

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

JAMES MEREDITH and ESTHER L. MEREDITH,	:	NO. 91-CV-
	:	0086-B
Plaintiffs	:	
	:	
vs.	:	
	:	
HEALTH CARE PRODUCTS, INC., d/b/a ANDERSON PHARMACALS, et al,	:	
	:	
Defendants	:	

ORIGINAL

DEPOSITION OF STEPHEN J. BARRETT, M.D.

Taken in the offices of Stephen J. Barrett, M.D., 2419 Greenleaf Street, Allentown, Pennsylvania, on Thursday, November 7, 1991, commencing at 9:35 a.m., before Dianne L. Knowles, Registered Professional Reporter.

\* \* \*

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**IN RE: James Meredith and Esther L. Meredith  
vs Health Care Products, Inc, d/b/a Anderson Pharmacals, et al.  
CASE NO: 91-CV-0086-B**

**CORRECTION SHEET FOR DEPOSITION OF  
Stephen Barrett, M.D.**

<b>Page</b>	<b>Line</b>	<b>Correction</b>	<b>Reason for Change</b>
18	15	<i>Barry</i> should be <i>Berry</i>	Misspelled name
19	14	<i>Allowed for</i> should be <i>abolished</i>	Transcription error
32	24	Eliminate the word <i>an</i>	I didn't say it
33	10	<i>point oh five</i> should be <i>.05</i>	It's a decimal number
47	6	This line should read <i>the late 1970s - - I'm sorry, late 1960s, when I</i>	Transcription error
54	14	<i>Appetite</i> should be <i>Alliance</i>	Transcription error
57	17	<i>was</i> should be <i>were</i>	Transcription error
57	22	<i>"All tentative"</i> should be <i>"Alternative"</i>	Transcription error
59	25	<i>Vices</i> should be <i>Voiced</i>	Misspelled word
86	6	Fix spelling of <i>advertising</i> .	Misspelled word
98	3	<i>250</i> should be <i>150</i>	Transcription error
110	2	<i>respected</i> should be <i>respect to</i>	Transcription error
112	17	Fix spelling of <i>phenomenal</i>	Misspelled word
121	1	Fix spelling of <i>Bruckheim</i>	Misspelled name
127	25	<i>went</i> should be <i>sent</i>	Transcription error

I certify that I have read my deposition in the above case and request that the above changes be made.

12/4/91

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\* \* \*

STEPHEN J. BARRETT, having been  
duly sworn, was examined and testified as follows:

MR. GRAHAM: Let the record  
reflect that this deposition is being taken pursuant  
to stipulation of counsel.

EXAMINATION

BY MR. GRAHAM:

Q. Would you please state your full name  
and residence address.

A. Okay. Stephen J. Barrett, 2421  
Greenleaf Street, Allentown, Pennsylvania.

Q. What is your professional address?

A. Twenty-four nineteen. It's the same  
building.

Q. What is your occupation or profession?

A. I'm a psychiatrist, medical editor and  
writer.

Q. What percent of your time do you devote  
to the practice of medicine?

A. You mean psychiatry?

Q. Yes.

A. Probably about between 10 and 20  
percent. It's varied. It's been gradually over a  
period of ten years becoming a smaller and smaller

1 percentage, and my writing, editing and  
2 investigative things have taken up a greater  
3 percentage.

4 Q. Okay. And in calendar year 1990, what  
5 percent of your activity was devoted to the practice  
6 of psychiatry?

7 A. Probably between 15 and 20 percent.

8 Q. Okay. In calendar year 1991, would that  
9 be a lesser percent?

10 A. Uh-huh.

11 Q. Okay.

12 A. Probably 10 to 15.

13 Q. All right. Do you have a curriculum  
14 vitae?

15 A. Uh-huh.

16 Q. Could you share one with me? It might  
17 move the deposition along.

18 A. Sure. I have to print it.

19 Q. Okay.

20 (Pause.)

21 BY MR. GRAHAM:

22 Q. Sir, you have been cited by Plaintiffs'  
23 counsel as an expert in the area of advertising and  
24 marketing. Would you relate for me your educational  
25 background, starting first with college, and tell me

1 the advertising and marketing courses that you took  
2 as part of your academic undergraduate education --

3 A. Uh-huh.

4 Q. -- in the area of marketing and  
5 advertising.

6 A. I went to Columbia College, Columbia  
7 University's College, and I did not take courses in  
8 marketing and advertising. I am an expert on  
9 health.

10 Q. Wait.

11 A. I don't consider myself an expert in  
12 the, in a broad area of marketing.

13 Q. I see. Do you consider yourself an  
14 expert --

15 MR. HUTTON: Kevin, let him  
16 finish.

17 A. I'll define what I consider myself to be  
18 an expert in; maybe that will save time.

19 BY MR. GRAHAM:

20 Q. I'll come to that.

21 Do I understand your testimony that when  
22 you went to undergraduate school at Columbia  
23 College -- is that correct?

24 A. Uh-huh.

25 Q. -- you took no marketing classes or --

- 1 A. That is correct.
- 2 Q. -- or advertising classes?
- 3 A. That's correct.
- 4 Q. Okay. Have you taken any course work at  
5 a recognized university or college post  
6 undergraduate in the area of the marketing?
- 7 A. I just remembered, I took one course  
8 that I think is relevant to the subject at hand, and  
9 that is, I took medical statistics.
- 10 Q. All right.
- 11 A. That enables me to, that gave me some  
12 background for analyzing claims and studies.
- 13 Q. Okay. I'm trying to figure out from an  
14 academic, purely academic aspect, what your  
15 background --
- 16 A. Medical statistics provided considerable  
17 background for the analysis of claims, whether they  
18 be advertising, medical literature or anywhere else.  
19 In other words, they taught us how to analyze health  
20 claims as part of medical statistics.
- 21 Q. Okay. But did you take that in  
22 undergraduate?
- 23 A. Yes.
- 24 Q. The course work, do you recall the name  
25 of the course?

1 A. I think it was called medical  
2 statistics.

3 Q. Okay. And do I understand correctly  
4 that that was taught by or in the school of  
5 marketing or business administration?

6 A. I don't know what school it was. It was  
7 part of Columbia University.

8 Q. But I'm wondering what department.

9 A. It probably was in the, in -- well, I  
10 don't know what department the professor belonged  
11 to, but it was part, it was in the general Columbia  
12 University College. Columbia University, by the  
13 way, when people say they go there as an  
14 undergraduate, what they go to is Columbia College.  
15 It's better known as part of the Columbia  
16 University.

17 Q. Okay.

18 A. It was listed in the catalog, and I  
19 simply looked at the catalog and chose to take it.

20 Q. But that was basically a course to  
21 acquaint you with the methodology for recording  
22 results of clinical studies and that sort of thing?

23 A. That, plus also pitfalls. We had a lot  
24 of discussion of statistical fallacies.

25 Q. Okay. And --

1           A.           We would look at studies and claims and  
2 analyze whether they were valid.

3           Q.           Okay. So with the exception of that  
4 course at Columbia you had no undergraduate work in  
5 the field of marketing or advertising; is that  
6 correct?

7           A.           Yes.

8           Q.           Did you pursue any postgraduate academic  
9 training in the fields of advertising and marketing?

10          A.           Not in college.

11          Q.           Okay.

12          A.           Or university.

13          Q.           All right. Have you attended any  
14 seminars or symposia on the topic of advertising  
15 and/or marketing?

16          A.           No. I have done considerable reading,  
17 but I can't remember offhand any symposia.

18          Q.           Or seminars; is that correct, sir?

19          A.           Yes.

20          Q.           All right.

21          A.           I may have been to seminars where they  
22 discussed food labeling, advertising claims. In  
23 fact, I have. I can't tell you what they are, but  
24 I've been to discussions where FDA officials or  
25 attorneys discussed food label laws, food

1 advertising.

2 Q. I'm --

3 A. Not marketing strategies, but --

4 Q. I'm asking specifically the topic of  
5 marketing and/or advertising, have you attended any  
6 seminars or symposia?

7 A. Not general advertising, the general  
8 principles of advertising or the general principles  
9 of marketing.

10 Q. Now, you have attended gatherings where  
11 the topic of advertising was discussed; is that your  
12 testimony?

13 A. Yes.

14 Q. All right.

15 A. And labeling and the laws.

16 Q. Relating to those -- I'm sorry; I didn't  
17 mean to cut you off. You have attended gatherings  
18 where the topic of advertising and labeling have  
19 been discussed and the laws applicable to those  
20 topics?

21 A. With respect to food and nutrients and  
22 nutrition, yes.

23 Q. All right. Would you tell me the  
24 seminars that you have attended that fit that  
25 category?

1           A.           I can't, I can't remember which ones  
2           they were. I've been to a lot of discussions of,  
3           I've been to a lot of meetings where this was a  
4           topic. I should -- I shouldn't say a lot; I imagine  
5           at least a dozen meetings in which this was  
6           discussed. It was not necessarily the only topic.  
7           There have been health conferences where officials  
8           spoke. I think there was one meeting, I think there  
9           was an attorney named, I think named Yingling, Gary  
10          Yingling or something, I remember he talked about  
11          the topic, but --

12          Q.           When was that, sir?

13          A.           Maybe five years ago. I don't recall.

14          Q.           And how long of a presentation?

15          A.           Probably an hour. I don't remember for  
16          sure.

17          Q.           All right.

18          A.           I've been very interested in the subject  
19          of food labeling and food advertising.

20          Q.           Have you attended any seminars or  
21          gatherings on the topic of advertising or labeling  
22          as it relates to the medical field in the last five  
23          years?

24          A.           Not without -- where that was the sole,  
25          I don't think I've been to any where that was the

1 sole topic of discussion. But there have been some  
2 in the last five years that have discussed food  
3 labeling, health claims and labels and so on.

4 Q. Would it be fair to characterize those  
5 as collateral issues to some other main topic?

6 A. No. Not necessarily. It would probably  
7 be in the context of, it was a meeting about,  
8 probably be a meeting that would involve the subject  
9 of quackery and health fraud, somebody would talk  
10 about the labeling issue and that sort of thing.

11 Q. When was the last such meeting you  
12 attended?

13 A. I can't remember the details of any of  
14 them, but I'm sure there have been a couple within  
15 the last five years, because that's been a pretty  
16 hot topic.

17 Q. Do you have any material that you  
18 obtained at those meetings with you?

19 A. It's possible that I have programs.  
20 That would be quite a search. It would be quite an  
21 undertaking to search for them.

22 Q. Would it be fair to say, sir, that you  
23 have not devoted any significant time in academic  
24 training --

25 A. Formal academic training --

1 Q. All right. Let me finish my question.

2 A. Okay.

3 Q. Would it be fair to say that you have  
4 not devoted any significant time in academic  
5 training in the field of advertising and/or  
6 marketing?

7 A. It would be correct to say that, but it  
8 would not be fair.

9 Q. Well, we'll get to that. We'll get to  
10 that.

11 A. It might not be fair.

12 Q. All right. Now let's talk about your  
13 work experience in the field of advertising and  
14 marketing. Okay?

15 MR. HUTTON: And quackery.

16 MR. GRAHAM: Mr. Hutton --

17 MR. HUTTON: That's what this is  
18 all about.

19 MR. GRAHAM: That's what you  
20 claim. We can do our opening here, if you'd like.  
21 Come on, Andy.

22 BY MR. GRAHAM:

23 Q. Do you, have you ever been employed in a  
24 marketing capacity?

25 A. I am not sure I understand your question

1 is.

2 Q. Okay. Perhaps maybe the other way to do  
3 it here is, why don't you describe for me, if you  
4 would, briefly, your employment history after the  
5 completion of your residency in psychiatry at Temple  
6 University in 1961.

7 A. I couldn't do it from memory.

8 MR. GRAHAM: All right. First of  
9 all, let's do this: Would the court reporter mark  
10 this as Exhibit 1.

11 (Barrett Deposition Exhibit Number  
12 1 was marked for identification.)

13 BY MR. GRAHAM:

14 Q. Handing you what's been marked by the  
15 court reporter as Exhibit 1, would you examine that  
16 document and identify it for the record.

17 A. That's my comprehensive resume.

18 Q. Is that current up through today,  
19 November 7, 1991?

20 A. It's current up through yesterday. I  
21 had one more article that was published, and that  
22 came in the mail.

23 Q. Congratulations. What was that about?

24 A. It's a paper for the American Cancer  
25 Society on a questionable form of treatment.

1 Q. Okay.

2 A. I've been doing work for them lately.

3 Q. Why don't we quickly go through your  
4 background.

5 A. All right. Do you want me to --

6 Q. Yes, please.

7 A. Following the completion of my residency  
8 I --

9 Q. You attended Columbia University, got  
10 your Bachelor's degree; is that correct?

11 A. And my medical degree, yes.

12 Q. Now, your Bachelor's degree was in what  
13 major?

14 A. They didn't have majors in those days.  
15 I considered myself a math major, but they didn't  
16 have declared majors.

17 Q. All right. And you took that degree in  
18 1954; is that correct?

19 A. Yes. I went to Columbia for three  
20 years. I got accepted in the professional option  
21 program, which meant the first year of medical  
22 school counted as the last year of college, so I had  
23 three actual years at the undergraduate, and then  
24 four years of medical school.

25 Q. You took your medical degree from

1 Columbia College of Physicians and Surgeons?

2 A. Yes.

3 Q. And where did you serve your internship?

4 A. It was Highland Park General Hospital in  
5 a suburb of Detroit.

6 Q. And did you at that point in time begin  
7 any specialized training?

8 A. Well, I was very interested in  
9 psychiatry. I began doing on the side a, I spent a  
10 fair amount of time with attempting to do  
11 psychotherapy with patients with some help from  
12 staff members before I started my residency, but  
13 that's all.

14 Q. Well, would you describe the Highland  
15 Park General internship as a rotating internship?

16 A. Yes.

17 Q. Which means that you hit all the  
18 different areas in the hospital?

19 A. Yes. It was a very, very intensive  
20 experience where I had a considerable amount of  
21 responsibility for patients in contrast to medical  
22 school, which was largely theoretical.

23 Q. How long were you in that internship?

24 A. That was one year.

25 Q. And then did you begin a specialized

1 residency program?

2 A. Yes. Three years at Temple University  
3 Hospital in psychiatry.

4 Q. Would you describe for us what the  
5 discipline of psychiatry is?

6 A. Well, it's the study and treatment of  
7 people who have emotional or mental disorders or  
8 difficulties.

9 Q. Okay. When did you complete that  
10 residency?

11 A. In June, 1961.

12 Q. Thereafter did you enter the private  
13 practice of psychiatry?

14 A. No. I was in a program that enabled me  
15 to be deferred, called the Barry Plan. I was able  
16 to be deferred through my residency. In return --  
17 it was a pact with the devil -- in return for that,  
18 the Air Force was able to draft me immediately  
19 afterwards, and I was notified during my residency  
20 that I would go into the service. So I did. I was  
21 chief of psychiatry at Scott Air Force Base Hospital  
22 for the two years following completion of my  
23 psychiatric residency. I also worked on the side as  
24 a -- in the clinic at St. Louis State Hospital.

25 Q. In what area did you engage yourself?

1 A. I see I left that off my resume for some  
2 reason. I'm sorry.

3 Q. You were involved in the practice of  
4 psychiatry, were you not, at Scott Base Hospital?

5 A. Yeah. I was chief of the department.

6 Q. And that was for two years, correct?

7 A. Right, uh-huh.

8 Q. After you left Scott Air Force Base did  
9 you continue in the employ of the United States Air  
10 Force?

11 A. No.

12 Q. Okay.

13 A. I told them I'd be happy to do so if  
14 they allowed for a civilian life, but no. I had a  
15 good time, but I -- we didn't want to be traveling  
16 forever.

17 Q. Understood. So you thereafter left the  
18 military, and did you go into private practice at  
19 that point?

20 A. Partly. I went to San Francisco and  
21 took two half-time jobs, one with a juvenile court  
22 and one with the Child Psychiatry Clinic. Then I  
23 opened an office. At that time we lived in an  
24 apartment, we had a nice setup where we actually  
25 opened an office inside the apartment where we had a

1 waiting room, and one of the bedrooms was an office.  
2 And as time went on, I moved out and had an office  
3 on the side, but I kept, I worked essentially  
4 full-time as an employee for two clinics.

5 Q. The San Francisco juvenile court, you  
6 participated in the treatment and evaluation of  
7 adolescents in consultation with probation officers;  
8 was that your principal --

9 A. Yes.

10 Q. -- job?

11 And in connection with the San Francisco  
12 Child Psychiatry Clinic, is that a governmental  
13 program that you had?

14 A. I think it belonged to the City of San  
15 Francisco.

16 Q. Okay. And that you engaged in  
17 psychotherapy and evaluation of children and  
18 parents; is that correct?

19 A. Uh-huh.

20 Q. Okay. And simultaneously with that you  
21 had a private practice of psychiatry as time  
22 permitted?

23 A. Uh-huh.

24 Q. Okay. In the 1965-'66 range you also  
25 served as a consultant for the Department of Welfare

1 for San Francisco; is that correct?

2 A. Uh-huh. As part --

3 (Deposition interrupted.)

4 BY MR. GRAHAM:

5 Q. You, during this period of time, '66,  
6 '65, '67, you served as a consultant for a number of  
7 different governmental entities, including the  
8 Public Health Department, the Parks Job Corps  
9 Camp --

10 A. Right.

11 Q. -- Center for Special Problems, San  
12 Francisco Adult Probation Department?

13 A. The sequence was that I was contacted by  
14 a headhunter who got me interested in the job at  
15 parks. They told me they wanted me to set up a  
16 model which would be used through all the job corps  
17 camps throughout the whole country. So I went on a  
18 trial basis for 30 days. And it turned out that  
19 it -- I actually came to the conclusion that the man  
20 running the program was trying to cheat the  
21 government. I talked to somebody about it, and I  
22 was fired about ten minutes later.

23 Q. Is that right?

24 A. Yeah.

25 Q. So much for --

1 A. So I went back to juvenile court, and  
2 the child psychiatry position had already been  
3 filled. So I went to the Center for Special  
4 Problems, and that, they had contracts with many  
5 agencies, so I wound up being rotated as a  
6 consultant through the various other agencies.

7 Q. I understand. Okay. And then it  
8 appears that in 1967 you left the San Francisco Bay  
9 area?

10 A. Right.

11 Q. And moved to Allentown; is that correct?

12 A. That's correct.

13 Q. When you moved to Allentown, you became  
14 a staff psychiatrist for the Allentown State  
15 Hospital?

16 A. Okay. The exact sequence was that my  
17 wife and I decided we wanted to settle near our  
18 families, so we moved out here. And before we left  
19 I had an interview with one of my old instructors  
20 from residency days who was a part of a group  
21 practice, and I became an employee of a psychiatric  
22 group. Then after several months it became apparent  
23 that it was not something that I wanted to stay with  
24 and so I opened my own office. While I was with the  
25 group, the group set me up with the state hospital

1 job, which I held for, I guess, about ten years. So  
2 that was the sequence.

3 Q. Was that a part-time position?

4 A. Yes. About half-time.

5 Q. Then you also served simultaneously, if  
6 I'm not mistaken, as a consultant for the  
7 Pennsylvania Board of Probation and Parole?

8 A. That was a research project, yes.

9 Q. What was that research?

10 A. They were setting up a demonstration  
11 program to see whether intensive probation and  
12 parole work could cut the recidivist rate. And I  
13 think it lasted about a year, year and a half. As  
14 part of the program they had a consulting  
15 psychiatrist who did evaluations as well as  
16 counseling, and that was me.

17 Q. You also spent approximately a year, 14  
18 months as a consultant for Lehigh Valley Mental  
19 Health Association. What is that organization?

20 A. Okay. That was actually for a day  
21 treatment called Haven House. And I would come in  
22 and see patients and talk with staff.

23 Q. Okay.

24 A. It wasn't a lot of time. It was, I  
25 think, a few hours a week.

1 Q. During that time you're still in the  
2 private practice of psychiatry?

3 A. Right.

4 Q. Seeing private patients?

5 A. Right.

6 Q. And you also, for the '68-'72 period,  
7 were a consultant to the Lutheran Children's Home.  
8 What was your capacity there?

9 A. They had children who were living there,  
10 some of them were orphans, some of them were kids  
11 who came from, who were seriously disturbed or came  
12 from backgrounds where they were abused and  
13 neglected. And I would go out there to talk with  
14 them, talk with staff occasionally about kids'  
15 behavior, or I would see the kids in my office, so I  
16 saw a few for therapy.

17 Q. Then in '68 through '90, June of '90,  
18 you are a psychiatrist at Allentown Hospital  
19 Psychiatric Clinic.

20 A. That's correct.

21 Q. What is Allentown Hospital Psychiatric  
22 Clinic?

23 A. Okay. Allentown Hospital is a private  
24 nonprofit hospital, which later became part of  
25 what's called HealthEast, combined with another

1 hospital; together I think they have about 800 beds.  
2 They had an outpatient clinic which was the  
3 principal psychiatric outpatient service for the  
4 Lehigh Valley. There is another in part of the  
5 Valley, which this is the biggest. I was, I began  
6 working a few hours a week and wound up going up to,  
7 I think at the most I think 24 hours a week. That  
8 was my principal job during a good part of the '70's  
9 and '80's.

10 Q. Okay. Now, for people who are not  
11 familiar with Allentown, the Lehigh Valley is the  
12 general area around Allentown?

