

COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT  
DIVISION NO. III  
CIVIL ACTION NO. 15-CI-551

PAUL KEARNEY, M.D., ) DEPOSITION TAKEN ON  
 ) BEHALF OF PLAINTIFF  
 PLAINTIFF ) BY: NOTICE  
 )  
 VS. ) Vol. 2  
 )  
 UNIVERSITY OF KENTUCKY, ) Witness:  
 )  
 DEFENDANT ) PRESIDENT ELI CAPILOUTO

\* \* \* \* \*

The continued deposition of PRESIDENT ELI CAPILOUTO was taken before Desiree J. Wright, Court Reporter and Notary Public in and for the State of Kentucky at Large, and by videotape recording, at the law offices of Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Suite 1500, Lexington, Kentucky, on Friday, August 5, 2016, commencing at the approximate hour of 9:10 a.m. Said deposition was taken pursuant to Notice, heretofore filed, to be read and used as evidence on behalf of the Plaintiff at the trial in the above-captioned action and all other purposes as permitted by the Kentucky Rules of Civil Procedure.

\* \* \* \* \*

1 APPEARANCES:

2

3 Hon. Bernard Pafunda  
4 PAFUNDA LAW OFFICE  
5 175 East Main Street - Suite 600  
6 Lexington, Kentucky 40507

7

ATTORNEYS FOR PLAINTIFF

8

9

Hon. Bryan Beauman  
10 STURGILL, TURNER, BARKER & MOLONEY, PLLC  
11 333 West Vine Street - Suite 1500  
12 Lexington, Kentucky 40507

13

ATTORNEYS FOR DEFENDANT

14

15

16 ALSO PRESENT:

17 Angela Edwards,  
18 Video Technician

19

Paul Kearney, M.D.

20

21 William Thro, University of Kentucky  
22 Counsel

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AN/DOR Reporting & Video Technologies, Inc.

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1 THE VIDEO TECHNICIAN: We are on the  
2 video record. Today's date is August 5th,  
3 2016. The time is 9:09 a.m.

4 This is the continuation of the  
5 deposition of Eli Capilouto.

6 We'll remind you that you are still  
7 under oath, sir.

8 THE WITNESS: Thank you.

9 EXAMINATION

10 By Mr. Pafunda:

11 Q President Capilouto, I'll show you  
12 what I've marked as Plaintiff's Exhibit No. 13,  
13 and represent to you that it's an organizational  
14 chart that may be a little out of date.

15 A Yes, sir.

16 (UK ADMINISTRATIVE ORGANIZATION  
17 OFFICE OF THE PRESIDENT WAS MARKED AS  
18 PLAINTIFF'S EXHIBIT NO. 13 FOR PURPOSES OF  
19 IDENTIFICATION.)

20 Q Have you had an opportunity to  
21 review it?

22 A Yes, sir.

23 Q And is it a little out of date?

24 A It's a little out of date on  
25 individuals who hold the position or titles that  
AN/DOR Reporting & Video Technologies, Inc.

1 may have been changed.

2 Q Does it accurately represent what we  
3 discussed in the -- in the first portion of your  
4 deposition, the organizational chart of the  
5 president's office in terms of positions and  
6 titles?

7 A I don't remember exactly what I said  
8 in terms of organization in my office, but it's --  
9 certainly at the time this is appropriate.

10 Q And is it appropriate for the  
11 present, other than the names of the individuals  
12 who hold the positions?

13 A Yes.

14 Q Thank you.

15 For example, for -- to correct the  
16 names, Vice President for Research, Jim Tracy, no  
17 longer holds that position as you pointed out  
18 earlier; correct?

19 A Correct.

20 Q And who holds that position now?

21 A Lisa Cassis.

22 Q Any other corrections with respect  
23 to the individuals in the --

24 A The Vice President for Institutional  
25 Diversity there is an interim holding that  
AN/DOR Reporting & Video Technologies, Inc.

1 position and that is Terry Allen. And the general  
2 counsel position is filled.

3 Q That's filled by Mr. Thro; correct?

4 A Correct.

5 Q Thank you.

6 So we have an accurate  
7 representation of the organization of the  
8 president's office; is that true?

9 A Yes.

10 Q As well as the chain of command from  
11 the president's office?

12 A Yes.

13 Q Thank you.

14 MR. BEAUMAN: Can I point something  
15 out that I think is obvious? The other  
16 vacancy has been filled.

17 THE WITNESS: Right. Excuse me, I  
18 didn't notice that. Eric Monday is in that  
19 position. Don't tell him I overlooked him.

20 MR. PAFUNDA: I won't. Mr. Beauman  
21 is just Johnny-on-the-spot.

22 Q Eric Monday?

23 A Yes, sir.

24 Q Thank you very much.

25 When this matter was first brought  
AN/DOR Reporting & Video Technologies, Inc.

1 to your attention, it was brought by general  
2 counsel William Thro; is that correct?

3 A Correct.

4 Q Do you recall what he told you about  
5 Dr. Kearney?

6 A I just -- my best recollection is  
7 that the Chief Medical Officer had made a decision  
8 to put Dr. Kearney on leave; that there had been  
9 an issue involving a patient, and that there was  
10 also an issue involving a recent lecture that  
11 Dr. Kearney had given, and that there was a letter  
12 in the last couple of years in which Dr. Kearney's  
13 unprofessional behavior had been documented in the  
14 form of corrective action.

15 Q Did the discussion -- was anyone  
16 else present at -- during this time?

17 A I don't think so.

18 Q And in the same vein, did Mr. Thro  
19 discuss with you any pattern of unprofessional  
20 behavior that was attendant to Dr. Kearney?

21 A Only to the extent that there was a  
22 letter that had documented previous, you know,  
23 behavior.

24 Q And did you see that letter?

25 A I don't remember --  
AN/DOR Reporting & Video Technologies, Inc.

1 Q Or was it presented to you?

2 A I don't remember when I saw that  
3 letter. I can't remember.

4 Q But at this meeting that occurred  
5 in -- no later than October, correct, of 2014?

6 A September, October, right.

7 Q Thank you.

8 A I can't remember.

9 Q Was it at this particular meeting  
10 that you made the decision to go ahead and see if  
11 you could negotiate a settlement with Dr. Kearney?

12 A I don't think that was discussed at  
13 that meeting. This was -- I mean, my reco --  
14 recollection is I'm sort of alerted to that this  
15 is taking place. I -- I don't recall discussing  
16 it at length at the time.

17 Q Would you agree with me that it's  
18 rare for you to be alerted as to a disciplinary  
19 action?

20 A It depends on the nature of the --  
21 the event.

22 Q Where on the spectrum of events  
23 would disciplinary actions fall that are brought  
24 to your attention?

25 A The seriousness of the event, the --  
AN/DOR Reporting & Video Technologies, Inc.

1 the decisions that have been made regarding  
2 somebody's continuation in their role, whether it  
3 involved something illegal, whether I was to  
4 expect that there could be media attention to  
5 this, those would be the kinds of things that  
6 would come to my attention.

7 Q And with respect to media attention,  
8 do you have a public relations person?

9 A Yes.

10 Q And who is that, please?

11 A The Vice President for University  
12 Relations is Tom Harris and somebody who works  
13 under him is Jay Blanton.

14 Q And in that -- in their -- and I'll  
15 call it PR positions -- what are their job duties,  
16 Mr. Harris and Mr. Blanton?

17 A Mr. Harris's responsibilities are  
18 far reaching. They involve anything from alumni  
19 relations, working with very -- various offices to  
20 develop PR campaigns. For instance, enrollment  
21 management to recruit students. His office also  
22 covers individuals that work on relations with  
23 elected officials, the state legislature, and they  
24 also cover our interactions with the press.

25 Q And when you say they cover our  
AN/DOR Reporting & Video Technologies, Inc.

1 interactions with the press, I take it that they  
2 confer between themselves as how to respond to any  
3 newspaper articles, is that correct, as well as  
4 with yourself?

5 A I would assume they confer, yes.

6 Q And if you'll recall from your  
7 previous deposition just a week or so ago, you had  
8 made an apology that appeared -- that was given to  
9 the entire faculty concerning the Kearney matter;  
10 do you recall that, sir?

11 A Yes.

12 Q Did your PR people participate in  
13 drafting that apology?

14 A No.

15 Q So that was you yourself alone?

16 A Yes.

17 Q And returning to your meeting with  
18 Mr. Thro, your initial meeting about the Kearney  
19 matter.

20 A Right.

21 Q Was he specific about -- other than  
22 the letter that you've generally described, was he  
23 specific in any regard with respect to  
24 Dr. Kearney's past unprofessional behavior?

25 A I only remember really the mention  
AN/DOR Reporting & Video Technologies, Inc.

1 of the letter that staged this, and the lecture.

