at the clinic, did you have any conversations with any of the employees who were there?

A Yes.

Q Was one of them -- a conversation you had with Vince Mione?

A Yes.

Q Did he tell you anything about syringes?

MR. SANTACROCE: I'm going to object to hearsay.

MS. WECKERLY: It's a prior inconsistent statement.

THE COURT: All right. Go ahead.

BY MS. WECKERLY:

Q You can answer. What did he tell you?

MR. WRIGHT: I join the objection.

THE COURT: I'll see counsel up here for a minute.

(Off-record bench conference.)

BY MS. WECKERLY:

Q Sir, I was asking you about the conversation you had with Mr. Mione. Before you tell me what was said, can you -- do you remember what day it was that you had the conversation with him?

A Yes, it was Friday right before lunch, and we were observing procedures.

Q So obviously it was at the -- obviously it was at the clinic. Was anyone else present besides yourself and Mr. Mione?

A Yes, Melissa Schaefer and I were standing there talking to him.

Q And was it in a procedure room, or just kind of in the hallway, or how would you describe the area?

A It was just outside the door of the procedure room, so it was kind of in the -- the more common area.

Q And the comments that he made to you, were they prompted by a question that you asked, or was it just something that he said in the course of another conversation?

A No, we were asking a few questions.

Q Okay. Do you remember what you -- what you asked him?

A Melissa was asking the questions, so I didn't ask him. I remember the general tenor of the conversation, but not the specific questions.

Q Do you remember if he said anything about syringes?

A Yes.

Q What did he say?

A He said that they were instructed to reuse syringes, but that he didn't do it.

Q Okay. And he didn't indicate who instructed him; is that fair?

A That's correct.

Q When you -- when you were told that information, did it cause you concern about a source or a means of transmission?

A Yes, it did.

Q And why -- why would that be?

A With the reuse of the propofol vials that we've seen, plus the reuse of syringes to access those vials, there would be the potential for a disease transmission between patients.

Q Okay. How long were -- were you and your investigators and the CDC at the clinic in days? How many