13 A. Lehigh Valley is Allentown, Bethlehem  
14 and Easton and surroundings.

15 Q. Pennsylvania?

16 A. That's correct.

17 Q. I also notice that for the periods '68  
18 to '71 you were a consultant for the Pastoral  
19 Institute for Lehigh Valley.

20 A. That's right.

21 Q. What was your position there?

22 A. Okay. I would meet usually I think one  
23 hour a week or two hours a week with the rector who  
24 did counseling and was essentially a supervisor. He  
25 would discuss his discussions with patients, and I

1 would make comments.

2 Q. You served as a resource person for him?

3 A. Yes. I was. I was essentially the,  
4 yeah, I was a consultant for his counseling.

5 Q. Okay. Sixty-nine to '72 you were a  
6 consultant for Allentown Counseling Center for  
7 Alcoholism.

8 A. Uh-huh.

9 Q. What was your role there?

10 A. Not many hours a week, but I would see  
11 patients and make recommendations. I think every  
12 patient, that I saw every patient that went through  
13 there; I'm not sure.

14 Q. Okay.

15 A. Maybe not.

16 Q. From 1970 to 1977 you were a consultant  
17 for the Lehigh University Centennial School?

18 A. That's a school for children with  
19 special educational problems, some behavior  
20 problems. Most of the kids were kids that had  
21 behavior problems of one sort or another. And I  
22 would see children and do evaluations, make  
23 recommendations, write reports.

24 Q. I'm getting a sense, given your  
25 background at the juvenile court and the various

1 children's homes that you've worked with, that you  
2 have a concentration of interest in the adolescent  
3 or the child aspect of psychiatry.

4 A. No. Actually, I have an interest in  
5 people of all ages up through probably about age  
6 sixty. I have very little interest in people above  
7 that. I'm interested primarily in talking with  
8 patients, but I've done a lot of other things simply  
9 because they were available, or I fell into them, or  
10 I was asked, or there was a need.

11 Q. Okay. So you don't limit your practice  
12 to children?

13 A. Actually, I don't see children anymore.  
14 When I came to Allentown there was no child  
15 psychiatrist. And I had enough experience and  
16 training that I opened a playroom and I saw some  
17 children. But I don't, it's not work that I -- it's  
18 very, very difficult work, because you have to deal  
19 with parents who generally deny that they have a  
20 problem, and children don't communicate well, so  
21 it's very tedious work. It's not -- I didn't find  
22 it fun.

23 Q. I see.

24 A. So I did it because there was a need for  
25 it, I did the various consulting things, but it's

1 not an area -- I don't have any particular interest  
2 in. And I don't -- when a child psychiatrist came  
3 to Allentown, I closed my playroom, I stopped doing  
4 therapy. I was still was asked occasionally for  
5 consulting work. They generally did not, the  
6 consulting with children generally did not involve  
7 treatment, so it was not very time-consuming, and it  
8 wasn't, I didn't find it very difficult. It was  
9 basically bread and butter.

10 Q. Okay. I note for ten years you served  
11 as medical director for Haven House?

12 A. That's correct.

13 Q. What is Haven House?

14 A. Haven House is what they call a partial  
15 hospitalization program. It's a day treatment  
16 center for people who are very disturbed where the  
17 effort is made either to prevent hospitalization or  
18 to prevent rehospitalization. And this, I would see  
19 patients there and consult with the staff.

20 Q. Now, I also note that you were a  
21 consultant from 1980 to 1985 with the Allentown  
22 Police Department, evaluate police candidates?

23 A. That's correct. There was a time when  
24 the police department was very nervous about hiring  
25 policemen, that they would do something awful,

1 potential for violence, and so then they felt safer,  
2 I guess, having a psychiatrist talk to each  
3 candidate. Whenever the selection process was down  
4 to the final lists, I got to see each one. This was  
5 periodic. It would usually be twice a year I would  
6 get maybe five, ten, 15 people to see.

7 Q. Whenever there was a new class that they  
8 wanted to put on the street?

9 A. Right. And I did that for quite a few  
10 years.

11 Q. Okay. Then the final entry here is from  
12 August, '90 to March, '91, medical director, New  
13 Vitae Partial Hospitalization Program.

14 A. That was a partial program that opened  
15 in September of '90. And I helped them get  
16 organized and get going. They wanted someone who  
17 would be available to do many other things for them,  
18 such as take care of people in the emergency care  
19 residence that they have, so I didn't want to do  
20 that. I worked there until they found somebody who  
21 was interested in doing considerably more work. I  
22 didn't have the time or inclination.

23 Q. So would it be a fair statement, sir, we  
24 have covered the years '61 through March of '91, are  
25 there, have we missed anything significant?

1 A. I didn't mention Muhlenberg. That was  
2 similar. I worked at the Muhlenberg Clinic.

3 Q. I'm sorry. You're right.

4 A. I worked in Muhlenberg's clinic from '71  
5 through '86. That was part-time. I worked one day  
6 a week.

7 Q. What is the Muhlenberg Medical Center  
8 Psychiatric Clinic?

9 A. Basically the same setup as Allentown; a  
10 little smaller. That was part of the county mental  
11 health system where I did outpatient treatment and  
12 evaluations. When I left there, that was part, that  
13 was the beginning of my sharp drop in psychiatric  
14 hours.

15 Q. I see. During this 27, 28 year period  
16 that we have described as far as your work  
17 experience, did you participate or be involved with  
18 any sort of treatment for weight management or  
19 obesity problems or eating disorder problems?

20 A. I saw occasional patients, but I  
21 wouldn't say that I, I wasn't involved in any  
22 special actual program.

23 Q. All right. Have you ever conducted any  
24 tests involving dietary products, particularly fiber  
25 products?

1 A. No.

2 Q. Okay.

3 A. I've had personal experience, but no,  
4 not --

5 Q. I'm focusing on your professional  
6 experience.

7 A. Right. I've done a lot of reading about  
8 them; no research.

9 Q. You've never, you've never conducted any  
10 clinical study concerning the application of fiber  
11 to weight control, to weight management?

12 A. No.

13 Q. Have you ever published any articles  
14 where you discussed from a medical aspect the  
15 application of fiber to weight control?

16 A. No. I -- the reason I hesitated is  
17 because I edit a newsletter called Nutrition Forum.  
18 And we may have had some briefs, some brief hundred,  
19 two hundred word articles that might have reported  
20 some, something related to that, but not --

21 Q. This would be an incidental situation?

22 A. It would be basically from a news point  
23 of view. We might report as a news event the  
24 publication of an article on a subject.

25 Q. You, yourself, have never --

1 A. No.

2 Q. -- published such an article?

3 A. No.

4 Q. Okay.

5 A. I may have written a little bit about it  
6 in a textbook, but --

7 Q. Have you ever conducted any clinical  
8 trials for any topic?

9 A. No.

10 Q. Okay. Do you consider yourself an  
11 expert in biostatistics?

12 A. No.

13 Q. Okay.

14 A. No. I have a pretty good background in  
15 the analysis of information from the medical  
16 statistics course and lots of experience, but I  
17 don't -- there are many times when I have to ask  
18 other people for, there were times when I have to  
19 ask other people for help in interpreting some of  
20 the studies that I might look at.

21 Q. Okay. For example?

22 A. One of my friends says I have the best  
23 crap detector in the world. I seem to have a talent  
24 for detecting an inconsistency. I may not  
25 understand what the inconsistency is, but --

1 Q. For example, are you familiar with a two  
2 sample T test?

3 A. I learned how to do that in statistics  
4 when I was in college. I don't remember how to do  
5 it anymore.

6 Q. You couldn't tell us what a two sample T  
7 test, or one sample T test is, how you do it?

8 A. I understand the T tests relate to  
9 probability and what the significance of the  
10 probability numbers like point oh five and that sort  
11 of thing would be, but I don't remember how you do  
12 them anymore.

13 Q. Okay.

14 A. I did them when I was in college, but I  
15 don't remember how now.

16 Q. You're not holding yourself out as an  
17 expert in biostatistics?

18 A. No.

19 Q. Okay.

20 A. I know a fair amount about statistical  
21 reasoning; I don't know whether I would be  
22 considered an expert.

23 Q. Okay.

24 A. Probably not in the formal sense.

25 Q. I asked you, and I guess I should go

1 back to the question, in the last 25 years, or 28  
2 years since your completion of your psychiatric  
3 residency at Temple University in 1961, would it be  
4 fair to say, sir, that you have at no time been  
5 employed in the field of advertising?

6 A. That's correct.

7 Oh, by the way, I just remembered, I did  
8 take a formal course in communication, which  
9 included things that are relevant to advertising,  
10 but it was a course given by an independent  
11 consultant; it was not a college course.

12 Q. Okay. What was the name of the course?

13 A. I don't, I don't know if it had a name.

14 Q. Do you know when you took it?

15 A. Probably in the late '70's.

16 Q. How many hours was it?

17 A. It was two hours a week for ten weeks,  
18 plus I also took private lessons afterwards when I  
19 was interested in certain kinds of, certain  
20 situations where I might be giving a talk or --  
21 combination of communication and public speaking.  
22 The focus was on how to reach your audience.

23 Q. This was effective communication,  
24 effective public speaking?

25 A. Perfect. Right on the button.

1 Effective communication. I was interested in  
2 writing as well as speaking.

3 Q. Okay. But your answer to my original  
4 question is no, in the period of time since your  
5 completion of your psychiatric residency in 1961,  
6 you have not been employed in the field of  
7 advertising?

8 A. That's correct.

9 Q. All right. In the 27 or 28 years since  
10 your completion of your psychiatric residency, you  
11 have not been employed in the field of marketing; is  
12 that not also correct?

13 A. Employed, that's correct. However,  
14 self-employed, I have been doing marketing.

15 Q. Good. But that's in connection with  
16 your newsletter?

17 A. And also books. I operate a mail-order  
18 book service.

19 Q. Okay.

20 A. And so I've done a certain amount of  
21 marketing.

22 Q. Whatever experience and expertise you've  
23 derived is from your own personal experience?

24 A. Personal experience and a considerable  
25 amount of reading and discussion with other people

1 who I consider to be experts.

2 Q. All right. Are you here today to say  
3 that you are an expert on the crafting of  
4 advertising?

5 MR. HUTTON: For health food?

6 MR. GRAHAM: No. I'm asking for  
7 advertising.

8 A. I don't know that I would say that. I  
9 would say that I have experience in crafting ads.

10 BY MR. GRAHAM:

11 Q. I'm asking, sir --

12 A. Do I consider myself an expert? I don't  
13 know.

14 Q. Are you -- the answer, sir, is: Are you  
15 presenting yourself to the Court as -- let me strike  
16 that.

17 MR. HUTTON: Couldn't you ask him  
18 what he's an expert in?

19 MR. GRAHAM: Mr. Hutton --

20 BY MR. GRAHAM:

21 Q. By your training and by your years of  
22 experience, I would assume that you feel that you  
23 have specialized knowledge in the area of  
24 psychiatry; is this not correct?

25 A. Correct.

1 Q. And if this were, if I were asking you  
2 whether or not you feel yourself qualified as an  
3 expert in the field of psychiatry --

4 A. I would say yes.

5 Q. -- you would say yes?

6 A. Right.

7 Q. Am I not correct, sir, that in the field  
8 of advertising, that you do not consider yourself an  
9 expert?

10 A. I can't answer that question. I would  
11 say that the question of whether or not I'm an  
12 expert is not something that I would present to a  
13 Court. I think that it's up to an attorney who  
14 asked me to testify to do that kind of presentation.  
15 All I can tell you is that I've had some experience  
16 in advertising, I know something about it, I'm  
17 probably pretty good at it. It's not, I would not,  
18 I don't represent myself to the world as an expert  
19 in advertising who is for sale, for example.

20 Q. Do you present yourself as an expert in  
21 psychiatry?

22 A. I would, yeah.

23 Q. But you don't present yourself as an  
24 expert in the field of advertising and marketing?

25 A. I'm not attempting to market myself as

1 an advertising consultant.

2 Q. All right. But I'm asking you, the same  
3 sense, in the same sense, sir, that you say that you  
4 would present yourself to the world as an expert in  
5 psychiatry --

6 A. I think that's clearly defined. I have  
7 credentials.

8 Q. Let me complete my question.

9 A. Sure.

10 Q. In the sense that you would present  
11 yourself to the world as an expert in psychiatry,  
12 you would not likewise present yourself to the world  
13 as an expert in advertising and marketing?

14 A. That's correct. In that sense.

15 Q. All right. The --

16 A. You're talking about the crafting of --

17 Q. I'm talking about advertising.

18 A. Analysis of advertising is another  
19 matter.

20 MR. HUTTON: Exactly.

21 Specializing in health food.

22 MR. GRAHAM: Mr. Hutton, you have,  
23 if you have an objection, state your objection.

24 MR. HUTTON: I object to the form  
25 of the question. It's misleading.

1 MR. GRAHAM: It's not misleading  
2 at all.

3 BY MR. GRAHAM:

4 Q. In connection with this deposition  
5 today, Doctor, were you given any materials to  
6 review?

7 A. I don't think so.

8 Q. Okay. When was the first time you were  
9 contacted by Mr. Hutton?

10 A. I'm not sure. I might be able to figure  
11 it out. I think I sent him some material, I sent  
12 him some material, and I don't, I don't know if I  
13 have the date. Let me see. I would say probably  
14 within the last six months. I can't nail it down.  
15 I'm sure he could, you know.

16 Q. Did you receive any written material  
17 from Mr. Hutton?

18 A. I don't think so.

19 Q. All right. Have you been shown any  
20 written material by Mr. Hutton prior to today?

21 A. I don't think so.

22 Q. All right. Did you and Mr. Hutton have  
23 occasion to speak about this particular pending  
24 case?

25 A. Actually, I don't know. I know almost

1 nothing about the case. I haven't seen the filing.  
2 He talked, we talked on the phone.

3 You want me to tell you how I connected?

4 Q. How did you come to --

5 A. I'm involved in another case, and one of  
6 his partners came to see me about this. This has  
7 nothing to do with Cal-Ban.

8 Q. What's the nature of that?

9 A. Tryptophan.

10 Q. What is that?

11 A. Amino acid. Seriously damaged several  
12 thousand people.

13 Q. Okay.

14 MR. HUTTON: It's been banned by  
15 the FDA.

16 MR. GRAHAM: Okay.

17 A. When the attorney came here he spied a  
18 poster for Cal-Ban, which came from a local  
19 pharmacy. And he said, oh, one of my partners has a  
20 case.

21 I started telling him about the  
22 experience I had in investigating what happened when  
23 Cal-Ban was advertising in Allentown.

24 BY MR. GRAHAM:

25 Q. That's how you connected?

1           A.           I said I have a fair amount of  
2 information and I'd be happy to get involved if he  
3 has any use for me. And so he called me I guess a  
4 few weeks later and asked me, we just talked  
5 briefly, and I sent him some documents that I  
6 thought would be of interest that I had collected.  
7 And then I don't think we have had any other  
8 discussion.

9                       We met this morning for, I don't know,  
10 about 20 minutes, and I think he told me about some,  
11 he mentioned there was one woman in one of the ads  
12 that had had an operation, and that's about it.

13           Q.           Okay. Now, do you recall what documents  
14 you sent to Mr. Hutton? Did you retain copies?

15           A.           I have copies, but I don't have them  
16 segregated. I remember there was one I sent a copy  
17 of; I can remember some of them.

18           Q.           All right. Have you assembled any  
19 documents in one place relative to Cal-Ban 3000?

20           A.           Yes.

21           Q.           Do you have them before you?

22           A.           No.

23           Q.           Okay. Where would they -- are they  
24 within arm's reach?

25           A.           Sure. This is a copy of the hearing. I

1 got this from the postal service, which is the  
2 transcripts from the hearing, some hearing that they  
3 had --

4 Q. Okay.

5 A. -- in '87.

6 Q. What else?

7 A. This is part of the file. And then this  
8 is other things that I pulled out which I thought  
9 would be pertinent to the hearing today.

10 Q. Okay.

11 A. I did mention some of these to him while  
12 we were waiting that I have them.

13 Q. All right.

14 A. These are what I think are the relevant  
15 documents.

16 Q. All right.

17 A. The rest of it is, I don't think would  
18 be of interest to anybody. It's not --

19 Q. We'll probably want to take a look at  
20 all of it.

21 A. You're welcome to.

22 Q. What I'd like to do, Doctor, is take a  
23 copy of all of what you have here.

24 A. This, too?

25 Q. Yes.

1 A. Can I just show you the face pages? I  
2 think you'll see you don't want it.

3 Q. Let me, first of all, look at --

4 A. There's 500 pages there.

5 Q. I understand.

6 A. I'm sure you've seen a lot of it. The  
7 bulk relates to documents connected with law  
8 enforcement actions, which I'm sure you've seen most  
9 of them.

10 Q. I think we'll want to --

11 A. Then I have this. This is how I got  
12 involved, there's two of them, and this is what got  
13 me into this deposition.

14 MR. GRAHAM: All right. I would  
15 like the court reporter to mark this as Composite  
16 Exhibit Number 2.

17 (Barrett Deposition Composite  
18 Exhibit Number 2 was marked for identification.)

19 MR. GRAHAM: And off the record.

20 (Discussion was held off the  
21 record.)

22 MR. GRAHAM: I'd like this to be  
23 marked as Composite Exhibit 3.

24 (Barrett Deposition Composite  
25 Exhibit Number 3 was marked for identification.)

1 BY MR. GRAHAM:

2 Q. All right, sir. I'm handing you what  
3 the court reporter has marked as Exhibit 2,  
4 Composite Exhibit 2. Could you identify that  
5 exhibit for us?

6 A. Okay. That represents the -- okay.  
7 Items 2 and 3 represent my file on Cal-Ban. Number  
8 3 represents what I pulled out this morning that I  
9 thought would be of interest, Number 2 represents  
10 the rest of it that I did not think would be of  
11 interest.

12 Q. Now, I also note that there is a  
13 telephone bill?

14 A. Yes.

15 MR. GRAHAM: And I'd like to have  
16 the court reporter mark this as Composite Exhibit 4,  
17 if you would, please.

18 (Barrett Deposition Composite  
19 Exhibit Number 4 was marked for identification.)

20 BY MR. GRAHAM:

21 Q. I hand you what's been marked as Exhibit  
22 4, which when copied will consist of a single sheet  
23 called page 2 of 7, bearing phone number area code  
24 215, 437-1795-081, dated December 19, 1989,  
25 addressed to Stephen J. Barrett.

- 1 A. No, no. That's not -- no. That's all  
2 the bills from that year.
- 3 Q. Okay. And then attached to this is a  
4 single sheet that starts with April 9, and it  
5 includes a phone number, number 13, April 16 at 1:52  
6 p.m., to Tampa, Florida, to a phone number 813,  
7 949-9304, lasting 16 minutes. Could you identify  
8 Composite Exhibit 4, what that is?
- 9 A. Okay. These are my phone bills from tax  
10 year 1990.
- 11 Q. Okay. This is simply, I'll only have  
12 two pages, that front page and the page I've also  
13 clipped.
- 14 A. Okay.
- 15 Q. What is that? That is your phone bill?
- 16 A. That's the phone bill of April 16th.
- 17 Q. Okay. And that indicates, what; a phone  
18 conversation you had?
- 19 A. With Barbara Larkins and Carl Anderson.
- 20 Q. On the 16th --
- 21 A. Yes.
- 22 Q. -- of April of 1990; is that correct?
- 23 A. That's correct.
- 24 Q. While we're on the topic, what did you  
25 say, what did they say, what was the substance of

1 the conversation?

2 A. I was, I was interested in writing about  
3 Cal-Ban for my newsletter, and I was also retained  
4 by Consumer Reports Health Letter to write about  
5 Cal-Ban. In the course of my investigation,  
6 somebody told me that Cal-Ban was no longer put out  
7 and was no longer manufactured in tablets, that it  
8 was manufactured in capsules.

9 Q. Who told you that?

10 A. I think it might have been David Gaudet,  
11 who was one of the people in the ads that, one of  
12 the testimonial people in the ads. I'm not  
13 positive. I think it was him. So having heard that  
14 I felt it was important to find out whether what was  
15 being marketed now was the same thing that had  
16 caused difficulty.

17 I got, I should start with, I think  
18 that -- I can't remember whether this -- I think --

19 Q. Let me interrupt you. We'll come back  
20 to this conversation.

21 This was in connection with your  
22 research for an article that you prepared?

23 A. More than one article, yes.

24 Q. Okay. Let's talk now about your  
25 journalistic efforts.

1 A. Okay.

2 Q. When did you first become involved in  
3 journalism?

4 A. I began, I got interested in the subject  
5 of health misinformation and quackery and fraud in  
6 the late 1980's -- I'm sorry, late 1970's, when I  
7 read several books that made me very irritated. And  
8 I began to, I formed an organization which was a  
9 discussion, action and action group, which became a  
10 nonprofit corporation in 1970.

11 Q. What was the name of that?

12 A. Lehigh Valley Committee Against Health  
13 Fraud.

14 Q. Okay. And how large of an organization?

15 A. At that peak it was, it had about 40  
16 members, and --

17 Q. What sort of budget did it have?

18 A. It was not, we were not concerned about  
19 money. We -- I couldn't even tell you what it was,  
20 the cash flow was. We sold a few materials, but it  
21 was not a group that required money.

22 Q. Did it have a place of business?

23 A. We had no dues. Pardon?

24 Q. Did it have a place of business?

25 A. No.

1 Q. It was an ad hoc group?

2 A. It was an ad hoc group that would meet,  
3 at first I guess we'd meet, it was every other week  
4 we would meet for lunch and discussion. We would  
5 talk for about an hour.