2 That's sort of what I remember.

3 Q And at that time I take it did you  
4 pass on the disciplinary action? Did you tell  
5 Mr. Thro, hey, it's okay, go ahead?

6 A I think what I wanted to know and  
7 got more detail at subsequent meetings is -- is  
8 what is the process that the University follows in  
9 this particular matter. You know, we -- we --  
10 depending on the nature, there are different  
11 guidelines. If somebody is found to have abused  
12 substances, for instance, that is a protocol  
13 that's followed. If somebody is accused of sexual  
14 assault, that's a different protocol that's  
15 followed. So it was I think at a subsequent  
16 meeting that I got briefed on how this would  
17 transpire. I mean -- but I don't remember when  
18 that exactly was.

19 Q Can you recall without being  
20 specific as to date and time how long after your  
21 initial meeting with Mr. Thro?

22 A I can't remember exactly when. I  
23 mean during that time. I mean, it's not -- it's  
24 not five months later, I can tell you that.

25 Q Would you say it's within a --  
AN/DOR Reporting & Video Technologies, Inc.

1 within a month?

2 A Most likely.

3 Q And on that subsequent -- we'll call  
4 it the second meeting, just for the sake of being  
5 obvious -- were you given more information about  
6 Dr. Kearney?

7 A I don't recall getting detailed  
8 information. I -- most of what I learned about  
9 Dr. Kearney was after the decisions had been made  
10 by the Board. This last hearing, that's when I  
11 looked into the hearing panel and that kind of  
12 information where more detail was shed on this.

13 Q Returning to, and again, I'll label  
14 it the second meeting, who attended that second  
15 meeting?

16 A I don't know. It may have been  
17 Mr. Thro and my Chief of Staff may have been  
18 standing there.

19 Q And your Chief of Staff is who,  
20 please?

21 A Bill Swinford.

22 Q Thank you.

23 A I'm not sure, but could have been.

24 Q So I take it from your response that  
25 no record or memoranda or notes were made of  
AN/DOR Reporting & Video Technologies, Inc.

1 either the first meeting or the second meeting --

2 A No, sir.

3 Q -- is that correct?

4 And any notes made by yourself or  
5 anyone on your behalf of any of the meetings prior  
6 to the time the Healthcare Committee returned  
7 Dr. Kearney to work as a full tenured professor?

8 A No, sir.

9 Q Was that deliberate on your part, to  
10 keep things off paper?

11 A No. I didn't see any reason to  
12 necessarily keep information. I was more  
13 interested in the process that was going to be  
14 followed.

15 Q And I take it you were advised as to  
16 the process that would be followed; correct?

17 A Yes, sir.

18 Q And again, by Mr. Thro?

19 A Yes.

20 Q So Mr. Thro was, for lack of a  
21 better expression, one of the driving forces  
22 behind the disciplinary action; is that correct?

23 A He was the person that informed me  
24 of the process that would be followed.

25 Q And you relied on that information  
AN/DOR Reporting & Video Technologies, Inc.

1 at that point in time from your general counsel;  
2 is that --

3 A Yes.

4 Q All right. Thank you.

5 At some point in time, you gave, and  
6 I take it it would be Mr. Thro, the green light to  
7 negotiate with Dr. Kearney?

8 A Yes.

9 Q Did you discuss this matter with  
10 Dr. Karpf at any time?

11 A No, sir.

12 Q Did you discuss it with  
13 Mr. Boulanger at any time?

14 A No, sir.

15 Q But you knew, according to the  
16 organizational chart, we have Dr. Karpf as  
17 Executive Vice President of Health Affairs, do we  
18 not?

19 A Yes.

20 Q So he's the one who is immediately  
21 above the dean at the college, or at least on a  
22 parallel level; correct?

23 A The dean also reports to the  
24 provost.

25 Q Why not meet with the Executive Vice  
AN/DOR Reporting & Video Technologies, Inc.

1 President for Health Affairs on this matter since  
2 it was brought to your attention?

3 A Sure.

4 When it was brought to my attention  
5 and the decision had sort of gone forward to  
6 remove Dr. Kearney from the -- sort of healthcare  
7 delivery environment, and then a process was  
8 described to me, I saw no reason to discuss that  
9 with Dr. Karpf. He wasn't involved in that  
10 process. And I will say that -- and I wanted to  
11 make sure that in no way that process would have  
12 interference. So I never talked to anybody that  
13 would subsequently serve on these panels. I never  
14 talked to people on the hearing panel. I never  
15 talked to a board member about the case. I didn't  
16 think it was appropriate to.

17 Q But when you say that you didn't  
18 want to interfere with the process, you --

19 A I --

20 Q -- you actually were already brought  
21 into the process by Mr. Thro, were you not?

22 A I was informed by Mr. Thro of what  
23 had happened, and I asked what process is followed  
24 in these matters.

25 Q But likewise, you took a more active  
AN/DOR Reporting & Video Technologies, Inc.

1 role when you informed Mr. Thro to go ahead and  
2 negotiate with Dr. Kearney; is that correct?

3 A When -- when he said to me, you  
4 know, here is the process that's followed by the  
5 Executive Committee. If it were an appeal, here  
6 is the process, and I couldn't remember the  
7 details from the time, but as it unfolded, I  
8 learned more about it. He said that, and  
9 recognizing it sounded like a protracted  
10 situation, we discussed working with Dr. Kearney  
11 to find a mutually satisfactory separation from  
12 the University.

13 Q And that separation, would it not  
14 from your point of view, from your eyes at the  
15 time, would necessarily involve money; correct?

16 A I would expect that money would be  
17 part of the negotiation, yes.

18 Q Well, when the negotiations were  
19 underway, you recall that they, in fact, occurred;  
20 correct?

21 A Yes.

22 Q You had given the okay to negotiate  
23 in terms of here is a separation package, monetary  
24 separation package for Dr. Kearney; correct?

25 A I remember that we discussed those.  
AN/DOR Reporting & Video Technologies, Inc.

1 I don't remember the amounts.

2 Q My question to you is more pointed,  
3 Dr. -- Dr. Capilouto. Where was the money to come  
4 from?

5 A I'm not sure where the money was to  
6 come from. I didn't discuss where the money came  
7 from.

8 Q But we're talking at least a  
9 substantial sum of money that's in excess of half  
10 a million dollars; correct?

11 MR. BEAUMAN: Let me object. I don't  
12 think we need to get into any specific  
13 dollar figure.

14 MR. PAFUNDA: We're going to. You've  
15 got to duct tape me.

16 MR. BEAUMAN: Because I don't think  
17 that's appropriate. It's certainly never  
18 going to be admissible --

19 MR. PAFUNDA: It doesn't have to be.

20 MR. BEAUMAN: -- the dollar figure.

21 MR. PAFUNDA: Doesn't have to.

22 MR. BEAUMAN: Has to either be  
23 relevant or lead to discovery --

24 MR. PAFUNDA: It's going to lead  
25 there, yeah.

AN/DOR Reporting & Video Technologies, Inc.

1 MR. BEAUMAN: I don't think any  
2 dollar figure does, and I don't think it's  
3 appropriate to be --

4 MR. PAFUNDA: I know, but what do we  
5 do? I disagree.

6 MR. BEAUMAN: Yeah.

7 MR. PAFUNDA: Save it?

8 MR. BEAUMAN: Yeah, I mean, are  
9 you --

10 MR. PAFUNDA: I'm going -- let me  
11 continue and then you can be adamant.

12 MR. BEAUMAN: Okay.

13 MR. PAFUNDA: Or the president can  
14 be adamant.

15 Q In this present litigation your  
16 understanding it's a whistleblower case; correct?

17 A Correct.

18 Q And that the allegation is that  
19 Dr. Kearney blew the whistle on the mismanagement  
20 of Kentucky Medical Services Foundation; correct?

21 A I was informed of that after the  
22 discussions with I believe you and Dr. Kearney  
23 about the separation or mediation or whatever you  
24 call it.

25 Q And when you say you were informed  
AN/DOR Reporting & Video Technologies, Inc.

1 by myself and Dr. Kearney --

2 A Not by you. Dr. Thro. It's the  
3 first time we've met you.

4 Q Yes, it is.

5 Is this -- in this particular  
6 matter, this litigation, is there insurance  
7 coverage?

8 A I don't know, sir.

9 Q Returning to my earlier question  
10 about the negotiations and the monetary amount,  
11 did you at the time anticipate that it would come  
12 from insurance coverage?

13 A I don't remember anticipating it  
14 would come from insurance coverage, no.

15 Q But likewise, the University has its  
16 own self-insurance?

17 A For certain matters, yes.

18 Q And those matters would include --  
19 well, let me ask this: Would those matters  
20 include this, in your opinion?

