

<p>1652</p> <p>1 think we've all listened, and Mr. Lowery is a very smart,</p> <p>2 experienced person. And had they made an expert disclosure, I</p> <p>3 don't have any doubt they would have been able to qualify him</p> <p>4 as an expert. But you don't need an offer of proof about this</p> <p>5 because they can hand up documents, and counsel has just</p> <p>6 explained what she would ask for.</p> <p>7 But otherwise, we're doing exactly what we've</p> <p>8 been trying to avoid this entire time, which is, based on Mr.</p> <p>9 Lowery's experience, he's about to be asked, what do these</p> <p>10 files -- what do these mean to you? What can you conclude</p> <p>11 based on these files? And that should have been disclosed in</p> <p>12 an expert report back on July 9th and it simply wasn't.</p> <p>13 MS. NEISWENDER: Mr. Grissom, this is exactly</p> <p>14 the kind of testimony that the Fifth Circuit under Soden</p> <p>15 allows. It's the kind of testimony that was provided under</p> <p>16 Medforms. It is the testimony that QPXS faulted the appellant</p> <p>17 for not providing and said, you know what, we can't review this</p> <p>18 because there was no factual underpinning disclosed. There was</p> <p>19 no offer of proof given.</p> <p>20 Mr. Lowery, under 701, to the extent that 701</p> <p>21 even applies, is fully capable of providing the kind of</p> <p>22 testimony that I've disclosed and described because he has</p> <p>23 personal knowledge of the facts from which that opinion is said</p> <p>24 to derive. There is a rational connection between his opinion</p> <p>25 and the facts. And that opinion would be helpful, I imagine,</p>	<p>1654</p> <p>1 he has not been designated an expert witness and has not</p> <p>2 prepared a report and provided advanced notice to opposing</p> <p>3 counsel -- the opposing party of the opinions and conclusions.</p> <p>4 That's not his obligation. I mean, that's the obligation of</p> <p>5 Parallel Networks.</p> <p>6 And as for the Rule 701, ability to testify as a</p> <p>7 lay witness about technical issues, my understanding of that</p> <p>8 based on the authorities provided is that a lay witness may be</p> <p>9 allowed to testify on technical things that are within their</p> <p>10 personal knowledge. And my further understanding was that the</p> <p>11 QuinStreet documents were not ever under or within Mr. Lowery's</p> <p>12 personal knowledge as they were produced while the QuinStreet</p> <p>13 case was pending by QuinStreet under the aegis of a protective</p> <p>14 order, which I think was attorneys' eyes only.</p> <p>15 And my understanding is, not having to have been</p> <p>16 involved in this case, of course, is that the QuinStreet</p> <p>17 documents are now available really, according to QuinStreet's</p> <p>18 agreement after settlement of the QuinStreet case, and there</p> <p>19 are no pending or threatened claims. So my further</p> <p>20 understanding is that Mr. Lowery would never have been able to</p> <p>21 have access to these documents to review, and they would not</p> <p>22 have been within his personal knowledge.</p> <p>23 But that's just my understanding. If there is</p> <p>24 something that I have overlooked or misunderstood, I'm -- you</p> <p>25 know, I'm open to further discussions on that.</p>
<p>1653</p> <p>1 for you as you go forward and are going to evaluate</p> <p>2 QuinStreet's systems and Jenner & Block's actions in connection</p> <p>3 with the QuinStreet settlement. Without those underlying</p> <p>4 facts, your job is going to be a lot more difficult.</p> <p>5 ARBITRATOR GRISSOM: You're now taking a pathway</p> <p>6 under 701?</p> <p>7 MS. NEISWENDER: Yes, sir.</p> <p>8 ARBITRATOR GRISSOM: This witness hasn't been</p> <p>9 disclosed.</p> <p>10 MS. NEISWENDER: Yes, sir, he was disclosed in</p> <p>11 our April --</p> <p>12 ARBITRATOR GRISSOM: Not as an expert.</p> <p>13 MS. NEISWENDER: 701 is not expert witness</p> <p>14 testimony, and the law says that it does not need to be</p> <p>15 disclosed. That's under 702.</p> <p>16 ARBITRATOR GRISSOM: Okay. Well, let's go off</p> <p>17 the record for a second. I need to re-look at some things.</p> <p>18 (Break was taken at 3:11 p.m. to 3:28 p.m.)</p> <p>19 ARBITRATOR GRISSOM: We're back on the record.</p> <p>20 And just let the record reflect, I think that counsel for</p> <p>21 Jenner & Block asked that the witness be excused while we</p> <p>22 discuss the pending topic.</p> <p>23 If I missed something, please help me understand</p> <p>24 it. I thought that I had pretty much ruled on this, but --</p> <p>25 because although this witness is certainly extremely qualified,</p>	<p>1655</p> <p>1 MS. NEISWENDER: Mr. Grissom, what I would say</p> <p>2 is you heard Mr. Lowery testify that the Apache software is</p> <p>3 open source software available on the Internet, and that Tomcat</p> <p>4 software is also open source and available on the Internet, and</p> <p>5 that the directives in Apache software and the directives in</p> <p>6 Tomcat software are not modified. And so the presence -- Mr.</p> <p>7 Lowery's ability to identify those files which we discussed,</p> <p>8 like jk_mount and the workers.properties files would remain</p> <p>9 unchanged from what's publicly available to what's in the</p> <p>10 QuinStreet documents. And so we would have Mr. Lowery identify</p> <p>11 that those files are present in the configuration files that</p> <p>12 QuinStreet produced to Jenner & Block in the QuinStreet case.</p> <p>13 ARBITRATOR GRISSOM: And how do we get around</p> <p>14 the fact that he would never have known about that absent his</p> <p>15 ability to see the data now after that case has settled and</p> <p>16 would not have been able to see it while that case was pending?</p> <p>17 MS. NEISWENDER: Well, I think where we're</p> <p>18 having a bit of a disconnect is, is that when you run Apache or</p> <p>19 when a Web site like QuinStreet would run Apache, the publicly</p> <p>20 available open source code is what's running. And so all that</p> <p>21 Mr. Lowery would do is identify that these files, which are</p> <p>22 present in the public source code which he has worked with for</p> <p>23 more than 30 years, are present in the QuinStreet documents as</p> <p>24 they would be indicated under the, you know, publicly available</p> <p>25 Apache and Tomcat information. So he's not testifying as to</p>