6 Q. Okay. Who participated in these  
7 discussions, meetings?

8 A. When it first started we went to the  
9 professional societies and said, is there somebody  
10 who you think might be suitable as a representative,  
11 we went to the Bar Association and said, can you  
12 find us a lawyer who will work for us for nothing,  
13 and we, I guess, started with half a dozen people,  
14 and gradually expanded through personal contact. We  
15 found out later it wasn't efficient to work with  
16 representatives from other groups, so people came as  
17 individuals, because you can't ever get anything  
18 done if you have to go back to a group.

19 Q. All right.

20 A. And so people worked through their  
21 network of personal contacts. We found there were a  
22 lot of people that were interested in the subject,  
23 and some of them had been observing or investigating  
24 various aspects of health improprieties in various  
25 areas, and we all brought different areas of

1 interest. And what happened is that as we got  
2 going, we funded local projects to do national  
3 concerns, began writing a little bit, occasionally  
4 getting in the news, people would hear about it,  
5 they would call up and say they want to join. And  
6 so it was a very informal process. I began writing  
7 with letters to the editor in local papers and other  
8 publications.

9 (Deposition interrupted.)

10 A. Let's see. I began, I and other people  
11 began writing, and somewhere around the third or  
12 fourth year we were hitting about one mention a week  
13 in national publications.

14 BY MR. GRAHAM:

15 Q. Were you issuing press releases, or --

16 A. Some, some press releases, some letters,  
17 some reports.

18 (Deposition interrupted.)

19 BY MR. GRAHAM:

20 Q. Doctor, I think we were talking about  
21 how you became interested journalistically.

22 A. So gradually we began penetrating the  
23 national media with letters to the editor, reports,  
24 news releases. I got, developed a network of  
25 friends, some of whom were involved in public

1 relations, and so I was gradually getting  
2 instruction as well as struggling on my own to do  
3 those sorts of things, and other people were doing  
4 it, too.

5 In the early, in the mid, let's say the  
6 early 1970's, around 1972, '73, I began collecting  
7 enough information that people were asking for it.  
8 I was getting mail from all over the country, and I  
9 wound up coauthoring -- I didn't know much about  
10 writing, I didn't like to write, I ended up  
11 coauthoring a few articles. I guess I had written a  
12 few things for journals about some experiences I  
13 had. But I began writing about controversial health  
14 issues in the early 1970's. They were coauthor  
15 articles with a woman who is a nutrition editor.  
16 And I began trying to, I had enough material for a  
17 book, but I didn't know how to write. It never  
18 occurred to me to write it down. I tried to get  
19 people who were interested. There was a man who was  
20 interested, he was a professor, I sent him tons of  
21 material. He wound up deciding it was too  
22 difficult. I realized nobody would write the book I  
23 had in mind. I organized a team with this nutrition  
24 editor, and we wound up getting about 25 or 30  
25 people in a collaborative effort, which produced my

1 book on the wall over there, Health Robbers, right  
2 behind the lamp.

3 Q. Is that listed on your curriculum vitae  
4 that we have marked as Exhibit 1?

5 A. Yes.

6 Q. When was that published?

7 A. Nineteen seventy-six.

8 Q. And that was your first venture in --

9 A. -- into a book.

10 Q. Prior to 1976 had you published any  
11 articles?

12 A. Yes. There was a list in the resume.

13 Q. Okay.

14 A. Well, I can pull it on the screen.

15 Q. Why don't we go through that.

16 A. I wrote about some experiences I had as  
17 a psychiatrist back in the early 1960's, but I  
18 wasn't interested in writing.

19 Q. Okay.

20 A. I guess I had my first journal article,  
21 single authored about, oh, I did a research project  
22 where some chiropractors testified before a  
23 congressional committee, and I knew they were lying.  
24 I got a membership list and sent letters pretending  
25 to be a -- I didn't send them; a number of people

1 sent letters -- pretending to be prospective  
2 patients to go to the chiropractors to be treated  
3 for the diseases that the chiropractors testified  
4 they don't treat, it's not within their scope. And  
5 I published the results in the journal as well as a  
6 document that went to Congress.

7 Q. Okay.

8 MR. HUTTON: Did they treat?

9 THE WITNESS: Hum?

10 MR. HUTTON: Did you catch them  
11 lying?

12 THE WITNESS: Oh, yeah,  
13 definitely.

14 BY MR. GRAHAM:

15 Q. Let me, if I could, review with you the  
16 publications that are listed on your curriculum  
17 vitae marked as Exhibit 1.

18 A. Okay.

19 Q. And I believe they start on page 3,  
20 "Books Coauthored."

21 A. Okay.

22 Q. In 1976, Health Robbers?

23 A. Right.

24 Q. George F. Stickley Company is the  
25 publisher?

1 A. Right.

2 Q. Is that a vanity publisher?

3 A. No. That was a commercial publisher who  
4 specialized in books on nutrition and health, and  
5 was one of the accurate ones. He was one of the  
6 very few in the United States that would only  
7 publish accurate information for the public.

8 Q. Now, did the Health Robbers, How to  
9 Protect Your Money and Your Life contain any  
10 original work by you, or did you serve as an editor  
11 for that book?

12 A. I was coauthor, I was an editor. It  
13 contained several chapters that I wrote.

14 Q. Which specific chapters did you write?

15 A. If you want to pull the book, I could  
16 tell you very simply. All those are my books, by  
17 the way.

18 Q. That's going to be a long process, if I  
19 try to do that.

20 A. Up through the yellow book. That's the  
21 latest. That's, the wall, the books to the left of  
22 that are my books.

23 Q. All right.

24 A. Maybe I can do some summarizing for you.

25 Okay. Let's see. I wrote the chapter

1 on chiropractors, I think. Let's see. Yeah. I  
2 wrote the chapter on chiropractors.

3 Q. Would each book reflect what chapters  
4 you wrote in each of these books?

5 A. No.

6 Q. Okay. So we need to go through in order  
7 to know?

8 A. I can give you a sense of what took  
9 place.

10 Q. So with regards to --

11 A. I also wrote the one on "Organized  
12 Quackery" in Health Robbers.

13 Q. What chapter is that?

14 A. "Unhealthy ~~Appetite~~." Alliance "

15 Q. What other chapters did you write in  
16 that book?

17 A. And the "Truth Seekers, the Voices of  
18 Scientific Truth."

19 Q. What chapter is that; is there a chapter  
20 number?

21 A. That would be chapter 19. And that  
22 would have some relevance. I talked about how  
23 scientific information is, how scientific facts are  
24 established.

25 Q. All right. But what I'm getting at is,

1 that for 1976, The Health Robbers, you wrote two  
2 chapters?

3 A. Three.

4 Q. Three chapters?

5 A. Right.

6 Q. What chapter numbers are they?

7 A. Okay. Chapters 10, 19, and 13.

8 Q. All right.

9 A. But I heavily edited most of the rest,  
10 so they reflect, they reflect -- I just don't do  
11 copy editing; I also enrich things with my own  
12 information, et cetera.

13 Q. Is there any topics, is the topic of  
14 weight management covered by that book?

15 A. Yes.

16 Q. And what chapter?

17 A. Let's see. It's chapter 4.

18 Q. Okay. Who wrote chapter 4?

19 A. Jean Mayer.

20 Q. Spell that last name.

21 A. M-a-y-e-r.

22 Q. Do you know who he is?

23 A. Yes.

24 Q. Would you help me with that?

25 A. Yeah. He's a former professor at

1 Harvard, considered one of the world leading  
2 authorities on weight.

3 Q. Does that chapter include a discussion  
4 of fiber and fiber products?

5 A. I doubt it. I don't think they were in  
6 the news in the mid '70's.

7 Q. All right. Moving to your next book  
8 here listed, Consumer Health, A Guide to  
9 Intelligent Decisions.

10 MR. HUTTON: Just for your  
11 information, the revised edition, chapter 13 is  
12 "Diet Facts and Fads," by Stephen Barrett, that  
13 would be relevant.

14 MR. GRAHAM: I think we are going  
15 to get to that, if that's -- I think that's listed,  
16 is it not?

17 A. Yes.

18 BY MR. GRAHAM:

19 Q. I'm going to the 1980 Consumer Health,  
20 A Guide to Intelligent Decisions, second edition,  
21 would you tell me what chapter you wrote, and  
22 secondly, if the topic of diet is discussed?

23 A. We have a chapter on that, I think.  
24 Wait a minute.

25 Q. First of all --

1 A. No, we don't.

2 Q. All right.

3 A. We have "Food Faddism and Weight  
4 Control," chapter 11.

5 Q. Did you write that chapter?

6 A. I'd have to look. I think it was mostly  
7 written by my coauthor, but there were some parts  
8 that I contributed to about. It does have a section  
9 on dietary fiber.

10 Q. Well, the first question, sir: Did you  
11 write any chapter in that book, which is the second  
12 item?

13 A. I coauthored the book. Yeah. I wrote,  
14 I contributed, I think, four of the chapters as  
15 primary author, and the other fella did the rest.

16 Q. Which ones did you coauthor?

17 A. There ~~was~~<sup>were</sup> 14, so I think I did four and  
18 he did ten. He was the primary author, but we  
19 exchanged information and made additions and  
20 corrections to each other.

21 Q. What chapter were you primary author of?

22 A. "~~Alternative~~<sup>Alternative</sup> Tentative Approaches."

23 Q. What chapter?

24 A. Chapter 6.

25 Q. All right.

1 A. "Dental Care."

2 Q. What chapter?

3 A. Chapter 3, "Mental Health Care," chapter  
4 4, and "Orthodox Health Care," chapter 2.

5 Q. Does that book contain a discussion of  
6 weight management?

7 A. Yes, it does.

8 Q. What chapter is that?

9 A. That would be chapter 11.

10 Q. All right. Does it specifically include  
11 a discussion of dietary fiber and weight management?

12 A. No. There is brief mention of bulk  
13 producing agents, methyl cellulose.

14 Q. Does that book --

15 A. I didn't write it, didn't write that  
16 section.

17 Q. Does the book contain a discussion of  
18 advertising or marketing?

19 A. Let's see. There is some discussion.  
20 It was not written by me.

21 Q. All right.

22 A. There is some discussion.

23 Q. Is there a focused discussion on  
24 advertising or marketing in that book?

25 A. Well, we discussed advertising and

1 advertising abuses, nutrition advertising, hidden  
2 motivators, self-regulation techniques used.

3 Q. What page is that discussion contained  
4 on?

5 A. Thirteen through, let's see, 12 through  
6 16 is the main section.

7 Q. Twelve through 16, page 12 through page  
8 16?

9 A. Yeah.

10 Q. Okay. Did you write that --

11 A. No.

12 Q. -- portion?

13 All right. Moving to Health Robbers,  
14 second edition, 1980. Would you first identify what  
15 chapters you were the author of?

16 A. Okay. "How Quackery is Sold," chapter  
17 2. You want the titles?

18 Q. Yes, please.

19 A. "The Spine Salesman," that's the one  
20 about chiropractors, chapter 10; "Diet Facts and  
21 Fads," chapter 13; "Genuine Fakes," that's about  
22 natural and organic foods, chapter 18; "The  
23 Unhealthy Alliance," that's about organized  
24 quackery, chapter 19; "The Mental Health Maze,"  
25 chapter 25; "The <sup>Voices</sup> ~~Vices~~ of Scientific Truth," chapter

1 26, which talks about, again, how the scientific  
2 community arrives at a consensus and things like  
3 that; I coauthored a chapter on government  
4 enforcement called "The Feds," chapter 29. That's  
5 it.

6 Q. All right. Is there any focused  
7 discussion contained in Health Robbers, second  
8 edition, pertaining to advertising or marketing?

9 A. Yeah. There is a chapter called the --  
10 and there was one in the previous one -- a chapter  
11 called "The Pill Peddlers." And it's about the  
12 advertising of over-the-counter drugs.

13 Q. All right. You say that there is a  
14 similar chapter in the first edition?

15 A. It's the same chapter, by the same  
16 author, but this one is updated.

17 Q. Okay. I don't think you responded when  
18 I asked that question, you did not identify that.

19 A. I didn't remember.

20 Q. Okay. Let's go back, then, to the first  
21 edition of The Health Robbers. If you would, I  
22 think you have it right there?

23 A. Right.

24 Q. May I look at it?

25 A. Sure. Am I allowed to ask a question

1 off the record?

2 (Discussion was held off the  
3 record.)

4 BY MR. GRAHAM:

5 Q. Sir, I'm handing you The Health Robbers,  
6 edition one, and direct your attention to the  
7 chapter called "The Pill Peddlers."

8 A. Yes.

9 Q. Is this the chapter that speaks to  
10 advertising and marketing of products?

11 A. Yes. Nonprescription drugs, period.

12 Q. And would you direct me to, is there any  
13 discussion in that chapter pertaining to the  
14 advertisement of diet products?

15 A. No.

16 Q. Okay.

17 A. Wait. I'm sorry. Yeah. Only slightly.  
18 There is a quote where it talks about advertising  
19 encouraging people to stay slim.

20 Q. Could you read -- it's not long, would  
21 you read that into the record?

22 A. "Madison Avenue encourages everyone,  
23 including children, to take drugs to get up, to stay  
24 awake, to stay slim, healthy and beautiful, to  
25 eliminate minor pain or discomfort and to go to

1 sleep."

2 Q. Is that attributed to any particular  
3 source?

4 A. Francis Belotti, who was attorney  
5 general of Massachusetts.

6 Q. Is there any other mention of  
7 advertising or marketing?

8 A. I don't remember any.

9 Q. All right. Now, let's look at the  
10 second edition. And I think I already asked you  
11 which chapters you wrote?

12 A. Right.

13 Q. Now I'd like you to tell me if that  
14 second edition speaks to the issue of advertisement  
15 or marketing. '

16 A. It has an updated version of "The Pill  
17 Peddlers," which is the one we just did in the other  
18 one that --

19 Q. That is contained in paragraph --  
20 chapter 11?

21 A. Right.

22 Q. Could you direct me to any specific  
23 reference to the marketing or advertising practices?

24 A. Well, there is a discussion of consumer  
25 psychology and how some of the psychology of the

1 advertiser in getting people to do things.

2 Q. Okay. What page is that contained on?

3 A. Page 152.

4 Q. Again, did you write this chapter?

5 A. It was written primarily by someone  
6 else, but I heavily --

7 Q. Who is that someone else?

8 A. Murray Katz.

9 Q. Who is Mr. Katz?

10 A. He is a physician in Canada who had a  
11 special interest in over-the-counter drugs.

12 Q. You're directing my attention to page  
13 152?

14 A. Pages 151 and 152, "Consumer  
15 Psychology."

16 Q. All right.

17 A. There is a discussion of how advertising  
18 affects pharmacies, and the gist of which was, to a  
19 large extent, they're basically salespeople rather  
20 than professionals.

21 Q. All right.

22 A. Talks about the FDA over-the-counter  
23 drugs and --

24 Q. Doctor, I'm limiting my question to the  
25 area of advertising and marketing.

1           A.           Okay.  Talked about the Federal Trade  
2 Commission was thinking about stopping certain kinds  
3 of advertising that were unsupported by scientific  
4 evidence.

5           Q.           Is there an attribution to that?

6           A.           Federal Trade Commission.

7           Q.           Okay.  Is there a cite to any particular  
8 publication?

9           A.           They had a food advertising rule that  
10 occupies a -- it was in the Congressional Register,  
11 and the many hearings, thousands of pages.

12          Q.           Do you provide a bibliography --

13          A.           No.

14          Q.           -- when you --

15          A.           Not for this book.

16          Q.           All right.  Are there any other chapters  
17 in the second edition of The Health Robbers that  
18 make any mention of marketing or advertising of  
19 health products?

20          A.           We talk about how quackery is sold.  
21 That was coauthored by me.  It talks about the use  
22 of hope.

23          Q.           Could you specifically direct me to a  
24 chapter?

25          A.           "The Use of Hope," it's chapter 2.  Page

1 18 we talked about the use of hope. It doesn't  
2 specifically talk about advertising, it doesn't  
3 mention the word advertising, but it's, I guess it's  
4 related to marketing. The whole chapter is about  
5 marketing, but most of it probably wouldn't pertain  
6 to advertising.

7 Q. All right. Any other chapters in that  
8 book, the second edition of Health Robbers that  
9 speak to advertising or marketing?

10 A. Not specifically, but there are, there  
11 is a, what we call a quick reference guide to weight  
12 reduction methods that talks about claims, not  
13 necessarily in advertising.

14 Q. All right. And what page would that  
15 discussion be contained in?

16 A. Page 180 to 183.

17 Q. All right.

18 A. That's in a chapter which I wrote about  
19 diet facts and fads. My consultant for the chapter  
20 was the head of the food and nutrition department  
21 for the American Medical Association.

22 Q. All right.

23 A. He helped me with that.

24 Q. Did you provide a bibliography as to  
25 facts contained in that?

1 A. It's not referenced, no.

2 Q. Okay.

3 A. I normally don't use references except  
4 in my textbooks and sometimes in my newsletter.

5 Q. All right. May I see this for a minute?

6 A. Sure. I think it covers the bulk  
7 producing products which would be, I think, one  
8 claim that would be alleged in the category that  
9 Cal-Ban would fit in.

10 Q. I'm asking whether or not you can direct  
11 me to a category involving fibers.

12 A. Bulk producing.

13 Q. You are referring to the top of page  
14 181, "Artificial Bulk Producing Agents"?

15 A. Right.

16 Q. It states: "Artificial bulk producing  
17 agents frequently are sold with the claim that they  
18 will curb appetites by tricking the stomach into  
19 thinking it is full. Your stomach won't be tricked,  
20 so don't you be tricked either."

21 A. Uh-huh.

22 Q. Okay. Now, could you relate to us the  
23 studies that you relied on in making the statement  
24 that you made at page 181 that I've just recited?

25 A. That was, I relied on, one thing that

1 I -- two things, I'm sorry, there are two things  
2 that I recall, one is that this was partially  
3 drafted by a woman who was executive director or  
4 executive secretary or executive assistant, I guess,  
5 of the American Institute of Nutrition, which is the  
6 professional group for board certified  
7 nutritionists. She compiled part of the list that  
8 was one of the -- that's basically her language.  
9 And I do remember there was a study in the Journal  
10 of the American Medical Association, I don't  
11 remember whether it was before this book or  
12 afterwards, where somebody gave bulk producers, took  
13 x-rays and watched what happened. This did not  
14 relate specifically to guar gum, but to methyl  
15 cellulose.

16 Q. Are you testifying today that guar gum  
17 is the, falls within the general definition of  
18 artificial bulk producing agents?

19 A. I think in -- I'm not sure whether the  
20 word artificial would still be applicable, but bulk  
21 producing agents would be. Artificial in the sense  
22 that you're not talking about the fiber that's  
23 contained naturally in foods. They're talking  
24 about, what is meant, was meant is that the bulk is  
25 being produced by a manufactured product rather than

1 in the form of a pill or a capsule or a powder,  
2 rather than what is contained in a more natural,  
3 unprocessed food. That's what is meant.

4 Q. All right. But guar gum was not --

5 A. I don't even know if I had even heard of  
6 guar gum in 1980.

7 Q. This second edition --

8 A. That was 1980.

9 Q. -- was prepared in 1980?

10 A. Uh-huh.

11 Q. All right. And on the back it says, you  
12 cite, I guess with some pride, an expert from  
13 Publishers Weekly --

14 A. Uh-huh.

15 Q. -- which reviews the books, and states:  
16 "Their attacks," meaning the authors, "for each  
17 chapter is written by an acknowledged expert, their  
18 attacks are razor sharp, assertive, largely  
19 well-documented."

20 A. Uh-huh.

21 Q. Can you tell me the documentation that  
22 you had to make the statement that --

23 A. That was --

24 Q. -- we have just referred to?

25 A. The quote was, referred to the first

1 edition, which was written in 1976.

2 Q. This does not, this quote --

3 A. Does not refer to this edition.

4 Q. -- does not refer to this book, the  
5 second edition?

6 A. That's correct. That was the  
7 publisher's doing. I had nothing to do with that.

8 Q. Okay.

9 (Deposition interrupted.)

10 BY MR. GRAHAM:

11 Q. The next book listed on page three of  
12 your curriculum vitae is a 1980 entry for The Tooth  
13 Robbers, a Pro-Fluoridation Handbook.

14 A. It's not relevant.

15 Q. It has nothing to do with advertising or  
16 marketing?

17 A. No.

18 Q. In 1981, Vitamins and Health Foods, the  
19 Great American Hustle.

20 A. It has a lot to do with the marketing.

21 Q. First of all, Vitamins and Health Foods,  
22 could you tell us what chapters you authored?

23 A. I wrote the, I basically wrote the book,  
24 except for --

25 (Deposition interrupted.)

1 A. -- except for I didn't write, I didn't  
2 write parts about modern food quackery and parts of  
3 the Laetrile story. And some of the chapters were  
4 adapted from the material in The Health Robbers.

5 Q. Could you direct my attention to --

6 A. And Victor Herbert contributed to many  
7 of the chapters. I can't separate what he did. And  
8 I basically handled the manuscript and would put  
9 things together from his writing and other people's  
10 writing and my writing, and their research, I sent  
11 it to him, and it went back and forth. By the time  
12 it was finished, it was sort of a blend of the two  
13 of us.