21 A I -- I don't know, sir.

22 MR. PAFUNDA: I'll mark this as  
23 Plaintiff's Exhibit 14.

24 (ANSWERS TO INTERROGATORIES WERE

25 MARKED AS PLAINTIFF'S EXHIBIT NO. 14 FOR  
AN/DOR Reporting & Video Technologies, Inc.

1           PURPOSES OF IDENTIFICATION.)

2           Q           If you'll just take a moment,  
3   President Capilouto, and review that.  It's  
4   Answers to Interrogatories.

5                   MR. PAFUNDA:  Do you want a copy,  
6   Bryan?

7                   MR. BEAUMAN:  I've got it.  You on  
8   No. 8, Interrogatory No. 8?

9                   MR. PAFUNDA:  Yes.

10          A           Okay, sir.

11          Q           When is the first time that you saw  
12   the answer to Interrogatory No. 8?

13          A           I skimmed this document.  I can't  
14   remember when I first did that.  I don't know when  
15   it -- I can't remember when it was produced, but.

16          Q           When was the last time that you  
17   looked at it prior to today?

18          A           I think it was the first time I  
19   looked at it and the last time.

20          Q           So prior to today, it's been  
21   approximately how long since you --

22          A           Weeks, I think.

23          Q           Would three weeks pretty well kick  
24   it in the head?

25          A           I -- several weeks.  That's what I  
  AN/DOR Reporting & Video Technologies, Inc.

1 know.

2 Q I'll direct your attention to the  
3 sentence that begins, "After being advised of the  
4 results of the initial investigation," would you  
5 read that first sentence into the record, please?

6 A "After being advised of the results  
7 of the initial investigation in Dr. Kearney's  
8 previous record of misbehavior,  
9 President Capilouto directed the University's  
10 counsel to attempt to negotiate an agreement where  
11 Dr. Kearney would leave the University."

12 Q Does that accurately reflect what  
13 happened?

14 A Yes.

15 Q Let's take it step-by-step.

16 When did you learn about  
17 Dr. Kearney's previous record of misbehavior?

18 A I was first advised that the Chief  
19 Medical Officer had made this decision. Just  
20 because of a coincidence in time, I was made aware  
21 that -- that there had been difficulty with a  
22 lecture he had given, and that there was a  
23 previous letter in his file that talks about  
24 previous behavior and sort of a corrective action  
25 and a warning that had he not adhered to this,  
AN/DOR Reporting & Video Technologies, Inc.

1 given that this wasn't the first time it had  
2 happened, there would be corrective action.

3 Q And my question again is, and when  
4 was his alleged previous record of misbehavior  
5 brought -- first brought to your attention, and by  
6 whom?

7 A It could be brought to attention in  
8 the form I just described to you in that first  
9 short briefing.

10 Q And when you say the first short  
11 briefing, by general counsel?

12 A Yeah, let me tell you that the Chief  
13 Medical Officer has done this, this and that. By  
14 the way, there's also a lecture that presented a  
15 problem for which decisions were made to remove  
16 Dr. Kearney from those roles, and there's a letter  
17 in his file that talks about incidents and  
18 warnings that this shouldn't happen again.

19 Q And if you'll look at the beginning  
20 of that answer that's given to interrogatories, it  
21 says, "After being advised of the results of the  
22 initial investigation," what investigation are you  
23 referring to?

24 A Well, I remember being alerted, you  
25 know, that this had happened, and what I can't  
AN/DOR Reporting & Video Technologies, Inc.

1 remember is there was some investigation involving  
2 an interview with a patient and his mother, and I  
3 just can't remember when somebody told me that was  
4 done. I can't remember entirely who was at that,  
5 so I know that -- and that may have been done  
6 prior to the decision to suspend him. I can't  
7 remember.

8 Q Well, maybe take it one step at a  
9 time. Who informed you that the initial  
10 investigation had been done?

11 A What I remember is general counsel  
12 telling me there had been an incident; there had  
13 been obviously some examination of the incident to  
14 some level to make the decision to put Dr. Kearney  
15 on administrative leave. You know, and that was  
16 an internal decision made within the -- within...

17 Q Healthcare?

18 A Appropriate persons, right. And I  
19 can't remember -- you know, it was after all of  
20 this is over that I did a more sort of thorough  
21 review of all of the materials and I could have  
22 learned the details then. I mean, I think I  
23 remember something about the patient being  
24 interviewed by -- I don't know if it's  
25 Dr. Boulanger or Cliff Iler or -- I can't  
AN/DOR Reporting & Video Technologies, Inc.

1 remember, Margaret Pisacano. Maybe I learned that  
2 later. I can't remember when I learned that.

3 Q Well, when this answer was -- did  
4 you participate in any way in the preparation of  
5 this answer to Interrogatory No. --

6 A No.

7 Q But is it -- are you saying today  
8 that this answer to Interrogatory No. 8 accurately  
9 reflects the timeline involved to the best of your  
10 recollection?

11 A To the -- to the best of my  
12 recollection. What I can't fully recall is the  
13 details that you asked me about depth of initial  
14 investigation and so forth. I can't remember.

15 Q Well, taking it one step at a time,  
16 you were advised that the investigation -- the  
17 initial investigation had been completed, am I --  
18 is that correct?

19 A And I could have assumed that  
20 something was done, you know, that -- I would  
21 anticipate that with any complaint there's some  
22 preliminary assessment that is done close to the  
23 occurrence of the events of that. That's  
24 typically what happens.

25 Q Well, to use your words, if there  
AN/DOR Reporting & Video Technologies, Inc.

1 was a preliminary assessment of the event that  
2 occurred --

3 A Uh-huh.

4 Q -- your answer, or the answer that  
5 was given on your behalf, is that after the  
6 investigation had been completed, there were  
7 results; correct?

8 A And that may have been this  
9 preliminary interview with the patient, and I  
10 don't know if there was anybody else. I can't  
11 tell you what the investigation included. I don't  
12 know the details of that.

13 Q And just to make the record clear,  
14 you didn't participate in any way in the  
15 investigation?

16 A No, no, never.

17 Q You left that to others; correct?

18 A Yes, sir. I'm not a person that  
19 conducts the investigation.

20 Q But at this point in time, after the  
21 initial investigation was over, you made the  
22 decision to go ahead and attempt to negotiate an  
23 agreement where Dr. Kearney would leave the  
24 University; correct?

25 A Yes.  
AN/DOR Reporting & Video Technologies, Inc.

1 Q So at that time, and I'm taking it  
2 this is in October of 2014, you had made the  
3 decision based on the information passed on to you  
4 by general counsel that Dr. Kearney should leave  
5 the University; correct?

6 A I made the decision that we should  
7 negotiate with Dr. Kearney about his leaving the  
8 University.

9 Q But if you'll look at that  
10 sentence --

11 A Uh-huh.

12 Q -- "negotiate an agreement" --

13 A Uh-huh.

14 Q -- it reads, "Negotiate an agreement  
15 where Dr. Kearney would leave the University"?

16 A Correct.

17 Q So he had two choices, correct,  
18 leave or negotiate?

19 A Negotiate to leave.

20 Q So he actually had one choice.  
21 Either way, he was gone from the University;  
22 correct?

23 A No.

24 Q Someone must have made at this  
25 particular time, in the fall of 2014, that  
AN/DOR Reporting & Video Technologies, Inc.

1 Dr. Kearney was going to leave the University?

2 MR. BEAUMAN: Object to form.

3 A I don't understand what you're  
4 saying.

5 Q From this answer that was given on  
6 your behalf, someone in the fall of 2014 had to  
7 have made the decision that Dr. Kearney was going  
8 to leave the University?

9 MR. BEAUMAN: Same objection.

10 A That would be premature.

11 Q And the reason you say it would be  
12 premature?

13 A Is because the -- the -- the  
14 process -- and here we're -- at this stage we're  
15 only talking about his medical privileges. That  
16 process had not --

17 Q Even begun?

18 A Even begun, right.

19 Q So when you say be premature, so if  
20 Dr. Kearney was given the ultimatum to settle or  
21 have his career ruined, that would be an improper  
22 characterization of the whole process; correct?

23 A I don't understand exactly what you  
24 are --

25 Q You in no way gave approval for  
AN/DOR Reporting & Video Technologies, Inc.

1 someone on your behalf to tell Dr. Kearney that if  
2 he didn't take a settlement his career would be  
3 ruined?

4 MR. BEAUMAN: Object to the form.

5 A I -- I wasn't trying to ruin  
6 Dr. Kearney's career. I was trying to negotiate a  
7 separation, so it's that simple.

8 Q Thank you.

9 When it references in this answer  
10 that was given, "Dr. Kearney's previous record of  
11 misbehavior," that's more than just a letter of  
12 reprimand, is it not?

13 A You know, as I said earlier, you  
14 know, I have that initial sort of this is what's  
15 happened. I asked to -- you know, for somebody to  
16 brief me on these medical bylaws and the process  
17 that is followed. I would imagine there was more  
18 discussion, but I did not -- I didn't examine  
19 Dr. Kearney's file. You know, I just heard that  
20 there had been a pattern, that there had been a  
21 history.