14 Q. Okay. Can you direct me to those  
15 portions of the book which speak to advertising and  
16 marketing?

17 A. Well, in the index I see there is some.

18 Q. Would you direct my attention?

19 A. Okay. It's discussed, according to the  
20 index, page 150 to 154 discusses the Federal Trade  
21 Commission.

22 Q. Let me stop you there. One fifty?

23 A. To 154.

24 Q. That's entitled "FTC Laws"?

25 A. Uh-huh.

1 Q. Could you direct me to the specific  
2 language that you believe speaks to the marketing or  
3 advertising?

4 A. Well, nothing that has to do with weight  
5 control.

6 Q. Okay.

7 A. FTC's trade regulation rule, proposed  
8 rule 151 that had to do with food advertising. That  
9 would include nutrition product, as well as foods.  
10 There are a few cases described in page 153 that had  
11 to do with postal service action.

12 Q. Is it connected with diet or diet  
13 products?

14 A. Let me see. Yes. Some. At least one.

15 Q. Which one is that?

16 A. Formula twelve scheme to get rid of  
17 stubborn cellulite is one product.

18 Q. Isn't this discussion basically a  
19 journalistic effort to report on FTC actions?

20 A. Yes. And the general setup of the law  
21 and how effective it is, or ineffective.

22 Q. All right.

23 A. Uh-huh.

24 Q. You're not presenting yourself as a  
25 legal expert, are you?

1 MR. HUTTON: No. But he knows  
2 about the Food and Drug Act.

3 MR. GRAHAM: Mr. Hutton, this is  
4 an examination of a witness. And if you want to  
5 coach your witness, that's fine, but --

6 MR. HUTTON: I'm just telling you.

7 MR. GRAHAM: After I have him  
8 answer the questions, you can come back and do  
9 whatever you think is appropriate.

10 MR. HUTTON: I'm trying to help  
11 you out.

12 A. I would not present myself to a court as  
13 a legal expert. It's possible that an attorney  
14 might present me that way. I have a fair amount of  
15 knowledge of the laws that apply to consumer  
16 protection and advertising of health products, and  
17 I've had a year and a half of law school by  
18 correspondence. But that just gives me a general  
19 feeling for the law. I have a pretty, I think I'm  
20 quite expert at judging whether an ad is legal. I  
21 would consider myself to be fairly expert at that.

22 BY MR. GRAHAM:

23 Q. I see.

24 A. In other words, I can say I believe I'd  
25 be quite good at taking an advertisement, and if I

16 1 know something about the product, and sometimes even  
2 if I don't, and judging whether that ad is legal or  
3 whether it's suspicious.

4 Q. Well, let's get into a more general  
5 discussion here. When you did that evaluation, you  
6 relied on your research?

7 A. That, plus more than a decade of contact  
8 with enforcement officials in which I compared  
9 notes.

10 Q. I see.

11 A. Actually, 15 years of discussions with  
12 enforcement officials and the postal service and the  
13 FDA. I used to talk on a regular basis with  
14 officials about ads that I or others thought were  
15 labeling claims or product literature that I thought  
16 was not right, I would send it. And I would say  
17 that I did that fairly regularly over about a 15  
18 year period with several officials.

19 Q. But you, yourself, are not a  
20 nutritionist; is that correct?

21 A. I'm not a nutritionist, but I have  
22 edited a nutrition newsletter and I have edited and  
23 coauthored books on nutrition. I have a very sound  
24 knowledge of basic, practical nutrition.

25 Q. You don't have any academic training in

1 nutrition?

2 A. Well, yes and no.

3 Q. Other than what every medical doctor  
4 might know?

5 A. Every medical doctor gets a considerable  
6 amount of training in physiology and biochemistry,  
7 which is the basic science of nutrition, and I have  
8 had, and what doctors don't usually get, is formal  
9 training from dieticians, which is, I guess, the  
10 science of assembling a diet to meet various  
11 criteria for nourishment or whatever it is you're  
12 trying to do. Doctors learn when to prescribe  
13 certain kinds of diets for what disease. I've had a  
14 tremendous amount of contact with nutritionists,  
15 dieticians and so on, and written a great deal about  
16 dietary cases, dietary strategy, nutrient adequacy  
17 and so on. I'm an expert at something, but I'm not  
18 sure how to define it.

19 Q. Well, the question that I have, sir, is:  
20 When I review your nutrition newsletter, I perceive  
21 it as a reporting of events in the medical, legal  
22 field.

23 A. It could be reporting, it could be  
24 investigative reporting where people go to do market  
25 surveys, or where they go to meetings and describe

1 what they see.

2 Q. But you are --

3 A. There are scientific articles in this  
4 written, they're written by an expert.

5 Q. But not by you?

6 A. No. But I would edit them.

7 Q. Your involvement in your newsletter is  
8 to assemble the facts and present those facts to  
9 your readers?

10 A. That's partly it, but also many articles  
11 are written by other people. Most articles are  
12 written by experts. The articles that involve  
13 straight nutrition, that is relation, let's say,  
14 between diet or disease or about a particular  
15 nutrient, that's, they're all written by experts.

16 Q. Right. Did you have, have you edited an  
17 article pertaining to the use of fiber, dietary  
18 fiber, in weight management?

19 A. No. I've written briefly on the  
20 subject.

21 Q. But have you edited any articles by  
22 experts on the issue of the use of dietary fibers in  
23 weight management?

24 A. I'm not sure we -- there was one article  
25 we had on dietary fiber that I edited. I don't

1 think it discussed weight management.

2 Q. Okay. You have, however, written an  
3 article on dietary fiber?

4 A. No. I've written parts of, I've written  
5 parts of books on dietary fiber. The two more  
6 recent editions of my consumer health textbook  
7 contain discussions of dietary fiber.

8 Q. Okay. Well, maybe what we ought to do  
9 is, you've pointed out, I think, in Vitamins and  
10 Health Foods a discussion of advertising and  
11 marketing. Let's move to Shopping For Health Care.

12 A. Okay. That's basically a cut down  
13 edition of, updated edition of the 1980 Consumer  
14 Health, and I would suggest, you know, you not get  
15 into it. It's basically the 1980 book which is put  
16 out in the form for lay people with less, with fewer  
17 references, some updating, but the same topics.

18 Q. So if --

19 A. It wouldn't be relevant.

20 Q. There's nothing in that book --

21 A. I don't think there is anything in that  
22 book that wouldn't be in the 1980 edition of  
23 Consumer Health, except that's two years updated.

24 Q. Okay. That's a 1982 publication?

25 A. That's correct, uh-huh.

- 1 Q. Well, I guess we --
- 2 A. That's 1990. You want me to pull out  
3 the ones --
- 4 Q. What is the most recent one; the fourth  
5 edition? Why don't you hold on to that.
- 6 A. Guide to Nutrition just came out a few  
7 weeks ago. That would probably have some stuff in  
8 it. The rest would not be relevant.
- 9 Q. All right.
- 10 A. Well, actually, there is a former  
11 edition, which is, Your Basic Guide to Nutrition. I  
12 don't know whether it has a discussion or not. It  
13 might have a little bit, but it would all be in here  
14 if it is significant. Does that matter?
- 15 Q. This --
- 16 A. That was 1983 or '84.
- 17 Q. Is that listed on your --
- 18 A. Yes. I can do a computer search on  
19 that.
- 20 No. I guess I don't have that anymore.  
21 I can't do it.
- 22 Q. We have completed Vitamins and Health  
23 Foods. Let's talk about Shopping for Health Care.  
24 Does that contain any discussion?
- 25 A. Nothing that wouldn't be in the 1980

1 edition, or updated.

2 Q. The 1980 edition of --

3 A. -- of Consumer Health. Shopping for  
4 Health Care is an updated lay version of the 1980  
5 book, textbook, written for a different market.

6 Q. Consumer Health, a Guide to Intelligent  
7 Decisions?

8 A. Right. I would think it would contain  
9 nothing about fiber or weight control that's not in  
10 the 1980 edition, except perhaps one or two  
11 enforcement actions.

12 Q. All right.

13 A. Nothing substantial.

14 Q. And what about the Consumer Health,  
15 fourth edition; same answer?

16 A. No. I wouldn't say that.

17 Q. All right.

18 A. I would have to look at that one. The  
19 fourth edition has an entire chapter on weight  
20 control, and the third edition has an entire chapter  
21 which I wrote.

22 Q. Is the third -- fourth edition simply an  
23 update of the third?

24 A. Tremendous expansion, as you can see  
25 from the thickness.

1 Q. If you would, pick up the fourth edition  
2 of Consumer Health -- which was published in 1989;  
3 is that correct?

4 A. That's correct.

5 Q. -- and direct my attention to portions  
6 of that book that deal with advertising and  
7 marketing.

8 A. There is an entire chapter on  
9 advertising.

10 Q. All right. What chapter would that be?

11 A. There's also a chapter on "Separating  
12 Fact From Fiction," which I wrote, which is probably  
13 an area which I have, if I were to identify some  
14 expertise, I think I'm pretty good at that.

15 Q. All right.

16 A. So there is chapter 4, which is  
17 "Separating Fact From Fiction," talks about how  
18 facts are determined in the scientific methods,  
19 statistics, how they're misused, sources of  
20 information, and the media, how information is  
21 spread, so that would be relevant. Then there is a  
22 chapter on advertising, which my coauthor was the  
23 primary writer, but I contributed.

24 Q. All right. Who is the coauthor?

25 A. Mail advertising is an area of special

1 interest to me.

2 Q. Who --

3 A. Dr. Harold Cornacchia, professor of  
4 health education, emeritus from San Francisco State  
5 University.

6 Q. Okay. He is a doctor of education?

7 A. Yes.

8 MR. GRAHAM: I'd like, Doctor, I'm  
9 handing what will be marked by the court reporter as  
10 Exhibit 5.

11 (Barrett Deposition Exhibit Number  
12 5 was marked for identification.)

13 A. That's the fourth edition of my college  
14 textbook.

15 BY MR. GRAHAM:

16 Q. I'm specifically directing your  
17 attention to chapter 5 of that fourth edition.  
18 Could you identify Exhibit 5 for us?

19 A. That's a chapter on advertising which  
20 has appeared in Consumer Health, a Guide to  
21 Intelligent Decisions. It's in the fourth edition  
22 of the college textbook.

23 Q. Is that the first publication that  
24 you've devoted to the topic of advertising?

25 A. I think the third edition had a chapter

1 on advertising also.

2 Q. Okay. Do we have that with us?

3 A. Yes.

4 (Barrett Deposition Exhibit Number  
5 6 was marked for identification.)

6 BY MR. GRAHAM.

7 Q. I'm handing you what has been marked by  
8 the court reporter as Exhibit 6.

9 A. By the way, if you want whole copies of  
10 the books, this one is \$32. That, I can give you  
11 for \$10.

12 Q. I'm handing you what has been marked by  
13 the court reporter as Exhibit 6. Could you identify  
14 that, Doctor, for the record?

15 A. Okay. This is Consumer Health, a Guide  
16 to Intelligent Decisions, third edition, which  
17 contains a chapter on advertising.

18 Q. Okay. Why don't you go ahead and put  
19 those down.

20 A. It might contain a chapter on weight  
21 control that I wrote, too. Does that matter?

22 Q. Yes. Would you identify that for us?

23 A. Yes. It contains chapter 18 on weight  
24 control, which I wrote.

25 Q. All right. And let's go to 18, then.

1 (Barrett Deposition Exhibit Number  
2 7 was marked for identification.)

3 BY MR. GRAHAM:

4 Q. Handing you what's been marked by the  
5 court reporter as Exhibit 7 --

6 A. It's chapter 18 in the third edition of  
7 Consumer Health, a Guide to Intelligent Decisions.

8 Q. Is there a similar chapter in the fourth  
9 edition of Consumer Health?

10 A. Yes.

11 Q. And what chapter might that be found in?

12 A. Okay. The chapters of relevance would  
13 be "Separating Fact From Fiction," which I wrote,  
14 "Advertising," which is chapter 5, which I was not  
15 the primary author. I think I wrote the section on  
16 "Mail Order Advertising," though. It's page 75.

17 Q. All right.

18 A. Because I did several studies of mail  
19 order advertising.

20 Q. When you say studies, what do you mean?

21 A. In 1977 the Pennsylvania Medical Society  
22 bought a set of all magazines distributed within  
23 Pennsylvania. Then they went to the largest  
24 wholesaler in the state, we want one of every  
25 magazine sold to the public. Their staff members



1 magazines, cut out all -- this time I hired my own  
2 people to, we went to the Allentown distributor,  
3 hired my own people to go through the magazines and  
4 pull out every ad, so we had every magazine, every  
5 ad from every magazine, and they were sorted, and I  
6 analyzed them again, on occasion calling one person  
7 or another to find out if there was something I  
8 didn't feel competent to make a decision about, and  
9 classifying whether this would work or it didn't, I  
10 would call somebody, and that study would be  
11 published probably this week as a booklet.

12 Q. Is this particular fourth edition  
13 available immediately?

14 A. Yes.

15 Q. I could buy --

16 A. Yes. Thirty-two dollars.

17 Q. Why don't we -- I'm just trying to  
18 identify how we can save some time.

19 A. Chapter 4 is very important. Chapter  
20 5 -- 4 is the most important, because my special  
21 interest is in sorting information, gathering and  
22 sorting information and judging information, rather  
23 than a detailed analysis of marketing techniques.

24 Q. All right. And that chapter 4 is the  
25 fourth edition that I'll mark as 8.

1 A. Here is the article I wrote on fiber.

2 (Barrett Deposition Exhibit Number  
3 8 was marked for identification.)

4 BY MR. GRAHAM:

5 Q. I hand you what has been marked by the  
6 court reporter as Exhibit 8. Could you tell us if  
7 this is the chapter 4 from the fourth edition of  
8 Consumer Health?

9 A. That's correct.

10 Q. Who authored that?

11 A. Chapter 4, I wrote.

12 Q. Okay.

13 A. I was the primary author.

14 Q. Any other chapters in the fourth  
15 edition?

16 A. "Advertising and Weight Control."

17 Q. Okay.

18 A. Should be about 18 or so.

19 Q. Okay.

20 A. Which I wrote.

21 (Barrett Deposition Exhibit Number  
22 9 was marked for identification.)

23 BY MR. GRAHAM:

24 Q. Okay. And handing you what's been  
25 marked by the court reporter as Exhibit 9, can you

1 identify that document for us?

2 A. Chapter 18 on weight control which I  
3 wrote for the fourth edition of Consumer Health.

4 Q. Are there any other chapters in the  
5 fourth edition of Consumer Health that pertain to  
6 the subject of advertising?

7 A. No. Well, the chapter on consumer  
8 protection would deal with government actions and  
9 lists some enforcement actions that have to do with  
10 advertising.

11 Q. Okay. Did you write that?

12 A. Which I wrote, yes.

13 Q. All right.

14 A. It also covers FDA laws, and these  
15 chapters, the chapters on law, were reviewed by  
16 somebody from the enforcement department of the FDA  
17 as well as one of the postal attorneys. So they  
18 both reviewed this prior to publication.

19 Q. All right.

20 A. My style of writing involves --  
21 incidentally, generally when I write about a  
22 subject, it's self-contained, meaning that I do the  
23 entire investigation, I write only as a journalist,  
24 I don't have too much in the way of expert review.  
25 When I write about a subject that requires expert

1 knowledge, even if I know quite a bit, I often will  
2 send it out for review for anywhere from one to  
3 eight people, and so it's a very nice learning  
4 process.

5 Q. Now, I notice that Consumer Health,  
6 fourth edition, and also the third edition, carries  
7 a bibliography after each chapter; is that correct?

8 A. Uh-huh.

9 Q. Does that indicate the source --

10 A. Yes.

11 Q. -- for the statements made?

12 A. For many of them, yes.

13 Q. All right. And if there is no source  
14 listed, is that to suggest it's just the writer's  
15 thought?

16 A. Well, you can't have, you can't have  
17 your reference for every sentence. I think it's  
18 pretty clear from the context that these represent  
19 both authors' opinions. There is not a statement in  
20 the book written without a reference that we don't  
21 agree with, I think.

22 Q. Okay.

23 A. I mean, I guess, well, I don't know if I  
24 should be that strong about it. I would say that  
25 the vast majority of the statements in the book that

1 don't have a source directly on that sentence are  
2 probably things we wrote and we agree with, yes.  
3 It's clear from the context whose voice it's written  
4 in.

5 Q. I'm now examining the next item on your  
6 list, which is Health Schemes, Scams and Frauds, a  
7 Consumer Reports book. Is that an adaptation of  
8 your --

9 A. No. That's an original book that came  
10 out last year. The story behind that book is that  
11 beginning in the mid '70's I collaborated as a  
12 consultant to Consumer Reports magazine on a number  
13 of articles involving what we call quackery and  
14 health fraud. During the mid-1980's I wrote four  
15 articles for the magazine. And there was enough  
16 material I thought that had been published that form  
17 most of the book, and so I proposed to Consumers  
18 Union that they have me update, organize and fill  
19 out a book on the subject of quackery, and so they  
20 retained me to do that. Some of the chapters there  
21 were originally written by other people, some  
22 independent of me, some of them were written where I  
23 had editorial input as well as consultant. I put,  
24 in other words, I provided source material and I  
25 read and gave editorial suggestions and so on. Some

1 of the things were originally written by me or  
2 Consumer Reports magazine, and some of the book was  
3 originally written by me for the book. The book  
4 went through a review process where a minimum of one  
5 medical expert read each part, and there were  
6 probably about 15 people who reviewed every word or  
7 parts of every chapter, or I'm sorry, or chapter.  
8 It went through an extremely thorough review  
9 process. I don't know even who all the people were  
10 except for the medical consultant who reviews  
11 everything. It reflects both my views and those of  
12 Consumers Union.

13 Q. All right.

14 A. This is official --

15 Q. Who, specifically?

16 A. Pardon?

17 Q. Who specifically reviewed --

18 A. Marvin Lipman is the chief medical  
19 consultant for Consumer Reports, Jonathon Leff was  
20 the former head of the book department, there are a  
21 bunch of editors, Joe Botta, who was the medical  
22 editor for Consumer Reports. He's not there  
23 anymore.

24 Q. This book, Health Schemes Scams and  
25 Frauds, that was published in 1990; is that correct?

1 A. December, uh-huh.

2 Q. December of 1990?

3 A. Uh-huh.

4 Q. And there is a chapter named "Weight  
5 Control: Fads and Fakes"?

6 A. Uh-huh.

7 Q. Is that something that you authored?

8 A. I was not the original author of some of  
9 it. The situation was, I had access to any material  
10 in Consumer Reports and was able to use it verbatim.  
11 And so I took some blocks of words and used them and  
12 then put in other things of my own doing. So it's a  
13 blend. I couldn't tell you what percentage. Some  
14 of it originated with my words, some of it  
15 originated with Joe Botta in the magazine, some of  
16 it originated earlier, and then it went through a  
17 team editing process.

18 MR. HUTTON: Cal-Ban is mentioned  
19 in there.

20 MR. GRAHAM: Right.

21 A. Not in that chapter, or is it? Okay.  
22 There is a mention of it.

23 (Barrett Deposition Exhibit Number  
24 10 was marked for identification.)

25 BY MR. GRAHAM:

1 Q. I'm handing you --

2 A. I also wrote about Cal-Ban for Consumer  
3 Reports Health Letter. And anything that was in the  
4 health letter was also accessible to me, but I used  
5 mostly my own writing.

6 Q. Handing you what the court reporter has  
7 marked as Exhibit 10, which purports to be chapter 9  
8 of the book, Health Schemes, Scams and Frauds, could  
9 you identify that for the record?

10 A. Yes. Chapter 9, "Weight Control: Fads  
11 and Fakes." This is chapter 9 of Health Schemes,  
12 Scams and Frauds, which I was the primary editor of  
13 the book, but also worked with editors of Consumer  
14 Reports, and was published in December, 1990. It's  
15 \$14 if you want a copy.

16 Q. Directing your attention to paragraph,  
17 or page 140, rather --

18 A. Okay.

19 Q. -- and I'm specifically directing your  
20 attention to the paragraph that reads: "Some diet  
21 pills contain a fiber, such as glucomannan or guar  
22 gum" --

23 A. Right.

24 Q. -- "that is claimed to curb appetite by  
25 absorbing water and swelling to fill the stomach.

1 That claim is false."

2 A. Right.

3 Q. Could you tell me the basis for your  
4 statement?

5 A. I explain in the next sentence, which  
6 says that, the next two sentences, "Fiber is too  
7 small to actually fill the stomach." Even if it  
8 could, filling the stomach doesn't necessarily stop  
9 people from eating. Some people eat past the point  
10 that they're full. "Moreover, double-blind tests  
11 have shown that so-called bulk producing agents  
12 don't result in weight loss."

13 That was based upon primarily a study by  
14 Judith Stern, who is a professor of nutrition. It's  
15 not been published.

16 (Deposition interrupted.)

17 (A brief recess was taken.)

18 BY MR. GRAHAM:

19 Q. I was directing your attention to page  
20 140 of Exhibit 10. And I'm wondering, did you  
21 provide a source for the declarative statement, and  
22 again I'll read: "Some diet pills contain a fiber,  
23 such as glucomannan or guar gum, that is claimed to  
24 curb appetite by absorbing water and swelling to  
25 fill the stomach. This claim is false." Is there

1 any --

2 A. During the process of writing more  
3 Consumer Reports or Health Letter or the book or the  
4 magazine, there the writer is required to document  
5 every statement. However, it's not always practical  
6 to document every single statement. So what

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1 think they need, if they need additional, then they  
2 request it.

3 Q. Can you direct me to the documentation  
4 that you have to support that statement?

5 A. Let me finish. This, in my opinion,  
6 does not require documentation as it's a well, it's  
7 a pretty well-established scientific fact, and they  
8 did not, their reviewers did not question it.  
9 However, I did discuss, I did call Judith Stern who  
10 did the study on bulk producers and glucomannan,  
11 which was a double-blind study, I called her to find  
12 out where it was published. I found out it was not  
13 published, but she testified before a congressional  
14 committee, and she discussed the study with me on  
15 the phone.

16 Q. Did you find the fact that it was not  
17 published to be a problem as far as its validity?

18 A. No. I think it was a proprietary  
19 study -- that is, it was not proprietary. There was  
20 some, I don't think she -- I'm not sure she had  
21 ownership of the data. I think it was done for a

22 ~~company; I'm not sure.~~

23 Q. Well, the fact, sir, it was not a  
24 published study, did that, in your mind, detract  
25 from its reliability?

1           A.           Well, it could, if I didn't know the  
2           person. But I mean, there are people who, I mean, I  
3           know who Judith Stern is, and she has a super  
4           reputation, so there was never any issue of  
5           credibility in my mind.

6           Q.           Okay. So the fact it was not published  
7           does not, in and of itself, suggest that the results  
8           obtained --

9           A.           Usually --

10          Q.           -- are invalid?

11          A.           Well, it's usually not a good sign.  
12          Usually if somebody does a study and it's a good  
13          one, they will want it published. I've come across  
14          a few situations where people said they did not have  
15          the ability to publish it because they didn't have  
16          ownership of the study.

17          Q.           But that is a legitimate reason for not  
18          publishing a study in the nutrition field; is that  
19          not correct?

20          A.           I don't know if it's legitimate. I've  
21          encountered that. If it's true that they didn't, I  
22          mean, they may have had a, I assume they have a  
23          contract, there was a contract with somebody, that  
24          the results become the property of the person who  
25          is, who bought the study or whatever it is.

1 Q. Now, did you get a copy --

2 A. That's unusual.

3 Q. Did you get a copy of the report?

4 A. No.

5 Q. Did you get a copy of the summary of the  
6 conclusions?

7 A. She testified before a congressional  
8 committee some years ago.

9 Q. What committee would that have been?

10 A. It was the Herbalife hearing in 1985, I  
11 think it was.

12 Q. Do you know what committee or  
13 subcommittee she appeared before?

14 A. I can probably find that.

15 Wait a minute. It was a hearing on  
16 weight control. I think I can find that. Senator  
17 Roth of the Permanent Subcommittee on Investigations  
18 had a hearing in 1985 that focused mainly on  
19 Herbalife, but it also had to do with, I think, very  
20 low calorie diet aides.

21 Q. What committee or subcommittee would  
22 that have been before?

23 A. It was the Senate's Permanent  
24 Subcommittee on Investigations.

25 Q. Is there a published transcript of those

1 proceedings?

2 A. Oh, yeah. It was the Roth hearings,  
3 yeah. Judith Stern. Here it is, 15 through 40,  
4 testimony of Judith Stern.

5 Q. You directed my attention to a document  
6 that is published by the United States Government  
7 printing office, entitled "Weight Reduction Products  
8 and Plans, Hearings Before the Permanent  
9 Subcommittee on Investigations of the Committee on  
10 Governmental Affairs, United States Senate, May 14  
11 and 15, 1985," and specifically pages 14 and 15, or  
12 just page 15?

13 A. It goes on.

14 Q. Commencing on page 15?

15 A. Then on to page 40. I think there is  
16 maybe a prepared statement. Yeah. Then she came  
17 with a prepared statement which starts on page 40.  
18 That probably describes her study.

19 Q. All right. Would I be correct, sir,  
20 that contained within page 15 through page 49 would  
21 be the support for the statement contained in --

22 A. Well, here it is, page 46, double-blind  
23 study on glucomannan.

24 Q. Let me complete my statement here.

25 A. All right.

2  
1 Q. If I understand your testimony  
2 correctly, the authority for the statement contained  
3 on page 140 which includes the declarative  
4 statement, "That claim is false," is found on a  
5 document that the court reporter will mark as  
6 Exhibit 11.

7 (Barrett Deposition Exhibit Number  
8 11 was marked for identification.)

9 BY MR. GRAHAM:

10 Q. And first of all, if you could, please  
11 identify Exhibit 11 for us.

12 A. Okay. This is a committee print of the  
13 hearings held on May 14 and May 15th 1985 before the  
14 Senate Permanent Subcommittee on Investigations. It  
15 was a hearing on weight reduction products and  
16 plans. And Judith Stern, a professor of nutrition,  
17 described a, summarized a study in which she did a  
18 controlled study of the use of glucomannan for  
19 weight loss. She apparently wrote about it. I  
20 don't know why it wasn't published. I think she  
21 said that it was, didn't belong to her, but I'm not  
22 positive of that.

23 But that's, that's not the sole basis of  
24 my statement; that is part of the basis.

25 Q. All right. What is the other basis?

1           A.           Well, just general knowledge. I read  
2 probably, my wife and I at this point together scan  
3 probably 250 publications a month. And I've been  
4 doing this for many years, so I have a tremendous  
5 input of various types of information. I can't cite  
6 any specific, I don't normally cite every reference  
7 that I absorb. It's not, it's a practical  
8 impossibility to do that. But I think it's general  
9 knowledge, and I've heard this from experts.

10          Q.           But you can't tell us what experts and  
11 what studies were published that support that  
12 statement?

13          A.           No. And --

14          Q.           If there were evidence presented in this  
15 trial by two --

16                       MR. HUTTON: Two?

17          BY MR. GRAHAM:

18          Q.           -- professionals in the nutrition field,  
19 one being an Ph.D. and another being a medical  
20 doctor who specializes in the treatment of obesity,  
21 that says that one of the modalities that by way, a  
22 way which guar gum works is it swells in the stomach  
23 thereby creating the sensation of satiety, would you  
24 say that that's an absolutely false claim; is that  
25 correct?

1           A.           I would say that I would be very dubious  
2           that guar gum would produce satiety in everybody.  
3           If you have enough of it you might, you might  
4           produce satiety; I'm not sure you would produce it  
5           in everybody. If you produce satiety -- I'm  
6           sorry -- fullness, you might produce fullness, I'm  
7           not sure that would produce satiety, being  
8           fulfilled.

9           Q.           You're saying the sensation of  
10          satiety --

11          A.           I would be very skeptical of somebody  
12          who would make that statement. It would take a  
13          tremendous amount of evidence to demonstrate that  
14          guar gum would be effective and would work that way.

15          Q.           Okay.

16          A.           I'm not, I don't consider myself an  
17          expert on guar gum as a means of weight control. I  
18          have investigated -- my expertise, if anything, lies  
19          in what I think is the ability to judge people's  
20          credibility and to develop what I think is sound  
21          information by gathering reports and talking to  
22          people and trying to establish what is a scientific  
23          consensus. I can look at some studies and perhaps  
24          find holes in them. There are studies, just to be  
25          specific, where I would ask people is this a good

1 study, or it may get down to personalities. In some  
2 cases I know who the researchers are, whether they  
3 do good research, what their reputation is and so  
4 on.

5 Q. Well, Doctor, do you think that it's  
6 proper to rely on nonpublished study in making  
7 statements concerning --

8 MR. HUTTON: Wait.

9 MR. GRAHAM: Let me complete my  
10 question.

11 MR. HUTTON: I want to make an  
12 objection to it.

13 BY MR. GRAHAM:

14 Q. Do you think it's proper to rely on  
15 unpublished studies in coming to conclusions  
16 regarding the effectiveness of a product?

17 MR. HUTTON: Object to the form of  
18 the question, because it's misleading. You did not  
19 also state the fact that he relies on other data  
20 besides this.

21 MR. GRAHAM: I'm not asking that.

22 A. I can answer the question, but you  
23 better repeat it.

24 MR. GRAHAM: Would you read it  
25 back, please.

(The last question was read.)

1  
2 A. What's really important is the question  
3 of how is, number one, the study designed, and  
4 number two, how it fits with the rest of the  
5 information that the scientific community has. So  
6 that it's not, it's not common for a single study to  
7 be able to set what would be considered scientific  
8 consensus or scientific fact. So that relying on an  
9 unpublished study would -- it's a question of the  
10 degree of reliance. But if it would generally not  
11 be enough to make an important clinical decision,  
12 but that varies. I mean, you're talking about in  
13 trying to establish what is a scientific consensus,  
14 a single unpublished study would normally not  
15 establish a scientific consensus. It also depends  
16 upon how it fits in, how well it's designed. So  
17 published studies tend to be -- and there are, I  
18 mean, there are unpublished studies, and there are  
19 unpublished studies. There are unpublished studies  
20 because they're waiting to be published, and there  
21 are unpublished studies because they have been  
22 rejected, they might be unpublished because the  
23 author didn't want to send it in. Published studies  
24 might be published in first rate journals, or they  
25 might be published in second rate journals, or they

1 might be published in no rate journals, so --

2 BY MR. GRAHAM:

3 Q. I assume --

4 A. The distinction between published and  
5 unpublished studies tends to be better, but it's not  
6 an absolute thing. If it's published in the

7 Journal of the American Medical Association or the

8 the New England Journal of Medicine, that is, you  
9 know, those are the marks of high credibility.

10 And -- but the really important thing is, number  
11 one, the study design, and number two, how it fits  
12 with the rest of the information that's come before  
13 it or comes after it.

14 Q. And you could have a well designed, well  
15 executed study that's commissioned and proprietary,  
16 and as a result would be as valid as a study that's  
17 published in the New England --

18 A. It could happen, but it's not very  
19 likely, because if a proprietary individual,  
20 proprietary study would normally, both the  
21 manufacturer and the author would want to have it  
22 published.

23 Q. Why would the manufacturer want to spend  
24 money to conduct a study and then put it in the  
25 public domain? Isn't there some interest in

1 retaining that knowledge that that manufacturer who  
2 spent money on it?

3 A. Well, it depends what the study is  
4 about. But if it involves, let's say, a therapeutic  
5 claim, it may be necessary to do that in order to  
6 make it legal to make the claim.

7 Q. Does that make it, because a propriety  
8 concern does not want to invest the money to create  
9 the study and then donate it to the public domain,  
10 does that make it an invalid study?

11 A. It doesn't make a lot of sense.

12 Q. Okay.

13 A. I mean your question doesn't make much  
14 sense to me.

15 Q. Well --

16 A. The situation you're describing --

17 MR. HUTTON: Wait a minute. Let  
18 him finish.

19 A. The situation you're describing doesn't  
20 make a lot of sense. A propriety study is a  
21 study -- there are many, many studies that are done  
22 by manufacturers. I think most of them are done  
23 with the intention of publication, both on the part  
24 of the manufacturer and on the part of the  
25 scientist, because number one, it will contribute to

1 scientific knowledge, and number two, it will  
2 contribute to favorable publicity and perhaps legal  
3 freedom to market a product in a certain direction.

4 BY MR. GRAHAM:

5 Q. Are you maligning those individuals that  
6 conduct proprietary studies that do not publish  
7 them?

8 A. I don't know. I have, really have no  
9 knowledge of the marketplace, the frequency with  
10 which unpublished studies are done, whether they  
11 apply to drugs or not. I have no, I don't have any  
12 sense of the marketplace.

13 Q. Well, for example, a doctor who has been  
14 asked to testify on behalf of the Plaintiff has  
15 participated in a number of commercial studies that  
16 he didn't publish. Would you malign him because he  
17 didn't publish those in any way?

18 A. Could you define malign?

19 Q. Think that he is less than conducting  
20 himself in a proper way.

21 MR. HUTTON: Object to the form of  
22 the question. If you left out facts that he did not  
23 use to make theurapeutic claims and use that for  
24 commercial purposes.

25 MR. GRAHAM: I'm not asking him

1 that.

2 MR. HUTTON: Well, give him all  
3 the facts, then.

4 MR. GRAHAM: You can do whatever  
5 you'd like on cross.

6 A. Okay. Try me again.

7 BY MR. GRAHAM:

8 Q. There is going to be testimony from a  
9 doctor --

10 MR. HUTTON: You mean Dr. Ayers  
11 (phonetic)?

12 MR. GRAHAM: Mr. Hutton, if you  
13 want to make an objection, make your objection. Let  
14 me conduct my examination the way I want to conduct  
15 my examination, and stop interrupting.

16 MR. HUTTON: Calm down.

17 BY MR. GRAHAM:

18 Q. Sir, there is going to be a physician  
19 testifying in this case that has participated in the  
20 directing of studies that were commissioned --

21 A. Okay.

22 Q. -- clinical studies. Am I to understand  
23 your testimony to be that you look with disfavor  
24 upon that physician --

25 A. No.

4 1 Q. -- because he did not publish the result  
2 of that proprietary study?

3 A. I would say that I would be, it would  
4 arouse my curiosity. I might look upon it with some  
5 suspicions, because I think the natural tendency of  
6 scientists who do studies is to want to publish  
7 them. And the natural tendency of manufacturers who  
8 do scientific studies of effectiveness would be to  
9 want to publish them. So that if a study were not  
10 published, I would want to know why it wasn't  
11 published. And that's about as far as I would go.

12 Q. Where do you get your conclusion that  
13 manufacturers want to publish results of their  
14 study?

15 A. To show their product is effective?  
16 Well, in order to make certain claims you have to  
17 have FDA approval.

18 Q. My question, sir: As you said,  
19 manufacturers, you made the statement that  
20 manufacturers would want to publish the results of  
21 their proprietary studies that show the  
22 effectiveness of their product, or am I mistaken?

23 A. You're talking about medical product?

24 Q. Any type of product. I'm talking about  
25 health product. Let me limit it to that.

1           A.           In order to market a health product with  
2           a claim, you have to follow certain legal  
3           guidelines. You're not likely to be able to make a  
4           claim legally unless you have documentation that is  
5           presentable to the FDA. Most of the time that  
6           documentation will be published. It may not all be  
7           published.

8           Q.           Are you testifying as a lawyer here or  
9           as a result of your legal education?

10          A.           Testifying to which?

11          Q.           To what the legal requirements are of  
12          the FDA.

13          A.           It's something that I'm interested in.

14          Q.           Okay. Now, are you saying, are you  
15          testifying today that the FDA requires that any data  
16          relied on in the regulatory process must be  
17          published?

18          A.           No. No.

19          Q.           All right.

20          A.           Required that the product be considered  
21          safe and effective.

22          Q.           That's not my question.

23          A.           Okay.

24          Q.           We're talking about clinical.

25          A.           It's not required it would be published,

1 but generally, generally a product will not approved  
2 for the, as a drug without published, generally  
3 there will be published data presented to the FDA to  
4 back up claims.

5 Q. Was the product Cal-Ban 3000 considered  
6 a drug in June of 1989?

7 A. There is a little --

8 MR. HUTTON: I am sorry;  
9 considered by whom?

10 MR. GRAHAM: Considered by the FDA  
11 to be a drug in June of 1989.

12 A. I don't know whether the FDA made a  
13 formal decision. However, the Food, Drug and  
14 Cosmetic Act has a definition of a drug, and in my  
15 opinion, Cal-Ban, the claims made for Cal-Ban made  
16 it a drug under the law.

17 BY MR. GRAHAM:

18 Q. So regardless of what the FDA's position  
19 was in June of 1989, it's your opinion it's a drug?

20 A. I don't think the FDA had an -- I'm not  
21 sure whether the -- I would suspect that the FDA did  
22 not make a formal decision that Cal-Ban was or was  
23 not a drug. I don't think that the FDA made that  
24 kind of formal decision.

25 Q. I don't want you to speculate. Do you,

1 or don't you know?

2 A. I'm not, I'm not aware that they made  
3 one.

4 Q. All right. So are you saying --

5 MR. HUTTON: Let him finish.

6 A. I'm not aware that they made one. It  
7 doesn't make sense to me that they would make one.  
8 I don't think that they did make one.

9 BY MR. GRAHAM:

10 Q. Make one what?

11 A. A decision that Cal-Ban was or was not a  
12 drug. That, by the way, under the law, when a claim  
13 is made that a product can prevent, cure, treat or  
14 mitigate disease, that is a drug. That's the law.

15 Q. As you define it?

16 A. No. That's the law.

17 Q. Okay.

18 A. I will pull the law.

19 Q. Are you now testifying as a lawyer?

20 A. I'm testifying as to what I believe is a  
21 fact, and I have a book of the FDA law, and the  
22 exact quote is reproduced in many of my writings. I  
23 don't know. I can't give you, I can't remember  
24 which is the order of prevention, treatment,  
25 mitigate and cure, but yes, that is the definition.

1 I have discussed this particular point probably  
2 dozens of times with respect<sup>to</sup>~~ed~~ different products  
3 with FDA officials.

4 Q. Okay. And your statement today is there  
5 is no dispute as to what is or what is not a drug?

6 A. You mean ever?

7 Q. Yes.

8 A. Well, there can be a dispute, but the  
9 courts have, what the dispute is, the manufacturers,  
10 in order to try to avoid being regulated, having  
11 their product regulated as drugs, manufacturers of  
12 certain kinds of products, particularly  
13 over-the-counter products, try and label their  
14 products as supplements; in other words, to escape  
15 the effect of the drug laws. However, the courts  
16 have never, as far as I know, upheld this. The  
17 courts say -- have upheld the law as it is written,  
18 which is extremely clear.

19 Q. And you've done the exhaustive research,  
20 and you are testifying that the use of a supplement  
21 is a drug?

22 A. No. The product itself doesn't start  
23 out as a drug, necessarily.

24 MR. HUTTON: Are you speaking of  
25 Cal-Ban?

1           A.           Whether the substance is used as a  
2 drug -- I'm sorry. Whether a substance is  
3 considered a drug under the law depends upon the  
4 circumstances. If it is, if its intended use is for  
5 the cure, prevention, mitigation or treatment of a  
6 disease, and there is a little more to it than that,  
7 then under the law it is a drug.

8                       MR. GRAHAM: Okay. Let the record  
9 reflect that Mr. Hutton was shaking his head in the  
10 affirmative throughout that last dissertation.

11                      THE WITNESS: And make it a matter  
12 of the record that I didn't notice.

13 BY MR. GRAHAM:

14           Q.           As you testify here today, is there any  
15 other foundation in the medical literature or  
16 otherwise for your statement on page 140 of Exhibit  
17 10, that claim of the use of guar gum to curb  
18 appetite by absorbing water and swelling to fill the  
19 stomach is false, other than the testimony of Judith  
20 Stern contained in Exhibit 11?

21                      MR. HUTTON: You mean in the  
22 article?

23           A.           It's my understanding that guar gum has  
24 not been extensively tested for weight control. The  
25 general statement is based, is based largely on my

1 gathering of information from authoritative sources,  
2 rather than primary reading of the literature. In  
3 order to make the claim, it's necessary to do  
4 certain experiments to demonstrate it. I did read  
5 the entire Cal-Ban hearing, and it was, I didn't  
6 think that there was evidence presented by the  
7 Cal-Ban company or Cal-Ban experts that demonstrated  
8 that it would do those things. I don't think that's  
9 the scientific consensus. I did call a number of  
10 people, most notably -- no. Wait. I called several  
11 people to discuss those particular points who I  
12 consider to be experts and to confirm what I thought  
13 was a scientific consensus. And the person I was  
14 most in touch with, or the one that I had the most  
15 with was Marvin Lipman, who was the primary medical  
16 advisor for Consumer Reports, and who is absolutely  
17 phenomenol.

18 Q. Did he have the benefit of knowing about  
19 a proprietary double-blind study testing the  
20 effectiveness of guar gum?

21 A. I doubt that.

22 Q. Okay. Do you know whether he would be  
23 influenced one way or the other with having access  
24 to that?

25 A. If somebody were to show him the study,

1 he would look at it and add it to what he already  
2 knows.

3 Q. Okay. When you asked him, he didn't  
4 tell you: By the way, there is a study?

5 A. You want me to tell you a story?

6 Q. No, I don't.

7 A. Of course he didn't.

8 I can tell you an interesting story  
9 about Marvin Lipman, if you want to hear it.

10 Q. No, I don't.

11 The last book coauthored is Your Guide  
12 to Good Nutrition.

13 A. Right. That's the first edition in your  
14 hand, or an earlier edition.

15 Q. Is there any portion of this book that  
16 speaks to advertising and marketing?

17 A. There may be, but I can tell you that  
18 you're wasting your time. What you should look at  
19 is the later edition.

20 Q. Which later edition have we got?

21 A. Okay. I don't know whether or not there  
22 is much in the later edition, but I'll have to look  
23 through it. It's the second yellow book there. We  
24 did it over again; it came out this year. The green  
25 book I edited, the yellow one, which is Your Guide

1        to Good Nutrition I coauthored as well as edited.

2        Q.            I'm looking at Your Basic Guide?

3        A.            Right. It's somewhat the same book.  
4        This is an update. We changed the name.

5        Q.            Okay. When was that published?

6        A.            Which?

7        Q.            Well --

8        A.            Let's start with Your Basic Guide.

9        A.            That was 1983 or '84.

10      Q.            If you'll look at the copyright date.  
11      Is this listed on your curriculum vitae?

12      A.            Yes.

13      Q.            As, what, Your Basic Guide to Nutrition?  
14      I'm not trying to be difficult, but in 1991 you have  
15      Your Guide to Good Nutrition.