22 Q When you heard that there had been a  
23 pattern or there had been a history, I take it  
24 from your earlier responses that came from general  
25 counsel William Thro?

AN/DOR Reporting & Video Technologies, Inc.

1 A Right, yes.

2 Q Am I correct?

3 A Correct.

4 Q Did it come from anyone else?

5 A No.

6 Q And as you've emphatically stated on  
7 several occasions, you relied on what general  
8 counsel passed on to you that there had been a  
9 pattern of unprofessional conduct?

10 A Including numerous letters in his  
11 file about his behavior.

12 Q Thank you.

13 And had no reason in your position  
14 as president of the University to question that  
15 information?

16 A As it was described to me, that was  
17 enough information to make a decision to negotiate  
18 a separation.

19 Q Thank you, sir.

20 So that the record is clear, as of  
21 the fall of 2014, you had information passed to  
22 you by general counsel that Dr. Kearney had  
23 engaged in a pattern of unprofessional conduct  
24 over the years; correct?

25 A That -- that there was a record of  
AN/DOR Reporting & Video Technologies, Inc.

1 numerous letters to him about his behavior.

2 MR. PAFUNDA: I highlighted the  
3 document rather than my shirt.

4 (Off the record.)

5 (HEARING PANEL RECOMMENDATION WAS  
6 MARKED AS PLAINTIFF'S EXHIBIT NO. 15 FOR  
7 PURPOSES OF IDENTIFICATION.)

8 Q I'll show you what I've marked as  
9 Exhibit No. 15.

10 A Yes, sir.

11 Q And I'll ask you --

12 MR. PAFUNDA: Do you want a copy,  
13 Bryan?

14 MR. BEAUMAN: Sure.

15 Q Take a moment and review it.

16 (Off the record.)

17 THE VIDEO TECHNICIAN: This may be a  
18 good time to take a break. We'll go off the  
19 video record. The time is 9:46. We're off.

20 (Brief recess.)

21 THE VIDEO TECHNICIAN: We're back on  
22 the video record. The time is 9:53.

23 CONTINUED EXAMINATION

24 By Mr. Pafunda:

25 Q President Capilouto, I presented you  
AN/DOR Reporting & Video Technologies, Inc.

1 with the Hearing Panel Recommendation; correct?

2 A Yes, sir.

3 Q You've had an opportunity to review  
4 it?

5 A Yes, sir.

6 Q In fact, you reviewed this in the  
7 past, did you not?

8 A After the Board of -- made its final  
9 decision, this is the document I'm pretty sure I  
10 reviewed.

11 Q Did you, in fact, review it?

12 A Yes.

13 Q What triggered you to review it?

14 A I think I was trying to get a  
15 complete picture on what had been reviewed and the  
16 decisions made, especially when the Board included  
17 language about tenure.

18 Q But you knew in the fall of 2014 at  
19 the time of your initial meeting with Mr. Thro on  
20 this matter that Dr. Kearney was on, for lack of a  
21 better expression, two tracks, clinical physician  
22 as well as tenured professor, regular title;  
23 correct?

24 A Correct.

25 Q And you knew with respect to that  
AN/DOR Reporting & Video Technologies, Inc.

1 that there were different disci -- disciplinary  
2 measures that can be taken, No. 1, against a  
3 clinical physician as opposed to a tenured faculty  
4 member; correct?

5 A Clinical privileges are under the  
6 aegis of the Medical Staff and so forth, yes.

7 Q Whereas tenured status is under --  
8 actually under state law, is it not?

9 A I don't know entirely.

10 Q What is your understanding?

11 A Tenure is certainly a University  
12 policy. How it's addressed in state law, I can't  
13 remember details.

14 Q Leave that to the lawyers?

15 A (Witness indicating.)

16 Q Yes?

17 A Maybe.

18 Q All right.

19 If you would, President Capilouto,  
20 numerical Paragraph 3 on Page 11, if you would  
21 read the first sentence as well as the title?

22 A "Major Obstacle: The Executive  
23 Committee had a substantial reason to believe that  
24 Dr. Kearney's unprofessional behavior would  
25 persist if the Medical Center continued to rely  
AN/DOR Reporting & Video Technologies, Inc.

1 upon the same kind of moderate sanctions that it  
2 had employed for most of 20 years."

3 Q As we take that sentence, the  
4 Hearing Panel is stating that moderate sanctions  
5 had in the past been imposed on Dr. Kearney over a  
6 20-year period of time; is that correct?

7 A Yes, sir.

8 Q If you would read the next sentence,  
9 please, President Capilouto.

10 A "As viewed by the Committee,  
11 multiple warnings, leaves of absence, remediation  
12 programs, written reprimands and action plans had  
13 done little to eliminate the problem."

14 Q And the problem that that refers to  
15 is the unprofessional behavior, is it not?

16 A Yes, sir.

17 Q Thank you.

18 So we've got here a picture, do we  
19 not, of Dr. Kearney, who over a 20-year period has  
20 received, No. 1, multiple warnings, 2, multiple  
21 leaves of absences, 3, multiple remediation  
22 programs, 4, writ -- multiple written reprimands,  
23 and 5, multiple action plans; correct?

24 A It says, "Multiple warnings, leaves  
25 of absence, remediation programs, written  
AN/DOR Reporting & Video Technologies, Inc.

1 reprimands and action plans."

2 Q And we take it, because it's  
3 modified by the word "multiple," that these have  
4 been multiple over a period of 20 years; correct?

5 A I -- I can't tell you if action  
6 plans were multiple action plans in one  
7 remediation program. I don't know exactly what --

8 Q But we have --

9 A -- but I got the picture, yes.

10 Q And the picture is what that you get  
11 from this?

12 A The picture is that Dr. Kearney was  
13 given several opportunities to change his  
14 behavior, and this committee believes that he  
15 hasn't done so because it hasn't eliminated the  
16 problem.

17 Q But this committee and its opinion  
18 is rather specific, is it not, when it says "Major  
19 obstacle, multiple warnings, leaves of absences,  
20 remediation programs, written reprimands and  
21 action plans had done little to eliminate the  
22 problem," correct, it's being specific?

23 A That's what they say.

24 Q Yes, they do. But they say that  
25 that's what was viewed by the Executive Committee,  
AN/DOR Reporting & Video Technologies, Inc.

1 do they not, in those two sentences?

2 A Uh-huh -- yes.

3 Q All right. Thank you.

4 So the Medical Staff Executive  
5 Committee, given what the Hearing Panel states,  
6 had to be presented with information that  
7 Dr. Kearney had multiple warnings, leaves of  
8 absences, remediation programs, written reprimands  
9 and action plans; correct?

10 A My understanding is this is a  
11 three-day hearing. This is what I've read. I  
12 don't know what was viewed by that group that day  
13 in its entirety, so I'm sorry, I don't know.

14 Q No, but you as a per -- you weren't  
15 present at the Fair Hearing?

16 A No.

17 Q All right. Weren't present during  
18 the disciplinary process; correct?

19 A Correct.

20 Q Weren't present at the Medical Staff  
21 Committee meetings; correct?

22 A It would have been inappropriate for  
23 me to be present, yes.

24 Q Yes. But weren't present?

25 A Correct.  
AN/DOR Reporting & Video Technologies, Inc.

1 Q So -- but the Hearing Panel, who had  
2 the matter before them, states that before the  
3 Medical Staff Executive Committee, they were  
4 presented with multiple warnings, leaves of  
5 absences, remediation programs, written reprimands  
6 and action plans. They're telling you that in  
7 this decision, are they not?

8 A Sir, they're rendering their  
9 decision for which if there's an appeal or the  
10 next level of consideration is the board. I in no  
11 way have authority to make a decision or overturn  
12 this decision. This is what they're saying.

13 Q No, no, I know that. That wasn't  
14 even my question.

15 A Yeah.

16 Q All right. Here is my question.

17 A What's your question?

18 Q The Fair Hearing Panel --

19 A Yes.

20 Q -- is informing everyone in its  
21 decision process --

22 A Right.

23 Q -- that the Medical Staff Executive  
24 Committee was informed that Dr. Kearney had  
25 multiple warnings, leaves of absences, remediation  
AN/DOR Reporting & Video Technologies, Inc.

1 programs, written reprimands and action plans, and  
2 those multiple matters failed to correct his  
3 alleged unprofessional behavior for a period of 20  
4 years?

5 A Again, I can't know entirely what  
6 this group sought. I can only turn back to  
7 Page 6, where there's a letter from Dr. Byron  
8 Young. There's a letter from Dr. Jay Perman.  
9 There's a letter from Medical Center leaders.  
10 There's a written reprimand, an action plan. I  
11 assume that's what they're referring to.

12 Q But that's an assumption on your  
13 part; correct?

14 A That's -- looking at these  
15 materials, that's what I can assume.

16 Q And in those materials on Page 6, do  
17 you see multiple written reprimands?

18 A Well, when somebody has made grossly  
19 inappropriate comments and gestures, not limited  
20 to the use of profanity and anti-minority  
21 statements, voluntary remediation program, the  
22 next one is about reports of profanity-laced,  
23 totally uncalled for outbursts on your part in the  
24 course of caring for trauma patients on the  
25 evening of June 25th, "I am looking for correction  
AN/DOR Reporting & Video Technologies, Inc.

1 here, Paul, through a meaningful, sustained  
2 professional behavior modification program.

3 "Here is -- here is four very  
4 high-level members of the University's Medical  
5 Staff (Drs. Zwischenberger, McGrath, Grayson,  
6 Nurse Colleen Swartz) stated that Dr. Paul Kearney  
7 has continued to exhibit aggressive and  
8 humiliating behavior around colleagues and staff.  
9 There have been numerous complaints which are  
10 serious and which require management intervention.  
11 His attitude towards colleagues is perceived as  
12 derogatory and impacts on student education."

13 And then another written reprimand  
14 where there are three events involving conduct  
15 between Dr. Kearney and the nursing staff of the  
16 OR that are described.

17 Q Let's take one example. Leaves of  
18 absence, on Page 6, any reference to leaves of  
19 absence?

20 MR. BEAUMAN: Are you going to ask  
21 him to read the whole page to go through --

22 MR. PAFUNDA: No, he can read -- he  
23 doesn't have to read it out -- well, he can  
24 read it out loud if he wants to.

25 Q I'm just asking for these --  
AN/DOR Reporting & Video Technologies, Inc.

1           A           All I know these are -- sounds like  
2 excerpts from letters.

3           Q           Thank you.

4                       Likewise, multiple action plans on  
5 Page 6?

6           A           It certainly suggests that those  
7 could be a part of this. I don't know.

8           Q           But the suggestion is, at the least  
9 on Page 11, that the Medical Staff Executive  
10 Committee was presented with that information; is  
11 that correct?

12          A           The Medical Staff Executive  
13 Committee is, I assume, aware of these things, but  
14 again, I wasn't part of the Medical Staff  
15 Executive Committee deliberation and so forth.

16          Q           No, I understand that. You've made  
17 that clear.

18          A           Okay.

19          Q           We are just looking at what the Fair  
20 Hearing Panel rendered in terms of a decision, are  
21 we not?

22          A           Yes, sir.

23          Q           Thank you.

24                       Now, if that information that was  
25 presented to the Medical Staff Executive Committee  
AN/DOR Reporting & Video Technologies, Inc.

1 was, in fact, false, then they couldn't render an  
2 appropriate decision, could they?

3 MR. BEAUMAN: Object to the form.

4 A I don't know what false is, sir.

5 Q It's not true. Well, let me make  
6 it -- let's go to the street level. If the  
7 Medical Staff Executive Committee was lied to,  
8 deliberately, then they couldn't --

9 A I can't speculate on what the  
10 Medical Staff Executive Committee heard or what  
11 statements you're making reference to is a lie.  
12 I'm sorry, I don't know that.

13 Q No, I'm asking you a hypothetical  
14 question. If the Medical Staff Executive  
15 Committee was lied to about Dr. Kearney's  
16 behavior, then they could not render a proper  
17 decision, could they?

18 MR. BEAUMAN: Object to form.

19 A I can't speculate on what the  
20 Medical Staff Executive Committee heard and what  
21 you're inferring is a lie, sir.

22 Q Let's take a look at what the  
23 Medical Staff Executive Committee heard?

24 MR. PAFUNDA: I think this has  
25 already been marked as an exhibit. I may be  
AN/DOR Reporting & Video Technologies, Inc.

1 mistaken, Bryan.

2 MR. BEAUMAN: It has -- it has in  
3 some deposition. Whether this was one of  
4 them, I don't recall. I really don't think  
5 so, but it's -- you can mark it again. It's  
6 all right.

7 (MEDICAL STAFF EXECUTIVE COMMITTEE  
8 MINUTES, DATED 2/5/15, WAS MARKED AS  
9 PLAINTIFF'S EXHIBIT NO. 16 FOR PURPOSES OF  
10 IDENTIFICATION.)

11 Q President Capilouto, I'll hand you  
12 what I've marked as Plaintiff's Exhibit 16, which  
13 is -- which are the minutes from the Medical Staff  
14 Executive Committee of February 5th, 2015. If you  
15 will, just take a moment and review that.

16 MR. BEAUMAN: Bernie, do you have a  
17 another copy?

18 MR. PAFUNDA: Pardon me?

19 MR. BEAUMAN: Do you have a copy  
20 handy?

21 MR. PAFUNDA: Yes.

22 MR. BEAUMAN: Thank you.

23 MR. PAFUNDA: I think that was me.

24 MR. BEAUMAN: Wasn't me.

25 MR. PAFUNDA: Would you stop.  
AN/DOR Reporting & Video Technologies, Inc.

1 (Off the record.)

2 A Yes, sir.

3 Q President Capilouto, have -- you've  
4 had an opportunity to review the minutes of the  
5 February 5th Medical Staff Executive Committee  
6 meeting?

7 A Yes, sir.

8 Q And it lists, does it not, Items 1  
9 through 21 as the documents that were presented to  
10 the Medical Staff Executive Committee, does it  
11 not?

12 A Yes, sir.

13 Q And of those documents that are  
14 listed, there's not a single document that shows a  
15 leave of absence, is there?

16 A I -- I don't know what's contained  
17 in all of these letters, sir.

18 Q But in looking at the title of the  
19 documents, just from the title, is there a single  
20 document entitled "Leave of Absence"?

21 A No, but I don't know what's in the  
22 letters.

23 Q I understand that.

24 A I...

25 Q Is there any documents entitled  
AN/DOR Reporting & Video Technologies, Inc.

1 "Remediation Programs"?

2 A No, it just says the letters. It  
3 doesn't discuss -- well, there's a written  
4 reprimand and action plan.

5 Q And that's one written reprimand and  
6 one action plan attended thereto; correct?

7 A Yes. But again, I don't know the  
8 contents of all of this.

9 Q I understand that.

10 A All right.

11 Q And, in fact, above that, the only  
12 performance evaluation presented in terms of a  
13 document is No. 15, the 2012 faculty performance  
14 review for Dr. Paul Kearney?

15 A Excuse me, which number is that?

16 Q 15, sir.

17 A Yes.

18 Q Do you see any other faculty  
19 performance reviews that were presented to the  
20 Medical Staff Executive Committee?

21 A No. But again, I don't know what's  
22 in every one of those letters.

23 Q I understand that.

24 So from what's contained in the  
25 minutes of the Medical Staff Executive Committee  
AN/DOR Reporting & Video Technologies, Inc.

1 of February 5th, 2015, we have Item No. 16, which  
2 is a single written reprimand and action plan;  
3 correct?

4 A Right.

5 Q And we have listed for the calendar  
6 year just one faculty performance review for 2012;  
7 correct?

8 A Right.

9 Q So to state the obvious, it appears,  
10 does it not, to the reader of these minutes  
11 that -- to any reader of these minutes, in fact,  
12 I'll ask you to speculate -- that only one faculty  
13 performance review was presented regarding  
14 Dr. Paul Kearney and that's the one for the year  
15 2012?

16 MR. BEAUMAN: Object to the form.

17 A Well, I don't know entirely what  
18 they reviewed here, but when you showed me Exhibit  
19 16, it -- and you have "Summary of Behavioral  
20 Standards Potentially violated," and -- and the  
21 bylaws declare "A failure to meet hospital  
22 standard of quality of care. Behavior not in the  
23 best interest of quality patient care. Behavior  
24 disruptive to the orderly operation of the  
25 hospital. Verbal and/or physical actions,  
AN/DOR Reporting & Video Technologies, Inc.

1 threats, inappropriate behavior directed against  
2 patients, physicians, nurses and other hospital  
3 personnel from a recurrence of behavior problems;  
4 a violation of the terms and conditions of any  
5 corrective action or remedial action; a violation  
6 of the behavioral standards of patient care," and  
7 then it says, "These standards of patient care  
8 commitments, I will use language free from  
9 obscenities, profanities and derogatory abusive  
10 and remarks. I'll be attentive to patients'  
11 feelings and adapt my responses to make them feel  
12 comfortable and understand -- understood  
13 regardless of their behavior. I will demonstrate  
14 supportive respect for my colleagues and handle  
15 all interactions in a professional manner. I will  
16 demonstrate integrity and professionalism at all  
17 times. I'll be respectful, talk through issues  
18 and conflicts and address them," and I do recall  
19 reading in this document that at this committee,  
20 people acknowledge Dr. Kearney's performance as a  
21 surgeon and teacher as being good.