16      A.            Right. That's the, sort of the second  
17      edition.

18      Q.            All right. I do not see Your Basic  
19      Guide to Nutrition.

20      A.            Okay. That was under books edited.

21      Q.            Okay. You did not write Your Basic  
22      Guide to Nutrition?

23      A.            No. I edited it, designed it partly,  
24      and it was written for me.

25      Q.            All right. Where is Your Guide to Good

1        Nutrition?

2        A.            Right here.

3        Q.            Okay. Now, did you author any of those  
4 chapters contained in Your Guide to Good Nutrition?

5        A.            It wasn't done by chapters; it was, it  
6 was, they're questions and answers, and I wrote some  
7 of them, I edited some of them, I contributed to  
8 some of them; I was editor and coauthor and so on.

9        Q.            Did you --

10       A.            I controlled the manuscript.

11       Q.            Can you direct me to any portions of  
12 that book that deal with advertising and marketing?

13       A.            I don't know that there is any specific.  
14 There are many portions of the book that deal with  
15 the fact that there are misleading claims made, not  
16 necessarily specifically in advertising, but about  
17 products.

18       Q.            Okay.

19       A.            Advertising is not discussed, as such,  
20 very much.

21       Q.            All right. And is there any focused  
22 discussion on nutrition products?

23       A.            There is a lot of discussion on  
24 nutrition products.

25       Q.            All right. Any discussion about fiber

1 supplement?

2 A. Okay. Let's see. Let's see. There is  
3 a discussion of fiber pills on page 183.

4 Q. Forgive me for looking over your  
5 shoulder.

6 And you are making reference to the  
7 following statement, or question: "Are fiber pills  
8 worthwhile?"

9 "Adequate amounts of fiber can be  
10 obtained quite easily from food. Fiber supplements  
11 have several disadvantages. They may inhibit the  
12 absorption of certain minerals, they don't provide  
13 any nutrients, the long-term effects are unknown,  
14 and they add bulk to the food budget. In addition,  
15 use of fiber supplements can lead to dependency on  
16 such pills to maintain, 'regularity'."

17 Any other reference to fiber or fiber  
18 supplements?

19 A. Let me see. Dietary fiber on page 8, we  
20 just describe what fiber, what fiber is. Page 176,  
21 how does fiber affect blood cholesterol level, we  
22 talk about the fact that soluble fiber will help  
23 lower blood cholesterol level.

24 Q. Now, is there any discussion of the use  
25 of the fiber supplement in management of weight?

1 A. Okay. Let's see. No.

2 Q. Okay. Returning to your curriculum  
3 vitae, under title, "Books edited and coedited," can  
4 you refer me to any of these publications that speak  
5 to the use of or the advertising and marketing of  
6 fiber products for weight management?

7 A. In the books, I would say that the one  
8 that would be most pertinent would be Consumer  
9 Health, the most recent edition.

10 Q. Which we have already discussed at  
11 length?

12 A. Yes. That's the one that has the,  
13 probably has the summary of my thoughts on it.

14 Q. All right. Under the heading "Booklets  
15 and Position Papers," are there any chapters or  
16 segments --

17 A. Totally irrelevant.

18 Q. All right.

19 A. That's totally irrelevant.

20 Q. What about "Textbook Chapters"?

21 A. No.

22 Q. What about "Book Forwards"?

23 A. No.

24 Q. Under the heading "Articles in  
25 Scientific Publications"?

1 A. There is an article on Cal-Ban, of  
2 course.

3 Q. Where is that found?

4 A. The last one under the "Scientific  
5 Publications," it was published in Nutrition Today.

6 Q. All right. I'll come back to that.

7 Anything else?

8 A. No.

9 Q. How about under the heading "Other  
10 Published Articles"?

11 While you're reviewing that, is this  
12 list of "Other Published Articles" all published by  
13 you, are these all written by you?

14 A. Yeah, uh-huh.

15 Q. Okay.

16 A. That would include anything I edited.  
17 They're all published by me with my name.

18 Q. Okay.

19 A. In Consumer Reports Health Letter there  
20 is an article which I think told you about,  
21 "Automatic Weight Loss with Cal-Ban? Send For Your  
22 Refund Now!"

23 Q. Where would that be found, sir?

24 A. June, '90.

25 Q. That was an article that followed my

1 interview with Barbara Larkins.

2 Q. And do you have a copy of that?

3 A. The article?

4 Q. Yes.

5 A. Yes.

6 Q. Where might that be?

7 A. This was not published under my name.

8 This list is a list of articles published under my  
9 name, except for Consumers Reports, which never puts  
10 the author's name. But if I felt, I wrote the  
11 original article, if I felt that the article was  
12 mostly what I wrote, I would put it on the list  
13 there. Once in a while they would publish something  
14 that they change so much that I didn't think it was  
15 mine anymore, so I didn't list it.

16 Q. All right.

17 A. Okay. Here we are.

18 MR. GRAHAM: Can we mark that?

19 A. It has a side bar box, as well.

20 (Barrett Deposition Exhibit Number  
21 12 was marked for identification.)

22 BY MR. GRAHAM:

23 Q. I'm handing you what's been marked by  
24 the court reporter as Exhibit 12, which is, appears  
25 to be an article entitled "Tales From the Bazaar,

1 Automatic Weight Loss With Cal-Ban?", and appears on  
2 page 46 and 47 of the Consumer Reports Health  
3 Letter, June, 1990. Would you identify that?

4 A. Okay. I was the original author. That  
5 is, I submitted a manuscript for this article which  
6 was published in June, 1990 in Consumer Reports  
7 Health Letter which they titled "Automatic Weight  
8 Loss With Cal-Ban? Send for Your Refund Now!"

9 Do you want me to talk about the  
10 editorial process?

11 Q. That's just fine.

12 A. Some of the words in there were probably  
13 not written by me.

14 Q. All right. Now, you make the statement  
15 on page 46: "Although some subjects have lost  
16 weight in studies of guar gum's effect on  
17 cholesterol and blood sugar, that has has not been a  
18 consistent finding. And no controlled study has  
19 specifically tested guar gum's effect on weight."

20 Now, that's a declarative sentence. How  
21 were you able to make that statement?

22 A. Okay. That was based on my interviewing  
23 of Dr. Lipman, interviewing one doctor who had done  
24 an unpublished proprietary study, who I asked the  
25 question, and he seemed to feel he knew the answer.

1 And Allen Breckhein, B-r-e-c-k-h-e-i-n, he did a  
2 proprietary study on guar gum.

3 Q. For who; do you know?

4 A. Probably for Rexall, because now they're  
5 selling a guar gum product through a Rexall  
6 subsidiary called Showcase International. His study  
7 did not involve capsules or tablets, but he used a  
8 powdered form, and he said it was a different  
9 process from what was in Cal-Ban.

10 Q. Did he tell you what the results of that  
11 study were?

12 A. He told me something about the results,  
13 but they were not published, and he said it was  
14 proprietary and he was not able to publish it.

15 Q. So he wasn't able to share with you the  
16 results?

17 A. No. He told me.

18 Q. What did he tell you?

19 A. It was written up in the National  
20 Enquirer. That's how I found out about it. He said  
21 that he, that there was some, that I believe there  
22 was some short-term benefit, but he said there was  
23 no long-term studies.

24 Q. But he did tell you that he had  
25 conducted a study, it was a proprietary study, and

1           that he had noted weight reduction through the use  
2           of guar gum?

3           A.           Right. But I asked him, I asked him  
4           whether there is any long-term study that  
5           demonstrates that it's effective over the long run,  
6           and he said no, there is not. I assumed he's  
7           somebody who knew the literature, because this was  
8           somebody, he was doing research on that. So that  
9           confirmed what I had drafted. I interviewed him  
10          before this was published.

11          Q.           All right. That went into your research  
12          prior to submitting this article for publication?

13          A.           I think so. If not that, then another  
14          one that had the same sentence in it.

15          Q.           Okay. And you also spoke to?

16          A.           Marvin Lipman.

17          Q.           So Barbara Larkins and Carl Anderson --

18          A.           That's correct.

19          Q.           -- in connection with the preparation of  
20          this article we have marked as Exhibit 12?

21          A.           Right, uh-huh. Carl Anderson sent me a  
22          packet of information.

23          Q.           Do you have that packet with you?

24          A.           Not in a packet; I have little bits of  
25          it. I can identify what's in the packet and what

1           isn't, except for a few things.

2           Q.           All right.

3           A.           This is the --

4           Q.           You're looking at composite Exhibit 3?

5           A.           Yeah. This is the envelope. I didn't  
6           keep the packet intact because it was too bulky to  
7           fit in my file, mostly.

8           Q.           You are directing my attention to a  
9           document starting with --

10                               (Deposition interrupted.)

11          A.           That's, they're not sequential. This is  
12          the cover of the package that was delivered.

13          BY MR. GRAHAM:

14          Q.           All right.

15          A.           I don't even recall why I saved it,  
16          but --

17                       Then I do remember two things that were  
18          in the packet.

19          Q.           I thought we had asked you what you did  
20          rely on. You're now going to add something to the  
21          exhibit?

22          A.           I didn't remember this. I hadn't put  
23          them back in the file.

24          Q.           Okay. I'll put it back in the pile  
25          here --

1 A. Okay.

2 Q. -- and make it all part of Exhibit 3.

3 A. Right. Okay. Fine. We are talking  
4 about, this I got, this was a product data sheet.

5 Q. Okay. So we can mark that 3A.

6 Please isolate for me from the Composite  
7 Exhibit 3 those documents, to the best of your  
8 knowledge as you sit here today, that you received  
9 from Carl Anderson --

10 A. Okay.

11 Q. -- prior to publication of the article  
12 we have marked as Exhibit 12.

13 A. Right. I know that I got the product  
14 data sheet, I know that I got the effect of guar gum  
15 on the body, I know that I got several of these.  
16 There are five things here: that is an affidavit  
17 from Dr. Jaakko Tuomilehto, T-u-o-m-i-l-e-h-t-o; and  
18 affidavit of Jack Hegenauer, I'm pretty sure that  
19 was sent to me by Mr. Anderson; there is a  
20 curriculum vitae from Dr. Tuomilehto, I don't know  
21 whether that was sent; there was two reports marked  
22 sent to me from Anderson, articles, one prepared by  
23 Jack Hegenauer and one, another by Jack Hegenauer, I  
24 think that was also in the packet Mr. Anderson sent  
25 me.

1 Q. What I want to do is mark all these as  
2 Composite Exhibit A.

3 A. Three-A.

4 Q. I'm sorry. Which is part of the larger  
5 3.

6 A. Correct. These are the ones I pulled  
7 that I thought were of significance to this case.

8 Q. Well, when we combine 2 and 3, that is  
9 all the documents that you have in connection with  
10 this subject?

11 A. That's correct. This one fell out.

12 Q. That should be part of 3.

13 (Barrett Deposition Composite  
14 Exhibit Number 3A was marked for identification.)

15 BY MR. GRAHAM:

16 Q. Okay. Now, did you discuss -- now,  
17 what, this was April of 1990 that you had this  
18 discussion with --

19 A. It's, it was on the phone bill.

20 Q. The date would be three days before  
21 this?

22 A. April, right, April 16th.

23 Q. Of 1990?

24 A. Yeah.

25 Q. That is correct?

1 A. Correct.

2 Q. Okay. And did you ask Mr. Anderson  
3 whether he had arranged for any studies to be had  
4 concerning Cal-Ban 3000?

5 A. Did I specifically ask were there any  
6 proprietary studies? No, I didn't specifically ask  
7 if there were any proprietary studies. I called  
8 primarily to find out when the switch was made or  
9 whether my information was correct that the product  
10 was being marketed primarily in capsules rather than  
11 tablets. That was the main reason I called. We got  
12 into a pretty broad-ranging discussion at the end of  
13 which he offered to send me information. I don't  
14 remember much of the detail that did not pertain to  
15 the question I called about. He did tell me, I did  
16 ask him about the interview, there was an interview  
17 of him in a catalog of Swanson, mail order catalog  
18 of Swanson's Health Products, asked him when this  
19 had taken place. It was within the last few months,  
20 fairly recently. As far as the question of  
21 effectiveness, I don't remember whether I questioned  
22 him about that, but he said he would send me  
23 information. What he sent me, I believe, aside from  
24 the product data sheet and that second one, "The  
25 Effect of Guar Gum," some of the material I had

1 seen; nothing in the material contained any evidence  
2 that I was not familiar with from having read the  
3 transcript of the hearing and documents that came  
4 with it.

5 (Deposition interrupted.)

6 BY MR. GRAHAM:

7 Q. All right.

8 A. Some of the claims that were made by  
9 Cal-Ban I could tell on reading the articles were  
10 not supported by the material that they were  
11 claiming to rely upon.

12 Q. Okay.

13 (Deposition interrupted.)

14 BY MR. GRAHAM:

15 Q. You were going to show me the other  
16 article. I think you said there is, you were  
17 picking out those articles that speak to fiber and  
18 weight management.

19 A. Oh, no. Oh. Well, this is one on  
20 fiber. This is not to weight management. We were  
21 concerned about certain kinds of claims, and it was,  
22 mostly had to do with diet and disease prevention  
23 and types of diet and what is fiber. It covered  
24 something about the risks involved in fiber. It was  
25 an article that I had went through extensive review.

1 I think at least two other people, two other people  
2 who are nutrition experts reviewed the article.

3 Q. All right. Does this speak to its  
4 effectiveness as a weight reducing --

5 A. No. It speaks to its, I think it  
6 mentions its effectiveness. It was an article that  
7 did not discuss claim, it was not focused on claims  
8 made for product, but rather, of what they're  
9 established to do. In other words, the fact that it  
10 was left out reflected the author's, I'm sure  
11 reflected the author's opinion it was not a  
12 significant factor in the weight reduction.

13 Q. How can you be certain of that? How do  
14 you know what the author thought?

15 A. Well, their request was to write a  
16 comprehensive article on fiber. And he covered the,  
17 what he thought was important and what I thought was  
18 important. I was not, at that time I was not  
19 thinking much about fiber and weight control; I was  
20 thinking more about the marketplace of what I  
21 monitor, the marketplace of information. And the  
22 marketplace of information was discussing fiber in  
23 connection with cancer prevention, disease  
24 prevention, epidemiological studies and so on.  
25 There really was not a lot of discussion in the

1 channels that I monitor about fiber as a weight  
2 control product. Now, there is discussion of high  
3 fiber diets and low fat diets being related to  
4 weight, being often many people lost weight when  
5 they go on high fiber, low fat diets. That's  
6 something that's been talked about a lot. That  
7 wasn't addressed in this article.

8 (Barrett Deposition Exhibit Number  
9 13 was marked for identification.)

10 BY MR. GRAHAM:

11 Q. Okay. I'll hand you what's been marked  
12 as Exhibit 13. Could you quickly identify that for  
13 us?

14 A. It's an article called "Current  
15 Perspectives on Fiber," written by George  
16 Demetrakopoulos, D-e-m-e-t-r-a-k-o-p-o-u-l-o-s, he's  
17 a physician, which I edited.

18 Q. Is that contained in your curriculum  
19 vitae?

20 A. No. I don't list edited articles in my  
21 newsletter. If I added the articles in my  
22 newsletter, I've had hundreds of articles.

23 Q. All right. Again, going through the  
24 other published articles, we were going to get those  
25 articles or copies of those articles that deal with

1 the question or the issue of advertising and  
2 marketing.

3 A. Well, we have -- and also, I presume,  
4 Cal-Ban and weight reduction?

5 Q. Yes.

6 A. I wrote "The Saga of Cal-Ban 3000" in  
7 June of 1990. I don't believe there is any  
8 information in there that's not found in the  
9 Nutrition Today article.

10 Q. Could you --

11 A. Still want to see it?

12 Q. Yes.

13 A. You won't find anything that wasn't  
14 anywhere else. They're built in the computer  
15 sequentially, and they get expanded and updated.

16 A. These articles evolve essentially from  
17 the same information base, and with each new  
18 publication, they include new information that I had  
19 collected.

20 (Barrett Deposition Exhibit Number  
21 14 was marked for identification.)

22 BY MR. GRAHAM:

23 Q. Okay. Now, is this -- I hand you what's  
24 been marked as Exhibit 14, which purports to be an  
25 article entitled, "The Saga of Cal-Ban 3000,"

1 appearing on page 22 and 23 of a publication  
2 entitled Nutrition Forum. Can you identify this  
3 document for us?

4 A. Okay. This is an article that I wrote  
5 for Nutrition Forum, appeared in the May, June issue  
6 of 1990 called "The Saga of Cal-Ban 3000."

7 Nutrition Forum is a newsletter that I've edited  
8 since 1984.

9 Q. Do you have a proprietary interest in  
10 Nutrition Forum?

11 A. Up through October 31st of this year, I  
12 was paid a monthly salary, plus an allowance for  
13 hiring writers. As of November 1st, I'm the owner.

14 Q. Okay.

15 A. It was published by George Stickley  
16 Company for the first years, and then J.B.  
17 Lippincott, L-i-p-p-i-n-c-o-t-t, business medical  
18 publishers. And it was transferred to me last week.

19 Q. Okay. And you now are in the publishing  
20 business?

21 A. Yes.

22 Q. What kind of salary did you receive for  
23 your work with Nutrition Forum?

24 A. During the -- let's see. Through the  
25 end of 1988 I was paid \$500 a month with an

1 understanding that if the circulation reached  
2 substantially higher than that that would be raised. But  
3 it wasn't marketed much, and it didn't get very big.  
4 Lippincott paid \$600 a month, plus an allowance for  
5 writers, which is the same understanding, and again,  
6 it wasn't marketed much, and so that's how it  
7 stayed.

8 Q. Okay. And that's what you were drawing  
9 as a salary through October when you purchased --

10 A. It wasn't a salary; I was an independent  
11 contractor, but yes.

12 Q. Okay. Are there any other articles  
13 contained on your curriculum vitae that speak to the  
14 issue of advertising and marketing?

15 A. I discussed the FDA law with respect to  
16 drugs and how that -- in quite a number of them. I  
17 talk about the definition of a drug and how the  
18 intention, how its intended use is arrived at, and  
19 how that will make something a drug or could make  
20 something a drug. I discuss that in quite a number  
21 of places as well as in the Consumer Reports book  
22 chapter on "Foods, Frauds and Drugs." And the  
23 Consumer Reports books contain an extensive  
24 discussion as to what makes a nutrition product a  
25 drug.

1 Q. Is that a -- have we already covered  
2 that?

3 A. We didn't mark the chapter, but yes,  
4 that's, it's chapter 5, "Foods, Frauds or Drugs" --  
5 I'm sorry -- "Foods, Drugs or Frauds," with a  
6 question mark, in Health Schemes, Scams and Frauds,  
7 has extensive discussion as to what makes a product  
8 a drug under the law.

9 (Barrett Deposition Exhibit Number  
10 15 was marked for identification.)

11 BY MR. GRAHAM:

12 Q. I'm handing you what's been marked as  
13 Exhibit 15. Would you identify that for us?

14 A. "Allergies: Real or Bogus?".

15 Q. I'm sorry; I put the sticker in the  
16 wrong place.

17 A. "Foods, Drugs, or Frauds" is chapter 5  
18 in the Consumer Reports, Health Schemes, Scams and  
19 Frauds. And it discusses what makes a product a  
20 drug under the law.

21 Q. Okay. Is that your authorship?

22 A. Yes.

23 (Barrett Deposition Exhibit Number  
24 16 was marked for identification.)

25 BY MR. GRAHAM:

1 Q. And I'm handing you what's been  
2 marked --

3 (Deposition interrupted.)

4 BY MR. GRAHAM:

5 Q. I'm handing you what's been marked as  
6 Exhibit 16. Can you identify that for us?

7 A. It's an article I wrote called  
8 "Nutrition Quackery: Recent Trends and Tidbits,"  
9 for my newsletter Nutrition Forum. It was published  
10 in August of 1990.

11 Q. Okay. Are there any articles that we  
12 have missed on your curriculum vitae that deal with  
13 the question of advertising or marketing?

14 A. Well, there is, there are a couple of  
15 articles that deal with the manner in which  
16 manufacturers provide information to health food  
17 stores and how they attempt to make claims, how they  
18 spread claims, how they spread off-label claims. I  
19 don't think that has any relevance to the marketing  
20 of Cal-Ban, because Cal-Ban was not marketed with  
21 off-label, substantial off-label claims. It was  
22 marketed with advertising.

23 Q. All right.

24 A. It's a discussion of the law as well as  
25 specific manufacturers.

1 I think that pretty well covers it. If  
2 there is anything else that we -- it would not  
3 contain, I mean, little tidbits. You've got it, all  
4 of my writings on the subject.

5 Q. Okay.

6 A. Except for an article that's not been  
7 published where I discuss the FDA in a little more  
8 detail, but I don't think that's relevant either.

9 (Barrett Deposition Exhibit Number  
10 3C was marked for identification.)

11 BY MR. GRAHAM:

12 Q. Okay. Directing your attention to what  
13 we have labeled as Exhibit 3 --

14 A. That is an ad that was in my local  
15 newspaper, I think, that got me interested in  
16 Cal-Ban.

17 Q. All right.

18 Q. Now, what I've labeled 3C, can you  
19 identify?

20 A. "The Rise and Fall of Cal-Ban 3000" was  
21 published in Nutrition Today. Let me see how it  
22 compares in time sequence to this.

23 Q. November?

24 A. May, June, this is December. Yeah.

25 This looks like a slightly later version. This is a

1 reference version of similar material which was  
2 published in Nutrition Today in the  
3 November/December 1990 issue. So it actually  
4 originated slightly later than the one that was in  
5 my newsletter.

6 Q. Okay. And you provide references?

7 A. It is referenced.

8 Q. Okay.

9 A. Not extensively. It's lightly  
10 referenced.

11 Q. Okay.

12 MR. GRAHAM: Let the record  
13 reflect that my prior reference to 3C was in error;  
14 it should be 3B.

15 (Barrett Deposition Exhibit Number  
16 3C was remarked to 3B for identification.)