22 Q Well, it's better than good.

23 A It's good.

24 Q It's excellent.

25 A Excellent.

AN/DOR Reporting & Video Technologies, Inc.

1 Q So we've got an excellent surgeon,  
2 excellent teacher, do we not, that we can agree?

3 A Well, this is what this group -- I  
4 don't know entirely what this group saw, but I'm  
5 assuming at this Hearing Panel these matters were  
6 recognized.

7 Q And -- but you just laid it out.  
8 The Hearing Panel apparently -- all right. You  
9 can't tell from the Hearing Panel what the Medical  
10 Staff Executive Committee heard, can you?

11 MR. BEAUMAN: Object to form.

12 A I can't tell from here what they  
13 heard. This is just a list of documents.

14 Q Correct. But can you tell from the  
15 minutes what they were told, and by whom?

16 A I -- it seems to me that they're  
17 focusing on his behavior --

18 Q No. My question --

19 A -- inappropriate behavior towards a  
20 patient.

21 Q My question to you, Mr. President --

22 A Yes, sir.

23 Q -- is can you tell from these  
24 minutes what the Medical Staff Executive Committee  
25 was told about Dr. Kearney?

AN/DOR Reporting & Video Technologies, Inc.

1           A           I am not sure what the Medical Staff  
2 Executive Committee was told about Dr. Kearney. I  
3 only see the list of documents.

4           Q           In fact, reviewing the minutes of  
5 the Medical Staff Executive Committee, there's no  
6 record as to what the Medical Staff Executive  
7 Committee was told about Dr. Kearney other than  
8 the list of documents; am I correct in stating  
9 that?

10          A           There are 21 documents listed here.  
11 After review, any questions were discussed --

12          Q           Let me stop --

13          A           I don't know what was in that  
14 discussion, sir.

15          Q           Thank you.

16                      Nor do these minutes reflect that?

17          A           I don't know what was discussed.

18          Q           But we do know from the Hearing  
19 Panel's decision on Page 11 that certain matters  
20 that aren't listed as documents were discussed  
21 with the Medical Staff Executive Committee, do we  
22 not?

23          A           It looks like several things were  
24 discussed at this Hearing Panel.

25          Q           No, not --  
AN/DOR Reporting & Video Technologies, Inc.

1           A           Disciplinary history, needed  
2    corrections, multiple witnesses before the Hearing  
3    Panel.  You know, I mean, there's a lot of  
4    information discussed here.  I'm not --

5           Q           I understand that.

6           A           -- entirely sure --

7           Q           But --

8           A           -- of everything.

9           Q           I'm talking about their prefatory  
10   remarks under major obstacle.  Apparently -- not  
11   apparently.  In fact, the Executive Committee was  
12   presented with a portrait of Dr. Kearney of  
13   multiple warnings, leaves of absences, remediation  
14   programs, written reprimands and action plans?

15          A           That they concluded had done little  
16   to eliminate the problem.

17          Q           Correct.

18          A           (Witness indicating yes.)

19          Q           Did you know that Dr. Kearney had no  
20   resident complaints over his 27-year period?

21          A           I don't know that.

22          Q           Did you know that he had only one  
23   patient complaint in 27 years and that came from  
24   Mr. Wilson?

25          A           I don't know that.  
          AN/DOR Reporting & Video Technologies, Inc.

1 Q Did you know he had zero faculty  
2 complaints?

3 A I don't know that.

4 Q Did you know that he had no student  
5 complaints over the 27 years except for the one in  
6 August of 2014, anonymous student complaint?

7 A I don't know that.

8 Q But if we're to look and pin down  
9 this alleged picture of unprofessional behavior,  
10 we would look at his performance evaluations where  
11 that should surely be reflected, should we not?

12 MR. BEAUMAN: Object to the form.

13 A I don't know entirely where all of  
14 that is captured, but I certainly see in what the  
15 Hearing Panel reviewed there was information  
16 shared about his behavior.

17 Q Give me a second.

18 I'll hand you --

19 MR. PAFUNDA: Just a second. Let me  
20 mark it.

21 (FACULTY PERFORMANCE REVIEWS WERE  
22 MARKED AS PLAINTIFF'S EXHIBIT NO. 17 FOR  
23 PURPOSES OF IDENTIFICATION.)

24 Q Mr. President --

25 A Yes, sir.  
AN/DOR Reporting & Video Technologies, Inc.

1 Q -- I'll hand you what I've --

2 MR. PAFUNDA: Do you want a copy,  
3 Bryan?

4 MR. BEAUMAN: Yes, sir.

5 (Off the record.)

6 Q President Capilouto, have you had an  
7 opportunity to review Dr. Kearney's past --

8 A A quick review.

9 Q I understand.

10 A Not every line of every document.

11 Q And just for the record, we're on a  
12 time limit. You have to leave at 11:00, which is  
13 in approximately 35 minutes or less; is that  
14 correct?

15 A Yes.

16 Q Thank you.

17 But after a quick review, you see  
18 that all of his evaluations range -- are in the  
19 excellent range; correct?

20 A They're in a high range. I don't --

21 Q Well, 5 is outstanding. 4 is very  
22 good -- is very good, above average?

23 A Yeah, I see the quality rating, yes.

24 Q They're all above 4 and in the 5  
25 some of them?

AN/DOR Reporting & Video Technologies, Inc.

1 A Some of them.

2 Q Yes. But as you pointed out just a  
3 moment ago, we're dealing here with an excellent  
4 surgeon and an excellent teacher, are we not?

5 A That's what the Hearing Panel  
6 certainly acknowledged.

7 Q But it is also reflected in these  
8 performance evaluations, is it not?

9 A In general, yes.

10 Q Thank you.

11 And turning to the calendar year  
12 2012, you'll see that Dr. Kearney refused to sign  
13 that one because it specifically notes  
14 unprofessional behavior; correct?

15 A It says, "Had some issues with staff  
16 with allegations of unprofessional behavior  
17 resulting in reprimand."

18 Q And prior to that, there's not a  
19 single mention in these performance evaluations of  
20 leaves of absences, written reprimands or any  
21 other disciplinary actions, is there, just based  
22 on your --

23 A Based on my skimming the documents.

24 Q And your answer would be there are  
25 none; correct?

AN/DOR Reporting & Video Technologies, Inc.

1 MR. BEAUMAN: Object to form.

2 A I didn't see any in my first review.

3 Q Had you seen Dr. Kearney's  
4 performance evaluations prior to today?

5 A I do remember seeing some of his  
6 performance evaluations after the whole thing was  
7 concluded.

8 Q And when you say the whole thing,  
9 you're talking about the Board of Trustees  
10 Healthcare Committee --

11 A Yes, sir.

12 Q -- when they issued the return to  
13 work for Dr. Kearney --

14 A Yes, sir.

15 Q -- as a tenured professor?

16 A Yes, sir.

17 MR. BEAUMAN: Object to form.

18 Q And what triggered that, where you  
19 looked at his perform --

20 A I think -- I think what I looked at  
21 were the documents accessible to the Health  
22 Committee. And they may have been in there. And  
23 I don't know if I saw all of them, but I remember  
24 seeing --

25 Q Did it raise any questions in your  
AN/DOR Reporting & Video Technologies, Inc.

1 mind at the time?

2 A No.

3 Q But you took it upon yourself to be  
4 hands-on after the Healthcare Committee issued a  
5 decision returning Dr. Kearney to campus as a  
6 tenured professor?

7 A I thought it was appropriate to  
8 review the materials.

9 Q And took a more active part in the  
10 procedure following that return?

11 A I asked for advice on how we were  
12 going to handle that, and to be reasonably  
13 informed, I certainly looked through all of the  
14 documents.

15 Q And you also set up a committee, did  
16 you not?

17 A I didn't set up a committee. I  
18 asked Mr. Thro to get people together to determine  
19 how we were going to handle this.

20 Q And was that, in fact, done?

21 A Advice was given to me by Mr. Thro,  
22 yes.

23 Q That it was, in fact, done?

24 A That there was --

25 Q That people were assembled?  
AN/DOR Reporting & Video Technologies, Inc.

1           A           -- a way for it to outline his --  
2 his responsibilities and so forth, yes.

3           Q           Do you know what persons that he  
4 gathered together to address that?

5           A           You asked me that last time. I  
6 haven't checked on it. I think I remember the  
7 Dean of Medicine and Chair of Surgery, Chief  
8 Medical Officer. Maybe somebody who knew  
9 something about accreditation. I'm sorry, I can't  
10 remember who he consulted.

11          Q           But you didn't check on it --

12          A           I --

13          Q           -- because you didn't have time;  
14 right?

15          A           Well, I mean, what do you mean,  
16 check on what?

17          Q           See who was --

18          A           No, I just didn't do it, sir.

19                        (AMENDMENT TO VOLUNTARY REMEDIAL  
20 ACTION PLAN WAS MARKED AS PLAINTIFF'S  
21 EXHIBIT NO. 18 FOR PURPOSES OF  
22 IDENTIFICATION.)

23                        MR. PAFUNDA: If you don't mind,  
24 Bryan, mark that. My pen is lost. Thank  
25 you. Appreciate it.  
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1 (Off the record.)

2 A Yes, sir. I've -- I've skimmed  
3 this.

4 Q Thank you. I appreciate it.  
5 Is this the first time you've seen  
6 this document?

7 A No. I recall seeing it somewhere.  
8 I don't remember where.

9 Q Do you remember when or who  
10 presented it to you or the circumstances?

11 A I don't know if it -- I just don't  
12 remember.

13 Q Was it in preparation for this  
14 deposition?

15 A No, sir.

16 Q Did you do preparation for this  
17 deposition?

18 A I tried to remember the dates of  
19 certain things. That's it. I was informed that  
20 of those kinds of things. It's been a couple of  
21 years.

22 Q Did you have a practice session for  
23 this deposition in terms of --

24 A I had a conversation with counsel,  
25 yes.

AN/DOR Reporting & Video Technologies, Inc.

1 Q Now, you've got two lawyers sitting  
2 over here?

3 A Yes.

4 Q Do you refer to them as a group when  
5 you say counsel, or was it Mr. Thro?

6 A Both of them.

7 Q Thank you.

8 What did you all discuss in that  
9 preparation?

10 MR. BEAUMAN: Objection. That's  
11 privileged.

12 MR. PAFUNDA: All right. Thank you.  
13 I didn't know if you were on your toes.

14 MR. BEAUMAN: You can keep trying  
15 these tests. Hopefully I've passed them  
16 all.

17 MR. PAFUNDA: You have with flying  
18 colors. Kudos. I'm serious.

19 Q This is a draft document, is it not,  
20 Mr. President?

21 A That's what it appears to be.

22 Q In fact, it's not signed, is it?

23 A No, sir.

24 Q Did you know that this document had  
25 been placed in Dr. Kearney's personnel file at  
AN/DOR Reporting & Video Technologies, Inc.

1 some point in time?

2 A I may have known that. I just don't  
3 remember. I can't remember.

4 Q When you say you can't remember and  
5 that you may have known that, if you -- if you  
6 did, in fact, know it, who would have brought it  
7 to your attention?

8 A This may have been part of the  
9 materials available to the Committee. I -- I  
10 remember seeing this somewhere (indicating).

11 Q If this, in fact, was presented to  
12 the Committee, now are you talking about the  
13 Medical Staff Executive Committee or the Fair  
14 Hearing Panel?

15 A I don't know, sir.

16 Q If this in fact was presented to the  
17 Medical Staff Executive Committee, it would, in  
18 fact, be a false document, would it not?

19 MR. BEAUMAN: Object to form.

20 A I don't know if it was presented,  
21 how it was presented and how it was conveyed.

22 Q Or even who had custody of it?

23 A I -- I don't know all of that, sir.

24 Q In fact, if it was presented to the  
25 investigators for the Medical Staff Executive  
AN/DOR Reporting & Video Technologies, Inc.

1 Committee, it's a document that's false in its  
2 entirety, is it not?

3 MR. BEAUMAN: Object to form.

4 A I don't know that, sir.

5 Q If it, in fact, is false in its  
6 entirety, and was, in fact, given to the  
7 investigative -- investigative team for the  
8 Medical Staff Executive Committee, it should have  
9 never been presented to the Medical Staff  
10 Executive Committee; isn't that correct?

11 MR. BEAUMAN: Object to the form.

12 A I don't know, sir.

13 Q In other words, at the University of  
14 Kentucky, a faculty members's file should not be  
15 papered with false documents, isn't that true?

16 A You asked me about this being  
17 presented to the Medical Staff Executive  
18 Committee. I'm not sure if it was --

19 Q Correct.

20 A -- or not, but how they interpreted  
21 it and in what context they put it in, I do not  
22 know.

23 Q Because you weren't present, didn't  
24 have hands-on --

25 A No.  
AN/DOR Reporting & Video Technologies, Inc.

1 Q -- and nobody gave you information  
2 as to what went on; correct?

3 A No, sir.

4 Q In fact, you didn't even know when  
5 the Medical Staff Executive Committee met; is that  
6 correct?

7 A I -- I don't.

8 Q No, I mean, you weren't given a  
9 heads up that they were going to meet on  
10 February --

11 A I mean, no -- I mean, somewhere  
12 along the line I certainly knew they were meeting,  
13 but I don't -- I don't...

14 Q And you did not send any message to  
15 the Medical Staff Executive Committee through  
16 anyone --

17 A No, sir.

18 Q -- about your office is standing on  
19 this Kearney disciplinary matter, did you, sir?

20 A No, sir.

21 MR. PAFUNDA: The one in front of  
22 you, Mr. President, is?

23 THE WITNESS: 18.

24 MR. PAFUNDA: Thank you.

25 (SERIES OF E-MAILS WAS MARKED AS  
AN/DOR Reporting & Video Technologies, Inc.

1 PLAINTIFF'S EXHIBIT NO. 19 FOR PURPOSES OF  
2 IDENTIFICATION.)

3 (Off the record.)

4 Q And not to interrupt you, but in the  
5 sake of brevity, President Capilouto --

6 A Yes.

7 Q -- had you ever seen that e-mail  
8 prior to today?

9 A I don't recall seeing this e-mail,  
10 sir.

11 Q Were you ever informed about the  
12 content of that e-mail, that Dr. Kearney had  
13 accused Dr. Michael Karpf of mismanagement of KMSF  
14 funds?

15 A I was -- what I remember is -- I  
16 remember something about a faculty council meeting  
17 in which a question about whether something  
18 Dr. Karpf had said was a threat was raised, and  
19 that was seven months earlier from when I first  
20 heard about it. That's what I remember. I don't  
21 remember exact information about funds. I  
22 remember something -- and Dr. Karpf's response  
23 about -- to that question, I don't know exactly  
24 what it was about, and somebody asked if that was  
25 a threat. He said no. That's what I heard.

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1 Q When did you first learn that  
2 Dr. Kearney had made the allegation that  
3 Dr. Michael Karpf had mismanaged Kentucky Medical  
4 Services Foundation funds?

5 A I think it was during the  
6 discussions with you by our counsel to mediate  
7 this matter.

8 Q So at the time of the mediation?

9 A Yes, sir.

10 Q Thank you.

11 Did you take any -- undertake any  
12 action to investigate that allegation? Did you  
13 talk --

14 A No. I -- I had the events described  
15 to me. I never heard a complaint from anyone  
16 else, and based on the description I heard, I did  
17 not.

18 Q And did you discuss it at any time  
19 with Dr. Karpf, up to and including today?

20 A No.

21 Q You told me earlier today, and if I  
22 happen misspeak the gentleman's name, correct me,  
23 Mr. Brent Short is the compliance officer?

24 A Brett Short.

25 Q Brett, thank you.  
AN/DOR Reporting & Video Technologies, Inc.

1 A Got that wrong last time, excuse me.

2 Q No, excuse me, I got it wrong this  
3 time.

4 A Oh, okay.

5 Q Mr. Short found that there were  
6 billing errors with Hazard Cardiology; is that  
7 correct?

8 A Correct.

9 Q And you're saying that that was  
10 first uncovered in 2016; correct?

11 A No, sir.

12 Q When was it first uncovered?

13 A Sometime in 2014.

14 Q Who uncovered it, Mr. Short?

15 A Yes, sir.

16 Q And was corrective active taken when  
17 those billing errors were uncovered in 2000 --

18 A We immediately suspended billing.  
19 And we then investigated what had gone on and what  
20 were the extent of our errors.

21 Q So the \$4 million that was paid back  
22 to the federal government only covered the year  
23 2014 back to 2013?

24 A I think I went to the announcement  
25 of this event -- I believe we got up and running  
AN/DOR Reporting & Video Technologies, Inc.

1 in late 2013, we may have started billing, or  
2 first of '14.

3 Q The first billings, but I'm talking  
4 about when it was discovered or learned that there  
5 had been billing and coding errors.

6 A Yes.

7 Q You earlier stated that was 2014?

8 A Yes, sir.

9 Q And I take it the person who  
10 uncovered it was Mr. Short; is that correct?

11 A Yes.

12 Q And my question then is, the \$4  
13 million that was paid back covered what period of  
14 time for those coding and billing errors?

15 A I think from the time we started  
16 billing or rendering services to the time that we  
17 stopped billing.

18 Q Which would have been?

19 A In summer of '14, maybe August of  
20 '14. I'm not sure.

21 Q But after 2014, no question, Hazard  
22 Cardiology was out of the billing and coding  
23 business with Kentucky Medical Services  
24 Foundation?