17 BY MR. GRAHAM:

18 Q. Doctor, I have a question. If you might  
19 look at page 140 of Exhibit 10.

20 A. Okay.

21 Q. When was Exhibit 10 written?

22 A. It was written over a period of almost a  
23 year. The first manuscript went to the publisher  
24 approximately December of 1989. However, I got it  
25 back, edited it several times, and I had input in it

1 up to probably around July or August of 1990.

2 Q. Okay.

3 A. Possibly even later than that.

4 Q. Okay.

5 A. I had last minute input. Obviously we  
6 are talking about July, 1990. The manuscript was  
7 originally submitted back in the end of '89, but it  
8 kept going back and forth, and then I got the  
9 galleys, then I got the page proofs, and I was able  
10 to make additions to keep it up to date.

11 Q. When was the last input you had to  
12 Exhibit 10?

13 A. I may be able to look that up and see.  
14 No. I don't have the original  
15 documents, transmittal documents. I would say  
16 probably sometime in the summer of 1990, but I  
17 really don't remember. Could have been as late as  
18 September of 1990.

19 Q. Okay. Same question, then, for Exhibit  
20 3B.

21 A. When was that submitted?

22 Q. Yes. When did you have your last input?

23 A. Okay. No. The original article has  
24 been modified in my computer. I would say probably  
25 around September or October of 1990.

1 Q. Did you do any research from the time  
2 you wrote Exhibit 10 and the time you wrote Exhibit  
3 3B?

4 A. I probably continued to get, I probably  
5 got a few more documents; not very much.

6 Q. Do you know what specifically you got?

7 A. There might have been a regular update.  
8 I don't remember whether -- I got information from  
9 the FDA and California and Florida and so on that  
10 were in the packet. I don't remember which ones  
11 offhand, I don't remember which ones came before or  
12 after.

13 Q. Okay. I'm just trying to get an  
14 understanding.

15 A. The bulk of the material that I got was  
16 gotten prior to I'd say September of 1990. There  
17 was a flurry of regulatory activity during the  
18 summer of 1990, and I think I got additional  
19 information. I don't know if it came in writing, or  
20 simply the -- I attended a speech by the Iowa  
21 attorney general's office that described what  
22 happened when they sent out the refund offers. I  
23 think I wrote about that. I don't know if I got  
24 that in writing or not.

25 Q. What about the studies of the medical

1 literature? Had there been any studies that you --

2 A. I have not been monitoring the  
3 literature specifically for that. I do browse  
4 through many sources of nutrition information,  
5 newsletters as well as journals, and I don't recall  
6 anything having been published. It's not, I didn't  
7 do exhaustive search, nor would it be my practice.

8 Q. Prior to today did you do any research  
9 of the medical literature?

10 A. You mean especially for today?

11 Q. Yes.

12 A. No. The only preparation I made was  
13 last night I went through my file to see what I  
14 could find of interest, and I made it into a pile --

15 Q. Okay.

16 A. -- in the hopes to save some time.

17 Q. Okay. In chapter 9 of Exhibit 10 you  
18 state that "Some diet pills contain a fiber such as  
19 guar gum that is claimed to curb appetite by  
20 absorbing water and swelling to fill the stomach.  
21 This claim is false."

22 A. Right.

23 Q. "The amount of fiber is too small to  
24 actually fill the stomach, and even if it could,  
25 that would not necessarily curb a person's

1           appetite."

2           A.           Uh-huh. Scientific consensus is that --

3           Q.           Let me ask my question.

4           A.           All right.

5           Q.           Then I note in Exhibit 3B you state the  
6 following: "When taken by mouth, guar gum forms a  
7 gel within the stomach that may contribute to a  
8 feeling of fullness and may block the absorption of  
9 some nutrients."

10          A.           Uh-huh.

11          Q.           Now, you don't view that as a  
12 contradiction to --

13          A.           Because it says here it may not  
14 necessarily curb a person's appetite. It means that  
15 it might have some curbing effect. However, there,  
16 my understanding is that there is no, at that time  
17 and still, there is no long-term study that shows  
18 that taking guar gum is safe and effective as a  
19 long-term weight control helper.

20          Q.           Okay.

21          A.           And believe me, I gave a great deal of  
22 thought to the question you're asking me at the time  
23 that I wrote it.

24          Q.           All right. In connection with the  
25 writings that you've made, did you contact Mr.

1 Hegenauer?

2 A. No.

3 Q. Did you contact Dr. Hegenauer -- I'm  
4 sorry. Did you contact Dr. Cooper?

5 A. I don't believe I had heard of Dr.  
6 Cooper.

7 Q. Dr. Hegenauer provided a list of  
8 articles that dealt with the subject of guar gum --

9 A. Right.

10 Q. -- and the scientific basis. And I  
11 think there is a list of upwards of 25, 65  
12 articles -- 75 articles. Did you read any of those  
13 articles?

14 A. There were a few articles that I have in  
15 my possession. I think those are the ones that the  
16 company presented as most important at the hearing,  
17 and I did read them.

18 Q. Are they contained within the documents  
19 that you've produced today?

20 A. Yes. The ones that I read are in there,  
21 or they would be in the transcript of the hearing.

22 Q. Okay.

23 A. I read that.

24 Q. All right.

25 A. And --

1 Q. You've been asked to provide expert  
2 testimony. What opinions have you come to regarding  
3 the advertising or marketing of Cal-Ban 3000?

4 MR. HUTTON: Or regarding Cal-Ban  
5 3000 in general.

6 MR. GRAHAM: Let me ask --

7 MR. HUTTON: But --

8 MR. GRAHAM: Come on.

9 MR. HUTTON: Go ahead.

10 BY MR. GRAHAM:

11 Q. What I'm asking is --

12 A. What are my views of the --

13 Q. You've been asked to provide expert  
14 testimony in these proceedings; is that correct?

15 A. Yeah.

16 Q. All right. And the area that you've  
17 been designated as an expert is in the area of  
18 marketing and advertising.

19 MR. HUTTON: As well as I sent you  
20 a copy of the article he wrote, "The Rise and Fall  
21 of Cal-Ban 3000," so the information that he set  
22 forth in that article.

23 MR. GRAHAM: Andy, I mean, this is  
24 outrageous. Let me ask my question.

25 MR. HUTTON: It's not outrageous.

1 MR. GRAHAM: Let me ask my  
2 question, and if you have an objection, you can make  
3 it.

4 MR. HUTTON: You are being very  
5 devious.

6 MR. GRAHAM: I'm not.

7 MR. HUTTON: He's identified as an  
8 expert by providing the article, "The Rise and Fall  
9 of Cal-Ban 3000," so the information within that  
10 article.

11 MR. GRAHAM: I'll not be having  
12 you coach the witness as to how you want him to  
13 answer questions.

14 MR. HUTTON: No, but you are being  
15 dishonest.

16 MR. GRAHAM: That is against local  
17 rule, as Counsel well knows.

18 THE WITNESS: Don't. You present  
19 your objection, your formal objection, then he won't  
20 argue with you.

21 BY MR. GRAHAM:

22 Q. Now, you have been identified as an  
23 expert in these proceedings on the question of  
24 advertising and marketing of Cal-Ban 3000. Do you  
25 have any opinions as to the advertising or marketing

1 of Cal-Ban 3000?

2 A. Yes.

3 Q. All right. What are those opinions?

4 A. Okay. May I preface this? I didn't  
5 have much discussion of this with Mr. Hutton and  
6 the -- I collected a great, I collected a  
7 significant amount of information on the advertising  
8 and marketing of Cal-Ban. I can tell you what I  
9 think of the advertising. Is that what you want to  
10 know?

11 Q. I want to be very clear here, you know,  
12 I mean, sir: Have you formed any opinions regarding  
13 the marketing or advertising of Cal-Ban 3000?

14 A. Yes.

15 Q. All right. What are those opinions?

16 A. Okay. My opinion is that there were  
17 claims made for Cal-Ban that make it a drug under  
18 the Federal Food Drug and Cosmetic Act that I do  
19 not -- I believe that some of the claims, that at  
20 least some of the claims were misleading; I believe  
21 that the advertisements were illegal; and I believe  
22 that the people from Anderson Pharmacals continued  
23 to promote Cal-Ban with the same claims that led to  
24 the regulatory -- I'm sorry -- the postal service  
25 obtained an order to stop marketing certain claims

1 through the mail; I believe that Cal-Ban continued  
2 to market with the same or similar claims that were  
3 illegal after the mail stop order went into effect;  
4 and I believe that Mr. Anderson or somebody at  
5 Anderson Pharmacals represented that Cal-Ban was  
6 safe. I'm not sure what else. I believe that after  
7 reading the transcript of the hearing that the  
8 people who testified for Cal-Ban at the hearing were  
9 not correctly interpreting -- no, I shouldn't say  
10 that -- that the position of Cal-Ban at the hearing  
11 was not a correct interpretation of the studies that  
12 were presented by their experts. In other words,  
13 they made their presentation, there was discussion,  
14 there were opinions made by the postal service  
15 administrative law judges. I believe that the  
16 administrative law judges were correct in the way  
17 they analyzed the evidence, that although I could  
18 not say that I have a comprehensive and detailed  
19 view of the scientific literature for Cal-Ban, I  
20 think I have an understanding of its significance.

21 Q. Okay. Any other opinions?

22 A. Probably do, but I can't think of them.

23 Q. Okay. Let's talk, you said your first  
24 opinion -- and I don't want to put words in your  
25 mouth, but I want to make sure I frame what your

1 opinion is correctly.

2 A. Okay.

3 Q. -- that in your opinion, Cal-Ban 3000 is  
4 a drug as that term is defined by the FDA?

5 A. I believe that the advertising of  
6 Cal-Ban made it a drug as defined by the Food, Drug  
7 and Cosmetic Act, federal.

8 Q. Is the advertising of the drug --

9 A. Advertising made it a drug, that a drug  
10 is, what is important is the intended use.

11 Q. Okay. So let me be clear here. The  
12 first opinion you have is that the claims made by  
13 the makers of Cal-Ban 3000 --

14 A. Uh-huh.

15 Q. -- made the product a drug as that term  
16 is defined by federal law?

17 A. Yes.

18 Q. Is that a correct statement of your  
19 opinion?

20 A. That's correct. However, it's not quite  
21 complete, because the FDA has jurisdiction primarily  
22 over labeling, and I think I'm being slightly  
23 imprecise that an article that hasn't -- okay. All  
24 right. I got my thoughts now. Yes. I do believe  
25 that the marketing of Cal-Ban with the claim that it

1 was effective as a means of weight control makes the  
2 product a drug, yes.

3 Q. Is there any other claim that you  
4 believe makes the product a drug for purposes of the  
5 Food and Drug Act?

6 A. Offhand, I can't think of any.

7 Q. Okay.

8 A. Anything that would have an effect on  
9 the -- no, I can't think of anything else offhand.  
10 That certainly is sufficient.

11 Q. That's the basis for your opinion  
12 that --

13 A. Yeah. If you say a product is effective  
14 as a weight control product, that product is a drug.  
15 That's the law.

16 Q. All right. The second opinion is some  
17 claims are misleading.

18 A. Yes.

19 Q. All right. That is to say that some  
20 claims made by the makers of Cal-Ban 3000 were  
21 misleading.

22 A. Correct.

23 Q. Is that your opinion?

24 A. I believe that.

25 Q. All right. What is the basis for that

1 opinion?

2 A. I believe --

3 Q. Specifically -- let me strike that.

4 What are the claims that you assert are  
5 misleading?

6 A. We are going to be here past 2:15, or  
7 something.

8 Okay. I don't remember. I went over  
9 them all. I don't remember my exact conclusions.  
10 Here's a statement here --

11 Q. I need a list of each claim that you are  
12 going to testify at trial is misleading.

13 MR. HUTTON: Let me do that.

14 BY MR. GRAHAM:

15 Q. I just want you to know what I'm after.

16 A. I can't give you such a list now,  
17 because I went, I don't remember, I didn't keep  
18 notes on where I listed every single claim. What I  
19 did is looked over the things, looked at each claim,  
20 formed an opinion about it, and then wrote about it  
21 in, and wrote about it in a brief way.

22 Q. You're going to have to tell me today  
23 what those claims are.

24 A. I'll tell you the claims that were  
25 suspicious.

1 Q. I want to know, you are saying there are  
2 claims made by the makers of Cal-Ban 3000 which were  
3 misleading.

4 A. Yeah.

5 Q. I want you to list those claims that you  
6 allege --

7 A. I can't. I can list the ways that you  
8 allege a misleading, list claims that I was  
9 suspicious about that maybe, that I may have  
10 concluded were misleading, but I don't remember.

11 Q. I want you to testify today, this is  
12 discovery and the only time I have an opportunity --

13 A. You never met a more open witness than  
14 me.

15 Q. The purpose for our getting together is  
16 for me to ask you questions so I know what you are  
17 going to testify about at trial. And one of the --

18 A. I have no idea what I'm going to be  
19 asked. I have not had any discussion with Mr.  
20 Hutton as to what I'm going to be asked.

21 MR. HUTTON: Go ahead.

22 BY MR. GRAHAM:

23 Q. You have to answer.

24 MR. HUTTON: Just let him --

25 BY MR. GRAHAM:

1 Q. I want it very clear on the record what  
2 we have here. This is a discovery deposition. I  
3 need to know what claims you are alleging to be  
4 misleading.

5 MR. HUTTON: He's going to tell  
6 you.

7 BY MR. GRAHAM:

8 Q. Give me each and every claim you are  
9 going to testify to at trial.

10 A. I can't. I --

11 Q. I want to know specifics of what you're  
12 going to testify --

13 A. Let me say what I'm going to say and  
14 you'll understand what I'm talking about. Okay.  
15 "They were surprised to find that every person who  
16 took the formula had lost a significant amount of  
17 weight." I don't remember, I looked that up, it  
18 sounded wrong. I would have to recheck it before  
19 trial.

20 Q. All right. Now what? You're looking at  
21 a document.

22 A. Yeah.

23 Q. What document are you looking at?

24 A. This is the material that was given to  
25 the pharmacy in Allentown.

1 Q. Okay.

2 A. These are advertising slicks. They have  
3 appeared in ads, and this happened to physically  
4 come from the pharmacy in Allentown that chose not  
5 to sell it, and they gave me the material.

6 Q. All right. Let me mark that as Exhibit  
7 D, that you're referring to.

8 (Barrett Deposition Exhibit Number  
9 3D was marked for identification.)

10 BY MR. GRAHAM:

11 Q. And do you know when this advertisement  
12 was made?

13 A. Yes.

14 Q. When?

15 A. I'll have to look it up. Exhibit 3D?  
16 These are advertising slicks that appeared, that  
17 were given to the pharmacist when they bought it in  
18 Allentown.

19 Q. What personal knowledge do you have of  
20 that?

21 A. I have the invoices from the, I have an  
22 invoice from the pharmacy, the pharmacist handed it  
23 to me.

24 Q. Do you know the pharmacy that this is  
25 directed to?

1 A. Yes.

2 Q. What pharmacy?

3 A. Dorneyville.

4 Q. I'm sorry?

5 A. Dorneyville Pharmacy.

6 Q. The "Sold To" and "Ship To" are blocked  
7 out. Is there any reason?

8 A. I guess he didn't want to get involved.  
9 It came from Dorneyville Pharmacy.

10 Q. Where is Dorneyville Pharmacy?

11 A. In the Allentown area.

12 Q. What are you -- do you know how it came  
13 to pass that Exhibit 3D was in his possession?

14 A. Yes. He ordered Cal-Ban, was prepared  
15 to sell it, his name was in an ad, and he chose not  
16 to sell it and gave it to me.

17 Q. All right. So that's the basis from  
18 which you conclude that was an advertisement that  
19 was placed by Cal-Ban 3000?

20 A. Yeah. I've seen this ad in other  
21 places. My mail order study picked up several  
22 copies and so on.

23 Q. What specific claims, then, on Exhibit  
24 3D do you claim are misleading?

25 A. I don't remember that every person lost

1 a significant amount of weight. I remember looking  
2 it up. I don't remember.

3 Q. You're referring to the column headed  
4 with: "Formula accidentally discovered by European  
5 scientists," and under that the bold print "They  
6 were surprised to find that every person who took  
7 the formula had lost a significant amount of  
8 weight."

9 A. I don't remember that being true. I  
10 remember I looked it up. I don't remember what I  
11 concluded. I will look it up again before trial.

12 Q. If it's true, is that misleading?

13 A. Of course, if it's true. If it -- if  
14 it's true, it's true. It could still be literally  
15 true and still misleading, because that was a long  
16 range study.

17 Q. See, I'm not asking what could be, might  
18 be; I'm asking you for your opinion.

19 A. It could be misleading.

20 Q. Are you claiming it is misleading?

21 A. It might be even if it's true.

22 Q. All right. I'm asking you: Are you  
23 going to testify in your opinion that this statement  
24 is misleading regardless of whether it's true or  
25 not?

1           A.           Number one, I don't know what I'm going  
2           to asked; number two, if I were going to testify on  
3           this statement, my answer would depend in part on my  
4           review of the literature that Cal-Ban said was the  
5           basis of this. That was in the postal hearing, and  
6           I don't remember what the study showed.

7           Q.           Doctor, the question I have and I've  
8           asked you is: Have you formed any opinions?

9           A.           Yes.

10          Q.           You said yes, I have formed opinions, an  
11          opinion that some of the claims --

12          A.           I formed the opinions, some of which are  
13          currently, some of which are in the past, and I do  
14          not know.

15          Q.           Let me complete my sentence.

16          A.           Okay. All right.

17          Q.           Doctor, you were going to be called as  
18          an expert witness --

19          A.           Yeah.

20          Q.           -- in these proceedings. You are going  
21          to be asked your opinion.

22          A.           I have no idea what I'm going to be  
23          asked. I really don't. I have not discussed what  
24          I'm going to be asked.

25          Q.           So you're not prepared to provide

15 1 testimony as it relates to what your opinions are  
2 concerning the advertising or --

3 A. I will give --

4 Q. Let me finish my question, sir, please.

5 A. All right.

6 Q. Can you give testimony as to what your  
7 opinions are regarding the advertising and marketing  
8 of Cal-Ban 3000?

9 A. Am I able to give opinions? Yes.

10 MR. HUTTON: We told you, just let  
11 him give opinions.

12 MR. GRAHAM: Mr. Hutton, please.

13 MR. HUTTON: You waste so much  
14 time.

15 MR. GRAHAM: I don't waste time.  
16 If your witness would be telling me what his  
17 opinions are, I think we'll get through this.

18 BY MR. GRAHAM:

19 Q. Now, what claims, in your opinion, that  
20 were made by the makers of Cal-Ban 3000 are  
21 misleading?

22 MR. HUTTON: He told you one.

23 BY MR. GRAHAM:

24 Q. What claims are you going to opine are  
25 misleading? That's my question.

1 A. Okay.

2 Q. So what is the first claim?

3 A. I can't tell you what I'm going to  
4 testify to at the trial in every detail, because  
5 some of it will involve my having to go back and  
6 review opinions that I formed in the past.

7 Q. Well, do we need to reconvene once  
8 you've done that review?

9 A. I think you'd be wasting your time.

10 Q. We are wasting our time if you're not  
11 able to give me the opinions you're going to testify  
12 to at the time of trial. If you are telling me you  
13 can't give me those opinions --

14 A. I formed opinions. I don't remember  
15 whether I -- one or two of them I will have to  
16 refresh my recollection by going through the same  
17 process again. I don't think I'm going to be asked  
18 about all of that.

19 MR. HUTTON: Tell him what you do  
20 remember.

21 A. Can I start with what I --

22 MR. HUTTON: Yes.

23 BY MR. GRAHAM:

24 Q. I want you to tell me what claims you  
25 are going to testify are misleading.

1 A. We have a problem, because I asked you  
2 whether it was safe to make an appointment at 2:15  
3 with somebody, and I made one. We are up against a  
4 little wall here.

5 Q. I understand.

6 A. "Body weight was significantly reduced  
7 during the study even though patients were  
8 specifically asked not to alter their dietary  
9 habits."

10 That statement may be true, but the  
11 overall ad is still misleading; maybe that would be  
12 a better way to put it. Some of the statements in  
13 the ad may be true. The ad overall is misleading  
14 because it does not address the issue of permanent  
15 weight control.

16 Q. The statement that you're referring to  
17 contained in Exhibit 3D, and it says -- which  
18 specific language were you talking about?

19 A. This stuff (indicating).

20 Q. You're directing me to the following  
21 language: "The Cal-Ban 3000 formula was discovered  
22 by European scientists who were testing a natural  
23 compound for its ability to lower cholesterol." Is  
24 that a misleading statement?

25 A. That was, I believe that's true. They

1 were testing for cholesterol.

2 Q. "They were surprised to find that every  
3 person who took the formula had lost a significant  
4 amount of weight." Is that a true statement?

5 A. I don't remember today looking at the  
6 article.

7 Q. You're testifying today it's a  
8 misleading statement?

9 A. I don't remember the article. I don't  
10 remember whether that's true or not.

11 Q. But so you're not testifying today that  
12 that's a misleading statement?

13 MR. HUTTON: That one sentence,  
14 but -- let me finish.

15 MR. GRAHAM: I'm asking about that  
16 sentence --

17 A. Is that a misleading statement? I'm not  
18 sure.

19 BY MR. GRAHAM:

20 Q. Are you testifying today that that  
21 statement, "They were surprised to find that every  
22 person who took the formula had lost a significant  
23 amount of weight" --

24 A. I don't remember whether that's in the  
25 article or not. How can I possibly answer your

1 question?