25 A Was out of the business?  
AN/DOR Reporting & Video Technologies, Inc.

1 Q Yes.

2 A No. We corrected the way we billed  
3 and all and -- and resumed billing.

4 Q And resumed business or -- with  
5 Hazard Cardiology?

6 A In partnership with that group.

7 Q Is that still going on today?

8 A No, that's been...

9 Q When was it terminated?

10 A I can't remember the exact date.

11 Q Do you know the reason or reasons  
12 why it was terminated?

13 A I just know that the -- it's what  
14 the parties chose.

15 Q And when you say the parties, you're  
16 referring to whom?

17 A The cardiology group in Hazard.

18 Q And likewise, Kentucky Medical  
19 Services Foundation, right, or they chose to do  
20 it, Hazard Cardiology?

21 A I think the Hazard Cardiology group  
22 indicated that was their choice.

23 MR. PAFUNDA: Bryan, I'm going to  
24 make this a collective exhibit. These are  
25 all of Mr. Thro's letters, and since the  
AN/DOR Reporting & Video Technologies, Inc.

1 president --

2 MR. BEAUMAN: Letters to you?

3 MR. PAFUNDA: Well, you know, that's  
4 interesting, because my responses are back I  
5 think mostly to you.

6 MR. BEAUMAN: That's fine. I'm going  
7 to fix your sticker here.

8 MR. PAFUNDA: Are you that anal?

9 MR. BEAUMAN: I'm sure she was going  
10 to later, so I'm just trying to --

11 MR. PAFUNDA: You are a little over  
12 the top, Bryan. My God.

13 MR. BEAUMAN: A collective exhibit is  
14 fine.

15 MR. PAFUNDA: Are you sure? All  
16 right.

17 (LETTERS, 19 PAGES, FROM WILLIAM  
18 THRO WERE MARKED AS PLAINTIFF'S COLLECTIVE  
19 EXHIBIT NO. 20 FOR PURPOSES OF  
20 IDENTIFICATION.)

21 Q Mr. President, I'm going to make  
22 this a collective exhibit, and I've just got a few  
23 questions because you have to leave in 15 minutes;  
24 am I correct?

25 A Yes, sir.  
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1 Q And if you will, just take a look at  
2 these letters.

3 MR. PAFUNDA: Bryan, I'm just going  
4 to hand you a copy.

5 MR. BEAUMAN: Sure. We can look at  
6 them together.

7 MR. PAFUNDA: Make sure I didn't  
8 attach something that doesn't belong like a  
9 picture of Bill Thro making noises during a  
10 video deposition.

11 Q Mr. President, and I'll just  
12 interrupt you because I've got one question with  
13 respect to these letters -- well, two actually.

14 A All right.

15 Q Mr. Thro is speaking on behalf of  
16 you in this correspondence, is he not?

17 A Speaking on behalf of the  
18 University.

19 Q All right. Thank you.

20 And he references I believe in his  
21 first letter, unless I'm mistaken, that there's a  
22 committee that's been formed to address  
23 Dr. Kearney's return to work?

24 MR. BEAUMAN: If I can, I think the  
25 context of all of these correspondence were  
AN/DOR Reporting & Video Technologies, Inc.

1 after the Board of Trustees' final action.

2 MR. PAFUNDA: Yes. Thank you. I was  
3 operating -- the dates should be clear, but  
4 for the record, after --

5 MR. BEAUMAN: I was just...

6 MR. PAFUNDA: No, no, let's just  
7 follow up on that.

8 Q After the Board -- Board of Trustees  
9 Healthcare Committee returned Dr. Kearney to work  
10 as a tenured professor, that correspondence from  
11 Mr. Thro, he's speaking on behalf of the  
12 University; correct?

13 A Yes.

14 Q Did you see any of this  
15 correspondence before it was sent out?

16 A I -- I certainly discussed this with  
17 Mr. Thro.

18 Q And when you say discussed it, I  
19 take it you discussed it in detail?

20 A I -- I knew certainly the gist of  
21 the content, yes.

22 Q Thank you.

23 My second question was there was a  
24 committee formed, and again, what individual or  
25 individuals comprised that committee?

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1           A           I don't know if you could call it a  
2 committee, or that people were consulted.

3           Q           Well, it's referenced as a committee  
4 in the let -- in the correspondence, is it not?

5           A           Well, what I'm reading here, and I  
6 don't have time to read every --

7           Q           I understand.

8           A           -- line of it, the reference is made  
9 to the University Healthcare Committee. That's  
10 the committee that's referenced as I read it.

11          Q           Then the individuals who are  
12 consulted to address Dr. Kearney's return as a  
13 tenured professor are whom; do you know?

14          A           I don't know in the entirety who may  
15 have been consulted. I would certainly think  
16 people mentioned on the carbon copy, some of those  
17 may have been consulted, that they would have  
18 been --

19          Q           Would you read their -- would you  
20 read their names into the record, please?

21          A           Tim -- Timothy Tracy, Bill Swinford,  
22 Frederick DeBeer, Robert Cofield,  
23 Bernard Boulanger, Susan McDowell,  
24 Jay Zwischenberger, R. Brett Short,  
25 Margaret Pisacano.

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1 Q If you'll briefly look through the  
2 other -- rapidly look through the other  
3 correspondence, and if there are any additional  
4 people copied on it, would read their names into  
5 the record?

6 A Well, I'm not going to read the  
7 letter.

8 Q No, no. I just want you to check  
9 the names.

10 A The next one is Dean DeBeer's copy.

11 Q That date of that letter is dated?

12 A October 24th, November --

13 MR. BEAUMAN: 2015.

14 MR. PAFUNDA: Thank you.

15 A November 11th, 2015 -- excuse me,  
16 I've got two letters -- Dean DeBeer. December  
17 28th, 2015, Dean DeBeer.

18 MR. BEAUMAN: It's actually the 23rd,  
19 Mr. President.

20 THE WITNESS: Excuse me.

21 A 25th, it would have been Christmas.  
22 Excuse me. And then one on February 17th, 2016,  
23 Provost Tracy and Dean DeBeer. And then March  
24 24th, 2016, Provost Tracy, Dean DeBeer. April  
25 20th, 2016, Provost Tracy, Dean DiPaola.  
AN/DOR Reporting & Video Technologies, Inc.

1 Q And this correspondence -- after the  
2 initial piece of correspondence, were you updated  
3 or apprised of the content of the -- this  
4 correspondence?

5 A I'd have to read every one of those.  
6 I don't think I was brought into the details of  
7 every one of those.

8 Q Did you at any time during your  
9 conversations with Mr. Thro or anyone else that  
10 was involved in the disciplinary matter of  
11 Dr. Kearney make notes or memoranda to yourself?

12 A No, sir.

13 Q Did you make any notes or memoranda  
14 to yourself or cause any e-mails to be  
15 generated with re -- after you reviewed the  
16 Hearing Panel decision and the documents attended  
17 thereto as well as the testimony?

18 A Not that I know of, no.

19 Q If you, in fact, had, where would  
20 those -- where would those documents be located?

21 A They would be somewhere at our  
22 University. I don't know exactly where. I  
23 just -- I don't know where those are housed.

24 MR. PAFUNDA: If you give me two  
25 minutes, I may be done.

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1 THE WITNESS: Sure.

2 THE VIDEO TECHNICIAN: Time is  
3 10:49.

4 (Off the record.)

5 (Brief recess.)

6 \* \* \* \* \*

7 THEREUPON, the taking of the  
8 deposition of PRESIDENT ELI CAPILOUTO was  
9 concluded at 10:50 a.m.

10 \* \* \* \* \*

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AN/DOR Reporting & Video Technologies, Inc.

1 STATE OF KENTUCKY )

2 COUNTY OF PENDLETON )

3

4 I, DESIREE J. WRIGHT, the undersigned  
5 Notary Public in and for the State of Kentucky at  
6 Large, certify that the facts stated in the  
7 caption hereto are true; that at the time and  
8 place stated in said caption, the witness named in  
9 the caption hereto personally appeared before me,  
10 and that after being by me duly sworn, was  
11 examined by counsel for the parties; that said  
12 testimony was taken down in stenotype by me and  
13 later reduced to computer transcription by me and  
14 the foregoing is a true and accurate record of the  
15 testimony given by said witness.

16 No party to said action nor counsel for  
17 said parties requested in writing that said  
18 deposition be signed by the testifying witness.

19 My commission expires: September 11,  
20 2018.

21 IN TESTIMONY WHEREOF, I have hereunto set  
22 my hand and seal of office on this the 1st day of  
23 September, 2016.

24

25

\_\_\_\_\_  
DESIREE J. WRIGHT  
NOTARY PUBLIC, STATE AT LARGE  
AN/DOR Reporting & Video Technologies, Inc.