2 Q. I'm asking you today, are you testifying  
3 the fact --

4 A. Am I willing to testify today?

5 Q. That's why we're here today.

6 MR. HUTTON: Calm down. Don't  
7 browbeat.

8 MR. GRAHAM: Well, the trouble is,  
9 we're here, but if he doesn't have an opinion, what  
10 are we doing here?

11 MR. HUTTON: Just slow down and  
12 calm down.

13 MR. GRAHAM: You want to take a  
14 moment and talk to him?

15 MR. HUTTON: Doctor, there are  
16 very obvious things in there that you know are  
17 misleading. Just tell him what you do know is  
18 misleading. Okay?

19 THE WITNESS: Okay.

20 A. Let me go back to -- okay. I think the  
21 headline is misleading.

22 BY MR. GRAHAM:

23 Q. What headline is that?

24 A. "Lose up to 30 pounds in 30 days."  
25 That's misleading.

1 Q. Okay. In what way is it misleading?

2 A. No one can lose 30 pounds in 30 days in  
3 a meaningful way safely. It's impossible.

4 Q. All right. What other statements or  
5 claims are misleading?

6 A. "Cal-Ban is sweeping the nation because  
7 it works." There is no -- I doubt if that's true.  
8 I believe that's misleading. I believe that's  
9 misleading.

10 Q. You're opining that is a misleading  
11 statement?

12 A. I would believe that's misleading.

13 Q. Okay.

14 A. "It works without rigid diets, without  
15 strenuous exercise, without expensive therapy." I  
16 believe that's misleading.

17 Q. Is it false?

18 A. Can you lose weight without exercise,  
19 without exercise? It's very unlikely.

20 Q. Is the statement "Lose up to 30 pounds  
21 in 30 days," a false statement?

22 A. No. It's misleading. It may be false,  
23 but it's definitely misleading.

24 Q. All right. Now, doesn't it say, "Lose  
25 up to 30 days or your money back"?

1 A. It misled me.

2 Q. Is that false?

3 A. It is misleading me, as I read it. I  
4 didn't even notice that "up to" as I read it. It's  
5 a misleading statement. It's misleading. People  
6 will look at it and think they can lose 30 pounds in  
7 30 days. You can't lose 30 pounds in 30 days  
8 safely, period. That's the scientific fact.

9 Q. All right. That's your testimony?

10 A. That's my testimony.

11 Q. All right. So it is a misleading  
12 statement?

13 A. Yes.

14 Q. All right. What other misleading  
15 statements or false statements?

16 A. I believe it is misleading and probably  
17 false that "Cal-Ban is sweepig the nation because it  
18 works." I don't believe that's true.

19 Q. All right. Is that false, or  
20 misleading?

21 A. It's at least misleading and probably  
22 false.

23 Q. All right. What other statements are  
24 false or misleading?

25 A. Implication of the statement, "It works

1 without strenuous exercise, without expensive  
2 therapy." Well, "It works without strenuous  
3 exercise" is misleading because it's unlikely that  
4 people will be able to maintain or sustain weight  
5 loss without an exercise program.

6 Q. It doesn't talk about sustaining it; it  
7 just talks about losing it?

8 A. It's misleading. Losing it is nothing.  
9 You lose if you gain it back. You've actually been  
10 harmed.

11 Q. All right. What other statements are  
12 misleading or false?

13 A. Okay. I don't remember whether every  
14 person who took the formula had lost a significant  
15 amount of weight. If I were to look it up and saw  
16 that and came to the conclusion that --

17 (Deposition interrupted.)

18 BY MR. GRAHAM:

19 Q. Whether that statement, "They were  
20 surprised to find that every person who took the  
21 formula" --

22 A. I don't remember that as being true when  
23 I looked up the article.

24 Q. Is it your testimony that it's  
25 misleading?

1 A. It may be false. I don't remember.

2 Q. But is it your testimony it's  
3 misleading?

4 A. I don't know. I'm not stating it's  
5 misleading.

6 MR. HUTTON: That's fine.

7 That's --

8 A. "Body weight was significantly reduced  
9 during the study even though the patients were  
10 specifically asked not to alter their dietary  
11 habits."

12 BY MR. GRAHAM:

13 Q. Are you testifying that's a misleading  
14 statement?

15 A. I'd have to refresh my memory.

16 Q. So you're not testifying that that's --

17 A. The postal service concluded --

18 Q. I'm not asking about the postal service,  
19 sir.

20 A. I would have to go over the data again.

21 Q. You do not have an opinion? What you're  
22 telling me, you're not testifying that that is a  
23 misleading statement; is that a correct statement?

24 A. I am not testifying to that today,  
25 that's correct.

1 Q. All right. Fine.

2 A. "Alters the way your body digests food."

3 And --

4 Q. You're referring to the statement:

5 "While it is still not entirely clear how the  
6 formula induces weight loss, some scientists believe  
7 this compound alters the way your body digests food,  
8 when taken before mealtime it bonds with food and  
9 supresses calorie absorption."

10 A. I think that's misleading, because it  
11 says in here that includes weight loss. I'm not  
12 sure I believe that that's true. Some scientists  
13 have said that that compound alters the way your  
14 body digests food. What the claim is simply saying,  
15 Cal-Ban prevents calories from being absorbed. And  
16 if that -- I'm not sure that that really has any --  
17 well, I guess that, I say it could be true. Okay.

18 Q. Is that, are you claiming that you're  
19 testifying that that is a misleading statement?

20 A. No, I'm not.

21 Q. So there is no problem?

22 A. Yes. There is. It says induces weight  
23 loss, "It's not entirely clear how the formula  
24 induces weight loss." I don't believe the formula  
25 induces weight loss, so the statement is misleading.

1 Q. All right.

2 A. Okay. "The active ingredient has been  
3 clinically tested for safety." I'm not sure, I  
4 don't believe that's true.

5 Q. Your testimony today is it's a false  
6 statement?

7 A. I believe it's false.

8 Q. All right.

9 A. Available without a prescription, now,  
10 available without -- in the -- that's misleading.

11 "Some best case histories report losing  
12 eight pounds of fat and fluid in the first 72  
13 hours." That's misleading for two reasons: number  
14 one is that the average person may not know what the  
15 best case history is, and what happens in a best  
16 case history has no significance to the general  
17 public, number one; number two, losing eight pounds  
18 of fat and fluid is misleading because most of it is  
19 fluid, and fluid loss has no significance, has no  
20 health benefit or no benefit in weight reduction, so  
21 it could be that they lost one-half a pound of fat  
22 and seven and half pounds of fluid, and that has  
23 absolutely no clinical significance.

24 Q. What other statements are false in --

25 A. "Up to 40 pounds in the first month,"

1 that statement is misleading, because you can't lose  
2 40 pounds safely.

3 Q. Does that make any statement or  
4 representation about safe?

5 A. It's misleading, because you could,  
6 starvation will produce, could produce a weight loss  
7 of that magnitude, but it's not safe.

8 Q. Okay. What other statements?

9 A. And you couldn't lose more than -- let's  
10 see, lose more been two-thirds of a pound of body  
11 tissue per day. If you fast, you lose fluid. It's  
12 not safe. If you lose, anyone that makes a claim of  
13 losing more than a pound a day, that claim is  
14 misleading no matter who makes it.

15 Q. All right.

16 A. Okay?

17 Q. What other statements are false?

18 a. "Others have continued to lose up to 60,  
19 80 and 100 pounds." They can certainly cite cases  
20 that people have lost weight. I have no way of  
21 knowing whether they're true or false. I suspect  
22 that they're true.

23 Q. All right.

24 A. What they have done, they have invited  
25 people to tell them if they lose weight, and there

1 are bound to be some people who will.

2 Q. All right. What other statements are  
3 false or misleading?

4 A. "You can transform your body into a  
5 slender more youthful figure with ease while still  
6 enjoying the foods you like." That may not be true.

7 Q. Is that a false statement?

8 A. It's misleading because it may not be  
9 true. That implies it's easy to do. It's not. So  
10 it's, so in my opinion the statement is misleading,  
11 because it's implying that something is easy when it  
12 isn't.

13 Q. All right.

14 A. Okay. "Your success is guaranteed by  
15 our money-back guarantee." I believe that statement  
16 is misleading because success is not guaranteed by  
17 anything, and my understanding is they had an awful  
18 lot of trouble even with their money-back guarantee.  
19 Just, I'm looking at the ad, "Your success is  
20 guaranteed." I think that that phrase is misleading  
21 no matter what you put on the end of it.

22 Q. All right. What other statements do you  
23 claim are false or misleading?

24 A. I think that's about it.

25 Q. All right. Any other --

1 A. The rest are testimonials.

2 Q. Any other claims made by the maker of  
3 Cal-Ban 3000 which you are going to testify are  
4 false or misleading?

5 MR. HUTTON: We talked about the  
6 side effects.

7 THE WITNESS: Okay.

8 A. Okay. Yeah. This one.

9 MR. HUTTON: On your Exhibit 3A.

10 BY MR. GRAHAM:

11 Q. Exhibit 3A?

12 A. This was sent by Mr. Anderson. I  
13 received this in mid-April of 1990. It says: "The  
14 only side effects reported have been some instances  
15 of gas discomfort or softness of the stools, but  
16 this is not harmful and is consistent with improved  
17 bowel regularity." Mr. Anderson was aware of that,  
18 that there was intestinal obstruction.

19 Q. Do you know who else received that  
20 document?

21 A. This particular product data sheet?

22 Q. Yes.

23 A. No. I have no --

24 Q. Do you know whether that went to anyone  
25 other than yourself?

1 A. No. I certainly don't.

2 Q. All right. What other statements do you  
3 believe, or claims made, are false or misleading?

4 A. "Calorie absorption is significantly  
5 suppressed." I believe that that is not true;  
6 however, I don't plan to testify to it.

7 Q. All right.

8 A. That's something I think that someone  
9 with more expert knowledge of the literature should  
10 testify to.

11 Q. All right.

12 A. But I think it's misleading.

13 Q. Again, that came from Exhibit 3A?

14 A. 3A.

15 Q. All right. Any other claims or  
16 statements?

17 A. Yeah. They say: "Giving a feeling of  
18 fullness before the normal portion of food has been  
19 consumed." I think that's misleading because this  
20 may not, that doesn't necessarily mean that you're  
21 going to lose weight. However, I don't plan to  
22 testify to that either.

23 Q. All right. You are not going to claim  
24 that's false or misleading?

25 A. I tell you now it's misleading. I don't

1 think I'm going to be asked about it. I'm guessing,  
2 because I --

3 Q. I want to know what your opinions are,  
4 what claims you believe and opinions --

5 A. I believe I'm happy to help you.

6 Q. -- in your professional opinion are  
7 false or misleading. That's the purpose of this.

8 Any other claims or statements in the  
9 advertising which you believe to be false or  
10 misleading?

11 A. Again, it goes over the clinical study  
12 by Dr. Tuomilehto in 1980. The post office felt  
13 that that study was not credible. And I read the  
14 same material, and I agreed that the study did not  
15 demonstrate that -- it's misleading because I don't  
16 think the study demonstrated Cal-Ban is effective,  
17 significant and effective for weight control. So  
18 it's misleading. They're citing a study that came  
19 up with a piece of data that might appear to be  
20 supportive, but it's misleading to present it as the  
21 basis for making that kind of a claim.

22 Q. All right. You're referring to under  
23 the caption, "Clinical Studies," on Exhibit 3A?

24 A. Right.

25 Q. Any other statements or claims that

1 you -- appearing in advertising which you believe to  
2 be false and/or misleading?

3 A. Let's see. There were previous ads. I  
4 hope I can find them quickly. Would it be helpful  
5 if I sent you in writing?

6 Q. No. I would like you to answer my  
7 question.

8 A. Here's another one. "Lose up to" --  
9 let's see what's in here. It says, "Cal-Ban, eat  
10 all you want and still lose weight." Misleading.

11 (Barrett Deposition Exhibit Number  
12 3E was marked for identification.)

13 BY MR. GRAHAM:

14 Q. This is on Exhibit 3E?

15 A. Yeah. I think that's misleading. This  
16 is an earlier ad. I think this is the ad that the  
17 postal service took objection to in 1986.

18 Q. Do you know whether this was  
19 discontinued?

20 A. This ad?

21 Q. Yes.

22 A. Yes. I believe it was toned down  
23 considerably.

24 Q. All right. So is this, are you going to  
25 testify that this is advertising that was current at

1 the time of the purchase by Mr. Meredith?

2 A. I don't believe it was current. I'm not  
3 aware of it being current. I have no idea if I'm  
4 going to be asked that.

5 Q. All right. I want to know what  
6 statements and claims you're going to testify at  
7 trial are false and misleading contained in the  
8 advertising of Cal-Ban 3000.

9 A. I will give my opinion what is false and  
10 misleading, but I don't know what I'm going to be  
11 asked.

12 MR. HUTTON: Go ahead. There's  
13 things on there.

14 A. Cal-Ban virtually eliminates dieting, I  
15 don't believe that's true.

16 BY MR. GRAHAM:

17 Q. Is it false, or misleading?

18 A. I believe it's false.

19 "Eliminates strenuous exercise", false.

20 "Eliminates fat, flab and cellulite."

21 There is no such thing as cellulite. Even if there  
22 were, it doesn't.

23 "The powerful bioactive ingredient works  
24 by short-circuiting the fat building process."

25 Total nonsense.

1 Q. That's false?

2 A. Total nonsense.

3 Q. Again, you don't know whether this ad  
4 was discontinued?

5 A. I think it was.

6 Q. All right. Okay. What other claims or  
7 statements do you find to be false or misleading?

8 A. "No matter how many times you have tried  
9 to lose weight and failed before, you will reach  
10 your weight-loss goal this time. We guarantee it."  
11 The guarantee is a money-back guarantee. There is  
12 no guarantee you are going to lose weight. That is  
13 a guarantee that, that's an alleged guarantee you're  
14 going to get your money back if you say you're  
15 dissatisfied, but that's no guarantee you're going  
16 to lose weight.

17 Q. And you consider that to be misleading?

18 A. Sure.

19 Q. All right.

20 A. "You can eat all your favorite foods and  
21 still lose weight." That's misleading, because it  
22 probably isn't true. Most people, it wouldn't be  
23 true.

24 Q. Is it false, or misleading --

25 A. Depends.

1 Q. -- or both?

2 A. It's misleading.

3 Q. All right. And the reason for it being  
4 misleading?

5 A. Because it wouldn't apply to the  
6 majority of people who read the ad.

7 Q. All right.

8 A. It might apply to some.

9 Q. All right. Any other claims or  
10 statements which you believe to be misleading?

11 A. It talks about forcing your body to burn  
12 fat, flab and cellulite. That's misleading, because  
13 there is no such thing as cellulite.

14 Weight loss is automatic, you  
15 automatically lose weight. "There is no calorie  
16 counting, no tortuous exercises and no dangerous  
17 stimulants." I think that's misleading because you  
18 can't lose weight, I don't think Cal-Ban presents  
19 automatic, causes automatic weight loss. And if it  
20 does, it would be in a very tiny percentage of  
21 people, not most people who read the ad.

22 Q. All right.

23 A. "Millions of fat cells will begin to  
24 shrink within 24 hours as your body goes on" --

25 Q. Wait a minute.

1 A. "Cal-Ban is absolutely safe."

2 Q. Is that false?

3 A. "No harmful side effects have been  
4 reported." I don't know if it was true or false at  
5 the time that it came out. This was 1987. I don't  
6 know; I'm just reading out loud.

7 Q. Well, you're not going to testify as to  
8 that?

9 A. Well, as it appeared in 1987, I don't, I  
10 don't know that. The statement that it's absolutely  
11 safe might be, is probably misleading because,  
12 because I don't think it was extensively tested for  
13 safety, so I think the statement is misleading. I  
14 don't know if I'll testify to it.

15 Q. All right.

16 A. "A clinical study showed 100 percent  
17 success." I believe that statement is false. It  
18 wasn't a clinical study of the Cal-Ban formulation.  
19 I don't think it was. It showed 100 percent  
20 success. That's at least misleading, because even  
21 if every single person lost weight, and I don't  
22 remember if they did, that has nothing to do with  
23 permanent weight control, which is what's needed.  
24 Temporary weight loss is not helpful for most  
25 people, because if you lose weight, especially if

1           you lose a lot of weight, and you gain it back, you  
2           tend to gain more weight and you're worse off than  
3           you were before you started.

4                        "Most diets fail because they require  
5           ongoing discipline and willpower, this formula  
6           doesn't." This is misleading, because I don't  
7           believe that. I believe that in order to lose  
8           weight, you do have to exercise discipline, and that  
9           there is no product yet on the market that can  
10          produce permanent long-term weight loss, automatic  
11          or otherwise.

12          Q.           Is it your position, sir, that these,  
13          this product does not produce, at a minimum,  
14          short-term weight loss?

15          A.           Does it produce weight loss? You mean  
16          does it ever; is that the question?

17          Q.           Yes.

18          A.           I don't know.

19          Q.           All right.

20          A.           Whether it ever does or not.

21          Q.           All right.

22          A.           You have to weigh that against the  
23          question of safety. You have to weigh the odds of  
24          weight loss against the odds of safety.

25          Q.           What other claims or statements in the

1 advertisement are you going to testify are false or  
2 misleading?

3 A. "Do not allow yourself to become too  
4 thin. If you start to lose weight too rapidly,  
5 reduce your tablet intake or skip a day or two."  
6 The chances of someone losing weight rapidly are  
7 very slim, and I think that statement is misleading.

8 "Cal-Ban 3000 enables you to lose weight  
9 without dieting or we'll return every cent." I  
10 don't believe Cal-Ban will enable most people to  
11 reduce without dieting, but I don't believe it will  
12 allow most people to.

13 Q. Is that misleading, or false?

14 A. Misleading.

15 Q. All right.

16 A. That's about it.

17 Q. All right. Any other statements or  
18 claims? And if you'd like to consult with Mr.  
19 Hutton --

20 MR. GRAHAM: You are satisfied,  
21 Mr. Hutton?

22 MR. HUTTON: Yeah. If there is  
23 anything else, we'll let you know before trial. I  
24 mean, it's -- I'm sure he's covered most of it.

25 MR. GRAHAM: All right. I think

1 that concludes my questions.

2 My only final line has to do with  
3 what arrangements -- off the record.

4 (Discussion was held off the  
5 record.)

6 BY MR. GRAHAM:

7 Q. Now, you have testified as to all the  
8 advertising claims or statements that you have found  
9 to be either false or misleading this afternoon, is  
10 that correct, regarding Cal-Ban?

11 A. Are there any others anywhere else?

12 Q. Have you testified as to all the  
13 advertising claims or statements that you have found  
14 to be either false or misleading regarding Cal-Ban  
15 3000?

16 A. I think I have.

17 Q. Doctor, have you stated all the  
18 statements or claims that you have found to be  
19 either false or misleading in connection with the  
20 advertising of Cal-Ban 3000 in today's deposition?

21 A. I think so.

22 Q. All right.

23 A. I'm not positive.

24 Q. Have you and Mr. Hutton arrived at any  
25 sort of compensation arrangements for your

1 testimony?

2 A. For the amount of time, yeah.

3 Q. All right. What is the arrangement?

4 A. Actually, we haven't. My basic fee is  
5 \$90 an hour. We have not discussed how that would  
6 apply to a stay that might involve a day or two, nor  
7 have I actually formed an opinion.

8 Q. All right. But for your services today,  
9 you'll be charging \$90 per hour?

10 A. Yes.

11 Q. We started at 9:30, and it is now  
12 approximately 20 after 2:00.

13 A. Uh-huh. Plus about an hour and a half  
14 last night.

15 MR. HUTTON: I'll pay for that.

16 BY MR. GRAHAM:

17 Q. He's paying for that.

18 MR. HUTTON: He pays for the  
19 deposition time, and I pay for the preparation time.

20 THE WITNESS: I see.

21 MR. HUTTON: On that bill just  
22 segregate the prep time versus the actual deposition  
23 time.

24 BY MR. GRAHAM:

25 Q. I believe that's -- by the way, have you

- 1 testified before?
- 2 A. In court proceedings?
- 3 Q. Yes.
- 4 A. Yes.
- 5 Q. In what cases have you testified?
- 6 A. Mostly pertaining to psychiatry.
- 7 Q. Okay. Ever in the field of advertising  
8 or marketing?
- 9 A. No. Just, I've testified at government  
10 hearings, but not court cases.
- 11 Q. What sorts of government hearings?
- 12 A. The FTC, food regulation rules, Senate  
13 investigation, a number of --
- 14 Q. Committees, sort of?
- 15 A. Also FTC, food advertising rules, I've  
16 testified.
- 17 Q. Okay. In connection with the other  
18 lawsuit that you're working on with one of Mr.  
19 Hutton's partners, is that in a psychiatric role, or  
20 is that advertising?
- 21 A. That's, it has to do with my analysis of  
22 the marketplace.
- 23 Q. Okay.
- 24 A. And the conduct of companies that, and  
25 some of the conduct of companies that were

1 advertising and marketing the Tryptophan product.

2 MR. GRAHAM: Very well. That's  
3 all I have, Doctor.

4 How do you want to handle  
5 signature?

6 MR. HUTTON: Do you want to read  
7 and sign, or waive signature? It's your choice.

8 THE WITNESS: I'd like to read it.  
9 (Deposition concluded.)

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